

**REPORT ON MEASURES TO COMBAT DISCRIMINATION**  
**Directives 2000/43/EC and 2000/78/EC**

**COUNTRY REPORT/UPDATE 2005**  
**France**  
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## INTRODUCTION

### 0.1 The national legal system

*Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed between different levels of government.*

Laws are the main source of rights in France. They may be proposed by the government (bills) or by the 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 the Republic, the Constitutional Council may, at the request of members of Parliament, verify its consistency with the Constitution. Its effective implementation also depends on the adoption by the Conseil d'Etat of secondary legislation such as decrees.

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
- Judicial courts have jurisdiction over criminal and private law. Their highest court is the Cour de cassation, which is made up of several Chambers among which the Civil Chamber for general private law, the social Chamber for Labour law and the Criminal Chamber for criminal Law.

France is traditional a unitary state but it is becoming increasingly decentralised. It is divided into 22 regions, 100 departments and approximately 36 000 parishes:

<u>Constituency:</u>	<u>Executive power :</u>	<u>Assembly :</u>
Region	Regional prefect	Regional council
Department	Prefect	General council
Commune	Mayor	Local council.

The policies relating to the banning of discrimination are implemented above all by the Ministry of social affairs and labour, the Ministry of health and the Ministry of Interior. Certain local authorities, mostly departmental, also have an important role to play.

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) and the Civil Code (CC). Administrative law, on the other end, is mostly jurisprudential, and based on the implementation of a formal theory of equality. In addition, there is legislation which include provisions prohibiting discrimination in specific areas, such as for example article L1110-3 of the Code of public health with respect to the right to medical assistance.

Since the abolition of slavery (1848) and of punishment by “civil death” (1854), French law has, in theory at least, considered all human beings to be equal in legal status and in dignity.<sup>1</sup>

Historically, French legislation first considered racism and discrimination as aspects of freedom of expression and of the necessary legal restrictions thereto. A law of July 1, 1972 modified the law of July 29, 1881 on the freedom of the press by introducing aggravated penalties for racist speech or writing. Subsequent legislation has amended and enhanced this framework by clarifying its terms and extending its scope to acts as well as verbal utterances.

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<sup>1</sup>As in other European countries, exceptions to this general principle can however be found in the former legal framework of colonialism.

The key to the French legal approach to racism and discrimination is a characteristic interpretation of the principle of equality within a universalistic framework, based on the abstract principles of statehood, nationhood, and citizenship.<sup>2</sup> Since the Second World War, the long-standing abstract principle has been enshrined in a range of instruments, including the constitutions of 1946<sup>3</sup> and 1958 and the major international human-rights conventions as incorporated into French law,<sup>4</sup> as well as comprehensive criminal penalties against racism and xenophobia. The resulting French approach has developed along two complementary lines: the condemnation of inequality based on “origin” and the refusal to use criteria of “origin” for policy and administrative purposes.<sup>5</sup>

The French approach to discrimination relies heavily on the symbolism of criminal punishment, in which the perpetrators have, above all, violated the principle of human dignity. The emphasis put on criminal law is also related to institutional and procedural factors: the ability of a victim to obtain evidence is facilitated in criminal cases by the inquisitorial powers of the enquiring judge (*juge d’instruction*), whereas, as will be discussed later on, it may be very narrowly circumscribed in civil cases. Nonetheless, under the influence of European law, there is increasing interest in the civil law.

The broader principle of non-discrimination as applicable to civil and labor law, has been introduced more recently and largely derives from EC law. Initially incorporated in statute in 1982 on the occasion of the transposition of European directives relating to sex discrimination,<sup>6</sup> it has been extended since 1998 to the whole range of labor law. However, the principle has only really had teeth since being recognized by the *Cour de Cassation* in the context of discrimination by employers against trade union members or representatives and of disputes about equal pay for equal work;

While equality and non-discrimination are, at a purely abstract and descriptive level, intimately related, the legal principle of non-discrimination is foreign to the French legal tradition and conflicts in some respects with the principle of equality as enshrined in French public law. The universalistic conception of equality is inseparable from the French conception of democracy, which affirms that the law, as the expression of the general will, should be identical for all and solely and exclusively authoritative with regard to the rights and duties of citizens. Such legal uniformity is, on this conception, the only effective bulwark against the despotism of some individual or section of the people. It follows that, with regard to access to public “dignities, positions, and employment”, no distinctions other than those of “capacity, virtue, and talent” are relevant.<sup>7</sup>

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 all. In theory, exceptions to

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<sup>2</sup> Cf. the 1996 report of the *Conseil d’État*, *Sur le principe d’égalité*, La Documentation française, 1998, p. 15.

<sup>3</sup> While the Constitution of 1946 has been abrogated, the general principles proclaimed in its preamble were explicitly incorporated into the Constitution of 1958, and remain an important source of constitutional law.

<sup>4</sup> Mireille Delmas-Marty, *Libertés et droits fondamentaux*, Paris, 1996, p. 9-10.

<sup>5</sup> The phrase “origin” covers what in other countries might be referred to as “identity” or “membership” (of, e.g., an ethnic or racial group) but interprets it in a rather different way. The underlying debate is of considerable sociological and legal significance but cannot be addressed here.

<sup>6</sup> Article 1 of Law n° 82-689 of August 4 1982 (known as the Auroux Law) inserted in the Labour Code a new article L122-45, which prohibits disciplinary action against or dismissal of an employee on the grounds of “origin or ethnic, national or racial belonging [*appartenance*]”. Article 6 of Law n° 83-634 of July 13 1983, which related to the rights and duties of civil servants, restated the prohibition against distinctions between civil servants on the grounds of their “opinions (...) or ethnic belonging”. Law n° 83-635 of July 13 1983 transposed European Council directive 76/207/CEE relating to equal treatment at work of men and women.

<sup>7</sup> Cf. Declaration of the Rights of Man and Citizen, 1789, article VI.

the generality of the law are by their very nature illegal and the principle of equality is exhaustively expressed by equality before the law.

Needless to say, French law includes a wide range of rules that define differential treatment for diverse circumstances. In particular, such distinctions are essential to the very nature of the welfare state, and they may also be based on public policy in a number of other areas. The relevant categories are, however, accepted only to the extent that they rely on neutral criteria devoid of identity content such as socio-economic considerations.<sup>8</sup> Specifically, no circumstances are considered to justify differential treatment on grounds of “race” or “origin”. In its case law, the Constitutional Council has recognized only the French people, without distinction of origin, “race” or religion, and the law has consistently refused to admit such criteria as legal categories<sup>9</sup>. Thus, no section of the French population may claim to be a “people”, a “minority”, or a “group”, with cultural or other rights attaching to such status. The law grants to all individuals, and to their beliefs and allegiances, its uniform and impartial protection, but does so solely to them as individuals. For legal purposes, groups defined by such beliefs or allegiances simply do not exist.<sup>10</sup>

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. The most important recent case concerned the Framework Convention for the Protection of National Minorities drawn up by the Council of Europe, which commits signatory states to the recognition of national minorities. The *Conseil d'État* considered, in its advice to the government of July 6<sup>th</sup> 1995, that the Convention was incompatible with the Constitution<sup>11</sup>.

The refusal to use the criteria of “origin” for legal purposes, on the basis of a “universalistic” conception of equality, naturally does not entail that such criteria are of no social significance. In recognizing and addressing racism and discrimination, French policy must therefore work within the differential categories that are judged to be legally and philosophically acceptable. It is as poor, young or old people, as women, as inhabitants of socially deprived areas, and so on, that the victims of racism and discrimination may benefit indirectly from programs that may, indeed, be defined with their specific concerns in mind. What is both legally impossible and socially unacceptable, on the other hand, is to design policies that explicitly target beneficiaries in terms of their “origin”, their “identity” or their “ethnic group”.

Much of the practical content of the legal principle of equality is to be found in administrative case law, where it serves to evaluate, in an ongoing and routine way, the full range of delegated legislation and administrative decisions. Administrative jurisprudence has developed historically around three dimensions of equality – with respect to taxation, access to public services, and public burdens and obligations – which, since 1946, have been constitutionalised as “general principles of law”.<sup>12</sup>

In France, since the law is transversal for all grounds of discrimination, cases are referred to as precedents whether or not they discuss issues related to the same ground of discrimination.

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<sup>8</sup> Gilles Pelissier, *Le principe d'égalité en droit public*, Paris, LGDJ, 1996 ; Conseil d'État, *Sur le principe d'égalité*, Paris, La Documentation française, 1996.

<sup>9</sup> C.C. May 9, 1991, no. 91-290

<sup>10</sup> In its Annual Report for 2001, the advisory *Haut Conseil à l'intégration* underlined the particular problems this creates for addressing or even identifying discrimination suffered by French citizens from the overseas departments and territories. Anecdotal evidence suggests that the problem is significant. See also the Conseil d'Etat's judgment of November 29 2002 voiding a ministerial instruction (*circulaire*) relating to bilingual Breton-French “immersion” teaching in Diwan schools (suits n° 248192 and 248204 brought by the Conseil national des groupes académiques de l'enseignement public).

<sup>11</sup> CE, Gen. Ass. July, 6, 1995, no. 357-466, [www.conseil-etat.fr/avisag/357466.pdf](http://www.conseil-etat.fr/avisag/357466.pdf)

<sup>12</sup> Preamble of the Constitution of 1946, paragraph 1.

There are very few cases on each ground. In addition, since 1995, the Social Chamber of the Court of cassation has begun to apply the shift in the burden of proof to discrimination cases related to trade union activities. Generally speaking, whether or not they apply EU law, they seldom refer to the EU directives. Moreover, many lower court cases are the first ones to apply the newly transposed legal regime and are therefore important for its construction, although they remain inconsistent.

## 0.2 State of implementation

*List below the points where national law is in breach of the Directives. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.*

*Has the Member State taken advantage of the option to defer implementation of Directive 2000/78 to 2 December 2006 in relation to age and disability?*

- Directive 2000/43 is completely transposed by the Law no. 1006-2001 of November 16, 2001 (hereafter Law of November 16, 2001), the law of social modernization no. 2002-73 of January 17, 2002 (hereafter Law of January, 17, 1983), the Law no. 2004-1486 of December 30, 2004<sup>13</sup> creating the specialised body – High Authority against discrimination and for equality- and completing transposition of directive 2000/43, (hereafter Law HALDE).
- Harassment is covered by separate legislation which requires repeated acts and remains to be formally included in the definition of discrimination.
- The protection of plaintiffs and witnesses against reprisals is still inadequate, since, with respect to the plaintiff, it covers only disciplinary action or dismissal by the employer (rather than any reprisal that he may effect) and places the burden of proof on the employee.
- The State has taken advantage of the option to defer implementation of directive 2000/78 to December 2, 2006 in relation to disability. However, transposition has been completed by the law no 2005-102 of February 11, 2005<sup>14</sup>.
- With respect to the status of the army, France has prevailed itself of the exception of article 3 (4) of directive 2000/78 allowing derogation concerning criteria based on age and disability.
- So far, Directives 2000/78 has only been transposed, with respect to employees covered by the Labour Code and civil servants. The legislation transposing the Directive 2000/78 does not cover the professions and unsalaried workers on all grounds. They are considered to be covered by general principles of contractual and civil liability.
- The age discrimination requirements of directive 2000/78 have been implemented by the general legal regime of the Labour Code and the Penal Code, thus covering salaried workers and non salaried activities. As discussed in section 4.7.1 b) , on July 26, 2005, the Law no 2005-846 of July 26, 2005 was adopted in order to habilitate Government to adopt emergency measures for employment by way of Governmental Decree<sup>15</sup>, and was followed by many Executive orders: the first one, no 2005-901 of August 2<sup>nd</sup>, 2005 revisits conditions of access to public employment and abolishes age limitations except in limited cases that appear to comply with the requirements of the Mangold case ( see section 4.7.1).

## 0.3 Case-law

*Provide a list of any important case-law within the national legal system relating to the application and interpretation of the Directives. This should take the following format:*

- a. Name of the court

<sup>13</sup> <http://www.legifrance.gouv.fr/texteconsolide/PFECT.htm>

<sup>14</sup> [www.legifrance.gouv.fr/texteconsolide/SMEAX.htm](http://www.legifrance.gouv.fr/texteconsolide/SMEAX.htm)

<sup>15</sup> [www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SOCX0500142L](http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SOCX0500142L)

- b. Date of decision and reference number (or place where the case is reported). If the decision is available electronically, provide the address of the webpage.
- c. Name of the parties
- d. Brief summary of the key points of law (no more than several sentences)

For reasons explained in the introduction, we have selected the landmark decisions in matters related to the burden of proof, both in civil and criminal cases, and recent decisions that cover new grounds. Other leading cases relating to other issues are discussed in the rest of this report. Please note that while this list only highlights some of the recent developments, it is not exhaustive of jurisprudential developments on all grounds of discrimination in France or of developments in 2005.

### **General principles:**

#### **Court of Cassation, Social Chamber, March 28, 2000, no. 1027 P+B Fluchère, Dick and CFDT c./ SNCF**

In matters related to discrimination on the ground of trade union activities, after having established unequal treatment of the trade union representative in the pursuit of his career over thirty years, the employer has the burden to establish that the difference in situation is attributable to objective elements unrelated to any discrimination. The court has the burden of verifying the conditions of the alleged discrimination and the burden of proof is not entirely attributable to the employee.

#### **Court of Cassation, Criminal Chamber, June 14, 2000, no. 2792, 99-108, CFDT Interco** [www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXRXAX2000X06X06X00226X000](http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXRXAX2000X06X06X00226X000)

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 must investigate the comparative situation of the employee with that of others. In addition, the burden of proof may be discharged even if discrimination is not the only motive of the decision taken against an employee

#### **Court of Appeal, Montpellier, March 25, 2003, no. 0200504, IBM c. Buscail**

The Court decided that the Defendant could not argue the insufficiency of the Plaintiff's evidence if he didn't communicate the documents ordered by the Court. The corollary consequence of the right to have access to the evidence between the hands of the opposing party is that failure to comply transfers the burden of proof on the Defendant.

#### **Court of Cassation, Criminal Chamber, September 12, 2000 no. 99-87.251, Fardeau** [www.legifrance.gouv.fr/WAspad/UnDocument?base=INCA&nod=IXRXCX2000X09X06X00872X051](http://www.legifrance.gouv.fr/WAspad/UnDocument?base=INCA&nod=IXRXCX2000X09X06X00872X051)

Racial discrimination in access to goods and services (night club)– admissibility before the criminal court of evidence resulting from a situation testing operation organised by SOS Racisme when the results of the situation testing are established by way of testimony and Police or Bailiffs reports.

#### **Court Cassation, Criminal Chamber, June 7, 2005, no. 04-87354, SOS Racisme,** [www.legifrance.gouv.fr/WAspad/UnDocument?base=INCA&nod=IXRXCX2005X06X06X00873X054](http://www.legifrance.gouv.fr/WAspad/UnDocument?base=INCA&nod=IXRXCX2005X06X06X00873X054)

In this case, the Court admitted telephone testing as evidence in criminal cases of discrimination in access to rental housing. The Court declared that recordings of telephone conversations establishing that a real estate agent declared an apartment as being rented to

people with surnames of “foreign origin”, and as being available to people with surnames which sounded “French”. The weight and value to be attributed to this evidence however is to be left to the judgement of the trial judge.

**Court of Cassation, Social Chamber, November 28, 2000, Harba, Dr. Soc. 2001, 315**

[www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX2000X11X05X00395X000](http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX2000X11X05X00395X000)

First case implementing the protection of witnesses against employer victimization further to taking action for discrimination, on the basis of article L123-5 LC protecting against victimization in cases related to discrimination on the ground of sex.

**TGI Montauban, 3 mai 2002, no. 02-00171, Mairie de Montauban c . George C . et al.**

In this context, the town of Montauban, which had provided the Roma population with an insalubrious and dangerous site, was refused an injunction by the local Court to expel them from a sporting facility that they had subsequently occupied. The Court ruled that it is was the local authority that was responsible for the public disorder it complained of, by failing to meet its obligation to provide a camping area compatible with proper living conditions. The right to decent housing is a constitutional principle, which is regarded as constitutive of the protection of human dignity.

**Court of Cassation, Social Chamber, March 15, 2005, no- 02-43.616, Renault c. Morange, Dictionnaire permanent social, 4114, Bulletin 814.**

[www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX2005X03X05X00089X000](http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX2005X03X05X00089X000)

Article L122-45 LC provides for an action requesting the annulment of all discriminatory decisions and indemnification of discriminatory career progressions over a long period of time. Since according to article L143-14 of the Labour Code actions for loss of wages are subject to a time limitation of five years, the question arose as to the time limitation applicable to actions for discrimination requesting damages for loss of wages. In this case the Court expressly decided for the application of the common law time limitation period for contractual damages of thirty years.

**Court of Cassation, Social Chamber, February 16, 2005, no. 02-43402,**

[www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX2005X02X05X00434X002](http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX2005X02X05X00434X002)

In France during the probation period, the decision to interrupt the labour contract is discretionary and does not require to justify cause. However, in this case France’s highest court decided that this discretionary power did not obviate the obligation of the employer to abide by the non-discrimination principle. Therefore, the Court decided that Article L122-45 LC prohibiting dismissal for discriminatory reasons was applicable to the probation period and that in this case the employer had dismissed the employee for discriminatory reasons based on a prohibited ground, his health.

**Origin:**

**Court of Cassation, Criminal chamber, June 27 1997, Bull. Crim. 1997 no. 253 p. 864**

In reference to accusations of provocation to discriminate, the terms Invaders, those occupying the land and disrespectful and toxic foreigners generate a feeling of aggression and intend to produce a feeling of hatred or acts of discrimination against immigrants considered as a group of persons who are not part of the French community. Foreigners living in France when they are targeted because they are not part of the French community constitute a group of persons according to article 24 (6) of the law on the press of July 29, 1881.

**CE, 30 octobre 2001, no. 204909, Association française des sociétés financières.**

[www.legifrance.gouv.fr/WAspad/UnDocument?base=JADE&nod=JGXAX2001X10X0000004909](http://www.legifrance.gouv.fr/WAspad/UnDocument?base=JADE&nod=JGXAX2001X10X0000004909)

The Conseil d'État heard an action for judicial review of a deliberation of the National Commission of Control of Data and Information Technologies, CNIL, of December 22 1998, which forbade, on grounds of discrimination, the use of a person's nationality as a criterion in credit assessments. The Conseil d'État struck down the CNIL's decision on the grounds that, so long as nationality was merely one element in an automatic calculation that was not in itself determinative of a credit decisions made by a financial institution, the criteria of nationality was not discriminatory under the terms of article 13 TUE and the Criminal Code. Nationality may be relevant as to the likelihood of a debtor leaving the country and, as a result, failing to repay a loan. It is therefore an admissible criterion and applicants for a loan may lawfully be required to provide it.

**Conseil d'Etat, July 29 2002, GISTI, Mrap et Femme de la terre no. 231158**

[www.legifrance.gouv.fr/WAspad/UnDocument?base=JADE&nod=JGXBX2002X07X0000031158](http://www.legifrance.gouv.fr/WAspad/UnDocument?base=JADE&nod=JGXBX2002X07X0000031158)

Certain aspects of ministerial instructions relating to the implications of the newly created civil union (*pacte civil de solidarité*) were struck down as discriminatory by the *Conseil d'État*. The Minister had acted unlawfully in instructing that, for the purpose of acquisition of a right of residence, cohabitation should be 3 years for partners of French or European nationals, but 5 years for partners of third-country nationals. Furthermore, the instruction specified that the partners of foreign students should not have rights in this respect

**Conseil d'Etat, 30/ 11/ 2002, no. 212179, 212211 DIOP,**

The Conseil d'État granted the request for judicial review of pensions arrangements of a Senegalese former Army Sergeant-Major on the grounds that the relevant Law of 1961 was discriminatory. The *Conseil d'État* found, not only that nationality is an inappropriate consideration on which to base a difference in pension calculation, but furthermore that "if the objective of French law was to draw the consequences from the independence of the former colonies and their distinct development, the difference of treatment thus created cannot be regarded as based on a criterion consistent with the objective, and that the provisions are therefore inconsistent with article 14 of the European Convention on Human Rights".

