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Non-discrimination

France

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Country report

Non-discrimination

France

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EXECUTIVE SUMMARY

1. Introduction

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

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

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

The Roma population in France comprises French citizens, the Travellers, who represent 95 % of this population (approximately 700 000 people) and foreign Roma, who are mostly migrants from Romania and Bulgaria and are estimated to number 20 000. The problems they experience and their relations with the public services are very different. Until recently, public awareness of the situation of the Traveller population was very low. Historically, all French citizens who pursue a travelling way of life (including Roma and non-Roma) have had a specific legal and administrative status. Roma Travellers constitute 80 % of this administrative category. After it was declared unconstitutional by the Constitutional Council on 5 October 2012 (QPC- 2012-279), Article 195 of Law No. 2017-86 of 27 January 2017 on equality and citizenship finally abrogated Law 69-3 on the status of Travellers and put an end to their derogatory status.

The settled Roma population lives both in public housing and on privately owned land. In 2000, the Besson Law No. 2000-614 on the accommodation of the travelling population, re-imposed on all departments the requirement to adopt accommodation schemes for Travellers, renewing requirements introduced into the law in 1990. The reluctance of the authorities to implement parking sites persists and reinforced enforcement of parking prohibitions creates a situation where Travellers often have no place to settle, even for a few days. This situation could be deemed to be a *de facto* non-compliance with respect of Directive 2000/43/EC with regard to housing rights. In a case relating to the eviction of Travellers from their land on the ground of urban planning regulations forbidding parking, the European Court of Human Rights condemned France in 2013 for a violation of Article 8 of the Convention.²

With regard to migrant Roma, since the June 2012 elections, the Minister of the Interior has intensified the previous policy of enforcement of land occupation restrictions. Evictions of Travellers and Roma from illegally occupied land and orders to leave French territory have virtually doubled. This policy now targets migrants as well. According to the census

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

² ECtHR, *Winterstein v. France*, 17 October 2013.

carried out by the Human Rights League and the ERRC,³ in 2017, 11 309 people were expelled from 130 living areas, i.e. 71 % of all slums of the territory, particularly targeting those occupied by Roma. This represents an increase of 12 % when compared to the 10 119 persons evicted in 2016. Regarding Travellers, according to a motion adopted by the National Consultative Commission on Travellers on 12 October 2017, currently two thirds of the permanent parking areas and half the parking areas for large events have been implemented. These difficulties are aggravated by the parking interdiction adopted in many urban plans and the insufficient implementation of schemes for access to housing.

Beyond Metropolitan France, the overseas regions are subject to the pressure of a massive influx of migrants attempting to reach the territory, which has triggered the implementation of a policy of massive repression and a restrictive approach to their access to rights. This is particularly the case in Guyana and Mayotte. In Metropolitan France, the Government pursues a policy to limit the budgetary means and human resources devoted to the needs of asylum seekers and unaccompanied minors, and complicates access to rights. As regards social protection, controls are multiplied in order to question the permanence of migrants' rights to legal residence and the continuity of their rights to social protection benefits.

2. Main legislation

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

Directive 2000/43/EC was first transposed by the Law of 16 November 2001, the Law on Social Modernisation No. 2002-73 of 17 January 2002, with the Law No.2004-1486 of 30 December 2004 creating the equality body (*Haute autorité de lutte contre les discriminations et pour l'égalité, HALDE*) completing the transposition of Directive 2000/43/EC. General provisions prohibiting discrimination have always been transversal, , providing a uniform legal regime, covering not only for the grounds covered by Article 19(1) of the Treaty on the Functioning of the European Union, but also physical appearance, last name, customs, health, political opinions, trade union activities and involvement in mutual benefit organisations, family situation and genetic characteristics. On 15 May 2008, the Parliament adopted Law No. 2008-496 of 27 May 2008 correcting the transposition of the directives regarding the definitions of harassment and discrimination with regard to the seven (7) TFEU Grounds. In Article 1 it provides a definition of discrimination covering direct and indirect discrimination and harassment, as well as instructions to discriminate. It completes the protection against victimisation and covers non-salaried and independent workers.

This legislation has been amended at regular intervals creating a number of discrepancies between the list of grounds covered by the Penal Code, the Labour Code and the Law of 27 May 2008. Further to the adoption of Law No. 2016-1547 of 18 November 2016 on the modernisation of the justice system in the 21st century,⁴ Article 2(3) of Law No. 2008-496 unified the legal regimes completing the list of grounds offered, the maximum protection afforded by Directive 2000/43/EC. All texts were amended to designate the list of the Penal Code as a reference thereby proposing unified protection and reintroducing the ground of national origin. However, as a consequence, the ground of belief (*conviction*) was abandoned in the Penal Code and Law No. 2008-496 of 27 May 2008, although it is still

³ Human Rights League and the ERRC (2018), 'Census of forced evictions in living areas occupied by Roma (or people designated as such) in France', available at: <https://www.ldh-france.org/recensement-evacuations-forcees-lieux-vie-occupes-roms-personnes-designees-telles-en-france-en-2017/>.

⁴ France, Law No. 2016-1547 of 18 November 2016, available at: <https://www.legifrance.gouv.fr/eli/loi/2016/11/18/JUSX1515639L/jo>.

covered in employment by the Labour Code and Law No. 83-634 protecting civil servants in employment.

Remedies in relation to discrimination before the civil courts created by explicit statute (Law of 16 November 2001, Law of 17 January 2002 and Law No. 2008-496) all benefit from the shift in the burden of proof.

Magistrates, public servants working within Parliament and contractual public servants who hold one of the various statuses that are excluded from the application of Law No. 83-634 are excluded from all protections against discrimination and are not covered by the transposition of the directives. However, in the *Perreux* case, the *Conseil d'Etat* held that Directive 2000/78/EC, was directly applicable in national law and therefore applicable to all public agents.⁵

In terms of public policy, the concept of a disabled person was renewed with the adoption of Law No. 2005-102 of 11 February 2005, which focuses on integration in all areas of life and any decrees to enforce these principles in the workplace, access to schools, urban renovation and public support and creates employment quotas in both the private and public sectors. Law No. 2005-102 reviews the entire system relating to public support and legal protection for disabled people and completes the transposition of Directive 2000/78/EC by providing a right to reasonable accommodation in the workplace, as well as positive action programmes imposing employment quotas for both the public and private sectors. However, even after the adoption of Law No. 2008-496 completing transposition, reasonable accommodation obligations still benefit only employees who have obtained official recognition, have disabled worker status, those who have suffered an accident at work resulting in a degree of disability greater than 10 % and who benefit from compensation in this regard, those in receipt of disability pensions and disabled veterans. Therefore, non-registered disabled people, non-salaried disabled workers and disabled people who are members of the professions are still not covered by the reasonable accommodation obligation. Regarding accessibility of public places, the deadline provided by law for adaptations to ensure access, initially scheduled for 1 January 2015, was postponed by the legislative accessibility timetable, establishing an implementation deadline that can extend from three months to five years.⁶

3. Main principles and definitions

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

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

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

⁶ France, Law No. 2014-789 of 10 July 2014 authorising the Government to adopt legislative measures for the implementation of accessibility of public places (Articles 11 and 19 to 22).

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

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

Although discrimination by association is not expressly covered, except in case of explicit protection provided by law (e.g. parents caring for disabled children), there is jurisprudence extending the legal protection to associated persons in matters of discrimination related to trade union activities.⁷ There is no legal rule addressing multiple grounds of discrimination, but the courts have accepted that such findings may be made when evidence shows unequal treatment resulting from a combination of grounds.⁸

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

4. Material scope

Through Law No. 2016-1547 of 18 November 2016 on the modernisation of the justice system in the 21st century, France intended to foster a unified legal regime that afforded civil, administrative and penal redress for all protected grounds and areas of discrimination. However, in 2017, Law No. 2017-86 of 27 January 2017 on equality and citizenship created a prohibition of unequal treatment for the refusal to be the victim of bullying in the Penal Code, and the Programming Law **No. 2017-256 of 28 February 2017 for the overseas territories** has created in the Law of 27 May 2008 a civil prohibition of discrimination based on banking address. An extended material scope covering social protection, social advantages, education, access to health services and goods and services, applies to all protected grounds of discrimination. The Labour Code and Penal Code cover national origin and there is still no provision for reasonable accommodation of public servants benefiting from specific statuses and non-salaried and independent workers.

The general protection against discrimination is enforceable against both private and public persons. Regarding employment, implementation applies to both the public and private sectors. The principle of equality is applicable to non-nationals, unless the legislator can justify a difference in treatment on the basis of conditions of public interest. Such is the case for access to some professions and the law imposes a time delay before affording a number of social protections. Furthermore, the law makes access to certain rights, such as

⁷ Caen Appeals Court, *Enault v. SAS ED*, 17 September 2010.

⁸ Court of Appeal of Poitiers, No. 08/00461, 17 February 2009.

the right to work and some social benefits, conditional on the individual having the status of a legally resident foreign national.

The scope of the protection against discrimination extends beyond that required by the directives since it offers coverage of all grounds with regard to housing, access to goods and services and, further to the adoption of the Law of 11 February 2005, offers protection in access to education, social protection, social advantages in relation to disability.

5. Enforcing the law

In France, given that the law offers a common protection for most protected grounds, cases are referred to as precedents whether or not they discuss issues related to the same ground of discrimination. There has been significant development of the jurisprudence facilitating the claimant's access to evidence in matters of discrimination; however, resistance and inconsistent application of the shift in the burden of proof and principles of access to evidence before the lower courts can still be observed.

Admissible means of evidence include the use of statistics. Statistics resulting from the comparative situation of employees of a common employer are now frequently used in labour law and have been repeatedly recognised by the Court of Cassation.⁹

Situation testing was introduced into the Penal Code at Article 225-3-1 PC by the Law of 9 March 2006 as evidence of discrimination in criminal courts by the jurisprudence of the Court of Cassation. Article 42 of the Law No. 2017- 86 of 27 January 2017 on equality and citizenship, which was adopted on 23 November 2016 but enacted on 27 January 2017, provides for the admissibility of situation testing before the civil courts. It has not yet been used as evidence in civil cases. Developed by anti-racist NGOs, it is mostly used by them, but also by individual complainants. The Criminal Chamber of the Court of Cassation has validated the legality and admissibility of a testing organised by the public prosecution to establish discrimination on the ground of origin in access to a nightclub.¹⁰ However, it will only trigger conviction if it is supported by other sources of evidence.

