



Executive Summary

Country Report France 2011 on measures to combat discrimination

By Sophie Latraverse

1. Introduction

France has traditionally been a centralised state. The policies relating to the banning of discrimination are created and implemented above all by the Ministry of Social Affairs and Labour and the Ministry of Interior. Certain local authorities, mostly departmental and managed through the prefect under the authority of the Ministry of Interior and local services of social affairs, also have an important role to play, particularly as regards policies relating to the Roma, traveller population and immigrants. The first legislation implementing the directives, the Law of 16 November 2001, integrated the fight against discrimination as an objective in collective bargaining, branch (sub-sections of the labour force) negotiations and national negotiations. It has been completed by the creation of the French Equality Body, HALDE, with the law 2004-436, and the Law no 2008-496 of May 27, 2008 relating to the adaptation of National Law to Community Law in Matters of Discrimination adopted on May 15, 2008. In 2011, the HALDE has been merged in a new Constitutional authority called the Defender of Rights (Défenseur des droits), created by the Organic Law no 2011-333 of 29 April 2011. Starting 1st May 2011, it holds amongst other missions the integrality of the former scope of competence, powers and missions of the HALDE.

The key to the French legal approach to racism and discrimination is a characteristic interpretation of the principle of equality within an abstract universalistic framework, enshrined in a range of instruments, including the Constitutions of 1946 and 1958. The resulting legal framework has developed along two complementary lines: the condemnation of inequality based on “origin” and the refusal to use the criteria of “origin” for policy and administrative purposes (confirmed by the Constitutional Council). Even if there is no constitutional text expressly prohibiting discrimination on the basis of age, disability, health or sexual orientation, according to the Constitutional Council the list of prohibited grounds of discrimination in the Constitution is an open one.

In French law, rules are judged to meet the requirement of equality if they are the same for all. Rules that foresee differential treatment for diverse circumstances are nevertheless considered to meet the requirement of the theory of equality if they are based on differences in situations or on considerations of public policy. The relevant categories are accepted only to the extent that they rely on neutral criteria, devoid of identity content such as socio-economic considerations. In 2007, for the first time, the Constitutional Council has explicitly endorsed the refusal by French doctrine to recognize the concepts of ethnic origin or race, both as legal or administrative or research categories on the basis of which differential treatment could be evaluated.



Any approach of origin must be based on objective indications such as nationality of the parents and grandparents in order to objectivise the construction of comparative categories.

Public policy's conception of disability was renewed with the adoption of the Law no 2005-102 of February 11, 2005 which focuses on integration in all areas of life and all decrees to enforce those principles in the workplace, access to school, urban renovation and public support and creates quotas of employment in both the private and public sectors.

The Roma population in France is divided among French citizens, who represent 2/3rd of this population, and migrants from Romania and Bulgaria. Their difficulties and relations with the public service are very different. Until recently, public awareness on the situation of the Traveller population was very low.

Because most social rights are managed on the basis of one's link to a place of residence, all French citizens who have a travelling way of life (including Roma and non-Roma) have a specific legal and administrative status requiring regular controls and limitation of access to the right to vote. Undertakings of Government to amend the Law n°69-3 of January 3 1969 governing this status have not been followed-up but have been reiterated and the issue has reached the public sphere for the first time during the 2012 political campaign. Roma travellers constitute 80% of this administrative category.

The sedentary population lives both in public housing and on privately owned land. In 2000, the Besson Law no 2000- 614 relating to the accommodation of the travelling population, re-imposed on all departments the adoption of accommodation schemes for travellers, renewing requirements introduced into the law since 1990. According to the most recent data used in the Parliament report no 3292 presented by Mr Didier Quentin on March 9, 2011, after many extensions and further to the financing by the Ministry of Housing that ended in 2009 , there were in 2011, 96 departmental schemes adopted. 19 936 parking areas for Roma and Travellers had been implemented and 27, 847 were to be financed, i.e. 67% of the 41, 589 programmed by the authorities (NGOs consider that 60 000 are needed).

Many Mayors adopt decrees to forbid motor home parking on the entire territory in order to prevent parking on private lands. Meanwhile, the law no 2003-239 on interior security of 2003, creates at article 322-4-1 of the Penal Code an offence of illegal parking for travellers and authorises the immediate removal of motor homes parked in towns that are not subject to the obligation to install parking areas, that have met their obligation or that are in the process of meeting them. The reluctance of the local authorities to install parking areas, difficulties faced by central government to insure enforcement of parking provisions and reinforced enforcement of parking prohibitions creates a situation where travellers often have no place to settle even for a few days.

This situation could be deemed to be a *de facto* non compliance with respect to the 2000/43 Directive as regards housing rights.