**Cour de Cassation, Chambre sociale 10/12/2002, n°0042158, X c/ Institut Goethe,**

[www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX2002X12X05X00373X000](http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX2002X12X05X00373X000)

(discrimination based on nationality- differential remuneration of EU citizens working in France- all employees must receive the same remuneration regardless of citizenship and origin)

**Cour de Cassation Chambre sociale 22/01/2003, N°00-44686, Mme X c/ Société Chauvin Laboratoire,**

[www.legifrance.gouv.fr/WAspad/UnDocument?base=INCA&nod=IXCXCX2003X01X05X00446X086](http://www.legifrance.gouv.fr/WAspad/UnDocument?base=INCA&nod=IXCXCX2003X01X05X00446X086)

Discrepancy in remuneration between employees working for the same corporation in France and Tunisia is illegal if the qualification and task are identical.

**CA Paris 17/10/2003 / appel de TGI Paris 22/11/2002, DO juillet 2003 p.284, Affaire « Moulin Rouge » SOS Racisme et Marega c/ Beuzit et Association du Moulin**

The evidence introduced before the Court was based on the results of an investigation by a Labour Inspector, which showed that the table and bar staff were 97% European whereas



“coloured” workers were numerous in the kitchens, and on a taped telephone conversation in which the manager stated that “coloured” staff were not hired for table and bar service. The Paris Criminal Court found that illegal discrimination leading to a racist management of the workforce had been established.

#### **Cout of Appeal of Besançon, April , 27, 2004**

The Chamber of preliminary enquiry of the Court of appeal went against the decision of the investigating magistrate, dismissing the case for lack of evidence after a three years preparatory inquiry following a complaint for racial discrimination for refusing, contrary to the standard procedure, to give a long term contract to a nurse who was on short terms contracts for three years and had received satisfactory evaluations. The Court of appeal returned the case to the investigating magistrate and ordered that a complementary investigation be opened, demanding that a detailed comparative study of all records of the hospital staff be made, and that witnesses be heard.

#### **Court of Cassation, Social Chamber, June 2, 2004, no. 02-45269, Sté Pavillon Montsouris c. X. and Sté Spot Image**

An employee pronouncing racist insults against a subordinate or addressing an electronic email to his employer containing anti-Semitic menaces and insults necessarily commits a wrongful act generating a real and serious reason for dismissal.

#### **T.A. Paris, March 16, 2005, no. 0502805/9, [www.gisti.org/doc/actions/2005/bnf/arret.html](http://www.gisti.org/doc/actions/2005/bnf/arret.html)**

The Court decides that article L312-1 of the Monetary and Financial Code, defining the conditions of the right to a bank account, does not foresee the obligation to prove legal residence in France before opening a bank account. Therefore the Banque de France cannot refuse the right to open a bank account to illegal and non resident non nationals.

#### **Religion:**

#### **CE April 14<sup>th</sup> 1995, *Consistoire central des israélites de France, Mr Koen*, (2 arrêts), Recueil Lebon page 169, Dalloz 1995, jur. page 481, note Koubi G.**

The principle of equality was raised in a case concerning the applicability of children's obligation to attend school when their religion requires worship on a day other than Sunday,. In this case, the *Conseil d'État* has given 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 public order (*ordre public*) in the school.”.

#### **Cour de Cassation 3<sup>ème</sup> Chambre civile 18/12/2002 N° 01-00519, X c/ Société d'investissement et de gestion de la Caisse centrale de réassurance**

[www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX2002X12X03X00262X000](http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX2002X12X03X00262X000)

The installation of an electrical digicode to open the door to a housing building, to the exclusion of any key or mechanical device, does not violate the freedom of worship of people who, for religious reasons, cannot use electricity on Saturday and religious holidays. Religious practice does not enter in the contractual realm of the lease unless expressly provided.

**CA Paris 19/06/2003, Dallila Tahri c/ Téléperformance France** – Appeal from the Conseil de Prud'hommes (Labour Court of Paris) 17/12/2002, RG n°0203547 (An employee

dismissed for refusing to take out her Islamic scarf obtained, on the basis of L122-45LC the annulment of her dismissal and damages amounting to wages for the entire period and moral damages as well as reintegration in her employment.

**T.A. Bordeaux, July, 20, 2005, no 0502605, Ali MERDJA**

The refusal by the Prefect to renew the accreditation of a youth support association and its members on the basis of its educators involvement in Muslim religious organizations, is a violation of freedom of conscience and the Court orders the Prefect to review his decision.

**Sexual orientation:**

**Court of Cassation, Social Chamber, April 17, 1991, Association Fraternité Sainte Pie**

The dismissal of a catholic church employee by reason of his homosexuality is abusive if there is no evidence of fault or of a substantial disturbance to the community. The Court refused to consider any argument of principle opposing faith and homosexuality as a legitimate occupational conflict. In matters related to faith, the rule is that the behaviour of the employee must be provocative and generate a functional problem. This case is further discussed in the report (section 4.2).

**Disability**

**C.A. Paris, March 14, 2005, no. 200108355, SNCF c. Thetier**

The Plaintiff was disabled and needed to travel with an electric respiratory device. He informed the SNCF agent of this at the time of booking his train tickets in order to be seated near an electrical plug. This request was not taken into consideration and the Plaintiff had to travel in the lavatory. In the absence of a civil recourse in damages for discrimination in access to goods and services, the Plaintiff had to sue for contractual liability and was awarded 2000€ in damages.

**T.G.I Paris, 17<sup>th</sup> Chamber, June 28, 2005, no. 0402608235, Poncelet c. Lassailly**

The Defendant admitted to having refused to rent an apartment because of Plaintiff's disability and argued that this decision was justified because the apartment was on an upper floor and the elevator was not reliable. The Court concluded that the Defendant could not substitute her own appreciation of the reasonableness of the situation for that of the Plaintiff and condemned the Defendant to a fine.

**C.A. Poitiers, September 1<sup>st</sup>, 2005, no. 419/05, Association des paralysés de France c. Société Hellucha**

The Defendant refused to sell cinema tickets to people in a wheel chair for safety reasons. After having failed to negotiate the installation of an access ramp to the Defendant's Movie theatre, the Plaintiff association asked a bailiff to certify the state of the installations and filed a criminal complaint. The Court decided that unless the Defendant demonstrated the technical impossibility of installing means of access to the theatre, or its disproportionate cost, the present condition of the premises did not constitute an acceptable ground of defence, since the file shows that the failure to install means of access was driven by a policy not to bother other clients with the presence of wheelchairs on the premises. The Court condemned the Defendant to a fine and damages in the amount of 2000 €

**T.A. Lyon , September 29, 2005, no. 0403829, M. & Mme Hebri, AJDA, 2005, 1874**

The failure of the State to provide access to school to a disabled child because of insufficient existing specialised facilities gives rise to the liability of the State in damages regardless of whether or not it is at fault, the additional burden on the family being unreasonable.

## 1. GENERAL LEGAL FRAMEWORK

### Constitutional provisions on protection against discrimination and the promotion of equality

*a) Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?*

The French tradition derives from the Enlightenment conception of equality enshrined in the 1789 Declaration of the Rights of Man and Citizen. Like the preamble of the Constitution of 1946, the Declaration was constitutionalised by the Constitution of 1958. Both documents express opposition to racism based on an absolute conception of humanity and, inseparably, on respect for human dignity, human rights and the universality of the principle of equality.

*The Declaration of the Rights of Man and Citizen, 1789*, states at article I : “Men are born and remain free and equal in rights. Social distinctions can have no other basis than common utility.”.

*The Preamble of the Constitution of 1946 states*: “On the morrow of the victory of the free peoples of the world over those regimes that attempted to enslave and to degrade the human person, the French people reaffirms that each human being, irrespective of race, religion, or belief, possesses inalienable and sacred rights. (...) France constitutes with the peoples of Overseas (*Outre-mer*) a Union based on equality of rights and duties, irrespective of race or religion.” And adds: “Each has a duty to work and the right to obtain employment. No one can be attacked in his work or employment by reason of his origins, opinions or beliefs”.

*Article 1<sup>st</sup> of the Constitution of 1958* states that: “France guarantees equality before the law to all citizens without distinction based on origin, race or religion. She respects all beliefs”. Article 2<sup>nd</sup> adds: “France is an indivisible, secular, democratic and social Republic.” In addition article 10 states: “No one must be questioned on the basis of his opinions, even religious, as long as their manifestation do not constitute a threat to public order as foreseen by law ».

Administrative tribunals have consistently struck down decisions using the criteria of “origin” for purposes of adjudication: for instance, an instruction denying eligibility for leave to a category of civil servants on the grounds of ethnic origin,<sup>16</sup> the denial of school registration to foreign children,<sup>17</sup> or local policies giving preferential treatment to sections of the population on the basis of origin.

There is no constitutional text prohibiting discrimination on the basis of age, disability, health or sexual orientation even if the list of discriminatory criteria listed in the Constitution have not been deemed to be exhaustive by the Constitutional Council who decided that the list of grounds was open and subject to evolution<sup>18</sup>. In addition, article 55 of the Constitution of 1958 specifies that Treaties and International conventions ratified by France are of superior

<sup>16</sup> Conseil d'État, November 21<sup>st</sup> 1962, *République Malgache c/ Mme Rasafindranaly*, recueil Lebon page 618.

<sup>17</sup> TA Bordeaux, June 14<sup>th</sup> 1988, *El Rhazouani*, recueil Lebon page 518

<sup>18</sup> Mélin-Soucranian, *Le principe d'égalité dans la jurisprudence du Conseil constitutionnel*, RFDA, Economica, 1997, 92. Conseil d'Etat, *Sur le principe d'égalité*, La documentation Française, 1998.

value to national law, which therefore includes all criteria of discrimination enumerated therein.

*b) Are constitutional anti-discrimination provisions directly applicable?*

*c) In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?*

Constitutional anti-discrimination provisions cannot be enforced by private actors before the Conseil Constitutionnel. The constitutional recourse against legislation is reserved to members of Parliament before enactment of the law by the President of the Republic.

However, private citizens can attack secondary legislation on constitutional grounds before the Conseil d'Etat at the condition that the text is not the mere repetition of a duly enacted law<sup>19</sup>.

## **2. THE DEFINITION OF DISCRIMINATION**

### **2.1 Grounds of unlawful discrimination**

*Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.*

Texts prohibiting discrimination in national legislation state an identical list of prohibited grounds without defining them (Article 225-1 and 2 of the Penal Code, Article L122-45 and following and L123-1 of the Labour Code, article 1 of the law “Mermaz” relating to landlord and tenants no. 89-462 of July 6, 1989 further to amendments introduced by the Law of January, 17, 2002, article 6 of the law no 83-634 of July, 13 1983 relating to the rights and obligations of civil servants, article 19 of the law HALDE): origin, appearance of origin, race, sex, family situation, physical appearance, last name, health, disability, genetic characteristics, mores, sexual orientation, age, union activities, religion, political and religious convictions (which are interpreted broadly to encompass all philosophical or mystical endeavours).

The Law n° 2002-303 of March 4, 2002 relating to the rights of the sick and to the quality of the medical system has enacted an additional ground of discrimination based on genetic characteristics (article 4). It has been introduced in the Civil Code (article 16-13) and added to the list of prohibited grounds of the Penal Code and the Labour Code<sup>20</sup>.

In addition, article L1110-3 of the Code of public health states a general principle of non discrimination in access to health without limiting its scope to a list of prohibited grounds.

#### **2.1.1 Definition of the grounds of unlawful discrimination within the Directives**

*a) How does national law on discrimination define the following terms: racial or ethnic origin, religion or belief, disability, age, sexual orientation?*

Each ground of discrimination is not defined in anti-discrimination legislation. Moreover, since their list is very broad, the judge does not approach a case of discrimination by identifying whether or not the complainant conforms to the definition of a group covered: .

<sup>19</sup> Sect. 23 avril 1997, GISTI AJ 1997, 435 ; Chapus, Droit administratif général, 13e ed. Tome 1, p. 31 et ss.

<sup>20</sup> [www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MESX0100092L](http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MESX0100092L)

mores, sexual orientation, sex, origin, appearance of origin, supposed race, physical appearance, last name, religious and philosophical convictions, family situation, union activities, political opinions, age, health, disability and genetic characteristics.

The Law no 2005-102 of February 11, 2005 for equal rights and opportunity of the disabled, (hereafter Law on disability)<sup>21</sup> has revisited the definition of discrimination at article L114 of the Code of social welfare (CSW). This definition of disability applies for the purpose of implementing all relevant dispositions relating to equal opportunities for the disabled:

A person with disability faces a complete limitation of activity or restriction of the ability to participate in society encountered by a person in his or her environment by reason of a substantial, lasting or definitive alteration of one or more physical, sensory, mental, cognitive or psychological faculties, of multiple disabilities or of a disabling illness<sup>22</sup>. (Our translation)

*b) Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law (e.g. the interpretation of what is a 'religion')?*

### **Origin and “race”:**

As discussed in section 1 a), since the law prohibits taking these concepts into consideration, they are not defined.

### **Religion and belief :**

In French law there is no legal definition of religion or belief. It is the Law of December 9, 1905 on the separation of Church and State that addresses the concepts of freedom of worship and beliefs. Article 1<sup>st</sup> of the 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.*” Freedom of religion is considered as an aspect of freedom of opinion. According to Jean Rivéro, freedom of religion includes on the one hand freedom of belief, hence the freedom to chose between non belief and membership to 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 its decision of July 28, 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...”. The report of the Commission of enquiry on sects, concluded that French law offered no definition of “sects”.

### **Sexual orientation:**

In a decision of December 19, 1980, the Constitutional Council refused to include in the definition of discrimination based on sex, discrimination based on sexuality<sup>23</sup>. The Protection against discrimination based on sexual orientation has been introduced in French law under the term “mores” first in the Penal Code in 1985 (Law 85-772 of July 25, 1985) then in the Labour Code in 1986 (Law 86-76 of January 17 1986 and Law 92-1446 of December 31 1992). However, the legislator chose to use the concept of “Mores” until the term “sexual

<sup>21</sup> [www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANX0300217L](http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANX0300217L)

<sup>22</sup> « Art. 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 polyhandicap ou d'un trouble de santé invalidant. »

<sup>23</sup> 80-125 RJC I-88.

orientation “ was added to the Labour Code and the Penal Code by the Law of November 16, 2001. Henceforth, the two terms co-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 the jurisprudence.

Sexual orientation has not however been interpreted to cover transexuality. Transexuals will have to try to argue the use of the concept of discrimination based on “sex”, even if it was never used to protect homosexuals, or those of discrimination based on “mores” or physical appearance.

*c) Are there any restrictions related to the scope of ‘age’ as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?*

There are no restriction per se related to the scope of age other then exceptions discussed in section 4.7.

### **2.1.2 Assumed and associated discrimination**

*a) Does national law prohibit discrimination based on assumed characteristics? e.g. where a woman is discriminated against because another person assumes that she is a Muslim, even though that turns out to be an incorrect assumption.*

The wording of the prohibition to discriminate in the Penal Code, the Labour Code and the Civil Code expressly include the concept of assumed characteristics for the grounds of origin, race and religion: “ the belonging or non belonging, real or assumed, to an ethnic group, a nation, a race or a determined religion”.

The systematic reference to physical appearance in the list of prohibited grounds of discrimination is also a way to cover assumed characteristics such as origin and sexual orientation.

Moreover, since the wording of all the legislation prohibits not only discrimination on the basis of one’s characteristics but also the sheer fact of taking into account such characteristics, regardless of whether it is an attribute of the victim, we can consider that the definition of discrimination systematically integrates assumed characteristics.

The definition of the prohibition to discriminate on the basis of disability is based on the employer’s perception of the employee coupled with the duty to accommodate<sup>24</sup>. It can thus be considered to include assumed characteristics as well and covers discrimination on the ground that, although a person does not now have a disability and is not perceived to have one, they have had one in the past or are thought likely to acquire one in the future.

*b) Does national law prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group)? If so, how?*

There is no specific provision in this regard but, as discussed in section 2.1.2 a), the prohibition to discriminate covered by article L122-45 LC, 225-2 PC and art. 19 of the Law no 2004-1486 of December 30, 2004 (Law HALDE), cover discrimination by reason of association in as much as the definition of prohibited discrimination entails that the mere

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<sup>24</sup> Stated in the following terms at article L323-9-1 LC: “employers take, in relation to need dictated by a concrete situation, all necessary measures “

reference to a prohibited ground of discrimination as a selection criteria seems sufficient to trigger illegal conduct.

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

### *a) How is direct discrimination defined in national law?*

Direct discrimination is covered by all legislation covering all prohibited grounds of discrimination (articles 225-1 and 2 PC, Article L122-45 and following and L123-1 LC, article 1 of the Law “Mermaz” relating to landlord and tenants no. 89-462 of July 6, 1989 further to amendments introduced by the Law of January, 17, 2002, article 6 of the Law no 83-634 of July, 13 1983 relating to the rights and obligations of civil servants, article 19 Law HALDE). These texts list the grounds and the prohibited discriminatory behaviours. The Penal Code and the Law on the Press of 1881 refer to direct discrimination and provide the following definition: “Constitutes discrimination any distinction by reason of origin, real or presumed belonging to an ethnic national or racial origin and religion.”<sup>25</sup>

Since the Law of November 16, 2001 implementing the directive 2000/78 and Law HALDE, other texts prohibiting discrimination expressly refer to direct and indirect discrimination without providing a definition.

### *b) Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).*

The law does not permit justification of direct discrimination generally, or in relation to a particular ground, as it provides for a uniform legal regime for all grounds of discrimination. However, the Law no 2005-102 on disability, which defines the unjustified failure to make reasonable accommodation as a form of discrimination, limits the duty of reasonable accommodation (see section 2.6 answer to question B).

### *c) In relation to age discrimination, if the definition is based on ‘less favourable treatment’ does the law specify how a comparison is to be made?*

The law provides for a uniform legal regime for all grounds of discrimination. However, as discussed in section 4.7 below, for age, article L122-45-3 recognizes exceptions in application of article 6 of the directive for employee of the private sector. This exception however does not modify the conditions of application of the general prohibition to discriminate and does not comment on legal tests applicable to this particular ground of discrimination.

## ➔ 2.2.1 Situation Testing

### *a) Does national law permit the use of ‘situational testing’? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court.*

Situation testing has been held admissible as evidence in criminal courts by the jurisprudence of the Court of Cassation discussed hereafter, on the basis of the principle of complete freedom of evidence in criminal cases: evidence is admissible whether or not it has been obtained by legal and fair methods. In France, the illegality of the mean of access to evidence has no bearing on its admissibility in criminal cases.

<sup>25</sup> « 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. ».

It 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 on the basis of general rules of evidence. There is no specific legislation addressing the issue of the admissibility in evidence of situation testing or regulating its procedural conditions for admissibility at the present date but draft legislation is presently being prepared by government and a bill should be presented to Parliament in the first semester of 2006.

In the landmark cases establishing admissibility of situation testing as evidence, the Court of Cassation does not provide any commentary or explanation on the methodology to be followed in order to conduct a situation test with decisive evidentiary value. The jurisprudence in this respect results from subsequent trial and appellate court decisions.

In September 2000<sup>26</sup>, the Criminal Chamber of the Cour de cassation recognised that a situation test on limitations to access to goods and services, carried out by prospective clients (so-called ‘testers’), can be admitted as evidence of discrimination in the entry to night clubs in violation of articles 225-1 and 225-2 of the Penal Code. In its decision of June 11, 2002, the Cour de cassation further declared that the alleged unfairness and/or illegality of this mean of access to evidence had no bearing on its admissibility<sup>27</sup>. In these cases, the results of the situation tests were established in court by the testimony of the prospective clients or third party witnesses (June 2000) and the filing of Police or Bailiffs reports (September 2002) on the situation test.

Although admissible as evidence in criminal matters of discrimination, the trial judge is not bound to attribute any value to this evidence unless he is satisfied if its reliability which is often challenged by defendants. The courts of appeal have set out clear criteria for evaluating the evidence since the first decision of the Court of cassation of September 2000. The results of the situation testing must be certified by third party witnesses, preferably bailiffs and police officers, and the participants must not be members of the structure (NGO, Union etc...) organising the testing and appearing as a civil party before the court<sup>28</sup>.