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

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

The general principle in French civil law is to remedy the prejudice by awarding compensatory pecuniary damages indemnifying the financial and non-material damages, without further pecuniary sanction or punitive damages. In matters related to employment,

⁹ Court of Cassation, Social Chamber, No. K 10-15873, *Airbus*, 15 December 2011.

¹⁰ Court of Cassation, Criminal Chamber, No. 15-87378, 28 February 2017, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000034140789&fastReqId=1149594191&fastPos=1>, accessed 9 March 2018.

a significant development can be observed in non-material damages awarded in cases where financial damages are difficult to establish. In cases of discrimination at work, Article L1134-4 LC provides for the possibility of also requesting the annulment of the discriminatory measure concerned, resulting, for example, in the reintegration of the employee in case of dismissal. This provision was amended by Law No. 2008-561 of 17 June 2008, to subject the claim to a statute of limitations of five years. However, in cases related to access to goods and services damages remain very low.

Articles 62 to 88 of Law No. 2016-1547 of 18 November 2016 on the modernisation of the justice system in the 21st century create a legal framework supporting class action to put an end to a discriminatory behaviour (*action en manquement*) or for liability related to discriminatory acts (*action en responsabilité*), that can be brought before the regional court or the administrative court.¹¹

The first legislation implementing the directives, the Law of 16 November 2001, integrated combating discrimination as an objective in collective bargaining, branch (sub-sections of the labour force) negotiations and national negotiations. The Sciberras report published on 13 May 2015 by a group of mandated social partners stresses the lack of progress in the promotion and implementation of equal opportunities through social dialogue.¹²

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

With regard to disabled people, the Law of 11 February 2005 maintains the quota obligations for 6 % of disabled employees, while extending it to the public sector, and sets out specific mechanisms of access to public employment and early retirement conditions. However, the implementation of the enforcement of the rules regarding accessibility of public places is hindered by the many options to request authorisations to derogate.

There is a specific scheme, which targets Roma and Traveller children, in order to facilitate their access to education and integration into state schools.¹³

6. Equality bodies

On 21 July 2008, the Government passed a Constitutional Law modernising the institutions that established, through Article 41, a Defender of Rights. Its powers and jurisdiction were precisely defined by the Institutional Act (*loi organique*) No. 2011-333 of 29 March 2011, which came into force on 1 May 2011. It integrates the French Ombudsman (*Médiateur de la République*), the Children's Defender, the National Commission on Security Ethics and, finally, the former equality body – the Equal Rights and Anti-Discrimination Commission (*Haute autorité de lutte contre les discriminations et pour l'égalité, HALDE*). Organic Law No. 2016-1690 of 9 December 2016 on the competence of the Defender of Rights has extended its responsibility to cover the guidance and protection of whistleblowers.

The Defender of Rights assumes the jurisdiction for claims in all these areas, as well as competence to propose legislative reform, to pursue the promotion of rights and to carry out research in all its spheres of competence. It covers all grounds of discrimination, direct

¹¹ France, Law No. 2016-1547 of 18 November 2016 on the modernisation of the justice system in the 21st century (*Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI^e siècle*) <https://www.legifrance.gouv.fr/eli/loi/2016/11/18/JUSX1515639L/jo> (accessed 10 March 2017).

¹² France, Sciberras, J.-C., *Rapport de synthèse des travaux du groupe de dialogue inter-partenaires sur la lutte contre les discriminations en entreprise* (Report to the Minister of Employment and Social Dialogue, Synthesis of the working group between social partners on the fights against discrimination in the workplace), 13 May 2015, available at: http://travail-emploi.gouv.fr/IMG/pdf/Rapport_Sciberras.pdf (accessed 1 June 2018).

¹³ Ministerial Instruction 2012-143 of 2 October 2012.

and indirect, prohibited by national laws and international conventions duly ratified by France.

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

Its claims have increased by more than 30 % since the last full year of activity of the HALDE in 2010. Jacques Toubon was appointed Defender of Rights in July 2014, following the death of his predecessor, Dominique Baudis. He has set priorities in relation to the rights of migrants, communication strategy, promotion of access to rights and research.

7. Key issues

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

Even though anti-discrimination law has been implemented by the higher courts and has evolved over the last 15 years, lawyers in general practice and first instance judges often lack proper training to implement its rules of evidence, the latest jurisprudential developments and the particulars of its rhetoric. Claimants still have to be ready to face multiple appeals before winning their cases. Discrimination cases are much more favourably heard at the appellate level and the rate of success before the courts has been significantly improved by the contribution of observations presented by the HALDE and the Defender of Rights.

Indirect discrimination is still a misunderstood concept that is seldom argued by lawyers, often directly invoked by the court unilaterally,¹⁴ and only once in a case relating to discrimination on the ground of origin.¹⁵

The ground of religion in the fields of employment and education is the subject of important legal and political debates aiming to extend the duty of neutrality of public servants to private law employees in situations where the employer executes missions of service to the public or where commercial bodies wish to present a neutral figure in relations with the public.

¹⁴ The first case concluding indirect discrimination, where it was raised by the Court of Cassation, Social Chamber, No. 05-04962, 9 January 2007, available at: www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000017624898&fastReqId=1576422841&fastPos=1 (accessed 6 September 2016).

¹⁵ Court of Cassation, Social Chamber, No. 10-20765, 3 November 2011, available at: www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024764368&fastReqId=1975217984&fastPos=1 (accessed 6 September 2016).

Further to constant debates in France on the ability of employers to adopt restrictions on wearing or displaying religious symbols, during discussion of Law No. 2016-1088 of 8 August 2016 on employment, the modernisation of social dialogue and the protection of professional careers, Parliament unanimously adopted a provision (Article 2) which amends the Labor Code to create, at Article L 1321-2-1, the ability for employers to set out in their in-house regulations the principle of neutrality as a rule and to stipulate restrictions to the principle of religious freedom for employees. The application of this rule will necessarily be influenced by the decisions of the Court of Justice in the cases *Asma Bougnaoui and Association de defense des droits de l'homme v. Micropole SA* and *G4S Secure Solutions* which have been duly followed by the subsequent decision of the Court of Cassation. The Court sends a clear message to employers that in the private sector, the desire of clients constitutes direct discrimination that cannot be justified and that requirements relating to the neutral public identity of an employer must be non-discriminatory and enforced in a strictly proportionate fashion. Therefore it cannot target religion or be applicable to all employees.¹⁶

The significant increases in hate speech and violent manifestations of Islamophobia and anti-Semitism continue. The French authorities have made considerable efforts to organise a proportionate and democratic response to xenophobic reactions to terrorist violence and the geopolitical context, which has been exploited by extreme right populist politicians. This context has had a significant impact on the number of discriminatory responses in relation to access to employment and access to goods and services experienced by people of North African and Middle Eastern origin.

The post of Secretary of State for disabled persons reporting to the Prime Minister has been created to mainstream all policies relating to disability, which has been designated as a priority of the mandate of the President of the Republic.

The new Government has maintained the policy decision to monitor public policies relating to the fight against discrimination on the ground of origin and social condition within the urban affairs policy (*Politique de la ville*), which is supervised by the Ministry for the cohesion of the territories.

¹⁶ CJEU, Case C-188/15, *Bougnaoui*, 14 March 2017, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=188853&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=125215>, accessed 9 March 2018; Court of Cassation, Social Chamber, No. 13-19855, 22 November 2017, available at: https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/2484_22_38073.html, accessed 9 March 2018; CJEU, C-157/15, *G4S Secure Solutions*, 14 March 2017, available at: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130de3f064e7c9cba45c199f6f40234efaa34.e34KaxiLC3eQc40LaxqMbN4Pb30Re0?text=&docid=188852&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=339583>, accessed 9 March 2018.

RÉSUMÉ

1. Introduction

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

Dans une décision du 15 novembre 2007, le Conseil constitutionnel a explicitement entériné pour la première fois le refus de la philosophie française de reconnaître les concepts de l'origine ethnique et de la race en tant que catégories juridiques ou administratives, ou de recherche, pouvant servir de base à l'évaluation d'un traitement différencié.¹⁷ Toute approche de l'origine doit se fonder sur des indications objectives telles que la nationalité des parents et des grands-parents, afin d'objectiver la construction de catégorie de comparaison.

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

La population rom de France comprend des citoyens français (les gens du voyage) qui en représentent 95 % (700 000 personnes environ) et les roms étrangers, qui sont principalement des migrants originaires de Roumanie et de Bulgarie et dont le nombre est estimé à 20 000. Les problèmes qu'ils rencontrent et leurs relations avec les services publics sont très différents. Le grand public était, jusqu'à une date récente, très peu sensibilisé à la situation des gens du voyage. Historiquement, tous les citoyens français ayant un mode de vie nomade (Roms et non-Roms) ont eu un statut juridique et administratif spécifique. Les gens du voyage roms représentent 80 % de cette catégorie administrative. Après qu'elle ait été déclarée inconstitutionnelle par le Conseil constitutionnel le 5 octobre 2012 (QPC-2012-279, l'article 195 de la loi n° 2017-86 du 27 janvier 2017 relative à l'égalité et à la citoyenneté a finalement abrogé la loi n° 69-3 relative au statut des gens du voyage et mis fin à leur statut dérogatoire.

