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Country report
Non-discrimination
France

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EXECUTIVE SUMMARY

1. Introduction

The key to the French legal approach to racism and discrimination is based on the abstract universalistic formal concept of equality, enshrined in a range of instruments, including the Constitutions of 1946 and 1958. The resulting legal framework has developed along two complementary lines: the condemnation of inequality based on 'origin', on the one hand, and the parallel refusal to use the criteria of 'origin' for policy and administrative purposes, even as regards the fight against discrimination (confirmed by the Constitutional Council).

In a decision of 15 November 2007, for the first time, the Constitutional Council explicitly endorsed the refusal by French doctrine to recognise the concepts of ethnic origin or race, as legal or administrative or research categories, on the basis of which differential treatment could be evaluated.[1] Any approach relating to origin must be based on objective indications, such as nationality of the parents and grandparents, in order to objectivise the construction of comparative categories.

Even if there is no constitutional text expressly prohibiting discrimination on the basis of age, disability, health or sexual orientation, according to the Constitutional Council the list of prohibited grounds of discrimination in the Constitution is an open one.

In terms of public policy, the concept of disability was renewed with the adoption of Law no. 2005-102 of 11 February 2005, which focuses on integration in all areas of life and any decrees to enforce these principles in the workplace, access to schools, urban renovation and public support and creates employment quotas in both the private and public sectors. The deadline for adaptations to ensure access to public places, initially scheduled for 1 January 2015, was postponed by the legislative Accessibility Timetable, establishing an implementation deadline that can extend from three months to five years.[2]

The Roma population in France comprises French citizens, the Travellers, who represent 95 % of this population (approximately 700 000 people) and foreign Roma, who are mostly migrants from Romania and Bulgaria and are estimated to number 20 000. The problems they experience and their relations with the public services are very different. Until recently, public awareness of the situation of the Traveller population was very low. Because most social rights are managed on the basis of the individual's link to a place of residence, all French citizens who pursue a travelling way of life (including Roma and non-Roma) have a specific legal and administrative status. Roma travellers constitute 80 % of this administrative category. The regular inspections and limitation of access to the right to vote entailed by this special status were quashed by the Constitutional Council in a decision of 5 October 2012 and a decision of 28 March 2014 by the UN Committee for Human Rights.[3] Undertakings by the former Government to amend Law No. 69-3 of 3 January 1969 governing this status have been followed up by the vote in first reading by the National Assembly of a legislative proposal no. 1610 on 9 June 2015, which has not yet been presented to the Senate.

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1 Constitutional Council, 2007-557, 15 November 2007. Available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2007/2007-557-dc/decision-n-2007-557-dc-du-15-novembre-2007.1183.html (accessed 6 September 2016).

2 France, Law No. 2014-789 of 10 July 2014 authorising the Government to adopt legislative measures for the implementation of accessibility of public places (Articles 11 and 19 to 22).

3 See: www.fnasat.asso.fr/dossiers%20docs/condamnation%20ONU/Docs/ComOnu_20140506_CCPR.pdf (accessed 6 September 2016).

The settled Roma population lives both in public housing and on privately owned land. In 2000, the Besson Law No. 2000-614 on the accommodation of the travelling population, re-imposed on all departments the requirement to adopt accommodation schemes for Travellers, renewing requirements introduced into the law in 1990. The reluctance of the authorities to implement parking sites and reinforced enforcement of parking prohibitions creates a situation where Travellers often have no place to settle, even for a few days. This situation could be deemed to be a *de facto* non-compliance with respect of Directive 2000/43/EC with regard to housing rights. In a case relating to the eviction of Travellers from their land on the ground of urban planning regulations forbidding parking, the European Court of Human Rights condemned France in 2013 for a violation of Article 8 of the Convention.[4]

With regard to migrant Roma, since the June 2012 elections, the Minister of the Interior has intensified the previous policy of enforcement of land occupation restrictions. Evictions of Travellers and Roma from illegally occupied land and orders to leave French territory have virtually doubled. In 2013, 21 000 people were evicted from illegally occupied campsites and approximately 13 000 in 2014. Meanwhile, the migrant Roma population remains stable and is still estimated at 20 000.

2. Main legislation

In private law, the legal regime relating to discrimination is to be found in statutes and codified law i.e. the Labour Code (LC), the Penal Code (PC) and the Civil Code (CC). Administrative law, on the other hand, is mostly jurisprudential and based on the implementation of a formal theory of equality.

Directive 2000/43/EC was first transposed by the Law of 16 November 2001, the Law on Social Modernisation No. 2002-73 of 17 January 2002, with the Law of 21 December 2004 creating the equality body (*Haute autorité de lutte contre les discriminations et pour l'égalité*, *HALDE*) completing the transposition of Directive 2000/43/EC. General provisions prohibiting discrimination have always been transversal, providing a uniform legal regime, not only for the grounds covered by Article 19(1) of the Treaty on the Functioning of the European Union, but also physical appearance, last name, customs, health, political opinions, trade union activities and involvement in mutual benefit organisations, family situation and genetic characteristics. On 15 May 2008, the Parliament adopted Law No. 2008-496 of 27 May 2008 correcting the transposition of the directives regarding the definitions of harassment and discrimination. In Article 1 it provides a definition of discrimination covering direct and indirect discrimination and harassment, as well as instructions to discriminate. It completes the protection against victimisation and covers non-salaried and independent workers.

The legislative development resulting from the Law of 27 May 2008 has brought about the removal of national origin from the list of prohibited grounds covered, except in the Labour Code and the Penal Code.

Remedies in relation to discrimination before the civil courts created by explicit statute (Law of 16 November 2001, Law of 17 January 2002 and Law No. 2008-496) all benefit from the shift in the burden of proof. There has been significant development of the jurisprudence facilitating the claimant's access to evidence in matters of discrimination; however, resistance and inconsistent application of the shift in the burden of proof and principles of access to evidence before the lower courts can still be observed.

Magistrates, public servants working within Parliament and contractual public servants who hold one of the various statuses that are excluded from the application of Law No. 83-634 are excluded from all protections against discrimination and are not covered by

[4] ECtHR, *Winterstein v. France,* 17 October 2013.

the transposition of the directives. However, in the *Perreux* case, the *Conseil d'Etat* held that Directive 2000/78/EC, was directly applicable in national law and therefore applicable to all public agents.[5]

Law No. 2005-102 of 11 February 2005 reviews the entire system relating to public support and legal protection for disabled people and completes the transposition of Directive 2000/78/EC by providing a right to reasonable accommodation in the workplace, as well as positive action programmes imposing employment quotas for both the public and private sectors. However, even after the adoption of Law No. 2008-496 completing transposition, reasonable accommodation obligations still benefit only employees who have obtained official recognition, have disabled worker status, those who have suffered an accident at work resulting in a degree of disability greater than 10 % and who benefit from compensation in this regard, those in receipt of disability pensions and disabled veterans. Therefore, non-registered disabled people, non-salaried disabled workers and disabled people who are members of the professions are still not covered by the reasonable accommodation obligation.

The adoption of Law No. 2013-404 of 17 May 2013 opening access to marriage to same-sex couples put an end to indirect discrimination resulting from rights and privileges reserved for married couples, such as special holidays, which were held to be indirectly discriminatory on the ground of sexual orientation by the CJEU on 12 December 2013 in the *Hay* case.

3. Main principles and definitions

All codified texts prohibiting discrimination in national legislation state a list of prohibited grounds without defining them. Since the law prohibits taking the concept of origin or race into consideration, they are not defined and no application of the exception provided in Directive 2000/43/EC was enacted into French law. The wording of the prohibition of discrimination in the Penal Code, the Labour Code and the Civil Code includes the concept of assumed characteristics on the grounds of origin, race and religion. The systematic reference to physical appearance, national origin and last name in the list of prohibited grounds of discrimination is also a way to cover assumed characteristics.

The concepts of direct and indirect discrimination are defined in Article 1 of Law No. 2008-496. Whereas the definition of indirect discrimination conforms to the directives, that of direct discrimination does not. It excludes the possibility of proceeding by way of hypothetical comparison: the expression 'would have been' has been replaced by 'will have been'. In addition, the law extends the definition of discrimination to a correct definition of harassment, which eliminates the previous requirement for repeated measures, and instruction to discriminate. Furthermore, incitement and instruction to discriminate correspond to the notion of complicity in Articles 121-6 and 121-7 of the Penal Code and are covered by general principles of liability in civil law.

The Law of 28 May 2008 creates a possibility for employers to invoke occupational requirements on all grounds, provided this pursues legitimate objectives and is proportionate (Articles 2(3) and 8(3)). With regard to age, it has created Article L1133-3 of the Labour Code, which provides the possibility to make exceptions to the prohibition of discrimination on the ground of age.

However, the Law of 27 May 2008 also extends the defence in the Labour Code to direct and indirect discrimination based on age, by creating a general defence which is non-specific and appears to allow any employer in any situation to attempt to justify differential treatment (Article 6(4)).

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5 *Conseil d'Etat* (Council of State), No. 298348, 30 October 2009.

Although discrimination by association is not expressly covered, except in case of explicit protection provided by law (e.g. parents caring for disabled children), there is jurisprudence extending the legal protection to associated persons in matters of discrimination related to trade union activities.[6] There is no legal rule addressing multiple grounds of discrimination, but the courts have accepted that such findings may be made when evidence shows unequal treatment resulting from a combination of grounds.[7]

In Law No. 2005-102 of 11 February 2005 on disability, the definition of the prohibition of discrimination in employment on the basis of disability covers the employer's perception of the condition of the employee and limitations resulting from the environment. It can thus be considered to include assumed characteristics as well. It provides a definition of disability that is broader than that of the CJEU in case C-13/05, *Chacón Navas*, that is not limited to access to professional life and encompasses limitations in all areas of life, related or not to consequences of health problems. In addition, Article L1132-1 of the Labour Code and the Law on public servants no. 83-643 cover discrimination on the grounds of both health and disability, and provide for reasonable accommodation in both cases in terms of adapting the work environment to the requirements imposed by occupational medicine, the only limitation being if the measure is disproportionate in terms of costs. Therefore, French protection complies with the definitions of disability and reasonable accommodation defined by the CJEU in joined cases C-335/11 and C-337/11 *Ring and Skouboe Werge*.

4. Material scope

Since the Law of 27 May 2008, the legal regime is variable according to protected grounds and areas of discrimination. There is an extended material scope covering social protection, social advantages, education, access to health services and goods and services, which applies only to ethnic origin and race. Protection of access to professional organisations and of non-salaried and independent workers applies only to Article 19(1) TFEU grounds (Law No. 2008-496, Article 2). The Labour Code and Penal Code cover national origin and there is still no provision for reasonable accommodation of public servants benefiting from specific statuses and non-salaried and independent workers.

The general protection against discrimination is enforceable against both private and public persons. Regarding employment, implementation applies to both the public and private sectors. The principle of equality is applicable to non-nationals, unless the legislator can justify a difference in treatment on the basis of conditions of public interest. However, the law makes access to certain rights, such as the right to work and some social benefits, conditional on the individual having the status of a legally resident foreign national.

The scope of the protection against discrimination extends beyond that contained in the directives since it offers coverage of all grounds with regard to housing (Article 1 of Law No. 2014-366 of 24 March 2014 introduced age as a ground of prohibited discrimination in access to housing) and, further to the adoption of the Law of 11 February 2005, offers protection in access to education, social protection, social advantages and goods and services in relation to disability. On other TFEU grounds, protection in access to goods and services is limited to the Penal Code.

5. Enforcing the law

In France, since the law is transversal for a great part of its protection, cases are referred to as precedents whether or not they discuss issues related to the same ground of discrimination. Procedural means of access to evidence remain difficult to enforce.

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6 Caen Appeals Court, *Enault v. SAS ED*, 17 September 2010.
7 Court of Appeal of Poitiers, No. 08/00461, 17 February 2009.

Admissible means of evidence should include the use of statistics. On 15 December 2011, the Court of Cassation recognised that discrimination on the ground of origin can be established by analysing lists of employees on the basis of their surname.[8] Statistics resulting from the comparative situation of employees of a common employer are now frequently used in labour law and have been repeatedly recognised by the Court of Cassation.

Situation testing was introduced into the Penal Code at Article 225-3-1 PC by the Law of 9 March 2006 as evidence of discrimination in criminal courts by the jurisprudence of the Court of Cassation. It has not yet been used as evidence in civil cases, due to the strict requirements of fairness enforced in civil procedures. Developed by anti-racist NGOs, it is mostly used by them, but also by individual complainants.

All complaints alleging discrimination against a private party (employer, service provider, landlord etc.) must be brought before the civil courts. Salaried employees (in the private sector or contractual agents of an industrial or commercial public service) must bring their claim before the Labour Court. All other cases will be brought before the district court (*tribunal d'instance*) or regional court (*tribunal de grande instance*), depending on the amounts involved or claimed. Most cases are brought before the Labour Court. There is no systematic system for the publication of decisions. However, legal publications and the media regularly cover discrimination cases.

The Law of 16 November 2001 provides the possibility for representative trade unions and NGOs that have been in existence for over five years to act on behalf of a victim bringing a claim. Article 31 of the New Code of Civil Procedure recognises the legal status before the civil courts of any person who has a legitimate interest in the dismissal or granting of the action. In cases of discrimination in housing, the Law of 17 January 2002 extends the right of action of NGOs to collective and individual recourse. The equality body (Defender of Rights) can present observations as *amicus curiae* before the court and file elements of its investigation in the court record.

The general principle in French civil law is to remedy the prejudice by awarding compensatory pecuniary damages indemnifying the financial and non-material damages, without further pecuniary sanction or punitive damages. In matters related to employment, a significant development can be observed in non-material damages awarded in cases where financial damages are difficult to establish. In cases of discrimination at work, Article L1134-4 LC provides for the possibility of also requesting the annulment of the discriminatory measure concerned, resulting, for example, in the reintegration of the employee in case of dismissal. This provision was amended by Law No. 2008-561 of 17 June 2008, to subject the claim to a statute of limitations of five years. However, in cases related to access to goods and services damages remain very low.

The first legislation implementing the directives, the Law of 16 November 2001, integrated combating discrimination as an objective in collective bargaining, branch (sub-sections of the labour force) negotiations and national negotiations. In autumn 2014, the Minister of Employment initiated a large-scale working group, bringing together civil society and social partners in relation to the effectiveness of policies and mechanisms to combat discrimination. It was due to deliver its conclusions in spring 2015.

Pursuant to the adoption of Article L1133-3 LC by the Law of 27 May 2008, the Government adopted Decree No. 2009-560 of 20 May 2009 establishing a positive action scheme to support the employment of workers over 50 years of age.

[8] Court of Cassation, Social Chamber, no. K 10-15873, *Airbus*, 15 December 2011.

With regard to disabled people, the Law of 11 February 2005 maintains the quota obligations for 6 % of disabled employees, while extending it to the public sector, and sets out specific mechanisms of access to public employment and early retirement conditions.

There is a specific scheme, which targets Roma and Traveller children, in order to facilitate their access to education and integration into state schools.[9]

6. Equality bodies

On 21 July 2008, the Government passed a Constitutional Law modernising the institutions that established, through Article 41, a Defender of Rights. Its powers and jurisdiction were precisely defined by the Institutional Act (*loi organique*) No. 2011-333 of 29 March 2011, which came into force on 1 May 2011. It integrates the French Ombudsman (*Médiateur de la République*), the Children's Defender, the National Commission on Security Ethics and, finally, the former equality body – the Equal Rights and Anti-Discrimination Commission (*Haute autorité de lutte contre les discriminations et pour l'égalité*, *HALDE*). It assumes the jurisdiction for claims in all these areas, as well as competence to propose legislative reform, to pursue the promotion of rights and to carry out research in all its spheres of competence. It covers all grounds of discrimination, direct and indirect, prohibited by national laws and international conventions duly ratified by France.

The Defender of Rights has competence to investigate individual and collective complaints, following requests from individuals, NGOs, trade unions or members of Parliament, and request explanations from any public or private person, including communication of documents or any information providing evidence of the facts. Its means for the resolution of claims are mediation, recommendations to the state or private parties, whether individual or general, and the ability to present its observations as *amicus curiae* and file its investigative complaint before all jurisdictions, unilaterally or at the request of the court or the parties. It also has a specific power to propose a transaction in case of discrimination of a penal nature covered by the Penal Code called '*la transaction pénale*' (penal transaction).

The capacity of the Defender of Rights to fully pursue this mission with regard to combating discrimination is no longer in question. Its claims have increased by 20 %, compared to those received by the HALDE during its last full year of activity in 2010. Jacques Toubon was appointed Defender of Rights in July 2014, following the death of his predecessor, Dominique Baudis. He has set priorities in relation to communication strategy, access to rights, research and combating racism.

For the first time in 2014, the Defender of Rights brought three third-party interventions before the ECtHR and submitted observations in relation to a claim related to voting rights of Roma before the European Commission.

7. Key issues

- Anti-discrimination law continues to focus resistance on what is perceived as community-based analysis of social tensions. This constitutes the core of very strong ideological objections to anti-discrimination law within the French institutions. The traditional formal theory of equality, the concept of fault in civil matters and the supremacy of Parliament remain the ultimate reference. At trial level, the shift in the burden of proof and the concept of indirect discrimination are perceived as means to condemn liability without fault and to confer special rights to members of certain groups.

[9] Ministerial Instruction 2012-143 of 2 October 2012.

- Even though anti-discrimination law has been implemented by the higher courts and has evolved over the last ten years, lawyers in general practice and first instance judges often lack proper training to implement its rules of evidence, the latest jurisprudential developments and the particulars of its rhetoric. Claimants still have to be ready to face multiple appeals before winning their cases. Discrimination cases are much more favourably heard at the appellate level and the rate of success before the courts has been significantly improved by the contribution of observations presented by the HALDE and the Defender of Rights.
- Indirect discrimination is still a misunderstood concept that is seldom argued by lawyers, and often directly invoked by the court unilaterally,[10] and only once in a case relating to discrimination on the ground of origin.[11]
- The ground of religion in the fields of employment and education is the subject of important legal and political debates aiming to extend the duty of neutrality of public servants to private law employees in situations where the employer executes missions of service to the public or where commercial actors wish to present a neutral figure in relations with the public. This tension was translated in 2013 through the conflict between the Social Chamber of the Court of Cassation and the Versailles and Paris Courts of Appeal in the *Baby Loup* case, regarding possible limitations to the duty of neutrality of private employees working in a daycare centre by reason of its ethos and belief.[12] This case was heard a second time by the plenary session of the Court of Cassation, which issued its decision on 25 June 2014.[13] It refused to consider that the law provided for a possibility to argue occupational requirements and discuss whether neutrality can be argued to constitute an occupational requirement exception. The plenary did not discuss whether or not this limitation on religious expression was discriminatory, directly or indirectly, and whether or not it was justified. It followed an altogether different justification to conclude that the claimant's dismissal was legal, based on a particular context allowing legitimate restrictions to a fundamental freedom, and deciding the case as a pure question of facts. This conflict re-emerged as a result of a case relating to the dismissal of an IT consultant further to her refusal to remove her Islamic veil, which was said to have made employees of the client uncomfortable. Given that the CJEU has not yet decided whether the desire of private clients not to be served by someone wearing an Islamic veil qualifies as a determining occupational requirement relating to the nature or the conditions of performance of the working contract, the Court of Cassation referred the question to the CJEU on 24 April 2015, in the case *Asma Bougnaoui and Association de defense des droits de l'homme v. Micropole SA*.[14]
- 2014 and 2015 have seen a significant increase in hate speech and violent manifestations of Islamophobia and anti-Semitism. The French authorities have made considerable efforts to organise a proportionate and democratic response to xenophobic reactions to terrorist violence and the geopolitical context, which is exploited by extreme right populist politicians. An action plan against racism was publicly announced on 19 April 2015. The action plan, which has a budget of EUR 100 million over three years, sets out 40 measures related to access to rights, education, communication and the support of NGOs. This context has a significant

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[10] The first case concluding indirect discrimination, where it was raised by the Court of Cassation, Social Chamber, No. 05-04962, 9 January 2007, available at: www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000017624898&fastReqId=1576422841&fastPos=1 (accessed 6 September 2016).

[11] Court of Cassation, Social Chamber, No. 10-20765, 3 November 2011, available at: www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024764368&fastReqId=1975217984&fastPos=1 (accessed 6 September 2016).

[12] Versailles Court of Appeal, No. 10/05642, *Baby Loup*, 27 November 2011; Court of Cassation decision, available at: www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/536_19_25762.html; Court of Appeal of Paris decision, available at: http://combatsdroitshomme.blog.lemonde.fr/files/2013/11/CA-Paris-27-novembre-2013-13-02981-c-A-Babyloup1.pdf (accessed 6 September 2016).

[13] http://www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/612_25_29566.html (accessed 6 September 2016).

[14] CJEU, C-188/15, 9 April 2015.

impact on the number of discriminatory responses in relation to access to employment and access to goods and services experienced by people of North African and Middle Eastern origin.

- Since the June 2012 national elections in France, the Minister of the Interior has intensified the previous policy of evicting people from illegally occupied land. A Ministerial Instruction was published on 28 August 2012,[15] putting in place a policy anticipating the dismantling of illegal camps, in order to implement humanitarian conditions in relation to access to housing, education and social rights in the context of each eviction of Travellers and Roma from illegally occupied land. In autumn 2013, the Government opened a EUR 4 million fund to finance integration measures for families who are deemed able to be integrated, while pursuing its eviction policy. Data on the impact of this policy are not available, since there are no ethnic data in France and therefore no specific statistics on Roma. However, NGOs estimate that very few foreign Roma benefited from the integration measures and that their situation and number in French territory is stable, regardless of the expulsion policy, since families keep returning after expulsion.

[15] Ministerial Instruction of 26 August 2012 NOR INTK1233053C, available at: http://circulaire.legifrance.gouv.fr/pdf/2012/08/cir_35737.pdf (accessed 6 September 2016).

RÉSUMÉ

1. Introduction

La clé de l'approche juridique du racisme et de la discrimination en France repose sur une conception formelle abstraite et universaliste de l'égalité, consacrée par une série d'instruments parmi lesquels les constitutions de 1946 et 1958. Le cadre juridique ainsi formé s'est développé selon deux axes complémentaires: la condamnation de l'inégalité fondée sur «l'origine», d'une part, et le refus parallèle d'utiliser le critère de «l'origine» à des fins politiques et administratives, même en ce qui concerne la lutte contre la discrimination (confirmé par le Conseil constitutionnel).

Dans une décision du 15 novembre 2007, le Conseil constitutionnel a explicitement entériné pour la première fois le refus de la philosophie française de reconnaître les concepts de l'origine ethnique et de la race en tant que catégories juridiques ou administratives, ou de recherche, pouvant servir de base à l'évaluation d'un traitement différencié.[16] Toute approche de l'origine doit se fonder sur des indications objectives telles que la nationalité des parents et des grands-parents, afin d'objectiver la construction de catégorie de comparaison.

Même en l'absence de texte constitutionnel interdisant expressément la discrimination fondée sur l'âge, le handicap, la santé ou l'orientation sexuelle, la liste des motifs interdits de discrimination figurant dans la Constitution est, selon le Conseil constitutionnel, ouverte.

En termes de politique publique, la conception du handicap a été renouvelée avec l'adoption le 11 février 2005 de la loi n° 2005-102, qui est axée sur l'intégration des personnes handicapées dans tous les domaines de la vie et de tous les décrets destinés à mettre ces principes en vigueur sur le lieu de travail ainsi qu'en matière d'accès à l'école, de rénovation urbaine et d'aide publique, et qui institue des quotas d'emploi tant dans le secteur privé que dans le secteur public. La date butoir pour la réalisation des adaptations nécessaires en vue d'assurer l'accès aux espaces publics, initialement fixée au 1er janvier 2015, a été repoussée par le dispositif de l'Agenda d'accessibilité programmée qui accorde des délais pouvant aller de trois mois à cinq ans.[17]

La population rom de France comprend des citoyens français (les gens du voyage) qui en représentent 95 % (700 000 personnes environ) et les roms étrangers, qui sont principalement des migrants originaires de Roumanie et de Bulgarie et dont le nombre est estimé à 20 000. Les problèmes qu'ils rencontrent et leurs relations avec les services publics sont très différents. Le grand public était, jusqu'à une date récente, très peu sensibilisé à la situation des gens du voyage. La plupart des droits sociaux étant gérés sur la base du rattachement de la personne à un lieu de résidence, tous les citoyens français ayant un mode de vie nomade (Roms et non-Roms) ont un statut juridique et administratif spécifique. Les gens du voyage roms représentent 80 % de cette catégorie administrative. Les contrôles réguliers et la restriction de l'accès au droit de vote dont ce statut spécial était assorti ont été annulés par le Conseil constitutionnel dans une décision du 5 octobre 2012 et par le Comité des droits de l'homme des Nations unies dans une décision du 28 mars 2014.[18] Les tentatives du précédent gouvernement visant à modifier la loi n° 69-3 du 3 janvier 1969 régissant ce statut ont abouti au vote en

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16 Conseil constitutionnel, décision n° 2007-557, 15 novembre 2007, disponible sur: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2007/2007-557-dc/decision-n-2007-557-dc-du-15-novembre-2007.1183.html (consulté le 6 septembre 2016).

17 France, loi n° 2014-789 du 10 juillet 2014 habilitant le Gouvernement à adopter des mesures législatives pour la mise en accessibilité des établissements recevant du public, des transports publics, des bâtiments d'habitation et de la voirie pour les personnes handicapées (articles 11 et 19 à 22).

18 Voir: www.fnasat.asso.fr/dossiers%20docs/condamnation%20ONU/Docs/ComOnu_20140506_CCPR.pdf (consulté le 6 septembre 2016).

première lecture par l'Assemblée nationale, en date du 9 juin 2015, de la proposition de loi n° 1610 – laquelle n'a pas encore été soumise au Sénat.

La population rom sédentaire vit à la fois en logements publics et sur des terrains privés. En 2000, la loi Besson n° 2000-614 relative à l'accueil et à l'habitat des gens du voyage a réimposé à tous les départements l'obligation d'adopter des régimes d'hébergement à l'intention des gens du voyage, renouvelant ainsi les exigences introduites dans la législation depuis 1990. La réticence des autorités d'installer des aires de stationnement et l'application plus rigoureuse des interdictions de stationnement créent une situation par laquelle il est fréquent que les gens du voyage ne trouvent pas d'endroit où s'installer, ne serait-ce que quelques jours. Cette situation pourrait être considérée comme un non-respect de facto de la directive 2000/43/CE pour ce qui concerne les droits au logement. Dans une affaire relative à l'expulsion de gens du voyage des terrains où ils s'étaient établis au motif que la réglementation en matière d'urbanisme y interdisait le stationnement, la Cour européenne des droits de l'homme a condamné la France en 2013 pour violation de l'article 8 de la Convention.[19]

En ce qui concerne les Roms migrants, le ministre de l'Intérieur a renforcé depuis les élections de 2012 la politique antérieure d'application des restrictions en matière d'occupation de terrains. Les expulsions de gens du voyage et de Roms de terrains occupés illégalement et les ordres de quitter le territoire français ont pratiquement doublé. En 2013, 21 000 personnes ont été évacuées de campements occupés illégalement, et 13 000 environ en 2014. Entre-temps, la population rom migrante, toujours estimée à 20 000 personnes, reste stable.

2. Législation principale

En droit privé, le régime juridique relatif à la discrimination se trouve dans les lois et le droit codifié, c'est-à-dire dans le code du travail (CT), le code pénal (CP) et le code civil (CC). Le droit administratif est pour sa part essentiellement jurisprudentiel et fondé sur la mise en application d'une théorie formelle de l'égalité.

La directive 2000/43/CE a tout d'abord été transposée par la loi du 16 novembre 2001, par la loi n° 2002-73 sur la modernisation sociale du 17 janvier 2002 et par la loi du 21 décembre 2004 créant l'organisme de promotion de l'égalité (Haute autorité de lutte contre les discriminations et pour l'égalité ou HALDE) qui achève cette transposition. Les dispositions générales interdisant la discrimination ont toujours été transversales, assurant un régime juridique uniforme non seulement pour ce qui concerne les motifs couverts par l'article 19, paragraphe premier, du traité sur le fonctionnement de l'Union européenne (TFUE) mais également ceux de l'apparence physique, du nom de famille, des coutumes, de la santé, des opinions politiques, des activités syndicales et de l'affiliation à des mutuelles, de la situation familiale et des caractéristiques génétiques. Le Parlement a adopté le 15 mai 2008 la loi n° 2008-496 du 27 mai 2008 rectifiant la transposition des directives en ce qui concerne les définitions du harcèlement et de la discrimination. Elle contient en son article premier une définition de la discrimination couvrant la discrimination directe et indirecte, ainsi que du harcèlement et de l'injonction de discriminer. Elle complète la protection contre les représailles et inclut les travailleurs non-salariés et indépendants.

L'évolution législative générée par la loi du 27 mai 2008 a entraîné la suppression de l'origine nationale de la liste de motifs prohibés couverts, hormis dans le code du travail et le code pénal.

Lorsqu'ils ont été instaurés par une loi expresse (loi du 16 novembre 2001, loi du 17 janvier 2002 et loi n° 2008-496), tous les recours intentés pour discrimination auprès

[19] CouEDH, Winterstein c. France, 17 octobre 2013.

des juridictions civiles bénéficient du renversement de la charge de la preuve. Si la jurisprudence a fortement évolué et facilite l'accès de la partie plaignante aux preuves dans les affaires de discrimination, on n'en observe pas moins la persistance d'une réticence et d'un manque de cohérence dans l'application de la charge de la preuve et des principes d'accès aux preuves devant les juridictions inférieures.

Les magistrats, les fonctionnaires exerçant leur activité au sein du Parlement et les agents publics contractuels relevant des différents statuts exclus de l'application de la loi n° 83-634 ne bénéficient d'aucune des protections contre la discrimination et ne sont pas couverts par la transposition des directives. Dans l'affaire Perreux, toutefois, le Conseil d'État a considéré que la directive 2000/78/CE était directement applicable en droit national et, en conséquence, à l'ensemble des agents publics.[20]

La loi n° 2005-102 du 11 février 2005 réexamine entièrement le régime de l'assistance publique et de la protection juridique des personnes handicapées, et complète la transposition de la directive 2000/78/CE en prévoyant un droit à l'aménagement raisonnable sur le lieu de travail, ainsi que des programmes d'action positive imposant des quotas d'emploi tant dans le secteur public que dans le secteur privé. Il n'en reste pas moins que, même après l'adoption de la loi n° 2008-496 achevant la transposition, les obligations d'aménagement raisonnable ne profitent encore qu'aux salariés qui ont obtenu une reconnaissance officielle et qui ont le statut de travailleurs handicapés; à ceux qui ont été victimes d'un accident de travail leur occasionnant un handicap de plus de 10 % et qui bénéficient d'une indemnisation correspondante; aux bénéficiaires d'allocations d'invalidité; et aux invalides de guerre. Il en résulte que les personnes handicapées non enregistrées, les travailleurs handicapés non-salariés et les personnes handicapées exerçant en professions libérales ne sont toujours pas couverts par l'obligation d'aménagement raisonnable.

L'adoption de la loi n° 2013-404 du 17 mai 2013 ouvrant l'accès au mariage aux couples de même sexe a mis fin à la discrimination indirecte découlant des droits et avantages réservés aux couples mariés (congés spéciaux notamment), considérés comme indirectement discriminatoires par la CJUE dans l'affaire Hay (arrêt du 12 décembre 2013).

3. Principes généraux et définitions

Tous les textes codifiés de la législation nationale qui prohibent la discrimination énoncent une liste de motifs interdits sans les définir. La loi interdit de prendre en considération le concept d'origine ou de race, mais ils ne sont pas définis et aucune application de la dérogation autorisée par la directive 2000/43/CE n'a été retenue dans la législation française. Le libellé de l'interdiction de discrimination figurant dans le code pénal, le code du travail et le code civil inclut la notion de caractéristiques présumées fondées sur l'origine, la race et la religion. La référence systématique à l'apparence physique, à l'origine nationale et au nom de famille dans la liste des motifs de discrimination interdits constitue aussi une manière de couvrir les caractéristiques présumées.

Les concepts de discrimination directe et indirecte sont définis à l'article premier de la loi n° 2008-496. Si la définition de la discrimination indirecte est conforme aux directives, celle de la discrimination directe ne l'est pas. Cette dernière exclut en effet la possibilité de procéder par voie de comparaison hypothétique: l'expression «ne l'aurait été» a été remplacée par «ne l'aura été». La loi étend en outre la définition de la discrimination en vue d'une définition correcte du harcèlement, qui élimine l'ancienne exigence de mesures répétées, ainsi que de l'injonction de pratiquer une discrimination. De surcroît, l'incitation et l'injonction à discriminer correspondent à la notion de complicité visée aux articles

[20] Conseil d'État, décision n° 298348, 30 octobre 2009.

121-6 et 121-7 du code pénal, et sont couvertes par les principes généraux du droit civil en matière de responsabilité.

La loi du 28 mai 2008 donne aux employeurs la possibilité d'invoquer des exigences professionnelles essentielles et déterminantes pour tout motif à condition que l'objectif poursuivi soit légitime et les moyens proportionnés (article 2, paragraphe 3, et article 8, paragraphe 3). En ce qui concerne l'âge, cette loi a créé l'article L1133-3 du code du travail qui permet de prévoir des dérogations à l'interdiction de discrimination fondée sur l'âge.

La loi du 27 mai 2008 étend néanmoins aussi les moyens de défense prévus par le code du travail à la discrimination directe et indirecte fondée sur l'âge en instituant un moyen de défense général non spécifique permettant apparemment à tout employeur de tenter dans n'importe quelle situation de justifier un traitement différencié (article 6, paragraphe 4).

Bien que la discrimination par association ne soit pas expressément couverte, sauf en cas de protection explicite prévue par la loi (parents s'occupant d'enfants handicapés, par exemple), il existe une jurisprudence qui étend la protection juridique aux personnes associées dans des cas de discrimination liée à des activités syndicales.[21] Aucune règle juridique ne vise les motifs multiples de discrimination, mais les juridictions ont admis qu'une conclusion dans ce sens pouvait être établie lorsque des éléments probants attestent d'une inégalité de traitement découlant d'une combinaison de motifs.[22]

Dans la loi n° 2005-102 du 11 février 2005 relative au handicap, la définition de l'interdiction dans l'emploi d'une discrimination fondée sur un handicap couvre la perception par l'employeur de l'état du travailleur ainsi que les limites imposées par l'environnement. On peut donc considérer qu'elle inclut aussi les caractéristiques présumées. Cette loi contient donc une définition du handicap plus large que celle donnée par la CJUE dans l'*affaire C-13/05, Chacón Navas*, dans la mesure où elle ne se limite pas à l'accès à la vie professionnelle et où elle englobe les limitations dans tous les domaines de vie, qu'elles soient ou non la conséquence de problèmes de santé. De surcroît, l'article L1132-1 du code du travail et la loi n° 83-643 relative aux fonctionnaires couvrent à la fois la discrimination fondée sur la santé et celle fondée sur le handicap, et prévoient dans les deux cas un aménagement raisonnable consistant à adapter l'environnement de travail aux exigences fixées par la médecine du travail – la seule réserve étant que la mesure doit être proportionnée en termes de coût. La protection française est donc conforme aux définitions du handicap et de l'aménagement raisonnable données par la CJUE dans les *affaires jointes C-335/11 (Ring)* et *C-337/11 (Skouboe Werge)*.

4. Champ d'application matériel

Depuis l'entrée en vigueur de la loi du 27 mai 2008, le régime juridique varie selon les motifs de protection et les domaines de discrimination. Il existe un champ d'application matériel étendu couvrant la protection sociale, les avantages sociaux, l'éducation, l'accès aux services de santé et les biens et services, qui s'applique uniquement à l'origine ethnique et à la race. La protection de l'accès aux organisations professionnelles et de travailleurs non-salariés et indépendants s'applique seulement aux motifs visés à l'article 19, paragraphe 1, TFUE (loi n° 2008-496, article 2). Le code du travail et le code pénal couvrent l'origine nationale, mais il n'y a toujours aucune disposition visant l'aménagement raisonnable pour les fonctionnaires relevant d'un statut spécifique ni pour les travailleurs non-salariés et indépendants.

[21] Cour d'appel de Caen, Enault c. SAS ED, 17 septembre 2010.
[22] Cour d'appel de Poitiers, affaire n° 08/00461, 17 février 2009.

La protection générale contre la discrimination est opposable tant aux personnes privées qu'aux personnes publiques. En ce qui concerne l'emploi, elle couvre à la fois le secteur public et le secteur privé. Le principe d'égalité s'applique aux non-nationaux à moins que le législateur puisse justifier d'une différence de traitement fondée sur des conditions d'intérêt public. La loi subordonne cependant l'accès à certains droits, tel le droit au travail, et à certaines prestations sociales, à la possession du statut de ressortissant étranger en séjour régulier.

Le champ d'application de la protection contre la discrimination va au-delà de celui des directives dans la mesure où il couvre tous les motifs pour ce qui concerne le logement (l'article premier de la loi n° 2014-366 du 24 mars 2014 a introduit l'âge en tant que motif interdit de discrimination en matière de logement) et où, de surcroît, la loi du 11 février 2005 offre une protection en rapport avec le handicap dans les domaines de l'accès à l'éducation, à la protection sociale, aux avantages sociaux et aux biens et services. En ce qui concerne les autres motifs visés par le TFUE, la protection en matière d'accès aux biens et services se limite au code pénal.

5. Mise en application de la loi

La loi étant transversale en France pour une grande partie de la protection qu'elle confère, les affaires sont citées comme précédents, qu'elles traitent ou non de sujets liés au même motif de discrimination. Les moyens procéduraux d'accès aux données probantes restent difficiles à mettre en œuvre.

L'utilisation de statistiques devrait faire partie des moyens de preuve recevables. Le 15 décembre 2011, la Cour de cassation a reconnu que la discrimination fondée sur l'origine pouvait être établie par une analyse du registre des membres du personnel sous l'angle de leur nom de famille.[23] Des statistiques tirées d'une comparaison de la situation des salariés au service d'un même employeur sont désormais couramment utilisées en droit du travail et elles ont été reconnues à plusieurs reprises par la Cour de cassation.

Le test de situation a été introduit à l'article 225-3-1 du code pénal par la loi du 9 mars 2006 en tant que preuve de discrimination devant des juridictions pénales par jurisprudence de la Cour de cassation. Il n'a pas encore été utilisé comme preuve dans des affaires civiles en raison des exigences très strictes appliquées dans les procédures civiles en matière d'équité de la preuve. Développé par des ONG de lutte contre le racisme, le test de situation est le plus souvent utilisé par celles-ci, mais également par des plaignants individuels.

Toutes les demandes alléguant une discrimination à l'encontre d'une personne privée (employeur, prestataire de service, propriétaire, etc.) doivent être portées devant une juridiction civile. Les salariés (du secteur privé ou agents contractuels d'un service public industriel ou commercial) doivent introduire leur plainte auprès du conseil de prud'hommes (juridiction du travail). Tous les autres recours sont déposés auprès du tribunal d'instance ou du tribunal de grande instance en fonction des montants impliqués ou réclamés. La plupart des requêtes sont adressées au conseil de prud'hommes. Il n'existe pas de mécanisme systématique de publication des décisions, mais les publications juridiques et les médias couvrent régulièrement des affaires de discrimination.

La loi du 16 novembre 2001 offre la possibilité à des syndicats et ONG représentatifs exerçant leur activité depuis plus de cinq ans d'agir au nom d'une victime qui dépose plainte. L'article 31 du nouveau code de procédure civile reconnaît la capacité d'ester devant les juridictions civiles à toute personne ayant un intérêt légitime à ce que le recours soit rejeté ou ait une issue favorable. S'il s'agit d'une discrimination en matière

[23] Cour de cassation, chambre sociale, pourvoi n° K 10-15873, *Airbus,* 15 décembre 2011.

de logement, la loi du 17 janvier 2002 prévoit un droit d'action des ONG à la fois pour les recours collectifs et individuels. L'organisme pour l'égalité (le Défenseur des droits) peut présenter des observations en tant qu'amicus curiae devant le tribunal et verser des éléments de son enquête au dossier judiciaire.

Les principes généraux du droit civil français veulent que le tort soit réparé par l'octroi de dommages et intérêts compensatoires en réparation du préjudice financier et moral subi, sans autre sanction pécuniaire ni autres dommages et intérêts punitifs. On observe, lorsqu'il s'agit d'emploi, une tendance très nette à l'octroi d'une réparation morale lorsque la réparation financière est difficile à établir. En cas de discrimination au travail, l'article L1134-4 du code du travail offre la possibilité de réclamer aussi l'annulation de la mesure discriminatoire en cause – ce qui peut conduire, par exemple, à la réintégration du travailleur en cas de licenciement. Cette disposition a été modifiée par la loi n° 2008-561 du 17 juin 2008, qui soumet la plainte à un délai de prescription de cinq ans. Il convient de signaler toutefois que les dommages et intérêts restent très peu élevés dans les affaires relevant de l'accès à des biens et services.

Le premier acte législatif transposant les directives, à savoir la loi du 16 novembre 2001, a fait de la lutte contre la discrimination un objectif des négociations collectives, des négociations de branche (les branches professionnelles formant des subdivisions des forces de travail) et des négociations nationales. Le ministre de l'emploi a institué au cours de l'automne 2014 un groupe de travail à grande échelle regroupant des représentants de la société civile et des partenaires sociaux pour examiner l'efficacité des politiques et des dispositifs de lutte contre la discrimination. Ses conclusions sont attendues au printemps 2015.

En application de l'article L1133-3 du code du travail adopté par la loi du 27 mai 2008, le gouvernement a voté le décret n° 2009-560 du 20 mai portant création d'un programme d'action positive en faveur de l'emploi de travailleurs de plus de 50 ans.

En ce qui concerne les personnes handicapées, la loi du 11 février 2005 maintient l'obligation d'un quota de 6 % de salariés handicapés et l'étend au secteur public; elle fixe des mécanismes particuliers pour l'accès à l'emploi public ainsi que les conditions de préretraite.

Il existe un régime particulier à l'intention des enfants des communautés roms et des gens du voyage, destiné à faciliter leur accès à l'enseignement et leur intégration dans des écoles publiques.[24]

6. Organismes de promotion de l'égalité de traitement

Le Parlement a voté le 21 juillet 2008 une loi constitutionnelle de modernisation des institutions qui établit en son article 41 le Défenseur des droits, dont les compétences et la juridiction ont été définies avec précision dans la loi organique n° 2011-333 du 29 mars 2011, entrée en vigueur le 1er mai 2011. Le Défenseur des droits intègre le Médiateur de la République, le Défenseur des enfants, la Commission nationale de déontologie de la sécurité et enfin l'ancien organisme de lutte contre les discriminations et de promotion de l'égalité, à savoir la Haute autorité de lutte contre les discriminations et pour l'égalité (HALDE). Il peut être saisi de recours dans l'ensemble de ces domaines, et il est habilité à proposer des réformes législatives, à mener des actions de promotion des droits et à effectuer des travaux de recherche dans toutes ses sphères de compétence. Il couvre tous les motifs de discrimination, directe et indirecte, prohibés par la législation nationale et par les conventions internationales dûment ratifiées par la France.

[24] Circulaire n° 2012-143 du 2 octobre 2012.

Le Défenseur des droits est habilité à enquêter sur des plaintes individuelles et collectives à la requête de particuliers, d'ONG, de syndicats ou de membres du Parlement, et à réclamer des explications à toute personne publique ou privée, y compris la communication de documents ou de toute information fournissant la preuve de faits. Les moyens à sa disposition pour résoudre les litiges sont la médiation, les recommandations à l'État ou à des personnes privées (à titre individuel ou général), la présentation de ses observations en tant qu'amicus curiae et le dépôt de son dossier d'enquête devant toute juridiction, unilatéralement ou à la demande du tribunal ou des parties. Le Défenseur des droits est spécifiquement habilité à proposer une transaction en cas de discrimination de nature pénale couverte par le code pénal («transaction pénale»).

La capacité du Défenseur des droits à assumer pleinement cette mission n'est plus mise en cause pour ce qui concerne la lutte contre les discriminations. Le nombre de plaintes dont il a été saisi a augmenté de 20 % par rapport à celles introduites auprès de la HALDE durant sa dernière année complète d'activité (2010). Jacques Toubon a été nommé Défenseur des droits en juillet 2014 suite au décès de son prédécesseur, Dominique Baudis. Ses priorités sont la stratégie de communication, l'accès aux droits, la recherche et la lutte contre le racisme.

Le Défenseur a effectué pour la première fois en 2014 trois tierces interventions devant la CouEDH et présenté des observations en rapport avec un recours relatif aux droits de vote des Roms devant la Commission européenne.