In its decision of 7 June 2005 no. 04-87354<sup>29</sup>, the Criminal chamber of the Court of Cassation admitted in evidence a telephone testing established by way of the testimony of a third party and the filing of the recording of the tape of the telephone conversation, in order to support criminal charges of discrimination in access to rental accommodation on the basis of article 225-1 and 225-2 of the Penal Code. The Court declared admissible recordings of telephone conversations which established that a real estate agent informed prospective clients that apartments were still available or not according to whether or not their surnames sounded “French”. The weight to be attributed to this evidence however is a matter for the trial judge.

In the Moulin Rouge case<sup>30</sup>, testing will take the form of the observations on the absence of coloured employees in all premises accessible to the public, drawn up in the labour inspector’s report, confirmed by a telephone testing recorded by SOS Racism<sup>31</sup>. The labour inspector having visited the premises, recorded ethnic segregation in the distribution of

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<sup>26</sup> Court of Cassation, Criminal Chamber, September 12, 2000 no. 99-87.251, Fardeau

<sup>27</sup> Court of Cassation, Criminal Chamber, June 11, 2002 no W01-85.560 F-D

<sup>28</sup> See C.A. , Grenoble, April 18, 2001, no. 00/00657

<sup>29</sup> [www.legifrance.gouv.fr/WAspad/UnDocument?base=INCA&nod=IXRXCX2005X06X06X00873X054](http://www.legifrance.gouv.fr/WAspad/UnDocument?base=INCA&nod=IXRXCX2005X06X06X00873X054)

<sup>30</sup> CA Paris 17/10/2003 / appel de TGI Paris 22/11/2002, DO juillet 2003 p.284

<sup>31</sup> TGI Paris, 31st Chamber, November 22, 2002, no 0111790455, C.A. Paris, 11th Chamber, October 17, 2003, no. 03/00387.



personnel in the restaurant: coloured people working in the kitchen and caucasian in contact with the public.

b) *Outline important case-law within the national legal system on this issue.*

Cf. Answer a)

c) *Outline how situation-testing is used in practice and by whom (e.g. NGOs)*

Situation testing is a mean of evidence developed by anti-racist NGOs which is mostly used by them, but as well by individual plaintiffs. It has been used in racial and disability discrimination cases. Some associations have recently used it in age discrimination cases in access to employment.

It has been used to trap discriminating parties in situations leaving no trace of discriminatory behaviour, such as pre-contractual relation leading to refusal of access to goods and services (night clubs, rental housing) or access to employment.

It offers the record of an objective situation of 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.

The recognition of the admissibility of recordings of telephone testing and the simplicity of the process will open access to this mean of evidence to a greater number of victims.

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

a) *How is indirect discrimination defined in national law?*

Indirect discrimination and shift in the burden of proof in cases of discrimination have been introduced into French Law, first by the courts<sup>32</sup>, then by legislation, first in the Labour Code (section L. 122-45 LC, added by the Law of November 126, 2001) and then in the Civil Code in matters related to a general principle forbidding racial discrimination (article 19 Law HALDE).

However, legislative provisions do not provide a definition of indirect discrimination and it will have to be defined by the courts, hopefully by reference to the definition of the directive. There have not yet been such judicial decisions.

It is important to note that indirect discrimination does not apply in criminal matters or to the Law on the Press of 1881, since the principles of criminal law require evidence of intentional discrimination.<sup>33</sup>

b) *What test must be satisfied to justify indirect discrimination?*

The few cases referring to indirect discrimination resulted from the application of Directive 76/207 concerning equal treatment between men and women in national law<sup>34</sup>. Most of them were the result of decisions of the Court of Justice of the European Communities and preceded implementation of the directives. However, in matters of discrimination based on

<sup>32</sup> Cass. Soc. 9 April 1996, no. 1727 P, *RJS* 5/96 no. 550; Cass. Soc. 23 November 1999 no. 4290, *RJS* 5/00 no. 498

<sup>33</sup> Art. 121-3 of the Penal Code : 'Il n'y a point de crime ou de délit sans intention de le commettre'.

<sup>34</sup> (see USAI Champignons section 0.3)

trade union activities, the Social Chamber of the Court of Cassation has applied a comparative situation approach inspired by the case law of the ECJ in order to establish direct discrimination, thereby making way to the implementation of the methodology underlying indirect discrimination.

*c) Is this compatible with the Directives?*

Yes, the transposition of the shift of the burden of proof in the Law of November 16, 2001 and the Law of December 30, 2004, conform to the requirements of the directive.

However, the decisions of lower courts remain at this stage inconsistent and effective implementation by trial judges and non professional Labour courts judges will require time and training.

*d) In relation to age discrimination, does the law specify how a comparison is to be made?*

No. See 2.2 C)

### ➔ 2.3.1 Statistical Evidence

*a) Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court.*

General principles of evidence in criminal cases allow the proof to be made by all means and consider 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 in evidence.

In labour law, the constant jurisprudence of the social chamber of the Cour de cassation in matters of discrimination has favoured an approach based on the comparative analysis of the situation of the Plaintiff against that of allegedly non discriminated parties. This comparative approach necessarily allows plaintiff to establish a statistically significant discrepancy based on the analysis of evidence emanating from the employer on the respective situations of employees based on the prohibited grounds of discrimination including ethnic origin, race, religion, age, sexual orientation and disability.

General rules of civil and criminal procedure and the provisions transposing directives 2000/43 and 2000/78 do not refer expressly to the use of statistical evidence. However, general principles of interpretation allow the national judge to refer to the directive in order to interpret national law and their explicit reference to the use of statistics as a legal mean of evidence of discrimination should be sufficient to justify admissibility of statistics in evidence. Civil and administrative recourses resulting from texts transposing directive 2000/43 and 2000/78 have not yet addressed the issue of the admissibility of statistics in evidence whether they be national statistics or resulting from the presentation of data emanating from defendant<sup>35</sup>.

Finally article 8 II paragraph 5 of the Law 78-17 of January 6, 1978 relating to information systems, data and the protection of freedom<sup>36</sup> states that personal data can be used in the context of any administrative and judicial proceeding pursuant to the defence or the exercise of a legal right.

<sup>35</sup> LANQUETIN, GREVY, Bilan de la mise en oeuvre de la loi du 16 novembre 2001, rapport final Direction de la Population et des Migration, Ministère des Affaires sociales, , December 2005 (not yet published)

<sup>36</sup> Loi n° 78-17 du 6 Janvier 1978 relative à l'informatique, aux fichiers et aux libertés : [www.cnil.fr/index.php?id=301](http://www.cnil.fr/index.php?id=301)

*b) Is the use of such evidence commonly used?*

As mentioned above, statistics resulting from a situation testing are commonly used in criminal matters and statistics resulting from the comparative of situation of employees of a common employer are as well commonly used in labour law.

Statistics have not yet been used in civil and administrative procedures<sup>37</sup>.

According to a very recent study reviewing application of discrimination law by the courts since transposition of directives 2000/43 and 2000/78, beyond data analysis on the situation in the workplace, statistics have not yet been used before the civil courts<sup>38</sup>.

*c) Please illustrate the most important case law in this area.*

With respect to situation testing in criminal matters see 2.2.1

In its decision of June 14, 2001<sup>39</sup>, the Cour de 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 the obligation to investigate the comparative situation of the employee with that of others and to actively request production of the necessary evidence by defendant. Failure to proceed to such a comparative analysis is the equivalent of refusing plaintiff access to enforcement of his/her rights to protection against discrimination.

*d) Are there national rules which permit data collection? Please answer in respect of all 5 grounds.*

Data collection is governed by the Law 78-17 of January 6, 1978 relating to information systems, data and the protection of freedom<sup>40</sup> and covers collection and manipulation personal information relating to both computerised and non-computerised information and files. This legislation is enforced by The *Commission nationale informatique et liberté* (CNIL/ National Commission for data protection).

Personal information is defined at article 2 of the law as any information relating to an identified physical person or to a person, directly or indirectly identifiable in reference to a number of identification or personal attributes.

Data collection and treatment activities are subject to a declaration for authorisation by the CNIL pursuant to articles 22 and following of the Law.

Article 8 II paragraph 5 of the Law states that personal data can be used to adduce and present evidence in the context of any administrative and judicial proceeding pursuant to the defence or the exercise of a legal right without declaration or authorization. Thus, Plaintiffs 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.

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<sup>37</sup> LANQUETIN, GREVY, Op. Cit.

<sup>38</sup> LANQUETIN, GREVY, Op. Cit.

<sup>39</sup> Court of Cassation, Criminal Chamber, June 14, 2000, no. 2792, 99-108, CFDT Interco

<sup>40</sup> Op. Cit.

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

Violation of the obligation to declare or obtain authorisation for collecting and treating data is subject to penal and administrative sanctions.

There is no general principle forbidding the collection of data based on ethnic origin, religion, age, disability or sexual orientation. However, all collection and treatment is subject to authorisation - including for the purpose of research - except, as discussed above, for the purpose of presenting evidence in judicial and administrative proceedings.

National governmental statistical agencies (INSEE, DARES, DRESS, INED<sup>41</sup>) refuse to collect data on race and ethnic origin in the national census except regarding on nationality and the origin of first degree ascendants. Therefore, racial and ethnic statistical indicators allowing to undertake impact evaluation of policies, 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 National statistical agencies (based on a maximum representative sample of 5000 selected people). It is not collected in institutional or corporate records, for example employers records.

Recently many studies and reports, as well as public policy on racial discrimination, have launched a debate on the opportunity to revisit the position of the French institutions managing the national policy on statistics and data protection, that prohibits the collection of data on national, ethnic and racial origin. With a particular focus on the field of employment, the CNIL decided to create a working group with the mandate to consult national statistics institutions, to audit the present research projects and to prepare recommendations on possible orientation of future developments on this issue. It issued a recommendation on July, 5, 2005, the CNIL<sup>42</sup> on the collection of data by employers in order to monitor discrimination in the work place.

The CNIL considers that records can be kept by employers for the purpose of combating discrimination as this constitutes a “legitimate endeavour” as defined by the Law. In order to monitor origin, the employer can collect the following information: surname of the candidate or the employee, first name, current nationality, nationality at birth, place of birth, nationality and place of birth of parents, address. The use of existing records is possible if they are declared to the CNIL and only when anti-discrimination programs have been adopted by the public service or the private employer concerned. The use of data to induce ethno-racial profiles is not expressly authorised by law and considered abusive by the CNIL.

The treatment of such data must be confidential, anonymous and reserved to the group monitoring the implementation of the program. After production of the study, the data collection program must be destroyed immediately. For studies conducted by survey, the answers must be anonymous and their use exclusively reserved to exploitation in the context of the study by the persons responsible for the study.

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<sup>41</sup> INSEE (Institut national de la statistique et des études économiques) ; DARES ( Direction de l’animation de la recherche, des études et des statistiques) ; DRESS (Direction de la recherche, de l’évaluation, des études et des statistiques) ; INED ( Institut national des études démographiques).

<sup>42</sup> CNIL recommendation on national, racial and ethnic data of July 5, 2005

[www.cnil.fr/index.php?id=1844&news\[uid\]=272&cHash=55f0416448](http://www.cnil.fr/index.php?id=1844&news[uid]=272&cHash=55f0416448) : summary: [www.cnil.fr/index.php?id=1845](http://www.cnil.fr/index.php?id=1845)

However, there is no general methodology and indicators for ethno-racial indicators constructed by national institutions managing statistics in France, the relevance of such indicators being controversial and remaining contested. In this context, there is no reliable methodological framework to collect data or to allow comparative analysis on the basis of origin or race. Therefore, such studies cannot be improvised and they should not be allowed until such time as the legislator authorises them and only when authorised. The substitution to existing data of extrapolations based on last name or address (which has been used by scholars in the last years), is not acceptable as it is not relevant, not reliable and should not be generalised as an acceptable research practice of substitution. Employers should not use information such as name or area of residence as ethno-racial indicators from which to draw certain conclusions about their employment of certain racial or ethnic groups etc.

In relation to the construction of research protocols, the CNIL recommends that Government initiate a consultation with unions, employers, the public service and representatives of civil society in order to prepare draft legislation proposing a relevant approach to monitoring to a discussion and vote before Parliament.

## 2.4 Harassment (Article 2(3))

*a) How is harassment defined in national law? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

In French Law, harassment takes both the form of sexual harassment and moral harassment. It is sanctioned by criminal law (article 222-33 and 222-33-2 PC) and labour law (articles L122-46 et L122-49 LC and article 6 of Law no 83-634 of July 13, 1983 concerning civil servants).

Prohibition of harassment is applicable to both the private and public sectors and its definition covers acts of superiors as well as acts perpetrated by colleagues. The Labour Code specifically states that no employee must be the victim of such behaviour or be sanctioned for having testified or complained in relation thereof (article L122-49 paragraph 2 LC). According to the Law of January 17, 2002, moral harassment covers « *repeated acts which result in a degradation of working conditions such as to alter one's benefit of one's rights or dignity, to alter one's physical or psychological health or to jeopardise one's professional future.* » Moreover, since this law, article L122-46 LC defines sexual harassment as “ *the behaviour of any person which aims at obtaining sexual favours for one's own benefit or that of a third party.* ” The courts have decided that homosexual sexual advances were covered by the prohibition of sexual harassment<sup>43</sup>.

Article L122-52 LC provides in labour law for the shift in the burden of proof in the same terms as those used in directives 2000/43 and 2000/78.

*b) Is harassment prohibited as a form of discrimination?*

Moral and sexual harassment are not considered as discrimination in French Law but as a violation of one's physical and psychological integrity. However, in the present state of the law, discrimination taking the form of harassment is considered by the courts as covered by the prohibition of direct discrimination under article L122-45 LC.

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<sup>43</sup> Cour d'Appel Paris, 18<sup>e</sup> Ch., section C, 8 octobre 1992, *Stè Euro Disney c. Vallinas*, Juris Data no 023467

*c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?*

No.

## **2.5 Instructions to discriminate (Article 2(4))**

*Does national law prohibit instructions to discriminate?*

Instructions to discriminate are not covered as such by the Labour Code, the Civil Code or the Penal Code. However, incitement and instructions to discriminate correspond to the notion of complicity of articles 121-6 and 121-7 PC and general principles of liability in civil law. Thus in labour law an employee's superior and the employer will support liability for actions of their subordinates covered by L122-45 LC in situations of discrimination and by L122-49 LC in situations of harassment. In addition, L122-52 LC creates an obligation on the part of the employer to take all necessary measures to put an end to harassment in the workplace. In public service, the same principles apply.

In very few cases instructions to discriminate were presumed in criminal cases and the corporation was held liable for the discrimination perpetrated by its employees. However, criminal prosecutions against corporate entities remain extremely rare, as do prosecution arguments for penalties against employers when specific employees are prosecuted. In few isolated cases however, the exacting burden of proof with regard to the liability of senior management was met deductively because the court was persuaded of its active involvement in what was a discriminatory policy<sup>44</sup>. In fact it is the manager giving instructions who is targeted in the procedure and in penal cases the court is looking for evidence of the involvement of the decision maker<sup>45</sup>.

The Law on the Press prohibits provocation to racial, religious, sex, disability and sexual orientation discrimination, as well as complicity (article 23 and 24 of the Law on the Press of 1881 in case of public provocation and article R625-7 PC in case of non public provocation). The Court of cassation has clearly established that the prohibited provocation refers to discriminations defined by article 225-1 and 225-2 PC.<sup>46</sup>

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

*a) How does national law implement the duty to provide reasonable accommodation for disabled people? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. e.g. ➔ does national law define what would be a "disproportionate burden" for employers or is the availability of financial assistance from the State taken into account in assessing whether there is a disproportionate burden?*

The Law on disability reforms the legal scheme concerning assistance to the disabled and revisits their rights as well as all support and administrative schemes in the light of the

<sup>44</sup> TGI Versailles, 2 avril 2001. CA Paris 20 mars 1997, Sté NIDEK Europarc, n° 4835/96 ;

<sup>45</sup> CA Paris 17/10/2003 / appel de TGI Paris 22/11/2002, DO juillet 2003 p.284, Affaire « Moulin Rouge » SOS Racisme et Marega c/ Beuzit et Association du Moulin ; TGI November 14, 2002 no. 0019304084 Cantuel Horbette (Hotel La Villa), Essindi et al

<sup>46</sup> Cass. crim. April 12, 1976, Cass. crim. May 22, 1989.

principles of non-discrimination and of integration to society. It completes transposition of Directive 2000/78.

It modifies the definition of “Disability” by articulating the rights of the disabled around the principles of non-discrimination, access to the built and urban environment and integration in society. It proposes a timetable for the implementation of all necessary measures to ensure a right of access to local schools and higher education, access to public buildings and housing, access to public transport and urban mobility. The Law also requires adaptations to be made in order to facilitate access to new technology of information, voting and television.

Please note that, as discussed hereafter, the law on Disability translates the terms “reasonable accommodation “ by those of “all necessary measures”(mesures nécessaires).

The definition of disability at article L114 of the Code of Social Welfare (CSW) is immediately followed by the affirmation of the corresponding right to solidarity, equal treatment and the full benefit of citizenship, at article L114-1 of the same Code. It is followed by article L114-1-1 which lays down the right to access local schools, the labour market, public institutions and financial support, including compensation for additional costs related to one’s disability as well as an allowance for each disabled adult (article 11 of the Law) and a similar compensation for disabled children before 2008 (article 13).

Title IV of the Law, entitled “Accessibility”, covers access to education in chapter I, employment, adapted employment and protected employment in chapter II, and structural modifications necessary to ensure accessibility to buildings and infrastructures in chapter III.

Article 24 adds article L122-45-4 to the Labour Code (hereafter LC) which provides: “No salaried employee can 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 towards disabled workers” and, at 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 L122-45 LC, and resulting from the transposition of Directive 2000/78, is applicable.

In addition, the Law creates Article L323-9-1 LC in order to ensure respect for the principle of equal treatment towards the disabled in the workplace, as defined in Article L114 of the CSW, and reasonable accommodation. It provides that “(...) employers are to take, in relation to the need dictated by a concrete situation, all necessary measures to allow disabled workers to have access to or to keep a position of employment that corresponds to their qualifications, to execute the work, progress therein or to have access to adapted professional training”<sup>47</sup> (*our translation*). The only applicable limitation to this obligation is “disproportionate costs”, evaluated by taking into account any financial support available to the employer (cf. Article 37 of the law on disability concerning Article L323-6 LC on financial subsidies awarded by the departmental director of labour). There is no other guidance on assessing what is disproportionate. However, as accommodation is translated by “necessary measure” the issue must be analysed in terms of what measures are to be held necessary.

Similar provisions are integrated into the Law 83-6345 of July 13 1983 relating to the rights and obligations of civil servants; Law 84-16 of January 11 1984 concerning the civil service of the State; Law 84-53 of January 26, 1984 civil service for local and regional levels of government and Law 86-33 of January 9, 1986 concerning the hospital civil service.

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<sup>47</sup> Art. 323-9-1 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 »

*b) Does failure to meet the duty count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination?*

The second paragraph of Article L323-9-1 LC provides that “the refusal to take such measures (*reasonable accommodation*) may constitute discrimination according to Article L122-45 LC”. The claimant thus benefits from the legal regime of discrimination covering both direct and indirect discrimination, which gives him, or her, the benefit of the right to obtain access to evidence and of the shift in the burden of proof.

The law gives no precision as to when it will deem a refusal to make “accommodation” (or take “necessary measures”) to be discrimination. 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 we can further present with respect to the burden it imposes on employers.

*c) Has national law implemented the duty to provide reasonable accommodation in respect of any of the other grounds?*

We will only discuss reasonable accommodation as it relates to measures allowing for the integration of persons with specific needs in mainstream services and will not include in this section special schemes. In this regard please see sections 3.2.10, 4.7 and 5).

The Law on disability provides for a duty to integrate disabled children in the mainstream school system (see section 3.2.8).

On other grounds of discrimination there is no express provision providing for a duty of reasonable accommodation. However, the jurisprudence of the Conseil d’Etat clearly provides for a duty of reasonable accommodation on religious grounds of the duty of children to attend school (see section 0.3 and 3.2.8 CE April 14<sup>th</sup> 1995, Consistoire central des Israelites de France ).

In addition, the educational system provides for special classes to integrate newly arrived foreign migrant children <sup>48</sup>. The Law n° 2000-614 of July 5, 2000, on the accommodation of travelling people (euphemism that covers all travelling populations), provides for a duty to integrate occasional attendance to school of travelling Roma children <sup>49</sup>.