La population rom sédentaire vit à la fois en logements publics et sur des terrains privés. En 2000, la loi Besson n° 2000-614 relative à l'accueil et à l'habitat des gens du voyage a réimposé à tous les départements l'obligation d'adopter des régimes d'hébergement à l'intention des gens du voyage, renouvelant ainsi les exigences introduites dans la législation depuis 1990. La réticence des autorités d'installer des aires de stationnement persiste et l'application plus rigoureuse des interdictions de stationnement crée une situation par laquelle il est fréquent que les gens du voyage ne trouvent pas d'endroit où s'installer, ne serait-ce que quelques jours. Cette situation pourrait être considérée comme un non-respect de facto de la directive 2000/43/CE pour ce qui concerne les droits au logement. Dans une affaire relative à l'expulsion de gens du voyage des terrains où ils s'étaient établis au motif que la réglementation en matière d'urbanisme y interdisait le stationnement, la Cour européenne des droits de l'homme a condamné la France en 2013 pour violation de l'article 8 de la Convention.¹⁸

¹⁷ Conseil constitutionnel, décision n° 2007-557, 15 novembre 2007, disponible sur: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2007/2007-557-dc/decision-n-2007-557-dc-du-15-novembre-2007.1183.html>, consulté le 6 septembre 2016.

¹⁸ CouEDH, Winterstein c. France, 17 octobre 2013.

En ce qui concerne les Roms migrants, le ministre de l'Intérieur a renforcé depuis les élections de 2012 la politique antérieure d'application des restrictions en matière d'occupation de terrains. Les expulsions de gens du voyage et de Roms de terrains occupés illégalement et les ordres de quitter le territoire français ont pratiquement doublé. Cette politique vise désormais aussi les migrants. Selon le recensement effectué par la Ligue des droits de l'homme et l'European Roma Rights Centre (ERRC),¹⁹ 11 309 personnes ont fait en 2017 l'objet d'expulsions de 130 lieux de vie, ce qui correspond à 71 % des personnes vivant dans des bidonvilles et squats situés en France; les lieux occupés par des Roms ont été particulièrement ciblés. Ce chiffre représente une hausse de 12 % par rapport aux 10 119 personnes expulsées en 2016. En ce qui concerne les gens du voyage, selon une motion adoptée par la Commission consultative nationale des gens du voyage en date du 12 octobre 2017, les deux tiers des terrains de stationnement permanent et la moitié des terrains de stationnement pour événements de grande envergure sont aujourd'hui aménagés. Les problèmes découlant de cette situation se trouvent aggravés par l'interdiction de stationnement adoptée dans le cadre de nombreux plans d'urbanisme ainsi que par la mise en œuvre insuffisante de programmes d'accès au logement.

Au-delà de la France métropolitaine, les régions d'outre-mer subissent la pression d'un afflux massif de migrants tentant de rejoindre le territoire – ce qui a donné lieu à la mise en œuvre d'une politique de répression massive et à une approche restrictive de leur accès aux droits. Tel est particulièrement le cas en Guyane et à Mayotte. En France métropolitaine, le gouvernement a pour politique de limiter les moyens budgétaires et les ressources humaines consacrées aux besoins des demandeurs d'asile et des mineurs non accompagnés, et rend l'accès aux droits plus compliqué. En ce qui concerne la protection sociale, les contrôles se multiplient afin de mettre en cause la permanence des droits des migrants à une résidence légale et la continuité de leurs droits aux prestations de sécurité sociale.

2. Législation principale

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

La directive 2000/43/CE a tout d'abord été transposée par la loi du 16 novembre 2001, par la loi n° 2002-73 sur la modernisation sociale du 17 janvier 2002 et par la loi n° 2004-1486 du 30 décembre 2004 créant l'organisme de promotion de l'égalité (Haute autorité de lutte contre les discriminations et pour l'égalité ou HALDE) qui achève cette transposition. Les dispositions générales interdisant la discrimination ont toujours été transversales, assurant un régime juridique uniforme qui couvre non seulement les motifs visés à l'article 19, paragraphe premier, du traité sur le fonctionnement de l'Union européenne (TFUE) mais également ceux de l'apparence physique, du nom de famille, des coutumes, de la santé, des opinions politiques, des activités syndicales et de l'affiliation à des mutuelles, de la situation familiale et des caractéristiques génétiques. Le Parlement a adopté le 15 mai 2008 la loi n° 2008-496 du 27 mai 2008 rectifiant la transposition des directives en ce qui concerne les définitions du harcèlement et de la discrimination pour ce qui concerne les sept (7) motifs du TFUE. Elle contient en son article premier une définition de la discrimination couvrant la discrimination directe et indirecte, ainsi que du harcèlement et de l'injonction de discriminer. Elle complète la protection contre les représailles et inclut les travailleurs non-salariés et indépendants.

¹⁹ Ligue des droits de l'homme et ERRC (2018), «Recensement des évacuations forcées de lieux de vie occupés par des Roms (ou des personnes désignées comme telles) en France», disponible sur: <https://www.ldh-france.org/recensement-evacuations-forcees-lieux-vie-occupes-roms-personnes-designees-telles-en-france-en-2017/>.

La modification à intervalles réguliers de cette législation est à l'origine d'un certain nombre d'incohérences entre la liste des motifs respectivement visés par le code pénal, le code du travail et la loi du 27 mai 2008. Suite à l'adoption de la loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI^e siècle,²⁰ l'article 2, paragraphe 3, de la loi n° 2008-496 uniformise les régimes juridiques en complétant la liste des motifs bénéficiant de la protection maximale au titre de la directive 2000/43/CE. Tous les textes ont été modifiés pour désigner la liste du code pénal en tant que référence, proposant ainsi une protection uniforme et réintroduisant l'origine nationale. En conséquence cependant, le motif des convictions a été abandonné dans le code pénal et la loi n° 2008-496 du 27 mai 2008, mais reste couvert dans le domaine de l'emploi par le code du travail et la loi n° 83-634 portant droits et obligations des fonctionnaires.

Lorsqu'ils ont été instaurés par une loi expresse (loi du 16 novembre 2001, loi du 17 janvier 2002 et loi n° 2008-496), tous les recours intentés pour discrimination auprès des juridictions civiles bénéficient du renversement de la charge de la preuve.

Les magistrats, les fonctionnaires exerçant leur activité au sein du Parlement et les agents publics contractuels relevant des différents statuts exclus de l'application de la loi n° 83-634 ne bénéficient d'aucune des protections contre la discrimination et ne sont pas couverts par la transposition des directives. Dans l'affaire Perreux, toutefois, le Conseil d'État a considéré que la directive 2000/78/CE était directement applicable en droit national et, en conséquence, à l'ensemble des agents publics.²¹

En termes de politique publique, la notion de personne handicapée a été renouvelée avec l'adoption le 11 février 2005 de la loi n° 2005-102, qui vise à intégrer à la fois les personnes handicapées dans tous les domaines de la vie et tous les décrets destinés à mettre ces principes en vigueur sur le lieu de travail ainsi qu'en matière d'accès à l'école, de rénovation urbaine et d'aide publique, et qui institue des quotas d'emploi tant dans le secteur privé que dans le secteur public. La loi n° 2005-102 revoit entièrement le régime de l'assistance publique et de la protection juridique des personnes handicapées, et complète la transposition de la directive 2000/78/CE en prévoyant un droit à l'aménagement raisonnable sur le lieu de travail, ainsi que des programmes d'action positive imposant des quotas d'emploi tant dans le secteur public que dans le secteur privé. Il n'en reste pas moins que, même après l'adoption de la loi n° 2008-496 achevant la transposition, les obligations d'aménagement raisonnable ne profitent encore qu'aux salariés qui ont obtenu une reconnaissance officielle et qui ont le statut de travailleurs handicapés; à ceux qui ont été victimes d'un accident de travail leur occasionnant un handicap de plus de 10 % et qui bénéficient d'une indemnisation correspondante; aux bénéficiaires d'allocations d'invalidité; et aux invalides de guerre. Il en résulte que les personnes handicapées non enregistrées, les travailleurs handicapés non-salariés et les personnes handicapées exerçant en professions libérales ne sont toujours pas couverts par l'obligation d'aménagement raisonnable. En ce qui concerne l'accessibilité des lieux publics, le délai prévu par la loi pour les adaptations garantissant l'accès, initialement fixé au 1^{er} janvier 2015, a été postposé par le calendrier législatif en matière d'accessibilité; le délai de mise en œuvre peut désormais aller de trois mois à cinq ans.²²

3. Principes généraux et définitions

Tous les textes codifiés de la législation nationale qui prohibent la discrimination énoncent une liste de motifs interdits sans les définir. La loi interdit de prendre en considération le concept d'origine ou de race, mais ils ne sont pas définis et aucune application de la

²⁰ France, Loi n° 2016-1547 du 18 novembre 2016, disponible sur: <https://www.legifrance.gouv.fr/eli/loi/2016/11/18/JUSX1515639L/jo>.

²¹ Conseil d'État, décision n° 298348, 30 octobre 2009.

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

dérogation autorisée par la directive 2000/43/CE n'a été retenue dans la législation française. Le libellé de l'interdiction de discrimination figurant dans le code pénal, le code du travail et le code civil inclut la notion de caractéristiques présumées fondées sur l'origine, la race et la religion. La référence systématique à l'apparence physique, à l'origine nationale et au nom de famille dans la liste des motifs de discrimination interdits constitue aussi une manière de couvrir les caractéristiques présumées.

Les concepts de discrimination directe et indirecte sont définis à l'article premier de la loi n° 2008-496. Si la définition de la discrimination indirecte est conforme aux directives, celle de la discrimination directe ne l'est pas. Cette dernière exclut en effet la possibilité de procéder par voie de comparaison hypothétique: l'expression «ne l'aurait été» a été remplacée par «ne l'aura été». La loi étend en outre la définition de la discrimination en vue d'une définition correcte du harcèlement, qui élimine l'ancienne exigence de mesures répétées, ainsi que de l'injonction de pratiquer une discrimination. De surcroît, l'incitation et l'injonction à discriminer correspondent à la notion de complicité visée aux articles 121-6 et 121-7 du code pénal, et sont couvertes par les principes généraux du droit civil en matière de responsabilité.