7. Points essentiels

- Le droit antidiscrimination continue de susciter une réticence focalisée sur ce qui est perçu comme une analyse communautaire des tensions sociales. Tel est le fondement des fortes objections idéologiques de la part des institutions françaises à son égard. La théorie formelle traditionnelle de l'égalité, la notion de faute en matière civile et la suprématie du Parlement, demeurent les références ultimes. Au niveau judiciaire, le renversement de la charge de la preuve et le concept de discrimination indirecte sont perçus comme des moyens de faire assumer une responsabilité sans faute au défendeur et de conférer des droits spéciaux aux membres de certains groupes.
- Même si le droit antidiscrimination a été mis en œuvre par les juridictions supérieures et a évolué au cours des dix dernières années, les juristes généralistes et les juges de première instance manquent souvent de formation suffisante pour en appliquer les règles de preuve, les développements les plus récents en matière de jurisprudence et les spécificités de rhétorique. Les requérants doivent encore toujours s'attendre à faire face à de nombreux appels avant d'obtenir gain de cause. Les affaires de discrimination sont entendues beaucoup plus favorablement au niveau de l'appel et le taux de procès gagnés a sensiblement augmenté grâce à la contribution des observations présentées par la HALDE et par le Défenseur des droits.
- La discrimination indirecte reste une notion mal comprise qui est rarement avancée par des avocats mais souvent invoquée directement et unilatéralement par les tribunaux[25] – et une fois seulement dans une affaire de discrimination fondée sur l'origine.[26]
- Le motif de la religion dans les domaines de l'emploi et de l'éducation fait l'objet de débats juridiques et politiques majeurs à propos de l'élargissement aux salariés

[25] Première affaire concluant à une discrimination indirecte, dans laquelle celle-ci a été soulevée par la Cour de cassation, chambre sociale, n° 05-04962, 9 janvier 2007, disponible sur: www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000017624898&fastReqId=1576422841&fastPos=1 (consulté le 6 septembre 2016).

[26] Cour de cassation, chambre sociale, n° 10-20765, 3 novembre 2011, disponible sur: www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024764368&fastReqId=1975217984&fastPos=1 (consulté le 6 septembre 2016).

relevant du droit privé de l'obligation de neutralité appliquée aux agents de la fonction publique lorsque l'employeur effectue des missions de service à l'intention du public ou lorsque des acteurs commerciaux souhaitent offrir une image neutre dans leurs relations avec le public. Cette tension s'est concrétisée en 2013 au travers du conflit entre la chambre sociale de la Cour de cassation et les cours d'appel de Versailles et de Paris dans l'affaire Baby Loup concernant les limitations éventuelles de l'obligation de neutralité des salariés privés travaillant dans une crèche en raison de leur philosophie et de leurs convictions.[27] L'affaire a été entendue pour la seconde fois par la Cour de cassation siégeant en assemblée plénière, qui a rendu sa décision le 25 juin 2014.[28] Elle a refusé de considérer que la loi ouvre la possibilité de faire valoir des exigences professionnelles et d'examiner si la neutralité pouvait être qualifiée de dérogation relevant de l'exigence professionnelle. L'Assemblée plénière de la Cour de cassation n'a pas examiné si cette restriction de l'expression religieuse était ou non discriminatoire, directement ou indirectement, ni si elle était ou non justifiée. Elle a suivi une argumentation totalement différente pour conclure que le licenciement de la requérante était légal, fondé sur un contexte particulier autorisant des restrictions légitimes à une liberté fondamentale, et statuer sur l'affaire comme une pure question de faits. Ce conflit a refait surface à l'occasion d'une affaire relative au licenciement d'une consultante en informatique suite à son refus d'enlever son foulard islamique – lequel aurait apparemment mis le personnel du client mal à l'aise. Étant donné que la CJUE n'a pas encore statué sur le point de savoir si le souhait de clients privés de ne pas être servis par une personne portant un voile islamique constitue une exigence professionnelle déterminante, en raison de la nature ou des conditions de l'exécution d'un contrat de travail, la Cour de cassation a adressé la question à la CJUE le 24 avril 2015 dans l'affaire *Asma Bougnaoui et Association de défense des droits de l'homme c. Micropole SA*.[29]

- Les années 2014 et 2015 ont été marquées par une forte montée des discours haineux et des manifestations violentes d'islamophobie et d'antisémitisme. Les autorités françaises ont déployé des efforts considérables pour organiser une réponse proportionnée et démocratique aux réactions xénophobes suscitées par les violences terroristes et un contexte géopolitique exploité par des politiciens populistes d'extrême-droite. Un plan d'action contre le racisme a été publiquement annoncé le 19 avril 2015. Doté d'un budget de 100 millions d'euros sur trois ans, il définit 40 mesures portant sur l'accès aux droits, l'éducation, la communication et le soutien d'ONG. Ce contexte a une incidence majeure sur le nombre de réactions discriminatoires dont les personnes originaires d'Afrique du Nord et du Moyen-Orient font l'objet dans le cadre de l'emploi et de l'accès aux biens et aux services.
- Le ministre de l'Intérieur a renforcé depuis les élections de 2012 la politique antérieure d'expulsion des terrains occupés illégalement sans droit ni titre. Une circulaire ministérielle publiée le 28 août 2012[30] instaure une anticipation des opérations d'évacuation des campements illicites afin de mettre en œuvre des conditions humanitaires en matière d'accès au logement, à l'enseignement et aux droits sociaux chaque fois que des gens du voyage et des Roms sont évacués de terrains occupés illégalement. Le gouvernement a créé à l'automne 2013 un fonds de 4 millions d'euros destiné à financer des mesures d'intégration en faveur de familles considérées comme aptes à s'intégrer, tout en poursuivant sa politique d'expulsion. On ne dispose d'aucune donnée quant à l'incidence de ces mesures

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[27] Cour de Versailles, n° 10/05642, 27 novembre 2011, *Baby Loup*; décision de la Cour de cassation, disponible sur: www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/536_19_25762.html; décision de la Cour d'appel de Paris, disponible sur: http://combatsdroitshomme.blog.lemonde.fr/files/l2013/11/CA-Paris-27-novembre-2013-13-02981-c-A-Babyloup1.pdf (consulté le 6 septembre 2016).

[28] http://www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/612_25_29566.html (consulté le 6 septembre 2016).

[29] CJUE, C-188/15, 24 avril 2015.

[30] Circulaire du 26 août 2012 NOR INTK1233053C, disponible sur: http://circulaire.legifrance.gouv.fr/pdf/2012/08/cir_35737.pdf (consulté le 6 septembre 2016).

car, les informations ethniques n'étant pas consignées en France, il n'existe aucune statistique spécifique concernant les Roms. Les ONG estiment cependant que très peu de Roms étrangers ont bénéficié des mesures d'intégration, et que leur situation et leur nombre sur le territoire français restent stables malgré la politique d'expulsion, car les familles reviennent après avoir été expulsées.

ZUSAMMENFASSUNG

1. Einleitung

Der Schlüssel zur französischen Rechtsauffassung zu Rassismus und Diskriminierung ist der abstrakte universelle Formalbegriff der Gleichheit, der in zahlreichen Rechtsinstrumenten, einschließlich der Verfassungen von 1946 und 1958 verankert ist. Der daraus entstandene Rechtsrahmen hat sich entlang zweier komplementärer Linien entwickelt: einerseits die Verurteilung von Ungleichbehandlung aufgrund der „Herkunft" und andererseits die parallele Weigerung, das Kriterium „Herkunft" für politische oder verwaltungstechnische Zwecke zu nutzen, selbst beim Kampf gegen Diskriminierung (wie vom Verfassungsrat bestätigt).

In einem Urteil vom 15. November 2007 bestätigte der Verfassungsrat erstmals ausdrücklich die Weigerung der französischen Rechtsdoktrin, die Begriffe „ethnische Herkunft" und „Rasse" als rechtliche, verwaltungstechnische oder wissenschaftliche Kategorien anzuerkennen, auf deren Grundlage eine Ungleichbehandlung festgestellt werden kann.[31] Um die Objektivität vergleichender Kategorien zu gewährleisten, dürfen in Bezug auf die Herkunft nur Merkmale herangezogen werden, die sich auf objektive Indikatoren, wie die Nationalität der Eltern oder Großeltern, beziehen.

Obwohl der Wortlaut der Verfassung Diskriminierung aufgrund von Alter, Behinderung, Gesundheitszustand oder sexueller Ausrichtung nicht ausdrücklich verbietet, ist die Aufzählung der verbotenen Diskriminierungsgründe in der Verfassung nach Auslegung des Verfassungsrats nicht abgeschlossen.

Das Thema Behinderung trat mit der Verabschiedung des Gesetzes Nr. 2005-102 vom 11. Februar 2005 wieder in den Fokus der öffentlichen Politik. Das Gesetz konzentriert sich auf die Eingliederung von Menschen mit Behinderungen in allen Lebensbereichen und schreibt die Durchsetzung dieses Grundsatzes am Arbeitsplatz, beim Zugang zu Schulen, in der Stadtsanierung und bei der staatlichen Unterstützung vor. Außerdem legt es Beschäftigungsquoten für den privaten und öffentlichen Sektor fest. Die Frist für Umbaumaßnahmen, die den Zugang zu öffentlichen Räumen gewährleistet, endete ursprünglich am 1. Januar 2015, wurde jedoch durch den Fahrplan zur Barrierefreiheit je nach Bauvorhaben um drei Monate bis zu fünf Jahre verlängert.[32]

Die Roma-Bevölkerung Frankreichs besteht aus französischen Staatsbürgern, den Fahrenden, die 95 % dieser Bevölkerungsgruppe (rund 700 000 Personen) ausmachen, und ausländischen Roma, die zum größten Teil aus Rumänien und Bulgarien zugewandert sind und deren Zahl auf 20 000 geschätzt wird. Die Probleme der beiden Gruppen und ihre Beziehungen zur öffentlichen Verwaltung unterscheiden sich stark voneinander. Bis vor kurzem war die Situation der Reisenden in der breiten Öffentlichkeit kaum bekannt. Weil die meisten sozialen Rechte an einen Wohnort gebunden sind, haben alle französischen Staatsbürger, die einen nicht sesshaften Lebensstil pflegen (Roma ebenso wie Nicht-Roma), einen speziellen rechtlichen und verwaltungstechnischen Status. Fahrende Roma stellen 80 % dieser Verwaltungskategorie. Die mit diesem Sonderstatus verbundenen regelmäßigen Überprüfungen und Einschränkungen des Wahlrechts wurden vom Verfassungsrat in einem Urteil vom 5. Oktober 2012 und in einer Entscheidung des Menschenrechtsausschusses der Vereinten Nationen vom 28. März 2014 kassiert.[33] Pläne

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[31] Verfassungsrat, 2007-557, 15. November 2007; abrufbar unter: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2007/2007-557-dc/decision-n-2007-557-dc-du-15-novembre-2007.1183.html (letzter Zugriff am 6. September 2016).

[32] Frankreich, Gesetz Nr. 2014-789 vom 10. Juli 2014, mit dem die Regierung ermächtigt wird, legislative Maßnahmen zur Gewährleistung der Barrierefreiheit öffentlicher Räume zu ergreifen (Artikel 11 und 19 bis 22).

[33] Siehe: www.fnasat.asso.fr/dossiers%20docs/condamnation%20ONU/Docs/ComOnu_20140506_CCPR.pdf (letzter Zugriff am 6. September 2016).

der vorherigen Regierung zur Überarbeitung des Gesetzes Nr. 69-3 vom 3. Januar 1969, das diesen Sonderstatus reget, wurden umgesetzt, indem die Nationalversammlung am 9. Juni 2015 in erster Lesung den Legislativvorschlag Nr. 1610 verabschiedete, der bisher noch nicht an den Senat weitergeleitet wurde.

Die sesshafte Roma-Bevölkerung lebt teils in Sozialwohnungen und teils auf eigenen Privatgrundstücken. Das Besson-Gesetz Nr. 2000-614 aus dem Jahr 2000 über Wohnraum für die fahrende Bevölkerung verpflichtete erneut alle Departements, Wohnraumprogramme für Fahrende zu verabschieden, diese Pflicht wurde 1990 gesetzlich verankert. Die Untätigkeit der Behörden bei der Schaffung von Stellplätzen und die verstärkte Durchsetzung von Parkverboten hat eine Situation geschaffen, in der Fahrende kaum noch Stellplätze finden, und sei es für wenige Tage. Diese Situation könnte als *De facto*-Verstoß gegen die Bestimmung der Richtlinie 2000/43/EG ausgelegt werden, die das Recht auf Wohnraum betrifft. In einem Fall, in dem Fahrende von ihrem Land vertrieben wurden, weil die Stadtplanungsvorschriften dort das Parken verboten hatten, hat der Europäische Gerichtshof für Menschenrechte Frankreich im Jahr 2013 aufgrund eines Verstoßes gegen Artikel 8 der Menschenrechtskonvention verurteilt.[34]

In Bezug auf die zugewanderten Roma hat der Innenminister seit den Wahlen vom Juni 2012 seine bisherige Politik intensiviert, die Verstöße gegen das Niederlassungsverbot streng verfolgt. Die Vertreibung von Fahrenden und Roma von illegal besetztem Land und die Ausweisungen aus dem französischen Hoheitsgebiet haben sich nahezu verdoppelt. Im Jahr 2013 wurden 21 000 Menschen aus illegal besetzten Camps vertrieben, im Jahr 2014 waren es rund 13 000. Die Zahl der Roma-Migranten bleibt derweil stabil bei geschätzten 20 000 Personen.

2. Wichtigste Gesetze

Im Privatrecht ist ein Diskriminierungsverbot in Rechtsvorschriften und im kodifizierten Recht verankert, z. B. im Arbeitsgesetzbuch (AGB), Strafgesetzbuch (StGB) und Bürgerlichen Gesetzbuch (BGB). Das Verwaltungsrecht dagegen besteht vorwiegend aus Fallrecht und beruht auf der Umsetzung des formalen Gleichheitsgrundsatzes.

Die Richtlinie 2000/43/EG wurde zunächst durch das Gesetz vom 16. November 2001 und das Gesetz über soziale Modernisierung Nr. 2002-73 vom 17. Januar 2002 umgesetzt; abgeschlossen wurde die Umsetzung durch das Gesetz vom 21. Dezember 2004, mit dem die Gleichbehandlungsstelle HALDE geschaffen wurde. Allgemeine Bestimmungen zum Verbot von Diskriminierung waren immer bereichsübergreifend und bildeten einen einheitlichen Rechtsschutz, nicht nur für die in Artikel 19 Absatz 1 des Vertrags über die Arbeitsweise der Europäischen Union genannten Gründe, sondern auch in Bezug auf körperliche Erscheinung, Nachname, Gebräuche, Gesundheitszustand, politische Ansichten, Mitgliedschaft oder Beteiligung in Gewerkschaften oder Interessenverbänden, familiäre Situation und genetische Merkmale. Am 15. Mai 2008 verabschiedete das Parlament das Gesetz Nr. 2008-496 vom 27. Mai 2008, mit dem die Umsetzung der Richtlinien in Bezug auf Belästigung und Diskriminierung überarbeitet wurde. Artikel 1 des Gesetzes enthält eine Definition von Diskriminierung, die unmittelbare und mittelbare Diskriminierung und Belästigung sowie die Anweisung zur Diskriminierung abdeckt. Es verbessert den Schutz vor Viktimisierung und gilt auch für unbezahlte und selbständig Beschäftigte.

Aufgrund der legislativen Weiterentwicklung durch das Gesetz vom 27. Mai 2008 wurde die nationale Herkunft aus der Liste der verbotenen Diskriminierungsgründe überall gestrichen, außer im Arbeitsgesetzbuch und im Strafgesetzbuch.

[34] EGMR, *Winterstein gegen Frankreich*, 17. Oktober 2013.

In dem durch gesonderte Rechtsvorschriften (Gesetz vom 16. November 2001, Gesetz vom 17. Januar 2002 und Gesetz Nr. 2008-496) geschaffenen Klageweg gegen Diskriminierung vor den Zivilgerichten ist eine Umkehr der Beweislast vorgesehen. Eine umfassende Entwicklung in der Rechtsprechung erleichtert Klägern in Diskriminierungsfällen inzwischen den Zugang zu Beweisen, allerdings werden die Umkehrung der Beweislast und die Grundsätze des Zugangs zu Beweisen von Gerichten der ersten Instanz immer noch nicht oder nicht durchgehend umgesetzt.

Friedensrichter, Beamte, die im Parlament arbeiten, und Vertragsbedienstete des öffentlichen Dienstes, die unter die zahlreichen Sonderregelungen fallen, auf die sich der Geltungsbereich des Gesetzes Nr. 83-634 nicht bezieht, sind von jeglichem Schutz vor Diskriminierung ausgenommen. Für diese Gruppen wurden die Richtlinien nicht umgesetzt. Allerdings kam der Conseil d'Etat im Fall *Perreux* zu dem Ergebnis, dass die Richtlinie 2000/78/EG im nationalen Recht unmittelbar anwendbar ist und daher auch für alle Bediensteten der öffentlichen Hand gilt.[35]

Das Gesetz Nr. 2005-102 vom 11. Februar 2005 reformiert das gesamte System staatlicher Hilfen und den Rechtsschutz von Menschen mit Behinderung und setzt die Richtlinie 2000/78/EG um, indem es ein Recht auf angemessene Vorkehrungen am Arbeitsplatz vorsieht und als positive Maßnahme Beschäftigungsquoten für den öffentlichen und den privaten Sektor einführt. Allerdings haben auch nach der Verabschiedung des Gesetzes Nr. 2008-496, das die Umsetzung der Richtlinie verbessert, nur Arbeitnehmer, deren verminderte Arbeitsfähigkeit staatlich anerkannt ist, Arbeitnehmer, die aufgrund eines Arbeitsunfalls zu mehr als 10 % behindert sind und Anrecht auf Schadensersatz haben, Empfänger von Behindertenrenten und behinderte Veteranen einen Anspruch auf angemessene Vorkehrungen. Daher gilt die Pflicht zu angemessenen Vorkehrungen weiterhin nicht für Menschen mit nicht anerkannten Behinderungen, unbezahlte behinderte Arbeitnehmer und für Behinderte, die einen freien Beruf ausüben.

Die Verabschiedung des Gesetzes Nr. 2013-404 vom 17. Mai 2013, dass gleichgeschlechtlichen Paaren die Ehe ermöglicht, beendet die mittelbare Diskriminierung durch die Rechte und Privilegien verheirateter Paare, wie das Anrecht auf zusätzliche Urlaubstage, die nach dem Urteil des EuGH vom 12. Dezember 2013 in der Rechtssache Hay eine unmittelbare Diskriminierung darstellen.

3. Wichtigste Grundsätze und Begriffe

Alle kodifizierten Rechtstexte im französischen Recht, die Diskriminierung verbieten, enthalten eine Liste verbotener Diskriminierungsgründe, ohne diese zu definieren. Da die Berücksichtigung der Begriffe „Herkunft" oder „Rasse" gesetzlich verboten ist, werden diese nicht definiert und die in der Richtlinie 2000/43/EG vorgesehenen Ausnahmeregelungen wurden nicht in französisches Recht umgesetzt. Der Wortlaut des Diskriminierungsverbots im Strafgesetzbuch, Arbeitsgesetzbuch und Bürgerlichen Gesetzbuch deckt den Begriff der mutmaßlichen Eigenschaften aufgrund von Herkunft, Rasse und Religion ab. Auch der systematische Verweis auf körperliche Erscheinung, nationale Herkunft und Nachname in der Liste der verbotenen Diskriminierungsgründe ist ein Versuch, auch mutmaßliche Merkmale abzudecken.

Unmittelbare und mittelbare Diskriminierung sind in Artikel 1 des Gesetzes Nr. 2008-496 definiert. Während die Definition von mittelbarer Diskriminierung den Richtlinien entspricht, ist dies bei der unmittelbaren Diskriminierung nicht der Fall. Sie schließt einen Nachweis von Diskriminierung durch einen hypothetischen Vergleich aus: der Ausdruck „erfahren hat" wurde ersetzt durch „erfahren wird". Außerdem dehnt das Gesetz die Definition von Diskriminierung auf eine korrekte Definition von Anweisung zur

[35] *Conseil d'Etat* (Staatsrat), Nr. 298348, 30. Oktober 2009.

Diskriminierung und von Belästigung aus, wodurch die Definition nicht mehr wie bisher wiederholte Handlungen vorschreibt. Anstiftung und Anweisung zur Diskriminierung entspricht außerdem dem Begriff der Mittäterschaft in Artikel 121-6 und 121-7 Strafgesetzbuch und fällt damit unter den allgemeinen Grundsatz der Haftung im Zivilrecht.

Das Gesetz vom 28. Mai 2008 ermöglicht es Arbeitgebern, für alle Diskriminierungsgründe berufliche Anforderungen geltend zu machen, sofern diese ein rechtmäßiges Ziel verfolgen und verhältnismäßig sind (Artikel 2 Absatz 3 und Artikel 8 Absatz 3). In Bezug auf das Alter eröffnet es durch den neu eingeführten Artikel L1133-3 Arbeitsgesetzbuch die Möglichkeit, Ausnahmen vom Verbot der Altersdiskriminierung zu machen.

Allerdings enthält das Gesetz vom 27. Mai 2008 eine allgemeine Verteidigungsklausel, mit deren Hilfe jeder Arbeitgeber in jeder Situation versuchen kann, eine Ungleichbehandlung zu rechtfertigen (Artikel 6 Absatz 4). Damit dehnt es die im Arbeitsrecht vorgesehenen Rechtfertigungen auch auf unmittelbare und mittelbare Diskriminierung aufgrund des Alters aus.

Obwohl Diskriminierung aufgrund von Assoziierung nicht ausdrücklich erwähnt wird, mit Ausnahme von Fällen, in denen ein Schutz ausdrücklich gesetzlich gewährt wird (z. B. für Eltern, die ein behindertes Kind pflegen), hat die Rechtsprechung den Rechtsschutz bei der Diskriminierung wegen der Mitgliedschaft in Gewerkschaften auch auf assoziierte Personen ausgedehnt.[36] Es gibt keine rechtliche Regelung in Bezug auf Mehrfachdiskriminierung, allerdings haben die Gerichte entsprechende Klagen akzeptiert, wenn die Beweise zeigen, dass die Ungleichbehandlung durch eine Kombination von Gründen motiviert ist.[37]

Im Gesetz Nr. 2005-102 vom 11. Februar 2005 über Behinderung deckt die Definition des Verbots von Diskriminierung im Arbeitsleben aufgrund von Behinderung die Wahrnehmung des Gesundheitszustands des Arbeitnehmers sowie von Einschränkungen durch die Arbeitsumgebung durch den Arbeitgeber ab. Damit lässt sich argumentieren, dass das Verbot auch für mutmaßliche Eigenschaften gilt. Die Definition von Behinderung ist weiter gefasst als die des EuGH in der Rechtssache C-13/05, *Chacón Navas*, die nicht auf den Zugang zum Berufsleben beschränkt ist und Einschränkungen in allen Lebensbereichen berücksichtigt, egal ob diese auf gesundheitliche Probleme zurückgehen oder nicht. Ferner decken Artikel L1132-1 des Arbeitsgesetzbuchs und das Gesetz über Beamte Nr. 83-643 Diskriminierung sowohl aufgrund des Gesundheitszustands als auch wegen einer Behinderung ab und verpflichten den Arbeitgeber in beiden Fällen zu angemessenen Vorkehrungen, mit denen das Arbeitsumfeld an die arbeitsmedizinischen Anforderungen angepasst wird, solange die Maßnahmen keine unverhältnismäßige finanzielle Belastung darstellen. Daher entspricht der französische Schutz der Definition von Behinderung und angemessenen Vorkehrungen, die der EuGH in den verbundenen Rechtssachen C-335/11 und C-337/11, *Ring* und *Skouboe Werge*, vorgegeben hat.

4. Sachlicher Anwendungsbereich

Seit dem Gesetz vom 27. Mai 2008 ist das Rechtssystem in Bezug auf die geschützten Gründe und Lebensbereiche uneinheitlich. Es gibt einen erweiterten sachlichen Anwendungsbereich, unter den die Bereiche Sozialschutz, soziale Vergünstigungen, Bildung, Zugang zu Gesundheitsdiensten und zu Gütern und Dienstleistungen fallen, jedoch nur für Diskriminierung aufgrund der ethnischen Herkunft und Rasse. Der Schutz beim Zugang zu beruflichen Vereinigungen und für unbezahlt und selbständig Beschäftigte gilt nur für die in Artikel 19 Absatz 1 AEUV genannten Gründe (Gesetz

[36] Caen Berufungsgericht*, Enault gegen SAS ED*, 17. September 2010.
[37] Berufungsgericht Poitiers, Nr. 08/00461, 17. Februar 2009.

Nr. 2008-496, Artikel 2). Das Arbeitsgesetzbuch und das Strafgesetzbuch decken die nationale Herkunft ab, es gibt jedoch noch immer keine Pflicht zu angemessenen Vorkehrungen für staatliche Beschäftigte, für die ein Sonderstatus gilt, und für unbezahlt und selbständig Beschäftigte.

Der allgemeine Diskriminierungsschutz kann sowohl gegen private als auch gegen öffentliche Stellen durchgesetzt werden. Im Arbeitsleben gilt das Diskriminierungsverbot sowohl für die öffentliche Hand, als auch für den privaten Sektor. Der Grundsatz der Gleichbehandlung gilt auch für Nichtstaatsbürger, sofern der Gesetzgeber eine Ungleichbehandlung nicht durch das öffentliche Interesse rechtfertigen kann. Allerdings sind bestimmte Rechte wie das Recht auf Arbeit und bestimmte soziale Vergünstigungen davon abhängig, ob die betreffende Person den Status eines ausländischen Staatsbürgers mit legalem Aufenthaltsrecht genießt.

Der Schutz vor Diskriminierung geht über die Anwendungsbereiche der Richtlinien hinaus, weil er beim Zugang zu Wohnraum alle Diskriminierungsgründe abdeckt (Artikel 1 des Gesetzes Nr. 2014-366 vom 24. März 2014 hat Alter als verbotenen Diskriminierungsgrund beim Zugang zu Wohnraum eingeführt) und durch die Verabschiedung des Gesetzes vom 11. Februar 2005 Diskriminierung wegen einer Behinderung auch beim Zugang zu Bildung, Sozialschutz, sozialen Vergünstigungen und Gütern und Dienstleistungen verboten ist. In Bezug auf die anderen im AEUV genannten Diskriminierungsgründe ist Diskriminierung beim Zugang zu Gütern und Dienstleistungen nur im Strafgesetzbuch verboten.

5. Rechtsdurchsetzung

Da der größte Teil des Rechtsschutzes im französischen Recht übertragbar ist, gelten auch Fälle als Präzedenzfälle, die andere Diskriminierungsgründe betreffen. Bei der Durchsetzung des Rechts auf Zugang zu Beweisen gibt es weiterhin Schwierigkeiten.

Auch statistische Daten sollten als Beweise zulässig sein. Am 15. Dezember 2011 hat der Kassationsgerichtshof anerkannt, dass Diskriminierung aufgrund der Herkunft durch eine Analyse von Arbeitnehmerverzeichnissen auf der Grundlage der Nachnamen bewiesen werden kann.[38] Statistische Daten anderer Arbeitnehmer desselben Arbeitgebers in einer vergleichbaren Situation werden im Arbeitsrecht inzwischen häufig genutzt und wurden vom Kassationsgerichtshof wiederholt anerkannt.

Situationstests wurden durch das Gesetz vom 9. März 2006 in Form einen neuen Artikels 225-3-1 des Strafgesetzbuchs und durch die Rechtsprechung des Kassationsgerichtshofs als Beweise für Diskriminierung vor Strafgerichten eingeführt. Wegen der strengen Billigkeitsgründe in Zivilverfahren wurden in zivilrechtlichen Fällen noch keine Situationstests eingesetzt. Da diese Verfahren von Antirassismus-NROs entwickelt wurden, werden sie auch von diesen besonders häufig verwendet, gelegentlich jedoch auch von Einzelklägern.

Alle Diskriminierungsklagen gegen private Parteien (Arbeitgeber, Dienstleister, Vermieter usw.) müssen bei Zivilgerichten eingereicht werden. Abhängige Beschäftigte (in der Privatwirtschaft) oder Vertragsbedienstete eines industriellen oder kommerziellen staatlichen Dienstleistungsbetriebs müssen allerdings vor dem Arbeitsgericht klagen. Alle anderen Fälle werden vor dem Amtsgericht (*tribunal d'instance*) oder Bezirksgericht (*tribunal de grande instance*) verhandelt, abhängig von den verhandelten bzw. geforderten Summen. Die Mehrheit der Fälle kommt vor das Arbeitsgericht. Es gibt kein systematisches System zur Veröffentlichung von Urteilen. Diskriminierungsfälle werden jedoch regelmäßig in juristischen Publikationen und den Medien besprochen.

[38] Kassationsgerichtshof, Sozialkammer, Nr. K 10-15873, *Airbus*, 15. Dezember 2011.

Das Gesetz vom 16. November 2001 ermöglicht es Vertretern von Gewerkschaften und NROs, die seit mindestens fünf Jahren bestehen, im Namen von Opfern zu klagen. Nach Artikel 31 der Neuen Zivilprozessordnung kann sich jeder an zivilrechtlichen Verfahren beteiligen, der ein rechtmäßiges Interesse daran hat, dass die Klage abgewiesen oder dieser stattgegeben wird. In Fällen von Diskriminierung beim Zugang zu Wohnraum gewährt das Gesetz vom 17. Januar 2002 auch NROs das Recht, Sammelklagen oder Einzelklagen einzureichen. Die Gleichbehandlungsstelle (Ombudsmann) kann als *Amicus Curiae* vor Gericht auftreten und der Gerichtsakte Teile ihres Untersuchungsberichts beilegen.

Es ist ein Grundsatz des französischen Zivilrechts, dass materielle und ideelle Schäden durch eine Entschädigung wieder gut gemacht werden, das Gericht jedoch keine weiteren finanziellen Sanktionen oder Strafschadenersatz verhängt. In arbeitsrechtlichen Fällen lässt sich die Entwicklung beobachten, dass in Fällen, in denen sich die finanziellen Schäden nur schwer beziffern lassen, dem Opfer häufig Schmerzensgeld zugesprochen wird. Bei einer Diskriminierung am Arbeitsplatz sieht Artikel L1134-4 AGB die Möglichkeit vor, auf eine Aufhebung der diskriminierenden Maßnahme zu klagen, was beispielsweise bei einer Kündigung zur Wiedereinstellung des Klägers führt. Diese Bestimmung wurde durch das Gesetz Nr. 2008-561 vom 17. Juni 2008 überarbeitet, das für diese Ansprüche eine Verjährungsfrist von fünf Jahren einführt. In Fällen von Diskriminierung beim Zugang zu Gütern und Dienstleistungen ist die Höhe der Entschädigungssummen weiterhin sehr gering.

Die erste Rechtsvorschrift, mit der die Richtlinien umgesetzt wurden, das Gesetz vom 16. November 2001, führte die Bekämpfung von Diskriminierung als Ziel von Tarifverhandlung, Branchenverhandlungen (die nur einen Teil der Arbeitnehmer betreffen) und nationalen Verhandlungen ein. Im Herbst 2014 setzte der Minister für Beschäftigung eine umfassende Arbeitsgruppe ein, in der zivilgesellschaftliche und Sozialpartner die Wirksamkeit von politischen Strategien und Mechanismen im Kampf gegen Diskriminierung bewerten sollen. Die Arbeitsgruppe sollte ihre Ergebnisse im Frühjahr 2015 vorlegen.

Gestützt auf den neuen Artikel L1133-3 AGB, der durch das Gesetz vom 27. Mai 2008 eingeführt wurde, erließ die Regierung die Verordnung Nr. 2009-560 vom 20. Mai 2009, mit dem ein System positiver Maßnahmen zur Beschäftigungsförderung von Arbeitnehmern über 50 Jahre eingerichtet wurde.

Für Menschen mit Behinderung bestätigt das Gesetz vom 11. Februar 2005 eine verpflichtende Quote von 6 % behinderten Arbeitnehmern und dehnt sie auf den öffentlichen Sektor aus. Außerdem legt das Gesetz spezielle Mechanismen für den Zugang zum öffentlichen Dienst und spezielle Regelungen zum Vorruhestand fest.

Es gibt ein spezielles Programm für Kinder von Roma und Fahrenden, das deren Zugang zu Bildung erleichtern und ihre Eingliederung in staatliche Schulen verbessern soll.[39]

6. Gleichbehandlungsstellen

Am 21. Juli 2008 verabschiedete die Regierung ein Verfassungsgesetz, mit dem die durch Artikel 41 der Verfassung eingerichtete Institution des Ombudsmanns modernisiert wurde. Die Befugnisse und Kompetenzen des Ombudsmanns werden durch das Organgesetz (*loi organique*) Nr. 2011-333 vom 29. März 2011, das seit dem 1. Mai 2011 in Kraft ist, genau definiert. Es führt den französischen Ombudsmann (*Médiateur de la République*), den Kinderschutzbevollmächtigten, die Nationale Kommission für Sicherheitsethik und die frühere Gleichbehandlungsstelle, die Hohe Behörde zur Bekämpfung von Diskriminierungen und Gleichheit (*Haute autorité de lutte contre les*

[39] Ministerialverordnung 2012-143 vom 2. Oktober 2012.

discriminations et pour l'égalité, *HALDE*) in einem Organ zusammen. Die neue Stelle ist für Beschwerden in allen genannten Bereichen zuständig, sie kann Gesetzesreformen vorschlagen, die Durchsetzung von Rechten fördern und wissenschaftliche Studien zu allen Zuständigkeitsbereichen durchführen. Sie deckt unmittelbare und mittelbare Diskriminierung aufgrund aller Diskriminierungsgründe ab, die durch französisches Recht und durch internationale Abkommen, die Frankreich ordnungsgemäß ratifiziert hat, verboten sind.

Der Ombudsmann kann Einzel- und Sammelklagen untersuchen, die von Einzelpersonen, NROs, Gewerkschaften oder Parlamentsabgeordneten eingereicht werden, und von jeder öffentlichen oder privaten Person eine Stellungnahme einfordern und schriftliche Dokumente und alle sonstigen Informationen anfordern, die sich als Beweismittel eignen. Seine Mittel zur Behandlung von Klagen sind Schlichtungsverfahren und Empfehlungen an staatliche oder private Parteien, die sich auf den jeweiligen Einzelfall beziehen oder allgemeine Geltung haben können. Außerdem kann er als *Amicus Curiae* vor Gericht auftreten und aufgrund der von ihm untersuchten Beschwerden von Amts wegen oder auf Wunsch des Gerichts oder der Parteien Klage einreichen. Darüber hinaus hat er eine spezielle Befugnis, die es ihm erlaubt, in Diskriminierungsfällen, die unter das Strafgesetzbuch fallen, einen so genannten „strafrechtlichen Vergleich" (*transaction pénale*) vorzuschlagen.

Es besteht kein Zweifel mehr, dass der Ombudsmann in der Lage ist, seine Aufgaben im Kampf gegen Diskriminierung vollständig zu erfüllen. Er nimmt 20 % mehr Beschwerden entgegen, als die HALDE in ihrem letzten vollen Tätigkeitsjahr 2010. Nach dem Tod seines Vorgängers Dominique Baudis wurde Jacques Toubon im Juli 2014 zum neuen Ombudsmann ernannt. Seine Prioritäten sind Aufklärungskampagnen, der Zugang zur Justiz, Forschung und der Kampf gegen Rassismus.

Im Jahr 2014 trat der Ombudsmann erstmals als dritte Partei einem Verfahren vor dem EGMR bei und gab ein Gutachten zu einer Beschwerde von Roma bei der Europäischen Kommission in Bezug auf das Wahlrecht von Roma ab.

7. Wichtige Punkte

- Dem Antidiskriminierungsrecht wird weiter mit Widerstand begegnet, weil es als gemeinschaftsbasierte Analyse sozialer Spannungen aufgefasst wird. Dies bildet den Kern einer äußerst heftigen ideologischen Reaktion der französischen Institutionen gegen das Antidiskriminierungsrecht. Die traditionelle formale Theorie der Gleichheit, der Begriff des Verschuldens in zivilrechtlichen Fällen und der Vorrang des Parlaments sind weiterhin die letztgültigen juristischen Richtwerte. Die Gerichte fassen die Umkehr der Beweislast und den Begriff der indirekten Diskriminierung als Mittel auf, um eine Haftung ohne Verschulden zu begründen und den Mitgliedern bestimmter Gruppen Sonderrechte zu garantieren.
- Obwohl das Antidiskriminierungsrecht von den höheren Instanzen angewendet wird und sich in den vergangenen zehn Jahren weiterentwickelt hat, fehlt vielen Anwälten und Richtern unterer Instanzen häufig das nötige Wissen über die Regeln der Beweislast, die jüngsten Entwicklungen in der Rechtsprechung und deren besonderen Sprachgebrauch. Kläger müssen sich immer noch darauf einstellen, ihr Verfahren erst in einer höheren Instanz zu gewinnen. In den höheren Instanzen werden Diskriminierungsfälle wesentlich positiver aufgenommen und die Erfolgsquote vor Gericht ist stark gestiegen, seit die HALDE und nun der Ombudsmann ihre Gutachten vor Gericht vorbringen können.

- Der Begriff der mittelbaren Diskriminierung wird immer noch zu wenig verstanden und häufig nicht vom Anwalt, sondern vom Gericht einseitig geltend gemacht[40] und dies nur einmal in einem Fall von Diskriminierung aufgrund der Herkunft.[41]
- Diskriminierung aufgrund der Religion im Arbeitsleben und in der Bildung steht im Zentrum wichtiger rechtlicher und politischer Debatten, die darauf abzielen, die Pflicht von Beamten zur religiösen Neutralität in Situationen, in denen Beschäftigte öffentliche Dienstleistungen erbringen oder kommerzielle Akteure gegenüber der Öffentlichkeit eine neutrale Position einnehmen, auf privatrechtlich Beschäftigte auszudehnen. Diese Spannung trat im Jahr 2013 in einen Konflikt zwischen der Sozialkammer des Kassationsgerichtshofs und dem Berufungsgericht Versailles und Paris in der Rechtssache *Baby Loup* offen zutage, in der es um eine mögliche Einschränkung der Neutralitätspflicht von privaten Angestellten einer Kindertagesstätte aufgrund deren Ethos und Weltanschauung ging.[42] Der Fall wurde ein zweites Mal von der Plenarsitzung des Kassationsgerichtshofs verhandelt, dessen Urteil am 25. Juni 2014 erging.[43] Das Gericht lehnte die Annahme ab, dass es gesetzlich möglich sei, berufliche Anforderungen geltend zu machen und behandelte auch nicht die Frage, ob Neutralität eine berufliche Anforderung darstellen kann, für die die gesetzliche Ausnahmeregelung gilt. Das Plenum entschied nicht darüber, ob diese Einschränkung der Religionsausübung eine unmittelbare oder mittelbare Diskriminierung darstellt und ob sie gerechtfertigt ist oder nicht. Es folgte einer völlig anderen Argumentation und kam zu dem Schluss, dass die Kündigung der Klägerin rechtmäßig war, weil sie in einem besonderen Zusammenhang erfolgte, in dem rechtmäßige Einschränkungen von Grundfreiheiten möglich sind. Damit wurde der Fall als reine Sachfrage entschieden. In einem Verfahren, in dem es um die Entlassung einer IT-Ingenieurin ging, die sich geweigert hatte, ihren islamischen Schleier abzunehmen, an dem verschiedene Mitarbeiter eines Kunden Anstoß genommen hatten, kam dieser Konflikt erneut auf. Da der Europäische Gerichtshof noch nicht entschieden hat, ob der Wunsch privater Kunden, nicht von einer Person bedient zu werden, die einen islamischen Schleier trägt, die Kriterien für eine entscheidende berufliche Anforderung hinsichtlich der Art oder der Bedingungen für die Ausführung des Arbeitsvertrags erfüllt, legte der Kassationsgerichtshof die Frage in der Rechtssache *Asma Bougnaoui und Association de défense des droits de l'homme gegen Micropole SA* am 24. April 2015 dem EuGH vor.[44]
- 2014 und 2015 wurde ein starker Anstieg von Hassreden und gewalttätigen islamfeindlichen oder antisemitischen Bekundungen verzeichnet. Die französischen Behörden haben umfangreiche Maßnahmen ergriffen, um eine verhältnismäßige und demokratische Antwort auf die fremdenfeindlichen Reaktionen zu finden, die von den Terrorangriffen und dem geopolitischen Kontext ausgelöst und von rechtsextremen Politikern instrumentalisiert werden. Am 19. April 2015 wurde ein Aktionsplan gegen Rassismus öffentlich vorgestellt. Der Aktionsplan, der über drei Jahre läuft und mit einem Budget von 100 Millionen Euro ausgestattet ist, umfasst 40 Maßnahmen, die den Zugang zu Rechten, Bildung, Kommunikation sowie die Unterstützung von NROs betreffen. Dieser Kontext hat erhebliche Auswirkungen auf

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40 Der erste Fall, in dem vor der Sozialkammer des Kassationsgerichtshofs, Nr. 05-04962, 9. Januar 2007, auf mittelbare Diskriminierung erkannt wurde; abrufbar unter: www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000017624898&fastReqId=1576422841&fastPos=1 (letzter Zugriff am 6. September 2016).

41 Kassationsgerichtshof, Sozialkammer, Nr. 10-20765, 3. November 2011; abrufbar unter: www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024764368&fastReqId=1975217984&fastPos=1 (letzter Zugriff am 6. September 2016).

42 Berufungsgericht Versailles, Nr. 10/05642, *Baby Loup*, 27. November 2011; Urteil des Kassationsgerichtshofs, abrufbar unter: www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/536_19_25762.html; Urteil des Berufungsgerichts Paris, abrufbar unter: http://combatsdroitshomme.blog.lemonde.fr/files/2013/11/CA-Paris-27-novembre-2013-13-02981-c-A-Babyloup1.pdf (letzter Zugriff am 6. September 2016).

43 http://www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/612_25_29566.html (letzter Zugriff am 6. September 2016).

44 EuGH, C-188/15, 9. April 2015.

die Zahl der Diskriminierungen, denen Menschen mit nordafrikanischer und nahöstlicher Herkunft beim Zugang zu Beschäftigung und beim Zugang zu Gütern und Dienstleistungen ausgesetzt sind.

- Seit den französischen Parlamentswahlen vom Juni 2012 hat der Innenminister seine bestehende Politik der Vertreibungen von illegal besetztem Land verstärkt. Am 28. August 2012 wurde eine Ministerialverordnung erlassen,[45] nach der bei jeder Vertreibung von Fahrenden und Ro*m*a von illegal besetztem Land die Verbesserung der humanitären Bedingungen in Bezug auf den Zugang zu Wohnraum, Bildung und sozialen Rechten geplant werden muss. Im Herbst 2013 richtete die Regierung einen Fonds in Höhe von 4 Millionen Euro ein, aus dem Eingliederungsmaßnahmen für Familien finanziert werden sollen, die als integrationsfähig gelten. Gleichzeitig wird die Politik der Vertreibungen fortgesetzt. Es liegen noch keine Daten zu den Folgen dieser Politik vor, weil in Frankreich keine Daten über die ethnische Herkunft und damit auch keine Statistiken zur Roma-Bevölkerung erhoben werden. Nach Schätzungen von NROs war die Zahl der ausländischen Roma, die von den Integrationsmaßnahmen profitierten, jedoch sehr gering und ist ihre Situation und Zahl auf französischem Staatsgebiet trotz der Vertreibungspolitik stabil, da die meisten Familien nach einer solchen Vertreibung zurückkehren.

[45] Ministerialverordnung vom 26. August 2012, NOR INTK1233053C, abrufbar unter: http://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/536_19_25762.html (letzter Zugriff am 6. September 2016).

INTRODUCTION

The national legal system

Laws are the main source of rights in France. They may be proposed by Government (bills) or by Parliament (proposed laws), which is made up of two chambers, the National Assembly and the Senate. Before a law is enacted by the President of France, the Constitutional Council may, at the request of members of Parliament, verify its consistency with the Constitution. The effective implementation of enacted legislation also depends on the regulatory section of the Administrative Supreme Court (*Conseil d'Etat*) adopting secondary legislation, such as decrees.

International conventions ratified by France can be directly invoked before the courts which have the duty to control the conformity of national legislation.

The jurisdictional order is made up of two branches:

- Administrative courts have jurisdiction over all administrative litigation. Their highest court is the *Conseil d'Etat* (Council of State).
- Judicial courts have jurisdiction over criminal and private law. Their highest court is the Court of Cassation, which is made up of several Chambers, including the Civil Chambers for general private law, the Social Chamber for labour law and the Criminal Chamber for criminal law. Trial Court in Employment matters is enforced by non-professional judges, and can be appealed to the Social Chamber of the Court of Appeal.

In private law, the general legal regime relating to discrimination is to be found in codified law i.e. the Labour Code (LC), the Penal Code (PC), the Civil Code (CC) and Law No. 2008-496 of 27 May 2008 on various provisions implementing Community Law in relation to the fight against discrimination.[46]

Administrative law, on the other hand, is mostly jurisprudential, and based on the implementation of a formal theory of equality. In French law, as interpreted by both the administrative and constitutional courts, rules are judged to meet the requirement of equality if they are the same for everyone.

The law grants uniform and impartial protection to all individuals, and to their beliefs and allegiances, but this applies solely to them as individuals. For legal purposes, groups defined by such beliefs or allegiances simply do not exist. As a consequence, France has systematically rejected clauses in international conventions or declarations that imply that individuals should be granted rights on the basis of their membership of a minority, thus constituting a legal category on the basis of origin.

Since the Second World War, the long-standing abstract principle of equality has been enshrined in a range of instruments, including the Constitutions of 1946 and 1958, as well as comprehensive criminal penalties for racism and xenophobia. The resulting French approach has developed along two complementary lines: the condemnation of any reference to any concept of 'origin' 'ethnicity' or 'race' and the refusal to use criteria of 'origin', 'ethnicity' or 'race' for policy and administrative purposes.

The broader principle of non-discrimination as applicable to administrative, civil and labour law, has been introduced more recently, and derives largely from EU law.

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[46] France, Law No. 2008-496 of 27 May 2008 Implementing Community Law in Relation to the Fight Against Discrimination (*Loi No. 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations*), available at: http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000018877783 (accessed 6 September 2015).