*d) Does national law require buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/43?*

Article L111-7 of the Code of construction requires public and residential buildings to be designed and built in a way accessible to the disabled. The conditions of enforceability of this principle and the regulation of any delay in proceeding to necessary adaptations will be adopted by decree (not yet adopted).

A building which does not conform to requirements of accessibility could be shut down by administrative order (article 111-8-3 of the Code of construction). Public subsidies to building

<sup>48</sup> FRANCHI, Vijé, Raxen 4 EUMC French national report on education. Policy document n° 2002-102 issued on the 25/04/2002.

<sup>49</sup> [www.legifrance.gouv.fr/texteconsolide/MEEAX.htm](http://www.legifrance.gouv.fr/texteconsolide/MEEAX.htm)



construction and renovation projects are conditional upon respecting accessibility requirements (article 111-26 par IV of the Code of construction).

The mobility chain including sidewalks, buildings, streets, public facilities, must allow total accessibility for the disabled within ten years of publication of the Law on disability (February 2005). Public transport must offer complete accessibility within three years, or offer substitute transport services to the disabled.

The regulation of building and infrastructure accessibility existed before the Law on disability, but the obligation to modify existing buildings and reasonable accommodation requirements result from this law.

These provisions give rise to administrative remedies. In addition, they create a duty of reasonable accommodation in access to housing and employment. The failure to provide reasonable accommodation could give rise to remedies in discrimination in access to housing based on the law no 2002-73 of Social Modernisation of January 17, 2002 and, as discussed in section 2.6 b), a recourse in discrimination in access to employment based on article L122-45-4 LC.

## ➔ 2.7 Sheltered or semi-sheltered accommodation/employment

*a) To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for disabled workers?*

Title IV Chapter II section 4 of the Law on disability reforms the provisions of the Labor Code on sheltered and semi-sheltered workers provided in articles 323-21 and 323-29 et seq. of the Labour Code and articles 313-23 and following CSW.

The Labour Code provisions provide for subsidized employments with a minimum wage determined by decree (article 323-23 LC), in adapted businesses and sheltered employment centres for disabled person selected by a commission.

*b) Would such activities be considered to constitute employment under national law?*

Such activities are considered as employment and covered by the Labour Code ( article L131-2, L323-1 and following, L412-5 LC ).

## 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)

*Are there residence or citizenship/nationality requirements for protection under the relevant national laws transposing the Directives?*

No. The general protection against discrimination covers all and 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<sup>50</sup>. However, the law conditions the access to certain rights, such as the right to work and some social benefits, to the status of legal foreign resident. In addition, the law creates some legal discrimination in access to specific professions and jobs (about 7000 named jobs), subjecting them to conditions of citizenship, whether national or from the European Union (see GELD publication no 1. on legal discriminations and employments inaccessible to foreigners<sup>51</sup>).

### 3.1.2 Natural persons and legal persons (Recital 16 Directive 2000/43)

*Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?*

No. Physical and legal persons, whether public or private, are bound to uphold the prohibition to discriminate in penal law (article 121-2 PC for legal persons and 432-7 PC for public authority), private law and public law.

### 3.1.3 Scope of liability

*What is the scope of liability for discrimination (including harassment and instruction to discriminate)? Specifically, can employers or (in the case of racial or ethnic origin) service-providers (e.g. landlords, schools, hospitals) be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?*

See answers to questions 2.5 and 3.1.2. All direct or indirect perpetrators of discrimination or harassment can be held liable, whether public or private, natural or legal persons.

## 3.2 Material Scope

### 3.2.1 Employment, self-employment and occupation

*Does national legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office?*

All employees and civil servants are protected against discrimination with respect to all the grounds covered by Article 13 of the Amsterdam Treaty. The extent of the protection and the legal regime varies according to whether the situation is covered by the Penal Code, the Labour Code or administrative law.

Article L122-45 LC covers, on all grounds, hiring practices, remuneration, appointment, promotion, transfer, qualification, classification, renewal of contract and redeployment. In addition, the Labour Code forbids discriminatory provisions (L120-2 LC) in the in house regulations (L122-35 LC) and collective bargaining agreements (L132-1 LC). The right of alert of the employees' representative (the ER) in case of violations of human rights and freedoms in the workplace stipulated at article L422-1-1 LC, entitles the ER to file an emergency recourse for injunctive relief before the Labour Court and applies to cases of discrimination<sup>52</sup>.

<sup>50</sup> Constitutional Council, January, 22, 1990, 296 DC, R.F.D.C. no. 2 1990, obs Favoreu

<sup>51</sup> [www.le114.com/contenu.php?dossier=0&id\\_rubrique=4](http://www.le114.com/contenu.php?dossier=0&id_rubrique=4)

<sup>52</sup> Cass. soc. May 26, 1999, Bull. Civ. V no. 238

With respect to labour court judges' elections, lists presented by a political party or an organisation favouring discrimination are illegal (L513-3-1).

The Labour Code does not foresee exceptions to the principle of non discrimination for occupational reasons in relation to its nature or its conditions of exercise. In addition, the prohibition of discrimination applies to salaried workers as well as temporary employees and vocational apprenticeship.

In the public sector, article 6 quinquies of Law no. 83-634 of July 13, 1983 as modified by the Law of November 16, 2001 forbids distinctions between civil servants in reason of their political, philosophical or religious opinions, union activities, sex, health, disability, race or origin. However, since according to article R411-1 of the Code of administrative justice, the administrative judge has inquisitive powers providing him direct access to the evidence, the shift in the burden of proof has not been implemented in application of the exception provided at article 10 paragraph 5 of directive 2000/78. This legal regime is completed by the prohibition of discrimination by public agents and authorities provided at article 432-7 of the Penal Code.

With respect to the status of the army, France has prevailed itself of the exception of article 3 (4) of directive 2000/78 allowing derogation concerning criteria based on age and disability.

For other areas listed at article 3 of the directive, namely non salaried workers and independent contractors, French positive law refers to general principles of constitutional value guaranteeing the respect of their right to equality before the law, and to general principles of contractual and civil liability which provide a liability scheme wide enough to accommodate the enforcement of the principle of non discrimination.

In addition, the Law HALDE completes implementation of directive 2000/43 by creating at article 19 a general principle prohibiting direct and indirect discrimination on the basis of "race" and origin and a recourse benefiting from the transfer in the burden of proof as regards independent and non salaried workers.

The penal regime (articles 225-1 and 225-2 PC) does not provide for a shift in the burden of proof and covers only direct discrimination. It protect against discrimination in recruiting, vocational apprenticeship and training, as well as sanctions and dismissal. It offers the only possible recourse in case of refusal of the benefit of a right granted by law and of hindrance to economic activity.

Article 226-19 PC further incriminates anyone who collects nominative data- i.e. information linked to a person's name- concerning race, political or religious opinions, union membership as well as a person's mores. Therefore, the employer and no one can, in the course of business, gather this information except in certain regulated circumstances related to specific small scale studies.

**➔ 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))**

**Is the public sector dealt with differently to the private sector?**

Access to employment is specifically covered by article 225-2 PC, article L122-45 LC and article 6 of the Law no 83-634 of July 13, 1983 on the rights and obligations of civil servants.

There is no specific regulation for self employment or occupation except as regards the criteria of “race” and “origin” (see above article 19 Law HALDE). These areas are covered by general principles of contractual law. In addition, the Penal Code (article 225-2) specifically targets the refusal of the benefit of a right granted by law and of hindrance to economic activity.

However, as discussed above (section 3.1.1), the law conditions the access to certain rights, such as the right to work, to the status of legal foreign resident and creates some legal discrimination in access to specific professions and jobs (about 7000 named jobs), subjecting them to conditions of citizenship, whether national or from the European Union (see GELD publication no 1. on Legal discriminations and employments inaccessible to foreigners, *supra*).

In France access to the civil service is conditional upon being admitted further to a competitive entry examinations. The Law on disability creates at article 19, an express obligation to adapt the examination processes to the benefit of the disabled. Government is just starting to adopt the decrees required to implement the Law on disability, and in this context has adopted on December 21, 2005, decree no. 2005-1617<sup>53</sup> concerning accommodation for the disabled of competitive entry examinations in public service.

Further more, in France, access to careers in the public service and to competitive entry examinations were subject to limitations based on maximum age requirements. ( see section 4.7.1 b))

Executive Order no 2005-893 of August 2<sup>nd</sup>, 2005, creates the labour contract « new hiring ». The purpose of this new contract is to allow very small employers (20 employees or less) to recruit more easily as they hold unexploited reserves of employment, and facilitate employability. This contract is characterised by a two years probation period and a variable notice period - two weeks under six months employment, to a month for a period of employment of two years. In addition, it gives rise to increased indemnity (8%) and increased contribution to unemployment insurance. The contract and its execution must otherwise conform to all prescriptions of the Labour Code, including the prohibition of discrimination.

In France during the probation period the decision to interrupt the labour contract is discretionary and does not require to justify cause. However, the Cour de cassation has decided that this discretionary power did not obviate the obligation of the employer to abide by the non-discrimination principle and that article L122-45 LC prohibiting dismissal for discriminatory reasons was applicable to the probation period<sup>54</sup>.

Some legal scholars have argued, on the basis of an argument based on the Seymour-Smith case, that since this new contract targets persons with difficulty to access employment, among which there is a substantially higher number of persons from discriminated groups, statistics may support an argument that it generates indirect discrimination<sup>55</sup>. There is no formal claim at present raising this argument.

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

<sup>53</sup> [www.legifrance.gouv.fr/texteconsolide/PEH26.htm](http://www.legifrance.gouv.fr/texteconsolide/PEH26.htm)

<sup>54</sup> Court of Cassation, Social Chamber, February 16, 2005, no. 02-43402.

[www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX2005X02X05X00434X002](http://www.legifrance.gouv.fr/WAspad/UnDocument?base=CASS&nod=CXCXAX2005X02X05X00434X002)

<sup>55</sup> BERTHOU, Katell, Contrat nouvelles embauches et droit communautaire, Semaine sociale lamy, 18 juillet 2005, no 1224

*Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.*

As discussed in section 3.2.1 employment and working conditions, including pay and dismissals, are covered by Article L122-45 LC and article 6 quinquies of Law no. 83-634 of July 13, 1983 as modified by the Law of November 16, 2001. In addition, the Law HALDE completes implementation of directive 2000/43 by creating at article 19 a general principle prohibiting direct and indirect discrimination on the basis of “race” and origin and a recourse benefiting from the transfer in the burden of proof as regards independent and non salaried workers. For other non salaried workers general principles of constitutional value and general principles of contractual and civil liability can be argued.

### **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))**

*Note that there is an overlap between ‘vocational training’ and ‘education’. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category.*

Vocational training and guidance is covered by article 225-2 PC, L122-45 LC and article 6 quinquies of Law no. 83-634 of July 13, 1983 as modified by the Law of November 16, 2001. In addition, the Law HALDE completes implementation of directive 2000/43 by creating at article 19 a general principle prohibiting direct and indirect discrimination on the basis of “race” and origin and a recourse benefiting from the transfer in the burden of proof as regards independent and non salaried workers.

More generally, public schools are subject to general principles of administrative law and administrative courts implement general principles of non discrimination.

### **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))**

Article 411-5 LC states that « Any salaried employee, can become member of the union of his or her choice regardless of their sex, age, nationality” and article 411-4 LC provides that any member of French or foreign citizenship can participate to its administration. Article 423-8 LC provides that all salaried employees are eligible to become employees’ representative if they are 18 years of age and have been employee in said business since at least one year;.

With respect to labour court judges’ elections, lists presented by a political party or an organisation favouring discrimination are illegal (L513-3-1 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 November 16, 2001 provides that in the public sector “Union rights are guaranteed to civil servants. The persons concerned can freely create unions, become member and be elected as representatives ».

In addition, the Law HALDE completes implementation of directive 2000/43 by creating at article 19 a general principle prohibiting direct and indirect discrimination on the basis of “race” and origin and a recourse benefiting from the transfer in the burden of proof as regards

membership in unions and professional organisations and covers as well independent and non salaried workers.

Some professions are inaccessible by reason of nationality (cf. section 3.2.1). Many are regulated by specific statute but all are subject to the judicial control of the administrative judge who will apply general principles of administrative law.

Finally, the trade unions, employers associations and all other organisations have to 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 at article 225-1 includes health, age, disability, sexual orientation, racial and ethnic origin, convictions, religion, political opinions and sex.

*In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.*

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

*In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?*

The Law HALDE completes implementation of directive 2000/43 by creating at article 19 a general principle prohibiting direct and indirect discrimination on the basis of “race” and origin and a recourse benefiting from the shift in the burden of proof as regards social protection.

For the other grounds of discrimination, general principles of public law are based on a general principle of equality towards the public service (see section 0.1 and section 1 - article 1<sup>st</sup> of the Constitution of 1958, the preamble of the Constitution of 1946, the declaration of human rights and of the citizen of 1789). These principles apply as well to civil servants. In addition, all residents benefit from the same social rights regardless of nationality.

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

*This covers a broad category of benefits that may be provided by either public or private actors granted to people because of their employment or residence status, for example, e.g. reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of ‘social advantages’ or if discrimination in this area is likely to be unlawful.*

The Law HALDE completes implementation of directive 2000/43 by creating at article 19 a general principle prohibiting direct and indirect discrimination on the basis of “race” and origin and a recourse as regards social advantages or advantages resulting from membership in a union or professional organisation.

For the other grounds of discrimination, general principles of public law are based on a general principle of equality towards the public service (see article 1<sup>st</sup> of the Constitution of 1958, the preamble of the Constitution of 1946, the declaration of human rights and of the citizen of 1789). These principles apply as well to civil servants. In addition, all residents

benefit from the same social rights regardless of nationality. The price paid for access to municipal services for instance and social support can only be based on socio-economic considerations<sup>56</sup>.

Otherwise, public agents taking into account a criteria based on a prohibited ground of discrimination, such as religion, have been held to violate article 225-1 and 432-7 PC and been sanctioned accordingly by the courts.

Despite the creation of the PACS, which procures similar rights to those of married couples in many areas (access to social security, rights of residence etc...), there remains some form of legal indirect discrimination against couples of same sex resulting from the present inaccessibility of marriage. Partners to a PACS cannot benefit from widowers' pensions, transfer of pension rights, rights accessible to spouses in employments benefits or parental rights after the decease of the spouse holding the parental rights.<sup>57</sup>

Finally, all social advantages that form part of remuneration are covered by the prohibitions of discrimination relating to equal pay.

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

*This covers all aspects of education, including all types of schools. Please also consider cases of segregation in schools, affecting notably the Roma community. If these cases exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.*

#### **Origin:**

National education is considered as a public service accessible to all and subject to the respect of the general principle of equality presented above as regards all of the public service. As explained in section 1, it is a general principle of administrative law of constitutional value that origin cannot be taken in consideration whether by legal texts or managing practices.

Not only is the criteria of nationality not taken into account, but until university, the illegality of the presence of parents on the national territory cannot be taken into account to deny access to school or kinder garden<sup>58</sup>. There are mayors who enforce strategies not to respect this obligation, however, they are sanctioned by the courts. The Grenoble Court of appeal has condemned a mayor for refusing to register children of North African origin in schools and school cafeterias<sup>59</sup>.

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 identification of the child's public school is legally determined by his or her address. In theory, Geographical zoning has no impact on the educational program which is national and identical throughout the territory, except that some areas have an increased budget when they deal with socially underprivileged children. No official monitoring device takes in consideration origin. However, statistically, the population of North African and Sub-Saharan origin are highly represented in these underprivileged suburbs and in some of these schools represent the majority of the students.

<sup>56</sup> See section 0.1 and section 1

<sup>57</sup> See Borrillo et Fassin, 2003. Parliament has recently opposed adoption of amendments to the law proposed by the communist parliamentary group extending to partners of a PACS and to common law spouses benefits from pensions rights and from widowers pensions.

<sup>58</sup> Ministerial instructions of national education, n° 84-246 dated July 16 1984 and n° 86-120 dated March 13, 1986,

<sup>59</sup> Grenoble Court of Appeal, November 13, 1991. TA Bordeaux, June 14, 1988, El Rhazouari recueil Lebon, p. 518.

The Law HALDE completes implementation of directive 2000/43 by creating at article 19 a general principle prohibiting direct and indirect discrimination on the basis of “race” and origin and an administrative recourse in discrimination benefiting from the shift in the burden of proof as regards education. Any evidence of a segregative practice or a management taking origin in consideration, directly or indirectly, would give rise to a right of action before the administrative courts and the penal courts.

In addition, the Educational system provides for special classes to integrate newly arrived foreign migrant children and travelling children<sup>60</sup> and the Law n° 2000-614 of July 5, 2000, on the accommodation of travelling people (euphemism that covers all travelling populations) provides for a duty to integrate occasional attendance to school of travelling Roma children<sup>61</sup>. Again, some mayors fail to respect the law. When they are brought before the courts they are sanctioned, but parents on the road will often leave without seeking enforcement.

Centres called **Academic Centres for the Schooling of Newly-arrived Learners and Travelling Children (CASNAV)** are placed under the responsibility of academy rectors and provide for adapted tools to allow children to catch up and integrate the regular school system<sup>62</sup>. In addition there are project of adaptation of an educational support to children while travelling, in coordination with other national public school systems of other countries<sup>63</sup>.

With respect to vocational training and access to apprenticeship, legal protections appear in the Labour Code and the Penal Code as well, as discussed in section 3.2.4.

## 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'État* has given 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.”<sup>64</sup>

Nonetheless, ten years after the first judgments of the *Conseil d'État* relating to the expression of faith within schools, there remains a debate about the limits of the neutrality of the public sector and the prerogatives of private life, in application of the constitutional principle of the

<sup>60</sup> FRANCHI, Vijié, Raxen 4 EUMC French national report on education.

[http://www.raxen.eumc.eu.int/1/webmill.php?fx=r&id=32810&lin=result&modid%5B%5D=604&dstart=0&order=result\\_line1&junc=AND&s\\_qd=4&s\\_searched=1&column\\_1=neverendingbook&operator\\_1\\_1=6&keyc%5B%5D=54&key%5B%5D=54](http://www.raxen.eumc.eu.int/1/webmill.php?fx=r&id=32810&lin=result&modid%5B%5D=604&dstart=0&order=result_line1&junc=AND&s_qd=4&s_searched=1&column_1=neverendingbook&operator_1_1=6&keyc%5B%5D=54&key%5B%5D=54); Policy document n° 2002-102 issued on the 25/04/2002.

<sup>61</sup> [www.legifrance.gouv.fr/texteconsolide/MEEAX.htm](http://www.legifrance.gouv.fr/texteconsolide/MEEAX.htm)

<sup>62</sup> A number of web sites exist for the CASNAV in each of the academies. See for example, <http://www2.ac-toulouse.fr/ariege-education/fle/dispositifs> and <http://cefisem.scola.ac-paris.fr/frmain.htm>

<sup>63</sup> <http://www.ac-orleans-tours.fr/daric/files/10-gens-du-voyage.rtf>;  
<http://www.cndp.fr/lesScripts/bandeau/bandeau.asp?bas=http://www.cndp.fr/vei/enfvoiage/accueil.htm>,  
[http://www.le114.com/contenu.php?dossier=0&id\\_rubrique=2&cns\\_mode=read&id\\_theme\\_fiche=1,2,3&id\\_fiche=39](http://www.le114.com/contenu.php?dossier=0&id_rubrique=2&cns_mode=read&id_theme_fiche=1,2,3&id_fiche=39).

<sup>64</sup> CE April 14<sup>th</sup> 1995, *Consistoire central des israélites de France, Mr Koen*, (2 arrêts), Recueil Lebon page 169, Dalloz 1995, jur. page 481, note Koubi G.



religious neutrality, which is regarded as constitutive of French Republican identity<sup>65</sup>. The previous parameters of secularity (*laïcité*) restricted to the universal rule of religious neutrality are brought into question by the practices and political demands of some groups, who claim that it must take into account the right to the public expression of faith.

The Law on the application of the principle of secularity in public schools was adopted on 15 March 2004 and published on 17 March 2004 (Law of March 15, 2004 no. 2004-228)<sup>66</sup>. It forbids "...in public elementary, secondary and high schools, the wearing of signs or clothes by which a student ostensibly manifests his or her religious beliefs" (our translation). Discreet religious signs remain authorized. 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. In view of the debates raised by this new law, the text itself foresees an evaluation of the results of its enforcement in September 2005.