As regards foreign Romas, on 9 November, 2009 HALDE adopted Deliberation no 2009-372 further to a large consultation, and concludes that the French government's policy and transitory regime targets Romanian and Bulgarian Romas and is as such discriminatory on the ground of race and origin. In its decisions of 19 October 2009 (no 521/2008) and 13 September 2011 (no 67/2011) the European Committee of Social Rights concludes as well that the limitations to social rights resulting from the status created in France for Romanians and Bulgarians during the transitory period are violations of Article 19 par 4 c) relating to housing rights of migrant populations. It is in this context that in the spring of 2010, the Minister of Interior decided to emphasise enforcement of parking restrictions and announced that illegal camps occupied by Romas and Travellers would be massively dismantled before the end of summer. This policy has been pursued in 2011, with, again, the objective of dismantling Roma camps. Meanwhile, the Roma population remains stable and is still evaluated at 15 000 persons.

2. Main legislation

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

Directive 2000/43 was first transposed by Law no. 1006-2001 of 16 November 2001 (hereafter Law of 16 November 2001), the Law on Social Modernisation no. 2002-73 of 17 January 2002 (hereafter Law of 17 January 2002), the Law of 21 December 2004 creating the Equality Body (HALDE) completing the transposition of Directive 2000/43. General provisions prohibiting discrimination have always been transversal, providing a uniform legal regime, not only for the grounds covered by Article 19 par 1 TFEU but also physical appearance, last name, customs, health, political opinions, trade union activities and involvement in mutual benefit organisations, family situation and genetic characteristics. On May 15, 2008 Parliament adopted Law no 2008-496 correcting transposition of the directives as regards the definitions of harassment and discrimination. It provides at article 1 for a definition of discrimination covering direct and indirect discrimination and harassment, as well as instructions to discriminate. It also completes the protection against victimisations, covers non salaried and independent workers, but creates a possibility for employers to invoke occupational requirements on all grounds provided it pursues legitimate objectives and is proportionate (article 2 par. 3 and 8 par. 3). As regards age, it has created Article L1133-3 LC which provides a possibility to foresee exceptions to the prohibition of discrimination on the ground of age. Thereafter, Government adopted Decree no 2009-560 of 20 May, 2009 creating a positive action scheme to support the employment of workers over 50 years of age.

However, this legislative evolution has brought about the suppression of national origin in the list of prohibited grounds covered, except in the Labour Code and the Penal Code.

Recourses in discrimination before the civil courts created by explicit statute (Law of November 16, 2001, Law of January 17, 2002, and Law no 2008-496) all benefit from the shift in the burden of proof. There has been significant development of the jurisprudence in the last five years facilitating plaintiff's access to evidence in matters of discrimination; however we can still observe inconsistent application of the shift in the burden of proof and principles of access to evidence before the lower courts.

As regards the protection afforded to public agents, the Law no 83-634 states at article 3 that, in conformity with article 64 of the Constitution of 1958, it does not cover the status of Magistrates who are not considered as civil servants. Public agents working within Parliament are as well not subject to the Law no 83-634 and are also governed by application of article 3 of the law by separate in-house rules of Parliament. Finally, all contractual public agents who hold one of the various status that are excluded from the application of the Law no 84-16 of 11 November 1984 are also excluded from all protections against discrimination of public agents provided by the Law no 83-634 and are not covered by transposition; they do not benefit from the right to reasonable accommodation in case of disability.

The Law no 2005-102 of February 11, 2005, reviews the entire scheme relating to public support and legal protection of the disabled person and completes transposition of Directive 2000-78 by providing a right to reasonable accommodation in the work place as well as positive action programmes imposing employment quotas for both the public and private sectors.

Even after adoption of the Law no 2008-496 completing transposition, reasonable accommodation obligations still benefit only to employees who have obtained official recognition, have a status of disabled workers, to those who have suffered from an employment accident procuring a disability superior to 10% and who benefit from compensation in relation thereto, to beneficiaries of disability pensions and to disabled veterans. Therefore, non registered disabled people, non salaried disabled workers and disabled persons who are members of the professions are still not covered by the obligation of reasonable accommodation.

3. Main principles and definitions

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

name in the list of prohibited grounds of discrimination is also a way to cover assumed characteristics.

Although discrimination by association is not expressly covered, except in case of explicit protection provided by law (ex: caring parents of disabled children), there is one judgment extending the legal protection to associated persons. There is no legal rule addressing multiple grounds of discrimination, but the courts have accepted to make such findings when evidence showed the unequal treatment resulting from a combination of grounds.

In the Law no 2005-102 of February 11, 2005 on Disability the definition of the prohibition to discriminate in employment on the basis of disability is based on the employer's perception of the condition of the employee. It can thus be considered to include assumed characteristics as well. It provides a definition of disability that is broader than that of the CJUE in case C-13/05, Chacón Navas, that it is not limited to access to professional life and encompasses limitations in all areas of life.

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

4. Material scope

The law covers all grounds prohibited by Article 19 par.1 TFEU and a number of other grounds: origin, national origin- in some legislation- appearance of origin, race, sex, pregnancy, family situation, physical appearance, last name, health, disability, genetic characteristics, mores, sexual orientation, age, union activities, and religion, political and religious convictions (which are interpreted broadly to encompass all philosophical or mystical endeavours). Since the Law of 27 May 2008, the regime is variable according to protected grounds and areas of discrimination. There is an extended material scope covering social protection, social advantages, education, access to health services, and goods and services that applies only to ethnic origin and race. Protection of access to professional organisations and of non salaried and independent workers apply only to article 19 par. 1.TFEU grounds (Law no 2008-496 article 2). The Labour Code and the Penal Code cover national origin and there are still no provisions for reasonable accommodation of public agents benefiting from specific status and non salaried and independent workers.