In France, since most of the legislation applies to all grounds of discrimination, cases are referred to as precedents whether or not they discuss issues related to the same ground of discrimination. Generally speaking, whether or not they apply EU law, they seldom refer to the EU directives.

List of main legislation transposing and implementing the directives

The European Convention of Human Rights and the ILO Conventions are directly applicable by the courts. As regards the EU directives and other international conventions, it depends upon the drafting of each provision. All provisions that are programmatic and provide for intervention on the part of the State are held not to be directly applicable. There has not yet been a judicial decision discussing the implementation of the Convention on the Rights of Persons with Disabilities (CRPD)CRPD, there has not yet been a judicial decision discussing its implementation.

Law No. 1006-2001 of 16 November 2001 (entered into force on 16 November 2001), covers all the grounds contained in Article 19(1) of the Treaty on the Functioning of the European Union (TFEU) and all aspects of employment.[47]

Article 158 of the Law on Social Modernisation No. 2002-73 of 17 January 2002 (entered into force on 18 January 2002) covers all Article 19(1) TFEU grounds relating to access to housing.[48]

Law No. 2008-496 of 27 May 2008 (entered into force on 27 May 2008) covers:

- protection for race and ethnic origin, extending to areas covered by Directive 2000/43/EC beyond employment and housing law – social protection, health, social advantages, education, access to and supply of goods and services;
- the protection for Article 19(1) TFEU grounds extends to areas covered by Directive 2000/78/EC which are not covered by laws on public service or labour law – membership of and involvement in professional or trade organisations, independent non-salaried workers.

Organic Law (*Loi organique*) No. 2011-333 of 29 March 2011 establishing the constitutional authority of the Defender of Rights, the French equality body (which entered into force on 1 April 2011) covers an evolving list of grounds of discrimination: all grounds and material scope covered by French law and international conventions ratified by France.[49]

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[47] France, Law No. 2001- 1006 of 16 November 2001 relating to the fight against discriminations, (*Loi No. 2001-1006 du 16 novembre 2001 relative à la lutte contre les discriminations*), available at: http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000588617 (accessed6 September 2016), covers mores, sexual orientation, sex, affiliation (whether real or assumed) to an ethnic origin, nation, race or specific religion, physical appearance, last name, philosophical convictions, family situation, union activities, political opinions, age, health, pregnancy, genetic characteristics, sexual identity and place of residence.

[48] France, Law No. 2002-73 of 17 January 2002 on Social Modernisation –(*Loi no 2002-73 du 17 janvier 2002 de modernisation sociale*), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000408905&dateTexte=&categorieLien=id (accessed 6 September 2016), covers the grounds covered by the Law No. 1006-2001.

[49] France, Organic Law No. 2011-333 of 29 March 2011 establishing the Defender of Rights (*Loi organique No. 2011-333 du 29 mars 2011 relative au Défenseur des droits*), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023781167&dateTexte=&categorieLien=id (accessed 6 September 2016).

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The French constitution includes the following articles dealing with non-discrimination. The Declaration of the Human and Civic Rights of 26 August 1789 states in Article I: 'Men are born and remain free and equal in rights. Social distinctions can have no other basis than common utility'.[50]

The Preamble of the Constitution of 1946 states: '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... France shall form with its overseas peoples a Union founded upon equal rights and duties, without distinction of race or religion', and adds: 'Each person has the duty to work and the right to employment. No person may suffer prejudice in his work or employment by virtue of his origins, opinions or beliefs'.[51]

Article 1 of the Constitution of 1958 states that: "[France] shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs".[52]

In addition, Article 10 of the Declaration of the Human and Civic Rights of 26 August 1789 states: 'No one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order'.[53]

These provisions do not apply to all areas covered by the directives. Their material scope is not broader than those of the directives. The constitutional provisions covers race, origin, religion, opinions and sex, and do not cover disability, age and sexual orientation.

The constitutional anti-discrimination provisions are directly applicable.

The constitutional equality clauses can be enforced defensively against private actors in addition to the State, by way of a procedure invoking an exception of unconstitutionality relating to legislation applicable to the litigation.

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[50] France, Declaration of the Human and Civic Rights of 26 August 1789 (*Déclaration des droits de l'homme et du citoyen de 1798*), available at: http://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789 (accessed 6 September 2016). Article 1: 'Les hommes naissent et demeurent libres et égaux en droits/ Les distinctions sociales ne peuvent être fondées que sur l'utilité commune'.

[51] France, Preamble of the Constitution of 1946 (*Préambule de la Constitution de 1946*), available at: http://www/conseil-constitutionnel/fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/preambule-de-la-constitution-du-27-octobre-1946/5077/html (accessed 6 September 2016). 'Au lendemain de la victoire remportée par les peuples libres sur les régimes qui ont tenté d'asservir et de dégrader la personne humaine, le peuple français proclame à nouveau que tout être humain, sans distinction de race, de religion ni de croyance, possède des droits inaliénables et sacrés/ Il réaffirme solennellement les droits et libertés de l'homme et du citoyen consacrés par la Déclaration des droits de 1789 et les principes fondamentaux reconnus par les lois de la République'.

[52] France, Constitution of 1958 (*Constitution de 1958*), available at: http://www/conseil-constitutionnel/fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/texte-integral-de-la-constitution-du-4-octobre-1958-en-vigueur/5074/html#preambule (accessed 6 September 2016). Article 1: Elle [La France] assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion/ Elle respecte toutes les croyances.'

[53] France, Declaration of the Human and Civic Rights of 26 August 1789 (*Déclaration des droits de l'homme et du citoyen de 1789*), available at: http://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789 (accessed 6 September 2016). Article 10: 'Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la Loi'.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in national law:

> real or assumed origin, appearance of origin, national and ethnic origin, race, sex, pregnancy, family situation, physical appearance, last name, health, disability, genetic characteristics, loss of autonomy, mores, sexual orientation, age, union activities, mutualist activities, religion, political and religious convictions (which are interpreted broadly to encompass all philosophical or spiritual endeavours; however, the term belief is not usual), belief, sexual identity and place of residence.

The ground of loss of autonomy has not yet been interpreted. It has been adopted in order to assimilate to discrimination abusive behaviour towards persons who are dependant, and confer jurisdiction on the equality body in situations where people in a sheltered environment are abusively treated, whether such environments are old age homes, hospitals or homes for disabled or chronically sick persons. Given the definition of disability in the International Convention on the Rights of Persons with Disabilities, this definition covers situations relating to disabled people.

As regards the ground of sexual identity, the preparatory working group that lead to its adoption indicates that it is meant to cover unequal treatment and harassment related to gender identity whatever the characteristics of the person – whether he or she be gay, transgender or intersex.[54]

2.1.1 Definition of the grounds of unlawful discrimination within the directives

French anti-discrimination legislation does not define each ground. Since the list is very broad, the judge does not approach a discrimination case by identifying whether or not the complainant conforms to the definition of one of the groups covered, the approach is more oriented towards an appreciation of adverse effect in comparison to a group or of the defendant's differentiating behaviour in relation to a prohibited ground.

- Racial or ethnic origin

No definition.

The law actually refuses to validate the concept of 'race' and of 'ethnic origin' or to define them. Since the law prohibits taking these concepts into consideration to create legal categories, they are not defined. The concept of race is interpreted as being referred to in the Constitution as a prohibited concept. Ethnic origin is not interpreted either, as it is deemed to be a euphemism for race. This is why 'national origin', conceived as objective information on a person's ancestry, based on his or her nationality or the nationality of his or her parents is deemed to be the only objective reference to origin admissible as per French reservations, according to the Constitutional Council.[55]

The case law does not discuss whether a person or a group meets this category. It looks for evidence of the behaviour of the discriminating party or impact of indirect discrimination based on indications that lead to presumptions. It will never discuss the

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[54] France, Ministerial instruction of the Minister of Justice relating to Application of the Law of 6 August 2012 (*Circulaire relative à l'application de la loi du 6 aout 2012*), 7 August 2012, No. RIM 2012 -15 / E8 – 07 August 2012, available at: http://www.textes.justice.gouv.fr/art_pix/1_1_circulaire_07082012.pdf, verified 29 May 2016.

[55] Constitutional Council, No. 2007-557 DC, 15 November 2007. Available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2007/2007-557-dc/decision-n-2007-557-dc-du-15-novembre-2007.1183.html, verified 27 May 2016.

content of the concept of race or ethnic origin. Given that the law covers appearance of origin, meant as being foreign or of foreign descent or not, and that direct discrimination essentially addresses assumptions made by the discriminating party, evidence of direct discrimination based on origin or the judgement of a racist person, can be based on foreign physical appearance or attributed origin related to a person's external appearance or characteristics, such as their last name, mother tongue or accent.[56]

- Religion or belief

No definition.

In French law there is no legal definition of religion or belief. The Law of 9 December 1905 on the separation of Church and State addresses the concepts of freedom of worship and beliefs.[57] Article 1 of this law states: 'The Republic guarantees freedom of belief. It guarantees freedom of worship, the only restrictions being stated therein in the pursuit of the interest of public order'.[58] Freedom of religion is considered to be an aspect of freedom of opinion. According to Jean Rivéro, an expert in public law, freedom of religion includes, on the one hand, freedom of belief, hence the freedom to choose between non-belief and membership of a religion, and on the other hand, freedom of worship, that is the individual or collective practice of a religion.

The Lyon Court of Appeal, in a decision of 28 July 1997, offered the following definition: 'a religion can be defined by the convergence of two elements, an objective element, the existence of a community, even limited, and a subjective element, a common faith…'

However, a legislative limitation on religious freedom exists in France. Indeed, sects are prohibited in France by Articles 223-15-2 to 223-15-4 of the Penal Code. Moreover, Law No. 2001-504 of 12 June 2001 allows the dissolution of any legal entity considered to be a sect. Such entities can also incur criminal sanctions.[59]

- Disability

Law No. 2005-102 of 11 February 2005 on equal opportunities and the integration of disabled persons (hereafter the Law on Disability)[60] revised the definition of disability contained in Article L114 of the Code of Social Welfare (CSW). This definition applies for the purpose of implementing all relevant provisions relating to equal opportunities for people with disabilities:

> 'a disability is deemed to be any limitation of activity or restriction in relation to participation in life in society experienced by an individual in the context of his or her environment by reason of a substantial, lasting or definitive alteration of one or

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[56] Court of Cassation, No. K 10-15873, *Airbus*, 15 December 2011. Available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024993730&fastReqId=946410880&fastPos=1, verified 29 May 2016.

[57] France, Law of 09 December 2005 on the separation of Church and State (*Loi du 9 décembre 1905 concernant la séparation des Eglises et de l'Etat*), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070169&dateTexte=20080306 (accessed 6 September 2016).

[58] Article 1: 'La République assure la liberté de conscience/ Elle garantit le libre exercice des cultes sous les seules restrictions édictées ci-après dans l'intérêt de l'ordre public'.

[59] France, Law No. 2001-504 of 12 June 2001 reinforcing the prevention and repression of sectarian movements violating human rights (Loi No. 2001-504 du 12 juin 2001 tendant à renforcer la prévention et la répression des mouvements sectaires portant atteinte aux droits de l'homme et aux libertés fondamentales), available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000589924&categorieLien=id (accessed 6 September 2016).

[60] France, Law No. 2005-102 of 11 February 2005 on Equal Opportunities and the Integration of Disabled Persons (*Loi n 2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées*), available at: www/legifrance/gouv/fr/WAspad/UnTexteDeJorf?numjo=SANX0300217L (accessed 6 September 2016).

more physical, sensory, mental, cognitive or psychological faculties, of multiple disabilities or of a disabling illness' (author's translation).[61]

The definition of the prohibition of discrimination in employment on the basis of disability covers the employer's perception of the employee's condition and limitations resulting from the environment. It can thus be considered to include assumed characteristics as well. It provides a definition of disability that is broader than that of the CJEU in Case C-13.05*, Chacón Navas*, that is, not limited to access to professional life, and encompasses limitations in all areas of life, whether or not they are related to the consequences of health problems. However, although the definition of disability could be interpreted to be in conformity with the definition in CJEU joined cases C-335.11 and C-337.11, *Ring and Skouboe Werge* in as much as it situates the definition of disability 'in relation to participation to life in society experienced by an individual in the context of his or her environment', legislation is drafted in such a way that people who could satisfy the requirement of Article L114 of the CSW but do not wish to be registered as disabled may have difficulty in enforcing their right to reasonable accommodation. They can, however, argue their right to reasonable accommodation on the ground of the general protection against discrimination contained in Article L1132-1 ff. LC and Article 2 of Law No. 2008-496 of 27 May 2008, and their right will be recognised by the courts.[62]

- Age

No definition.

The concept of age itself has not been defined by jurisprudence.

- Sexual orientation

No definition.

In a decision of 19 December 1980, the Constitutional Council refused to include in the definition of discrimination based on sex, discrimination based on sexuality.[63] Protection against discrimination based on sexual orientation was introduced into French law under the term 'mores', first in the Penal Code in 1985 (Law 85-772 of 25 July 1985)[64] then in the Labour Code in 1986 (Law 86-76 of 17 January 1986[65] and Law 92-1446 of 31 December 1992).[66]

The term 'sexual orientation' was added to the Labour Code and the Penal Code by the Law of 16 November 2001. Henceforth, the terms 'mores' and 'sexual orientation' co-

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61 France, Law No. 2005-102 of 11 February 2005, Article L 114: '*Constitue un handicap, au sens de la présente loi, toute limitation d'activité ou restriction de participation à la vie en société subie dans son environnement par une personne en raison d'une altération substantielle, durable ou définitive d'une ou plusieurs fonctions physiques, sensorielles, mentales, cognitives ou psychiques, d'un poly-handicap ou d'un trouble de santé invalidant*'.

62 Orléans Court of Appeal, *X. vs La poste*, No. 10/01990, 15 November 2011,

63 Constitutional Council, No. 80-125, 19 December 1980, 1980 RJC I-88.

64 France, Law no 85-772 of 25 July 1985 relating to various social measures (*Loi No. 85-772 du 25 juillet 1985 portant diverses dispositions d'ordre social)*, available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000317523&dateTexte= (accessed 6 September 2016).

65 France, Law No. 86-76 of 17 January 1986 relating to various social measures (*Loi No. 86-76 du 17 janvier 1986 portant diverses dispositions d'ordre social*), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000317532&dateTexte= (accessed 6 September 2016).

66 France, Law No. 92-1446 of 31 December 1992 relating to employment, development of part time employment et unemployment insurance (*Loi No. 92-1446 du 31 décembre 1992 relative à l'emploi, au développement du travail à temps partiel et à l'assurance chômage*), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000542542&categorieLien=id, (accessed 6 September 2016).

exist, although the term 'mores' previously referred to homosexuality, and 'sexual orientation' was not defined in the law and has not yet been defined by jurisprudence.

However, sexual orientation has not been interpreted to cover discrimination suffered by transgender people. In the past, transsexuals have argued for the use of the concept of discrimination based on 'sex' or discrimination based on 'mores' or physical appearance. In the Law No. 2012-954 of 6 August 2012, the French legislator added a new ground of discrimination on the ground of sexual identity to the list of prohibited grounds in private and public employment, in access to housing and in the Penal Code.[67]

2.1.2 Multiple discrimination

In France prohibition of multiple discrimination is not included in the law.

However, courts have allowed claimants to claim that they have been cumulatively discriminated against on a number of grounds, for example in cases where access to university education or employment is based on an evaluation of a candidate which could be influenced by cumulative factors of age and nationality or age and sex. Therefore no additional legislation is required in order to address this issue.

In France the following case law deals with multiple discrimination. Findings of multiple discrimination have had no impact on damages, since condemnations are strictly compensatory.

The HALDE[68] (the French equality body which was the predecessor of the Defender of Rights) held that the erroneous refusal to admit the claimant into an adult education programme on the ground of her origin was influenced by a refusal to treat her situation on the basis of a subjective discrimination on the ground of her age (over 30) and the fact that she had young children.[69] The same could be found regarding the refusal of a social housing administrator to take into consideration the priority situation of a disabled person, on the basis of her origin,[70] or discrimination in hiring, the employer having evaluated the claimant, a woman of 44, as being very efficient while she was a temporary employee, but not dynamic enough when she applied to be hired in competition with young, inexperienced people.[71]

In a case brought before the Paris Administrative Court,[72] the claimant was denied access to an adult education programme managed by a state secondary school on the ground that she wore a Muslim headscarf. An injunction ordering her immediate re-integration was granted. The HALDE presented observations based on arguments founded on the principles of secularism, which had been advanced in the course of its investigation. The court held that the claimant's personal project could not be challenged and that the prohibition of religious symbols in state schools did not apply to adult education programmes. However, the issue and the evidence that this case could be discussed on the basis of multiple grounds emerged as a result of the defence by the school authorities before the administrative court, which by way of an additional argument, questioned whether her personal education project was serious, because she was

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67 France, Law No. 2012-954 of 06 August 2012 relating to sexual harassment (*Loi No. 2012-954 du 6 août 2012 relative au harcèlement sexuel*), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026263463&dateTexte=&categorieLien=id (accessed 6 September 2016).

68 French Equal Rights and Anti-Discrimination Commission (*Haute autorité de lutte contre les discriminations et pour l'égalité, HALDE*).

69 Deliberation No. 2006-03, available at: www.defenseurdesdroits.fr (accessed 6 September 2016).

70 Deliberation No. 2007-162, available at: www.defenseurdesdroits.fr (accessed 6 September 2016).

71 Deliberation No. 2006-20, available at: www.defenseurdesdroits.fr (accessed 6 September 2016). The Court of Appeal of Poitiers followed the HALDE's analysis: Court of Appeal of Poitiers, 17 February 2009, No. 08.00461.

72 Paris Administrative Court, *Saïd v. Greta*, 27 April 2009, No. 0905233.9.

pregnant and her husband had substantial financial resources. This defence was held to be discriminatory and was dismissed by the court, but did not contribute to the evidence of discrimination per se determining the outcome of the case.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In France, the following national law prohibits discrimination based on perception or assumption of what a person is:

- Law of 16 November 2001 No. 2001-1066 on the fight against discrimination, providing for the definition of grounds protected in Article 225-1 of the Penal Code, Article L1132-1 of the Labour Code and Article 6 of Law No. 83-634 of 13 July 1983 on civil servants.

b) Discrimination by association

In France the following national law (including case law) does not expressly prohibit discrimination based on association with people who have particular characteristics, but it has been interpreted by the courts to cover discrimination by association:

- Law of 16 November 2001 No. 2001-1066 on the fight against discrimination, providing for the definition of grounds protected in Article 225-1 of the Penal Code, Article L1132-1 of the Labour Code and Article 6 of Law No. 83-634 of 13 July 1983 on civil servants;
- Law No. 2008-496 of 27 May 2008 on various provisions implementing Community Law in relation to the fight against discrimination.

In a case alleging discrimination on the basis of Article L1132-1 of the Labour Code the court followed the arguments presented by the HALDE and concluded that differential treatment of an employee by reason of her relationship with an individual protected by the prohibition of discrimination on the ground of trade union activities is protected by the prohibition of discrimination.[73]

This interpretation seems to correspond to the definition of protection against discrimination in the Coleman case.

In France the following national law expressly prohibits discrimination based on association with people who have particular characteristics:

- Article 225-1, paragraph 2 PC and Article 5 of Law No. 2008-496 prohibit discrimination perpetrated against legal persons and, in this regard, they can only be considered in terms of discrimination by association with their members/employees;
- Article L3122-26 LC provides for a right to request adjustment of working hours, by association, for employees who are family members and carers for someone with disabilities.

2.2 Direct discrimination (Article 2(2)(a))

a) Prohibition and definition of direct discrimination

In France, direct discrimination is prohibited in national law and is defined.

[73] Caen Appeal Court*, Enault v. SAS ED*, No. 08/04500, 17 September 2010.

Direct discrimination is covered by all the legislation covering all the prohibited grounds of discrimination (Articles 225-1 and 2 PC, Articles 1132-1 ff LC and Article L1141-1 LC, Article 1 of Law No. 89-462 of 6 July 1989 on landlords and tenants[74] (known as the Mermaz Law), further to amendments introduced by the Law of 17 January 2002, and Article 6 of Law No. 83-634 of 13 July 1983 on the rights and obligations of civil servants).[75] These texts list the grounds and the prohibited discriminatory conduct.

The Penal Code at article 225-1 refers to direct discrimination and provides the following definition: 'any distinction on the ground of a person's origin... actual or supposed membership or non-membership of a given ethnic group, nation, race or religion shall constitute discrimination'.[76]

Law No. 2008-496 of 27 May 2008 introduces in Article 1, paragraph 1 a definition of direct discrimination, which provides as follows:[77] 'Direct discrimination shall be deemed to occur in a situation where, on the grounds of a person's actual or supposed membership or non-membership of an ethnic group or race, or of their religion, belief, age, disability, sexual orientation or sex, they are treated less favourably than another is, has been or will have been treated in a comparable situation.'

This is not literally the same as the definition contained in the directive in as much as it does not explicitly foresee a hypothetical comparison relating to how an individual 'would be treated in a comparable situation'. However, the French courts do use inferences and hypothetical comparisons.[78]

b) Justification of direct discrimination

Since the transposition of Directives 2000/78/EC and 2000/43/EC in 2001, the French legal regime did not allow justifications of direct discrimination except in limited circumstances on the ground of age. In completing the transposition of the directives, Law No. 2008-496 created a general regime of justification applicable to all grounds in all situations, in Article 2, paragraph 2.

This principle does not prohibit different treatment which is based on a characteristic related to any of the grounds referred to in the above paragraph where such a characteristic constitutes a genuine and determining occupational requirement, if the objective is legitimate and the requirement is proportionate.

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[74] France, Law 89-462 of 06 July 1989 on relations between landlords and tenants (*Loi No. 89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs*), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006069108 (accessed 6 September 2016).

[75] France, Law 83-634 of 13 July 1983 relating to rights and obligations of civil servants (*Loi No. 83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires*), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068812 (accessed 6 September 2016).

[76] Article 225-1 of the Penal Code (*Article 225-1 du Code pénal*), available at: http://www.legifrance.gouv.fr/affichCodeArticle/do?idArticle=LEGIARTI000006417831&cidTexte=LEGITEXT000006070719 (accessed 6 September 2016): *'Constitue une discrimination toute distinction/// en raison de leur origine... de leur appartenance ou de leur non-appartenance, vraie ou supposée, à une ethnie, une nation, une race, une religion déterminée.'*

[77] France, Law of 27 May 2008, Article 1 : *'Constitue une discrimination directe la situation dans laquelle, sur le fondement de son appartenance ou de sa non appartenance, vraie ou supposée, à une ethnie ou une race, sa religion, ses convictions, son âge, son handicap, son orientation sexuelle ou son sexe, une personne est traitée de manière moins favorable qu'une autre ne l'est, ne l'a été ou ne l'aura été dans une situation comparable.'*

[78] For example, in a case relating to discrimination on the ground of origin, see Court of Cassation, Social Chamber, *Dos Santos*, No. 10-20765, 03 November 2011, available at: http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024764368&fastReqId=1975217984&fastPos=1,(accessed 6 September 2016).

In addition, the law permits the defendant to present evidence to be assessed by the judge to justify direct discrimination generally, since in the context of defining the burden of proof, it provides for a uniform legal regime for all grounds of discrimination, that applies both to direct and indirect discrimination, and that allows the defendant to rebut evidence of apparent discrimination established by way of presumption (Article L1134-1 of the Labour Code and Article 4 of the Law of 27 May 2008):

> 'in case of litigation... the job applicant... or employee presents factual elements from which the existence may be presumed of direct or indirect discrimination as defined by Article 1 of Law No. 2008-496 of 27 May 2008.
>
> 'In the light of these elements, the defendant must establish that the measure or decision is justified by objective elements which are free of any discriminatory component.'[79]

Law No. 2005-102 on equal opportunities and the integration of disabled persons, which defines an unjustified failure to provide reasonable accommodation as a form of discrimination, continues to limit the duty of reasonable accommodation to persons who are officially recognised as disabled workers.

As regards direct discrimination on the ground of age, Article 6 of Law 2008-496 (Article L1133-2 LC) allows each employer to create and justify exceptions to the prohibition of discrimination on the ground of age, which appears to delegate to individual employers the possibility given to Government to establish legitimate differences in treatment aimed at the protection of employees who are victims of their age.[80] Therefore, this would not appear to satisfy the requirements of CJEU case-law on age.

2.2.1 Situation testing

a) Legal framework

In France situation testing is clearly permitted in national law.

Article 45 of Law No. 2006-396 on equal opportunities of 31 March 2006[81] created Article 225-3-1 of the Penal Code which codifies the higher court's jurisprudence on the admissibility of situation testing for all prohibited grounds of discrimination to establish discrimination and to prove the criminal offence of discrimination provided by Articles 225-1 and 225-2 of the Penal Code.

Although it is admissible as evidence of discrimination in criminal matters, the trial judge is not bound to attribute any value to this evidence unless they are satisfied of its reliability which is often challenged by defendants.

While in criminal matters the admissibility of evidence is not bound by criteria of fairness and evidence can be presented by every means, situation testing is not deemed

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[79] France, Law of 27 May 2008, Article 4: '*Toute personne qui s'estime victime d'une discrimination directe ou indirecte présente devant la juridiction compétente les faits qui permettent d'en présumer l'existence. Au vu de ces éléments, il appartient à la partie défenderesse de prouver que la mesure en cause est justifiée par des éléments objectifs étrangers à toute discrimination. Le présent article ne s'applique pas devant les juridictions pénales*'.

[80] France, Law of 27 May 2008, Article 6, modifying Article 1133-2 LC: '*Les différences de traitement fondées sur l'âge ne constituent pas une discrimination lorsqu'elles sont objectivement et raisonnablement justifiées par un but légitime, notamment par le souci de préserver la santé ou la sécurité des travailleurs, de favoriser leur insertion professionnelle, d'assurer leur emploi, leur reclassement ou leur indemnisation en cas de perte d'emploi, et lorsque les moyens de réaliser ce but sont nécessaires et appropriés*'.

[81] France, Law No. 2006-396 on Equal Opportunities (*Loi sur l'égalité des chances*) of 31 March 2006 (*Loi no 2006-396 du 31 mars 2006 pour l'égalité des chances*), available at: http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20060402&numTexte=1&pageDebut=04950&pageFin=04964 (accessed 6 September 2016).

admissible before the civil courts, where evidence is bound by rules of legality and fairness, as it is considered as an unfair form of evidence. To date, it has not been used before the administrative courts.

b) Practice

In France situation testing is used in practice.

It was developed by anti-racism NGOs and the equality body, but is also used by individual claimants and thus the public prosecutor. It has been used in racial and disability discrimination cases. Some organisations have recently used it in age discrimination cases in relation to access to employment.

This method has also been used to trap discriminating parties in situations which leave no trace of discriminatory behaviour, such as pre-contractual relations leading to a refusal of access to goods and services (such as night clubs or rental housing) or access to employment. It offers a record of an objective situation from which discrimination can be inferred, in the absence of evidence by way of witnesses or written documents relating to the discriminatory basis for the decision.

In a decision of 7 June 2005 the Criminal Chamber of the Court of Cassation admitted as evidence an instance of telephone testing, established by way of the testimony of a third party and the filing of the tape recording of the telephone conversation, in order to support criminal charges of discrimination in access to rental accommodation on the basis of Articles 225-1 and 225-2 of the Penal Code.[82]

The first court of appeal decision following the adoption of Article 225-3-1 of the Penal Code providing for the admissibility of testing evidence in criminal cases of discrimination was issued by the Paris Court of Appeal.[83] SOS Racism, an anti-racism NGO, organised a wide-ranging testing operation at a number of nightclubs in Paris. The situation involved two couples of North African or African origin seeking admission to an establishment. If they were denied access, they were followed by two couples of European origin. They were all photographed to demonstrate that they were all wearing comparable outfits. The teams were accompanied by a third-party witness, who could attest to the pretexts given to the couples who were denied access. Only one test was undertaken for each establishment and some of the participants were not available to testify, although some of them were present for each test. A criminal complaint was immediately filed with the police against four nightclubs after the European couples were admitted.

The door attendants testified that many clients of African or North African origin were admitted. SOS Racism's third-party witness testified precisely as to the discriminatory comments used by the door attendants when denying access but confirmed that she saw clients of North African or African origin who were admitted. The court found that there were people of foreign origin who were admitted and that the date the testers' photograph was taken was not sufficiently definitely established to admit it as relevant evidence. In evaluating whether the tests were conclusive and sufficient to establish discrimination, the court held that, in the context of evidence by way of testing:

- the refusal to admit just one person or group of foreign origin was insufficient to establish that the behaviour of the door staff was triggered by discriminating criteria;
- if one takes into consideration the way nightclubs operate, the time lapse between the 'foreign' group and the following group is very significant, as it may justify different responses.

[82] Court of Cassation, Criminal Chamber, No. 04-87354 of 07 June 2005.
[83] Paris Court of Appeal, No. 07.04974, *Billau v. SOS Racism*, 17 March 2008.

Considering the testimony of the defendants' representatives who witnessed the admission of clients of foreign origin, the testing in itself, which established the refusal to admit a small number of people, was deemed insufficient to prove discrimination. The court found that it should have been corroborated by other sources of evidence.

In autumn 2008, the HALDE (former equality body) undertook a testing exercise with the prospect of generating criminal proceedings, attempting to meet the evidence requirements of the criminal courts, in a context where testimonial evidence was in itself insufficient to trigger a conviction. In total, 12 cases were prosecuted by the State and all of them were dismissed on the ground that undertaking situation testing by fictitious candidates, investigating and transmitting cases to the state prosecution puts the equality body in a position where the value of the evidence is altered, due to the accumulation of functions undertaken by the HALDE in the procedure.[84]

Situation testing has not yet been used as evidence in civil cases. However, considering the inadmissibility of evidence obtained illegally in civil cases and the strict requirements of fairness enforced in civil procedure, it is doubtful that situation testing would be held admissible based on general rules of evidence. In 1991, the Court of Cassation decided that video or sound recording, and even photocopies, obtained without the knowledge of a party, was not admissible in civil matters.[85]

2.3 Indirect discrimination (Article 2(2)(b))

a) Prohibition and definition of indirect discrimination

In France, indirect discrimination is defined and prohibited in national law.

Since Law No. 2001-1066 of 16 November 2001 came into force, indirect discrimination has been covered by non-criminal legislation covering all prohibited grounds of discrimination (Article 1132-1 LC and following and L1141-1 LC, Article 1 of the Mermaz Law on landlords and tenants No. 89-462 of 6 July 1989, further to amendments introduced by the Law of 17 January 2002, Article 6 of Law No. 83-634 of 13 July 1983 on the rights and obligations of civil servants. These texts list the grounds and the prohibited discriminatory behaviours.

Law No. 2008-496 of 27 May 2008 introduces at Article 1 paragraph 2 a definition of indirect discrimination, which provides as follows:[86] 'Indirect discrimination shall be deemed to occur where an apparently neutral provision, criterion or practice, which, on one of the grounds mentioned in paragraph 1, gives rise to a particular disadvantage for persons in comparison with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.

b) Justification test for indirect discrimination

Article 1, paragraph 2, of Law No. 2008-496 of 27 May 2008 provides for the following justification test for indirect discrimination: '(…)unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.

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84 Paris High Court, No. 0907108445, 07 January 2011.

85 Court of Cassation, Social Chamber, No. 89-44605, 20 November 1991.

86 France, Law of 27 May 2008, Article 1 : *'Constitue une discrimination indirecte une disposition, un critère ou une pratique neutre en apparence, mais entraînant, pour l'un des motifs mentionnés au premier alinéa, un désavantage particulier pour des personnes par rapport à d'autres personnes, à moins que cette disposition, ce critère ou cette pratique ne soit objectivement justifié par un but légitime et que les moyens pour réaliser ce but ne soient nécessaires et appropriés'.*

However, the transposition of the shift of the burden of proof resulting from Law No. 2008-496 creates ambiguity, as opposed to the former drafting of the burden of proof which was based on the presentation of 'elements of facts" ... from which it may be presumed…'. It now provides that claimant presents elements of facts that lead to the presumption of the existence of direct or indirect discrimination'.[87] These terms do not correspond to existing legal standards and therefore do not give clear indications to the judge as to the burden of proof for the claimant. It appears, however, to be compatible with the directives and their application by the CJEU.

At this stage, there are very few higher court decisions and the decisions of the lower courts remain inconsistent. Effective implementation by trial judges and non-professional labour court judges will require time and training.

However, the Court of Cassation has commented on arguments which could be used to justify unequal remuneration. They must be based on the justification of an objective difference proportional to the difference in payment[88] and therefore defeat the unequal treatment argument.

Nevertheless, the Court of Cassation has also provided an evaluation of a legitimate aim to justify differential remuneration on economic grounds.[89]

In *Banque Finaref*, the Court of Cassation concluded that the limitation of compensation for redundancy because an employee was two years away from full retirement was a practice using an apparently neutral criterion that could constitute indirect discrimination on the ground of age.[90] However, the court decided that it met the requirement of reasonableness and proportionality provided by the exception authorised by Article 6 of Directive 2000/78/EC and therefore concluded that this compensation scheme was not discriminatory.

In 2012, the *Conseil d'Etat* first used the concept of indirect discrimination in relation to a case concerning discrimination on the ground of disability and a reduction in the variable portion of the salary of a magistrate with the public prosecution office who had become deaf.[91] The claimant had seen his functions redefined in order to allow him to maintain his professional activity: his pleading duties were replaced with administrative duties. The *Conseil d'Etat* decided that the universal application of a rule defining the scope of variable salary in reference to hearing duties was unfavourable to the claimant and, considering his functions were the result of accommodation of disability, the decision was not reasonable and proportionate. Therefore, the rule applicable to variable salaries had to be redefined to counter the adverse impact, so as to prevent salary loss in relation to the variable portion and only take into consideration the claimant's performance in carrying out his redefined duties.

c) Comparison in relation to age discrimination

In France the law does not specify how a comparison is to be made in relation to age.

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87 France, Law of 27 May 2008, Article 4 : '*Toute personne qui s'estime victime d'une discrimination directe ou indirecte présente devant la juridiction compétente les faits qui permettent d'en présumer l'existence*'.

88 Court of Cassation, Social Chamber, *M. Gabriel Aguera et al c. Société M2PCI et al.*, No. 03-40465, 16 February 2006.

89 Court of Cassation, Social Chamber, ESRF c. M. X., confirmed in another matter against ESRF on 17 April 2008 (Soc. 819 FS-P+B).

90 Court of Cassation, Social Chamber, No. 09-42071, 17 November 2010.

91 Conseil d'Etat, *Volot-Pfiser v. Ministry of Justice*, No. 347703, 11 July 2012.

2.3.1 Statistical evidence

a) Legal framework

In France there are national rules permitting data collection.

Data collection is governed by Law 78-17 of 6 January 1978 on information systems,[92] data and the protection of freedom and covers the collection and manipulation of personal information relating to both computerised and non-computerised information and files. This legislation is enforced by the French Data Protection Authority (*Commission nationale informatique et liberté, CNIL*).

Personal information is defined in Article 2 of the Law as any information relating to an identified physical person or to a person who is directly or indirectly identifiable in reference to an identification number or personal attributes.

Article 8 I defines sensitive data, the collection of which is forbidden except as provided for in Article 8 II. Sensitive data is any information linked to a person's name relating to race, ethnic origin, philosophical and political opinions, religion, union activities, health, sexual activity (which is deemed by the CNIL to cover sexual orientation). Neither an employer nor anyone, in the course of business, may gather this information except in certain regulated circumstances related to specific small-scale studies or in arguing a case before the courts (cf. Article 8 II of the CNIL Law).

Data collection and handling activities are subject to a declaration for authorisation by the CNIL pursuant to Articles 22 ff. of the Law. Violation of the obligation to declare or obtain an authorisation for collecting and handling data is subject to criminal and administrative sanctions. In case of violation, the perpetrator will be prosecuted in accordance with Article 226-19 PC.

Article 8 II, paragraph 5 of the Law states that personal data, without exception for sensitive data, can be used to adduce and present evidence in the context of any administrative or judicial proceeding pursuant to the defence or exercise of a legal right without declaration or authorisation. Thus, claimants alleging racial discrimination are not required to obtain an authorisation from the CNIL in order to request a court order to collect personal data from an employer. The CNIL is not legally competent to interfere in the judicial process.

Article 8 II, paragraph 7 of the Law authorises the statistical treatment of personal data by national government statistics institutes, under the supervision of the CNIL.

There is no general principle forbidding the collection of sensitive data. However, all collection and handling is subject to authorisation - including for the purpose of research - except, as discussed above, for presenting evidence in judicial and administrative proceedings.

National statistics institutes regularly publish data relating to the economic situation and employment of people in relation to age and disability.

National government statistics agencies (INSEE, DARES, DRESS and INED)[93] refuse to collect data on race and ethnic origin in the national census except regarding nationality

[92] France, Law 78-17 of 6 January 1978 on information systems, data and freedoms (*Loi No. 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés*), available at: http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000886460 (accessed 6 September 2016).

[93] The National Institute of Statistics and Economic Studies (*Institut national de la statistique et des études économiques*, *INSEE*)); the Directorate for Research, Studies and Statistics of the Ministry of Labour, Employment, Vocational Training and Social Dialogue(*Direction de l'animation de la recherche, des études et*

and the origin of first degree ascendants for limited secondary studies. Therefore, racial and ethnic statistical indicators, allowing policy impact evaluation to be undertaken, or created for monitoring purposes, do not exist.

However, such data can be collected in small-scale multi-criteria surveys and studies under the supervision of the national statistics agencies (based on a maximum representative sample of 5,000 selected people). The data are not collected in institutional or corporate records, such as employers' records. The treatment of such data must be confidential, anonymous and reserved for the external group monitoring the implementation of the anti-discrimination programme. Once the study has been completed, the data collection programme must be destroyed immediately. For studies conducted by survey, the answers must be anonymous and their use exclusively reserved for use in the context of the study by those persons responsible for the study.

The CNIL issued a recommendation on 5 July 2005 on the collection of data by employers in order to monitor discrimination in the workplace. The design and implementation of positive action measures are subject to the same rules as other activities. The use of data to produce ethno-racial profiles is not authorised by law and is considered abusive conduct. The CNIL accepts that each protocol be evaluated but it requires that they be allowed on a case-by-case basis.

In a decision of 15 November 2007, the Constitutional Council declared that studies relating to diversity of origin, discrimination and integration could be based on objective information but that ethnic origin and race are not objective concepts and are contrary to Article 1 of the Constitution.[94]

In April 2012, the Defender of Rights and the CNIL published joint guidelines for human resources managers in order to explain to them how they could develop a methodology to produce quantitative management indicators in relation to the promotion of diversity which would be in compliance with the current requirements of the law. They essentially develop the practical implications of the CNIL's recommendations and define the compliance procedures to be implemented by the CNIL.

In France statistical evidence is permitted by national law in order to establish indirect discrimination.

Article 8 II, paragraph 5 of Law 78-17 of 6 January 1978 states that personal data can be used in the context of any administrative or judicial proceeding pursuant to the defence or exercise of a legal right. However, the national data protection agency (CNIL) is reluctant to allow the French equality body (Defender of Rights) to avail itself of this exception to classify data based on origin resulting from its investigations and systematically requires that it request authorisation.

General rules of civil and criminal procedure and the provisions transposing Directives 2000.43.EC and 2000.78.EC do not refer expressly to the use of statistical evidence.

However, the general principles of interpretation allow judges to refer to the directives in order to interpret national law and their explicit reference to the use of statistics as a

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des statistiques, *DARES*); the Directorate for Research, Studies, Assessment and Statistics of the Ministry of Social Affairs, Health and Women's Rights (*Direction de la recherche, de l'évaluation, des études et des statistiques, DRESS*)); and the French Institute for Demographic Studies (*Institut national des études démographiques, INED*).

[94] Constitutional Council, No. 2007-557 DC, 15 November 2007, available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2007/2007-557-dc/decision-n-2007-557-dc-du-15-novembre-2007.1183.html (accessed 6 September 2016).

legal means of evidence of discrimination should be sufficient to justify the admissibility of statistics in evidence.

The general principles of evidence in criminal cases allow proof to be provided by any means and consider the means of evidence to be unlimited. Therefore, admissible means of evidence should include the use of statistics. Situation testing is representative of the sort of statistics which the criminal courts regularly admit as evidence.

In labour law, the constant jurisprudence of the Social Chamber of the Court of Cassation in matters of discrimination has favoured an approach based on access to evidence in order to allow, when necessary, the comparative analysis of the situation of the claimant against that of allegedly non-discriminated parties. This comparative approach necessarily allows claimant to establish a statistically significant difference based on an analysis of evidence emanating from the employer regarding the respective situations of employees based on the prohibited grounds of discrimination, including ethnic origin, race, religion, age, sexual orientation and disability.

b) Practice

In France, statistical evidence in order to establish indirect discrimination is used in practice.

Statistics resulting from the comparative situation of employees of a common employer are now commonly used in labour law, based on the comparative approach developed by the CJEU in discrimination cases, and repeatedly recognised by the Court of Cassation in relation to anti-trade-union discrimination and other grounds of discrimination.[95]

However, statistics resulting from research reports have not been used in civil and administrative procedures. Their admissibility would be subject to an evaluation of their relevance to the case in question, but does not raise per se ethical or methodological problems. The concepts of race, origin and ethnicity are not defined by French law, as they are not legal categories. Sensitive data and data based on origin are admissible before the courts.[96] They are empirically constructed and without technical constraints, their value being essentially subject to the evaluation of the judge. However, they are used regularly by the national equality body (HALDE and Defender of Rights).

There is no indication that foreign law examples have been used in order to justify the use of statistical evidence before the French courts. However, decisions of the CJEU have been at the core of all the arguments supporting the comparative approach to evidence of discrimination.

In essence, the difficulty in adducing statistical evidence relates to the availability of data that can be relied upon in relation to issues raised in a specific case. For instance, the HALDE reviewed all the available studies and statistics relating to age and employment and its review revealed that, regarding the matter of age, the national indicators have not been constructed to sustain anti-discrimination policy or legal action. Therefore, they are either too old or too incomplete and do not facilitate analysis to ascertain national trends or analysis of age discrimination in access to employment.

As regards the use of statistics in cases relating to the ground of origin, the problem is amplified by the absence of a recognised methodological framework to produce statistics on the basis of origin and, more generally, the unavailability of data on origin in France.

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[95] Court of Cassation, Social Chamber, *P+B Fluchère, Dick and CFDT v SNCF*, No. 1027, 28 March 2000, ; CA Paris 17 October 2003. Appeal from Paris High Court 22 November 2002, D.O. July 2003 p. 284, 'Moulin Rouge' *SOS Racisme and Marega v Beuzit et Association du Moulin*.

[96] Court of Cassation, Social Chamber, *Airbus*, No. K 10-15873, 15 December 2011.

In this context, though authorised by law, the use of statistics is rare and therefore risky and burdensome. It has essentially been based on deductions made from lists of employees on the basis of their last names and/or nationality.

In its decision of 14 June 2001,[97] the Court of Cassation decided that, in matters related to discrimination on the ground of trade union activities, the offence of discrimination may be established by comparative evidence and the judge has an obligation to investigate the situation of the employee comparative to that of others and to actively request the production of the necessary evidence by the defendant.

Failure to undertake such a comparative analysis is the equivalent of refusing the claimant access to the enforcement of their rights to protection against discrimination.

The use of a quantitative analysis of the results of recruitment procedures excluding candidates on the grounds of origin and age was expressly recognised by the courts of appeal of Paris, Toulouse and Poitiers as a valid approach to establishing a presumption of discrimination.[98]

In the Airbus case, the Toulouse court of appeal referred to the HALDE's investigation to reach a finding of discrimination on the ground of origin further to a claim alleging that people of North African origin were hired for short-term contracts at Airbus but almost never for contracts of indefinite duration. The claimant was employed as a specialist worker by Airbus for a short-term contract from October 2000 to September 2001. He was contacted directly by Airbus in October 2004 for a second contract from January 2005 to July 2006 for an employment at a certain level. In autumn 2005, he applied for an indefinite duration contract for a vacancy relating to a function with indeterminate classification. Another short-term employee of French origin was selected. He held a post at the same level with the same company but this was his first short-term contract. In addition, he worked at another site of the same employer and had only been in employment since January 2005. Furthermore, the candidate of French origin, who was ultimately hired, did not perform well in the workplace, but his application nevertheless received a better rating. The evidence was based on enquiries by the HALDE relating to the list of employees, which indicated that among the staff recruited between 2000 and 2006, all had French citizenship and only two had a last name of North African origin. Moreover, for the period between January 2005 and July 2006, of the 43 employees hired for contracts of indefinite duration, none had a last name of North African origin. This evidence was sufficient to trigger a presumption of discrimination.[99] The decision was confirmed by the Court of Cassation.[100]

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In France harassment is prohibited in national law and is defined.

It takes the form of both sexual harassment and moral harassment.

There are two coexisting legal regimes: a general legal regime which is not defined in relation to a list of prohibited grounds of discrimination, applicable to any relevant employment situation, and a legal regime pursuant to the definition of discrimination.

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[97] Court of Cassation, Criminal Chamber, CFDT Interco, No. 2792, 99-108, 14 June 2000; see also below footnote No. 41.

[98] Court of Appeal of Paris, *L'Oreal v. SOS Racism*, No. 06/07900, 06 July 2007; Court of Appeal of Poitiers, *Mont-Louis Bonnaire v. Crédit Agricole*, No. 08.00461, 17 February 2009; Court of Cassation, Social Chamber, *Airbus*, No. K 10-15873, 15 December 2011.

[99] Toulouse Court of Appeal, No. R 08.06630, 19 February 2010.