The administrative instruction of 18 May 2004 on the conditions of enforcement of the above-mentioned law, which was redrafted three times, was published on 25 May 2004 (Circulaire N°2004-084 of May 18, 2004)<sup>67</sup>.

It states that "the prohibited signs and clothes are those by which one is immediately identified by his or her religious beliefs such as the Islamic Veil, whichever is the word by which it is designated, the Kippa or a cross of manifestly excessive dimension" (our translation). However, it emphasises the necessity of organising a true mediation procedure with professional support in order to limit disciplinary sanctions to cases of deliberate refusal by the student to abide by the law.

## Disability

The vast reform of the organisation of assistance to the disabled imposes an express obligation on the State to insure 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 a personalised educational project..

Title IV of the Law on disability, entitled "Accessibility", covers access to education in chapter I. It creates a commission which will assess the child and propose to his or her parents' a personalised program of education that will also be taken into consideration when subsequently determining rights of the child in application under the general compensation scheme for all disabled people established by the Law. Article 19 III creates an obligation to provide education to each child at every level of education and a right to have access to mainstream school is conferred by article L112-1 of the Code of Education. Orientation towards a specialised structure is made only with the consent of the child's parents in the context of the child's personalised program (article L112-2 of the same Code).

If access to the local ordinary school is not possible because of physical condition of the premises, the extra cost of transportation to another school are met by the municipal authorities (article L112-1 par 8 of the Code of Education).

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<sup>65</sup> Charlier-Dagras, M-D, *La laïcité française à l'épreuve de l'intégration européenne. Pluralisme et convergences*, L'Harmattan – Coll. Logiques Juridiques, Paris, 2002, 452p.

<sup>66</sup> Internet link: [www.legifrance.gouv.fr/WAspad/Visu?cid=25931&indice=1&table=CONSOLIDE&ligneDeb=1](http://www.legifrance.gouv.fr/WAspad/Visu?cid=25931&indice=1&table=CONSOLIDE&ligneDeb=1)

<sup>67</sup> Internet link: [www.education.gouv.fr/bo/2004/21/MENG0401138C.htm](http://www.education.gouv.fr/bo/2004/21/MENG0401138C.htm)

Administrative instruction no 2005-129 of August 19, 2005 concerning access to education of disabled children states that the Law on disability is applicable for the school year 2005/2006.

At article 75, the Law introduces Article L 312-9-1 to the Code of Education in order to officially recognise the French sign language for persons with impaired hearing.

The Law on disability further creates at article L112-4 of the Code of Education an express obligation to adapt examination processes to the benefit of the disabled. The Government is just starting to adopt the decrees required to implement the Law on disability, and in this context has adopted on December 21, 2005, decree no. 2005-1617<sup>68</sup> concerning accommodation for the disabled in conditions of access to employment in public education.

In September 2005, the Administrative Tribunal of Lyon decided that the failure of the State to provide access to school to a disabled child because of insufficient available adapted facilities gives rise to the liability of the State in damages regardless of whether or not it is at fault, the additional burden on the family being unreasonable<sup>69</sup>.

The decrees necessary to implement institutional reforms pursuant to the adoption of the Law on disability have only partially been adopted. However, decree no 2005-1589 of December 19, 2005 has been adopted to enforce the administrative simplification of the management of the various rights of the disabled person, enacted at article L1465-9 CSW by the Law on disability. It substitutes to the many commissions which managed the various governmental schemes intervening in the life of a disabled person and educational orientation, a single body for each department, the Commission for the rights and the autonomy of disabled persons<sup>70</sup>.

The Departmental administration of National Education (Académie) participates in this commission, in coordination with all persons involved in the support and education of the child. It will, amongst other missions, determine, in accordance with his or her personal life project, whether a child should be placed either in the mainstream educational system, in some cases with special support, in specialised classes (CLIS) or in specialised institutions. Parents' remedies when they are opposed to the conclusions of the orientation process are dealt with in section 6.1 of this report.

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

*Does the law distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association)? If so, explain the content of this distinction.*

The Penal Code (article 225-2) punishes discrimination in access to goods and services in the private sector without distinguishing whether the offer is private or available to the public. In the public sector the same disposition punishes any public agent who refuses to any person the benefit of a right afforded by law or hinders the free exercise of an economic activity. The Perben Law of March 9, 2004 adapting justice to the evolutions of criminality creates an aggravated sanction in case of discriminatory refusal to sale or provide access to public places.

<sup>68</sup> [www.legifrance.gouv.fr/texteconsolide/PEH26.htm](http://www.legifrance.gouv.fr/texteconsolide/PEH26.htm)

<sup>69</sup> T.A. Lyon, September 29, 2005, no. 0403829, M. & Mme Hebri, AJDA, 2005, 1874

<sup>70</sup> [www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANA0524617D](http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANA0524617D)

In addition, the Law HALDE completes implementation of directive 2000/43 by creating at article 19 a general principle prohibiting direct and indirect discrimination on the basis of “race” and origin and a recourse benefiting from the shift in the burden of proof as regards access and supply of goods and services, there again without distinction between goods available to the public or privately.

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

*To which aspects of housing does the law apply? Are there any exceptions?*

The Law of January 17, 2002 amends article 1 paragraph 2 of Law no. 89-462 of July 6, 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, i.e. all grounds covered by the two directives, and provides for civil remedy and shift in the burden of proof.

In addition, at article 162, it forbids to the landlords the right to request copy of photographs, social insurance card, copy of statements of bank accounts and banking certification of good conduct and, creates an article 22-1 to the Law of July, 6, 1989, preventing landlords to refuse security on the basis that the warrantor is in a foreign country or of foreign nationality.

Furthermore, the Penal Code’ s prohibition of discrimination 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 (see section 0.3<sup>71</sup>).

In the Hamida case<sup>72</sup>, the owner refused to complete the transaction arguing that she was afraid of provoking problems with the neighbours because the buyer was “Arab”, some of the neighbours being her own children. The basis for the refusal of the owner was also established by the testimony of the real estate agent. On September 14, 2004, the Grenoble criminal court condemned the owner to important pecuniary sanctions, marking a turning point in the penal treatment of discrimination. In this case, racial discrimination was considered as a serious offence and the landowner was condemned to a 10 000€ fine, to a four months imprisonment suspended sentence, to pay an amount of 1500€ in damages to the buyer and of 500€ to his wife. The Court also ordered the publication of the condemnations in the Professional bulletin of the federation of real estate brokers and awarded 1500€ in damages to the two NGOs supporting the victim, MRAP and SOS Racism. This decision has been appealed and the Court of Appeal of Lyon confirmed the order to publish the judgement, increased the suspended imprisonment sentence to six months, while lowering the fine to 6 000€, on October 27, 2005<sup>73</sup>.

On June 13, 2002 the Administrative Court of Poitiers decided that a municipality could not refuse to rent a municipal room to Jehovah Witnesses on the basis that their cult was

<sup>71</sup> T.G.I Paris, 17<sup>th</sup> Chamber, June 28, 2005, no. 0402608235, Poncelet c. Lassailly

<sup>72</sup> No 3122 MP 32 AM

<sup>73</sup> Reference to be completed 2<sup>nd</sup> week of March

considered as a sect by a Parliamentary Enquiry. This refusal was held to constitute a violation of the principle of equality of all citizens before the law.

The municipalities' obligation to accommodate travelling populations by providing settlement areas is provided by Law 2000-614 of July, 5, 2000, and the technical requirements of these areas are provided by decree 2001- 569 of June 29, 2001<sup>74</sup>. Otherwise, the law forbids taking origin into consideration in the management of public housing. When a municipality fails to put in place specific parking lots for the travelling population, it is barred from seeking removal of the travellers' trailers and from prohibiting parking (TGI de Montauban du 3 mai 2002<sup>75</sup>) and can be attacked for this failure before the administrative courts. The Conseil d'Etat decided in 2000 that the failure of a mayor to implement regulations and accommodations for the travellers could incur its liability<sup>76</sup>. In addition, it also decided that unless he or she complied with accommodation requirements, a mayor could not forbid their presence on the territory for less than a period of time necessary for their transit until identifying a new destination<sup>77</sup>.

## 4. EXCEPTIONS

### 4.1 Genuine and determining occupational requirements (Article 4)

*Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?*

Constitutional texts require that no disposition create an inequality of treatment by reason of origin in French Law. Thus, no application of this exception of article 4 was enacted in French Law.

Article 225-3 PC enumerates a list of admissible exceptions to the principle of non discrimination set out in article 225-1 and 225-2 PC : in relation to health, operations related to life, invalidity and incapacity insurance (paragraph 1) ; Refusal to hire related to health or disability when it results from a certificate of incapacity delivered by the employment medicine (paragraph 2) ; discriminations on the basis of sex when sex constitute a determining factor of employment (paragraph 3). The list of these latter professions is fixed by decree at article R123-1 LC. It limits exceptions to the following: actor, fashion model, artistic models.

### 4.2 Employers with an ethos based on religion or belief

*a) Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?*

<sup>74</sup>[http://www.le114.com/contenu.php?dossier=0&id\\_rubrique=2&cns\\_mode=read&id\\_theme\\_fiche=1,2,3&id\\_fiche=40](http://www.le114.com/contenu.php?dossier=0&id_rubrique=2&cns_mode=read&id_theme_fiche=1,2,3&id_fiche=40)

<sup>75</sup> [www.rajf.org/article.php3?id\\_article=1043](http://www.rajf.org/article.php3?id_article=1043)

<sup>76</sup> [Conseil d'Etat, 20 décembre 2000, Cie d'Assurances Zurich International c/ Commune de Maurepas de Bavai](http://www.legifrance.gouv.fr/WAspad/UnDocument?base=JADE&nod=JGXAX2000X12X000011284), pub. Rec. Lebon ; MPTB 9 mars 2001, p 99 : <http://www.legifrance.gouv.fr/WAspad/UnDocument?base=JADE&nod=JGXAX2000X12X000011284>

<sup>77</sup> [Conseil d'Etat, 2 décembre 1983, Ville de Lille c/Ackermann](http://www.legifrance.gouv.fr/WAspad/UnDocument?base=JADE&nod=JGXAX1983X12X0000013205), Rec. Lebon, p. 470.

Quot. Jur, 28 janvier 1984, n°12-15, note M.-D., Dalloz, 1985, p. 388-390, note Raphaël Romi :

<http://www.legifrance.gouv.fr/WAspad/UnDocument?base=JADE&nod=JGXAX1983X12X0000013205>

*b) Are there any 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?*

For a time, the Court of Cassation considered that, although members of a religious community were considered by law to be party to an employment contract, this fact did not entail the applicability of all the dispositions of the Labour Code. Thus, it excluded for some time the application of article L122-45 LC to dismissal or sanctions resulting from behaviour contravening prescriptions related to the requirements of the faith of the employer

However, ever since the decision of the Court of cassation on April 17, 1991 in *Fraternité Ste Pie*, the religious orientation of the employer does not justify an exception to the application of article L122-45 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. It considered at the time that the employer was required to establish that the behaviour of the employee had, considering his function and his objective behaviour, generated substantial disruption (“*trouble caractérisé*”) within the community<sup>78</sup>. In 1993, the Court of appeal of Montpellier concluded that provocative distasteful behaviour could justify dismissal<sup>79</sup>.

However, in transposing Directive 2000/78 by adopting the Law of November 16, 2001, the legislator did not foresee any exception to the principle of non discrimination on the basis of faith or opinions, and since the new texts the courts have not adjudicated on this issue.

As regards exterior signs of one’s religion such as the veil, they are forbidden to all members of the public service who must respect a principle of neutrality<sup>80</sup>

### **4.3 Armed forces and other specific occupations**

*a) Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?*

With respect to the status of the army, France has prevailed itself of the exception of article 3 (4) of directive 2000/78 allowing derogation concerning criteria based on age and disability. However, the formal job requirements for career under-officers does not contain requirements based on age or physical aptitude.

*b) Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?*

The Law of Orientation and Program in Relation to Security of January 21, 1995 creates a specific derogatory status for the police by application of article 19 which clearly states : « By reason of the peculiar character of their missions and exceptional nature of their responsibilities, active personnel of the national police force constitute a special category of the public service. The special status of these personnel may derogate from the general status of public service. In compensation for their obligations and the constraints of their missions they are classified out of chart for the determination of their remuneration.” Meanwhile, generally article 5 of the Law 83-634 of July, 13, 1984, states that the civil servant must have the physical aptitude of the assigned function. However, the French State has not manifested

<sup>78</sup> Cour de Cassation, chambre sociale, 17 avril 1991, *Droit Social* 1991, 485

<sup>79</sup> CA Montpellier, January, 28, 1993.

<sup>80</sup> Conseil d’Etat 3 Mai 2000 Mlle Marteaux N° 217017, Conseil d’État 15/10/2003 n°244428

its intention to invoke a derogation with respect to police officers which therefore benefit from the general legal regime.

#### 4.4 Nationality discrimination

*Both the Race Directive and the Framework Employment Directive include exceptions relating to difference of treatment based on nationality (Art 3(2) in both Directives).*

*a) How does national law treat nationality discrimination?*

*b) Are there exceptions in anti-discrimination law that seek to rely on Art 3(2)?*

The principle of non discrimination bears no exception by reason of Nationality. However, the public service (article 5 Law 83-634 of July 13, 1983) and some professions and careers are not accessible by law to non nationals or non European nationals. Further to a report published by the GELD in March 2000, supra section 3.1, commenting on the extent and incoherence of the regime of legal discrimination in employment against non nationals, some of these professions have been made accessible to non nationals but the list is exhaustive and addressed piecemeal.

#### ➔ 4.5 Work-related family benefits

*Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employee and their partner. Certain employers limit these benefits to the married partners or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.*

*(a) Does national law permit an employer to provide benefits that are limited 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 getting married (article L226-1 LC).

The first attempt at testing the French Law on the right of homosexuals to get married was undertaken in June 2004 when a same sex couple was married by the Mayor of Bègles. This wedding was challenged by the Public Prosecutor and the Civil Court of Bordeaux pronounced the annulment of the first civil wedding between persons of the same sex: Procureur de la République c./ Charpin et Charpentier<sup>81</sup>. The Couple appealed and their appeal was dismissed.

The Trial Court had decided that the difference of the sexes did not have to be expressly stated in the law in order to be interpreted as the core of the institution created in 1804 by the legislator. The Court of Appeal of Bordeaux went further. It decided that since article 75 of the Civil Code states that the celebrating officer must receive from each party, one after the other, the declaration that they want to become man and wife, this means that the Civil Code imposes clearly that the declaration be taken from two persons of different sex. This is further confirmed by the fact that the law imposes to the civil officer to read articles of the Civil Code on the education of children and parental authority on common children., any

<sup>81</sup> TGI Bordeaux, July 26, 2004, Charpin et Charpentier

other decision would be incoherent with the legal consequence of marriage on filiations and patrimonial rights<sup>82</sup>. This decision has been appeal to the Cour de cassation.

Meanwhile, the Civil Pact of Solidarity (PACS) created by the Law 99-944 of November 15, 1999 is a registered partnership open to couples of same sex to organize the patrimonial aspect of their relationship which provides them with a status and rights in terms of access to a right of residence for the foreign partner, right of transfer in the public service, of days away from work in case of death or family matters, and a patrimonial partnership based on joint-ownership, common liability towards creditors and common taxation (article 6 of the General Tax Code) and, as a spouse, a right to be maintained on the premises of rented lodgings (article 515-1 et s Civil Code) . Finally, parties to the Pact benefit from the social security rights of the eligible spouse (article L. 161-14 of the Social Security Code), they have priority, before children and parents, towards access to life insurance benefits. However, the partners are considered as alien with respect to each others' Estates and they therefore must provide for succession benefits by way of a will, although they may benefit from taxation exemptions more favourable than the regime applicable to third parties (article 777 bis of the General Tax Code). Finally they have similar rights to those of the spouse in term of priority in sharing the estate (article 515-8 CC). Since the PACS has entered into force there has been no discrimination in the law between concubines of same sex and heterosexual concubines.<sup>83</sup>

In case of work related benefits reserved to married couples and granted by collective agreements, they could be argued to constitute indirect discrimination in employment for homosexual couples since they cannot have access to marriage. Such cases have not yet been brought before the courts.

In addition, some rights, such as access to pension by the surviving spouse in case of death are not accessible to couples who have underwritten a PACS, and rights linked to parenthood are not accessible to homosexual couples since their right to parenthood is not recognized. Their exclusion from such benefits could be argued to constitute indirect discrimination.

*(b) Does national law permit an employer to provide benefits that are limited to those employees with opposite-sex partners?*

No, Article L122-45 covers the ground of sexual orientation and remuneration. This would be held to constitute direct discrimination but has not yet been brought before the courts.

#### 4.6 Health and safety

*Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?*

*Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery etc)?*

Constitutional texts exclude inequality of treatment by reason of origin. Thus, no application of the exception of article 7(2) of the Directive on the ground of origin has been enacted.

Article 225-3 PC enumerates a list of admissible exceptions to the principle of non discrimination set out in article 225-1 and 225-2 PC: in relation to health, operations related

<sup>82</sup> CA Bordeaux, April 19, 2005, no 04/04683

<sup>83</sup> Art. 515-8 du code civil : 'Le concubinage est une union de fait, caractérisée par une vie commune présentant un caractère de stabilité et de continuité, entre deux personnes, de sexe différent ou de même sexe, qui vivent en couple'.

to life, invalidity and incapacity insurance (paragraph 1) ; Refusal to hire related to health or disability when it results from a certificate of incapacity delivered by the employment medicine (paragraph 2).

With respect to dress codes, the general principle is that they must conform to the requirements of one's duty<sup>84</sup>. Dress requirements may be imposed by law, collective agreements, in house regulation or the labour contract (article L 212-4 LC).

In the private sector, safety occupational requirements are deemed to allow reasonable restrictions (article L120-2LC, L122-35LC) but otherwise, the courts have decided that freedom of religion was to prevail<sup>85</sup>.

Further to the adoption of the Law on disability, articles 111-1 and following of the Code of construction create an obligation to provide accessibility to public buildings to the disabled people. The condition of conformity and delays to proceed to necessary improvements will be determined by decree. Decrees relating to the conditions of application of the law on disability, will be adopted in 2006.

Article L111-7-2 of the Code of construction imposes that limitations to accessibility in housing be determined by decree with a duty to relocate disabled occupants. Article L111-7-3 of the same Code provides the same for buildings accessible to the public, but in this case the technical impossibility to proceed to required modifications are subject to the decision of a commission and in this case, the owner must propose alternative measures to compensate the disabled persons concerned.

## **4.7 Exceptions related to discrimination on the ground of age**

### **➔ 4.7.1 Direct discrimination**

*a) Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the European Court of Justice in the Case C-144/04, Mangold ?*

Article L122-45-3 LC 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 objectives of employment policy, and when means to attain these objectives are appropriate and necessary. These differences may consist of the following:

- Interdiction to accede to employment or special working conditions in order to insure the protection of young and old workers;
- The determination of a maximum age for recruiting based on the required training for the function or the requirement of pursuing a reasonable period of employment before retirement.

Otherwise the law does not allow justification of direct discrimination on the ground of age.

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<sup>84</sup> Cass. 22 juillet 1986

<sup>85</sup> CA Paris 19/06/2003, Dallila Tahri c/ Téléperformance France – appeal Conseil de Prud'hommes of Paris 17/12/2002, RG n°0203547 ; Savatier Jean « Conditions de licéité d'un licenciement pour port du voile islamique » Droit social n°4 avril 2004, Paris



*b) Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?*

National law takes into account age in limited circumstances : hiring conditions in the public service and the rules to determine the number of salaried workers relevant to the implementation of legal requirements relating to representation of personnel.

In the public sector, article 6 par. 4 of the Law no. 83-634 of July 13, 1983 imposed conditions of age to the access of civil service. It was amended in July 2005 to eliminate the possibility to oppose age limitation in access to public employment to parents of three children and more and to single parents of one or more children (article 1 of the law no 2005-843 of July 27, 2005 transposing community law to the civil service).

On July 26, 2005, the Law no 2005-846 of July 26, 2005 was adopted in order to habilitate Government to adopt emergency measures for employment by way of Governmental Decree<sup>86</sup>, and followed by many Executive orders: The first one, no 2005-901 of August 2<sup>nd</sup>, 2005 revisits conditions of access to public employment. The second one no 2005-893 of August 2<sup>nd</sup>, 2005, creates a new labour contract to facilitate hiring by small business as a mean to fight unemployment.