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

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

Bien que la discrimination par association ne soit pas expressément couverte, sauf en cas de protection explicite prévue par la loi (parents s'occupant d'enfants handicapés, par exemple), il existe une jurisprudence qui étend la protection juridique aux personnes associées dans des cas de discrimination liée à des activités syndicales.²³ Aucune règle juridique ne vise les motifs multiples de discrimination, mais les juridictions ont admis qu'une conclusion dans ce sens pouvait être établie lorsque des éléments probants attestent d'une inégalité de traitement découlant d'une combinaison de motifs.²⁴

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

²³ Cour d'appel de Caen, Enault c. SAS ED, 17 septembre 2010.

²⁴ Cour d'appel de Poitiers, affaire n° 08/00461, 17 février 2009.

4. Champ d'application matériel

Par la loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI^e siècle, la France visait à instaurer un régime juridique uniformisé prévoyant des recours civils, administratifs et pénaux pour tous les motifs protégés et tous les domaines de discrimination. En 2017 toutefois, la loi n° 2017-86 du 27 janvier 2017 relative à l'égalité et à la citoyenneté crée dans le code pénal une interdiction d'inégalité de traitement pour refus de subir un harcèlement, et la loi n° 2017-256 du 28 février 2017 de programmation relative à l'égalité réelle outre-mer a créé dans la loi du 27 mai 2008 une interdiction civile de discrimination fondée sur la domiciliation bancaire. Un champ d'application matériel étendu couvrant la protection sociale, les avantages sociaux, l'éducation, l'accès aux services de santé et les biens et services, s'applique à tous les motifs protégés de discrimination. Le code du travail et le code pénal couvrent l'origine nationale, mais il n'y a toujours aucune disposition visant l'aménagement raisonnable pour les fonctionnaires relevant d'un statut spécifique ni pour les travailleurs non-salariés et indépendants.

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

Le champ d'application de la protection contre la discrimination va au-delà de celui exigé par les directives dans la mesure où il couvre tous les motifs pour ce qui concerne le logement et l'accès aux biens et aux services, et où, suite à l'adoption de loi du 11 février 2005, il offre une protection en matière d'accès à l'éducation, à la protection sociale et aux avantages sociaux en rapport avec le handicap.

5. Mise en application de la loi

Étant donné que la loi offre en France une protection commune pour la plupart des motifs protégés, les affaires sont citées comme précédents, qu'elles traitent ou non de sujets liés au même motif de discrimination. Si la jurisprudence a fortement évolué et facilite l'accès de la partie plaignante aux preuves dans les affaires de discrimination, on n'en observe pas moins la persistance d'une réticence et d'un manque de cohérence dans l'application de la charge de la preuve et des principes d'accès aux preuves devant les juridictions inférieures.

L'utilisation de statistiques fait partie des moyens de preuve recevables. Des statistiques tirées d'une comparaison de la situation des salariés au service d'un même employeur sont désormais couramment utilisées en droit du travail et elles ont été reconnues à plusieurs reprises par la Cour de cassation.²⁵

Le test de situation a été introduit à l'article 225-3-1 du code pénal par la loi du 9 mars 2006 en tant que preuve de discrimination devant des juridictions pénales par jurisprudence de la Cour de cassation. L'article 42 de la loi n° 2017-86 du 27 janvier relative à l'égalité et à la citoyenneté, adoptée le 23 novembre 2016 mais promulguée le 27 janvier 2017, prévoit la recevabilité du test de situation devant les juridictions civiles. Il n'a pas encore été utilisé comme preuve dans des affaires civiles. Développé par des ONG de lutte contre le racisme, le test de situation est le plus souvent utilisé par celles-ci, mais également par des plaignants individuels. La chambre criminelle de la Cour de cassation a validé et la recevabilité d'un test de situation effectué sous la direction du

²⁵ Cour de cassation, chambre sociale, pourvoi n° K 10-15873, *Airbus*, 15 décembre 2011.

pouvoir judiciaire pour établir l'existence éventuelle d'une discrimination fondée sur l'origine dans une affaire concernant l'accès à une discothèque.²⁶ Ce type de test ne donne cependant lieu à une condamnation qu'à condition d'être étayé par d'autres sources d'éléments probants.

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

La loi du 16 novembre 2001 offre la possibilité à des syndicats et ONG représentatifs exerçant leur activité depuis plus de cinq ans d'agir au nom d'une victime qui dépose plainte. L'article 31 du nouveau code de procédure civile reconnaît la capacité d'ester devant les juridictions civiles à toute personne ayant un intérêt légitime à ce que le recours soit rejeté ou ait une issue favorable. S'il s'agit d'une discrimination en matière de logement, la loi du 17 janvier 2002 prévoit un droit d'action des ONG à la fois pour les recours collectifs et individuels. L'organisme pour l'égalité (le Défenseur des droits) peut présenter des observations en tant qu'*amicus curiae* devant les tribunaux et verser des éléments de son enquête au dossier judiciaire.

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

Les articles 62 à 88 de la loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI^e siècle instaure un cadre juridique à l'appui des actions collectives visant à mettre fin à un comportement discriminatoire (*action en manquement*) ou à établir une responsabilité liée à des actes discriminatoires (*action en responsabilité*), lesquelles peuvent être engagées auprès du tribunal régional ou du tribunal administratif.²⁷

Le premier acte législatif transposant les directives, à savoir la loi du 16 novembre 2001, a fait de la lutte contre la discrimination un objectif des négociations collectives, des négociations de branche (les branches professionnelles formant des subdivisions des forces de travail) et des négociations nationales. Le rapport Sciberras, publié le 13 mai 2015 par un groupe de partenaires sociaux dûment mandatés, souligne le manque d'avancées dans la promotion et la concrétisation de l'égalité des chances au moyen du dialogue social.²⁸

²⁶ Cour de cassation, chambre criminelle, pourvoi n° 15-87378, 28 février 2017, disponible sur: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000034140789&astReqId=1149594191&fastPos=1>, consulté le 9 mars 2018.

²⁷ France, Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI^e siècle (<https://www.legifrance.gouv.fr/eli/loi/2016/11/18/JUSX1515639L/jo>), consulté le 10 mars 2017.

²⁸ France, Sciberras, J.-C., *Rapport de synthèse des travaux du groupe de dialogue inter-partenaires sur la lutte contre les discriminations en entreprise*, 13 mai 2015, disponible sur: http://travail-emploi.gouv.fr/IMG/pdf/Rapport_Sciberras.pdf, consulté le 1^{er} juin 2018.

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

En ce qui concerne les personnes handicapées, la loi du 11 février 2005 maintient l'obligation d'un quota de 6 % de salariés handicapés et l'étend au secteur public; elle fixe des mécanismes particuliers pour l'accès à l'emploi public ainsi que les conditions de préretraite. L'application des règles obligatoires en matière d'accessibilité des lieux publics se trouve en revanche entravée par les nombreuses possibilités de demandes de dérogation.

Il existe un régime particulier à l'intention des enfants des communautés roms et des gens du voyage, destiné à faciliter leur accès à l'enseignement et leur intégration dans des écoles publiques.²⁹

6. Organismes de promotion de l'égalité de traitement

Le Parlement a voté le 21 juillet 2008 une loi constitutionnelle de modernisation des institutions qui établit en son article 41 le Défenseur des droits, dont les compétences et la juridiction ont été définies avec précision dans la loi organique n° 2011-333 du 29 mars 2011, entrée en vigueur le 1^{er} mai 2011. Le Défenseur des droits intègre le Médiateur de la République, le Défenseur des enfants, la Commission nationale de déontologie de la sécurité et enfin l'ancien organisme de lutte contre les discriminations et de promotion de l'égalité, à savoir la Haute autorité de lutte contre les discriminations et pour l'égalité (HALDE). La loi organique n° 2016-1690 du 9 décembre 2016 relative à la compétence du Défenseur des droits a étendu celle-ci pour y inclure l'orientation et la protection des lanceurs d'alerte.

Le Défenseur des droits peut être saisi de recours dans l'ensemble de ces domaines, et il est habilité à proposer des réformes législatives, à mener des actions de promotion des droits et à effectuer des travaux de recherche dans toutes ses sphères de compétence. Il couvre tous les motifs de discrimination, directe et indirecte, prohibés par la législation nationale et par les conventions internationales dûment ratifiées par la France.

Le Défenseur des droits est habilité à enquêter sur des plaintes individuelles et collectives à la requête de particuliers, d'ONG, de syndicats ou de membres du Parlement, et à réclamer des explications à toute personne publique ou privée, y compris la communication de documents ou de toute information fournissant la preuve de faits. Les moyens à sa disposition pour résoudre les litiges sont la médiation, les recommandations à l'État ou à des personnes privées (à titre individuel ou général), la présentation de ses observations en tant qu'*amicus curiae* et le dépôt de son dossier d'enquête devant toute juridiction, unilatéralement ou à la demande du tribunal ou des parties. Il intervient régulièrement devant la CouEDH et le Comité européen des droits sociaux, et a présenté cette année ses premières observations devant la Cour de justice de l'Union européenne dans une affaire contre Google portant sur le droit d'effacer des traces sur internet. Le Défenseur des droits est aussi spécifiquement habilité à proposer un règlement en cas de discrimination de nature pénale couverte par le code pénal («*transaction pénale*»).

Le nombre de plaintes dont il a été saisi a augmenté de plus de 30 % depuis la dernière année complète d'activité de la HALDE (2010). Jacques Toubon a été nommé Défenseur des droits en juillet 2014 suite au décès de son prédécesseur, Dominique Baudis. Ses priorités sont les droits des migrants, la stratégie de communication, la promotion de l'accès aux droits et la recherche.

²⁹ Circulaire n° 2012-143 du 2 octobre 2012.

7. Points essentiels

Le droit antidiscrimination continue de susciter une réticence focalisée sur ce qui est perçu comme une analyse communautaire des tensions sociales. Tel est le fondement des fortes objections idéologiques de la part des institutions françaises à son égard. La théorie formelle traditionnelle de l'égalité, la notion de faute en matière civile et la suprématie du Parlement, demeurent les références ultimes. Au niveau judiciaire, le renversement de la charge de la preuve et le concept de discrimination indirecte sont perçus comme des moyens de faire assumer une responsabilité sans faute au défendeur et de conférer des droits spéciaux aux membres de certains groupes.