[100] Court of Cassation, Social Chamber, No. K 10-15873, 15 December 2011.

Law No. 2008-496 includes, at Article 1, paragraph 3, a definition of harassment as a form of discrimination, providing a distinct definition which does not require repeated acts:

> 'any behaviour related to one of the grounds mentioned in paragraph 1 and any behaviour of a sexual nature to which a person is subjected, with the purpose or effect of violating his or her dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment'.[101]

There is a legal advantage to invoking harassment in relation to a prohibited ground of discrimination, since remedies relating to discrimination include annulment of the measure, greater compensation and the possibility of reintegration. It must be shown that the harassment was related to a ground of discrimination.

The general regime of harassment is sanctioned by criminal law (Articles 222-33 and 222-33-2 PC) and labour law (Articles L1152-1, L1153-1 and Article 6 of Law No. 83-634 of 13 July 1983 on civil servants). It is applicable to both the private and public sectors and its definition covers acts perpetrated by superiors as well as by colleagues. The Labour Code specifically states that no employee should be the victim of such behaviour or be sanctioned for having testified or complained in relation thereto (Article L1152-2 LC).

In a decision of 4 May 2012, the Constitutional Council declared the provisions of the Penal Code (Article 222-33) regarding harassment unconstitutional on the ground that the prohibited behaviour was defined as 'Harassment is the fact of harassing', and did not provide sufficient details regarding the acts that were the target of criminal sanction, in violation of the requirements of criminal law that the behaviour sanctioned must be precisely defined.[102] The Government adopted Law No. 2012-954 of 6 August 2012 to amend the definition of sexual harassment. Article L1153-1 LC now defines sexual harassment as 'repeated statements or acts' or pressure that is repeated or not 'of a sexual nature that violate a person's dignity because of their humiliating or degrading content or because they generate an intimidating, hostile or offensive environment', as well as 'pressure with the perceived or real aim of obtaining sexual favours for a person's own benefit or the benefit of a third party.[103] The courts have decided that homosexual sexual advances are covered by the prohibition of sexual harassment.[104]

In the general regime applicable to harassment, Article L1154-1 LC provides for the shift in the burden of proof in the same terms as those used in Directives 2000/43/EC and 2000/78/EC.

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[101] France, Law of 27 May 2008, Article 1 paragraph 3: *'1° Tout agissement lié à l'un des motifs mentionnés au premier alinéa et tout agissement à connotation sexuelle, subis par une personne et ayant pour objet ou pour effet de porter atteinte à sa dignité ou de créer un environnement intimidant, hostile, dégradant, humiliant ou offensant.'*

[102] Constitutional Council, QPC No. 2012-240 QPC, 04 May 2012, available at: http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2012/2012-279-qpc/decision-n-2012-279-qpc-du-5-octobre-2012.115699.html.

[103] Article L1153-1 of the Labour Code, available at: https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000026268379&cidTexte=LEGITEXT000006072050 (accessed 6 September 2016): *'Aucun salarié ne doit subir des faits: 1° Soit de harcèlement sexuel, constitué par des propos ou comportements à connotation sexuelle répétés qui soit portent atteinte à sa dignité en raison de leur caractère dégradant ou humiliant, soit créent à son encontre une situation intimidante, hostile ou offensante ; 2° Soit assimilés au harcèlement sexuel, consistant en toute forme de pression grave, même non répétée, exercée dans le but réel ou apparent d'obtenir un acte de nature sexuelle, que celui-ci soit recherché au profit de l'auteur des faits ou au profit d'un tiers'*.

[104] Paris Court of Appeal, 18e Ch., section C, *Ste Euro Disney v. Vallinas*, Juris Data No. 023467, 8 October 1992.

b) Scope of liability for harassment

Where harassment is perpetrated by an employee, in France both the employer and the employee are liable.

French principles of civil liability and French labour law provide that legal persons are responsible for the actions of their employees and legal representatives, which covers employees and managers of employees, trade unions and NGOs. In addition, the definition of harassment as prohibited by French labour law covers actions by people in authority and that of colleagues as well (Articles 1151-1, 1152-1 and 1153-1 LC). Furthermore, it provides for an obligation on the part of the employer to guarantee a safe work environment free of harassment (Article 1152-4 LC). This provision creates an obligation on the part of the employer to take all necessary measures to put an end to harassment in the workplace. In the public services the same principles apply.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In France instructions to discriminate are prohibited in national law. Instructions are defined.

In France instructions explicitly constitute a form of discrimination.

Instructions to discriminate are not covered as such by the Labour Code, the Civil Code or the Penal Code. Law No. 2008-496, which provides the definition of discrimination applicable to all legal provisions, includes Article 1(3)(2), instructions to discriminate as a form of discrimination, providing the following definition:

> 'the fact of instructing anyone to adopt the behaviour defined in Article 2'.[105]

There is no specific provision adopted regarding incitement to discriminate, but it results from the application of general principles of liability. Incitement and instructions to discriminate correspond to the notion of complicity in Articles 121-6 and 121-7 PC and the general principles of liability in civil law.

The Law on the Press of 1881 prohibits provocation to perpetrate racial, religious, sex, disability and sexual orientation discrimination, as well as complicity (Articles 23 and 24 of the Law on the Press of 1881 for public provocation, and Article R625-7 PC for non-public provocation).[106] The Court of Cassation has clearly established that the prohibited provocation refers to discrimination defined by Articles 225-1 and 225-2 PC.[107]

b) Scope of liability for instructions to discriminate

In France the instructor and the discriminator are liable.

In labour law an employee's superior and the employer entity bear liability for the actions of their subordinates.

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[105] France, Law of 27 May 2008, Article 1(3): '*Le fait d'enjoindre à quiconque d'adopter un comportement prohibé par l'article 2*'.

[106] France, Law of 29 July 1881 on Freedom of the Press (*Loi du 29 juillet 1881 sur la liberté de la presse*), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722&dateTexte=20080312 (accessed 6 September 2016).

[107] Court of Cassation, Criminal Chamber, Cass. crim. 12 April 1976, Cass. crim. 22 May 1989.

French principles of civil liability and French labour law provide that legal persons are responsible for the actions of their employees and legal representatives, which covers employees and managers of employees, trade unions and NGOs.

In a few cases, the exacting burden of proof with regard to the liability of senior management was met by way of inferences from the facts because the court was persuaded of its active involvement in what was a discriminatory policy.[108] In fact, it is the manager giving instructions who is targeted by the procedure in criminal cases; the court is looking for evidence of the involvement of the decision-maker.[109]

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

a) Implementation of the duty to provide reasonable accommodation for people with disabilities in the area of employment

In France the duty to provide reasonable accommodation is included in all the legislation applicable to employment. It is defined.

Article L1132-1 LC provides: 'No salaried employee may be sanctioned, dismissed or be subject to a discriminatory measure by reason of his or her disability as the law guarantees the principle of equal treatment of disabled workers' and, in paragraph 2, that in the case of litigation relating to the application of this principle, the shift in the burden of proof provided for in Article L1134-1 LC, and resulting from the transposition of Directive 2000/78/EC, is applicable.

In addition, this provision must be read in relation to Article L5213-6 LC and Article 2 of Law No. 2008-496 of 27 May 2008, which provide that in order to ensure respect for the principle of equal treatment of employees with disabilities in the workplace, as defined in Article L114 of the CSW, and reasonable accommodation '(…) in relation to disabled workers, as mentioned in Article 5212-13 LC, employers shall take appropriate measures, in accordance with the specific situation, to allow disabled workers to have access to or to maintain a position of employment which corresponds to their qualifications, to execute their work, to progress therein or to have access to training adapted to suit their needs'[110] (*author's translation*). Therefore, failure to provide reasonable accommodation from application and hiring through to retirement constitutes discrimination as provided by Article L1132-1 LC.

Article L3122-26 LC provides for a right to request an adjustment of working hours, not only for people with disabilities, but also for the benefit of family members and carers of people with disabilities. The Labour Code also provides for an extension of parental leave after having a disabled child (Article L1225-61 LC).

In the Volot-Pfiser case, the claimant was a magistrate with the public prosecution office who became deaf.[111] His impairment led to a redefinition of his duties and those of his colleagues, since he could no longer participate as prosecutor in public hearings. He was therefore exempted from hearings and these obligations were substituted for administrative duties. The hearings he would normally have participated in were reallocated to other magistrates. In France the working conditions of magistrates are

[108] High Judicial Court of Versailles, 02 April 2001. CA Paris, *Sté NIDEK Europarc*, No. 4835.96, 20 March 1997.

[109] High Judicial Court of Paris 14 November 2002 No. 0019304084 *Cantuel Horbette (Hotel La Villa), Essindi et al.* Court of Appeal of Paris 17 October 2003. Appeal from High Judicial Court of Paris 22 November 2002, D.O. July 2003 p. 284, 'Moulin Rouge' *SOS Racisme and Marega v. Beuzit et Association du Moulin*.

[110] Article L 5212-13 LC: '*(…) les employeurs prennent, en fonction des besoins dans une situation concrète, les mesures appropriées pour permettre aux travailleurs handicapés d'accéder à un emploi ou de conserver un emploi correspondant à leur qualification, de l'exercer ou d'y progresser ou pour qu'une formation adaptée à leurs besoins leur soit dispensée'.*

[111] *Conseil d'Etat*, No. 347703, 11 July 2012.

seriously impacted by their hearings obligations, since the court does not close and the hearings go on until the roll call listing cases to be heard is finished, often late into the night. The same year this magistrate saw a significant reduction in the variable portion of his remuneration and, in fact, his premium rate became the lowest in the jurisdiction. The justification for this was that the premiums compensate for the objective burden of service and that his hearings burden had been reassigned to others who thus had their burden increased. Therefore, the adjustment in remuneration was considered to be objective and reasonable. The *Conseil d'Etat* reversed the lower courts' decisions and decided that, pursuant to Directive 2000/78/EC, the duty of reasonable accommodation on the part of the public employer creates a corresponding right to the benefit of the magistrate, guaranteeing that the measures taken will not create a disadvantage as regards remuneration or prevent proper professional progression. Maintaining pay was part of the reasonable accommodation. The fact of taking the disability into account to set objectives cannot generate unequal treatment as regards remuneration. The fact of comparing respective contributions as a result of the accommodation measures taken creates a situation whereby reasonable accommodation has an adverse impact on remuneration and becomes a factor in indirect discrimination. An evaluation must be made in the light of the objectives set, taking reasonable accommodation into account.

Law No. 2008-496 of 27 May 2008 did not extend the obligation of reasonable accommodation to non-salaried and independent workers. However, in the Bleitrach case[112] the *Conseil d'Etat* recognised a duty on the state to take positive measures to provide access to court buildings for people with disabilities working as auxiliaries of justice (a liberal profession). The same issue could be raised regarding access to many public places where non-employees come to perform their work, such as town halls, public clinics etc.

b) Practice

The only applicable limitation to the obligation of reasonable accommodation is 'disproportionate costs'. These are defined by Article 5213-6 paragraph 2 LC, taking into account any financial support available to the employer (cf. Article 37 of Law No. 2005-102 on equal opportunities and the integration of disabled persons, concerning Article L5213-10 LC on financial subsidies for the adaptation of the work environment awarded by the departmental director of labour).

This law is supplemented by two decrees:

- Decree No. 2006-134 of 9 February 2006 on the recognition of the burden of disability;[113]
- Decree No. 2006-501 of 3 May 2006 on the fund for the professional integration of disabled persons.[114]

These instruments set the criteria for determining the financial support provided to the employer. They are based on the level of impairment and the corresponding additional functional cost of employment resulting from the implementation of reasonable accommodation.

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[112] *Conseil d'Etat*, No. 301572, 30 October 2010.

[113] France, Decree No. 2006-134 of 9 February 2006 on the recognition of the burden of disability (*Décret no 2006-134 du 9 février 2006 relatif à la lourdeur du Handicap*), available at: http://www/creai-nantes/asso/fr/docs/decret_2006_134/pdf (accessed 6 September 2016).

[114] France, Decree No. 2006-501 of 03 May 2006 on the fund for the professional integration of disabled persons (*Décret No. 2006-501 du 3 mai 2006 relatif au fonds pour l'insertion des personnes handicapées dans la fonction publique*), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000814863&dateTexte=&categorieLien=id (accessed 6 September 2016).

Similar provisions are integrated into Law 83-634 of 13 July 1983 on the rights and obligations of civil servants.[115]

There is no provision for disproportionate burden and the courts have not yet issued any decision in a context which does not involve the financial aspect of the situation.

c) Definition of disability and non-discrimination protection

The obligation of reasonable accommodation established by Article L5213-6 LC is drafted in such a way that people who meet the definition of disability provided by Article 114 of CSW but who do not wish to be registered as disabled may have difficulty in forcing their employer to comply with their right to reasonable accommodation. They can, however, argue their right to reasonable accommodation on the ground of the general protection against discrimination contained in Article L1132-1 ff. LC and Article 2 of Law No. 2008-496 of 27 May 2008, and their right will be recognised by the courts.[116]

These reasonable accommodation obligations can therefore benefit all employees with official recognition, those who have disabled worker status, those who have suffered an accident at work resulting in a degree of disability greater than 10 % and who have received compensation in this regard, those in receipt of disability pensions and disabled veterans in all situations of employment integration, at the time of hiring and later on, for all types of employment and functions, unless making the accommodation entails a disproportionate burden.

Some public servants such as magistrates, parliamentary administrators and some state contractual agents are not covered by transposition and this also applies to independent workers and non-registered employees. However, these groups can argue the right to reasonable accommodation on the basis of the principle of the direct application of Directive 2000/78/EC pursuant to the jurisprudence of the *Conseil d'Etat* in three cases against the Ministry of Justice: the Perreux, Bleitrach and Volot-Pfiser cases (see above where the court did not refer to national legislation but to direct application of Directive 2000/78).

d) Duties to provide reasonable accommodation in areas other than employment for people with disabilities

In France there is a duty to provide reasonable accommodation for people with disabilities in areas other than employment.

Education

The Law on Disability provides for a duty to integrate disabled children into the mainstream school system. The right to education and to reasonable accommodation within education of disabled children is affirmed in Articles 19 to 22 of Law No. 2005-102 of 11 February 2005 on equal opportunities and the integration of disabled persons.

Article 11 affirms a right of access to local mainstream schools and the right to an individual educational programme.[117]

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[115] France, Law No. 83-634 of 13 July 1983, complemented by Law 84-16 of 11 January 1984 on the civil service of the State, Law 84-53 of 26 January 1984 on the civil service for the local and regional levels of government and Law 86-33 of 9 January 1986 on the hospital civil service.

[116] Orléans Court of Appeal, *X. vs La poste*, No. 10/01990, 15 November 2011..

[117] France, Ministerial Instruction No. 2006-126 of 17 August 2006 on the implementation of the individual educational programme (*Circulaire relative à la mise ne oeuvre et au suivi du projet personnalisé de scolairisation*) available at: http://www.education.gouv.fr//bo/2006/32/MENE0602187C/htm (accessed 6 September 2016).

The *Conseil d'Etat*, in a decision of 15 December 2010 (*Conseil d'Etat*, No. 344729)[118] concluded that adapted access to education for disabled children at preschool level is a fundamental freedom, and failure of the school authorities to maintain the accommodation determined by the individual educational programme, in this case an education assistant, violates this freedom. The *Conseil d'Etat* went even further and decided in a landmark case of 20 April 2011 (Nos. 345434[119] and 345442)[120] that the provisions of the individual educational programme paid for by the state authorities also covered needs related to extracurricular activities and therefore established an obligation which should be implemented without delay, regardless of budgetary and logistic considerations.

Therefore, parents can benefit from injunctive relief provided by Article L 521-2 of the Code of Administrative Justice, ordering that all necessary measures be taken by the education authorities in order to satisfy the requirements of the implementation of this right.

Law No. 2005-102 on equal opportunities and the integration of disabled persons further establishes, through Article L112-4 of the Code of Education, an express obligation to adapt examination processes to the needs of disabled students.

Access to goods and services except buildings and infrastructures

Article 53 of the Law on Disability specifically provides for the right to be accompanied anywhere by an assistance animal and Article 65 establishes the provision of a special card for disabled people, giving them and those accompanying them priority of access on public transport and in public places, waiting areas and queues.

The prohibition of discrimination on the ground of disability in access to goods and services provided by Articles 225-1 and 225-2 PC has been interpreted to impose an absolute duty to comply with accessibility obligations.

The HALDE decided that this obligation was violated by a bank's requirement that visually impaired people mandate someone to manage their accounts,[121] and by an insurer's abusive refusal to insure a person with a disability which was not health threatening.[122]

Except regarding access to mainstream schools, all these provisions create positive obligations without reference to alleviations or limitations related to a notion of disproportionate burden.

e) Failure to meet the duty of reasonable accommodation for people with disabilities

In France failure to meet the duty of reasonable accommodation does count as discrimination.

The employer can refuse to implement reasonable accommodation in cases of disproportionate burden. Article L5212-6 paragraph 2 LC provides that 'the refusal to take such measures [*reasonable accommodation*] may constitute discrimination according to Article L1133-2 LC'. The claimant thus benefits from the legal regime of discrimination

[118] *Conseil d'Etat*, no 344729, 15 December 2010, available at: http://www.education.gouv.fr//bo/2006/32/MENE0602187C/htm (accessed 6 September 2016).
[119] Conseil d'Etat, no 34534, 20 April 2011, available at: www/legifrance/gouv/fr/affichJuriAdmin/do?oldAction=rechJuriAdmin&idTexte=CETATEXT000023897748&fastReqId=911059899&fastPos=7 (accessed 6 September 2016).
[120] *Conseil d'Etat*, no 345442, 20 April 2011, available at: www/legifrance/gouv/fr/affichJuriAdmin/do?oldAction=rechJuriAdmin&idTexte=CETATEXT000023897749&fastReqId=538455663&fastPos=12 (accessed 6 September 2016).
[121] HALDE, Deliberation 2007-296. Available at:http://www.defenseurdesdroits.fr.
[122] HALDE, Deliberation 2007-234. Available at: http://www.defenseurdesdroits.fr.

covering both direct and indirect discrimination, which gives them the benefit of the right to obtain access to evidence and of the shift in the burden of proof and consequences related to the nullity of the decision.

The law provides no precision as to when it will deem a refusal to make 'accommodation' (or take 'necessary measures') to be discrimination or what is a disproportionate burden. Moreover, the concept of reasonable accommodation has never been interpreted and is foreign to French law. Therefore, the specific content of this obligation will have to be defined by the courts before further comment can be made with respect to the scope of the burden it imposes on employers.

The only decision relating to the evaluation of the requirements of reasonable accommodation relates to a request for an adapted vehicle for travel to work submitted by a civil servant. This request was refused on the basis of disproportionate costs, considering that the required adaptations were not covered by available public money.

The parties agreed that, without this vehicle, the claimant could not get to work and that no other measure could be put in place in substitution. The administrative court of Caen decided that the obligation of the employer to take 'necessary measures to provide access to work' covered measures allowing the person to get to work, and granted the request. It refused to discuss the defence of disproportionate costs on the ground that the employer did not provide evidence that they had applied for money from the fund for the integration of disabled persons and could not therefore put forward an argument related to the resulting unreasonable costs of implementing this measure.[123]

f) Duties to provide reasonable accommodation in respect of other grounds

In France there is no legislative duty to provide reasonable accommodation in respect of other grounds in the public and/or the private sector.

- Race or ethnic origin

The education system provides for special classes to integrate newly arrived foreign migrant children for a transitional period of between a few months and a year, in order that they can be assessed and acquire sufficient language skills to integrate into mainstream school.[124]

Law 2000-614 of 5 July 2000 provides for a duty to implement parking spaces for Travellers, failing which the local authorities must tolerate parking in the area, and Decree 2001-569 of 29 June 2001 (see Section 3.2.10 below) provides the technical requirements for these areas. This law also provides for a duty to accommodate the temporary school attendance of Traveller children.[125]

In addition, in implementing the shift in the burden of proof provided by Article 1134-1 LC, and applying the test of proportionality to the justifications invoked by defendants, the courts have started to discuss whether reasonable measures could be taken to prevent discrimination. In a decision by the Court of Appeal of Versailles,[126] upholding the ruling by the lower court, the court followed the arguments presented by the Defender of Rights and decided that the refusal to send an employee abroad on an

[123] Administrative Court of Caen, , No. 0802480, 01 October 2009.
[124] France, Ministerial Instruction No. 2012-141 of 02 October 2012 no REDE1236612C. RED - DGESCO A1-1 relating to the organisation of the integration of newly arrived children (*Circulaire relative à l'Organisation de la scolarité des élèves allophones nouvellement arrivés*), available at: http://www.education.gouv.fr//pid25535/bulletin_officiel/html?cid_bo=61536 (accessed6 September 2016).
[125] France, Law No. 2000-614 of 05 July 2000 on the reception and accommodation of Travellers (*Loi No. 2000-614 du 5 juillet 2000 relative à l'accueil et à l'habitat des gens du voyage*), available at: http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000583573 (accessed6 September 2016).
[126] Versailles Court of Appeals, No. 12.03739, 05 March 2014.

assignment to a particular country, on the ground of origin, alleging racism on the part of the citizens of that country and putting forward arguments around safety for the protection of the employee, could only be justified by documentation of the reality of this alleged racism and the attendant danger, and evidence of the scope of the risk, in order to justify the stated unreasonableness of the costs necessary to ensure the protection of the employee.

- Religion or belief

The jurisprudence of the *Conseil d'Etat* has defined a duty of reasonable accommodation on religious grounds of the duty of children to attend school.[127]

In the public service the Ministry of Public Service ministerial instruction No. 2106 of 14 November 2005 on authorisation of absence on religious grounds reiterates ministerial instruction No. 901 of 29 September 1967 allowing immediate superiors in the public service to authorise requests for religious holidays not foreseen by the French official calendar of holidays. This instruction provides relevant information and lists the principal Orthodox, Muslim, Jewish and Buddhist holidays.

- Age

None.

- Sexual orientation

None.

g) Accessibility of services, buildings and infrastructure

In France national law requires services available to the public, buildings and infrastructure to be designed and built so that they are accessible for people with disabilities. Law No. 2005-102 of 11 February 2005 on equal opportunities and the integration of disabled persons provides for an ambitious plan set out over 10 years to enforce accessibility throughout the country by 2015. Equivalent accessibility or a quality of service that is equivalent must be provided (Article R111-19-2 of the Construction and Housing Code), including public transport.

This plan has not been successful and, given the impossibility of meeting the requirements by 1 January 2015, a new programme, based on a rescheduling of the building work required, has been adopted.

At the Inter-ministerial Committee on Disability, on 25 September 2013, the Prime Minister announced the opening of a consultation of stakeholders in order to redefine the conditions for the implementation of the 'Accessibility' programme set out in the 2005 law. Further to this consultation, the Government confirmed on 26 February 2014 the postponement of the 2015 deadline for 'buildings receiving the public' and public transport. This delay postpones the prosecution and issuing of sanctions provided by the law of 2005 beyond 1 January 2015. In exchange, operators of public transport and public places (i.e. private and public managers, mayors and public transport providers) formally undertook to abide by a specific calendar for each type of works, providing for a timetable of between three months and nine years, according to the type of works. The calendar sets out detailed deadlines for preparing and programming the works, taking the form of 'programmed accessibility timetables' (*agendas d'accessibilité programmée – Ad'AP*).

[127] Conseil d'Etat, 14 April 1995, *Consistoire central des Israelites de France*, *Recueil Lebon*, p. 169, Dalloz 1995, jur. p. 481, note Koubi G.

Law No. 2014-789 of 10 July 2014 authorising the Government to adopt legislative measures for the implementation of the accessibility of public places enabled the Government to determine the conditions and schedule for the implementation of accessibility for disabled persons in relation to 'buildings receiving the public', public transport, residential buildings and roads.[128]

The Government then adopted Executive Order No. 2014-1090 of 26 September 2014,[129] providing the possibility to adopt decrees to specify schedules for each type of works (buildings, roads and public transport) and to proceed by means of Ad'AP.

Three decrees were adopted to specify the conditions for the implementation of these timetables, one for each type of works. Decree nos. 2014-1320[130] and 2014-1321[131] of 3 November 2014 relate to public transport and Decree No. 2014-1327[132] to public buildings and places open to the public. In addition, Decree No. 2014-1326[133] was adopted to review the standards of adaptation works relating to the accessibility of existing buildings.

Article L111-7 of the Construction and Housing Code requires public and residential buildings to be designed and built in such a way as to be accessible to people with disabilities. Many buildings, particularly buildings accessible to the public, have been modified.

Regardless of the postponement of the plan for the implementation of works by public authorities to ensure accessibility, at present new or renovated buildings which do not conform to accessibility requirements can be shut down by administrative order (Article 111-8-3 of the Construction and Housing Code). Access to public subsidies for construction and renovation projects are conditional on accessibility requirements being respected (Article 111-26, paragraph IV of the Construction and Housing Code).

In addition, the prohibition of discrimination on the ground of disability in access to goods and services provided by Articles 225-1 and 225-2 PC has been interpreted to impose a duty to comply with accessibility obligations.[134]

The courts have held that the burden of establishing a defence of disproportionate costs for installing necessary equipment falls upon the defendant.[135]

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[128] France, Law No. 2014-789 of 10 July 2014 authorising the Government to adopt legislative measures for the implementation of the accessibility of public places (*Loi No. 2014-789 du 10 juillet 2014 habilitant le Gouvernement à adopter des mesures législatives pour la mise en accessibilité des établissements recevant du public, des transports publics, des bâtiments d'habitation et de la voirie pour les personnes handicapées*) available at: http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029217888&categorieLien=id (accessed6 September 2016).

[129] France, Executive Order No. 2014-1090 of 26 September 2014 relating to accessibility of public works (*Ordonnance No. 2014-1090 du 26 septembre 2014 relative à la mise en accessibilité des établissements recevant du public, des transports publics, des bâtiments d'habitation et de la voirie pour les personnes handicapées),* available at: http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029503268&categorieLien=id (accessed6 September 2016).

[130] Available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029701835&categorieLien=id (accessed6 September 2016).

[131] Available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029707519&categorieLien=id (accessed6 September 2016).

[132] Available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029708128&categorieLien=id (accessed6 September 2016).

[133] Available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029708064&dateTexte=&categorieLien=id (accessed6 September 2016).

[134] Court of Cassation, Criminal Chamber, No. 05-85888, 20 June 2006.

[135] Administrative Court of Caen, No. 0802480, 01 October 2009.

In the case of the *Communauté d'agglomération du pays de Voironnais*,[136] the *Conseil d'Etat* decided that Article 45 of the Law of 11 February 2005 on the rights of disabled persons, which provides for complete accessibility of public transport, except in the case of manifest technical unfeasibility, requires that such unfeasibility be evaluated on a case-by-case basis each time works are to be undertaken. The assessment of a project as being unfeasible should only result from a technical obstacle which would be impossible to overcome or one that would incur a manifestly disproportionate cost.

Inaccessible premises can also give rise to legal action on the ground of discrimination in access to employment, which could be based on indirect discrimination pursuant to Article L1132-1 LC and Article 2 of Law No. 2008-496 of 27 May 2008 or, in the case of an unreasonable refusal to implement the necessary adaptations to allow access to a building, inaccessibility could result in failure to provide reasonable accommodation on the basis of Article 5213-6 of the Labour Code.

In the case of Ms Bleitrach against the State, the *Conseil d'Etat* found liability without fault on the part of the State on the basis of Directive 2000/78/EC, for failure to provide access to the court to a disabled judicial official who used a wheelchair - Ms Bleitrach is a qualified lawyer - who required this access in order to exercise her profession. Considering the scale of the necessary investments throughout France, the delay in implementing accessibility was held to be reasonable by the lower courts.[137] However, the *Conseil d'Etat* decided that it could not dismiss the liability for damages of the State solely by relying on the deadline for insuring accessibility provided by the Decree of 17 May 2006 which runs until 2015. Directive 2000/78/EC imposes a specific obligation in relation to professionals, i.e. lawyers in this case, in the provision of access to court buildings and the judge had to evaluate in this particular case whether the State had met its duties in this respect. The *de facto* inequality before 'public charges' (i.e. burdens imposed on citizens by the State) of lawyers who use a wheelchair is such as to incur liability without fault on the part of the State and the Administrative Supreme Court awarded EUR 20 000 in non-material damages, the claimant having failed to establish financial damages.

In France, national law contains a general duty to provide accessibility in anticipation for people with disabilities.

Title IV of the Law on Disability, entitled 'Accessibility', requires that access be provided to persons with disabilities as regards education (Chapter I), access to employment and sheltered employment (Chapter II), and the built environment, transport and new technologies (Chapter III). Inaccessibility could give rise to remedies relating to discrimination in access to housing based on Law No. 2002-73 on Social Modernisation of 17 January 2002 and legal action relating to discrimination in access to employment based on Article L1132-1 LC.

h) Accessibility of public documents

Article L111.7-3 of the Construction and Housing Code and Article 78 of the Law of 11 February 2005 require that all information published by the State and public authorities must be accessible for people with all types of disabilities, regardless of the media in which they are produced. This obligation is interpreted as requiring that all information be published in a form that can be easily understood, that it be available in Braille or a computer-adapted presentation for the visually impaired, that human help and translation into French sign language or into spoken and signed language be made available etc. (Article 47 of the Law of 11 February 2005). All public services are in the

[136] *Conseil d'Etat*, No. 343364, 22 June 2012, available at:https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026052824&fastReqId=72010635&fastPos=1 (accessed6 September 2016).

[137] *Conseil d'Etat*, No. 301572, 22 October 2010.

process of implementing these requirements in the production of all published documents and to allow accessibility to public service employees.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

In France there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives.

The general protection against discrimination covers everyone and the principle of equality is applicable to non-nationals unless the legislator can justify a difference in treatment based on conditions of public interest.[138] However, the law imposes conditions in access to certain rights, such as the right to work and some social benefits, restricting them to the people with the status of legal foreign resident. In addition, as was documented by a report prepared by the Group for Studying and Combating Discrimination (*Groupe d'Etude et de lutte contre les discriminations* – GELD),[139] the law creates some legal discrimination in access to specific professions and jobs (about 7 000 named jobs), subjecting them to conditions of citizenship, whether French, of bilateral partner countries (such as some African countries) or of the European Union.[140]

3.1.2 Protection against discrimination (Recital 16 Directive 2000/43)

a) Natural and legal persons

In France the personal scope of anti-discrimination laws, i.e. Article L1132-1 of the Labour Code, Article 6 of the Law 83-634 on civil servants, Article 225-1 of the Penal Code and Article 2 of Law No. 2008-496 of 27 May 2008, covers natural and legal persons for the purpose of protection against discrimination.

In France the personal scope of anti-discrimination laws (same provisions as above) covers natural and legal persons for the purpose of liability for discrimination.

Physical and legal persons, whether public or private, are bound to uphold the prohibition against discrimination in criminal law (Articles 121-2 PC for legal persons and 432-7 PC for public authorities), private law (Article L1132-1 of the Labour Code and Article 2 of Law No. 2008-496 of 27 May 2008) and public law (Article 6 of Law 83-634 on civil servants and Article 2 of Law No. 2008-496 of 27 May 2008 and Law No. 2001-1066 on the fight against discrimination).

b) Private and public sector including public bodies

In France the personal scope of national law covers the private and public sectors, including public bodies, for the purpose of protection against discrimination.

In France the personal scope of anti-discrimination law covers the private and public sectors, including public bodies, for the purpose of liability for discrimination.

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[138] Constitutional Council, 89-296 DC, 22 January 1990, R.F.D.C. No. 2 1990, obs Favoreu.

[139] First French anti-discrimination body created in 2000, which paved the way for the establishment of the HALDE.

[140] GELD (2000) *Publication No. 1 on legal discrimination and employment inaccessible to foreign nationals* (Groupe d'Étude et de Lutte contre les Discriminations (GELD), *'Une forme méconnue de discrimination et les emplois fermés aux étrangers: secteur privé, entreprises publiques, fonctions publiques',* Note No. 1 March 2000.), available at: http://www.gisti.org/doc/presse/2000/ged/index.html (accessed 6 September 2016).

National law resulting from the transposition of Directives 2000/43/EC and 2000/78/EC by the Law of 16 November 2001 and the Law of 27 May 2008 applies to both the private and public sectors, including public bodies, except in areas for which transposition has not taken place and for which jurisprudential interpretation regarding the direct effect of the directives must be invoked, i.e. magistrates, parliamentary administrators and state contractual agents outside the scope of the Law of 1984 are excluded by application of Article 3 of Law No. 83-634 on civil servants.

Physical and legal persons, whether public or private, are bound to uphold the prohibition of discrimination in criminal law (Articles 121-2 PC for legal persons and 432-7 PC for public authorities), private law and public law. In addition, Article 5 of Law No. 2008-496 expressly provides that the law is applicable to all public and private persons.

3.2 Material scope

3.2.1 Employment, self-employment and occupation

In France, national legislation does not apply to all sectors of private and public employment, self-employment and occupation, including contract work, self-employment, military service and holding statutory office, for the five grounds.

Further to the adoption of Law No. 2008-496, all employees, civil servants and state contracting agents are protected against discrimination with respect to all the grounds covered by Article 19 TFEU. The extent of the protection and the legal regimes vary according to whether the situation is covered by the Penal Code, the Labour Code or administrative law and according to the ground of discrimination.

However, the Law No. 83-634 of 13 July 1983 on the rights and obligations of civil servants states in Article 3 that, in conformity with Article 64 of the Constitution of 1958, it does not cover the status of magistrates who are not considered as civil servants. Ordinance No. 58-1270 of 22 December 1958 regulates the rules applicable to both prosecution and state magistrates and judges on the bench.[141] Public servants working in parliament are also not subject to Law No. 83-634, since Article 3 provides that they are governed by separate parliamentary rules. These texts have not been amended to implement Directives 2000/78/EC and 2000/43/EC and do not foresee any protection against discrimination on any grounds.

In its decision of 30 October 2009, the *Conseil d'Etat* decided that, given the failure of the Government to transpose Directive 2000/78/EC, it could be invoked directly by magistrates before administrative courts.[142]

Article L1132-1 LC covers, on all grounds, recruitment practices, remuneration, appointment, promotion, transfer, qualification, classification, renewal of contract and redeployment and the end of the employment relationship, whether by dismissal, expiry of contract or retirement. In addition, the Labour Code forbids discriminatory provisions (L1121-1 LC) in in-house regulations (L1321-3 LC) and collective bargaining agreements (L2251-1 LC).

The prohibition of discrimination applies to salaried workers as well as temporary employees and vocational apprenticeships.

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[141] France, Ordinance No. 58-1270 of 22 December 1958 relating to the status of magistrates *(Ordonnance No. 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature)*, available at: http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000339259 (accessed6 September 2016).

[142] *Conseil D'Etat*, No. 298348**,** 30 October 2009.

With respect to the status of the armed forces, France has availed itself of the exception contained in Article 3 (4) of Directive 2000/78/EC allowing derogation concerning criteria based on age and disability.

Article 2 of Law No. 2008-496 extends the same uniform protection to independent and non-salaried workers and to both the private and public sectors.

In the public sector, Article 6 quinquies of Law No. 83-634 of 13 July 1983, as modified by the Law No. 2008-496, forbids distinctions between civil servants on grounds of their political, philosophical or religious opinions, union activities, sex, health, disability, affiliation, whether real or supposed, to an ethnic origin, a nation, a race or a particular religion.

The penal regime (as established by Articles 225-1 and 225-2 PC and Article 4 of Law No. 2008-496) does not provide for a shift in the burden of proof and covers only direct discrimination. It provides protection against discrimination in recruitment, vocational apprenticeships and training, as well as sanctions and dismissal. It offers the only possible penal action in the case of denial of a right granted by law and hindrance of economic activity.

Some professions are subject to a condition of nationality. The GELD (see above) in March 2000 and then the HALDE in its deliberations of 2008 and 2009 (deliberations 2008-189 and 2009-139)[143] have drawn the attention of the Government to these legal discriminations, requesting that an assessment be made of the legality of the conditions of nationality in access to certain professions, which should be limited to functions that entail the exercise of prerogatives of public authority (*prérogatives de puissance publique*).

France was condemned by the CJEU in a decision of 25 May 2011 relating to the conditions of access to the profession of notary for EU citizens in application of Article 49 TFEU. It was decided that, even if notarial activities pursued objectives of public interest, they did not correspond to activities relating to the exercise of public authority in the sense of the EU Treaty. Therefore the Court decided that the condition of nationality attached to access to the profession of notary is discrimination on the ground of nationality prohibited by Community law.[144] Decree No. 2011-1309 of 17 October 2011 relating to the conditions of access to the profession of notary put an end to this condition of nationality.

3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))

In France national legislation includes conditions for access to employment, self-employment or occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy, for the five grounds, in both the private and public sectors, as described in the directives.

Access to employment is specifically covered with respect to all the grounds contained in Article 19 paragraph 1 TFEU and other grounds listed in Section 2.1 by Article 225-2 PC, Article L1132-1 LC and Article 6 of Law No. 83-634 of July 13 1983 on the rights and obligations of civil servants. Access to self-employment or occupation is covered by Article 2 of Law No. 2008-496 with respect to all the Article 19 (1) TFEU grounds.

[143] Available at:http://www.defenseurdesdroits.fr.
[144] CJEU, No. C50/08, *European Commission v French Republic*, 24 May 2011.

In addition, the Penal Code (Article 225-2) specifically targets denial of a right granted by law and of hindrance of economic activity.

However, as discussed above (Section 3.1.1), the law imposes conditions in access to certain rights, such as the right to work, restricting them to people with the status of legal foreign resident and creates some legal discrimination in access to specific professions and jobs (about 7 000 named jobs), subjecting them to conditions of citizenship, whether French or of the European Union (see GELD, *Publication No. 1. on legal discrimination and employment inaccessible to foreign nationals*).

In France access to the civil service is conditional on passing a competitive entry examination. Article 19 of Law No. 2005-102 on equal opportunities and the integration of disabled persons establishes an express obligation to adapt the examination processes to the needs of disabled students.

The Government adopted several decrees required to implement Law No. 2005-102 on equal opportunities and the integration of disabled persons and, on 21 December 2005, adopted Decree No. 2005-1617[145] on accommodation for disabled candidates in competitive examinations for entry into civil service.

Furthermore, in France access to careers in civil service and to competitive entry examinations were subject to limitations based on maximum age requirements, most of which have been repealed, but are in all cases not applicable to disabled candidates.

3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

In France, national legislation covers working conditions, including pay and dismissals, for all five grounds and for both private and public employment.

Employment and working conditions, including pay and dismissals, are covered by Article L1132-1 LC, Article 6 quinquies of Law No. 83-634 of 13 July 1983 and Article 2 paras. 1 and 2 of Law No. 2008-496. However, working conditions are not covered by Article 225-2 of the Penal Code.

The CJEU decided that Directive 2003/88 applied to persons attending work based occupational centres as regards its provisions relating to working time, regardless of their worker's status in national law. The court did not discuss whether not recognising persons attending such occupational centres as workers was discriminatory. However, this decision reaches beyond European labour law since it in fact extends the purview of the protection against discrimination on the ground of disability in employment to disabled people performing an activity in an occupational centre for disabled people and therefore extends the scope of the application of the rule of equal treatment. Therefore, in the future, maintaining their present status and working conditions will be in many respects held to be discriminatory on the ground of disability.[146]

[145] France, Decree No. 2005-1617 of 21 December 2005 on the accommodation of examinations in higher education for disabled students (*Décret n°2005-1617 du 21 décembre 2005 relatif aux aménagements des examens et concours de l'enseignement scolaire et de l'enseignement supérieur pour les candidats présentant un handicap*), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000456607 (accessed 6 September 2016).

[146] CJEU, No C-316/13, 26 March 2015, available at: http://curia.europa.eu/juris/celex.jsf?celex=62013CJ0316&lang1=fr&type=TXT&ancre (accessed6 September 2016).

3.2.3.1 Occupational pensions constituting part of pay

The Administrative Supreme Court, applying the principles set out by the CJEU in the Griesmar case,[147] considers that occupational pensions form part of remuneration and constitute a debt subject to Article 14 and Protocol 11 of the European Convention of Human Rights (ECHR) guaranteeing protection of property rights, and that non-occupational pensions constitute social security protected as such by the same provisions of the ECHR.[148]

The Court of Cassation has further interpreted Article 3221-2 of the Labour Code, to set a general principle of equality of remuneration,[149] and the Administrative Supreme Court has decided that it applies to professional pension rights.[150]

Partners in a PACS[151] cannot benefit from widow(er)s' pensions, the transfer of pension rights, rights accessible to spouses in relation to employment benefits or parental rights after the death of the spouse holding the parental rights.

Since the adoption of Law No. 2013-404 of 17 May 2013,[152] marriage is open to same-sex couples, putting an end to indirect discrimination on the ground of sexual orientation, based on the denial of access to widow(er)s' pensions for PACS partners for the future. However, this legislation has not put an end to PACS and persons, whether same sex partners or heterosexual, can remain under the PACS regime or decide to marry.

3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

In France national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses.

Vocational training and guidance are covered by Articles 225-2 PC, L1132-1 LC and Article 6 quinquies of Law No. 83-634 of 13 July 1983, as modified by the Law of 16 November 2001, with respect to all the Article 19 paragraph 1 TFEU grounds and other grounds listed in Section 2.1. In addition, Law No. 2008-496 Article 2 completes the implementation of Directives 2000/43/EC and 2000/78/EC by creating a general principle prohibiting direct and indirect discrimination on the basis of 'race' and ethnic origin (Article 2, paragraph 1) and protection against direct and indirect discrimination for independent and non-salaried workers on all the Article 19, paragraph 1 TFEU grounds (Article 2, paragraph 2).

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147 CJEU, No, C-366/99, 21 November 2001.

148 *Conseil d'Etat*, Nos. 212179 and 212211, 18 December 2002; CE 30 November 2001 DIOP, nos. 212179 and 212211.available at : https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000008029234 (accessed6 September 2016).

149 Court of Cassation, Social Chamber, 29 October 1996, *Delzongle v Ponsolle*, Dr.ouv. 1997, 149 comment Pascal Moussy.

150 *Conseil d'Etat*, No. 291595, 13 December 2006, (9ème et 10ème sous-sections réunies).

151 The Civil Solidarity Pact (*Pacte civil de solidarité, PACS*) was created to recognise life partnership before same-sex marriage was legalised in France.

152 France, Law No. 2013-404 of 17 May 2013 opening marriage to same-sex couples (*Loi No. 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe*), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027414540&dateTexte&categorieLien=id (accessed6 September 2016).

3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

In France national legislation includes membership of and involvement in workers' or employers' organisations as formulated in the directives for all five grounds and for both private and public employment.

Law No. 2008-496 Article 6, Article 2141-1 LC states that 'Any salaried employee can freely become a member of the union of his or her choice and cannot be excluded on grounds prohibited by Article 1133-1' (that is, all the Article 19, paragraph 1 TFEU grounds and others) and Article 2131-5 LC provides that any member who holds French or foreign citizenship can participate in union activities and management. Article 2314-16 LC provides that all salaried employees are eligible to become an employees' representative if they are 18 years of age and have been an employee of the organisation for at least one year.

With respect to the election of labour court judges, lists presented by a political party or an organisation favouring discrimination are illegal (L1441-23 LC). However, to be eligible, the candidate must have French citizenship.

Article 6, paragraph 2 and Article 8, paragraph 1 of Law No. 83-634 of July 13 1983, as modified by the Law of 16 November 2001, provides that in the public sector 'Union rights are guaranteed to civil servants. Those concerned can freely create unions, become members and be elected as representatives'.

Article 2, paragraph 2 of Law No. 2008-496 creates a specific protection of affiliation and involvement in a professional or trade organisation for all grounds protected by Directive 2000/78/EC as well as real or assumed ethnic origin and race.

Finally, trade unions, employers' associations and all other organisations must abide by Article 225-2 of the Penal Code prohibiting discrimination in access to goods and services, including services offered by the union to its members. The list of prohibited grounds listed in Article 225-1 PC includes health, age, disability, sexual orientation, racial and ethnic origin, convictions, religion, political opinions and sex.

3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

In France national legislation includes social protection, including social security and healthcare, as formulated in the Racial Equality Directive.

Law No. 2008-496 completes the implementation of Directive 2000/43/EC by integrating, in Article 2, a prohibition of all types of discrimination defined in Article 1 of the law, on the basis of affiliation, whether real or supposed, to an ethnic origin, nation or race, and making provision for the shift in the burden of proof, as regards social protection, including social security and healthcare.

Articles 11 to 18 of Law n 2005-102 of 11 February 2005 on equal opportunities and the integration of disabled persons provide for a right to social protection, including social security and healthcare.

For the other grounds of discrimination, the general principles of public law are based on a general principle of equality in the public service (see Section 0.1 and Section 1, Article 1, of the Constitution of 1958, the preamble of the Constitution of 1946 and the Declaration of the Rights of Man and of the Citizen of 1789) and a universal principle of

non-discrimination in access to healthcare which is not restricted to any prohibited ground of discrimination (Article 1110-3 SWC). These principles also apply to civil servants. In addition, all residents in France benefit from the same social rights, regardless of nationality.

3.2.6.1 Article 3.3 exception (Directive 2000/78)

National law does not rely on the exception in Article 3.3 of the Employment Equality Directive in relation to religion or belief, age, disability and sexual orientation, since the rules on access to social security and healthcare are universal.

3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

In France national legislation includes social advantages as formulated in the Racial Equality Directive.

Article 2 of Law No. 2008-496 completes the implementation of Directive 2000/43/EC by integrating a prohibition of all types of discrimination defined in Article 1 of the law, on the basis of affiliation, whether real or supposed to an ethnic origin, nation or race, and making provision for the shift in the burden of proof, as regards social advantages.