Article 1 of Executive Order 2005-901 eliminates previous age limitations in access to public service except 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 specialised school to follow an education programme of two years or more financed by the State. In this case Government should raise the age limitations to 15 years from retirement.

In application of Executive order 2005-901, Government adopted decree n° 2005-1722 of December 30, 2005 modifying conditions of age to access the entry examination for the School of the higher civil service, Ecole nationale d'administration (ENA), to a minimum of 28 years of age and a maximum of forty years of age<sup>87</sup>. The minimum age requirement corresponds to the level of responsibility of the employment undertaken by graduates of the school. On the other hand, education at the ENA is financed by the State who also pays a salary to the student who becomes civil servant upon entry to the school. It is a very costly education in terms of salary paid and educational cost per student. The maximum age requirement corresponds to the number of years of services left before retirement required for the state to obtain a return on its three years investments.

Article 2 of the Executive Order 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 considerations based on age in the public sector appear to meet the requirements of the Mangold case as they pursue legitimate objectives and an effort has been made to meet the test of proportionality. The evaluation of an argument based on the non compliance of age limitation in access to ENA, or other similar Public service training, would first require a

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<sup>86</sup> [www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SOCX0500142L](http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SOCX0500142L)

<sup>87</sup> [www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=FPPA0500152D](http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=FPPA0500152D)

factual expertise on a reasonable ratio years of service /cost of training, that cannot be commented in this context.

By Executive Order no 2005-892 of August 2<sup>nd</sup> 2005<sup>88</sup> Government changed the rules to determine the number of salaried workers relevant to the implementation of legal requirements relating to representation of personnel. Article 1<sup>st</sup> of the Executive Order provides that from 22 June 2005, employees under 26 years of age will not be taken into account in determining the number of employees.

Various Unions have filed a claim with the Conseil d'Etat alleging that this exemption would create an obstacle to the enforcement of Article 321-2 LC relating to employee representation requirements in application of Directive 2002/14 of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community.

The Conseil d'Etat has submitted a Preliminary reference to the ECJ on 19 October 2005.

The issue relates more specifically to the extent of the state's discretion to decide the criteria to be used to determine the critical number of employees which leads to an obligation on the employer to provide employee representation, in the form of a works council. The Union's arguments and the preliminary reference of the Conseil d'Etat have not alleged age discrimination, but an argument of discrimination on the ground of age could also be argued, since the legitimate policy objective that is being pursued, is not readily apparent<sup>89</sup>.

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

*Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.*

General principles concerning retirement are stated in section 4.7.1.

For younger workers articles L981-1 et s. LC set a special regime for apprenticeship for the qualification contract for candidates under 25 years of age.

Article L321-1-1 LC forces the employer to take into account age and disability as protecting factors in establishing the list of targeted employees in case of economic redundancy and article L321-4-1 LC imposes to the employer to establish a plan to organise in priority the reclassification and reemployment of older workers. In addition, Article L321-13 LC sets specific contributions of the employer in case of dismissal of older workers determined by article D321-8 of the application decree of the Labour Code. Article R322-6 et s. LC sets a special regime to indemnify workers over 57 years of age until retirement age in case of dismissal after a certain age. The notification delay for dismissal of a disabled worker are d, article L322-4-2 LC regulates a scheme named "employment initiative contracts" to encourage employment of precarious unemployed workers which specifically makes reference to aged and disabled unemployed workers.

Some dispositions foresee the possibility for caring parents to obtain leave of absence to take care of sick children (article L122-28 LC), to accompany the end of life (article L225-15 LC),

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<sup>88</sup> [www.legifrance.gouv.fr/texteconsolide/SEFBI.htm](http://www.legifrance.gouv.fr/texteconsolide/SEFBI.htm)

<sup>89</sup> [www.conseil-etat.fr/ce/actual/index\\_ac\\_lc0516.shtml](http://www.conseil-etat.fr/ce/actual/index_ac_lc0516.shtml)

extension of parental leave after having a disabled child (article L122-28-1 LC) and adaptation of work hours for caring for disabled family members (article L212-4-1-1 LC).

Article 2 of the governmental decree 2005-901 of August 2<sup>nd</sup>, 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)

### ➔ 4.7.3 Minimum and maximum age requirements

*Are there exceptions permitting minimum and/or maximum age requirements in relation to access to employment (notably in the public sector) and training?*

The admissible age to enter the workforce is regulated by article L211-1 LC which sets 16 years of age as the general norm, without prejudice to specific regimes (qualification and apprenticeship contracts L981-1 LC et s.) and summer employment after the age of 14.

There is no maximum age in the private sector. Moreover, article L311-4 LC forbids posting an offer of employment indicating a limitation of age which 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 L122-45-3 LC allows for a maximum age requirement “for recruiting, based on the required formation for the function or the requirement of pursuing a reasonable period of employment before retirement.”

The general age limitation in public service is 65 years of age with specific derogations for specific corps (article 1, Law 84-834 of September 13, 1984)

With respect to maximum age requirements see section 4.7.1 b).

### ➔ 4.7.4 Retirement

*In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).*

a) *Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?*

There is not compulsory pension age.

b) *Is there a normal age when individuals can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work for longer, or can an individual collect a pension and still work?*

Rights to retirement benefits are subject to both conditions of age and number of years of contribution<sup>90</sup>. The general rule is that a salaried worker can claim rights to retirement benefits from 60 years of age given he or she has contributed 42 years ( the number of years may vary according to the retirement regime). However, people who began to work before 15 years of age can claim rights to retirement at 56 years of age given he or she contributed for 42 years. Disabled employees and employees caring for a disabled child can benefit as well from the possibility of early retirement<sup>91</sup>.

Since 1984, in order to receive a pension, a salaried worker must resign from his or her current employment, but he can thereafter find another employment in the private sector.

*c) Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, if so please state which. Have there been recent changes in this respect or are any planned in the near future?*

There is not compulsory retirement age in the private sector. However, article L122-14-13 LC foresees the right of the employer to put an end to the employment contract on the basis of rights to retirement with respect to individuals who have acquired rights to full retirement pension according to article L351-1 of the Social security Code.

There exists a compulsory retirement age in the public sector (65 years of age subject to some derogations (article 1, Law no. 84-834 of September 13, 1984 ).

*d) Does national law permit employers to set retirement ages by contract, collective bargaining or unilaterally?*

Article L122-14-12 LC states that conditions of retirement in collective agreements and labour contracts are applicable as long as they do not contradict legal principles. Thus, are null and void all provisions of collective agreements and other labour contracts which would provide for the automatic interruption of the labour contract in reason of the age of the employee or because he would be entitled to benefit from old age pension.

*e) Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment or are these rights lost on attaining pensionable age or another age (please specify)?*

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

*For these above questions, please indicate whether the ages are different for women and men.'*

Until recently; difference in treatment as regards retirement between men and women did not target age requirements but the number of years of required contributions before being fully pensioned. Women could prevail themselves of early retirement if they had three children or more.

<sup>90</sup> Law 2003-775 of August 21, 2003 reforming old age pensions: [www.legifrance.gouv.fr/texteconsolide/SSEAEM.htm](http://www.legifrance.gouv.fr/texteconsolide/SSEAEM.htm).

<sup>91</sup> Decree n° 2005-1774 of December 30 *Journal officiel*, n° 304, 31/12/2005, p. 20856

<http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANS0524551D>; Decree n° 2005-1761 of December 29, 2005 *Journal officiel*, n° 303, 30/12/2005, p. 20444

<http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANS0524152D>

This scheme was held to be discriminatory on the basis of sex in 2002 by the Conseil d'Etat in the Giesmar case<sup>92</sup>. Therefore, the right to retire at an earlier age and the rebate on the number of year of contribution required to obtain full pension must benefits to both men and women who are parent of three children or more. Further to the reform of pensions, these benefits will continue to apply to all civil servants hired prior to 1989, but are repealed for those who started their activity in 1990 and after.

#### 4.7.5 Redundancy

a) Does national law permit age or seniority to be taken into account in selecting workers for redundancy?

Article L321-4-1 LC provides that in case of redundancy by an employer hiring 50 employee or more, rights to dismissal are limited and conditions of dismissal are complicated towards employee beyond 50 years of age.

b) *If national law provides compensation for redundancy, is this affected by the age of the worker?*

The legal protection against dismissal is applicable to all workers regardless of age. However, in the private sector, article L321-13 LC provides for superior indemnity of employees dismissed over the age of 50 and their right to a longer period of unemployment insurance.

#### 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)

*Does national law include any exceptions that seek to rely on Article 2(5) of the Framework Employment Directive?*

No

#### 4.9 Any other exceptions

*Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.*

None

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

a) *What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case-law or relevant legal/political discussions on this topic.*

French positive action, as it has been conceived by the jurisprudence of the Conseil d'Etat, is based on neutral and general grounds of distinction such as sex, disability, territory or socio-economic condition<sup>93</sup>. France does not enforce such programs in terms of "race" or origin. Nevertheless, the criteria of socio-economic condition and territory are means to indirectly target discriminations based on origin. In this context, some specialists regard some recent equal opportunity policies as promoting a "differentialist" approach, leading to indirectly

<sup>92</sup> Conseil d'Etat, July 29, 2002, n° 141112, M. Griesmar

<sup>93</sup> Conseil d'Etat, 1996, public report n° 48, p. 86 et 91).

implementing quota 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”.<sup>94</sup>

In its opening disposition, the law on disability affirms the right of the disabled to the support of all members of the nation and at article 11 the right to the compensation of one’s disability ( article L114-1 1 CSW).

Art. 122-45-4 states that positive action measures taken to promote equal opportunity for the benefit of disabled persons are not to be construed as discrimination.

*b) Do measures of positive action exist in your country? Which are the most important? Refer to measures taken in respect of all 5 grounds, in particular refer to the measures related to disability and any quotas for access of disabled persons to the labour market and any related to Roma.*

### Origin :

The territorial policy specific to disadvantaged suburbs, called « **politique de la ville** », concentrates a number of actions targeting populations of immigrant origin encouraging integration and fighting discrimination. The major instruments of this policy are municipality contracts -“**Contrats de Ville**”-including thematic agreements addressing issues of discrimination, Great City projects - **Grands Projets de Ville** – Urban stimulation zones - **Zones de redynamisation urbaine** (ZRU) and Priority educational measure zone – **les Zones d’éducation prioritaires** (ZEP).

However, there is no policy targeting ethnic groups or groups designated in term of their origin, whether they are North African, African or Roma.

The only policies targeting the Roma – who are not designated by their ethnic group- aim at accommodating their way of life in terms of housing (see section 3.2.10 ) and education (see section 3.2.8). They are represented and consulted in a national governmental commission, The National Consultative commission for the Travellers, which has however been inactive since 2002.

In order to accommodate the travelling way of life, Travellers are administratively linked to a municipality of attachment (Law of January 3<sup>rd</sup>, 1969, followed by the law of July 10, 1985 and the Law of May 31, 1990) and managed by a specific bureau of the prefect’s office. Although this status subordinates access to some legal rights, such as the right to vote in local elections, to specific modalities, it should not impact upon access to social rights and benefits. However, since this municipality of attachment seldom corresponds to the place where they are actually living, it does in fact marginalise them and their relation with the local authorities are often difficult. The issue of the specific administrative status of the travelling population has constantly been denounced by anti-racist NGOs<sup>95</sup>.

Meanwhile, governmental services have also initiated projects in the context of their general attributions. In 2002, the DGEFP (General delegation to employment and vocational training), DPM (Direction of population and migration), and ANPE (National Employment Agency) and the FASILD ( National fund for the support of immigration and actions against

<sup>94</sup> Maisonneuve, M., Les discriminations positives ethniques ou raciales en droit public interne : vers la fin de la discrimination positive à la française, AFDA, May-June 2002, 561.

<sup>95</sup> <http://www.gisti.org/doc/plein-droit/46/voyage.html>

discrimination) have concluded a general agreement to construct action to fight racial discrimination and favour access of these populations to vocational training and employment .

A sponsoring program following youngsters towards employment since 1993, mainly targets youth of immigrant origin, with low levels of qualification or from disadvantaged neighbourhoods. Their results have been conclusive, leading to a professional insertion rate of 60%. Its actions have been largely developed since 1999, leading to a rate of insertion exceeding 15000 a year, its extension to an adult public and the development of regional conventions with representatives of employers and business development actors.

2004 marks a turning point in terms of National focus on the issue of racial discrimination and positive action. Lobbying groups are organizing within the political parties, publishing reports<sup>96</sup> and organizing debates<sup>97</sup>. In this context the Minister of Social Cohesion is proposing an ambitious program set out in the BILL no 84-1911 of Social Cohesion voted by the National Assembly and the Senate in October and December 2004. It outlines a vast system of vocational training and support to integrate some 800 000 unemployed to the work force in non commercial activities and promote equal chances, at a cost of 13 billion € over five years.

Title III of the bill expressly addresses equality of chances with one chapter on tax support to disadvantaged municipalities (Chapter III), one on reception and integration of immigrants. It creates a National agency for the welcome of foreigners and migrants dedicated to the support of immigrants with a first legal authorization to reside on the National territory and the management of the Immigration contract (article 61).

The employment aspect of this program intends to create 300 regional centres of employment concentrating all reinsertion programs and services to the benefit of the long term unemployed (L311-10), reinforces the missions of the offices dedicated to youth professional insertion (L311-16-2). It further implements two substantial measures: the first one intends to put an end to the fatalism of unemployment and creates a contract of professional activity of two or three years paid at minimum wage up to twenty six hours a week offered to one million of the persons receiving social benefits in the next four years, for a cost of 5.2 billion euros.

The second measure targets disadvantaged youth and intends to offer a professional future to 800 000 persons under 25 over the next five years through apprenticeship and vocational training in the private sector as well as the public sector, where they will for the first time have access to employment without the traditional entrance competitive examination. They intend to recruit 20 000 such candidates per year through all the sectors of public service. A special program has been set up in the public service called the PACTE in order to favor « social melting pot in the public service » and foster the integration of unqualified youth of immigrant origin under 26 through a vocational training and educational program of two years leading to an examination and a status of civil servant. The Minister of the public service added that this program would be opened to long term unemployed over fifty years of age .

The second aspect of this social cohesion program is to face the national housing crisis by investing massively in public housing in order to construct 120000 social homes per year and

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<sup>96</sup> [/www.institutmontaigne.org/pub.php?id=88](http://www.institutmontaigne.org/pub.php?id=88)

<sup>97</sup> Sabeg, Y., *Les oubliés de l'égalité des chances*, Institut Montaigne 2004 ; Sabeg, Y., *Discrimination positive*, Calman-Lévy 2004 ; Blivet, L. *L'entreprise et l'égalité positive*, 2004, [www.institutmontaigne.org/pub.php?id=60](http://www.institutmontaigne.org/pub.php?id=60)

600 000 in five years, to create 12 000 more place in emergency housing and a special fund of 600 million euros for disadvantaged neighbourhoods.

In terms of education, the effort will concentrate on children in serious difficulty in order to improve equality of chances by offering specific support to identified children, by creating 750 educational achievement teams in order to offer support to children in 900 identified disadvantaged sectors (article 54B et s.) and the allotment of a specific budgets for schools in designated geographical sectors (article 55 and 56).

Meanwhile, on October 22, 2004, at the initiative of the Montaigne Institute, 35 important French businesses were signing a Charter against discrimination in the workplace<sup>98</sup>. Among the signing parties were, PSA Peugeot-Citroën, Adecco, Adia, France-Télévision, Accor, Casino or Axa. As well: Sodexho, Lafarge, Schneider Pinault-Printemps-Redoute, Total, Carrefour, Air Liquide. Since then, signatures have reached more than 200. They all undertake to abstain from any discriminatory hiring policy and to combat discrimination in their promotion system. This project has found the support of the Social Cohesion Minister who has declared that unless significant progress were made before two years, he was studying the possibility to legislate in order to impose diversified recruiting practices.

Finally, in the face of the de facto inaccessibility of higher specialized education bodies – elite schools specific to the French system- to children of disadvantaged neighbourhoods in reason of the eliminatory aspect of their recruiting system, the Institut d'Etudes Politiques (one of these schools) has entered into partnerships with Schools of these neighbourhoods in order to select their best students and create a parallel recruiting system<sup>99</sup>. This program is spreading to other similar “Grandes Ecoles”.

### ***Disability:***

Disabled persons enjoy special protection in the field of employment under articles L.323-1 to L.323-35 and R.323-1 to R.323-119 LC. They can work in a mainstream environment or a sheltered environment, including work aid centres (CAT), sheltered workshops and outwork distribution centres. Under the new law, CATs will keep their classification as sheltered environment, but sheltered workshops will become adapted businesses and be included in the mainstream environment. (In French the law says “ordinary environment for employment and school”).

Art. L212-4-1-1 LC provides that disabled employees have a right to request flexible work hours in order to facilitate their professional integration or their continued employment.

Finally, disabled workers enjoy special protection in the event of dismissal, with an extension of the period of notice if it does not amount to at least three months (art.. 323-7 LC) and, since March 2004, they can take early retirement<sup>100</sup> on advantageous terms.

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<sup>98</sup> [www.institutmontaigne.org/pub.php?id=75](http://www.institutmontaigne.org/pub.php?id=75)

<sup>99</sup> This program was challenged unsuccessfully on the basis of the principle of formal equality: CAA Paris 6 novembre 2003, UNI (Union nationale inter-universitaire) c/ résolutions du 3 septembre 2001 du conseil de direction de l'institut d'études politiques de Paris (IEP), N° 02PA02821

<sup>100</sup> J.O no. 66 of 18 March 2004 page 5253, Decree no. 2004-232 of 17 March 2004, relating to a reduction in the retirement age for disabled persons who pay social security contributions



As mentioned in sections 2.6, 3.2.2 and 4.6, the Law provides for adaptation of *the conduct of competitive examinations*” held by the three branches of the public sector, “*especially in order to adapt the duration and distribution of the tests to candidates’ physical resources*”.

Disabled employees and employees caring for a disabled child can benefit as well from the possibility for early retirement<sup>101</sup>.

The Disabled Persons Employment Act 87-157 instituted a quota system. According to section L.323-1 LC, any company with over 20 employees must employ a workforce at least 6% of which must be disabled. Despite the cost of the employment obligation, the Court of Cassation decided in May 2003 that disabled workers were not obliged to disclose their status to their employer, because the provisions relating to the employment of disabled persons are designed solely for their protection<sup>102</sup>.

The Law on disability creates a fund for the integration of the disabled in public employment as well as sanctions against the public service if it does not respect the employment quota set forth in the Law (article 36 creating article 323-8-6 LC).

Article 36 of the Law maintains the possibility to comply with the obligation to employ a minimal quota of 6% of disabled salaried workers provided by Article 323-2 LC by making a financial contribution to the AGEFIPH, which finances the integration of disabled workers, but increases that maximum penalty to 1500 times the minimum wage, and creates a similar obligation for the public sector.

Article 26 of the Law on disability creates an additional reporting obligation on the employer in Article L323-8-3 LC by imposing an annual evaluation of measures taken to integrate the disabled into the workplace.

### **Sexual orientation :**

No measure of affirmative action have been put in place with respect to sexual orientation.

### **Religion:**

Some religious holidays that are not in the calendar of legal holidays can be taken off and paid in accordance with collective agreements and customs: the Armenian Christmas and holidays (January 6, February 23, April, 24), Jewish Holidays (Roch Hachanah and Yom Kippour) and Muslim holidays (Aid el Fitr-Aid el Seghir, Aid el Adha-Aid el Kebir and El Moulded).

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<sup>101</sup> Decree n° 2005-1774 of December 30 *Journal officiel*, n° 304, 31/12/2005, p. 20856  
<http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANS0524551D>; Decree n° 2005-1761 of December 29, 2005 *Journal officiel*, n° 303, 30/12/2005, p. 20444  
<http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANS0524152D>

<sup>102</sup> Cass. Soc. no. 1083, 6 May 2003, *Revue de jurisprudence sociale* 8-9/03 p. 733

In School, the 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 (see the decision of the *Conseil d'État* section jurisprudence p. 9).<sup>103</sup>

## 6. REMEDIES AND ENFORCEMENT

### 6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

- a) *What procedures exist for enforcing the principle of equal treatment (judicial/administrative/alternative dispute resolution such as mediation)?*
- b) *Are these binding or non-binding?*
- c) ➔ *Can a person bring a case after the employment relationship has ended?*

*In relation to each, please note whether there are different procedures for employment in the private and public sectors.*

*In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body)?*

As regards recourses to a specialised body, including mediation, see section 7.