Même si le droit antidiscrimination a été mis en œuvre par les juridictions supérieures et a évolué au cours des quinze dernières années, les juristes généralistes et les juges de première instance manquent souvent de formation suffisante pour en appliquer les règles de preuve, les développements les plus récents en matière de jurisprudence et les spécificités de rhétorique. Les requérants doivent encore toujours s'attendre à faire face à de nombreux appels avant d'obtenir gain de cause. Les affaires de discrimination sont entendues beaucoup plus favorablement au niveau de l'appel et le taux de procès gagnés a sensiblement augmenté grâce à la contribution des observations présentées par la HALDE et par le Défenseur des droits.

La discrimination indirecte reste une notion mal comprise qui est rarement avancée par des avocats, souvent invoquée directement et unilatéralement par les tribunaux,³⁰ et une fois seulement dans une affaire de discrimination fondée sur l'origine.³¹

Le motif de la religion dans les domaines de l'emploi et de l'éducation fait l'objet de débats juridiques et politiques majeurs à propos de l'élargissement aux salariés relevant du droit privé de l'obligation de neutralité appliquée aux agents de la fonction publique lorsque l'employeur effectue des missions de service à l'intention du public ou lorsque des entités commerciales souhaitent offrir une image neutre dans leurs relations avec le public.

Suite aux discussions incessantes en France à propos de la capacité des employeurs d'adopter des restrictions concernant le port ou l'affichage de signes religieux, le Parlement a adopté à l'unanimité – lors du débat sur la loi n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels – une disposition (article 2) modifiant le code du travail en vue d'instituer en son article L 1321-2-1 la capacité pour les employeurs de prévoir dans leur règlement interne le principe de neutralité en tant que règle, et de stipuler des restrictions au principe de la liberté religieuse pour les salariés. L'application de cette règle sera nécessairement influencée par les décisions de la Cour de justice dans les affaires *Asma Bougnaoui et Association de défense des droits de l'homme c. Micropole SA et G4S Secure Solutions*, lesquelles ont été dûment suivies par la Cour de cassation lors de sa décision subséquente. Celle-ci adresse en effet aux employeurs un message très clair précisant que, dans le secteur privé, le souhait du client constitue une discrimination directe ne pouvant trouver de justification, et que les exigences d'un employeur en matière d'identité publique neutre doivent être non discriminatoires et respectées de façon rigoureusement proportionnée. Elles ne peuvent donc cibler la religion ni s'appliquer à l'ensemble des salariés.³²

³⁰ Première affaire concluant à une discrimination indirecte, dans laquelle celle-ci a été soulevée par la Cour de cassation, chambre sociale, n° 05-04962, 9 janvier 2007, disponible sur: www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000017624898&fastReqId=1576422841&fastPos=1, consulté le 6 septembre 2016.

³¹ Cour de cassation, chambre sociale, n° 10-20765, 3 novembre 2011, disponible sur: www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024764368&fastReqId=1975217984&fastPos=1, consulté le 6 septembre 2016).

³² CJEU, affaire C-188/15, Bougnaoui, 14 mars 2017, disponible sur: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=188853&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=125215>, consulté le 9 mars 2018; Cour de cassation, chambre sociale, n° 13-19855, 22 novembre 2017, disponible sur:

La forte montée des discours haineux et des manifestations violentes d'islamophobie et d'antisémitisme se poursuit. Les autorités françaises ont déployé des efforts considérables pour organiser une réponse proportionnée et démocratique aux réactions xénophobes suscitées par les violences terroristes et un contexte géopolitique qui a été exploité par des politiciens populistes d'extrême-droite. Ce contexte a eu une incidence majeure sur le nombre de réactions discriminatoires dont les personnes originaires d'Afrique du Nord et du Moyen-Orient font l'objet dans le cadre de l'emploi et de l'accès aux biens et aux services.

Le poste de Secrétaire d'État aux personnes handicapées rapportant au Premier ministre a été créé dans le but d'intégrer l'ensemble des politiques relatives au handicap, lequel fait partie des priorités du mandat du Président de la République.

Le nouveau gouvernement a maintenu la décision stratégique d'assurer le suivi des politiques publiques relatives à la lutte contre la discrimination fondée sur l'origine et la condition sociale dans le cadre de la Politique de la ville, laquelle relève du ministère de la Cohésion des territoires.

https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/2484_22_38073.html, consulté le 9 mars 2018;
CJUE, C-157/15, G4S Secure Solutions, 14 mars 2017, disponible sur:
<http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130de3f064e7c9cba45c199f6f40234efaa34.e34KaxiLc3eQc40LaxqMbN4Pb30Re0?text=&docid=188852&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=339583>, consulté le 9 mars 2018.

ZUSAMMENFASSUNG

1. Einleitung

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

In einer Entscheidung vom 15. November 2007 bestätigte der Verfassungsrat erstmals ausdrücklich die Weigerung der französischen Rechtsdoktrin, die Begriffe „ethnische Herkunft“ und „Rasse“ als rechtliche, verwaltungstechnische oder wissenschaftliche Kategorien anzuerkennen, auf deren Grundlage eine Ungleichbehandlung festgestellt werden kann.³³ Um die Objektivität vergleichender Kategorien zu gewährleisten, dürfen in Bezug auf die Herkunft nur Merkmale herangezogen werden, die sich auf objektive Indikatoren, wie die Nationalität der Eltern oder Großeltern, beziehen.

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

Die Roma-Bevölkerung Frankreichs besteht aus französischen Staatsbürgern, den Fahrenden, die 95 % dieser Bevölkerungsgruppe (rund 700 000 Personen) ausmachen, und ausländischen Roma, die zum größten Teil aus Rumänien und Bulgarien zugewandert sind und deren Zahl auf 20 000 geschätzt wird. Die Probleme der beiden Gruppen und ihre Beziehungen zur öffentlichen Verwaltung unterscheiden sich stark voneinander. Bis vor kurzem war die Situation der Reisenden in der breiten Öffentlichkeit kaum bekannt. Seit jeher hatten alle französischen Staatsbürger, die einen nicht sesshaften Lebensstil pflegen (Roma ebenso wie Nicht-Roma), einen speziellen rechtlichen und verwaltungstechnischen Status. Fahrende Roma stellen 80 % dieser Verwaltungskategorie. Nachdem der Verfassungsrat es am 5. Oktober 2012 (QPC-2012-279) für verfassungswidrig erklärt hatte, wurde das Gesetz 69-3 über den Status von Fahrenden mithilfe von Artikel 195 des Gesetzes Nr. 2017-86 vom 27. Januar 2017 über Gleichheit und Staatsbürgerschaft schließlich aufgehoben und der Ausnahmestatus dieser Personen damit beendet.

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

³³ Verfassungsrat, 2007-557, 15. November 2007; abrufbar unter: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2007/2007-557-dc/decision-n-2007-557-dc-du-15-novembre-2007.1183.html> (letzter Zugriff am 6. September 2016).

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

In Bezug auf Roma-Migranten hat der Innenminister seit den Wahlen vom Juni 2012 seine bisherige Politik intensiviert, die Verstöße gegen das Niederlassungsverbot streng verfolgt. Die Vertreibung von Fahrenden und Roma von illegal besetztem Land und die Ausweisungen aus dem französischen Hoheitsgebiet haben sich nahezu verdoppelt. Diese Politik zielt nun auch auf Migrantinnen und Migranten ab. Einer von der Liga für Menschenrechte und dem ERRC durchgeführten Zählung zufolge³⁵ wurden im Jahr 2017 11 309 Menschen aus 130 Wohngebieten – das entspricht 71 % aller in Frankreich existierenden Slums – vertrieben, wobei Ziel vor allem die von Roma bewohnten Gebiete waren. Dies entspricht einem Zuwachs von 12 % im Vergleich zu den 10 119 Personen, die im Jahr 2016 vertrieben wurden. Was Fahrende anbelangt, so sind einer von der Nationalen Beratungskommission für Fahrende (CNCGV) am 12. Oktober 2017 verabschiedeten Entschließung zufolge derzeit zwei Drittel der Dauerparkplätze und die Hälfte der Parkplätze für Großveranstaltungen installiert. Diese schwierige Situation wird durch das in vielen Städten beschlossene Parkverbot und die unzureichende Umsetzung von Maßnahmen zur Wohnraumversorgung noch verschärft.

Nicht nur der europäische Teil Frankreichs, auch die überseeischen Gebiete stehen unter dem Druck eines massiven Zustroms von Migranten, die versuchen, das französische Hoheitsgebiet zu erreichen. Dies hat zu einer Politik massiver Repression und zu Einschränkungen des Rechtszugangs dieser Personen geführt. Dies gilt besonders für Guyana und Mayotte. Im französischen Mutterland verfolgt die Regierung eine Politik, die für Asylbewerber und unbegleitete Minderjährige bestimmten finanziellen und personellen Mittel zu begrenzen, und erschwert die Inanspruchnahme von Rechten. Im Bereich des Sozialschutzes werden die Kontrollen vervielfacht, um die Kontinuität des Rechts von Migranten auf legalen Aufenthalt und ihres Anspruchs auf Sozialleistungen in Frage zu stellen.

2. Wichtigste Rechtsvorschriften

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

Die Richtlinie 2000/43/EG wurde zunächst durch das Gesetz vom 16. November 2001 und das Gesetz Nr. 2002-73 über soziale Modernisierung vom 17. Januar 2002 umgesetzt; abgeschlossen wurde die Umsetzung durch das Gesetz Nr. 2004-1486 vom 30. Dezember 2004, mit dem die Gleichbehandlungsstelle HALDE geschaffen wurde. Allgemeine Bestimmungen zum Verbot von Diskriminierung waren immer bereichsübergreifend und bildeten einen einheitlichen Rechtsschutz, der nicht nur die in Artikel 19 Absatz 1 des Vertrags über die Arbeitsweise der Europäischen Union genannten Gründe, sondern auch körperliche Erscheinung, Nachname, Gebräuche, Gesundheitszustand, politische Ansichten, Mitgliedschaft in Gewerkschaften und Beteiligung an Vereinen auf Gegenseitigkeit, familiäre Situation und genetische Merkmale abdeckte. Am 15. Mai 2008 verabschiedete das Parlament das Gesetz Nr. 2008-496 vom 27. Mai 2008, mit dem die Umsetzung der Richtlinien im Hinblick auf die Definitionen von Belästigung und Diskriminierung bezüglich der sieben (7) AEUV-Gründe überarbeitet wurde. Artikel 1 des Gesetzes enthält eine Definition von Diskriminierung, die unmittelbare und mittelbare Diskriminierung, Belästigung sowie die Anweisung zur Diskriminierung abdeckt. Es verbessert den Schutz vor Viktimisierung und gilt auch für freie Mitarbeiter und selbständig Beschäftigte.