For the other grounds of discrimination, benefits provided by either public or private actors to individuals on the basis of their employment which form part of remuneration are covered by the prohibitions of discrimination relating to equal pay and are covered by Law No. 2008-496.

For non-contributory benefits, the general principles of public law are based on a general principle of equality in the public service (see Article 1 of the Constitution of 1958, the preamble of the Constitution of 1946 and the Declaration of the Rights of Man and of the Citizen of 1789). These principles also apply to civil servants. In addition, all residents benefit from the same social rights regardless of nationality. For instance, the cost of access to municipal services and social support can only be based on socio-economic considerations.

Otherwise, public servants who apply a criterion based on a prohibited ground of discrimination, such as religion, have been held to violate Articles 225-1 and 432-7 PC and have been sanctioned accordingly by the courts.

The PACS, which grants similar rights to those of married couples in many areas (access to social security, rights of residence etc.) and was the only form of union open to same-sex couples until Law n 2013-404 of 17 May2013 opening marriage to same-sex couples, does not provide the 'same rights' as marriage and therefore maintained some form of legal indirect discrimination against same-sex couples in relation to the rights denied due to the fact that marriage was not open to them before May 2013.[153]

Partners in a PACS cannot benefit from widow(er)s' pensions, transfer of pension rights, rights accessible to spouses in relation to employment benefits or parental rights after the death of the spouse holding the parental rights. In a decision of 12 December 2013, the CJEU decided, further to a referral from the Court of Cassation in the case of Hay v. Crédit Agricole,[154] that, if marriage is not accessible to same-sex partners, a salaried employee who enters into a contractual union with a same-sex partner, must benefit from the same advantages as those conferred upon his or her colleagues when they

[153] Constitutional Council, No. 2010-92 QPC, 28 January 2011.
[154] CJEU, C-267/12, *Frédéric Hay Vs. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 December 2013.

marry. The refusal to confer such benefits on an employee constitutes direct discrimination on the ground of sexual orientation. Prior to the law authorising marriage between same-sex couples, the French Government always refused to amend Articles 3142-1 ff. of the Labour Code, which denies family holidays for same-sex partners. The issue remains in relation to rights are still pending and which could be claimed by people in life partnerships during the period prior to Law no 2013-404 of 17 May 2013 opening marriage to same-sex couples.

In France, the lack of definition of social advantages does not create problems.

3.2.8 Education (Article 3(1)(g) Directive 2000/43)

In France national legislation includes education as formulated in the Racial Equality Directive.

National education is considered as a public service accessible to all and subject to respect for the general principle of equality applicable to the public service (Article L111-1 of the Code of Education).

As explained in Section 1, it is a general principle of administrative law of constitutional value that origin cannot be taken into consideration, whether by legal texts or in management practices. Not only is the criteria of nationality not taken into account, but until university, if a child's parents are in France illegally, this cannot be taken into account to deny the child access to school or preschool. The Grenoble court of appeal convicted a mayor for refusing to register children of North African origin at schools and school cafeterias.[155]

Legal segregation on ethnic grounds is prohibited at all levels of the legal order and ethnic origin cannot form the basis of educational policy in France (see Section 1). The allocation of a state school place is legally determined by the child's address. Geographical zoning has no impact on the educational programme, which is national and identical throughout the country, except that some areas have an increased budget if they are dealing with socially underprivileged children.

No official monitoring takes origin into account. However, due to geographical zoning there is a concentration of migrant children and children of foreign origin in specific schools, where overall educational achievements are lower than in other schools.

Law No. 2008-496 completes the implementation of Directive 2000/43/EC by creating a general principle prohibiting direct and indirect discrimination on the basis of 'race' and ethnic origin, and provides for action before judicial and administrative courts in the event of discrimination in education and a shift in the burden of proof. Any evidence of the practice of segregation or managers taking origin into account, directly or indirectly, would give rise to a right to take action before the administrative courts and the criminal courts.

However, claims of discrimination in education involving the private sector, whether it be a private school or discrimination perpetrated by a private party in the context of an internship, are covered by the general principles of administrative law and therefore benefit from no specific routes of legal action other than a general private law civil liability claim on the basis of Article 1 of the Law of 27 May 2008 and a criminal claim based on Article 225-2 of the Penal Code.

[155] Grenoble Court of Appeal, 13 November 1991. TA Bordeaux, 14 June 1988, El Rhazouari, *Recueil Lebon*, p. 518.

Religion

The same principle of equality has been used to adjudicate on the applicability of the obligation to attend school to children whose religion enjoins worship on a day other than Sunday. In this case, the *Conseil d'Etat* gave priority to the protection of freedom of worship, arguing that compulsory school attendance is not intended to, and may not lawfully, deny to pupils who request it, such individual leave of absence as may be necessary for worship or celebration of a religious festival, at least in so far as their absence is compatible with performance of the tasks entailed by their studies and with the maintenance of good order *(ordre public)* in the school.[156]

The Law on the application of the principle of secularism in state schools was adopted on 15 March 2004 and published on 17 March 2004 (Law of 15 March 2004 No. 2004-228).[157] It forbids '…in state primary, secondary and high schools, the wearing of symbols or clothing by which students manifest their religious affiliation' (author's translation). Discreet religious symbols remain authorised. The law further instructs each school to adopt in-house regulations for the school year 2004-2005 in order to put in place a procedure of enforcement by disciplinary decision preceded by a mediation and dialogue process with the student.

The administrative instruction of 18 May 2004 on the conditions of enforcement of the above-mentioned law was published on 25 May 2004 (Ministerial instruction NO.2004-084 of 18 May 2004).[158] It states that 'the prohibited symbols and clothing are those by which people are immediately identified with their religious beliefs, such as the Muslim headscarf, by which ever word it may be designated, the kippah or a cross of manifestly excessive dimension' (author's translation). However, it emphasises the necessity of organising a true dialogue between the student, their parents or legal representatives and the head teacher of the school, in order to limit disciplinary sanctions to cases of deliberate refusal by the student to abide by the law.

In 2006, unresolved cases were limited to boys from the Sikh community and a few cases related to the Muslim headscarf. Their legal action before administrative courts and, ultimately the ECtHR have been dismissed.[159]

Since these decisions, which maintain the interpretation of the French authorities, most issues appear to be resolved, since those students who will not submit to clothing requirements do not pursue their request and register with the national home schooling system, known as CNED (*Centre national d'enseignement à distance*). There has been no official report on this matter since 2005. However, while commentators note that the number of cases of children who end up pursuing their studies through home schooling is stable (around 200 new cases per year), more than 10 Muslim private schools have opened since 2005.

In the meantime, on 1 November 2012, the UN Human Rights Committee contradicted the European Court of Human Rights in relation to the complaint filed by Mr Singh alleging that expulsion from school pursuant to the law of 15 March 2004 for wearing Sikh religious symbols was a violation of his right to freedom of religion pursuant to

[156] *Conseil d'Etat*, *Consistoire central des israélites de France*, Mr Koen, No. 157653**,** 14 April 1995, available at : https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007855903 (accessed 6 September 2016).

[157] France, Law No. 2004-228 of 15 March 2004 on the principle of secularism in state schools (*Loi No. 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité*), available at: http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000417977 (accessed6 September 2016).

[158] Available at: http://www.education.gouv.fr/bo/2004/21/MENG0401138C.htm (accessed 6 September 2016).

[159] *Conseil d'Etat*, No. 285394, 05 December 2007; ECtHR, No. 25463.08, 30 June 2009.

Articles 2, 17, 18 and 26 of the International Covenant on Civil and Political Rights.[160] The Committee decided that it must evaluate whether this restriction of freedom of religion complies with the requirements of being necessary and proportionate in accordance with Article 18, paragraph 3, of the Covenant. To be legitimate, the exercise of freedom of religion must be detrimental to a stated aim protecting public safety, order, health, morals or fundamental rights and freedoms of others. Even if secularism meets these requirements, given the importance of the male religious outfit in the Sikh religion, which forms part of the identity of a person, and the scope of the penalty on the pupil expelled from school, the Committee considered that the state had not established that wearing such a garment would present a threat to public order or to the fundamental rights and freedoms of others and that the sanction was proportionate. The Committee ordered the state to correct the individual situation and prevent further violations of the Covenant by the French education system.

In addition, the Law of 31 December 1959 recognises religious private schools and provides for financial support from the state for such schools which follow the national education programme.[161]

In the meantime, some local education authorities have held that parents wearing religious symbols could not accompany their children's classes for school activities.

The Defender of Rights requested an opinion from the *Conseil d'Etat* regarding the conditions of application of the rule of neutrality for public servants in relation to voluntary participants in public service. The *Conseil d'Etat* indicated that it does not impose religious neutrality on mothers accompanying their children to out-of-school activities, but it stated that the competent authority, on a case-by-case basis, can recommend that they abstain from manifesting their religion and beliefs, if maintaining peace in a given situation or environment requires it.[162] The Minister of Education has since declared that she would comply with this opinion.

In 2008 and 2009, the HALDE received a number of claims from women who were denied access to adult education delivered by the state school system on the ground that they wore a Muslim headscarf. In a case brought before the Administrative Court of Paris,[163] an injunction ordering the immediate re-integration of the claimant into the school was granted. The HALDE presented observations. The court decided that the ground of her exclusion was prima facie null and void, considering that the prohibition of religious symbols in state schools did not apply to adult education programmes. The decision was confirmed on its merits by the Paris Administrative Appeals Court.[164]

In addition, in a criminal case alleging discrimination on the ground of religion further to the exclusion of a student from an adult higher education apprenticeship programme because she was wearing a Muslim headscarf, which was deemed contrary to the internal regulations of the school,[165] on 8 June 2010 the Paris Court of Appeal, in application of Article 225-2 of the Penal Code, condemned the education centre to a fine of EUR 3 275,

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[160] UN Human Rights Committee, 106th session, no 1852/2008, 4th December 2012, *Bikramjit vs. France*, available at: http://unitedsikhs/org/rtt/doc/BikramjitSinghDecision/pdf (accessed 6 September 2016).

[161] France, Law No. 59-1557 of 31 December 1959 governing relations between the State and private schools *(Loi n° 59-1557 du 31 décembre 1959 sur les rapports entre l'Etat et les établissements d'enseignement privés)* available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000693420 (accessed 6 September 2016).

[162] Study conducted and adopted at the request of the Defender of Rights by the Plenary Assembly of the *Conseil d'Etat* on 23 December 2013, available at: http://www.defenseurdesdroits.fr/fr/publications/etudes/application-du-principe-de-neutralite-religieuse-dans-les-services-publics-etude (accessed 6 September 2016).

[163] Paris Administrative Court*, Saïd v. Greta*, No. 0905233.9, 27 April 2009.

[164] Paris Administrative Appeals Court, No. 0905232, 5 November 2011.

[165] Paris Court of Appeal, *Ms Boutaina Benkirane v. Centre universitaire de formation par l'apprentissage Sup 2000*, No. 08.08286, 8 June 2010.

its Director to a fine of EUR 1 250, and both were required to pay damages amounting to EUR 10 500.

a) Pupils with disabilities

In France the general approach to education for pupils with disabilities does cause problems in relation to the availability of resources to implement the state policy of integration and provide specialised support to those who need it.

Law No. 2005-102 of 11 February 2005 on equal opportunities and the integration of disabled persons completely reforms the assistance and education of disabled children.[166] It creates an express obligation on the state to ensure the education of all disabled children. The right to education and to reasonable accommodation within education of disabled children is affirmed in Articles 19 to 22 of the Law on Disability. Article 11 affirms a right of access to local mainstream schools and the right to an individual educational programme.

Title IV of the Law on Disability, entitled 'Accessibility', covers access to education in Chapter I. It creates a commission to assess children and suggest to their parents a personalised programme of education that will also be taken into consideration when subsequently determining the rights of the child under the general compensation scheme for all disabled people established by the law and conditions of access to special support.

Article 19 III creates an obligation to provide education to each child at every level of education and a right to access to mainstream school is conferred by Article L112-1 of the Code of Education. The adoption of the decrees necessary to implement institutional reforms pursuant to the adoption of the Law on Disability was completed in 2006. Decree No. 2005-1589 of 19 December 2005 was adopted to enforce the administrative simplification of the management of the various rights of disabled people.[167]

Since 2005, amongst other tasks, the Commission for the Rights and Autonomy of Disabled Persons must determine whether children, in consideration of the 'personal life project' established by the Commission, should be placed in the mainstream educational system, in some cases with special support, in specialised classes (CLIS) or in specialised educational institutions.[168] The Regional Administration of National Education (*Académie*) is part of this commission, together with everyone involved in the support and education of the child. The remedies available to parents if they are opposed to the conclusions of the orientation process are dealt with in Section 6.1 of this report.

Parents cannot demand a schooling orientation which differs from that proposed by the Commission for the Rights and Autonomy of Disabled Persons. If access to the local

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[166] Regarding autism and access to facilities, education and support, a national plan was initiated in 2004 to provide resources at the regional level, followed by a plan for 2005/2006 to provide resources at the local level. Available at: http://www/autismes/fr/fr/textes-rapports/html (accessed 6 September 2016).

[167] France, Decree No. 2006-583 of 23 May 2006 on the regulatory provisions of Book II of the Code of Education J.O. No. 120, 24 May 2006 *(Décret n° 2006-583 du 23 mai 2006 relatif aux dispositions réglementaires du livre III du code de l'éducation)*, available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000607176 (accessed 6 September 2016).

[168] France, Decree No. 2005-1587 of 19 December 2005 on the Departmental House [Authority] for the Disabled, J.O. no 295, 20 December 2005 *(Décret No. 2005-1587 du 19 décembre 2005 relatif à la maison départementale des personnes handicapées et modifiant le code de l'action Sociale et des familles)*, available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000454078&dateTexte=&categorieLien=id (accessed 6 September 2016)). France, Decree No. 2005-1752 of 20 December 2005 on schooling for disabled students J.O. no 304, 31 December 2005, *(Décret n°2005-1752 du 30 décembre 2005 relatif au parcours de formation des élèves présentant un handicap*), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000456016 (accessed 6 September 2016).

mainstream school is not possible because of the physical condition of the premises, the extra cost of transport to another school is met by the municipal authorities (Article L112-1, paragraph 8, of the Code of Education).

Article 75 of the Law on Disability introduces Article L 312-9-1 to the Code of Education in order to officially recognise French sign language for people with impaired hearing.

The Law No. 2005-102 on equal opportunities and the integration of disabled persons further creates (through Article L112-4 of the Code of Education) an express obligation to adapt examination processes to the benefit of children with disabilities.

The Ministry of Education faces significant difficulties in financing adequate support for the satisfactory integration of disabled children into mainstream schools. Since the first decision of the European Committee of Social Rights (ECSR) in 2002, the French Government has taken action to address the situation of autistic children and young people. In its 2014 decision in the case of *European Action of Persons with Disabilities (Action européenne des handicapés, AEH) v. France*, however, the ECSR decided that these actions were insufficient, since only 14 000 autistic children would be taken care of and an estimate of more than 40 000 would remain without proper care.[169]

A report to the Minister of Social Affairs of 22 June 2014 estimates the number of disabled children without an adequate solution to the lack of available facilities as being around 20 000.[170]

In September 2005, the Administrative Court of Lyon decided that the failure of the state to provide access to school to a disabled child because of insufficient available adapted facilities makes the state liable for damages, regardless of whether or not it is at fault, the additional burden on the family being unreasonable.[171] The Administrative Supreme Court decided that the state bears the obligation that rests upon all authorities of the state to provide the necessary resources.[172]

b) Trends and patterns regarding Roma pupils

In France no specific patterns regarding Roma pupils exist in education, such as segregation.

The education system provides for special classes to integrate newly arrived foreign migrant children and Traveller children[173] and Law No. 2000-614 of 5 July 2000, on the accommodation of Travelling people (a euphemism that covers all travelling populations), provides for a duty to accommodate the temporary school attendance of French Traveller

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169 *ECSR* No. 81/2012, issued 11 September 2013, published 5 February 2014, *AEH vs France,* available at: http://hudoc/esc/coe/int/eng#{%22fulltext%22:[%22No.%2081/2012%20%20France%22],%22ESCStateParty%22:[%22FRA%22],%22ESCDcIdentifier%22:[%22reschs-2014-2-en%22]} (accessed 6 September *2016*).

170 http://www/Social-sante/gouv/fr/IMG/pdf/Annexes_au_rapport_Zero_sans_solution_.pdf.

171 Administrative Court of Lyon, M. & Mme Hebri, No. 0403829, 29 September 2005, AJDA, 2005, 1874.

172 *Conseil d'Etat*, Annie Beaufils, No. 31850, 16 May 2011.

173 Franchi, V. (2002), *Raxen 4 European Monitoring Centre on Racism and Xenophobia (EUMC) French national report on Education*, available at: http://fra/europa/eu/sites/default/files/fra_uploads/186-CS-Education-en/pdf (accessed 6 September 2016); Policy document No. 2002-102 issued on the 25 April 2002; On educational integration of newly arrived non-French speaking children see Ministerial instruction no 2012-141 of 2 October 2012 relating to the school integration of newly arrived non–French speaking children, (*circulaire no 2012-141 du 2 octobre 2012 relative à la scolarisatin des élèves allophones nouvellement arrivés*). http://www.education.gouv.fr//pid25535/bulletin_officiel/html?cid_bo=61536 (accessed 6 September 2016); Ministerial Instruction No. 2012-142 of 2 October 2012 relating to the schooling of children from Traveller families and families without residence *(Circulaire no 2012-142 du 2 octobre 2012, REDE 236611C/ RED-DEGESCO A1-1 relative à la scolarisation de enfants issus de familles itinérantes et de voyageurs*), available at: http://www.education.gouv.fr/pid25535/bulletin_officiel.html?cid_bo=61529 (accessed6 September 2016).

children and Roma children.[174] Again, some mayors fail to respect the law. When they are brought before the courts they are sanctioned, but Traveller parents on the road will often leave without seeking enforcement. Moreover, as recognised in the ESRC decisions of 25 January 2012, *European Roma and Travellers Forum v. France*, and the decision issued further to the complaint of *Médecins du Monde v. France*, published 21 January 2013, the ongoing expulsion of Travelling people and foreign Roma populations, resulting from Government policy against the unauthorised occupation of private and public property, significantly hinders de facto children's access to education.

A total of 4 000 children, a number which has remained stable for years, are not registered in the formal system and attend between 10 and 50 half days of school in mobile school buses in 13 departments. The Government social affairs authorities stress that, since the abolition of military service, illiteracy rates are dramatically increasing, since this period served as a means to teach every young man to read and write.

The CNED home schooling system registers annually 750 Traveller children at primary school level and 5 000 at secondary level, of whom 1 300 follow traditional education and 3 700 follow classes destined to combat illiteracy.

The National Parking Accommodation Scheme for Travellers aims to stabilise residence and favours school attendance for children, as all mayors are obliged to accept registration of children in school even for a few days, followed by registration by the school principal (Articles L131-10 and 131-11 of the Code of Education and 227-17-2 of the Penal Code). However, where these schemes have been implemented, they tend to generate concentrations and in some cities (Dijon, Nancy and Toulouse) there are schools with a majority of children from the Travelling community on their rolls.

Ministerial instruction No. 2012-142 of 2 October 2012 on school integration of Travelling children reiterates the duty to integrate Traveller and Roma children, regardless of their nationality, housing conditions and legal residency on the French territory. This instruction was completed by another Ministerial instruction (*circulaire* No. 2012-143 of 2 October 2012)[175] providing for the generalisation to all rectorates of the CASNAV scheme (centres for the promotion of school attendance by non-French-speaking children who have recently arrived in France and Traveller children). In order to facilitate integration, children can register for school attendance directly with the CASNAV.

3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

In France, national legislation includes access to and supply of goods and services as formulated in the Racial Equality Directive.

The Penal Code (Article 225-2) covers all Article 19, paragraph 1 TFEU grounds and other grounds listed in Section 2.1 and sanctions discrimination in access to goods and services in the private and public sectors on all grounds covered by French law.

On 15 December 2015, the Court of Cassation's Criminal chamber sentenced EasyJet to a fine of EUR 50 000 and the subcontracting operating company was sentenced to a fine of EUR 25 000. Both companies were also jointly ordered to compensate the claimants the sum of EUR 2 000 each in damages, and to give a symbolic EUR 1 to the NGO *Association des Paralysés de France*. The Court of Cassation maintained the position of

[174] France, Law No. 2000-614 of 5 July 2000 relating to the accommodation of Travellers (*Loi No. 2000-614 du 5 juillet 2000 relative à l'accueil et à l'habitat des gens du voyage).* http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000583573 (accessed 6 September 2016).

[175] France, Ministerial Instruction No. 2012-143 of 2 October 2012 relating to the organisation of CASNAV (*circulaire no 2012-143 du 02 octobre 2012 relative à l'organisation des CASNAV*), available at: http://www.education.gouv.fr/pid25535/bulletin_officiel.html?cid_bo=61527 (accessed 6 September 2016).

the Court of Appeal of Paris that the decision of EasyJet not to train its personnel and the systematic refusal of the company to allow disabled people to board a plane without verifying their concrete capacity to travel alone constitutes an overall policy based on disability. Considering that industry practice shows that other companies provide such assistance to disabled people, the airline and the subcontractor executing its instructions cannot use the personnel restrictions argument to justify these security requirements and systematically refuse a service to disabled people without committing discrimination. In addition, Article 11 of the European regulation provides for an obligation on the part of air transport carriers to train their personnel, which has been transposed in French regulations by Decree No. 2008-1445 of 22 December 2008, and sanctioned by an administrative fine. The Court of Cassation expressly held that the European regulation does not provide for a safety requirement denying access to persons on the ground of disability, and EasyJet did not establish the existence of such a safety standard recognised by the national or international authorities.[176]

In addition, Article 2 of Law No. 2008-496 at completes the implementation of Directive 2000/43/EC by prohibiting the types of discrimination defined in Article 1 of the law, in access to goods and services, whether private or public, on the basis of 'race' and ethnic origin. It also covers the shift in the burden of proof in administrative and jurisdictional legal actions.

3.2.9.1 Distinction between goods and services available publicly or privately

In France national law does not distinguish between goods and services available to the public (e.g. in shops, restaurants or banks) and those only available privately (e.g. limited to members of a private association).

Article 2 of Law No. 2008-496 prohibits discrimination in the access to and supply of goods and services on the grounds of race, ethnicity and sex, without distinction between goods available to the public or privately.

The Penal Code (Article 225-2) does not distinguish between whether the goods or services are offered privately or are available to the public. In the public sector, the same provision (Article 432-7 PC) punishes any public servant who refuses to any person the benefit of a right afforded by law or hinders the free exercise of an economic activity.

However, the Perben Law No. 2004-204 of 9 March 2004, adapting justice to developments in criminality creates an aggravated sanction in the case of a discriminatory refusal to sell goods or to provide access to public places.[177]

3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

In France national legislation includes housing as formulated in the Racial Equality Directive.

Article 158 of the Law of 17 January 2002 amended Article 1, paragraph 2, of Law No. 89-462 of 6 July 1989 on relations between landlords and tenants, and forbids discrimination in access to rental housing, whether private or public, on all grounds of discrimination prohibited by French law except age, and provides for civil remedy and a

[176] Court of Cassation, Criminal chamber, *EasyJet vs. Gianmartini et al.*, No. 13-81586, 15 December 2015, available at: http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000031658282&fastReqId=2131939514&fastPos=2 (accessed 6 September 2016).

[177] France, Law No. 2004-204 of 9 March 2004, adapting justice to developments in criminality (*Loi No. 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité),* available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000249995&dateTexte=&categorieLien=id (accessed 6 September 2016).

shift in the burden of proof. In 2014, Law No. 89-462 on relations between landlords and tenants was amended to extend the prohibition to all grounds prohibited by article 225-1 of the Penal Code, by Article 1 of Law No. 2014-366 of 24 March 2014 on promoting access to housing and regenerating urban planning (ALUR Law).[178]

In France there is a general practice of requesting security for the rent as a condition of the lease. Rejection of security offered by an individual's parents if they are abroad or in French overseas territory has been largely used as a means to refuse to rent to non-nationals. Article 22-1 of the Law of 6 July 1989 on relations between landlords and tenants also prevents landlords from refusing security on the basis that the guarantor is in a foreign country or is a foreign national.

Furthermore, the Penal Code's prohibition of discrimination in Article 225-2 on all covered grounds in access to goods and services has been interpreted to cover housing whether in relation to rental or sale.

There can be no exception to the prohibition of racial discrimination in French law, and the law provides no exception to the principle of non-discrimination in housing. Even safety considerations cannot justify discriminating in renting an apartment to a disabled person.[179]

However, social housing institutions have interpreted the concept of social mix, which must govern allocation, as including a reference to origin in order to prevent concentrations that would lead to segregation. In a context where the concentration of people of foreign origin and migrants in social housing is a characteristic of the suburbs, the prohibition against any consideration of origin *de facto* conflicts with desegregation policies and management practices. However, for the first time, SOS Racism obtained a ruling against the St-Etienne social housing corporation on the basis of their ethnic management of access to housing.[180] In this case, the inter-ministerial mission for housing reported in July 2005 that the file of each tenant contained an indication of their racial/ethnic origin.

Disability

Article L111-7 of the Construction and Housing Code requires public and residential buildings to be designed and built to be accessible to people with disabilities. The conditions governing the enforceability of this principle and the regulation of any delay in making the necessary adaptations were adopted by decree in 2006. Decree no.2006-555 of 17 May 2007, specifies that the obligation concerns common areas, internal and external, part of the parking space for vehicles, residential lifts, collective premises and equipment.[181]

While the Law of 11 February 2005 had imposed that all buildings receiving the public conform to accessibility requirements by 2015, this deadline was postponed by Law No. 2014-789 of 10 July 2014 authorising the Government to adopt legislative measures for

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[178] France, Law No. 2014-366 of 24 March 2014 on promoting access to housing and regenerating urban planning *(Loi No. 2014-366 du 24 mars 2014 pour l'accès au logement et un urbanisme rénové),* available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028772256&categorieLien=id (accessed 6 September 2016).

[179] High Judicial Court of Paris, 17th Chamber, *Poncelet v. Lassailly*, No. 0402608235, 28 June 2005.

[180] High Judicial Court of St-Etienne, No. 204/09, 3 February 2009.

[181] France, Decree No. 2006-555 of 17 May 2006 on the accessibility of buildings receiving the public and residential buildings and modifying the Construction and Housing Code, J.O. No. 115, 18 May 2006 (*Décret No. 2006-555 du 17 mai 2006 relatif à l'accessibilité des établissements recevant du public, des installations ouvertes au public et des bâtiments d'habitation et modifiant le code de la construction et de l'habitation)*, available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000819417&dateTexte=&categorieLien=id (accessed 6 September 2016).

the implementation of the accessibility of public places. This delay postpones the prosecution and issuing of sanctions provided by the law of 2005 beyond 1 January 2015. In exchange, operators of public places (i.e. private and public managers) must formally undertake to abide by a specific calendar for each type of works, providing for a timetable of between three months and nine years, according to the type of works. The calendar sets out detailed deadlines for preparing and programming the works, taking the form of 'programmed accessibility timetables' (*agendas d'accessibilité programmée* – Ad'AP). Three decrees were adopted to specify the conditions for the implementation of these timetables, one for each type of works. Decree 2014- 1327 relates to public buildings and public places open to the public. In addition decree 2014-1326 was adopted to review the standards of adaptation works in relation to the accessibility of existing buildings.

After construction or renovation work has been completed, or the deadline has passed, a building that does not conform to accessibility requirements could be shut down by administrative order (Article 111-8-3 of the Construction and Housing Code). Public subsidies for construction and renovation projects are conditional on accessibility requirements being respected (Article 111-26 paragraph IV of the Construction and Housing Code).

Articles L441-1, 441-3 and 441-5 of the Construction and Housing Code provide for a priority in the allocation of social housing for disabled persons and their families, however decrees of application necessary to the enforcement of these provisions have not been adopted. The HALDE recommended their adoption in 2006.[182] To date, the Government has not acted on the HALDE's recommendation.

3.2.10.1 Trends and patterns regarding housing segregation for Roma

In France there are patterns of housing segregation and discrimination against Roma.

The Traveller population is subject to specific rules of accommodation. Municipalities of more than 5 000 inhabitants have an obligation to accommodate travelling populations by providing settlement areas as stipulated by Law No. 2000-614 of 5 July 2000, and the technical requirements of these areas are provided by decree 2001-569 of 29 June 2001[183] reviewing legislation that was first adopted in 1990 (Law No. 90-449 of 31 May 1990).

The installation of motor homes on unauthorised parking spaces is sanctioned by administrative expulsion measures created by Law No. 2003-239 of 18 March 2003.[184] Although the law provides that a municipality which has not satisfied its legal obligation cannot expel illegally parked Roma Travellers, the concentration of Travellers and the insufficiency of available space is a major problem.

According to the most recent data referred to in a report by the Auditor General (*Cour des comptes*) of 2012 evaluating public policy on Roma,[185] 96 departmental schemes were adopted. Of the 41 589 places planned by the authorities (NGOs consider that

[182] Halde Deliberation 2006-150, available at:http://www.defenseurdesdroits.fr.

[183] France, Law of 5 July 2000, see above note 135; Decree 2001-569 of 29 June 2001 relating to technical rules applicable to areas of accommodation of Travellers (*Décret n°2001-569 du 29 juin 2001 relatif aux normes techniques applicables aux aires d'accueil des gens du voyage*), available at: http://www.legifrance.gouv.fr/jopdf/common/jo_pdf/jsp?numJO=0&dateJO=20010701&numTexte=6&pageDebut=10540&pageFin=10540 (accessed 6 September 2016).

[184] France, Law No. 2003-239 of 18 March 2003 on interior security (*Loi No. 2003-239 du 18 mars 2003 pour la sécurité intérieure),* available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000412199 (accessed 6 September 2016).

[185] France, Auditor General, The accomodation of Travellers, 10 December 2012, (*Cour des comptes, 10 décembre 2012, L'acueil et l'accompagnement des gens du voyage*) available at: http://www.ccomptes.fr/Publications/Publications/L-accueil-et-l-accompagnement-des-gens-du-voyage (accessed 6 September 2016).

60 000 are needed), 52 % of the programmed parking areas for Roma and Travellers and 27 % of areas for large-scale events had been implemented. Their manifest insufficiency therefore increases illegal parking, monitoring by the police and the criminalisation of the way of life of Roma and Travellers, since they are concentrated in areas that have satisfied their legal obligations, while offering an insufficient number of spaces.

When a municipality fails to put in place specific sites for the travelling population, it is barred from seeking the removal of Travellers' trailers and from prohibiting parking[186] and can be challenged for this failure before the administrative courts.

In this context of insufficient parking provision, there is no widespread policy to facilitate the settlement of Travellers.

Some families attempt to purchase land, which for economic reasons is often situated in areas where residential construction is not permitted, and they thereby enter into complicated legal conflicts with municipalities with respect to their conditions of occupation of the land. Many mayors adopt decrees to forbid motor home parking on their entire territory, in order to prevent authorised parking on private land. Even though such decrees have systematically been found to be illegal, this situation increases monitoring, evictions and an overall atmosphere of a denial of access to rights.[187]

The reluctance of the central Government to ensure the enforcement of parking provisions in a context of increased repression could be deemed to be a *de facto* non-compliance with respect to Directive 2000/43/EC as regards housing rights.

[186] High Judicial Court of Montauban, No. 02/00171, 03 May 2002. Available at: www.rajf.org/article/php3?id_article=1043 (accessed 6 September 2016).
[187] Bordeaux Administrative Appeals Court, No. 03BX00379, 1 December 2005.

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In France national legislation provides for an exception for genuine and determining occupational requirements.

Article 2, paragraph 3, and Article 6, paragraph 3, of Law No. 2008-496 created the general possibility of raising an exception based on genuine and determining occupational requirements. It appears to be a regression compared to the absence of such an exception prior to the adoption of this law. In addition, it is framed in terms that are too broad, leaving open the possibility of justifying occupational requirements in each individual case. Article 6, paragraph 3 of the Law provides:

> 'The prohibition of discrimination does not forbid difference in treatment if it constitutes a genuine and determining occupational requirement, as long as the objective pursued is legitimate and the requirement proportionate.'[188]

The following question has been referred to the Court of Justice by the Court of Cassation in the Bougnaoui case:[189]

> 'Must Article 4(1) of Council Directive 78/2000/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation 1 be interpreted as meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?'

4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)

In France national law does not provide for an exception for employers with an ethos based on religion or belief.

- Conflicts between rights of organisations with an ethos based on religion or belief and other rights to non-discrimination

In France there are no specific provisions or case-law in this area relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination.

Ever since the decision of the Court of Cassation on 17 April 1991 in Fraternité Ste Pie, the religious orientation of the employer does not justify an exception to the application of Article L122-45 LC (now Article L1132-1 ff. LC). In this landmark case, which preceded the directive, the court decided that the sexual orientation of the employee was not in and of itself sufficient to justify dismissal. At the time, it considered that the employer was required to establish that the behaviour of the employee had, considering their function and their objective behaviour, generated substantial disruption ('*trouble*

[188] France, Law 27 May 2008, Article 6 Para. 3: '*L'article L. 1133-1 est ainsi rétabli: 'Art. L. 1133-1.-L'article L. 1132-1 ne fait pas obstacle aux différences de traitement, lorsqu'elles répondent à une exigence professionnelle essentielle et déterminante et pour autant que l'objectif soit légitime et l'exigence proportionnée.´*

[189] CJEU, Case C-188-15, *Bougnaoui*, presently pending before the Court of Justice.

caractérisé') within the community.[190] In 1993, the Court of Appeal of Montpellier concluded that provocative distasteful behaviour could justify dismissal.[191]

External symbols of an individual's religion, such as wearing a headscarf, are forbidden for all members of the public service, who must respect the principle of neutrality[192] whether or not they are in contact with the public.

In a decision regarding the clothing of people working for French social security - which is a private employer executing the functions of a public service - the Court of Cassation decided that a private employer executing a public service can adopt and enforce in-house regulations in order to implement the principle of secularism contained in Article 1 of the Constitution in relation to its employees, even if they are subject to a private law contract governed by the Labour Code.[193] This right of the employer is applicable to all employees, whether or not they are in contact with the general public. Restrictions on freedom of religion can be justified by the nature of the particular occupational activities concerned and the context in which they were carried out, and thereby constitute a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate and the in-house regulations specific and precise. The case concerned here provides an example of a restriction which is sufficiently precise to satisfy the requirements of precision and proportionality of a genuine and determining occupational requirement and holds as acceptable a prohibition targeting clothing and a general rule of neutrality covering not only religion but also ethnic origin or ideological conviction.

- Religious institutions affecting employment in state-funded entities

In France religious institutions are not permitted to select people (on the basis of their religion), to hire or to dismiss them from a job if that job is in a state entity or in an entity financed by the state.

4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)

In France national legislation provides for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78/EC).

France has availed itself of the exception of Article 3 (4) of Directive 2000/78/EC allowing derogations concerning criteria based on age and disability by way of a declaration to the European Commission. However, the formal job specifications for career under-officers do not contain requirements based on age or physical aptitude.

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In France national law includes exceptions relating to difference of treatment based on nationality.

The principle of non-discrimination allows for no exception because of nationality.

However, as documented by the report produced by the GELD, French legislation creates some legal discrimination in access to specific professions and jobs (about 7 000 named jobs in a number of different pieces of legislation), subjecting them to conditions of

[190] Court of Cassation, Social Chamber, 17 April 1991, Droit Social 1991, 485.
[191] Court of Appeal of Montpelier, 28 January 1993.
[192] *Conseil d'Etat*, *Mlle Marteaux* No. 217017, 3 May 2000; *Conseil d'Etat*, No. 244428, 15 October 2003.
[193] Court of Cassation, No. 12-11.690 45, 19 March 2013.

citizenship, whether national, from bilateral partner countries, such as some African countries, or from the European Union.

In France nationality (as in citizenship) is explicitly mentioned as a protected ground in the Penal Code. For the remaining French anti-discrimination law, it is not explicitly mentioned as a protected ground, but has been interpreted by courts as being covered by the ground 'national origin'.

The definition of the scope of the protection against discrimination in Article 2 of Law No. 2008-496 eliminated the wider list of grounds which initially appeared in Article 19 of Law No. 2004-1486[194] (Law creating the HALDE) and the first law transposing the directives (Law No. 2001-1006 of 16 November 2001), both of which explicitly included national origin, which has been interpreted by courts to cover differential treatment based on citizenship and specific requirements illegally imposed on third-country nationals. The resulting protection regarding the scope of Directive/2000/43/EC does not explicitly cover national origin except when explicitly mentioned in the list of prohibited grounds in Article 225-1 of the Penal Code and Article 1132-1 of the Labour Code.

Although it will have very limited impact on the interpretation of legal residents' rights, given that they are covered by labour law, penal law and legal residents benefit from equal treatment in the application of the Constitution and general principles of public law, Law No. 2008-496 expressly states for the first time that the law prohibiting discrimination applies without prejudice to provisions governing the entry and residence of third-country nationals (Article 5, paragraph 2).

b) Relationship between nationality and 'race or ethnic origin'

In relation to discrimination based on race or ethnic origin, whether it is direct or indirect, nationality and nationality of origin is regularly treated as an acceptable indication to constitute the comparable group in order to establish unequal treatment. Nationality is often assimilated with origin when the law does not allow restrictions based on nationality.

In many criminal cases the criteria of nationality has been held to be a form of direct discrimination based on origin, as the Penal Code refers to discrimination based on the link with a nation.

In civil cases the Court of Cassation has treated discrimination based on nationality as a source of apparent indirect discrimination that allows for justification on the part of the employer.[195] In this case, since 1993 a collective agreement had stipulated that employees of foreign nationality received a yearly bonus, even after having been in post with the company in France for a number of years (in some cases 20 years). In this situation, the court was faced with unequal financial benefits that could not be justified by the specifics of the work performed by the employee. First, the court decided that Article 12 of the EU Treaty did not cover this situation. In relation to the argument of indirect discrimination on the ground of origin, it further held that, in a high technology research installation, the business need to attract talented scientists from abroad, and the necessary compensation related to the expatriation of their families, were sufficient justifications of the adverse effect on the basis of origin to allow unequal remuneration based on nationality: attraction of workforce when proportionate is objectively justified.

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[194] France, Law No. 2004-1486 of 30 December 2004 creating the Commission against discrimination and Equal Opportunities (*Loi No. 2004-1486 du 30 décembre 2004 portant création de la haute autorité de lutte contre les discriminations et pour l'égalité)*, available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000423967 (accessed 6 Septembre 2016).

[195] Court of Cassation, Social Chamber, *ESRF v. M. X.*, No. 03-47720, 9 November 2005, confirmed in another matter against ESRF on 17 April 2008 (Soc. 819 FS-P+B).

On 21 September 2015, the Paris Employment Tribunal rendered a decision regarding the liability of the SNCF (French National Railway Company) towards 832 migrant workers of Moroccan nationality, who were hired to fill lower execution jobs but were not hired under the same conditions as the French employees — the regulatory status of the SNCF imposing a requirement of French nationality to be hired under the permanent employee status. The Moroccan employees were hired as contractual agents under a specific status 'PS25', which was used for temporary employees and for people holding a list of jobs that were not covered by the statutory regime. Plaintiffs spent all of their careers at SNCF. Their specific employment conditions were less favourable than those applicable to French permanent employees: they did not have access to promotion beyond a certain level of lower execution jobs (only 2 % of French employees holding the permanent status ended their career at these levels), these jobs were more physically strenuous (which had an impact on their physical condition at retirement), lower salary growth, less favourable overtime conditions and less favourable retirement conditions in terms of period of service and age requirements for access to a full pension, financial conditions of retirement and financial conditions of their widows pension rights (an average of EUR 300 per month). Although half of the 2 000 Moroccan employees became French citizens, only 113 obtained the permanent employee status reserved to French citizens and all the other Moroccan employees hired in the 1970s kept the PS25 status.

The claimants filed suit after retirement, claiming damages for their career and retirement conditions. It is worth noting that the court explicitly found that the ILO Convention No. 111 and Article 14 of the ECHR were applicable to raise the illegality of regulations limiting access to the permanent employee status to French citizens, as well as general principles of anti-discrimination provided by EU law without referring to any precise legal provision. In addition, the employment contract provided for equal remuneration (covering accessory advantages) with French employees having similar employment. The court held that jobs covered by employment status PS25 were comparable to those held by French employees, but were only designated otherwise in order to employ foreign employees under another employment status and meet the formal requirements of the two employment statuses. SNCF could not prove that the activities of the French employees holding comparable jobs related to the exercise of sovereignty justifying a distinct status reserved to French nationals. Therefore, the claimants' employment status constitutes direct discrimination on the ground of nationality and the criteria of nationality is the basis of indirect discrimination on the ground of the origin of these non-national migrant workers. Claims were admitted, except in a few cases, and the claimants were awarded damages ranging from EUR 150 000 to EUR 250 000. SNCF has appealed before the Paris Court of Appeal.[196]

As regards research and statistical data, most French studies on discrimination based on origin use the parameter of nationality of origin for monitoring purposes, since no other criterion is generally admitted.

4.5 Work-related family benefits (Recital 22 Directive 2000/78)

a) Benefits for married employees

In France it would not constitute unlawful discrimination in national law if an employer only provides benefits to those employees who are married.

Marriage is a legal source of rights and the law creates some rights to the exclusive benefit of married couples, whether they are patrimonial rights (inheritance) or work-related benefits created by law or collective agreements. The Labour Code awards holidays for couples getting married (Article L3142-1 LC).

[196] Paris Employment Tribunal, RG No.F 05/12309 and following, 21 September 2015, *832 Migrant workers v French National Railway Company (SNCF)*.

Meanwhile, the Civil Solidarity Pact (PACS) created by Law No. 99-944 of 15 November 1999 is a registered partnership which was open to same-sex couples before marriage was legalised in 2013.

However, before same-sex marriage was legalised, some rights that were reserved for married couples were not accessible for same-sex partners.

In 2007 the HALDE concluded that reserving extra days of holiday for family events for married heterosexual couples and creating a premium for employees' weddings in a collective agreement constituted direct discrimination based on family status and indirect discrimination based on sexual orientation.[197] The Government took the position that the PACS was a civil contract which was not aimed at creating a family status, and that therefore this reasoning did not apply. The Court of Cassation referred a preliminary ruling on this issue to the CJEU on 23 May 2012, in a case challenging the provisions of a collective agreement of the Crédit Agricole.

In a decision of 12 December 2013 the CJEU decided, further to a referral from the Court of Cassation in the case of Hay v. Crédit Agricole,[198] that, if marriage is not accessible to same-sex partners, a salaried employee who enters a contractual union with a same-sex partner must benefit from the same advantages as those conferred upon their colleagues when they marry. The refusal to confer such benefits on an employee constitutes direct discrimination on the ground of sexual orientation. Prior to the law legalising marriage between same-sex partners, the French Government had always refused to amend Articles 3142-1 ff. of the Labour Code, which denies family holidays for same-sex partners.

Law No. 2013-404 of 17 May 2013 opened marriage to same-sex couples,[199] and therefore the issue only remains with respect to rights which are not accessible to non-married couples and which have arisen prior to its adoption.

b) Benefits for employees with opposite-sex partners

In France it would constitute unlawful discrimination under Article L1132-1 of the Labour Code if an employer only provided benefits to those employees with opposite-sex partners.

The Law No. 2013-404 of 17 May 2013 opened marriage to same-sex couples and therefore rights related to marriage are not specific to heterosexual couples.

4.6 Health and safety (Article 7(2) Directive 2000/78)

a) Exceptions in relation to disability and health/safety

In France, Article 24 II of Law 2005-102 on the rights of disabled people does provide for exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78/EC).

Article 1133-3 of the Labour Code provides that, unequal treatment based on the decision that a person is not physically able to do the job by reason of health or disability, as determined by the occupational health doctor after having taken into

[197] HALDE Deliberation No. 2007-366 of 11 February 2008, available at:http://www.defenseurdesdroits.fr.
[198] CJEU, C-267/12, 12 December 2013.
[199] France, Law No. 2013-404 of 17 May 2013, opening marriage to persons of same sex (*Loi No. 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe*), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027414540 (accessed 6 September 2016).

consideration the possibilities of reasonable accommodation of the work environment and/or working conditions, does not constitute discrimination.

Article 225-3 PC enumerates a list of admissible exceptions to the principle of non-discrimination set out in Articles 225-1 and 225-2 PC: operations related to life, invalidity and incapacity insurance as regards the ground of health (paragraph 1); refusal to hire an individual on the ground of their health or disability, only when it results from a certificate of incapacity provided by the occupational medicine authorities (paragraph 2).

4.7 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)

4.7.1 Direct discrimination

In France national law provides an exception for direct discrimination on the ground of age.

Article 6 of Law No. 2008-496 allows the recognition of a legitimate reference to age in the following circumstances: differences in treatment on the basis of age are not discriminatory when they are reasonably and objectively justified by a legitimate objective, such as those specified in the law, namely health requirements and worker's safety, professional insertion, maintaining employment, redeployment or compensation in case of loss of employment, and when the means to attain these objectives are appropriate and necessary.

In addition, age limitations in employment can be authorised as genuine and determining occupational requirements pursuant to Article 4 of Directive 2000/78/EC, transposed by Law No. 2008-496 in Article 2, paragraph 3 and Article 6, paragraph 3.

a) Justification of direct discrimination on the ground of age

In France it is possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age.