The general protection against discrimination is enforceable against both private and public persons. The principle of equality is applicable to non-nationals unless the

legislator can justify a difference in treatment on the basis of conditions of public interest. However, the law makes access to certain rights, such as the right to work and some social benefits, conditional on the individual having the status of legal foreign resident.

5. Enforcing the law

In France, since the law is transversal for a great part of its protection, cases are referred to as precedents whether or not they discuss issues related to the same ground of discrimination. They all benefit from the shift in the burden of proof but procedural means of access to evidence remain difficult to enforce. However, French case law is opening up a new line of reasoning concluding that comparative evidence is not always necessary in order to establish a presumption of discrimination that can be inferred from the circumstances.

Admissible means of evidence should include the use of statistics. On 15 December 2011, the Court of cassation has recognized that discrimination on the ground of origin can be established by analysing the origin of lists of hired personnel on the basis of their surname. Article 8 II paragraph 5 of the Law 78-17 of January 6, 1978 relating to information systems, data and the protection of freedom 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. Statistics resulting from the comparative situation of employees of a common employer are now commonly used in labour law and repeatedly recognized by the Cour de cassation. Statistics resulting from research reports are not yet commonly used in civil and administrative procedures, but were taken in consideration by the Halde (Equality Body).

Situation testing has been introduced to the Penal Code at article 225-3-1 PC by the Law of March 9, 2006 as evidence of discrimination in criminal courts by the jurisprudence of the Cour de cassation. The Ministry of Justice issued a ministerial instruction in order to present the conditions of enforcement of the situation testing principle and explains that it cannot be used in the context of a fictitious offer or with persons acting under a false identity pursuing a false scenario. The victim has to act under his or her identity, be a truly unequally treated person.

However, testing has not yet been used as evidence in civil cases and considering the strict requirements of fairness enforced in civil procedure, it may be difficult to rely on situation testing as an element contributing to the shift of the burden of proof. Developed by anti-racist NGOs, it is mostly used by them, but as well by individual plaintiffs. It has been used in racial and disability discrimination cases to establish refusal of access to goods and services. Some associations have recently used it in age discrimination cases in access to employment.

All recourses alleging discrimination against a private party – employer, service provider, landlord etc. – must be brought before the civil courts. The salaried

employee (in the private sector or contractual agent of an industrial or commercial public service) must bring his or her claim before the Labour Court. All other cases will be brought before the District Court (tribunal d'instance – TI) or Regional Court (tribunal de grande instance – TGI) depending on the amounts involved or claimed.

The Law of 16 November 2001 provides the possibility for representative trade unions and NGOs which have been in existence for over five years to take part in the action. Article 31 of the New Code of Civil procedure recognises the legal status before the civil courts of any person who has a legitimate interest in the dismissal or granting of the action. In case of discrimination in housing, the Law of 17 January 2002 extends the right of action of NGOs to collective and individual recourse.

The general principle in French civil law is to remedy the prejudice by the award of compensatory pecuniary damages, indemnifying the financial and non-material damages, without further pecuniary sanction or punitive damages. We observe a significant evolution of non-material damages awarded in cases where financial damages are difficult to establish. In cases of discrimination at work, Article L1134-4 LC provides for the possibility of also requesting the annulment of the discriminatory measure concerned, resulting for example in the reintegration of the employee in case of dismissal or in judicial reconstitution of his or her career if discrimination occurred during the development of his or her career. This provision has been amended by the Law no 2008-561 of June 17, 2008, to subject the claim to a statute of limitations of five years.

6. Equality bodies

On July 21st, 2008, Government has passed a Constitutional Law modernising the institutions that creates, at Article 41, a Defender of the Rights with extended powers. Its powers and jurisdiction have been precisely defined by the Organic Law no. 2011-333 of 29 March 2011 that came into force on 1st may 2011. It integrates the Médiateur de la République (French Ombudsman), the Defender of the rights of the Child, the Commission for the Deontology of Security, and finally the HALDE. It absorbs the jurisdiction over claims in all these areas as well as competence to propose legislative reform, to pursue actions for the promotion of rights and carry out research in all its spheres of competence. Its competence covers all grounds of discrimination, direct and indirect, prohibited by national laws and International Conventions duly ratified by France.

The Defender of Rights has competence to investigate individual and collective complaints, following requests from individuals, NGOs, Trade Unions or members of Parliament. Its investigative powers allow it to request explanations from any public or private person including communication of documents or any information on any support. It can also undertake visits to non private persons after due notice and request assistance of any investigation service of the State. The Law further provides that the Defender can request a court order or, impose a fine if a respondent refuses to cooperate. Its means of resolution of claims are mediation, recommendations to



the State or private parties and present observations before all jurisdictions, unilaterally or at the request of the court or the parties. It can also propose penal transactions for situations covered by the criminal code.