³⁵ Liga für Menschenrechte und ERRC (2018), „Census of forced evictions in living areas occupied by Roma (or people designated as such) in France“, abrufbar unter: <https://www.ldh-france.org/recensement-evacuations-forcees-lieux-vie-occupes-roms-personnes-designees-telles-en-france-en-2017/>.

Dieses Gesetz wurde in regelmäßigen Abständen geändert, was zu einer Reihe von Abweichungen zwischen der Liste der vom Strafgesetzbuch, dem Arbeitsgesetzbuch und dem Gesetz vom 27. Mai 2008 erfassten Gründe geführt hat. Neben der Verabschiedung des Gesetzes Nr. 2016-1547 vom 18. November 2016 zur Modernisierung des Justizsystems im 21. Jahrhundert³⁶ vereinheitlicht Artikel 2 Absatz 3 des Gesetzes Nr. 2008-496 den rechtlichen Rahmen, indem er die Liste der Diskriminierungsgründe vervollständigt – der maximale in der Richtlinie 2000/43/EG vorgesehene Schutz. Alle Texte wurden dahingehend geändert, dass sie als Referenzliste die des Strafgesetzbuchs benennen, wodurch ein einheitlicher Schutz verfolgt und das Merkmal der nationalen Herkunft wieder eingeführt wurde. Damit einhergehend wurde das Merkmal „Überzeugung“ (*conviction*) im Strafgesetzbuch und im Gesetz Nr. 2008-496 vom 27. Mai 2008 fallengelassen; im Bereich Beschäftigung wird es vom Arbeitsgesetzbuch und vom Gesetz Nr. 83-634 zum Schutz der Beamten im Bereich Beschäftigung jedoch nach wie vor abgedeckt.

In dem durch gesonderte Rechtsvorschriften (Gesetz vom 16. November 2001, Gesetz vom 17. Januar 2002 und Gesetz Nr. 2008-496) geschaffenen Klageweg gegen Diskriminierung vor den Zivilgerichten ist eine Verlagerung der Beweislast vorgesehen.

Friedensrichter, Beamte, die im Parlament arbeiten, und Vertragsbedienstete des öffentlichen Dienstes, die unter die zahlreichen Sonderregelungen fallen, auf die sich der Geltungsbereich des Gesetzes Nr. 83-634 nicht bezieht, sind von jeglichem Schutz vor Diskriminierung ausgenommen. Für diese Gruppen wurden die Richtlinien nicht umgesetzt. Allerdings kam der Conseil d'État im Fall Perreux zu dem Ergebnis, dass die Richtlinie 2000/78/EG im nationalen Recht unmittelbar anwendbar ist und daher auch für alle Bediensteten der öffentlichen Hand gilt.³⁷

Mit Verabschiedung des Gesetzes Nr. 2005-102 vom 11. Februar 2005 wurde der Begriff der Person mit Behinderung neu gefasst. Das Gesetz, das sich auf die Integration in allen Lebensbereichen konzentriert, schreibt die Umsetzung dieses Grundsatzes am Arbeitsplatz, beim Zugang zu Schulen, in der Stadtanierung und bei der staatlichen Unterstützung vor und führt Beschäftigungsquoten sowohl im privaten als auch im öffentlichen Sektor ein. Das Gesetz Nr. 2005-102 reformiert das gesamte System staatlicher Hilfen und den Rechtsschutz von Menschen mit Behinderung und vervollständigt die Umsetzung der Richtlinie 2000/78/EG, indem es ein Recht auf angemessene Vorkehrungen am Arbeitsplatz vorsieht und Fördermaßnahmen in Form von Beschäftigungsquoten für den öffentlichen und den privaten Sektor einführt. Allerdings gilt auch nach Verabschiedung des Gesetzes Nr. 2008-496, mit dem die Umsetzung der Richtlinie vervollständigt wurde, der Anspruch auf angemessene Vorkehrungen nur für Arbeitnehmer, deren Behinderung offiziell anerkannt ist, die den Status eines Arbeitnehmers mit Behinderung haben, für Personen, die aufgrund eines Arbeitsunfalls zu mehr als 10 % behindert sind und einen Anspruch auf Ausgleichsleistungen haben, für Bezieher von Behindertenrenten und für behinderte Veteranen. Nach wie vor gilt die Pflicht, angemessene Vorkehrungen zu treffen, also nicht für nicht registrierte Menschen mit Behinderungen, für freie Mitarbeiter mit Behinderungen und für Behinderte, die einen Beruf ausüben, der von der genannten Pflicht nicht erfasst wird. Was die Gewährleistung des Zugangs zu öffentlichen Bereichen betrifft, so wurde die gesetzlich vorgesehene Frist für entsprechende Anpassungsmaßnahmen, die ursprünglich am 1. Januar 2015 auslief, durch den Gesetzgebungszeitplan Barrierefreiheit verschoben und eine Umsetzungsfrist festgelegt, die zwischen drei Monaten und fünf Jahre betragen kann.³⁸

³⁶ Frankreich, Gesetz Nr. 2016-1547 vom 18. November 2016, abrufbar unter: <https://www.legifrance.gouv.fr/eli/loi/2016/11/18/JUSX1515639L/jo>.

³⁷ Conseil d'État (Staatsrat), Nr. 298348, 30. Oktober 2009.

³⁸ Frankreich, Gesetz Nr. 2014-789 vom 10. Juli 2014 zur Ermächtigung der Regierung, Rechtsvorschriften zur Umsetzung der Barrierefreiheit im öffentlichen Raum zu erlassen (Art. 11 und Art. 19-22).

3. Wichtigste Grundsätze und Begriffe

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

Unmittelbare und mittelbare Diskriminierung sind in Artikel 1 des Gesetzes Nr. 2008-496 definiert. Während die Definition von mittelbarer Diskriminierung den Richtlinien entspricht, ist dies bei der unmittelbaren Diskriminierung nicht der Fall. Sie schließt einen Nachweis von Diskriminierung durch einen hypothetischen Vergleich aus: der Ausdruck „erfahren hat“ wurde ersetzt durch „erfahren wird“. Außerdem dehnt das Gesetz die Definition von Diskriminierung auf eine korrekte Definition von Anweisung zur Diskriminierung und von Belästigung aus, wodurch die Definition nicht mehr wie bisher wiederholte Handlungen vorschreibt. Anstiftung und Anweisung zur Diskriminierung entspricht außerdem dem Begriff der Mittäterschaft in Artikel 121-6 und 121-7 Strafgesetzbuch und fällt damit unter den allgemeinen Grundsatz der Haftung im Zivilrecht.

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

Allerdings enthält das Gesetz vom 27. Mai 2008 eine allgemeine Verteidigungsklausel, mit deren Hilfe jeder Arbeitgeber in jeder Situation versuchen kann, eine Ungleichbehandlung zu rechtfertigen (Art. 6 Abs. 4).

Obwohl Diskriminierung aufgrund von Assoziierung nicht ausdrücklich erwähnt wird – ausgenommen in Fällen, in denen das Gesetz ausdrücklich Schutz gewährt (z. B. für Eltern, die ein behindertes Kind pflegen) –, hat die Rechtsprechung den Rechtsschutz bei der Diskriminierung wegen der Mitgliedschaft in Gewerkschaften auch auf assoziierte Personen ausgedehnt.³⁹ Es gibt keine rechtliche Regelung in Bezug auf Mehrfachdiskriminierung, allerdings haben die Gerichte entsprechende Klagen akzeptiert, wenn die Beweise zeigen, dass die Ungleichbehandlung durch eine Kombination von Gründen motiviert ist.⁴⁰

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

³⁹ Berufungsgericht Caen, *Enault gegen SAS ED*, 17. September 2010.

⁴⁰ Berufungsgericht Poitiers, Nr. 08/00461, 17. Februar 2009.

angepasst wird, solange die Maßnahmen keine unverhältnismäßige finanzielle Belastung darstellen. Daher entspricht der französische Schutz der Definition von Behinderung und angemessenen Vorkehrungen, die der EuGH in den verbundenen Rechtssachen C-335/11 und C-337/11, *Ring* und *Skouboe Werge*, vorgegeben hat.

4. Sachlicher Geltungsbereich

Mit dem Gesetz Nr. 2016-1547 vom 18. November 2016 zur Modernisierung des Justizsystems im 21. Jahrhundert ging es Frankreich darum, einen einheitlichen Rechtsrahmen fördern, der zivil-, verwaltungs- und strafrechtliche Rechtsdurchsetzungsverfahren für alle geschützten Diskriminierungsgründe und -bereiche ermöglichen sollte. 2017 wurde im Zuge des Gesetzes Nr. 2017-86 vom 27. Januar 2017 über Gleichheit und Staatsbürgerschaft im Strafgesetzbuch jedoch ein Verbot der Ungleichbehandlung aufgrund der Zurückweisung von Mobbing eingeführt und im Zuge des Planungsgesetzes Nr. 2017-256 vom 28. Februar 2017 für die überseeischen Gebiete im Gesetz vom 27. Mai 2008 ein zivilrechtliches Verbot von Diskriminierung aufgrund der Bankanschrift verankert. Ein erweiterter sachlicher Geltungsbereich, der Sozialschutz, soziale Vergünstigungen, Bildung, Zugang zum Gesundheitswesen sowie zu Gütern und Dienstleistungen umfasst, gilt für alle geschützten Diskriminierungsgründe. Das Arbeitsgesetzbuch und das Strafgesetzbuch decken die nationale Herkunft ab, es gibt jedoch noch immer keine Vorschrift, angemessenen Vorkehrungen für staatliche Beschäftigte, die einen speziellen Status haben, sowie für freie Mitarbeiter und für selbständig Beschäftigte zu treffen.