The possibility for each employer to create and justify exceptions to the prohibition of discrimination on the ground of age seems too wide and appears to delegate to individual employers the possibility given to government to create legitimate differences in treatment aimed at the protection of employees who are victims of their age.

Therefore, it would appear not to satisfy the requirements of the *Mangold* and *Kücükdeveci* cases. However, when it is argued, French courts have implemented strict tests verifying the objective pursued by the age limitation and its proportionality.

Cases relating to statutory age limitations in specific employment have only been deemed justified after a stringent scrutiny of performance requirements in the case of pilots and air traffic controllers.[200] However, they can never be deemed justified if the employee is not entitled to a full pension.[201]

Situations also arise which do not relate to the implementation of public policy but decisions made by employers. A number of cases have held that differential treatment of

[200] Court of Cassation Social Chamber, No. 08-45307, 11 May 2010, available at: http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000022214723&fastReqId=419955441&fastPos=1 (accessed 6 September 2016); Court of Cassation Social Chamber, No. 09-72061, 16 February 2011; *Conseil d'Etat*, No. 362785, 4 April 2014.

[201] Court of Cassation Social Chamber, No. 08-4381, 11 May 2010.

older workers close to retirement age, in relation to redundancy compensation, was not discriminatory if it was reasonable and proportionate.[202] [203]

Justifications based on requirements of human resources management have been deemed too general and not proportionate.[204] In a 2014 decision, the Court of Cassation decided that overtly denying pilots access to training on a new plane because of imminent retirement constitutes age discrimination, since retirement age can be postponed in France and younger workers can also leave the company.[205]

b) Permitted differences of treatment based on age

In France national law does not permit differences of treatment based on age for any activities within the material scope of Directive 2000/78/EC.

In the public sector, Article 6, paragraph 4 of Law No. 83-634 of 13 July 1983 imposed conditions of age to access to employment in the civil service.

Previous age limitations were removed by Article 1 of Executive Order 2005-901,[206] except in access to public service in the following cases:

- agents in active armed service subject to early retirement (army, police, etc.);
- conditions related to minimum age requirements in view of the experience called for by the function, for example to take on higher management responsibilities;
- entry examination conditions for admission to a specialist school to follow an education programme of a duration of 2 years or more financed by the State. In this case, the Government should raise the age limitations to 15 years from retirement.

The considerations based on age in the public sector appear to meet the requirements of the *Mangold* and *Kïcükdeveci* cases as they pursue legitimate objectives and an effort has been made to meet the test of proportionality.

c) Fixing of ages for admission or entitlements to benefits of occupational pension schemes

In France national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by Article 6(2).

The general rule stated in Articles 17 and 18 of Law No. 2010-1330 of 9 November 2010 is that the age of entitlement increases by four months each year from 2010 until it reaches a maximum of 62 years in 2018, provided the employee has contributed for 42 years (the number of years may vary according to the retirement regime).[207] Exceptions to the general rule, identified in Section 4.7.4 b), are also subject to age requirements.

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[202] Court of Cassation Social Chamber, No. 09-42071, 17 November 2010.
[203] Court of Cassation Social Chamber, No. 10-24219, 5 December 2012.
[204] Court of Cassation Social Chamber, No. 10-10465, 16 February 2011.
[205] Court of Cassation Social Chamber, No. 13-10294, 18 February 2014.
[206] France, Executive Order No. 2005-901 of 2 August 2005 relating to conditions of age in accessing public service (*Ordonnance No. 2005-901 du 2 août 2005 relative aux conditions d'âge dans la fonction publique et instituant un nouveau parcours d'accès aux carrières de la fonction publique territoriale, de la fonction publique hospitalière et de la fonction publique de l'Etat),* available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000262918&dateTexte=&categorieLien=id (accessed 6 September 2016).
[207] France, Law No. 2010-1330 of 9 November 2010 reforming retirement schemes (Loi *No. 2010-1330 du 9 novembre 2010 portant réforme des retraites),* available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023022127&dateTexte=&categorieLien=id%20 (accessed 6 September 2016).

Article L1133-2LC provides for the possibility to derogate from the prohibition of discrimination on the basis of employment policy.

4.7.2 Special conditions for young people, older workers and persons with caring responsibilities

In France there are special conditions set by law for older or younger workers in order to promote their vocational integration, or for people with caring responsibilities to ensure their protection.

Article L3141-9 LC provides for additional holiday days for working mothers under 21 years of age. The Government has undertaken to extend this benefit to young fathers.

For younger workers Articles L6325-1 ff. LC set up a special regime for apprenticeship embodied in the apprenticeship qualification contract for candidates under 25 years of age.

Article L1233-5 LC requires the employer to take into account age and disability as protecting factors in establishing the list of targeted employees in the event of economic redundancy and Article L1233-61 LC requires the employer to establish a plan to organise its priorities in the redeployment and re-employment of older workers. Article R 5123-9 ff. LC sets a special regime to indemnify workers over 57 years of age until retirement age in case of dismissal.

Article L1237-5 of the Labour Code requires the employer to ask the employee every year, between the age of 65 and the age of 70, whether they wish to stay in employment or to retire.

A number of provisions establish the possibility for caring parents to obtain leave of absence to take care of sick children (Article L1225-62 LC), and for end of life care (Article L3142-16 LC), an extension of parental leave after having a disabled child (Article L1225-61 LC) and a right to adaptation of work hours for an employee caring for family members with a disability (Article L3122-26 LC) (see Section 2.6 a)).

Article 2 of governmental decree 2005-901 of 2 August 2005 provides new means of access to certain functions in the public service without entry examination, by combining formal training with internships, for people between 16 and 25 years of age who have left school without recognised diplomas, or with an insufficient level of education to obtain level C employment in the public service (lowest level).

The Government adopted Law No. 2012-1189 of 26 October 2012 to put in place in 2012 a scheme to promote employment of young workers under 25 years of age, called 'Contract of employment for the future' (*Contrats emplois d'avenir*).[208] It creates Articles L5134-110 ff. of the Labour Code, creating a specific employment contract of one to three years, benefiting from a special social contribution regime and financing by the state in order to facilitate access to employment and professional training for workers between the ages of 16 and 25, and 30 in the case of disabled people, who have low levels of qualifications in sectors with high employment development potential and sectors of social and environmental utility identified by the regional authority (*Conseil régional*). Decree No. 2012-1210 of 31 October 2012, modified by Decree No. 2014-188

[208] France, Law No. 2012-1189 of 26 October 2012 creating jobs for a future (*Loi No. 2012-1189 du 26 octobre 2012 portant création des emplois d'avenir*), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026536632&dateTexte=&categorieLien=id (accessed 6 September 2016).

of 20 February 2014, sets out the specific requirements and conditions of regional state financing.[209]

4.7.3 Minimum and maximum age requirements

In France there are exceptions permitting minimum and maximum age requirements in relation to access to employment (notably in the public sector) and training.

The permissible age to enter the workforce is regulated by Article L4153-1 LC, which sets 16 years of age as the general norm, without prejudice to specific regimes (qualification and apprenticeship contracts L6325-1 LC ff. at 15) and summer employment after the age of 14.

There is no maximum age in the private sector. Moreover, Article L5331-2 LC forbids an offer of employment to be made containing a limitation of age that would not otherwise be imposed by law. The legal protection against dismissal is applicable to all workers regardless of age.

However, as mentioned above, Article L1133-1, paragraph 2 LC allows for a maximum age requirement 'for recruiting, based on the required training for the function or the requirement of pursuing a reasonable period of employment before retirement'.

The general age limitation in the public service is 67 years of age (Article 28 of the Law of 9 November 2010), with specific derogations for specific branches of the service).

Further to the adoption of Law 2009-972 of 3 August 2009[210] relating to mobility and professional career in the public service, the Government adopted Decree 2013-593 of 5 July 2013[211] relating to conditions of admission to entry examination of access to higher civil service, which provides at article 13 that the Government may adopt age limitations to access to corps of higher civil service by decree. Even if this possibility remains, it has not adopted such a decree, therefore age limitations which previously applied are no longer in force.

4.7.4 Retirement

a) State pension age

In France there is a state pension age at which individuals must begin to collect their state pensions.

If an individual wishes to work longer, their pension can be deferred.

An individual can collect a pension and still work. An employee can collect their pension from the age of 60 (an age which will progressively increase to 62 by 2018), at which time the amount will depend on the number of years of contribution, in accordance with Law No. 2003-775 of 21 August 2003.[212] Article 351-8 of the Social Security Code

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[209] France, Decree No. 2014-188 of 20 February 2014 modifying the decree relating to jobs for a future (*Décret No. 2014-188 du 20 février 2014 portant modification du décret No. 2012-1210 du 31 octobre 2012 relatif à l'emploi d'avenir*), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000262918&dateTexte=&categorieLien=id (accessed 6 September 2016).

[210] France, Law No, 2009-972 of 3 August 2009, available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020954520&fastPos=1&fastReqId=1375373593&categorieLien=cid&oldAction=rechTexte.

[211] http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027666449&categorieLien=id.

[212] France, Law 2003-775 of 21 August 2003 reforming old age pensions (*Loi No. 2003-775 du 21 août 2003 portant réforme des retraites)*, available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000781627 France, Law No. 2006-396

establishes as 65 (an age which will progressively increase to 67 by 2023) the age at which minimum full state retirement is accessible independent of the number of years of contribution.

Rights to the state pension are subject to both conditions of age and number of years of contribution. The general rule is that a salaried worker can claim the right to a state pension from 60 years of age (rising to 62) provided that they have contributed for 41.5 years (the number of years may vary according to the retirement regime).

However, people who began to work before 18 years of age can claim a state pension at 58 years of age, provided they have contributed for 41.5 years, plus two years. Disabled employees and employees caring for a disabled child can benefit from full retirement at the age of 65 even if they have not contributed the required number of years (Article L351-8 of the Social Security Code). Article 18 of the Law No. 2010- 1330 of 9 November 2010 lowers the retirement age giving the right to a full pension from 65 to 60 years of age in the private sector for disabled people with a registered disability level of 80 %.[213]

On 27 June 2006 Law No. 2006-737 adopted increasing retirement benefits for disabled public servants to increase pension rights by 30 % for each year of disability during service and lowering the retirement age accordingly.[214]

Employees caring for a disabled child can also benefit from the possibility of an early pension.[215]

Since 1984, in order to receive a state pension, a salaried worker must resign from their current employment, but they can thereafter find another employment in the private sector.

Employees are never otherwise forced to retire and, if they collect their state pension, they can continue to work. However, from the time they start collecting their state pension, employees cannot collect unemployment benefits.[216]

b) Occupational pension schemes

In France there is a normal age when people can begin to receive payments from occupational pension schemes. Occupational pension schemes are managed by the state

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of 31 March 2006 on equal opportunities *(Loi No. 2006-396 du 31 mars 2006 pour l'égalité des chances)* Article 2, available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000268539 (accessed 6 September 2016).

213 France, Law No. 2010-1330 of 9 November 2010 reforming retirement (*Loi No. 2010-1330 du 9 novembre 2010 portant réforme des retraites*), available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023022127 (accessed 6 September 2016).

214 France, Law No. 2006-737 of 27 June 2006 providing for an increase in pension for disabled civil servants (*Loi No. 2006-737 du 27 juin 2006 visant à accorder une majoration de pension de retraite aux fonctionnaires handicapés*), available at: http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000816584 (accessed 6 September 2016).

215 France, Decree No. 2005-1774 of 30 December 2005, relating to pension increase on the ground of disability, *Journal officiel*, No. 304, 31 December 2005, p. 20856, *(Décret No. 2005-1774 du 30 décembre 2005 relatif à la détermination de la majoration de pension applicable aux assurés Sociaux handicapés bénéficiant de l'abaissement de l'âge de la retraite)* available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000265458&dateTexte=&categorieLien=id (accessed 6 September 2016).
France, Decree No. 2005-1761 of 29 December 2005 relating to financial support for single parents of handicaped children *(Décret n°2005-1761 du 29 décembre 2005 relatif à la majoration spécifique pour parent isolé d'enfant handicapé)* available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000268753 (accessed 6 September 2016).

216 National Collective Agreement safeguarding the personalised redeployment agreement (*Accord National Interprofessionnel de sécurisation de la convention de reclassement personnalisé*), 23 December 2008).

and follow rules applicable to state pension schemes.[217] Other employer-funded retirement benefits arrangements, over and above legal requirements, are purely contractual.

If an individual wishes to work longer, payments from all occupational pension schemes can be deferred subject to the same conditions as the state pension schemes.

An individual can collect an occupational pension and still work.

c) State imposed mandatory retirement ages

In France there is no state-imposed mandatory retirement age in the private sector.

There is a compulsory retirement age in the public sector (67 years of age subject to some derogations (Article 28 Law No. 2010-1330 of 9 November 2010)).

d) Retirement ages imposed by employers

In France national law does not permit private employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract and/or collective bargaining and/or unilaterally before the age of 70. Private employers can impose retirement at age 70 but they are not obliged to do so.

Further to the adoption of Law No. 2008-1330 of 17 December 2008, Article 1237-5 of the Labour Code refers to Article 351-8 of the Social Security Code to determine the age at which an employer can impose the retirement of an employee on the ground of age.[218] The employer can propose retirement to the employee at age 65, and each year thereafter. The employee may, however, defer such imposed retirement until they reach the age of 70.

Article L1237-5-1 LC states that conditions of retirement in collective agreements and labour contracts are applicable as long as they do not contradict legal principles. Thus, all provisions of collective agreements and other labour contracts are null and void which would provide for the automatic interruption of the labour contract by reason of the age of the employee or because they would be entitled to benefit from an old age pension.
There is a compulsory retirement age imposed by the employer in the public sector (67 years of age subject to some derogations (Article 28 Law no 2010-1330 of 9 November 2010)).

In 2012, the national ski instructors' union adopted a regulation limiting ski instructors' activity after 62 years of age and favouring young recruits in the distribution of teaching classes in order to favour the activity of young instructors. In its first decision dealing with maximum age limitations imposed in the private sector, the Court of Cassation (Supreme Court) decided that the internal regulation violates Law No. 2008-496 of 28 May 2008 and Directive 2000/78; it does not meet the requirements of Article 6(1)(a) of Directive 2000/78 because it favours the purely individual private interests that are specific to ski schools and their concern to satisfy the requests of their clients, which therefore do not qualify as legitimate aims as provided by article L1133-2 of the Labour Code.[219]

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[217] France, Law 2003-775 of 21 August 2003 reforming old age pensions. France, Law No. 2006-396 of 31 March 2006 on equal opportunities.

[218] France, Law No. 2008-1330 of 17 December 2008, on financing social security (*Loi No. 2008-1330 du 17 décembre 2008 de financement de la sécurité Sociale pour 2009)* available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019942966 (accessed 6 September 2016).

[219] Court of Cassation, No. 13-27142, 17 March 2015, available at: http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000030383142&fastReqId=964259005&fastPos=50 (accessed 6 September 2016).

e) Employment rights applicable to all workers irrespective of age

The legal protection against dismissal is applicable to all workers regardless of age.

However, Articles L1237-5-1 and 1237-8 LC provide for the right of the employer to end the employment contract if the employee has attained the full right to the retirement pension according to Article L351-1 of the Social Security Code and is 70 years of age. Nevertheless, as indicated above, retired people can pursue employment after receiving their pension.

f) Compliance of national law with CJEU case law

In France national legislation is not in line with the CJEU case law on age regarding compulsory retirement. However, in France, the courts are bound by European and international law before national law. Since national courts deem Directive 2000/78 to be directly applicable in case of legislative gap, they will enforce the CJEU case law.

The possibility provided by Article 6 of Law 2008-496 (Article L1133-2 LC) allowing each employer to create and justify exceptions to the prohibition of discrimination on the ground of age seems too wide and appears to delegate to individual employers the possibility given to government to create legitimate differences in treatment aimed at the protection of employees who are victims of their age. Therefore, it would appear not to satisfy the requirements of CJEU case law on age.

Some professions are still subject to statutory age limitations, but they are systematically challenged and the *Conseil d'Etat* systematically holds them to be contrary to Directive 2000/78/EC unless, after close scrutiny, it finds a justification based on safety requirements and an inability to ensure performance in view of the physical skills required (see cases cited in Section 4.7.1).

Therefore, it cannot be said that all legislation in respect of the justification of age requirements have been reviewed in conformity with the requirement set out in the *Prigge* case, but judicial challenges are effective and the courts uphold CJEU case law.

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In France national law permits age or seniority to be taken into account in selecting workers for redundancy.

Article L1233-6 LC provides that, in case of redundancy by an employer with 50 employees or more, conditions of dismissal are subject to the prior dismissal of younger employees and required to meet specific requirements of compensation for employees beyond 50 years of age.

b) Age taken into account for redundancy compensation

In France national law provides compensation for redundancy. This is affected by the age of the worker.

The legal protection against dismissal is applicable to all workers regardless of age. Article R5123-9 ff. LC sets a special regime to indemnify workers over 57 years of age until retirement age in case of dismissal after a certain age.

As regards conventional compensation for redundancy, the Social Chamber of the Court of Cassation decided that the limitation of compensation for redundancy because of age

on the ground that an employee is two years from full retirement meets the requirements of reasonableness and proportionality provided by the exception authorised by Article 6 of Directive 2000/78/EC implemented by Article L1133-1 of the Labour Code.[220]

4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

In France national law does not include exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

4.9 Any other exceptions

In France there are no other exceptions to the prohibition of discrimination (on any ground) provided in national law.

[220] Court of Cassation, Social Chamber, *Banque Finaref*, No. 09-42071, 17 November 2010.

5 POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

a) Scope for positive action measures

In France positive action in respect of disability and age is provided for in national law.

French positive action, as conceived by the jurisprudence of the *Conseil d'Etat* is based on neutral and general grounds of distinction such as sex, disability, territorial links to designated geographical areas or socio-economic considerations.[221] France does not enforce such programmes in terms of 'race' or ethnic origin.

In its opening provision, Law No. 2005-102 on equal opportunities and the integration of disabled persons affirms the right of disabled people to the support of all members of the nation and, in Article 11, the right to compensation for disability (Article L114-1 1 CSW).

Article 1133-3 LC states that positive action measures taken to promote equal opportunities for the benefit of disabled people are not to be construed as discrimination. Moreover, Article L1133-2 LC allows for differential treatment on the ground of age that is objectively and reasonably justified by a legitimate aim, in order to maintain health, support professional integration or maintain employment of workers, if the means to pursue these objectives are reasonable and necessary.

In addition, there are a number of integration programmes for foreign nationals in France.

b) Main positive action measures in place on national level

A- Quota system

1. Quota for disabled people

The Law on the Employment of Disabled Persons No. 87-157 instituted a quota system.[222] Despite the cost to employers of sanctions related to the failure to meet their obligation to employ a quota of disabled employees, the Court of Cassation decided in May 2003 that disabled workers were not obliged to disclose their status to their employer.[223]

Law No. 2005-102 on equal opportunities and the integration of disabled persons creates a fund for the integration of registered disabled people into both private and public employment, as well as providing for sanctions if the employment quota of 6 % set out in the law is not respected (Article 36 creating Article 5212-12 LC). Article 36 of the law maintains the possibility of substituting compliance with the obligation to employ a minimum quota of 6 % of disabled salaried workers provided by Article 5212-2 LC by making a financial contribution to the above-mentioned fund (known as AGEFIPH), which finances the integration of disabled workers. Furthermore, the law increases the maximum penalty for not complying with the quota obligation of employing 6 % of disabled workers, up to a maximum of 1 500 times the minimum wage in total, and creates a similar obligation for the public sector (see Section 2.6 for reasonable accommodation financing).

2. Quota for people over 50

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[221] *Conseil d'Etat* (1996), 'Public report No. 48', pp. 86 and 91.

[222] France, Law No. 87-517 of 10 July 1987 in favour of employment of disabled people (*Loi No. 87-517 du 10 juillet 1987 en faveur de l'emploi des travailleurs handicaps),* available at: http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000512481 (accessed 6 September 2016).

[223] Court of Cassation, Social Chamber, No. 1083, 06 May 2003, *Revue de jurisprudence Sociale* 8-9/03, p. 733.

Decree No. 2009-560 of 20 May 2009[224] imposing minimum quotas of employees over 50 creates Article R138-25 ff. of the Social Security Code and provides that businesses employing 50 people or more must either be bound by branch collective agreements to implement a contractually defined obligation of employment of older employees or must negotiate an agreement or engage in an action plan in favour of the employment of workers over 50 in order to meet their obligation in this regard.

The agreements must set quantitative objectives and employers must provide the statutory employees representative, such as the 'personnel representative' and the 'Enterprise Committee', with reports indicating quantitative annual data on their results with regard to these objectives, which are submitted to the collective bargaining unit and to labour authorities.

They must cover the employment of older workers, their career development projections, improvement of working conditions and protection related to the physical burden of work, access to training and skills development, accommodation of working conditions at the end of the older worker's career and transition towards retirement, as well as the development of tutorial and knowledge transfer programmes.

Reports on these agreements must be submitted to departmental labour authorities. The sanction for not undertaking such an agreement and of not following its objectives is to pay a special retirement contribution amounting to 1 % of the total gross salaries of all employees paid by the employer.

B- Broad social policy

1. Disadvantaged suburbs

In a context of significant concentrations of people of foreign descent in disadvantaged suburbs, the criteria of socio-economic status and territorial links to designated geographical areas mean to indirectly target discrimination based on origin. In this context, some experts regard certain recent equal opportunities policies as promoting a 'differentialist' approach, leading to indirectly implementing quotas or targeting systems that are deliberately designed in formally neutral terms but in such a way as to take account of the social reality of 'origin'.[225]

As a matter of fact, the policy focusing on disadvantaged suburbs (called '*politique de la ville*'), concentrates a number of actions targeting communities of foreign origin which encourage integration and combat discrimination.

The major instruments of this policy are municipality contracts ('*contrats de ville*'), including thematic agreements addressing issues of discrimination, Major City Projects (*Grands Projets de Ville, GPV*), Urban Stimulation Zones (*Zones de redynamisation urbaine, ZRU*) and Priority Education Zones (*Zones d'éducation prioritaires, ZEP*).

[224] France, Decree No. 2009-560 of 20 May 2009 relating to the content and the validation od conventions and actions plans in favour of employment of old workers *(Décret No. 2009-560 du 20 mai 2009 relatif au contenu et à la validation des accords et des plans d'action en faveur de l'emploi des salariés âgés*), available at: http://www.legifrance.gouv.fr/eli/decret/2009/5/20/ECED0901854D/jo/texte (accessed 6 September 2016).

[225] Maisonneuve, M. (2002), *Les discriminations positives ethniques ou raciales en droit public interne: vers la fin de la discrimination positive à la française* (Positive ethnic and racial discrimination in public law: towards an end to French positive action), AFDA, p. 561.

C- Preferential treatment narrowly tailored

1. Integration measures for school attendance by migrant and Traveller children

The Ministry of Education has issued several directives in order to facilitate school attendance by Traveller children: Ministerial instruction (Ministerial instruction No. 91-220 of 30 July 1991) instructed school principals to admit children to classes, even for a few days, without requirements for formal registration with the municipal authorities. In 2002, the Ministry of Education rationalised and put in place a formal notice instructing all education authorities and school principals as to the organisation of support for the education of Roma children (Ministerial instruction No. 2002-101 of 25 April 2002).[226] Ministerial instruction 2002-102 creates a coordinating training and documentation structure at the rectorate level (local administrative unit of national education), called the CASNAV,[227] which is supposed to provide support to integration classes and local initiatives. In total 34 such centres coordinate 104 local networks. Their effectiveness depends on political orientation at the local level.

Ministerial instruction No. 2012-142 of 2 October 2012 regarding School Integration of Traveller Children reiterates the duty to integrate the children of foreign nationals, Travellers and Roma, regardless of their nationality, conditions of housing and official status in France.[228] This instruction was completed by another instruction (*circulaire* No. 2012-143 of 2-10-2012 BOEN special No. 37 of 11 October 2012) providing for the generalisation of the CASNAV scheme to all rectorates. In order to facilitate integration, children can register for school attendance directly with the CASNAV.[229]

2. Integration measures for migrants

Upon arrival in France documented foreign nationals are enter a programme for a period of five years in order to facilitate their integration through personalised social support, French language classes and training for economic integration. This programme is implemented by local authorities under the supervision of a directorate of the Ministry of the Interior called the DAAEN[230] with the support of the OFII[231] which is the financial and executive operator of this policy.

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[226] France, Ministerial Instruction No. 2002-101 of 25 April 2002 relating to school integration of Traveller children (*circulaire no 2002-101 du 25 avril 2002 scolarisation des enfants du voyage et de familles non sédentaires*) available at: http://www.education.gouv.fr/botexte/sp10020425/MENE0201120C.htm%20 (accessed 6 September 2016).

[227] Centres for the promotion of school attendance by non-French-speaking children who have recently arrived in France and Traveller children *(Centre académique pour la scolarisation des enfants allophones nouvellement arrivés et des enfants issus de familles itinérantes et de voyageurs, CASNAV):* Ministerial Instruction No. 2012-143 of 2 October 2012 relating to the organisation of CASNAV (*circulaire no 2012-143 du 2 octobre 2012 relative à l'organisation des CASNAV*), available at: http://www.education.gouv.fr/pid25535/bulletin_officiel.html?cid_bo=61527 (accessed 6 September 2016).

[228] On educational integration of newly arrived non-French speaking children see Ministerial Instruction no 2012-141 of 2 October 2012 relating to the school intergration of newly arrived non–French speaking children,(*circulaire no 2012-141 du 2 octobre 2012 relative à la scolarisatin des élèves allophones nouvellement arrivés*) http://www.education.gouv.fr/pid25535/bulletin_officiel.html?cid_bo=61536 (accessed 6 September 2016); Ministerial Instruction No. 2012-142 of 2 October 2012 relating to the schooling of children from Traveller families and families without residence *(Circulaire no 2012-142 du 2 octobre 2012, REDE 236611C. RED-DEGESCO A1-1 relative à la scolarisation de enfants issus de familles itinérantes et de voyageurs*), available at: http://www.education.gouv.fr/pid25535/bulletin_officiel.html?cid_bo=61529 (accessed 6 September 2016).

[229] France, Ministerial Instruction No. 2012-143 of 2 October 2012 relating to the organisation of CASNAV.

[230] Directorate for Support, Integration and Access to Citizenship for Foreign Nationals (*Direction de l'accueil, de l'accompagnement des étrangers et de la nationalité*).

[231] French Office of Immigration and Integration (*Office français de l'immigration et de l'intégration*).

6 REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

a) Available procedures for enforcing the principle of equal treatment

In France the following procedures exist for enforcing the principle of equal treatment (judicial, administrative and alternative dispute resolution such as mediation).

There are judicial and non-judicial means of legal action in France.

Administrative procedure for disabled people's rights access

Article 64 of the Law No. 2005-102 on equal opportunities and the integration of disabled persons creates a Departmental Centre (*Maison départementale*) for people with disabilities that is intended to centralise all administrative procedures for enforcing the rights of disabled people. It further creates a claim reference person within these Departmental Centres (Article 146-13 CSW), who will transmit the disabled person's claim to the competent authority or jurisdiction. The decree establishing these Departmental Centres was adopted on 19 December 2005 (Decree No. 2005-1587).[232]

Non-judicial means of intervention

Both private and public employers can initiate a non-judicial in-house inquiry if a victim of harassment brings to their attention, or if they suspect, an incidence of discrimination, as they must guarantee a working environment free of such practices.

Staff representatives, the human resources manager or work councils (*Comité d'entreprise*) also have the power to request social dialogue on the integration of disabled workers (L2241-5, L2242-13 and L2242-14 of the Labour Code (LC)), and working conditions (L2241-3 and L2241-44 LC).

Labour Inspectors have reinforced investigation powers. They can enter all premises (Article L8113-5 LC), obtain communication of any document or information providing evidence of the facts, whether on paper, computerized support or other (L8113-4. LC). They may also draft a contravention report certifying their observations (L8113-7 LC) and submit this report to the Public Prosecutor (Article 40 Code of Penal Procedure, CPP).

With regard to mediation, Articles 21 and 131 of the New Code of Civil Procedure expressly refer to the duty of the judge to favour mediation and to designate a third party mediator upon obtaining the consent of the parties to that end. Conciliation is the first stage of any legal action before the Employment Tribunal in application of Article L1423-13 LC. The labour inspector (L611-1 ff.) can also initiate these non-judicial means of action.

Article 6 quinquies of Law No. 83-634 sets out the principle of disciplinary sanction against any public servant committing discriminatory actions.

With respect to claims against the public service, mediation can be pursued by the Defender of Rights (*Défenseur des droits*) or one of the many mediators put in place by specific public services relating to social protection, education, public transport, the

[232] France, Decree No. 2005-1587 of 19 December 2005 relating to the creating of the departmental centre for disabled people (*Décret No. 2005-1587 du 19 décembre 2005 relatif à la maison départementale des personnes handicapées),*available at: http://www.legifrance.gouv.fr/eli/decret/2005/12/19/SANA0524615D/jo (accessed 6 September 2016).

postal service, finance etc. This mediation is pursued without prejudice to the administrative legal action, which must be pursued independently.

In addition, the Defender of Rights, the French equality body, can investigate any claim alleging discrimination on any ground covered by French law and present observations before a judge, as amicus curiae (see Section 7). However, its decisions are not binding.

Legal actions against private parties

Legal actions may be brought before the Employment Tribunal (*Conseil de Prud'hommes*) in matters related to employment, private-sector salaried employees or contractual public agents of an industrial or commercial public service.

In cases of discrimination in employment, Article L1133-3 LC provides for action seeking damages as well as the possibility of requesting the annulment of a discriminatory measure before theEmployment Tribunal.

The right of alert of the employees' representative in case of violations of human rights and freedoms in the workplace, stipulated in Article L2313-2 LC, entitles the representative to file an emergency petition for injunctive relief before the Employment Tribunaland applies to cases of discrimination.[233]

It is important to note that on 12 December 2006 the Court of Cassation decided that the labour courts had jurisdiction over pre-contractual matters and were competent in cases related to access to employment and apprenticeship.[234] Moreover, the Court of Cassation decided to establish a specialised chamber of the Social Chamber to deal with the enforcement of anti-discrimination law in labour cases and chose anti-discrimination law as the topic for its annual thematic report on law enforcement in 2008.

Legal actions may also be brought before the district court (*tribunal d'instance*) or regional court (*tribunal de grande instance*) depending on the amounts involved or claimed (in cases relating to all other matters such as housing and access to goods and services).

Criminal procedure

Pursuant to Article 28 of the Organic Law (*loi organique*) of 29 March 2011 creating the Defender of Rights, under the supervision of the public prosecutor the Defender of Rights can negotiate a settlement.

Articles 121-1 and 121-2 PC establish the criminal responsibility of physical and legal persons. Article 225-2 PC, in the case of a private party, and Article 432-7 PC, in the case of a public servant or public authority, provide for a criminal complaint filed with the police or public prosecutor. The prosecution acts based on police enquiries (Article 15-3 CPP) after the victim's complaint or further to notice given by any public servant (Article 40 CPP). Victims and NGOs can also directly notify the public prosecutor. It is the public prosecutor which decides, further to its enquiries, whether to prosecute or not. A private party and the Defender of Rights, if the respondent refuses a settlement, can also initiate proceedings by way of direct citation (*citation direct*) but then they carry the entire burden of proof.

[233] Court of Cassation Social Chamber, 26 May 1999, Bull. Civ. V No. 238.
[234] Court of Cassation Social Chamber, No. 06-40662, 06-40799 and 06-40.864, 20 December 2006.

Legal action against the state or a public service

All claims against public services, in matters related to the employment of public servants ((Article 6 et. s. of Law No. 83-634) and to access to public services (such as access to school and social rights) must be brought before the administrative courts, whether they relate to the application of Law No. 2008-496 completing the implementation of Directives 2000/43/EC and 2000/78/EC in all matters dealing with the public services including education, or rely on general principles of administrative law which also provide legal redress against discrimination. The administrative court may correct the situation and/or award damages.

Concerning legal action to obtain an order for desegregation of a school, such action has never been initiated. In two cases where specific segregated classrooms were implemented for a few weeks before the evacuation of campsites, in order to satisfy the legal obligations of access to school for Roma children, the mayor was prosecuted in a criminal court in application of Article 226-2 PC, and before the administrative court for illegal action, since segregation is forbidden by law.

Mechanisms to support access to justice

Since 1996, France has put in place a national network of Points of access to rights (*points d'accès au droit*), offering legal expertise and free legal consultations. The network is managed by the Ministry of Justice and implemented through the Departmental Commission on Access to Rights under the supervision of the President of the First Instance District Court.

Law No. 2005-102 on equal opportunities and the integration of disabled persons recognises the right of people with impaired hearing to a sign language interpreter before the civil and criminal courts, and the right of the visually impaired to the provision in Braille of civil and criminal court records (Article 76), all these measures being provided at the cost of the state.

Public buildings and courts must be accessible to the public (Article L111-7 of the Construction and Housing Code) unless they have obtained special authorisation from the prefect (Ministerial Instruction No. 94-55 of 7 July 1994, R111.19.3 CCH. Construction and Housing Code). Article L152-4 of the Construction and Housing Code foresees enforcement of this principle through criminal fines and injunctive relief.

b) Barriers and other deterrents faced by litigants seeking redress

Legal expertise

Litigants seeking redress are faced with a number of barriers, whether they result from their situation or from insufficient legal expertise on the part of judicial actors. The main problems they experience are insufficient legal expertise on the part of NGOs supporting people in situations of great social and financial distress and anti-discrimination NGOs in general, non-specific legal action regarding access to goods and services, insufficient legal skills of legal actors regarding the implementation of the burden of proof, the complexity of the statute of limitations regarding actions in matters related to employment, the preliminary requirements before enforcing rights against the state, the inadequate resources of the labour inspectorate, the penal reflex of victims who seek redress before the criminal courts and conditions of access to litigation.

As regards access to redress for Travellers, if a municipality fails to put in place specific parking sites for the travelling population, it is barred from seeking removal of the

Travellers' trailers and from prohibiting parking[235] and can be challenged for this failure before the administrative courts. However, these are very technical remedies, which require the assistance of a lawyer and Travellers and Roma communities find it difficult to access legal aid due to the complexity of the administrative requirements.

Absence of a specific means of legal action

There are no specific legal actions or sanctions in matters related to education, housing or goods and services in general. For instance, in case of harassment in education related to internship programmes with a private employer, no specific means of legal action is available. Claimants must put their claim before the civil courts or, if they wish to challenge the state in cases relating to public housing and state education, they must apply to the administrative court like any other claimant.

Regarding the prohibition of police forces to perform racial profiling in police controls, The Court of Appeal of Paris decided on 24 June 2015 that, given the obligation of the state to insure access to judicial redress, in the absence of formal judicial procedures and of a procedure keeping evidence of police controls performed, and in a context where racial profiling is widely practiced, civil action in damages against the state can take advantage of the shift in the burden of proof. Therefore, if the claimant establishes by way of a witness statement that differential treatment was operated in the selection of persons subjected to police controls, then the police forces has the burden of justifying the relevance of the control. The state has presented a request before the Court of Cassation to quash this decision.[236]

Shift in the burden of proof

Legal actions relating to discrimination which come before the civil courts benefit from the shift in the burden of proof, as established by explicit statute (Law of 16 November 2001, Law of 17 January 2002 and Law No. 2008-496) (see Section 6.3) but remain difficult to enforce. The judicial tradition is to go to a civil court with the elements of evidence readily available to the party, which explains why claimants often go to the criminal courts to obtain access to evidence. In addition, in cases of discrimination, the evidence is very often in the hands of the defendant and not accessible to the claimant without intervention by a judge. Moreover, in France, making copies of documents belonging to the employer is considered theft. The rules of civil procedure make access to evidence in the hands of the other party or a third party, by way of what is called 'investigative measures' (*mesure d'instruction*), very difficult, as this is considered as an exceptional measure and is conditional upon having already provided sufficient evidence to the court. It is not in the legal culture of judicial actors, judges and lawyers to use these procedural means of access to evidence, as the judge in civil matters is seen as not inquisitorial and not part of the process leading to the introduction of evidence before the court.

Complexity of statute of limitations for instituting legal action in employment matters

In 2005 the Court of Cassation decided that discrimination claims related to the execution of a contract were subject to a statute of limitations of 30 years (Article 2262 CC).[237] A major reform of all statutes of limitations was adopted by Law No. 2008-561 of

[235] High Judicial Court of Montauban, No. 02/00171, 3 May 2002, available at: http://www.rajf.org/article/php3?id_article=1043 (accessed 6 September 2016).

[236] Paris Court of Appeal, civil chamber, No. 348 – 13/24286, No. 347, 13/24284, No. 346, 13/24277, No.345, 13/24274, No.344, 13/24269, No.343, 13/24267, No.342, 13/24265, No. 341, 13/24262, No. 340, 13/24261, No. 351, 13/24303, No. 350, 13/24300, No. 349, 13/24299, No. 339, 13/2425524 June 2015, available at: http://www.defenseurdesdroits.fr/fr/actions/protection-des-droits-libertes/decision/decision-msp-mds-mld-2015-021-du-3-fevrier-2015, (accessed 6 September 2016).

[237] Court of Cassation, Social Chamber, *Renault v. Morange*, No. - 02-43.616, 15 March 2005, *Dictionnaire permanent Social* (Dictionary of Social welfare law), 4114, Bulletin 814.

17 June 2008,[238] reducing the time limit for instituting any personal and moveable property actions to five years (Article 2224 Civil Code).

Moreover, further to complaints and lobbying on the part of employers as to the unmanageable scope of their risk, the statute of limitations for instituting an action in discrimination before the labour courts was lowered to five years, as is the case for claims relating to salaries (Article L1134-5 of the Labour Code). This reform entails an important regression in the scope of protection against discrimination. Article L1134-5 LC provides:

> 'any action in compensation of damages resulting from discrimination shall lapse after five years from the incidence of discrimination becoming known.'
>
> 'Compensation covers the damages in their entirety resulting from the whole duration of the discrimination.'

The Court of Cassation decided that prescription had no impact on the relevance of comparative evidence going beyond the prescribed period.[239] It has further decided that the concept of 'the discrimination becoming known' in Article 1134-5 of the Labour Code meant that the statute of limitations starts only when the victim has exact knowledge of the necessary comparative elements and their evidence.[240] The only time limit therefore results from another rule, provided in Article 2232 of the Civil Code, which limits the suspension of prescription by 'ignorance' of the facts, in all cases, to 20 years.

The criminal courts are competent in matters related to hiring, sanctions and dismissals in the workplace, access to goods and services (including all public services such as public housing, education, social rights etc.). They may impose criminal sanctions (i.e. fines, prison, loss of civil rights) and damages if the claimant has lodged a civil complaint before the criminal court. The time limits for the prosecution of discrimination through a criminal action are three years (Article 8 CPP).

Preliminary requirements for enforcing rights against the state

However, under all legislation governing civil servants, the time limit for presenting a claim to challenge a decision taken by a public employer must be preceded by a written request to have the decision reconsidered. This must be submitted within two months of the dismissal and followed by a formal administrative legal petition filed not earlier than two months after this written request. The claim for damages against the state must also be preceded by a written request which is not subject to a statute of limitations, but the administrative legal action must be filed not earlier than two months after the written request.

Insufficient resources of the Labour Inspectorate

The limited numbers of labour inspectors, who have the burden of pursuing all violations of the Labour Code, reduces the efficiency of this body, whose members are entirely free to choose the situations they investigate. In addition, their investigations lead exclusively to criminal claims and they do not transmit the results of their investigations to the parties or to the civil judge.

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[238] France, Law No. 2008-561 of 17 June 2008 reforming the civil statute of limitations (*Loi No. 2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile*), available at : https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019013696 (accessed 6 September 2016).

[239] Court of Cassation, Social Chamber, No 07-42697, 4 February 2009.

[240] Court of Cassation, Social Chamber, No. 05-45163, 22 July 2007.

The tendency of victims to file criminal complaints

The main reason so many people resort to the criminal courts is that it gives them access to evidence through the judge's investigation. In addition, in the context of criminal claims, they do not have to get involved or need a lawyer; the prosecution takes charge of the investigation and the prosecution. The public prosecutor nevertheless has the choice to investigate and pursue the matter or not in the name of the state. For a long period, very few discrimination complaints were prosecuted.

Since 2007, the Ministry of Justice has put in place a policy of specialisation, instituting a dedicated service to treat discrimination-related criminal complaints at the public prosecutor's office with the objective of increasing the rate of criminal prosecutions. However, the requirements of evidence in criminal matters lead to few decisions being issued in favour of the claimant, despite the significant number of complaints.

Conditions of access to litigation

Representation by a lawyer is not mandatory before the labour courts, the district courts and the criminal courts, or before the appeals court when appealing from the latter jurisdictions. Representation by a lawyer is mandatory before the regional courts, the commercial courts (Law No. 71-1130 of 31 December 1974),[241] the administrative courts (regulation of 4 May 2000) and the Court of Cassation (Article 974 ff. of the New Code of Civil Procedure, NCCP).

Legal aid is available to individuals on low incomes (Law No. 91-647 of July 1991 on legal aid.[242]

Since the equality body cannot initiate judicial proceedings, victims have the burden of instituting action and finding financing for their own litigation costs.

c) Number of discrimination cases brought to justice

In France there are no available statistics on the number of cases related to discrimination brought to justice.

Any quantitative study involves going to each district and evaluating the archives. In addition, the only statistics available concern convictions based on Article 225-2 of the Penal Code and relate only to convictions registered in the individual's criminal records. Therefore there are no statistics concerning the number of complaints lodged or the treatment they receive. Since 1998, the statistics show an average of 10 convictions per year for an approximate number of complaints evaluated at about 7 000 per year.

d) Registration of discrimination cases by national courts

In France discrimination cases are not registered as such by national courts.

[241] France, Law No. 71-1130 of 31 December 1971 reforming certain judicial professions (*Loi No. 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques*). Available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068396 (accessed 6 September 2016).

[242] France, Law No. 91-647 of 10 July 1991 relating to legal aid (*Loi No. 91-647 du 10 juillet 1991 relative à l'aide juridique*), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006077779 (accessed 6 September 2016).

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

a) Engaging on behalf of victims of discrimination (representing them)

In France associations, organisations and trade unions are entitled to act on behalf of victims of discrimination.

In France all trade unions are legally constituted with the status of associations. The Law of 16 November 2001 provides the possibility to all representative trade unions and NGOs which have been in existence for over five years to act on behalf or in support of victims of discrimination (Article 2, Code of Penal Procedure). They can act for the claimant in actions for any apprentice, trainee, job applicant or employee who alleges that they have been a victim of discrimination (Article L1132-1 LC ff., Law No. 83-634 of 13 July 1983 in the public sector Article 8, paragraphs 1 and 2).

However, they have no legal duty to act.

b) Engaging in support of victims of discrimination

In France associations, organisations and trade unions are entitled to act in support of victims of discrimination.

In France trade unions are legally constituted with the status of associations. Trade unions and NGOs can act in support and on behalf of victims of discrimination before any jurisdiction: Article R779-9 of the Code of Administrative Justice, Article 3 of the New Code of Civil Procedure, Article 2, Code of Penal Procedure; Articles L1134-2 and L1134-3 of the Labour Code, Law No. 83-634 of 13 July 1983 in the public sector Article 8, paragraphs 1 and 2).

Article 33 of the Organic Law (*loi organique*) creating the Defender of Rights also provides that the Defender can present observations in any case before any jurisdiction.

In addition, the Law of 16 November 2001 provides the possibility to all representative trade unions and NGOs which have been in existence for over five years to act on behalf of victims of discrimination (Article 2, Code of Penal Procedure). They can intervene in the action for any apprentice, trainee, job applicant or employee who alleges that they have been a victim of discrimination (Article L1132-1 LC ff., Law No. 83-634 of 13 July 1983 in the public sector Article 8, paragraphs 1 and 2). Finally, the Labour Code was amended by Law No. 2005-102 on equal opportunities and the integration of disabled persons, Article L1134-2 was created in order to provide standing to trade unions and Article L1134-3 to provide standing to NGOs acting to uphold the rights of disabled people to intervene before the courts in matters of discrimination.

c) Actio popularis

In France Law No. 2001-1006 allows associations, organisations and trade unions to act in the public interest on their own behalf, without a specific victim to support or represent.

The standing of any person who has a legitimate interest in the dismissal or granting of the action in all civil cases pursuant to Article 31 NCCP and Article R779-9 of the Code of Administrative Justice has been created in order to award standing to NGOs when they established that the facts at issue violated the collective interest they represented as declared in their constituting associative purpose pursuant to the Law of 1 July 1901.[243]

[243] Civ. 2e, 21 July 1986: Bull. Civ.II, No. 119.

d) Class action

In France national law does not allow associations, organisations or trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event except in matters related to access to housing as provided by Article 163 of Law no 2002-73.

However, following a number of initiatives on the part of Members of Parliament that have never been taken up by the Government, the Prime Minister announced that a bill would be presented to create a class action procedure for victims of discrimination. The bill was passed before the Senate in first reading on 5 November 2015 and is scheduled to be voted in first reading by the National Assembly in May 2016.[244] The provision has been conceived as a tool to impose change in future practice. A class action will be preceded by a written request that must give rise to a six months period of mediation. This action will be a request for cessation of discrimination, without compensatory damages for the past. The action will be exclusively initiated by trade unions for discrimination in the work place, and NGOs for discrimination outside employment.

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

In France national law requires a shift of the burden of proof from the complainant to the respondent.

The shift in the burden of proof has expressly been transposed in all matters that concern Directives 2000/43/EC and 2000/78/EC by Law No. 2008-496 at Article 4 and Article 158 of the Law of 17 January 2002 in matters of housing (modifying Article 1, paragraph 3 of Law no 89-462 of 6 July 1989).