There are in France judicial and non-judicial recourses, the latter being initiated by the employer when called upon by the victim of harassment or if he suspects discrimination, as he warrants a work environment exempt from such practices. In addition, the personnel representative, the human resources manager or the business comity (Comité d'entreprise) have power to request social dialogue on these issues (Art. L 422-1LC).

All recourses alleging discrimination against a private party - employer, service provider, landlord etc... - must be brought before the civil courts. In matters related to employment, the salaried employee, in the private sector or contractual agent of an industrial or commercial public service, will bring his recourse before the Labour Court. In all other cases recourses will be brought before the District court (Tribunal d'instance) or High district court (Tribunal de Grande Instance) depending upon the amounts involved or claimed.

All claims against the public service, in matters related to employment of public agents and of access to public service (such as access to school and social rights), whether in application the Law Halde completing transposition of the directive 2000/43 in all matters dealing with the public service including education, or of general principles of administrative law that also provide recourses against discrimination, must be brought before the administrative courts that may correct the situation and/or award damages.

There are no specific recourse or sanctions in matters related to education and or housing. Plaintiffs must put their claim before the civil courts or, when attacking the state in case of public housing and public education, the administrative court as any other claimant.

Recourses in discrimination before the Civil courts created by explicit statute (Law of November 16, 2001, Law of January 17, 2002 and Law HALDE) benefit from the shift in the burden of proof (see section 6.3) but remain difficult to enforce. The judicial tradition is to go

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<sup>103</sup> CE April 14<sup>th</sup> 1995, *Consistoire central des israélites de France, Mr Koen*, (2 arrêts), Recueil Lebon page 169, Dalloz 1995, jur. page 481, note Koubi G.

to civil court with the element of evidence readily available to the party, which explains why plaintiffs often go to criminal court 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 plaintiff without intervention of a judge. Moreover, in France, making copy of the documents of the employer is considered as theft. The rules of civil procedure make access to evidence in the hands of the other party or a third parties, by way of what is called ‘ measures of instruction’, very difficult as it is considered as an exceptional measure and it is conditional upon having already brought sufficient evidence before 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 inquisitive and not taking part to the process leading to the introduction of evidence before the court.

In cases of discrimination in employment, article L122-45 LC provides for a recourse in damages as well as the possibility to request annulment of a discriminatory measure before the Labour Court. In cases of harassment, article L122-49 LC provides for a recourse in damages before the Labour Court as well.

It is important to stress however, that although the Labour Code covers discrimination in access to employment and apprenticeship, the basis of the jurisdiction of the Labour Court is the labour contract and therefore it has no jurisdiction over pre-contractual matters. The victim must therefore either bring its recourse before the High District Court or resort to the Penal Courts.

In matters related to discrimination in the workplace, the Labour Code, the Law 83-843 of July 1983 relating to the rights and obligations of civil servants and the law no 2004-14 of December 30, cover discrimination leading to loss of employment and the labour Court, administrative and High court have jurisdiction to adjudicate a case after the termination of employment and may even annul the dismissal measure and order reintegration in the workplace with full compensation and retroactive pay.

Time limitation to take action is 5 years with respect to payment of salaries (L143-14 LC). However in 2005, the Cour de cassation has decided that claims for discrimination relate to execution of the contract and are subject to a time limitation of 30 years (article 2262 CC)<sup>104</sup>. In other civil cases, the applicable time limitation would be that of ten years applicable in case of civil liability (article 2270-1 CC).

Since the Law of November 16, 2001, Labour Inspectors have reinforced investigation means. They can enter all premises (article L611-8 LC), obtain communication of any document or information supporting evidence of the facts, whatever their material support (L611-1 et s. LC). They may as well draft a contravention report certifying their observations (L611-10 LC) and transmit this report to the Public Prosecutor (article 40 Code of Penal Procedure - CPP). However, the limited number of inspectors who have the burden of pursuing all violations to the Labour Code diminish the efficiency of this corps, whose members are entirely free to choose the situations they investigate. In addition, their enquiry exclusively leads to a penal recourse and they do not transmit the result of their investigations to the parties or to the civil judge.

Articles 121-1 and 121-2 PC provide for the penal responsibility of physical and moral persons. 225-2 and 432-7 PC provide for a penal complaint to the police or Public Prosecutor.

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<sup>104</sup> Court of Cassation, Social Chamber, March 15, 2005, no- 02-43.616, Renault c. Morange, Dictionnaire permanent social, 4114, Bulletin 814.

The prosecution acts on the basis of police enquiries (article 15-3 CPP) after the victim's complaint or further to notice given by any public agent (article 40 CPP). Victims and NGOs can as well directly notify the public prosecution.

The penal courts are competent in matters related to hiring, sanction and dismissal in the workplace, access to goods and services (including all public service such as public housing, education, social rights etc...). They may condemn to penal sanctions ( i.e. fines, prison, privation of civil rights) and to damages if Plaintiff has lodged a civil complaint before the penal court.

The main reason so many people resort to the penal court is that it gives them access to evidence through the judge's enquiry. Otherwise, in civil cases, rules of civil procedure as they are interpreted by judicial actors give little access to evidence to the plaintiff. In addition, in the context of the penal recourse, they don't have to get involved or need a lawyer, the prosecution takes charge of the enquiry and of the prosecution.

However, the public prosecutor 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. When the public prosecutor fails to pursue the matter, the civil party may bring action on his own before the penal courts (article 85 CPP), but will then require the assistance of a lawyer and will be obliged to bring about evidence of the penal discrimination without the support of the instructing judge.

The time limits to prosecute the penal action for discrimination is three years (article 8 CPP).

Civil servants and contractual employees of the public sector must bring their recourse before the administrative courts (article 6 et. s.). So must any citizen bringing action against the state or questioning the decision of a state representative. In addition, Art. 6 quinquies states the principle of disciplinary sanction against any agent proceeding to discriminatory actions. Meanwhile, civil servants remain liable before the penal courts.

Representation by an attorney is not mandatory before the Labour Court, the lower courts (TI) and the correctional court, or before the Appeals Court when appealing from the latter jurisdictions. Representation by an attorney is mandatory before the High Court (TGI), the Commerce Tribunal (Law no 71-1130 of December 31, 1974), the Administrative Courts (regulation of May 4, 2000) and the Cour de Cassation (article 974 et s. of the New Code of Civil procedure - NCCP).

Legal aid is available to low income individuals (Law n° 91-647 of July, 1991 regarding Legal aid ; Decree n° 91-1266 of November 19, 1991, Decree n° 2003-300 of April 2, 2003).

As regards mediation, articles 21 and 131 NCCP expressly refer to the duty of the judge to favour mediation and to designate a third party mediator upon obtaining their consent to that end. Conciliation is the first stage of any recourse before the Labour Court in application of Article L511-1 LC. These non-judicial means of action can also be initiated by the Labour Inspector (*L611-1 et S.*). Article L.122-54 LC creates a mediation procedure in matters of harassment which can be initiated by any person who deems to have been victim of moral or sexual harassment.

The Law on disability recognises a right of persons with impaired hearing to an interpreter in sign language before the civil and penal courts, and the right of the visually impaired to the reading in Braille of civil and penal court records at article 76, all these measures being

ensured at the cost of the State. Public buildings and courts must be accessible to the public (article L111-7 of the Code of construction) unless they have obtained a special authorisation of the prefect (circulaire 94-55 of July 7, 1994, R111.19.3 CCH /Code of construction). Article L152-4 of the Code of construction foresees enforcement of this principle through penal fines and injunctive relief.

Article 64 of the Law on disability creates a Departmental House (Maison départementale) for the disabled that is intended to centralise all administrative procedures to enforce rights of the disabled person. It further creates a claim referee within these Departmental Houses at article 146-13 CSW, who will transmit the disabled person's claim to the competent authority or jurisdiction. The decree implementing this House of the disabled has been adopted on December 19, 2005 (Decree no 2005-1587<sup>105</sup>).

Article 76 of the law on disability recognises a right of persons with impaired hearing to a sign language interpreter before the civil and penal courts, and the right of the visually impaired to the reading aloud of civil and penal court records, all these measures being ensured at the cost of the State.

With respect to claims against public service, mediation is the prerogative of the Médiateur de la République and is initiated by formal application through a Member of Parliament. This mediation is pursued without prejudice to the administrative recourse which must be pursued independently. Many administrations have their own mediator (ombudsman) such as the ministry of education, the postal service and public transports.

As discussed in section 3.2.10, when a municipality fails to put in place specific parking lots for the travelling population, it is barred from seeking removal of the travellers' trailers and from prohibiting parking (TGI de Montauban du 3 mai 2002<sup>106</sup>) and can be attacked for this failure before the administrative courts.

## ➔ 6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

*Please list the ways in which associations may engage in judicial or other procedures*

*a) in support of a complainant*

*b) on behalf of one or more complaints (please indicate if class actions are possible)*

The Law of November 16, 2001 gives the possibility to representative trade unions and NGOs existing for over five years to intervene in the action for any apprentice, trainee, employment candidate or employee who alleges to have been victim of discrimination (article L122-45-1 LC ; Law 83-634 of July 13, 1983 in the public sector article 8 par. 1 et 2). In addition, the Labour Code has been amended by the Law on disability and article L122-45-5 is created in order to provide standing to NGOs acting for the rights of the disabled before the Courts in matters of discrimination.

However, when the discrimination will have been perpetrated against individual persons, the NGO or the trade union will be able to pursue the action only if it establishes having received the consent of these persons in writing when the action arises from application of article L.123-1 LC, of article 6 of the Law No 83-634 of July 13, 1983 on the rights and obligations of civil servants, or if the victim is a minor, a written consent of his or her responsible parent or tutor.

<sup>105</sup> [www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANA0524615D](http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANA0524615D)

<sup>106</sup> [www.rajf.org/article.php3?id\\_article=1043](http://www.rajf.org/article.php3?id_article=1043)

In matters of harassment, the intervention of NGOs is foreseen at article L122-53 LC.

However, article 31 NCCP recognises the standing of any person who has a legitimate interest in the dismissal or granting of the action. This principle has been referred to in order to award standing to NGOs when it established that the facts in issue were violating the collective interest it represented (Civ. 2e, July 21, 1986: Bull. Civ. II no. 119).

In case of discrimination in housing, the Law of January, 17, 2002 extends the right of action of NGOs to collective and individual recourses (article 24-1 Law of July 6, 1989). Besides this possibility, civil action does not allow for class action. Each Plaintiff must initiate a civil action that may be joined for the purpose of simplifying the hearing. However, this will not allow joining the court records. Therefore, legally each record will be treated separately and evidence adduced in one action will not benefit the others.

Penal action is initiated by the Public prosecutor. Victims and NGO's can join as civil parties.

Article 48-1 of the Law on the Press of July 29, 1881 provides for the action of victims and NGOs defending the rights of victims of racial discrimination that can establish an existence of five years, in matters of provocation to discrimination, incitement to hatred and violence, defamation (articles 24, 32, 33).

Article 2-1 CPP further foresees the possibility of NGOs combating discrimination on the ground of origin, race and religion to become civil party to penal actions pursuant to a violation of article 225-2 CP. Article 2-6 CPP foresees the same possibility for discrimination on the basis of sex or mores, and article 2-8 CPP in matters of discrimination based on health and disability. In all cases it must have been regularly declared for over five years and obtain consent of the victim when it represents an individual victim.

### **6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)**

*Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).*

*The shift in the burden of proof has expressly been transposed in labour law at article L122-45 LC by article 1 of the Law of November 16, 2001, at article L122-49 in matters of harassment and article 158 of the Law of January 17, 2002 in matters of Housing (modifying article 1 par. 3 of Law 89-462 of July 6, 1989), and at article 19 of the Law HALDE, creating a civil and administrative recourse on all areas covered by directive 2000/43.*

- The plaintiff must present elements of fact leading to a presumption of direct or indirect discrimination.
- Upon having satisfied this burden, the defendant must establish that his or her decision was justified by objective elements which have nothing to do with discrimination.
- The judge forms his inner conviction after having ordered, if necessary, all enquiry order it considers useful.

This shift in the burden of proof is thus applicable in all non penal recourses except in case of discrimination initiated by an employee of the public sector. In such a case, the administrative

procedure is inquisitive and is covered by the derogation provided in article 8 par 5 of directive 2000/43 and article 10 paragraph 5 of directive 2000/78. 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 plaintiff is deemed not to have the burden of proof.

We must however make a distinction between evidence in penal matters and evidence in civil matters. Penal matters only prohibit direct discrimination. The victim or prosecutor must bring evidence of facts and intention to discriminate on the part of defendant. However, it has access to investigation means, interrogation, and the applicable principle in penal matters is that of freedom of evidence (article 427 CPP). The Court can therefore rely on testimony, material evidence but also, illegal evidence, circumstantial evidence, bailiffs certificates and testing<sup>107</sup>. In civil matters, evidence is under the control of the parties and only legal evidence is admissible. The judge rarely orders defendant to produce evidence and there is no preliminary deposition or obligation to transmit evidence. Expertise is seen as an exceptional measure and the expert is mandated by the judge and selected on a predetermined list fixed by the Court of Appeal. The burden on the victim in civil matters is very difficult to uphold in reason of judicial practice, the traditional conception of the civil recourse and rules of civil procedure. The enforcement of rules of evidence and their evolution is one of the real challenges facing enforcement of anti-discrimination rules in civil matters.

#### **6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)**

*What protection exists against victimisation? Does the protection against victimisation extend to persons other than the complainant? (e.g. witnesses, ➔ or person that helps the victim of discrimination to present a complaint)*

Since 1983, victimisation was sanctioned only in matters related to discrimination based on sex (article L123-5 LC) . In transposing directive 2000/78, the Law of November 16, 2001 adopted article L122-45 par 3, protecting all witnesses against sanctions, dismissal or any discriminatory measure with a recourse benefiting from the shift in the burden of proof provided in article L122-45 LC. The protection of the victim however is less extensive, as article L122-45-2 LC sanctions only dismissal, but the protection afforded to the witness could be argued as benefiting to the testimony of the victim.

A similar protection is afforded to witnesses of harassment (article L122-49 LC).

As regards public service employees, article 6 quinquies of Law no 83-643 created by the Law of January 17, 2002, sanctions victimisation. In addition the law of November 16, 2001 created article L315-14-1 of the Code of social services, equally protecting witnesses of bad treatment towards a patient.

Finally, the Penal Code protects victims and witnesses. Article 434-15 CP sanctions treats and intimidation towards a witness, and article 434-5 CP towards a victim, by a maximum penalty of three years imprisonment.

#### **6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)**

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<sup>107</sup> ‘testing’ is an operation with witnesses put in place in order to produce evidence of discrimination. This method of evidence has been recognised as admissible by the Criminal Chamber of the Cour de cassation ( June 11, 2002 (arrêt n° W 01-85-560 F-D).

*a) What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.*

*b) Is there any ceiling on the maximum amount of compensation that can be awarded?*

*c) Is there any information available concerning:*

➔ *- the average amount of compensation available to victims*

*- the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as is required by the Directives?*

The general principle in French civil law is to remedy the prejudice by the award of compensatory pecuniary damages, indemnifying the financial and moral damage, without further pecuniary sanction or punitive damages. The legislator has foreseen in the Labour Code the possibility to request the annulment of the discriminatory measure, allowing for reintegration in case of dismissal, retroactive indemnity (financial compensation of the loss in wages for the entire period of discrimination) and legal modification of the employee's status in his working environment (articles L122-45, L122-49, L123-1 LC). The Court of Cassation has many times ordered the reconstitution of the career of the employee with retroactive indemnification, the ensuing cost to the employer being substantial. However, other recourses, in matters of housing or non salaried employees (article 19 Law HALDE) do not benefit from this possibility and remedy is limited to damages. There is no statutory upper limit but the French legal practice is still very conservative in calculating pecuniary loss, and amounts awarded remain rather low.

The Law Perben II for the Adaptation of Justice to the Evolutions of Criminality has been adopted on March 16, 2004<sup>108</sup>. Sanctions incurred in relation to the offence of discrimination are increased to a maximum of three year imprisonment and a 45 000 € fine (article 225-2 PC). The law creates an aggravating factor in relation to discriminatory refusal to sell or give access to a public place (discos, shops, public services etc...), sanctioned by a maximum of 5 years imprisonment and a 75 000 € fine. In addition, the Penal Code allows accessory sanctions at article 225-19 PC: posting or publication of the judgement, closing down of a public place, exclusion from procurement contracts, confiscation of a business, suspension of civil rights, and a list of further penalties which are seldom ordered. The same sentence is applicable to discriminations by public services (article 432-7 PC).

Moral persons, including the state and all public services, can be condemned as well and this liability does not exclude that of the physical person. Since 2000, the level of penal fines and the number of prison sentences has evolved from insignificant amounts to amounts of 3000€ to 15 000€ and suspended prison sentences. In addition, publication of sentences in local papers has been ordered in a number of cases. However, beyond bad publicity, in case of a business strategy based on a discriminatory practice, the amount of these condemnations is not yet a significant deterrent unless assorted to a suspended sentence which entails substantial consequences in case of relapse.

In non penal matters involving the public service the recourse must be brought before the administrative tribunal. Two recourses are available: one for excess of power to annul the decision attacked or the full jurisdiction recourse, in order to obtain not only annulment of the decision but damages as well.

<sup>108</sup> Law n° 2004-204 March 9, 2004 (JORF n°59 du 10 mars 2004 page 4567)  
<http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=JUSX0300028L>



In addition to penal and administrative recourses, a civil servant can as well be the object of disciplinary sanctions in application of article 66 of the Law 84-16 of January, 11, 1984, article 89 of Law 84-53 of January 26, 1984, and article 81 of Law no 86-33 of January 9, 1986.

## 7. SPECIALISED BODIES

### *Body for the promotion of equal treatment (Article 13 Directive 2000/43)*

*When answering this question if there is any data regarding the activities of the body (or bodies), include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.*

- a) Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin?*
- b) Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable.*
- c) Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*
- d) Does it / do they have the competence to provide assistance to victims, conduct surveys and publish reports and issue recommendations on discrimination issues?*
- e) Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?*
- f) Is the work undertaken independently?*

The Law creating the High Authority against Discrimination and for Equality (HALDE) was finally adopted on December 30, 2004, and is in force since February 1<sup>st</sup>, 2005<sup>109</sup>. A commission of eleven members acts as decisional body. On March 4, 2005, the decree of enforcement of the law creating the High Authority was published<sup>110</sup>, and the High Authority formally started its activities in June 2005. Parliament voted a budget of 10 Million Euros for the years 2005 and 2006 and it should attain 65 staff members in 2006.

The law implements most of the recommendations of the report ordered by the Prime Minister to Mr Bernard Stasi, then Ombudsman of the Republic, and submitted on February 19, 2004, on the conditions of creation of an independent administrative authority to fight against discrimination. Mr Stasi was mandated to consult all the representatives of the various republican institutions, ministries and actors of civil society, including social partners and NGOs, and to consult foreign specialized bodies combating discrimination, in order to evaluate the expectations of the actors, take into account the experience of foreign examples and define the adequate institutional profile in order to create a specialized body in coherence with national institutions while providing an efficient contribution to the fight against discrimination.

The Stasi report proposes the creation of an independent administrative body with competence on all forms of discriminations, direct and indirect, forbidden by the laws of the Republic, therefore readily adaptable to any future legal evolutions. It will cover discrimination by reason of real or imputed race or origin, sex, disability, age, health, religion,

<sup>109</sup> [www.legifrance.gouv.fr/texteconsolide/PFECT.htm](http://www.legifrance.gouv.fr/texteconsolide/PFECT.htm)

<sup>110</sup> Decree 2005-215 of march 4, 2005 : [www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SOCN0510296D](http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SOCN0510296D)

sexual orientation, opinions, appearance, and trade union activities in all domains regulated by law. Its realm of power goes beyond the requirements of Directives 2000/43 and 2002/73.

In addition to investigative powers, the High Authority ensure the promotion of equal treatment, has the power to make recommendations on all issues relating to discrimination, to identify and promote good professional practices and to coordinate and conduct studies and research.