Der allgemeine Diskriminierungsschutz kann sowohl gegen private als auch gegen öffentliche Stellen durchgesetzt werden. Im Arbeitsleben gilt das Diskriminierungsverbot sowohl für die öffentliche Hand, als auch für den privaten Sektor. Der Grundsatz der Gleichbehandlung gilt auch für Nichtstaatsbürger, sofern der Gesetzgeber eine Ungleichbehandlung nicht durch das öffentliche Interesse rechtfertigen kann. Dies ist beim Zugang zu einigen Berufen der Fall, und das Gesetz sieht vor, dass eine Reihe von Sozialschutzmaßnahmen erst nach Ablauf einer gewissen Frist gewährt wird. Darüber hinaus macht das Gesetz den Zugang zu bestimmten Rechten, etwa dem Recht auf Arbeit oder auf bestimmte Sozialleistungen, davon abhängig, dass die betreffende Person den Status eines rechtmäßig ansässigen Ausländers hat.

Der Umfang des Antidiskriminierungsschutzes geht über den von den Richtlinien geforderten hinaus, da er alle Diskriminierungsgründe in Bezug auf Wohnraumversorgung und den Zugang zu Gütern und Dienstleistungen umfasst und, nach Verabschiedung des Gesetzes vom 11. Februar 2005, Schutz vor Diskriminierung aufgrund von Behinderung beim Zugang zu Bildung, zum Sozialschutz und zu sozialen Vergünstigungen gewährt.

5. Rechtsdurchsetzung

Da das französische Recht für die meisten geschützten Merkmale einen einheitlichen Schutz gewährt, werden in Frankreich Rechtssachen als Präzedenzfälle herangezogen, unabhängig davon, ob die in ihnen aufgeworfenen Fragen dasselbe Diskriminierungsmerkmal betreffen oder nicht. Eine umfassende Entwicklung in der Rechtsprechung erleichtert Klägern in Diskriminierungsfällen inzwischen den Zugang zu Beweismitteln; allerdings werden die Verlagerung der Beweislast und die Grundsätze des Zugangs zu Beweismitteln von den Gerichten der ersten Instanz immer noch nicht oder nicht durchgehend umgesetzt.

Statistische Daten sind als Beweismittel zulässig. Statistische Daten, die sich aus der vergleichbaren Situation anderer Arbeitnehmer desselben Arbeitgebers ergeben, werden

im Arbeitsrecht inzwischen häufig genutzt und wurden vom Kassationsgerichtshof wiederholt anerkannt.⁴¹

Testing-Verfahren wurden durch das Gesetz vom 9. März 2006 in Artikel 225-3-1 des Strafgesetzbuchs und durch die Rechtsprechung des Kassationsgerichtshofs als Beweismittel für Diskriminierung vor Strafgerichten eingeführt. Artikel 42 des Gesetzes Nr. 2017-86 vom 27. Januar 2017 über Gleichheit und Staatsbürgerschaft, das am 23. November 2016 verabschiedet, aber am 27. Januar 2017 in Kraft gesetzt wurde, sieht vor, dass Testing-Verfahren vor Zivilgerichten zulässig sind. Bisher wurden sie als Beweismittel in Zivilverfahren noch nicht eingesetzt. Da diese Verfahren von Antirassismus-NROs entwickelt wurden, werden sie von diesen auch besonders häufig verwendet, gelegentlich jedoch auch von Einzelklägern. Die Strafkammer des Kassationsgerichtshofs hat ein von der Staatsanwaltschaft organisiertes Testing-Verfahren, mit dem Diskriminierung aufgrund der Herkunft beim Zugang zu einem Nachtclub nachgewiesen werden sollte, für rechtmäßig und zulässig erklärt.⁴² Es wird jedoch nur dann zu einer Verurteilung führen, wenn es durch andere Beweisquellen gestützt wird.

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

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

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

Artikel 62 bis 88 des Gesetzes Nr. 2016-1547 vom 18. November 2016 zur Modernisierung des Justizsystems im 21. Jahrhundert schaffen die rechtlichen Rahmenbedingungen für die

⁴¹ Kassationsgerichtshof, Sozialkammer, Nr. K 10-15873, *Airbus*, 15. Dezember 2011.

⁴² Kassationsgerichtshof, Strafkammer, Nr. 15-87378, 28. Februar 2017, abrufbar unter: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000034140789&fastReqId=1149594191&fastPos=1> (letzter Zugriff am 9. März 2018).

Erhebung von Sammelklagen zur Beendigung eines diskriminierenden Verhaltens (*action en manquement*) oder einer Haftung im Zusammenhang mit diskriminierenden Handlungen (*action en responsabilité*), die beim Landgericht oder beim Verwaltungsgericht eingereicht werden können.⁴³

Die erste Rechtsvorschrift, mit der die Richtlinien umgesetzt wurden, das Gesetz vom 16. November 2001, führte die Bekämpfung von Diskriminierung als Ziel von Tarifverhandlung, Branchenverhandlungen (die nur einen Teil der Arbeitnehmer betreffen) und nationalen Verhandlungen ein. Der am 13. Mai 2015 von einer Gruppe von Vertretern und Vertreterinnen der Sozialpartner veröffentlichte Sciberras-Bericht weist auf die mangelnden Fortschritte bei der Förderung und Umsetzung der Chancengleichheit durch sozialen Dialog hin.⁴⁴

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

Was Menschen mit Behinderung betrifft, so wird im Gesetz vom 11. Februar 2005 eine verpflichtende Quote von 6 % behinderter Arbeitnehmer aufrechterhalten und auf den öffentlichen Sektor ausgedehnt. Außerdem legt das Gesetz spezielle Mechanismen für den Zugang zum öffentlichen Dienst und spezielle Vorruhestandsregelungen fest. Die Durchsetzung der Vorschriften über die Zugänglichkeit öffentlicher Bereiche wird indes durch die zahlreichen Möglichkeiten, Ausnahmegenehmigungen zu beantragen, behindert.

Es gibt ein spezielles Programm für Kinder von Roma und Fahrenden, das deren Zugang zu Bildung erleichtern und ihre Eingliederung in staatliche Schulen verbessern soll.⁴⁵

6. Gleichbehandlungsstellen

Am 21. Juli 2008 verabschiedete die Regierung ein Verfassungsgesetz, mit dem die durch Artikel 41 der Verfassung geschaffene Institution des Verteidigers der Rechte modernisiert wurde. Dessen Befugnisse und Kompetenzen werden im Organgesetz (*loi organique*) Nr. 2011-333 vom 29. März 2011, das seit dem 1. Mai 2011 in Kraft ist, genau definiert. Es führt den französischen Ombudsmann (*Médiateur de la République*), den Kinderschutzbevollmächtigten, die Nationale Kommission für Sicherheitsethik und die frühere Gleichbehandlungsstelle, die Hohe Behörde zur Bekämpfung von Diskriminierungen und Gleichheit (*Haute autorité de lutte contre les discriminations et pour l'égalité, HALDE*) in einem Organ zusammen. Das Organgesetz Nr. 2016-1690 vom 9. Dezember 2016 über die Zuständigkeit des Verteidigers der Rechte hat dessen Verantwortungsbereich um die Anleitung und den Schutz von Whistleblowern erweitert.

Der Verteidiger der Rechte ist für Beschwerden in allen genannten Bereichen zuständig, er kann Gesetzesreformen vorschlagen, die Durchsetzung von Rechten fördern und wissenschaftliche Studien zu allen Zuständigkeitsbereichen durchführen. Er deckt unmittelbare und mittelbare Diskriminierung aufgrund aller Diskriminierungsgründe ab, die durch französisches Recht und durch internationale Abkommen, die Frankreich ordnungsgemäß ratifiziert hat, verboten sind.

⁴³ Frankreich, Gesetz Nr. 2016-1547 vom 18. November 2016 zur Modernisierung des Justizsystems im 21. Jahrhundert (*Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI^e siècle*), <https://www.legifrance.gouv.fr/eli/loi/2016/11/18/JUSX1515639L/jo> (letzter Zugriff am 10. März 2017).

⁴⁴ Frankreich, Sciberras, J.-C., *Rapport de synthèse des travaux du groupe de dialogue inter-partenaires sur la lutte contre les discriminations en entreprise* (Bericht an den Minister für Beschäftigung und sozialen Dialog, Synthese der Arbeitsgruppe der Sozialpartner über die Bekämpfung von Diskriminierung am Arbeitsplatz), 13. Mai 2015, abrufbar unter: http://travail-emploi.gouv.fr/IMG/pdf/Rapport_Sciberras.pdf (letzter Zugriff am 1. Juni 2018).

⁴⁵ Ministerialverordnung 2012-143 vom 2. Oktober 2012.

Der Verteidiger der Rechte kann Einzel- und Sammelklagen untersuchen, die von Einzelpersonen, NROs, Gewerkschaften oder Parlamentsabgeordneten eingereicht werden, und von jeder öffentlichen oder privaten Person eine Stellungnahme einfordern und schriftliche Dokumente und alle sonstigen Informationen anfordern, die sich als Beweismittel eignen. Seine Mittel zur Behandlung von Klagen sind Schlichtungsverfahren und Empfehlungen an staatliche oder private Parteien, die sich auf den jeweiligen Einzelfall beziehen oder allgemeine Geltung haben können. Außerdem kann er als *Amicus Curiae* vor Gericht auftreten und aufgrund der von ihm untersuchten Beschwerden von Amts wegen oder auf Wunsch des Gerichts oder der Parteien Klage einreichen. Er interveniert regelmäßig vor dem EGMR und dem Europäischen Ausschuss für soziale Rechte und legte dem Gerichtshof der Europäischen Union dieses Jahr seine ersten Anmerkungen in einer Rechtssache gegen Google vor, in der es um das Recht ging, die eigenen Spuren im Internet zu löschen. Darüber hinaus hat er eine spezielle Befugnis, die es ihm erlaubt, in Diskriminierungsfällen, die unter das Strafgesetzbuch fallen, eine gütliche Einigung, einen so genannten „strafrechtlichen Vergleich“ (*transaction pénale*) vorzuschlagen.