- The claimant must present facts leading to a presumption of direct or indirect discrimination.
- Having satisfied this requirement, the defendant must establish that their decision was justified by objective elements, which have nothing to do with discrimination. It does not require that the defendant justify proportionality and necessity. Since this requirement is not intrinsically included in the definition of direct discrimination in Article 7, the burden of proof ends up being lighter for defendant in direct discrimination cases than in indirect discrimination cases. This does not appear to comply with the requirements of the directive.
- The judge forms an opinion after having ordered, if necessary, any investigative measures they consider useful.
- The claimant never has to establish that they are a member of a group targeted by the discrimination ground. Only the behaviour of the defendant is considered.

This shift in the burden of proof is thus applicable in all non-criminal legal actions (in the case of self-employed workers and the liberal professions, private and public employees, access to goods and services in the private and public sector and claims against services provided by the state).

For claims relating to the public sector that are brought before the administrative court, the administrative procedure is inquisitorial and is covered by the derogation provided in Article 8(5) of Directive 2000/43/EC and Article 10(5) of Directive 2000/78/EC.

Article R411-1 of the Code of Administrative Justice provides that 'the procedure alleges the facts, arguments and conclusions submitted to the judge'. Thus, the claimant is deemed not to have the burden of proof. However, in a plenary decision, the *Conseil*

[244] See: http://www.assemblee-nationale.fr/14/dossiers/justice_21e_siecle.asp.

d'Etat has spelled out indications to lower administrative courts as regards the implementation of the burden of proof in discrimination cases:

> 'while it is for the claimant to submit to the judge elements of facts that could lead the judge to presume a violation of the principle of non-discrimination, the respondent must adduce in evidence any elements that could justify that the decision challenged is based on objective elements devoid of discriminatory objectives. The decision of the judge is based on this exchange of contradictory elements. In case of doubt, the judge must complete the investigation by ordering any investigatory measure (or the filing of any element) that they deem necessary.'[245]

In fact, this definition of the shift in the burden of proof is very close to the definition implemented in Article L1134-1 of the Labour Code.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

In France there are legal measures of protection against victimisation.

Article 3 of Law No. 2008-496 of 27 May 2008 established a specific protection against victimisation applicable to the entire scope of civil legal actions alleging direct or indirect discrimination covered by the directives, which provides that no person, having testified in good faith about discriminatory behaviour, can be treated unfavourably on such a ground. No decision can be taken against a person because they were a victim of discrimination or because of their refusal to submit to discrimination as prohibited in Article 2.

This protection clarifies that it extends to victims and non-victims but does not provide any indication as to the burden of proof applicable to claims of victimisation and does not assimilate victimisation with discrimination.

Finally, the Penal Code protects victims and witnesses. Article 434-15 PC sanctions threats and intimidation towards a witness, and Article 434-5 PC towards a victim, with a maximum penalty of three years' imprisonment.

It is important to note that, in reaction to actions relating to discrimination and sexual harassment, there has been an ever-growing defence strategy leading to the filing of criminal complaints for slanderous complaint (226-10 PC) in order to intimidate complainants. These have sometimes given rise to investigation.

As for other grounds of criminal complaints, there are no statistics or studies as to the number of such complaints and their results, since they are integrated in global statistics relating to slanderous complaints.

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

- Applicable sanctions in cases of discrimination – in law and in practice

There are damages but there are no punitive sanctions in non-criminal cases.

The Perben II Law on adapting justice to developments in criminality was adopted on 9 March 2004.[246] Criminal sanctions incurred in relation to the criminal offence of

[245] *Conseil d'Etat*, No. 298348, 30 October 2009.

[246] France, Law No. 2004-204 of 9 March 2004, adapting justice to developments in criminality (*Loi No. 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité),* available at:

discrimination are increased to a maximum of three years' imprisonment and a EUR 45 000 fine (Article 225-2 PC).

The Penal Code creates an aggravating factor in relation to a discriminatory refusal to sell or allow access to a public place (nightclubs, shops, public services etc.), sanctioned by a maximum of five years' imprisonment and a EUR 75 000 fine. In addition, the Penal Code allows accessory sanctions in Article 225-19 PC: posting or publication of the judgment, closing down of a public place, exclusion from procurement contracts, confiscation of a business, suspension of civil rights and a list of further penalties that are seldom imposed. The same sentence is applicable in cases of discrimination by public services (Article 432-7 PC).

Legal persons, including the state and all public services, can also be convicted by the criminal court, and this liability does not exclude that of the physical person.

In non-criminal matters only compensatory remedies can be sought before the civil and administrative courts.

In cases involving the public services, legal actions must be brought before an administrative court. Two courses of action are available: one for excess of power to annul the decision challenged or the full jurisdiction petition, in order to obtain not only annulment of the decision but damages as well.

In addition to criminal and administrative legal actions, a civil servant can also be subject to disciplinary sanctions in application of Article 66 of Law No. 84-16 of 11 January 1984, Article 89 of Law No. 84-53 of 26 January 1984 and Article 81 of Law No.86-33 of 9 January 1986.

Before theEmployment Tribunal, the claimant may seek compensation and annulment of the discriminatory measure, thereby requesting reintegration in case of dismissal (Article L1132-4, Labour Code).

- Ceiling and amount of compensation

There is no ceiling on the amount of compensation.

There is no statutory upper limit but French legal practice is still very conservative in calculating pecuniary loss, and amounts awarded remain rather low and depend on the evidence adduced.

The first civil case against a private real estate agent was successfully brought before the civil courts in 2008, before the Montpellier district court (*tribunal d'instance*).

The court awarded EUR 3 000 in non-pecuniary damages, stating for the first time that suffering discrimination deserved specific compensation for non-pecuniary damages, which ought to be significant.[247] Since then, it has been observed that, when the claimant fails to quantify financial loss through concrete evidence, in situations such as discrimination in access to employment, or loss of business due to failure to gain access to the court building, in 2010 the courts awarded EUR 20 000 in non-pecuniary damages, an award that stands as a substitute in the face of difficulties in establishing damages (Airbus case, see above, and Bleitrach case, see above).

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http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068396 (accessed 6 September 2016).

[247] District Court of Montpellier, *Drucker v. Galerie Gregoire RG*, No. 11-07-001540, 3 April 2008.

However, the court often awards no moral damage, expressly stating the lack of evidence from the claimant.

In matters related to access to goods and services, cases are so rare and remedies so low that they cannot be considered to be effective and dissuasive.

In employment-related cases, however, compensation is more significant. Nevertheless, while it compensates the claimant's losses, enforcement of the non-discrimination rule is not widespread and cases are isolated. Therefore, judicial convictions are not yet effective and dissuasive.

- Assessment of the sanctions

There is no punitive sanction in civil matters.

Criminal sanctions represent about five to 10 cases a year. Given that they occur in matters related to goods and services with little evidence of significant damages, despite provisions of the law which allow for fines ranging up to EUR 45 000 and three years' imprisonment, the criminal sanctions awarded by the courts are very low, ranging from a few hundred to a few thousand Euros. They can be accompanied by suspended prison sentences. In a 2007 decision relating to a denial of access to a hotel for an individual wearing a headscarf, the hotel manager was sentenced to a EUR 1 000 fine and a four-month suspended prison sentence. Meanwhile, in a 2014 decision relating to a denial of access to a gym to an individual wearing a scarf, the sentence was a EUR 250 fine. Such sanctions are not effective and dissuasive.

However, in a Court of Appeal of Paris decision of 11 February 2014 against EasyJet's repeated refusal to admit people in wheelchairs aboard their planes, EasyJet was sentenced to a total fine of EUR 50 000 (in relation to a number of occurrences), lowering a sentence of a fine of EUR 70 000 imposed by the trial court.[248] The Court of Cassation upheld this sentence.[249]

[248] Paris Court of Appeal, No. 12/05062, 11 February 2014.
[249] Court of Cassation Criminal Chamber, No. 13-81586, 15 December 2015, Available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000031658282&fastReqId=1575884415&fastPos=4 (accessed 6 September 2016).

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

A specialised body has been designated for the promotion of equal treatment irrespective of racial or ethnic origin according to Article 13 of the Racial Equality Directive. It is the Defender of Rights established by Organic Law (*loi organique*) No.2011-333 of 29 March 2011.

b) Status of the designated body – general independence

Law No.2011-333 establishing the Defender of Rights integrated the HALDE into a new, constitutionally independent authority (Article 2), which merged a number of pre-existing specialised bodies, from 1 May 2011.

It provides for the centralisation of all powers within the control of the person of the Defender of Rights, who is appointed by the President of the Republic through a decision taken at a meeting of the Cabinet after consultation with both chambers of Parliament (Article 1). The Defender of Rights cannot be removed except for reasons related to their ability to perform their functions, as defined in Articles 3 to 5 of Decree No.2011-905 of 29 July 2011.[250]

The Defender of Rights nominates three deputies, one for each of its fields of action (Article 11 of Law No.2011-333). When new matters arise, the Defender can consult a collegial body dedicated to discrimination issues (Article 15 of the Organic Law) comprising eight members nominated by various institutions (three by the Senate, three by the National Assembly, one by the *Conseil d'Etat* and one by the Court of Cassation).

However, the Defender of Rights has the power to decide what claims to pursue (Article 24 of the Organic Law).

The reform integrating the HALDE into the Defender of Rights modifies the nomination and decision-making process of the equality body. The Defender of Rights takes no instructions, but he or she is appointed by the Government.

The Defender of Rights is not bound by any internal counter powers: he or she is not bound to follow the position of the collegial body and is only required to consult it on new matters submitted to the Defender for a decision. Furthermore, the process of appointment of the members of the collegial body of the Defender of Rights continues to be influenced strongly by political forces (six out of eight members are appointed directly by political authorities).

The administrative status of the Defender of Rights is not subject to the hierarchical authority of Government and it has free management of its budget. However, the body's financial resources are limited and derived completely from public funds, which are voted on by Parliament every year as part of the Prime Minister's budget, and thereby could be subject to budgetary cuts.

[250] France, Decree No. 2011-905 of 29 July 2011 relating to the organisation of the Defender of Rights (*Décret No. 2011-905 du 29 juillet 2011 relatif à l'organisation et au fonctionnement des services du Défenseur des droits)* available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000024414634&categorieLien=id (accessed 6 September 2016).

Whereas the HALDE's president's functions could be combined with an elected office, public employment or any other professional activity, the Defender of Rights and his deputies must resign from all other positions (Article 3 of the Organic Law).

In addition, as a result of the powers exercised by the former Ombudsman (*Médiateur de la République*), the Defender of Rights is competent in matters relating to illegal and unfair decisions by government services and to the rights and liberties of users of the public services. This extends the body's competence to human rights, public policy and public services. It also covers the rights of children covered by the UN Convention on the Rights of the Child and ethics in the activities of public and private security forces.

c) Grounds covered by the designated body

The Defender of Rights has the same field of competence as the HALDE on all forms of discriminations, direct and indirect, prohibited by French law and therefore readily adaptable to any future legal developments. It covers discrimination on the ground of affiliation, whether real or supposed, to an ethnic origin, nation, race or specific religion, sex, disability, loss of autonomy, age, health, sexual orientation, opinions, appearance and trade union activities in all areas regulated by law or covered by an international convention. Its scope goes beyond the requirements of Directives 2000/43/EC and 2002/73/EC.

In addition, given its competence with regard to all issues relating to claims against government and public services, as well as the 'superior interest of children', as defined in article 3 of the UN Convention on the Rights of the Child, and ethics in the activities of public and private security forces, its range of intervention covers most human rights issues, except as regards defence rights in criminal law, as well as all issues relating to children's rights and all issues relating to relations between the police, security forces and citizens.

d) Competences of the designated body – and their independent exercise

The Defender of Rights has powers similar to those of the HALDE, and the drafting of the organic law on matters of discrimination is modelled on the law creating the HALDE.

In addition to investigative powers, the Defender of Rights provides independent assistance to victims of discrimination in pursuing their complaints, conducts independent surveys concerning discrimination, publishes independent reports and makes recommendations to government, employers and civil society actors relating to its findings on discrimination.

<u>Assistance to victims</u>

The Defender of Rights has competence to investigate individual and collective complaints, whether the investigation is initiated of its own accord or following a written request from the claimant, a trade union or an NGO.

These investigative powers allow the Defender to request explanations from any public or private person, including the communication of documents and the hearing of relevant witnesses.

In case of non-cooperation with its investigative services, the Defender of Rights can request a court order and can also pursue the respondent for contempt. The Defender of Rights may also ask that all required investigations be carried out by any service of the state and carry out visits in any non-private premises after due notice and with the consent of the owner. Finally, the law gives the investigators authority to issue a sworn

statement concluding that discrimination has taken place, which can only be contradicted by way of substantial evidence before the courts.

In the case of a criminal offence, the Defender of Rights may submit the claim to the criminal courts or proceed with a penal transaction. This is a kind of negotiated criminal sanction offered to perpetrators of direct discrimination by application of Article 28 of the Organic Law, enforced exclusively by the Defender of Rights. It means that the Defender of Rights, following the investigation of a complaint resulting in a finding of direct intentional discrimination by the person or entity investigated, is authorised to suggest a specific criminal sanction to the perpetrator, which they can either accept or reject. This could be a fine or publication (for instance in a press release) of the fact that discrimination has taken place and, if relevant, an award of compensation to the victim. If the proposed negotiated criminal sanction is rejected or there is a subsequent failure to comply with it, the Defender of Rights may initiate a criminal prosecution, in place of the public prosecutor, before a criminal court. This system has much in common with the procedures followed by other administrative authorities, which have the power to propose on-the-spot fines for an infringement of the criminal law, such as the tax, customs and water or woodland authorities.

Otherwise, the Defender of Rights can deal with any case by pursuing an equitable settlement, which in French law consists of proposing a solution correcting the unfairness of a strict application of the law despite the absence of effective means of legal action (Article 25 of the Organic Law creating the Defender of Rights), and it may recommend mediation to the parties.

When the Defender of Rights completes the investigation, it will issue conclusions and recommendations to the parties who will have a certain amount of time to comply. These recommendations can include a request for disciplinary sanctions. The Defender can also make general recommendations to the parties, Government, public bodies or groups of interest and propose legislative and regulatory reforms and the amendment of existing legislation.

In cases of non-compliance, the Defender has the power to issue 'injunctions', failing which the body will draw public attention to its recommendations and the failure to comply. In addition, it may alert the relevant authorities if disciplinary sanctions against the respondent are required.

Conducting independent surveys

The Defender of Rights has a budget of EUR 300 000 to initiate or participate to surveys and studies in the field of discrimination. It also publishes an annual public survey implemented in collaboration with the French ILO authorities regarding the situation of discrimination in employment.

In 2015, the following studies co-financed by the Defender of Rights were published:

- *Selection Procedures of Workers with Lower Qualifications and Risks of Discrimination*;[251]
- *Discrimination Factors in the Processing of Requests for Social Housing in the Territories of La Camy, Nevers, Paris, Plaine Commune and Rennes Metropole*;[252]

[251] Pessaque, B. Guerrouahen, L., Trippon, C., Silva, F., (2015): Selection Procedures of Workers with Lower Qualifications and Risks of Discrimination (FACE).

[252] Driant, JC., Lelevrier, C., Cordier, M., Gaullier, P., Lanzaro, M., Navarre, F., (2015): *Analyse des facteurs et des pratiques de discrimination dans le traitement des demandes de logement sociaux à La Camy, Nevers, Paris, Plaine Commune et Rennes Métropole : Rapport final* (Discrimination Factors in the Processing of Requests for Social Housing in the Territories of La Camy, Nevers, Paris, Plaine Commune and Rennes Metropole), Defender of Rights/University of East Paris (IUP Lab'URBA).

- *Access to Voting for Disabled People*;[253]
- *Perceptions and Experience of Discriminations in Ile-de-France in 2014*;[254]
- *Introduction of the Subject of Discrimination in Secondary Level Teaching*;[255]
- *The Non-public Nature of Anti-discrimination Claim Mechanisms: challenges for public polices and victims*.[256]

Publication of independent reports and recommendations

Every year the Defender of Rights publishes independent reports addressed to the Government and recommendations to the Government and Parliament recommending legislative and regulatory reforms further to its findings of discrimination or in the course of the legislative process. In 2015, he sent 29 such reports to the Parliament[257] and five reports to the Government.[258]

e) Legal standing of the designated body/bodies

In France the designated body has legal standing to intervene in legal cases concerning discrimination.

The Defender of Rights has been conceived as a 'judicial official' (Article 33 of the Organic Law): the law creates the possibility for the criminal, civil and administrative courts to seek its observations in cases under adjudication. In addition, the Law on Equal Opportunities extended its power to the submission of observations on its own initiative before the criminal, civil and administrative courts.

It cannot bring a case on its own except as regards direct citation before the criminal courts in case of a refusal by the respondent to comply with the demands of a settlement (Article 28 of the Organic Law creating the Defender of Rights).

f) Quasi-judicial competences

In France the body is not a quasi-judicial institution.

g) Registration by the body/bodies of complaints and decisions

In France the body registers the number of complaints and decisions (by ground, field, type of discrimination, etc.). These data are available to the public in its annual report.[259]

h) Roma and Travellers

As regards the Roma and Traveller populations, HALDE had the opportunity to adopt a number of recommendations regarding access to education and housing, derogatory

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http://www.defenseurdesdroits.fr/sites/default/files/atoms/files/rapport_def_19_fevrier_2016_0.pdf (accessed 6 September 2016).

253 Defender of Rights (2015), *Accès au vote des personnes handicapées* (Access to voting for disabled people) (March 2015), internet link: http://www.defenseurdesdroits.fr/fr/publications/rapports/rapports-thematiques/acces-au-vote-des-personnes-handicapees.

254 Simon, P., Eberhard, M., (2015), *Perceptions et expérience des discriminations en Ile-de-France en 2014*, (Perceptions and Experience of Discriminations in Ile-de-France in 2014*)* INED, ARDIS.

255 Dhume, F., Sotto, F., (2015), *L'introduction du thème des discriminations dans l'enseignement secondaire* (Introduction of the Subject of Discrimination in Secondary Level Teaching), ISCRA, Association des Zégaux.

256 Bogalska-Martin, E., Prevert, A., (2015), *Les « non-publics » des dispositifs de lutte contre les discriminations : enjeux pour l'action publique et les victimes (*The non-public nature of anti-discrimination claim mechanisms : challenges for public polices and victims), PACTE – UMR CNRS 5194.

257 http://www.defenseurdesdroits.fr/fr/publications/avis-au-parlement (accessed 6 September 2016).

258 http://www.defenseurdesdroits.fr/fr/publications?type=46 (accessed 6 September 2016).

259 Defender of Rights (2015), *Annual Report 2015*, available at: http://www.defenseurdesdroits.fr/fr/rapport-annuel-dactivite-2015 (accessed 6 September 2016).

administrative conditions relating to travelling with regard to driving licences, identity cards, occupation of non-construction land, access to amenities etc.

However, in 2006, having observed insufficient numbers of claims by these groups, the HALDE decided to set up a working group to look into their specific status and its conformity with community law in order to submit recommendations to the Government to insure the pursuit of all necessary reforms. The conclusions of the working group were adopted by the HALDE in December 2007.

Law No.69-3 of 3 January 1969 relating to the status of Travellers still creates an obligation on the part of citizens with no permanent domicile who are travelling on French territory to hold special travelling identity papers that must be validated at the local office of the Ministry of the Interior within 48 hours of arriving in the prefecture (*préfecture*) and can be checked by the police at any time.[260] The HALDE has concluded that this was a violation of their rights to free movement and to privacy.

It recommended a reform of the status of Travelling people in order to eliminate all specific identity papers and all measures resulting in increased police checks (HALDE Deliberation No.2007-372 of 17 December 2007, recommending reform of the legal regime applicable to Travellers (*gens du voyage*).[261]

In addition, these citizens must specify a designated city where they are to be domiciled, but do not have the right to vote for three years, whereas the general population, as well as homeless people, are only required to have been registered for a period of six months in order to acquire the right to vote.

The Defender of Rights reiterated the HALDE's position and requested a reform of the legislation as regards access to voting rights in decision No. 2011-11 addressed to the Minister of Interior, who replied in February 2012 by referring to a proposed overall reform of the status of Travellers after the elections in autumn 2012. On 5 October 2012, the Constitutional Council quashed this aspect of the legislation and a legislative reform is expected. This recommendation was reiterated by the Defender of Rights in its decision MLD-MSP-2014-152 of 24 November 2014.[262]

On 1 December 2011, the Defender of Rights submitted a new proposal to the Minister of the Interior and all the mayors of France in order to request that all proceedings to cut access to electricity and water by reason of illegal use of land be suspended in the winter period for humanitarian reasons and the public duty to take into consideration in all matters the higher interest of the child. This recommendation was followed by some municipal authorities.

In 2009, the HALDE concluded that the French Government's policy and transitional regime targeted Romanian and Bulgarian Roma and was, as such, discriminatory on the ground of race and ethnic origin. This transitional regime ended on 1 January 2014. Romanians and Bulgarians now have full access to the employment market.

The Ministry of Immigration confirmed having escorted 14 000 Romanian Roma back to Romania in 2012, compared with 1 600 in 2007. However, at the end of each year the number of Romanian and Bulgarian Roma in France remains constant, year after year.

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[260] France, Law No. 69-3 of 3 January 1969 relating to the status of Travellers *(Loi No. 69-3 du 3 janvier 1969 relative à l'exercice des activités ambulantes et au régime applicable aux personnes circulant en France sans domicile ni résidence fixe)*, available at: http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000317526&fastPos=1&fastReqId=1998342744&categorieLien=cid&oldAction=rechTexte (accessed 6 September 2016).

[261] HALDE Deliberation No. 2007-372, available at: http://www.defenseurdesdroits.fr.

[262] Defender of Rights decision no MLD-MSP 2014-152, available at: http://www.defenseurdesdroits.fr.

The total is estimated to be 20 000 and the same groups seem to keep coming back after they are sent back to Romania.

The Government maintains a policy of pursuing illegal settlement by Roma and Travellers on improvised camp sites. This results in constant evictions and checks, which create anxiety and insecurity in these communities. The National Commission on Security Ethics (CNDS) (which was merged with the HALDE as of 1 May 2011 to form the Defender of Rights) has reported disproportionately violent evictions, which gave rise to unjustified violence by police forces. In addition, Romanian and Bulgarian Roma in France are victims of collective expulsions from France contrary to Article 4 of the 4th Protocol to the European Convention on Human Rights.

The situation regarding Roma in 2012 led to many NGO complaints to the Defender of Rights in all its capacities, whether relating to the defence of children, ethics in the security services, combating discrimination or inequality and illegal acts by the public services. There were an estimated 20 claims relating to 14 Departments, on 25 sites, concerning approximately 1 625 people in all, plus 1 000 people in Seine St-Denis (Department 93). The Defender of Rights presented observations before the courts in support of the suspension of 30 eviction procedures, in order to require that the prefect implement conditions of humanitarian support, as defined in the Ministerial instruction of 26 August 2012. In addition, the Defender of Rights systematically sent questionnaires to prefects concerning each eviction asking them to report on measures taken to implement humanitarian eviction procedures.

A report on the implementation of this Ministerial Instruction since September 2012 was published by the Defender of Rights in June 2013, in order to alert the Government to the inadequate respect for humanitarian requirements. It was also intended to provide NGOs with a legal vade mecum in order to empower support networks to use judicial proceedings to ensure access to rights for these groups.[263] It requested that financial means be provided to support the implementation of the interministerial instruction relating to evictions of illegal campsites and access to rights, and that further coordination at European level ensure strong public policy in support of Roma integration. In 2013, 21 000 people were evicted from illegally occupied campsites. Further to this report, the inter-ministerial delegation for precarious housing (DIHAL) was given a wider and stronger mandate. EUR 4 million was awarded to support integration processes for individual families who would remain on French territory. It continues to present its conclusions before the courts in support of the suspension of eviction procedures.

[263] Defender of Rights (2013), Report on the implementation of eviction in application of Ministerial Instruction 24 August 2012, (*Défenseur des droits, Rapports sur la mise en oeuvre des évacuations en apllicaiton de la circulaire du 24 Aout 2013, Juin 2013*) available at: http://www.defenseurdesdroits.fr/fr/publications/rapports/rapports-thematiques/anticipation-et-accompagnement-de-levacuation-des (accessed 6 September 2016).

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Dissemination of information about legal protection against discrimination

Most NGOs, whether anti-racist or promoting the rights of disabled people, gay people, people with certain health conditions or the elderly (including MRAP, SOS Racism, LICRA, LDH, SIDA Info services, AIDES, LGBT, APF etc.),[264] are subsidised by the state and pursue dissemination activities. These activities include dissemination from their own websites, presenting legal precedents and legal tools, many of which are adapted for the visually impaired, as well as seminars and events.

In 2007 and 2008, the HALDE coordinated dissemination actions in France, financed through the European Year of Equal Opportunities for All, to raise awareness among Travellers and their representatives of anti-discrimination law. In 2012 and 2013, its successor, the Defender of Rights, benefited from Progress project funding to publish a handbook for local authorities to provide them with guidance regarding requirements of implementation of anti-discrimination policy.[265]

An inter-ministerial delegate was nominated in order to coordinate government action with regard to racism (*Délégué interministériel à la lutte contre le racisme, DILCRA*). It is currently putting in place a vast training programme for 50 000 civil servants in contact with the public, in order to train them to offer adequate support and guidance for victims of racism and to respond to situations of overt racism.

The Defender of Rights pursues communications activities through its website, the publication of leaflets, posters in all public services, its network of local delegates and its media strategy, and it also regularly contributes to training programmes for civil servants and civil society.

On 5 October 2015, the Defender of Rights co-organised with the Judicial Supreme Court (Court of Cassation, *Cour de Cassation*), the Administrative Supreme Court (*Conseil d'Etat*) and the National Bar Association a one-day seminar at the Court of Cassation to celebrate the 10th anniversary of the national equality body. At the morning session the heads of jurisdiction, Mr Justice Jean-Claude Bonichot from the European Court of Justice, and Madam Justice Françoise Tulkens, former vice-president of the European Court of Human Rights, presented each court's contribution to ten years of judicial development. In the afternoon, lawyers who had initiated determining landmark cases presented their judicial strategy and their analyses of legal developments of the last 10 years.

Measures to promote dialogue with NGOs

The National Consultative Commission on Human Rights (*Commission nationale consultative des droits de l'homme, CNCDH*), counsel to the Prime Minister, is composed of representatives of all the major human rights and anti-racism NGOs, trade unions and

[264] MRAP (*Mouvement contre le racisme et pour l'amitié entre les peuples* - Movement against racism and for friendship between peoples), SOS Racism, LICRA (*Ligue internationale contre le racisme et l'antisémitisme* - International League against Racism and anti-Semitism), LDH (*Ligue des droits de l'homme* - Human Rights League), SIDA Info services (Aids hotline), AIDES (Rights of people suffering from Aids), LGBT (Lesbian, Gay, Bisexual and Trans coalition), APF (*Association des paralysés de France* – French Association of Victims of Paralysis).

[265] Defender of Rights (2014), 'Local authority guide to accessibility' (*Collectivités territoriales: Guide pour l'accessibilité des établissements recevant du public*), March 2014, available at: http://www.defenseurdesdroits.fr/fr/publications/rapports/rapports-thematiques/anticipation-et-accompagnement-de-levacuation-des (accessed 6 September 2016).

branches of the public sector. It is consulted on all legislative reforms affecting human rights and provides advice and recommendations to the Government. It is organised into six sub-commissions, one of which is responsible for the annual publication of a report on racism and anti-Semitism.

At the departmental level, the Departmental Commissions on Access to Citizenship (*Comités départementaux d'accès à la citoyenneté, CODAC*) – which was dedicated to combating racial discrimination – were renamed the Commissions for the Promotion of Equality and Citizenship (*Commissions pour la promotion de l'égalité des chances et la citoyenneté, COPEC*) and had their mission redefined in September 2004.[266] The COPEC brings together all local actors under the authority of the representative of the national state in the department (the Prefect). It is intended to generate cooperation and dialogue for the promotion of equality addressing all grounds of discrimination.

Law No.2005-102 on equal opportunities and the integration of disabled persons structures all the national and local commissions involved in establishing policies concerning disabled people and enforcing their rights, such as the National Consultative Council of Disabled Persons (*Conseil National Consultatif des Personnes Handicapées*) and its local counterparts, around the participation of NGOs representing disabled people (Article 1 of the Law creating Article L146-1 A CSW). It further creates a Departmental Commission for the Rights and the Autonomy of Disabled Persons which is competent for all decisions relating to the orientation of disabled people (see Section 6.1). Its members are representatives of public services, NGOs, trade unions and social partners and at least 30 % representatives of disabled persons (Article 66 of the Law on Title 1V of the Code of Social Welfare). NGOs in France have traditionally had the tasks of the public sector delegated to them in terms of support for disabled people and their families.

The Defender of Rights coordinates several consultative committees with NGOs on all grounds of discrimination. These six-monthly meetings provide an opportunity to keep NGOs informed of the Defender of Right's actions and likewise to keep the Defender of Rights informed of the concerns of NGOs. There are such committees on LGBTI rights, disabled people's rights and on discrimination in housing and employment.

Measures to promote dialogue between social partners

Article 4 of the Law of 16 November 2001 integrates the fight against discriminations as an objective in collective bargaining, in branch (sub-sections of the labour force) negotiations and national negotiations dealt with at the level of the National Commission on Collective Bargaining.

Article L2261-22 LC was modified in order to extend the equality objective not only in terms of access to employment but in terms of training and the employee's career as well. However, it limits this objective to the criteria of race and ethnic origin.

In addition, the commission responsible for monitoring professional equality between men and women has seen its competence extended to discrimination based on race and ethnic origin (Article L2271-1, paragraph 8 LC). Elements concerning racial and sex discrimination have become a mandatory provision in all branch collective agreements. However, beyond informal affirmation, these undertakings have not generated any specific negotiation in relation to equality.

[266] France, Ministerial Instruction, New missions for the Departmental Commissions on Access to Citizenship and the Commissions for the Promotion of Equality, (*Circulaire* COPEC NOR/INT/K/04/00117/C, 20 September 2004 , *Missions nouvelles des commissions départementales d'accès à la citoyenneté (CODAC), commissions pour la promotion de l'égalité des chances et la citoyenneté' (COPEC)*, available at: http://i.ville.gouv.fr/index.php/reference/3016/circulaire-nor-int-k-04-00117-c-du-20-septembre-2004-relative-aux-missions-nouvelles-des-commissions-departementales-d-acces-a-la (accessed 6 September 2016).

In the public services, social dialogue is a basic organisational principle, since all levels of human resources management are dealt with in a joint decision system where representatives of the state and unions are equally represented (Law No.83-634 of 1 July 1983, Article 9, paragraph 1).

Article 25 of the Law No.2005-102 on equal opportunities and the integration of disabled persons modifies Articles L2241-1 and L2242-1 LC, which concern mandatory annual negotiations between social partners, to create an obligation to hold annual negotiations concerning measures necessary for the professional integration of disabled people. In addition, social partners participate in the Departmental Commission for the Rights and Autonomy of Disabled Persons.

In reality, social partners are not sufficiently involved: they seldom represent employees against the employer before the courts in discrimination cases and are reluctant to submit to mandatory negotiation obligations with respect to discrimination. Discrimination is perceived as a side issue that conflicts with the social agenda in the employer's premises and, more generally, in global negotiation objectives. Discrimination is considered as an approach that protects target groups, whereas trade unions represent the interests of all employees.

The Minister of Employment, François Rebsamen, initiated a working group meeting every other week from October 2014 to June 2015, bringing together social partners, NGOs, the French equality body and recognised experts, in order to confer on good practices and difficulties related to the implementation of anti-discrimination policy and legislation. The group issued a report on 13 May 2015, called the Sciberras report, which recommended the development of reporting obligations on discrimination in the context of the adoption of obligations regarding the disclosure of diversity and non-financial information.[267]

Addressing the situation of Roma and Travellers

In August 2012, the Government gave a specific mandate to the Interministerial Delegation on Emergency Accommodation and Access to Housing (*Délégation interministérielle à l'hébergement et à l'accès au logement*, *DIHAL*) to establish the conditions for a programme on access to rights (including health, education, employment, accommodation and housing) and integration of foreign Roma and Travellers. It published programmes, including good practices for local authorities and coordination of public policy, throughout 2013. In autumn 2013, it was further mandated to coordinate the implementation of integration policies targeting the Roma and initiating preparatory work to launch a review of the status of Travellers.

The National Consultative Commission on Travellers (*Commission nationale consultative des gens du voyage*) was reinstated in 2015.

The National Assembly has passed in first reading on 9 June 2015, a parliamentary legislative proposal of the socialist group to repeal Law No. 69-3 (of 1969) regulating Travellers, after a number of decisions declaring the 1969 law to be discriminatory and contrary to international conventions on human rights, [268]thereby putting an end to their

[267] Sciberras, Jean-Christophe (2015), *Rapport de synthèse des travaux du groupe de dialogue inter-partenaires sur le lutte contre les discriminations en entreprise*, 13 May 2015, http://www.ville.gouv.fr/IMG/pdf/rapport_sciberras.pdf (accessed 6 September 2016).

[268] On 28 March 2014, the UN Human Rights Committee condemned France for violation of Article 12 of the International Covenant on Civil and Political Rights, concluding that Law No. 69-3 did not respect the principle of freedom of movement by imposing upon Travelers an obligation to carry a circulation booklet and to regularly present it to police authorities to have it stamped, with the threat of criminal sanctions. It requested that the Law No 69-3 of 3 January 1969 be reviewed and that France take action to prevent any further action before the Criminal Court to enforce this legislation (cf. FR-120). The *Conseil d'Etat* also

obligation to carry special identity papers and to have them validated.[269] The law has not yet been scheduled to be voted on by the Senate.

In addition, the bill amends the Code of Social Welfare in order to allow Travellers to benefit from the same rules regarding designation of administrative residence and registration on voting list as any person without fixed domicile. Article 2, also amends Law No. 2000-614 of 5 July 2000 regarding the parking and accommodation of Travellers, by imposing a duty on urban planning legislation to take into account the need for land allowing their ritual gatherings and specific land permitting long-term parking, called family plots, to be purchased or rented, in order to recognise the current need to be partially sedentary in periods when they do not travel, mainly for reasons of medical care or children's education.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Mechanisms

French law does not require that express legislation be introduced in order to ensure the superiority of the principle of equality to other sources of rights. Equal treatment is a constitutional principle and a rule of public order sanctioned by the Penal Code. Article 6 of the Civil Code further expresses the following general principle: 'One cannot derogate from laws that concern public order by way of a particular agreement', thus rendering this type of agreement null and void. Articles 1382 ff. and 1146 ff. of the Civil Code implement a general regime of civil and contractual liability which adapts to the evolution of custom and of superior rules of law, thereby adapting to Directives 2000/43/EC and 2000/78/EC. Article L1134-4 LC further expressly states that any such act is null and void and Article 2 of Law No.2008-496 of 28 May 2008 expressly covers independent activities.

Articles 6 and 6 quinquines of Law No.83-634 of 1 July 1983 are rules of general application and public order. They must be respected in all regulatory acts or decisions regarding a public servant.

The general principle *lex posterior derogat legi priori* applies to human rights and therefore implies the inapplicability of all non-conforming legislation and conventions. Finally the Conseil d'Etat held in its decision of 30 October 2009, that EU Directive 2000/78/EC provided sufficiently precise rules that were of direct application in cases of insufficient transposition that insured its application to all working relationships.[270]

b) Rules contrary to the principle of equality

There is no process of periodic legislative audit or restatement in France and the state has not undertaken an audit in order to verify compliance of all texts in force with the directives. Such legislation must be challenged before the Conseil d'Etat or the Cour de cassation, which are responsible for the control of conventionality, or before the European Court on a case-by-case basis. The HALDE, and now the Defender of Rights, have regularly raised issues related to the non-conformity of specific legislation or regulation with European anti-discrimination law.

As regards national collective agreements and contractual undertakings, they could be questioned by way of social dialogue but, in fact, must, on most issues, be challenged before the courts.

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declared this part of the law to be null and void in a decision of 19 November 2014, 10th and 9th Sections No. 359223 (cf. FR-125).

[269] Parliamentary legislative proposal No. 1610 to create repeal Law No. 69-3 regulating Travellers, http://www.assemblee-nationale.fr/14/ta/ta0526.asp.

[270] *Conseil d'Etat*, No. 298348, 30 October 2009.

9 COORDINATION AT NATIONAL LEVEL

The National Action Plan against Racism 2012-2014 was presented to the Cabinet by the Minister of the Interior on 15 February 2012.[271] It focused on the fight against racism and anti-Semitism as a priority for Government action and plans the creation of an Interministerial delegate against racism and anti-Semitism (*délégué interministériel à la lutte contre le racisme et l'antisémitisme*) reporting to the Prime Minister and the Minister of the Interior, to initiate, coordinate and evaluate Government action.[272] Regis Guyot was nominated Interministerial Delegate (DILCRA) and was kept in post by the new Government. He has initiated improvements in police and justice statistics on racist and anti-Semitic acts, as well as commissioning studies on diversity in French society and training for the public services. He was replaced by Gilles Clavreul on 26 November 2014, who published his own action plan for the fight against racism and anti-Semitism on 19 April 2015, together with the Prime Minister, the Education Minister, the Justice Minister, the Minister of Interior, the Minister of Culture, and state secretaries in charge of digital information and urban management policy.

The plan, which has a budget of EUR 100 million over three years, sets out 40 measures that are to be implemented under the supervision of the DILCRA who will have to report annually to the National Consultative Human Rights Commission, the Economic and Social Council and European human rights institutions. EUR 25 million per year will be used for projects in the suburbs in the context of the national urban management's policy against discrimination and racism. The fight against racism and anti-Semitism was declared 'National Great Cause' for 2015, which will lead to a national communication campaign, financed initiatives by anti-racist NGOs, and mobilisation around the dissemination of counter-discourses to fight hate speech on the internet. A specific action plan was also to be implemented in the national education programme.[273] Measures were also taken to improve safety around places of worship and faith schools. The repression of hate crime on the internet was reinforced.

Finally, following a number of initiatives on the part of Members of Parliament, which have never been taken up by the Government, the Prime Minister announced that a bill would be presented to create a class action procedure for victims of discrimination, which was passed before the Senate in first reading on 5 November 2015 and is scheduled to be voted on in first reading by the National Assembly in May 2016.[274] It has been conceived as a tool to impose change in future practice. A class action will be preceded by a written request that must give rise to a six-month period of mediation. This will be a request for cessation of discrimination, without compensatory damages for the past. The class action will be exclusively initiated by trade unions for discrimination in the work place, and NGOs for discrimination outside employment.

The Fund for Action and Support for Integration and Combating Discrimination (*Fonds d'Action et de Soutien pour l'Intégration et la Lutte contre les Discriminations, FASILD*), which became the National Agency for Social Cohesion and Equal Opportunities (*Agence nationale pour la cohésion sociale et l'égalité des chances*, ANCSEC), historically funded NGOs and actors in the fight against discrimination.[275] The programmes supporting anti-

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[271] France, National action plan against racism and anti-Semitism (*Plan national d'action contre le racisme et l'anti-sémitisme*), available at: http://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2015/09/racisme_antisemitisme-dilcra.pdf (accessed 6 September 2016).

[272] France, Decree No. 2012-221 of 16 February 2012 creating a delegate against racism and anti-semitism (*Décret No. 2012-221 du 16 février 2012 instituant un délégué interministériel à la lutte contre le racisme et l'antisémitisme*), available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000025372209 (accessed 6 September 2016).

[273] http://www.gouvernement.fr/planantiracisme-eveiller-les-consciences-agir-ne-plus-rien-laisser-passer.

[274] http://www.assemblee-nationale.fr/14/dossiers/justice_21e_siecle.asp.

[275] It was dissolved by Law No. 2014-173 of 21 February 2014 on town planning and urban cohesion (*Loi No. 2014-173 du 21 février 2014 de programmation pour la ville et la cohésion urbaine)* after its mission had

discrimination activities have been transformed into migrant integration policies under the supervision of the Ministry of Finance. A new interministerial delegate for integration and equality was established by decree No.2014-385 of 29 March 2014 and nominated in June 2014.[276] The Delegate is tasked with coordinating social migrant support policies and should was nominated in April 2014. It is complemented by the General Commissioner for Territorial Equality (*Commissariat général à l'égalité des territoires, CGET*), Marie-Caroline Bonnet-Ballzy, appointed on 1 June 2014, who took over the budget and resources of the ANCSEC and is mandated to implement access to rights and anti-discrimination policy targeting underprivileged areas of the country.

Government
Ministry of the Interior, Ministry of Education, Ministry of Justice, Ministry of Social Affairs, Health and Women's Rights and the Ministry of Urban Affairs, Youth and Sport.

Government departments
The Women's Rights Service (SdFe) has become a simple service of the General Directorate for Social Cohesion (DGCS, below) within the Ministry of Social Affairs, under the supervision of the Minister for Women's Rights; the Directorate of Population and Migration (DPM) was replaced by the Directorate for Reception, Integration and Citizenship, under the auspices of the Ministry of the Interior; the Directorate for Support, Integration and Access to Citizenship for Foreign Nationals (DAAEN); the Directorate of Labour Relations (DRT); the General Directorate for Social Cohesion (DGCS); the General Directorate for Health (DGS); the General Delegation for Employment and Professional Training (DGEFP); the Directorate for the Coordination of Research, Studies and Statistics (DARESS); the Directorate for Research, Evaluation and Statistics (DRESS); the Directorate for Public Liberties, Ministry of the Interior (Roma and Travellers); General Directorate for the Management of the Public Services (DGAFP).

National Research Institutes:
INSEE (National Institute of Statistics)
INED (National Demographics Institute)
CAS (Centre for Strategic Analysis, *Centre d'analyse stratégique*)

Interministerial Delegations:
Interministerial Delegation on Emergency Accommodation and Access to Housing (DIHAL)
Interministerial Delegation on Equal Opportunities for French Nationals from the Overseas Territories
Interministerial Delegation for the Rights of Persons with Disabilities
Interministerial Delegation for accessibility for Disabled Persons
Interministerial Delegation on Urban Affairs and Development
Interministerial Delegation against Racism and anti-Semitism (DILCRA)
Interministerial Delegation for Integration and Equality
Interministerial Committee on Disability (CIH)

Public bodies:
National Agency for Urban Regeneration (*Agence nationale de rénovation urbaine, ANRU*)
French Office of Immigration and Integration (*Office français de l'immigration et de l'intégration, OFII*)

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been thwarted to concentrate on urban regeneration projects, available at: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028636804 (accessed 6 September 2016).

[276] France, Decree No. 2014-385 of 29 March 2014 creating a delegate for republican equality integration (*Décret No. 2014-385 du 29 mars 2014 portant création d'un délégué interministériel à l'égalité républicaine et à l'intégration*), available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028811261&categorieLien=id (accessed 6 September 2016).

General Commissioner for Territorial Equality (*Commissariat général à l'égalité des territories, CGET*)

Consultative bodies:
National Consultative Commission on Travellers
National Consultative Commission on Human Rights
National Consultative Commission for the Retired and Older People
National Consultative Commission on Persons with Disabilities
National Council for Social Inclusion
High Council for Professional Equality between Men and Women
Commission for Political Equality between Men and Women

Specialised administrative bodies:
Merged to form the Defender of Rights:
- Ombudsman for the public sector (*Médiateur de la République*)
- National Commission on Security Ethics (*Commission nationale de déonthologie de la sécurité, CNDS*)
- Children's Defender (*Défenseur des enfants*)
- Equal Opportunities and Anti-Discrimination Commission (*Haute autorité de lutte contre les discriminations et pour l'égalité, HALDE*)

CNIL (National Commission for IT and Liberty)
CSA (Higher Council for Radio and Television)
CADA (Commission for Access to Administrative Documents)

Justice:
Anti-discrimination division (part of all public prosecutor's offices).

10 CURRENT BEST PRACTICES

- Equality body consultative committees bringing together NGOs to share information and for consultation on different subjects e.g. disability, LGBTI, discrimination in employment, discrimination in housing (Section 8.1).
- School integration system for Roma and Traveller children (CASNAV) (Section 5b)4)).
- Employment quotas for disabled persons in the public and private sectors (Section 5b)1)).
- The CNIL. Defender of Rights Guide to promoting monitoring and measuring of discrimination in employment (Section 2.3.1 a)).
- National network of free legal consultations managed by the Ministry of Justice through the Departmental Commission on Access to Rights under the supervision of the President of the First Instance District Court. (Section 6.1)a)).

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

Even if the courts will not hesitate to proceed by way of direct application of the Directives, some discrepancies remain in national legislation and the precisions they provide for those who enforce them.

Law No.83-634 regulating employment law in the public services, which was amended to cover discrimination by the above-mentioned transposition legislation, states at Article 3 that, in conformity with Article 64 of the Constitution of 1958, it does not cover the status of magistrates, who are not considered to be civil servants. Ordinance No.58-1270 of 22 December 1958 regulates the rules applicable to both prosecution and state magistrates and judges on the bench. Moreover, public servants working within Parliament similarly not subject to Law No.83-634 and are also governed by application of Article 3 of the Law by separate in-house rules of Parliament. Finally, all contractual public servants who hold one of the various statuses that are excluded from the application of Law No.84-16 of 11 November 1984 on the status of state contractual agents at Article 3, paragraph 5, are also excluded from all protections against discrimination for public servants provided by Law No.83-634. None of these texts have been amended to implement Directive 2000/78/EC and do not contain any protection against discrimination on any grounds. It is important to note that all public servants who are not covered by transposition do not benefit from the right to reasonable accommodation in case of disability, unless they seek enforcement by the courts.