The High Authority has competence to investigate individual and collective complaints, whether the investigation is initiated of its own accord or by written demand of the claimant. Its investigative powers allow it 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 the investigation services of the High Authority, it can request a court order. It may also ask that all required investigations be carried out by any service of the state and the High Authority may proceed to visits in all non-private premises after due notice and consent of the owner.

In the case of a criminal offence, it transmits the claim to the penal courts. Otherwise, it may offer mediation to the parties or complete the investigation, in which case it will issue its conclusions and recommendations to the parties who will have a certain amount of time to comply. In case of non-compliance, the High Authority has the power to call public attention to its recommendations. In addition, it may alert the relevant authorities in cases that require disciplinary sanctions against the respondent.

The High Authority has also been conceived as an 'auxiliary of Justice': the law creates the possibility for the criminal, civil and administrative courts to seek its observations in cases under adjudication. In addition, the High Authority has the power to seek permission to submit its observations in criminal matters.

Between June 2005 and February 2006, it has received over 1880 complaints based on all grounds and area of discrimination, solved 626 complaints and its Commission has rendered 163 recommendations.

Since September 2005, statistics relating to incoming claims remains stable. 61% of the complaints are lodged by men and 37,01% by women, the remainder being complaints transmitted by members of Parliament and NGOs.

39,71% of the claims allege discrimination based on origin (including race) on all grounds and 45,37% of all claims concern employment. Claims based on origin in employment amount to 13% of all claims. Health and disability concern 12,26% of the claims and deal mainly with access to the public service and goods and services. Discrimination in access to housing represents 5,33% of the claims , and allege mostly discrimination based on origin. Education, including primary, secondary school, university and other types of training, covers 5,11% of the claims, that allege as grounds of discrimination, origin first and disability in second. Age represents 5,61% of claims and concentrates mainly on the issue of access to employment. Sexual orientation represents 2,50% of the claims and concerns mainly access to goods and services and the public service. Religion represents only 1,98% of the claims that concentrate on access to the public service and raise issues related to dress codes. Finally, discrimination based on sex only represents 6,20% of the claims and most of them have been brought by men in order to claim benefits similar to those of women in relation to pension rights after having raised three children or more. Very few women raise discrimination based on sex in employment ( less then 20 on more then 1500 files).

The High Authority should present its first annual report to the President of the Republic and the parliament in April 2006.

## **8. IMPLEMENTATION ISSUES**

### **8.1 Dissemination of information, dialogue with NGOs and between social partners**

*Describe briefly the action taken by the Member State*

*a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)*

*b) to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and*

*c) to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)*

**see affirmative action section**

#### **a) Dissemination**

Over the years, the public service has developed at a national level a number of information and awareness programs, and mainly the Ministry of employment (DGEFP, DPM, ANPE and the FASILD), contributing as well to its dissemination at a regional and departmental level. In 2002, racial discrimination was elected Great National cause which provided to NGOs acting in this field, a global subsidy of over 1 million euros and cheaper TV diffusion costs. In 2002, a TV advertisement campaign was launched between April 11 and 20, 2002 on the main national Channels (it was aired 200 times over this period over a variety of channels: TF1, France 2, France 3, Canal +, M6 and LCI). In 2004, Disability was elected Great National cause and again, a TV advertisement campaign was produced and aired. All these campaigns were adapted for the visually and hearing impaired.

The GELD, a public structure created in 1999 to study and, in 2001, to combat discrimination by managing the 114 hotline, created in 2001 a website dedicated to racial discrimination and covering news, research, national, european and international legal texts and activity, communication and legal information tools, an actors directory and internet links for all intervening actors, experts and victims: [www.le114.com](http://www.le114.com). The GELD was closed in June 2005 but the resources of its website were transferred to the High Authority against Discrimination and for Equality (HALDE). The HALDE launched its own website in February 2006: [www.halde.fr](http://www.halde.fr).

In addition, most NGOs, whether anti-racist or promoting the rights of the disabled, of gays, of the sick, of the aged (amongst which MRAP, SOS RACISM, LICRA, LDH, SIDA Info services, AIDES, LGBT, APH etc...) are subsidized by the State and pursue dissemination activities among which, the diffusion of their own website presenting legal precedents and legal tools as well, many of which are adapted for the visually impaired. In November 2002, the MRAP and APAHF have published legal guides for victims of discrimination, for rights in matters related to access of disabled children to schools, etc...All these structures, as well as trade unions and the FASILD, organise seminars and training for actors and the general public.

Finally, in November 2003, the French government organised in collaboration with the Embassy of the United-Kingdom and the Economical and Social Council a three days Franco-

British Seminar on discrimination around ministers, governmental representatives, experts and NGOs of the two countries in order to confront their respective approach and discuss future perspectives. The seminar offered sign language translation and physical accessibility for wheelchairs was organised.

### **b) Dialogue with NGOs**

The major reforms undertaken with respect to the entire indemnification and support structure towards the disabled, the creation of the National Specialised Body (HALDE), the creation of the National Museum on the History of Immigration, the plan of social cohesion, and the legal reforms with respect to criminalisation of hateful speech based on sexism and homophobia, have all followed a similar approach based on consultation and dialogue with NGOs, social actors, representatives of the public service by way of mandates given to prominent personalities by the prime minister.

Meanwhile, the CNCDH (National Human Rights Consultative Commission), counsel to the prime Minister, is composed of delegates of all major human rights and anti-racist NGOs, representative trade unions and branches of the public sector. It is consulted on all legislative reforms affecting human rights and provides counsel and recommendations to the government. It is organised in 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 CODAC (Departmental Commission of Access to Citizenship) has been re-baptised COPEC (Commission for the promotion of equality) and seen its mission redefined in September 2004<sup>111</sup>. It gathers all local actors under the authority of the representative of the State in the department, the Prefect, and is intended to generate cooperation and dialogue. In the area of disability, a departmental commission conceived as the mirror of the National Consultative Commission for the Disabled, in order to articulate local cooperation between State and NGOs, who in France have traditionally been delegated the task of the public sector in terms of support to the disabled and their families.

Even if it was covered by existing legislation regulating the exercise of faith in France<sup>112</sup>, Islam, second national faith with four to five million followers, was the only major religion that did not have a national representative organisation. In the last ten years, all governments have attempted to organise such an official representation in order to allow dialogue with the State and promotion of its interests. The Ministry of Interior in 2002 organised a consultation with all the Islamic faiths' institutions under the supervision of the COMOR (Commission of Organisation of the Consultation of French Muslims) and a preliminary agreement for the creation of a French Council of Muslim Worship (Conseil français du culte musulman-CFCM) was signed on December 9, 2002 by the three main component of the Muslim community in France ( FNMF, GMP, UOIF). In February 2003, the COMOR reached a final agreement on the organisation of the CFCM, the organisation of their 17 regional council (CRCM) for the management and animation of Muslim Worship and the organisation of elections to these regional councils in April 2003. The CFCM is a federation of associations governed by the Law of July, 1<sup>st</sup> of 1901. Its general assembly reunites the elected representatives of the CRCMs (regional councils) which represent 995 communities, and elects a president and two vice-presidents.

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<sup>111</sup> Circulaire COPEC NOR/INT/K/04/00117/C, 20 / 09 / 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) [www.interieur.gouv.fr/rubriques/b/b5\\_lois\\_decrets/04\\_00117](http://www.interieur.gouv.fr/rubriques/b/b5_lois_decrets/04_00117)

<sup>112</sup> Marongui O. et D'un monde à l'autre, Droit français des cultes appliqués à l'Islam, 2002 ; Open society Institute of Budapest, La situation des musulmans en France, 2002 .

The Law on disability structures all the national and local structures involved in establishing policies concerning the disabled and enforcing their rights, such as the National consultative council of the disabled and its local counterpart, on the participation of NGOs representing the disabled (Article 1 of the law creating article L146-1 A CSW). It further creates a Departmental Commission for the Rights and the Autonomy of the Disabled competent for all decisions relating to the orientation of the disabled person (see section 6.1). Its members are representatives of public service, NGOs, trade unions and social partners and at least 30% of representatives of the disabled ( article 66 of the Law relating to Title 1V of the Code of social welfare). Its organisation is determined by decree (not yet adopted).

### *C) Dialogue with social partners*

Article 4 of the Law of November 16, 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 at the level of the National commission of collective bargaining. Article L133-5 LC is modified in order to extend the equality objective not only in terms of access to employment but in terms of training and the employees' 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 origin (article L136-2 par. 8 LC). Elements concerning racial and sex discrimination have become a mandatory disposition in all branches collective agreements.

In the public service, social dialogue is a basic organisational principle since all levels of human resources management are dealt with in a joint decisional system were representative of the State and unions are equally represented (Law 83-634 of July 1<sup>st</sup>, 1983, article 9 par. 1).

Article 25 of the Law on disability modifies articles L132-12 and L132-27 LC, which concern mandatory annual negotiations among social partners, to create the obligation to hold annual negotiations concerning measures necessary for the professional integration of the disabled.

In addition, as discussed in section b), social partners participate to the Departmental Commission for the Rights and Autonomy of the Disabled.

## **8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)**

- a) Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment?*
- b) Are any laws, regulations or rules contrary to the principle of equality still in force?*

French Law does not require that express legislation be introduced in order to insure the superiority of the principle of equality to other sources of rights. Equal treatment between persons 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 to public order by way of a particular convention", this type of agreement being null and void. Articles 1382 etc. and 1146 et s. of the Civil Code implements 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 and 2000/78. Article L122-45 and L122-49 LC further expressly state that any such act is null and void.

Article 6 and 6 quinquies of Law 83-634 of July 1<sup>st</sup>, 1983 are rules of general application and public order. They must be respected in all regulatory acts or decision regarding a public agent.

Finally the general principle *lex posterior derogate lege priori* applies to human rights and therefore implies the inapplicability of all non conforming legislation and conventions.

## 9. OVERVIEW

*This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.*

➔ *This could also be used to give an overview on the way (and if at all) national law has given rise to complaints or changes, including, eventually a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.*

France has adopted the required legislation to protect victims of discrimination. However, civil society is shocked and helpless in the face of the importance and range of the problem, particularly as regards racial discrimination and assuring a true integration of the disabled. We assist to a significant evolution of public awareness and a substantial mobilisation of actors in favour of the promotion of equality. More cases reach trial and are successful but they concern mainly direct discrimination in penal cases on the ground of origin in access to goods and services<sup>113</sup>.

Criminal law only sanctions intentional direct discrimination and is not subject to the requirements of community law.

There are many barriers however to systematic implementation in France. Legal action is not considered as a mean of advocacy. Very few NGOs are knowledgeable in the management of judicial recourses<sup>114</sup>.

In addition, anti-discrimination law is perceived by legal actors as foreign and undermining traditional civil law. Judicial actors in civil matters do not perceive rules of evidence as a central aspect of the civil judicial process and lack experience in making a systematic use of them. Meanwhile, the traditional formal theory of equality and the concept of fault in civil matters remain the ultimate reference and there is significant resistance at trial level to the concept of indirect discrimination that is perceived as a mean to condemn liability without fault. Until judicial precedents are established by the Higher courts and a clear jurisprudence is in place, the Plaintiffs will be required to be ready to face multiple appeals before winning their cases.

Implementing discrimination law entails considerable modification in the practice of judicial actors and in the way NGOs perceive their function in the judicial process. Funding of NGOs to pursue test cases and targeted training of judges, lawyers and NGOs in this regard seems indispensable.

<sup>113</sup> LANQUETIN, GREVY, Op. Cit. Bilan de la mise en oeuvre de la loi du 16 novembre 2001, rapport final DPM, December 2005 ( not yet published)

<sup>114</sup> In the field covered by the all anti-discrimination directives, including discrimination based on sex, there are only two NGOs specialised in bringing about legal action. The first is acting in the sector of sexual and moral harassment. It's name AVFT. The second in the legal rights of foreigners: the GISTI. Generalist NGOs mostly intervene in penal actions, but do not focus their activity on legal actions.

The Specialised body has been conceived to answer some of the evidentiary problems resulting from judicial practice in civil matters. However, considering remaining difficulties in enforcing anti-discrimination legislation, a bill is presently pending before Parliament and should be adopted in 2006 to grant the High Authority against Discrimination and for Equality (HALDE) with a power to pronounce pecuniary sanctions against discriminating parties<sup>115</sup>.

Meanwhile, the HALDE's contribution to the evolution of judicial practice will depend upon the attitude of NGOs, lawyers and the courts, and their willingness to resort to the HALDE as a mean to support the action of the judicial system. In this perspective, it has concentrated important efforts during its first year of existence to promoting training for legal actors and has put in place with the National Bar Association (Conseil National des Barreaux) a formal training program forming part of initial training in bar school, as well as a program for practising lawyers.

As for professional judges (magistrates), the HALDE will put in place in 2006 a similar formal training program with the Magistrates' National School (Ecole nationale de la magistrature) that is responsible for initial training and ongoing professional training.

Meanwhile an Equal project has focused on the training of Labour Court non professional judges in Paris with respect to enforcement of discrimination law, which has started to impact on the practice of the Court in terms of providing access to evidence and implementing the shift in the burden of proof. However, there are 271 such courts on the French Territory. Training of these non professional judges is funded by the Ministry of justice (article 513 LC) but managed by the social partners' local organisations. Hence, very few have undertaken this type of program, as it does not form part of their basic training.

## 10. CO-ORDINATION AT NATIONAL LEVEL

*Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?*

### **Government:**

Ministry of Interior -Ministry of Education - Ministry of Justice- Ministry of Social affairs- Ministry of Equal opportunities

### **Governmental departments:**

Women's Rights Service (S des F) - Direction of Population and Migration (DPM) - Direction of Labour Relations (DRT) - General Direction of Social Affairs (DGSA) - General Direction for Health (DGS) - General Delegation for Employment and Professional Training (DGEFP) - DARESS (Direction of the coordination of Research, studies and statistics) - DRESS (Direction of research, evaluation and statistics)

### **National Research Institutes:**

INSEE (National Statistical Institute)

INED (National Demographics Institute)

### **Interministerial Delegations:**

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<sup>115</sup>The Bill for Equal Opportunities: [www.senat.fr/dossierleg/pjl05-203.html](http://www.senat.fr/dossierleg/pjl05-203.html)

Interministerial Delegation for the Rights of the Disabled  
Interministerial Delegation to the City and urban development  
Interministerial comity to fight against racism and anti-Semitism  
Interministerial comity for integration

**Public bodies:**

FASILD - Agence nationale de l'accueil et des migrations (ANAM) –

**Consultative bodies:**

National consultative commission of the Travellers  
National consultative commission of Human Rights  
National consultative commission of the retired and older people  
National consultative commission for the Disabled  
High Council for Integration  
Higher Council for professional equality between men and women  
Commission for political equality between men and women

**Specialised administrative bodies:**

Médiateur de la République (Ombudsman for the public sector)  
CNIL (National Commission for IT and Liberty)  
CNDS (National Commission for ethics and security)  
CSA (Higher Council for Radio and Television)  
CADA (Commission for Acces to Administrative Documents)  
Défenseur des enfants (Children's Defensor)  
HALDE (High Authority against Discrimination and for Equality/ Haute autorité de lutte contre les discriminations et pour l'égalité)

**Annex**

**1. Table of key national anti-discrimination legislation**

**2. Table of international instruments**



## ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Name of Country: France

Date: 28-02-06

Title of Legislation (including amending legislation)	In force from:	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
This table concerns only key national legislation; please list not more than 10 anti-discrimination laws (which may be included as parts of laws with wider scope). Where the legislation is available electronically, provide the webpage address.	Please give month / year			e.g. public employment, private employment, access to goods or services	e.g. prohibition of direct and indirect discrimination or creation of a specialised body
Law on separation of Church and State <a href="http://www.legifrance.gouv.fr/WAspad/UnDocument?base=LEX_SIMPLE_AV90&amp;nod=1LX9051211P1">www.legifrance.gouv.fr/WAspad/UnDocument?base=LEX_SIMPLE_AV90&amp;nod=1LX9051211P1</a>	09/12/1905	Religion	Administrative	Worship	Condition of organisation of faith and worship in France
Law on secularity in public schools n° 2004-228 of March 15, 2004 <a href="http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MENX0400001L">www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MENX0400001L</a>	03/15/2004	Religion	Administrative	Public Education	Manifestation of faith in public schools
Law on the press of 1881 <a href="http://www.legifrance.gouv.fr/texteconsolide/PCEAA.htm">www.legifrance.gouv.fr/texteconsolide/PCEAA.htm</a>	Évolutive  Last	All grounds  The law on the HALDE	Criminal law	All fields	Provocation to discrimination as defined by article 225-1 and 225-2

	02/ 2005	incorporates prohibition of provocation to discrimination on the basis of sex and sexual orientation and disability			
Law combating discrimination no. 2001-1066 <a href="http://www.legifrance.gouv.fr/texteconsolide/SEEEH.htm">www.legifrance.gouv.fr/texteconsolide/SEEEH.htm</a>	11/ 2001	All grounds	Civil/ Administrative/ criminal law	Salaried employment, civil service and criminal law(goods and services)	prohibition of direct and indirect discrimination in employment and in criminal law extension of the grounds and powers of the Labour inspector
Law of social modernisation sociale n°2002-73 <a href="http://www.legifrance.gouv.fr/texteconsolide/SPECE.htm">www.legifrance.gouv.fr/texteconsolide/SPECE.htm</a>	01/200 2	All grounds	Civil. Administrative and criminal law	Private and public housing, Harassment	prohibition of direct and indirect discrimination in public and private housing Harassment in public and private employment Harassment in the Penal Code
Law no. 2001-434 of recognition of slavery and human trade as crime against humanity <a href="http://www.legifrance.gouv.fr/texteconsolide/PPEDY.htm">http://www.legifrance.gouv.fr/texteconsolide/PPEDY.htm</a>	05/23/2 001	Racial	criminal	All fields	

Law no 2004-1486 of December 30, 2004 creating the Specialised Body (HALDE) <a href="http://ameli.senat.fr/publication_pl/2004-2005/105.html">http://ameli.senat.fr/publication_pl/2004-2005/105.html</a>	01/03/2005	All grounds	Civil and Administrative law	All fields	Completes transposition vs Ethnic, national and racial origin creation of a specialised body
Law no 2005-102 of February 11, 2005 for the equality of rights and chances and the social participation of the disabled <a href="http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANX0300217L">http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANX0300217L</a>	11/02/2005	disability	Civil. Administrative law	Employment education, goods and services social rights	Completes transposition vs reasonable accommodation duties and positive action
Law of social cohesion adopted December 20, 2004 <a href="http://ameli.senat.fr/publication_pl/2004-2005/110.html">http://ameli.senat.fr/publication_pl/2004-2005/110.html</a>	12/2004	Origin, race, religion	Administrative law	Employment housing in public and private sector	Program promoting access to employment and housing
Law no 2005-846 of July 26, 2005 habilitating the Government to adopt emergency measures for employment by way of Governmental Decree: <a href="http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SOCX0500142L">http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SOCX0500142L</a> Governmental Decree 2005-901 of August 2 <sup>nd</sup> , 2005: <a href="http://www.legifrance.gouv.fr">http://www.legifrance.gouv.fr</a>	07/2005	age	Administrative law	Employment public sector	Remove age limits for recruitment in the public sector

<a href="#">/WAspad/UnTexteDeJorf?nu mjo=FPPX0500189R</a>					
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## ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: France

Date: 28-02-06

Instrument	Signed (yes/no)	Ratified (yes/no)	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)	yes	yes	No	yes	yes
Protocol 12, ECHR	No	No	No	No	No
Revised European Social Charter	yes	yes	No	Ratified collective complaints protocol? Yes	No
International Covenant on Civil and Political Rights	Yes	yes	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 Convention on Economic, Social and	yes	yes	Yes, articles 6, 9, 11 and 13 must not be interpreted as limiting sovereignty over access to work and	NO	No

Cultural Rights			social rights of foreigners		
Convention on the Elimination of All Forms of Racial Discrimination	yes	yes	No	No	No
Convention on the Elimination of Discrimination Against Women	yes	yes	No	yes	Yes
ILO Convention No. 111 on Discrimination	yes	yes	No	No	No
➔Convention on the Rights of the Child	yes	yes	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.	No.	Yes, some disposition have been interpreted by the Conseil d'Etat as directly opposable to the State. CE, September 22, 1997, GISTI,