With respect to the status of the armed forces, France has availed itself of the exception in Article 3 (4) of Directive 2000/78/EC allowing derogation concerning criteria based on age and disability.

The definition of direct discrimination still does not expressly include the possibility of proceeding by means of hypothetical comparison. This appears not to comply with the directive. There have been no cases arguing the possibility to proceed by way of such comparison on the basis of direct application of the Directive.

The definition of the burden of proof only requires in defence that the defendant establish that the decision was objective and non-discriminatory, and does not require that defendant establish appropriateness and necessity, which seems to be in breach of the directive.

Law 2008-496 completes the framework of protection against victimisation for all Article 19(1) TFEU grounds (Article 3). However, this definition provides no indication as to the applicable burden of proof and seems to remain inadequate.

Whereas in former legislation the French state had not availed itself of the possibility of providing for exceptions based on professional requirements, except on the ground of age, it adds a paragraph to the Labour Code which allows a characteristic based on any of the prohibited grounds to be presented by the employer as a professional requirement as long as 'its objective is legitimate and the requirement proportionate' (Article 6 of Law 2008-496 of 27 May 2008 amending article L1133-1 of the Labour Code). This framework does not appear to conform to the requirements of the directives.

In relation to disability, transposition was completed by Law No.2005-102 of 11 February 2005 on equal opportunities and the integration of disabled persons.[277] The law

[277] France, Law No. 2005-102 of 11 February 2005 on equal opportunities and the integration of disabled persons (*Loi No. 2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées*), available at: www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANX0300217L (accessed 6 September 2016).

translates the terms 'reasonable accommodation' as 'all necessary measures' (*mesures nécessaires*). The obligation to provide reasonable accommodation, defined in Article L 5213-6 LC does not find application in reference to the situation of a person meeting the general definition of disability in Article L1141-1 of the Code of Social Welfare, but is subject to the additional requirement that the disabled worker form part of the group targeted by the employers' employment quota obligation and listed in Article L5212-13 LC. The scope of the right to reasonable accommodation was not amended by Law No.2008-496. It therefore benefits only employees who have obtained official disabled worker status from the relevant institution, those who have suffered an accident at work resulting in a degree of disability greater than 10 % and who receive compensation in this regard, those in receipt of disability pensions and disabled veterans. Therefore, non-registered disabled people, non-salaried disabled workers and disabled people who are members of the professions are still not covered by the obligation for reasonable accommodation.

The French Government has always refused to amend Articles 3142-1 ff. of the Labour Code, which deny leave for family events for PACS partners, which used to be the only form of union accessible to same-sex partners. The adoption of Law No.2013-404 of 17 May 2013 opening access to marriage to same-sex couples puts an end to indirect discrimination resulting from rights and privileges reserved for married couples, such as special holidays, which were held to be indirectly discriminatory by the CJEU on 12 December 2013 in the case of *Hay v. Crédit Agricole*,[278] where it decided, further to a referral from the Court of Cassation that, if marriage is not accessible to same-sex partners, a salaried employee who enters into a contractual union with a same-sex partner must benefit from the same advantages as those conferred upon his or her colleagues when they marry.

11.2 Other issues of concern

Anti-discrimination law continues to focus resistance on what is perceived as community-based analysis of social tensions. This constitutes the core of very strong ideological objections to the framework of anti-discrimination law within the central state institutions.

- The equality body

The rate of success in discrimination cases before the courts has significantly improved with the contributions of the HALDE and the Defender of Rights. However, the capacity of the Defender of Rights to fully pursue this mission, in the context of the institutional reform that led to the merger of the HALDE, the Children's Defender, the Public Service Ombudsman and the National Commission on Security Ethics, is still in question, since the institution has to set institutional priorities among a number of topics and faces heavy pressure to cut resources. A decision to reduce communication budgets has had a direct impact on the visibility of the anti-discrimination mandate of the institution for the general public. In 2013, however, further to a specific outreach strategy on discrimination issues and the significant visibility of its actions in the context of the Roma crisis, anti-discrimination claims have returned to the levels recorded under the HALDE in 2010, and these have picked up and increased by 27 % in 2015.

- Difficulties in implementation and the training of judicial actors

Non-discrimination law is a derogatory legal regime. It continues to be perceived by legal actors as foreign and the choice to analyse a situation with its mechanisms is considered by all levels of the jurisdiction as a means of undermining national law. The traditional formal theory of equality, the concept of fault in civil matters and the supremacy of

[278] CJEU, *Hay v. Crédit Agricole*, C-267/12, 12 December 2013.

Parliament remain the ultimate reference. At trial level, the shift in the burden of proof and the concept of indirect discrimination are perceived as means to condemn liability without fault and to confer special rights to members of certain groups. Finally, at policy level, it is a limitation on sovereignty that judges are not willing to use frequently.

Even though it has been implemented by the higher courts and has evolved over the last ten years, lawyers in general practice and first instance judges often lack proper training to implement its rules of evidence, the latest jurisprudential developments and the particulars of its rhetoric. Claimants still have to be ready to face multiple appeals before winning their cases. Discrimination cases are much more favourably heard at the appellate level and the rate of success before the courts has been significantly improved by the contribution of observations presented by the HALDE and the Defender of Rights.

There remain many barriers to systematic implementation in France. Legal action is still not considered as a means of advocacy by civil society. Very few NGOs are knowledgeable in the management of judicial remedies[279] or have the means to pursue judicial cases. Implementing anti-discrimination law progresses with the evolution in the practice of judicial actors and in the way NGOs and trade unions perceive their functions in the judicial process and social dialogue, but technical progress and financing remains necessary to ensure efficient implementation. Funding of NGOs and trade unions to pursue test cases and targeted training of judges, lawyers, trade unions and NGOs in this regard is a long-term process that remains indispensable.

Indirect discrimination is still a misunderstood concept that is seldom argued by lawyers, and often directly invoked by the court unilaterally,[280] and only once in a case relating to discrimination on the ground of origin.[281]

The national equality body works together with the legal profession to ensure that the anti-discrimination law is addressed in the continuing professional training of lawyers, labour court non-professional judges and professional judges. However, evidence law and anti-discrimination law are not substantial subjects in law school, and the subject remains a field of specialists.

The Government is still focusing resources and energy on the implementation of anti-discrimination law before the criminal courts in the National Action Plan against Racism, reiterating the policy put in place in July 2007. This instituted a dedicated service to treat criminal discrimination complaints at the public prosecutor's office, with the objective of increasing the rate of criminal prosecutions. However, to date, this policy has generated little activity: few anti-discrimination services are active and they have not led to an increase in the number of criminal convictions.

- Extensive interpretation of secularism in employment

The scrutiny of French politics of the right to express one's religious beliefs is constantly reiterated through various parliamentary bills seeking to limit free expression of religion.

In addition, these tensions are finding echoes before national courts in arguments promoting the idea of extending the duty of neutrality of public servants to private sector employees. This tension was translated in 2013 through the conflict between the Social

[279] In the fields covered by the non-discrimination directives, including discrimination based on sex, there are only two NGOs specialised in bringing legal action. The first is active in the sector of sexual and moral harassment: the Association to Combat Violence against Women (*Association contre la violence faite aux femme, AVFT*)-). The second focuses on the legal rights of foreign nationals: the Migrant's Information and Support Group (*Groupe d'information et de soutien des immigrés*, *GISTI*). More generalist NGOs mostly intervene in criminal actions, but do not focus their activity on legal actions.

[280] The first case concluding indirect discrimination, where it was raised by the Court of Cassation, Social Chamber, No. 05-04962, 9 January 2007.

[281] Court of Cassation, Social Chamber, No. 10-20765, 3 November 2011.

Chamber of the Court of Cassation[282] and the Versailles and Paris Courts of Appeal in the Baby Loup case, regarding possible limitations to the duty of neutrality of private employees working in a day-care centre by reason of its ethos and belief.[283] This case was heard again by the plenary session of the Court of Cassation, which issued its decision on 25 June 2014.[284]

In this case, the Social Chamber of the Court of Cassation decided that the principle of secularism affirmed in Article 1 of the Constitution was not applicable to employees in the private sector who are not in a position of managing a public service. It therefore cannot be invoked by a private employer to hinder the protection against direct discrimination on the ground of religion afforded by the Labour Code in Article L. 1132-1. The provision of in-house regulations that imposed a general and imprecise restriction did not comply with the requirements of Article L. 1321-3 of the Labour Code, a dismissal decided on discriminatory grounds was considered null and void and the Court of Appeal of Versailles decision was quashed. The case was sent back before another Court of Appeal to be argued again.

In plenary session, the Court of Cassation decided that France had transposed the possibility offered by Article 4 of Directive 2000/78/EC to create an exception in its legislation based on a genuine and determining occupational requirement by copying paragraph 4 of the directive. However, the French legislator only adopted a list of jobs that were not subject to the protection against discrimination in relation to sex discrimination in 1983. It has not adopted such a list in relation to other grounds. Furthermore, France has not adopted an exception based on ethos and belief pursuant to Article 4(1) of the directive. In this context, the plenary session of the court refused to consider that the law provided for a possibility to argue occupational requirement and it does not even discuss whether neutrality can be argued to constitute an occupational requirement exception.

The court chose not to contradict the *Conseil d'Etat* and ruled out all arguments holding that the principle of secularism is applicable to private employers. It further decided that the day care centre was not an organisation with an ethos and belief to be protected pursuant to Article 9 ECHR, since its main purpose was not to promote or hold religious convictions, but to provide care for young children.

The plenary session of the Court of Cassation did not discuss whether or not this was discrimination, direct or indirect, and whether or not it was justified. It followed an altogether different justification to conclude that the claimant's dismissal was legal, based on legitimate restrictions to a fundamental freedom.

Its analysis followed one of the arguments of the Paris Court of Appeal and discussed the issue on the basis of the only legislative path available in French legislation: that of legitimate restrictions to rights and freedoms that can be imposed by an employer on the basis of Articles L1121-1 and L1321-3 of the Labour Code, through the adoption of in-house regulations. The Court transformed its analysis into a pure question of facts relating to the evaluation of whether or not these restrictions were legitimate, given the circumstances of the execution of the employment contract on the basis of evidence presented. The Court held that regarding the size and operating conditions of the day care centre, where all the employees were in direct contact with the parents and the children, the employer demonstrated that the proposed limitation to religious freedom was, in this case, justified by the nature of the function and proportionate to the legitimate objective pursued. The Court limited its analysis to these considerations on the

[282] Court of Cassation, Social Chamber, No. 11-28845, 19 March 2013.
[283] Versailles Court of Appeal, *Baby Loup*, No. 10/05642, 27 November 2011.
[284] Court of Cassation, Plenary session, *Baby Loup*, No. 13-28369, 25 June 2014.

merits of the functions and the context of employment to appreciate the legitimacy of a limitation to a freedom pursuant to the Labour Code.

Since this decision, the Senate adopted in its first reading a Senator's legislative proposal to extend the duty of neutrality to private facilities catering for children and young people under 18 years of age. This bill was struck from the agenda of the National Assembly.[285]

In April 2015, the Court of Cassation heard a case where a claimant who working as a consultant in the private sector was dismissed for the sole reason of refusing to remove her Islamic veil when working on the client's premises. Her claim of discriminatory dismissal on the ground of religion was dismissed by the Employment Tribunal and the Paris Court of Appeal.

Before the Court of Cassation, the claimant alleged that restrictions to religious freedom must be justified by the nature of the work and be required as a determining occupational requirement and that the fact of wearing an Islamic veil when working in the private sector does not violate the rights or beliefs of others, and that the discomfort of persons toward the Islamic veil does not qualify as a non-discriminatory reason justifying a limitation on claimant's religious freedom. Therefore, she argued that the Court of Appeal of Paris has violated Articles L. 1121-1, L. 1321-3 and L. 1132-1 of the Labour Code, Articles 9 and 14 of the ECHR and Article 18 of the International Covenant on Civil and Political Rights. Given that the CJEU had not yet decided whether the desire of private clients not to be served by someone wearing an Islamic veil qualifies as a determining occupational requirement related to the nature or the conditions of performance of the working contract, the Court of Cassation[286] referred the question to the CJEU, in the case *Asma Bougnaoui and Association de defense des droits de l'homme v. Micropole SA*.[287]

Meanwhile, in autumn 2014, the new Minister of Education, Najat Vallaud Belkacem, ended the controversy around the prevention of mothers wearing a Muslim headscarf from accompanying state school children on out-of-school excursions, further to a decision by the Montreuil Administrative Court.[288] This position was adopted after the publication of the opinion of the *Conseil d'Etat*, further to a request from the Defender of Rights, where it reiterated that the right to freedom of religion for accompanying mothers should be respected and that the proportionality of limitations imposed on the basis of local circumstances should be examined on a case-by-case basis.[289]

- Significant increase in hate speech and violent manifestations of Islamophobia and anti-Semitism

The French authorities can be observed to have made considerable efforts to promote the action plan against racism and anti-Semitism as mentioned above (see section 9) to organise a proportionate and democratic response to xenophobic reactions to terrorist violence and the geopolitical context, which is exploited by extreme right populist politicians. Nevertheless, this context is having a significant impact on the number of discriminatory responses in relation to access to employment and access to goods and services experienced by people of foreign origin.

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[285] http://www.assemblee-nationale.fr/14/dossiers/laicite_structures_petite_enfance.asp.
[286] Court of Cassation, No.13-19855, 9 April 2015. https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/630_9_31521.html.
[287] CJEU, C-188/15, *Asma Bougnaoui and Association de defense des droits de l'homme v. Micropole SA*.
[288] Montreuil Administrative Court, No. 1012015, 22 November 2011.
[289] *Conseil d'Etat*, Plenary session, 23 December 2013, Study adopted on the request of the Defender of Rights by the Plenary Assembly of the *Conseil d'Etat* on 19 December 2013, available at: http://www.legifrance.gouv.fr//fr/publications/etudes/application-du-principe-de-neutralite-religieuse-dans-les-services-publics-etude (accessed 6 September 2016).

- Disability

The Law on Disability No.2005-102 of 11 February 2005 provides, in addition to accessibility of new buildings, for the obligation to proceed with the necessary works in order to ensure accessibility of 'buildings receiving the public' (*établissements recevant du public)* and of existing public transport, within a deadline of 10 years (i.e. 1 January and 13 February 2015).

Due to delays in implementing the law and the impossibility of abiding by the planned schedule, on 26 February 2014 the Prime Minister confirmed the postponement of the 2015 deadline for 'buildings receiving the public' and public transport.

Law No. 2014-789 of 10 July 2014 authorising the Government to adopt legislative measures for the implementation of the accessibility of public places enabled the Government to determine the conditions and schedule for the implementation of accessibility for disabled persons in relation to 'buildings receiving the public', public transport, residential buildings and roads. Decrees adopted in application thereto provide for extensions that can vary from three months to five years.

This delay postpones the prosecution and issuing of sanctions provided by the law of 2005 beyond 1 January 2015. The Government has given assurances to stakeholders representing disabled people that this schedule will be closely managed and enforced and that it would ensure the effectiveness of the accessibility programme promoted by the Law of 2005. However, the mobilisation of public building and public transport managers and the lobbying of mayors for the postponement of the initial timetable of works have generated considerable distrust on the part of representatives of disabled people towards public operators and political actors in relation to the enforcement of this timetable.

With regard to education, the integration of disabled children into the education system and access to education is constantly improving from one year to the next, reaching an overall increase of 80 %. However, some children with particular kinds of disabilities still face inadequate access to education and once again, on 11 September 2013, in case No. 81.2012, published in January 2014, the European Committee of Social Rights issued a decision alerting France to the inadequacy of the measures taken to ensure access to mainstream and special education for autistic children in France.

- Travellers and Roma

Travellers.

The French Traveller population's rate of school attendance remains extremely low and illiteracy rates among the community have been systematically growing since compulsory military service was discontinued (10 years ago), which had fulfilled the function of providing young men with basic reading and writing skills. Many mayors overtly refuse to register Traveller and Roma children for school on the ground of their illegal occupation of land. This is theoretically opposed by the Government (Ministerial Instruction No. 2012-143 of 2 October 2012), but most mayors are also MPs, and even when education authorities or prefects intervene, they often refuse to abide by the demands of Government authorities.

The reforms on the status of Travellers, further to the decision of the Constitutional Council of 5 October 2012,[290] quashing Law 69-2 regulating their status and rights, have been on the legislative agenda since 2012. Given the Government's failure to reform

[290] Constitutional Council, No 2012-279, 5 October, 2012, available at:http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2012/2012-279-qpc/decision-n-2012-279-qpc-du-05-octobre-2012.115699.html (accessed 6 September 2016).

their status and take measures to address their difficulties regarding occupation of private land (*terrains familiaux*) with their caravans – despite a number of convictions against this derogatory status since 2012 (in 2013 by the European Court of Human Rights and the European Committee of Social Rights, and the 2014 decisions by the UN Human Rights Committee of 28 March 2014[291] and the *Conseil d'Etat* of 19 November 2014[292] (see below)) – the Defender of Rights adopted a decision to formally request that Parliament and the Government proceed with making the necessary legislative reforms.[293] The issue is whether this reform will address problems related to the Travellers' daily lives with regard to long-term occupation of private land (*terrains familiaux*) and travelling with their caravans. Urban planning regulations are systematically used as a justification for evictions, refusing to register children at school and refusing to connect facilities to water and electricity supplies. The National Assembly has passed in first reading on 9 June 2015, a parliamentary legislative proposal of the socialist group, to repeal Law No. 69-3 regulating Travellers, thereby putting an end to their obligation to carry special identity papers and to have them validated.[294] The law has not yet been voted on by the Senate in first reading.

Roma.

Since the June 2012 national elections in France, the Minister of the Interior has intensified the previous policy of evictions for illegal land occupation. A Ministerial Instruction was published on 28 August 2012, putting in place a policy anticipating the dismantling of illegal camps, in order to implement humanitarian conditions in relation to access to housing, education and social rights in the context of each eviction of Travellers and Roma from illegally occupied land. In autumn 2013, the Government opened a EUR 4 million fund to finance integration measures for families who are deemed able to be integrated, while pursuing its eviction policy. Data on the impact of this policy are not available, since there are no ethnic data in France and therefore no specific statistics on Roma. However, NGOs estimate that the number of foreign Roma on French territory is stable, regardless of the Government's expulsion policy, since families keep coming back after expulsion.

The DIHAL (Interministerial Delegation on Emergency Accommodation and Access to Housing), for homeless people and people with inadequate housing, was given a mandate to coordinate the state's policy on the integration of Roma and Travellers without housing and resources, and to put in place the conditions to allow the proper implementation of the Ministerial Instruction of 28 August 2012. The Prefect who held this position, Alain Régnier, resigned in July 2014, in the face of the absence of political will to fight discrimination and facilitate the integration of Roma. He was replaced by Sylvain Mathieu.

- Racial discrimination

More cases reach trial and are successful but they mainly concern direct discrimination in criminal or labour cases on the grounds of sex, age and disability,[295] relating to access to housing and employment.

Evidence of discrimination on the ground of origin can benefit from comparative panels establishing a difference in treatment between persons on the basis of their origin

[291] UN Human Rights Committee, 10th session, No 1960/2010, *Ory vs France*, 28 March 2014.
[292] *Conseil d'Etat*, No. 359223, 19 November 2014.
[293] Defender of Rights, Decision MLD 2014-152 of 24 November 2014.
[294] Parliamentary legislative proposal No. 1610 to repeal Law No. 69-3 regulating Travellers, http://www.assemblee-nationale.fr/14/ta/ta0526.asp (accessed 6 September 2016).
[295] Lanquetin, M.-T., Grevy, M. (2005) *Bilan de la mise en oeuvre de la loi du 16 novembre 2001* (Audit of the impact of the Law of 16 November 2001), *rapport final DPM*.

inferred from the employees' surname.[296] However, this depends on the availability of a sufficient number of employees and candidates to build a comparative panel, and these are seldom available in cases of racial and ethnic discrimination in access to employment. In France legal action is not an effective means of redress in cases of racial discrimination.

- Access to old age pensions for older migrant workers

Article L815-1 of the Code of Social Security holds that anyone residing regularly and continuously in France and having reached the age of retirement, i.e. 62, can benefit from the old age allocation. This allocation is aimed particularly at migrant workers who have been denied old age pensions because their employers have failed to contribute.

However, since 2007, Article L816-1 also requires that the non-French national be in a position to establish that they have resided continuously and regularly in France with authorisation to work for 5 years and, since 2012, for 10 years.

Establishing proof of regular residence and presence for a period of 10 years is very often de facto impossible for older migrant workers, who have been encouraged to return to their home countries for part of the year by the authorities: they are often practically illiterate, French customs seldom stamp their passports and they do not file income tax returns due to a lack of sufficient resources. These new rules have been used to suspend payment of social security to older migrant workers. Payments are therefore often suspended, sums paid are claimed back and older migrants find themselves in complicated situations where they are unable to establish their continuous presence in France for a period of 10 years.

- Homophobia

The adoption of the legislation authorising marriage for same-sex couples has given rise to a significant traditional, religious, family rights political lobby called 'Manifestation for all', which also campaigns against adoption by gay couples and recognition of civil rights for children born through surrogate motherhood abroad. However, this movement has not translated into an increase in the number of complaints alleging homophobia in employment or access to goods and services before the Defender of Rights or before the courts.

- Sanctions

While the law provides for integral compensation, in the absence of punitive damages, the difficulty of establishing damages regarding access to goods and services or access to employment often limits the awards of the courts to symbolic moral damages.

In criminal cases, the law provides for fines, which can reach EUR 45 000, but in practice fines are extremely low. Convictions can lead to fines as low as EUR 250 for refusal to admit a person wearing a Muslim headscarf to a gym, and rarely reach more than a few thousand Euros.

[296] Court of Cassation, Social Chamber, *Airbus Operations SAS*, No. K 10-15873, 15 December 2011.

12 LATEST DEVELOPMENTS IN 2015

12.1 Legislative amendments

- Law No. 2015-1776 of 28 December 2015 creating the ground of loss of autonomy, Article 23).

12.2 Case law

Name of the court: Court of Cassation
Date of decision: 17 March 2015
Name of the parties: *X v. National Ski Instructors' Union* (Syndicat national des moniteurs du ski français)
Reference number: No. 13-27142
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000030383142&fastReqId=964259005&fastPos=50
Brief summary: In 2012 the National Ski Instructors' Union adopted a regulation limiting ski instructors' activity after 62 years of age and favouring young recruits in the distribution of teaching classes in order to favour the activity of young instructors. Article L1133-2 of the Labour Code provides that maximum age limitations do not constitute discrimination when they are objectively and reasonably justified by a legitimate aim, in order to favour employment policies, the employment market and professional training. The *Cour de cassation* (Court of Cassation, the Supreme Court) decided that this internal rule violates Law No. 2008-496 of 28 May 2008 and does not meet the requirements of Article 6(1)(a) of Directive 2000/78 because it favours the purely individual private interests that are specific to ski schools and their concern to satisfy the requests of their clients, which therefore do not qualify as legitimate aims as provided by article L1133-2 of the Labour Code.

Name of the court: CJEU
Date of decision: 26 March 2015
Name of the parties: *Gérard Fenoll v. Centre d'aide par le travail «La Jouvene»*
Reference number: No. C-316/13
Address of the webpage:
http://curia.europa.eu/juris/liste.jsf?language=fr&num=C-316/13
Brief summary: The claimant attended a work-based occupational care centre (*Etablissement et service d'aide par le travail*) from 1 February 1996 to 20 June 2005. He benefited from five weeks' paid holidays until 2004 when he fell sick. He then had 12 remaining days to take for 2004 and remained on sick leave for a year. When he resigned, the claimant requested to be paid, as any salaried employee, holidays that he had not taken since 2004, to a value of EUR 945. The centre refused to pay.

In French law, disabled persons attending these centres are not considered as employees and many provisions of the Labour Code do not apply to their occupation. The claimant raised before the court that the minimal holidays claimed were mandatory in application of Directive 2003/88 relating to certain aspects of working hours. The claimant's case was dismissed and he brought it before the Court of Cassation, which referred the following prejudicial question to the CJEU: The issue is whether persons attending work-based occupational centres, who are not deemed employees by national law, benefit from the protection of workers afforded by EU Law and Directive 2003/88.

The CJEU decided that Directive 2003/88 applied to persons attending work-based occupational centres as regards its provisions relating to working time, regardless of their worker status in national law. In order to define whether a disabled person with such an occupation is a worker according to EU Law, the national judge must take into consideration objective parameters and all circumstances of the context of the work

executed and the relation between the parties. The fact that persons attending these centres are not subject to some provisions of the Labour Code is not a determining factor. Even if the work executed in these centres and its conditions of execution are meant to accommodate a person's disability, it has an economic value, is a paid activity, provides a person with social security and pursues the production of value. The fact that it is not subject to minimum wage and paid much less is not relevant. The applicable test is whether there is a real and effective production, as opposed to marginal and purely accessory, as was held in the case of a detox centre for addicts.[297]

The national judge must therefore verify the value and organisation of the work to determine if it comes within the realm of the employment market.

The CJEU decision did not discuss whether not recognising persons attending such occupational centres as workers was discriminatory. However, this decision reaches beyond European Labour Law since it in fact extends the purview of the protection against discrimination on the ground of disability in employment to disabled persons performing an activity in an occupational centre for disabled persons and the scope of their rights. Therefore, maintaining their present status and working conditions would be in many respects discriminatory on the ground of disability.

Name of the court: Paris Court of Appeal
Date of decision: 24 June 2015
Name of the parties: N/A
Reference number: No. 348 – 13/24286, N) 347, 13/24284, No. 346, 13/24277, No. 345, 13/24274, No. 344, 13/24269, No. 343, 13/24267, No. 342, 13/24265, No. 341, 13/24262, No. 340, 13/24261, No. 351, 13/24303, No. 350, 13/24300, No. 349, 13/24299, No. 339, 13/24255
Address of the webpage:
http://www.defenseurdesdroits.fr/fr/actions/protection-des-droits-libertes/decision/decision-msp-mds-mld-2015-021-du-3-fevrier-2015
Brief summary: Article 78 paragraph 2 of the Code of Criminal Procedure allows police forces to proceed to police controls without cause when there is a magistrate order allowing controls on a specific day in a designated area, or in application of paragraph 3 in order to prevent the perpetration of a crime. These provisions are widely used to control illegal immigrants or persons living in unsecure areas, giving rise to racial profiling. In the absence of arrest, there is no procedure to trace individual police controls and the Code of Criminal Procedure does not explicitly provides for a remedy.

This is the first decision on racial profiling in France. The 13 claimants have been subjected to identity controls and searches without being arrested. In this context their lawyers requested from the police justification for the controls and received no answer. On this basis they sued the state in civil damages for liability for racial profiling in application of Article L141-1 of the Code of Judicial Organisation. Civil liability of the state requires that intentional characteristic fault be established.

The 13 cases were dismissed by the first instance court on the basis that the actions of the police officers, who acted within the parameters of the law, could not give rise to liability of the state. The Defender of Rights presented observations before the Court of Appeal arguing that the state had a positive obligation to take action to prevent police controls based on racial grounds and to ensure effective access to judicial redress in application of the Constitution and of Articles 5, 8, 13, 14 and 15 of the ECHR. The Defender of Rights' observations were followed by the Court of Appeal who admitted the appeals in 5 of the 13 cases, even if all controls were legal and made under the authority of a magistrate order.

[297] CJEU, *Bettray v. Staatssecretaris van Justitie,* C-344/87, EU: C:1989:226; *Trojani*, C-456/02, EU:C:2004:488.

The Paris Court of Appeal held that police controls must be implemented with respect for fundamental rights and the principle of equal treatment, which cannot allow police controls operated on the basis of racial criteria, physical appearance or origin. The state must not only refrain from discrimination but must take all necessary measures to prevent its occurrence. In order to be effective the protection of the court must allow the claimant to demonstrate the fault. In the absence of any mechanism to trace and report the circumstances of police controls, once the circumstances of the control are established by the claimant, the police authorities must be in a position to justify why the control of this person or this profile of population chosen by reason of physical appearance or origin, is justified. In the absence of such evidence, even in the absence of evidence that police behaviour was inadequate, police controls based on a selection on discriminatory grounds constitute an aggravated fault that triggers liability of the state.

The existence of racial profiling is known to be a widespread practice. However the claimant has to establish the discriminatory circumstances of the police control. These circumstances can be established by simple written statements of witnesses, which will trigger the obligation of the state to justify the legitimacy of the control.

The Court has found discrimination in situations where a witness was able to describe a systematic discriminatory selection process exclusively targeting persons of North African or African origin. The civil court awarded EUR 1 500 in damages to the five claimants who had their action in damages admitted. However the identities of the policemen were never confirmed by the state and the civil court has no power to order disciplinary sanctions. However it accepted the police justification where the controls were based on a search for a person of North African origin who had just committed a robbery, where the person subject to the control was in an insecure neighbourhood, running and hiding his face with the hood of his sweatshirt, and for controls in a place known for massive violence and drug dealing.

The state has made a petition before the Court of Cassation.

Name of the court: Paris Employment Tribunal
Date of decision: 21 September 2015
Name of the parties: Decisions relating to 832 Migrant workers v. French National Railway Company (SNCF)
Reference number: RG No.F 05/12309 and following
Address of the webpage: N/A
Brief summary: In the 1970s, SNCF (the French National Railway Company) hired 2 000 Moroccan employees to fill unskilled positions at the lowest level of the worker's scale. However they were not hired under the same conditions as the French employees, the regulatory status of the SNCF imposing a requirement of French nationality in order for someone to be hired under the permanent employee status. Moroccan employees were hired as contractual agents under a specific status, PS25, which was used for temporary employees and for persons holding a list of jobs that were not covered by the statutory regime. The claimants spent all of their careers at SNCF. Their specific employment conditions were less favourable than those applicable to French permanent employees: they did not have access to career development beyond a certain level of lower execution jobs (only 2 % of French employees holding the permanent status ended their career at these levels), these jobs were more physically strenuous (which had an impact on their physical condition at retirement), lower salary scale, less favourable overtime conditions and less favourable retirement conditions in terms of period of service and age requirements for access to a full pension, financial conditions of retirement and financial conditions of their widows pension rights (an average of EUR 300 per month). Although half of the 2 000 Moroccan employees became French citizens, only 113 obtained the permanent employee status reserved to French citizens, while all the other Moroccan employees hired in the 1970s kept the PS25 status.

The 850 claimants filed suit after retirement, claiming damages for their career and retirement conditions.

SNCF argued that the various legal instruments prohibiting discrimination on the ground of origin were not in force in France at the time of the formation of the contracts and during the period covering part of their execution, that Article 14 of the ECHR could not apply and that the claims were time barred after a period of 30 years after the signature of the contracts. Furthermore it claimed that the claimants could not be held to be in a comparable situation as employees hired under the permanent employee status because they did not carry out the same jobs, and that the requirement of French nationality was authorised by rules applicable to requirements related to the exercise of national sovereignty, and that therefore it could not give rise to the liability of SNCF.

The Employment Tribunal adopted standardized decisions and reasonings in all 850 cases, which are very poorly legally motivated, thus the reasoning refers to International conventions without exhaustive justifications and substantive reasoning. Therefore our summary may seem incomplete but it strictly realtes the Tribunal's reasonning.

It decided that the prescription applicable was 30 years at the time the claim was filed, which only starts running once the claimant is aware of the damage. When damages claimed relate to a succession of situations over time, it starts running once the situations are terminated, i.e. at the time of interruption of the employment contract, and retirement.

As regards the application of international conventions, France ratified the ILO Convention No. 111 in 1981, and the prohibition of discrimination in the Labour Code was only adopted in 1982. The Franco Mediterranean Convention entered into force in 2000. Therefore they will only be applicable for the period after they entered into force. It is worth noting that the court explicitly found that the ILO Convention No. 111, and Article 14 of the ECHR were applicable to raise the illegality of regulations limiting access to the general employment status to French citizens, as well as general principles of anti-discrimination provided by EU law without referring to any precise legal provision. In addition, the employment contract provided for a provision of equal remuneration (covering accessory advantages) with French employees holding similar employment. The court holds that jobs covered by employment status PS25 were comparable to those held by French employees, but were only designated otherwise in order to employ foreign employees under another employment status and meet the formal requirements of the two employment statuses. SNCF could not prove that the activities of the French employees holding comparable jobs related to exercise of sovereignty justifying a distinct status reserved to French nationals.

Therefore, the claimants' employment status constitutes direct discrimination on the ground of nationality and the criteria of nationality is the basis of indirect discrimination on the ground of the origin of these non-national migrant workers. Claims were admitted, except in a few cases, and the claimants' damages range from EUR 150 000 to EUR 250 000. SNCF has appealed before the Paris Court of Appeal.

Name of the court: Court of Cassation, Criminal chamber
Date of decision: 15 December 2015
Name of the parties: *EasyJet v. Gianmartini et al.*
Reference number: No. 13-81586
Address of the webpage:
http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000031658282&fastReqId=2131939514&fastPos=2

Brief summary: Article 3 of Regulation (EC) No 1107/2006[298] forbids air transport carriers from refusing to board a disabled person on the ground of disability or reduced mobility. However Article 4 provides that an air carrier may refuse boarding 'in order to meet applicable safety requirements established by international, Community or national law or in order to meet safety requirements established by the authority that issued the air operator's certificate to the air carrier concerned'.

In the absence of precise regulations defining 'applicable safety requirements' some air transport carriers have implemented restrictive policies that result in systematically requiring disabled persons with reduced mobility to be accompanied, thereby refusing boarding to unaccompanied disabled persons with reduced mobility.

EasyJet adopted such a policy, formally instructing its subcontractor who took care of the boarding in Paris Charles De Gaulle Airport, to systematically refuse boarding to disabled unaccompanied travellers because the flight personnel are 'not trained to manage and assist disabled persons'.

Three disabled persons who were denied the right to board on the ground that they were not accompanied filed criminal complaints against EasyJet.

On 13 January 2012, the Bobigny Correctional Court found that the systematic refusal of the company to allow unaccompanied disabled persons to board a plane without verifying their concrete capacity to travel alone in consideration of safety requirements constitutes discrimination on the ground of disability. EasyJet appealed this decision. In a decision of 5 February 2013, the Court of Appeal of Paris maintained the Bobigny Correctional Court decision of 13 January 2012, and sentenced EasyJet to a fine of EUR 70 000 and to publish the decision in the newspaper, *Le Monde*. The subcontracting operating company was sentenced to a fine of EUR 25 000. Both companies were also jointly ordered to compensate the claimants to the amount of EUR 2 000 each in damages and a symbolic EUR 1 to the NGO Association des Paralysés de France. The Court of Cassation maintained the position of the Court of Appeal. The decision not to train its personnel, and the systematic refusal of the company to allow disabled persons to board a plane without verifying their concrete capacity to travel alone constitutes an overall policy based on disability. Considering that industry practice shows that other companies provide such assistance to disabled persons, the airline and its subcontractor executing its instructions cannot use the personnel restrictions argument to justify these security requirements and systematically to refuse a service to disabled persons without committing discrimination. In addition, Article 11 of the European Regulation provides for an obligation on the part of air transport carriers to train their personnel, which has been transposed in French regulations by Decree No. 2008-1445 of 22 December 2008, and sanctioned by an administrative fine. The Court of Cassation specifically states that the European regulation does not provide for a safety requirement denying access to persons on the ground of disability, and EasyJet did not establish the existence of such a safety standard recognised by national or international authorities.

Name of the court: Amiens Administrative Tribunal
Date of decision: 15 December 2015
Name of the parties: N/A
Reference number: n° 1401803
Address of the webpage: N/A
Brief summary: The academic director of the Amiens educational district issued an instruction on 4 December 2013 ordering school principals of a certain town to refuse the participation in school activities of all mothers wearing an Islamic veil. The petitioner requested that this instruction be annulled on the ground of its illegality and claims

[298] Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air.

damages for the refusals to her requests to accompany field trips of December 2013 and 11 February 2014.

The Ministry of Education admitted that article L 141-5 of the Code of Education, prohibiting students from exhibiting religious signs within the school environment and premises, is not applicable to parents. The Administrative Tribunal decided that even if school authorities can, in specific circumstances, limit the expression of religious freedom in order to ensure the respect of public order, in the absence of an explicit legal text they are not subject to the strict obligation of neutrality imposed on personnel and students, and religious signs cannot be forbidden on a continuous basis. As regards the petitioner's claim, she did not establish before the court that she had submitted requests to accompany field trips and the refusals that she invokes, therefore her claim was dismissed.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: France
Date: 31 December 2015

Title of legislation (including amending legislation)	Law No.92-686 of 22 July 1992 adopting the new Penal Code Date of adoption: 22 July 1992 Date of entry into force: 22 July 1992 Latest amendment: Article 15 of the Law No.2014-173 of 21 February 2014 creating the ground of place of residence. Internet link: http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719. Grounds protected: all grounds - sex, pregnancy, belonging, whether real or supposed to an ethnic origin, a nation, a race or a determined religion morals, sexual orientation, sexual identity, age, family situation, genetic characteristics, physical appearance, last name, health, disability, union activities, political convictions, place of residence
	Criminal Law
	Material scope: hiring, sanctions and dismissal, access to professional training, goods and services
	Principal content: prohibition of intentional discrimination in hiring sanctions, dismissal, access to professional training and access to goods and services, Articles 225-1 and 225-2 and 432-7 PC
Title of legislation (including amending legislation)	Law on the press of 1881 Date of adoption: 29 July 1881 Date of entry into force: 29 July 1881 Latest amendments: Law No.2010-1 of 4 January 2010 Internet link: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722&dateTexte=20080312 Grounds covered: All grounds - sex, of belonging, whether real or supposed to an ethnic origin, a nation, a race or a determined religion, sexual orientation, age, family situation, genetic characteristics, physical appearance, last name, health, disability, union activities, political convictions
	criminal law
	Material scope: Discriminatory discourse in all situations
	Principal content: Provocation to discrimination as defined by article 225-1 and 225-2 PC The Law on the HALDE incorporates prohibition of provocation to discrimination on the basis of sex and sexual orientation and disability
Title of legislation (including amending legislation)	Law No.2001- 1066 of 16 November 2001 relating to the fight against discriminations Date of adoption: 16 November 2001 Entry into force:16 November 2001 Latest amendments: Article 15 of the Law No.2014-173 of 21 February 2014 creating the ground of place of residence. Internet link: http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000588617&dateTexte=&categorieLien=id. Grounds covered: sex, of belonging, whether real or supposed to an

	ethnic origin, a nation, a race or a determined religion, sexual orientation, age, family situation, genetic characteristics, physical appearance, last name, health, disability, union activities, political convictions, place of residence
	Civil, administrative, criminal law
	Material scope: Salaried employment, civil service and criminal law (goods and services) However, it does not cover the status of Magistrates and public agents working within parliament.
	Principal content: prohibition of direct and indirect discrimination, harassment in employment and in criminal law extension of the grounds and powers of the Labour inspector
Title of legislation (including amending legislation)	Law of social modernisation No.2002-73 Date of adoption: 17 January 2002 Entry into force: 17 January 2002 Latest amendments: Article 15 of the Law No.2014-366 of 24 March 2014 adding the ground of age to the prohibition of discrimination in access of housing at article 1 Internet link: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000408905&categorieLien=id Grounds covered: All grounds Grounds: sex, pregnancy, of belonging, whether real or supposed to an ethnic origin, a nation, a race or a determined religion, sexual orientation, sexual identity, age, family situation, genetic characteristics, physical appearance, last name, health, disability, union activities, political convictions, place of residence
	Civil/administrative and criminal law
	Material scope: Private and public housing, Harassment
	Principal content: prohibition of direct and indirect discrimination in public and private housing Harassment in public and private employment Harassment in the Penal Code
Title of legislation (including amending legislation)	Law no 2001-434 of recognition of slavery and human trade as crime against humanity Date of adoption: 23 May 2001 Entry into force: 23 May 2001 Latest amendments: none Internet link: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000405369&categorieLien=id Grounds covered: race
	Criminal law
	Material scope: All forms of activity and employment
	Principal content: Recognize that slavery as it was practised in Africa and the Indian Ocean was a crime against humanity and support research and education on this part of French history
Title of legislation (including amending legislation)	Law no 2005-102 of February 11, 2005 for equal opportunities and integration of disabled persons Date of adoption: 11 February 2005 Entry into force: 11 February 2005 Latest amendments: Law no 2014-789 of 10 July, 2014 Habilitating Government to Adopt Legislative Measures by Way of Executive Order for the Implementation of Accessibility of Public Places Internet link: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000809647 Grounds covered: Disability

	Civil/administrative law
	Material scope: Employment, education, goods and services, social rights, access to health
	Principal content: Completes transposition vs/ reasonable accommodation duties and positive action, covers employment access to goods and services, access to education and right to public support
Title of legislation (including amending legislation)	Law no 2005-841 of July 26, 2005 habilitating the Government to adopt emergency measures for employment by way of Governmental Decree: Date of adoption: 13 July 2005 Entry into force: 27 July 2005 Latest amendments: 7 March 2007 Internet link: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000632799&dateTexte=&categorieLien=id Grounds covered: Age
	administrative law:
	Material scope: Employment public sector
	Principal content: Remove age limits for recruitment in the public sector
Title of legislation (including amending legislation)	Law no 2008-496 of May 27 2008 relating to the adaptation of National Law to Community Law in matters of discrimination Date of adoption : 27 May 2008 Date of entry into force: 27 May 2008 Latest amendments: Article 23 of the Law n° 2015-1776 of 28 December 2015 creating the ground of loss of autonomy. Internet link: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000018877783 Grounds covered: Article 19 TFEU Grounds: Sex, race, ethnic origin, religion, convictions, age, disability, loss of autonomy, sexual orientation, sexual identity, and place of residence
	Civil. Administrative and criminal law
	Material scope: All fields: public employment, private employment, access to goods or services (including housing), social protection, social advantages, education
	Principal content: Correcting implementation of directives 2000/43 and 2000/78 by providing definitions of direct and indirect discrimination, including harassment and instructions to discriminate to the definition of discrimination, completing prohibition of retorsion and creating new exceptions.
	Civil. Administrative and criminal law
	Material scope: All fields: public employment, private employment, access to goods or services (including housing), social protection, social advantages, education, civil rights
	Principal content: Integrates HALDE with other human rights administrative body in a unique Constitutional Independent Authority
Title of legislation (including amending legislation)	Title of the law: Organic Law no 2011-333 of 29 March 2011 creating the Defender of Rights. Abbreviation: N/A Date of adoption: 29 March 2011 Entry into force: 29 March 2011 Latest amendments: None Internet link: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023781167 Grounds protected: sex, pregnancy, of belonging, whether real or

	supposed to an ethnic origin, a nation, a race or a determined religion, sexual orientation, sexual identity, age, family situation, genetic characteristics, physical appearance, last name, health, disability, union activities, political convictions, place of residence, plus grounds covered by international conventions ratified by France
	Civil. Administrative and criminal law
	Material scope: All fields: public employment, private employment, access to goods or services (including housing), social protection, social advantages, education
	Principal content: Powers of the Equality Body
Title of legislation (including amending legislation)	Law No.2012-954 of 6 August 2012 relating to Sexual Harassment Date of adoption: 6 August 2012 and entry into force: 6 August 2012 Latest amendments: none Internet link: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026263463&dateTexte=&categorieLien=id Grounds covered: sex and sexual identity
	Civil. Administrative and criminal law
	Material scope: Public employment, private employment, access to goods or services (including housing)
	Principal content: reviewing the definition of sexual harassment and creating the ground of sexual identity at Article 4

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: France
Date: 31 December 2015

Instrument	Date of signature (if not signed please indicate) Dd.mm. yyyy	Date of ratification (if not ratified please indicate) Dd.mm. yyyy	Derogations. reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	04.11.1950	03.05.1974	No	Yes	Yes
Protocol 12, ECHR	04.11.2004	No	No	No	No
Revised European Social Charter	03.05.1996	07.05.1999	No	Ratified collective complaints protocol? Yes	No
International Covenant on Civil and Political Rights	16.12.1966	04.11.1980	Yes, article 13 towards rights relating to the expulsion of foreigners	No	No
Framework Convention for the Protection of National Minorities	No	No	N.A		
International Covenant on Economic, Social and Cultural Rights	16.12.1966	04.11.1980	Yes, articles 6, 9, 11 and 13 must not be interpreted as limiting sovereignty over access to work and social rights of foreigners	No	No
Convention on the Elimination of All Forms of Racial Discrimina-tion	07.03.1966	28.07.1981	No	No	No
Convention on the Elimination	18.12.1979	03.09.1981	No	Yes	Yes

Instrument	Date of signature (if not signed please indicate) Dd.mm. yyyy	Date of ratification (if not ratified please indicate) Dd.mm. yyyy	Derogations. reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
of Discrimina-tion Against Women					
ILO Convention No.111 on Discriminatio n	25.06.1958	15.06.1960	No	No	No
Convention on the Rights of the Child	26.01.1990	06.09.1990	Yes, article 6 cannot be interpreted to limit the application of French law on abortion; Article 30 cannot apply because of article 2 of The French constitution; Article 40 par 2b)V shall be interpreted as a general principle to which limited exception can be opposed by way of legislation, such as for certain criminal infractions.	Yes	Yes, some dispositions have been interpreted by the Conseil d'Etat as directly opposable to the State. CE, September 22, 1997, GISTI,
Convention on the Rights of Persons with Disabilities	30.03.2007	18.02.2010	No	Yes	Yes, some dispositions Could be interpreted as directly opposable to the State.

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