Die Zahl der von ihm bearbeiteten Beschwerden ist seit 2010, dem letzten vollen Tätigkeitsjahr der HALDE, um mehr als 30 % gestiegen. Im Juli 2014 wurde Jacques Toubon nach dem Tod seines Vorgängers Dominique Baudis zum Verteidiger der Rechte ernannt. Als Schwerpunkte hat er sich die Rechte von Migrantinnen und Migranten, Kommunikationsstrategien, Förderung des Rechtszugangs und Forschung gesetzt.

7. Zentrale Punkte

Das Antidiskriminierungsrecht trifft nach wie vor auf Widerstand gegen das, was als gemeinschaftsbasierte Analyse sozialer Spannungen wahrgenommen wird. Dies bildet den Kern einer äußerst heftigen ideologischen Reaktion der französischen Institutionen gegen das Antidiskriminierungsrecht. Die traditionelle formale Theorie der Gleichheit, der Begriff des Verschuldens in zivilrechtlichen Fällen und der Vorrang des Parlaments sind weiterhin die letztgültigen juristischen Richtwerte. Die Gerichte fassen die Umkehr der Beweislast und den Begriff der indirekten Diskriminierung als Mittel auf, um eine Haftung ohne Verschulden zu begründen und den Mitgliedern bestimmter Gruppen Sonderrechte zu garantieren.

Obwohl das Antidiskriminierungsrecht von den höheren Instanzen angewendet wird und sich in den vergangenen 15 Jahren weiterentwickelt hat, fehlt vielen Anwälten und Richtern unterer Instanzen häufig das nötige Wissen über die Regeln der Beweislast, die jüngsten Entwicklungen in der Rechtsprechung und deren besonderen Sprachgebrauch. Kläger müssen sich immer noch darauf einstellen, ihr Verfahren erst in einer höheren Instanz zu gewinnen. In den höheren Instanzen werden Diskriminierungsfälle wesentlich positiver aufgenommen und die Erfolgsquote vor Gericht ist stark gestiegen, seit die HALDE und nun der Verteidiger der Rechte ihre Gutachten vor Gericht vorbringen können.

Das Konzept der mittelbaren Diskriminierung wird immer noch zu wenig verstanden, selten von Anwälten ins Spiel gebracht, häufig einseitig vom Gericht direkt herangezogen⁴⁶ und dies nur einmal in einem Verfahren wegen Diskriminierung aufgrund der Herkunft.⁴⁷

Diskriminierung aufgrund der Religion im Arbeitsleben und in der Bildung steht im Zentrum wichtiger rechtlicher und politischer Debatten, die darauf abzielen, die Pflicht von Beamten zur religiösen Neutralität in Situationen, in denen Arbeitgeber öffentliche Dienstleistungen

⁴⁶ Der erste Fall, in dem vor der Sozialkammer des Kassationsgerichtshofs, Nr. 05-04962, 9. Januar 2007, auf mittelbare Diskriminierung erkannt wurde; abrufbar unter: www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000017624898&fastReqId=1576422841&fastPos=1 (letzter Zugriff am 6. September 2016).

⁴⁷ Kassationsgerichtshof, Sozialkammer, Nr. 10-20765, 3. November 2011; abrufbar unter: www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024764368&fastReqId=1975217984&fastPos=1 (letzter Zugriff am 6. September 2016).

erbringen oder gewerbliche Akteure gegenüber der Öffentlichkeit eine neutrale Haltung vermitteln wollen, auf privatrechtlich Beschäftigte auszudehnen.

Vor dem Hintergrund anhaltender Debatten darüber, ob Arbeitgeber in Frankreich die Möglichkeit haben sollten, das Tragen oder Zurschaustellen religiöser Symbole zu beschränken, hat das Parlament im Zuge der Diskussion über das Gesetz Nr. 2016-1088 vom 8. August 2016 über die Arbeit, die Modernisierung des sozialen Dialogs und die Absicherung der Berufslaufbahnen eine Vorschrift (Artikel 2) verabschiedet, mit der das Arbeitsgesetzbuch dahingehend geändert wird, dass Arbeitgeber in Artikel L 1321-2-1 die Möglichkeit erhalten, in ihren innerbetrieblichen Vorschriften den Grundsatz der Neutralität als Regel festzuschreiben und Einschränkungen des Grundsatzes der Religionsfreiheit für die Beschäftigten festzulegen. Die Anwendung dieser Regel wird notwendigerweise durch die Entscheidungen des Gerichtshofs in den Rechtssachen *Asma Bougnaoui und Association de Defense des droits de l'homme / Micropole SA* und *G4S Secure Solutions* beeinflusst, denen die darauf folgende Entscheidung des Kassationsgerichtshofs gebührend nachgekommen ist. Der Gerichtshof sendet den Arbeitgebern eine klare Botschaft: Im privaten Bereich stellt der Wunsch eines Kunden eine unmittelbare Diskriminierung dar, die nicht gerechtfertigt werden kann, und die Anforderungen bezüglich der neutralen öffentlichen Identität eines Unternehmens dürfen nicht diskriminierend sein und müssen auf streng verhältnismäßige Weise durchgesetzt werden. Daher kann die Regel nicht auf Religion abzielen oder auf alle Beschäftigten angewendet werden.⁴⁸

Der signifikante Anstieg von Hassreden und gewalttätigen Formen von Islamfeindlichkeit und Antisemitismus hält an. Die französischen Behörden haben erhebliche Anstrengungen unternommen, um eine verhältnismäßige und demokratische Antwort auf die fremdenfeindlichen Reaktionen auf die terroristische Gewalt und den geopolitischen Kontext zu finden, der von rechtsextremen populistischen Politikern instrumentalisiert wurde. Dieser Kontext hat erhebliche Auswirkungen auf die Zahl der Diskriminierungen gehabt, denen Menschen mit nordafrikanischer und nahöstlicher Herkunft beim Zugang zu Beschäftigung und beim Zugang zu Gütern und Dienstleistungen ausgesetzt sind.

Der Posten des Staatssekretärs für Menschen mit Behinderung, der dem Premierminister unterstellt ist, wurde geschaffen, um das Thema Behinderung, das zu einer Priorität der Amtszeit des Präsidenten der Republik erhoben wurde, in alle Politikbereiche einzubinden.

Die neue Regierung hat die politische Entscheidung aufrechterhalten, staatliche Maßnahmen zur Bekämpfung von Diskriminierung aufgrund der Herkunft und der sozialen Lage im Rahmen der Stadtpolitik (*Politique de la ville*), die vom Ministerium für territorialen Zusammenhalt überwacht wird, kontrollierend zu begleiten.

⁴⁸ EuGH, Rechtssache C-188/15, *Bougnaoui*, 14. März 2017, abrufbar unter: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=188853&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&cid=125215> <http://curia.europa.eu/juris/document/document.jsf?text=&docid=188853&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&cid=125215> (letzter Zugriff am 9. März 2018); Kassationsgerichtshof, Sozialkammer, Nr. 13-19855, 22. November 2017, abrufbar unter: https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/2484_22_38073.html (letzter Zugriff am 9. März 2018); EuGH, Rechtssache C-157/15, *G4S Secure Solutions*, 14. März 2017, abrufbar unter: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d0f130de3f064e7c9cba45c199f6f40234efaa34.e34KaxiLC3eQc40LaxqMbN4Pb30Re0?text=&docid=188852&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&cid=339583> (letzter Zugriff am 9. März 2018).

INTRODUCTION

The national legal system

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

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

The jurisdictional order is made up of two branches:

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

In private law, the general legal regime relating to discrimination is to be found in codified law i.e. the Labour Code (LC), the Penal Code (PC), the Civil Code (CC) and Law No. 2008-496 of 27 May 2008 on various provisions implementing Community Law in relation to the fight against discrimination.⁴⁹

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

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

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

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

⁴⁹ France, Law No. 2008-496 of 27 May 2008 Implementing Community Law in Relation to the Fight Against Discrimination (Loi No. 2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000018877783> (accessed 6 July 2017).

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

List of main legislation transposing and implementing the directives

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

Law No. 1006-2001 of 16 November 2001 (entered into force on 16 November 2001), covers all the grounds contained in Article 19(1) of the Treaty on the Functioning of the European Union (TFEU) and all aspects of employment.⁵⁰

Article 158 of the Law on Social Modernisation No. 2002-73 of 17 January 2002 (entered into force on 18 January 2002) covers all Article 19(1) TFEU grounds relating to access to housing.⁵¹

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

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

Organic Law (*Loi organique*) No. 2011-333 of 29 March 2011 establishing the constitutional authority of the Defender of Rights, the French equality body (which entered into force on 1 April 2011) covers an evolving list of grounds of discrimination: all grounds and material scope covered by French law and international conventions ratified by France.⁵²

⁵⁰ France, Law No. 2001- 1006 of 16 November 2001 relating to the fight against discrimination, (*Loi No. 2001-1006 du 16 novembre 2001 relative à la lutte contre les discriminations*), available at: <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000588617> (accessed 6 July 2017), covers mores, sexual orientation, sex, affiliation (whether real or assumed) to an ethnic origin, nation, race or specific religion, physical appearance, last name, philosophical convictions, family situation, union activities, political opinions, age, health, pregnancy, genetic characteristics, sexual identity and place of residence.

⁵¹ France, Law No. 2002-73 of 17 January 2002 on Social Modernisation (*Loi no 2002-73 du 17 janvier 2002 de modernisation sociale*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000408905&dateTexte=&categorieLien=id> (accessed 6 July 2017), covers the grounds covered by the Law No. 1006-2001.

⁵² France, Organic Law No. 2011-333 of 29 March 2011 establishing the Defender of Rights (*Loi organique No. 2011-333 du 29 mars 2011 relative au Défenseur des droits*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023781167&dateTexte=&categorieLien=id> (accessed 6 July 2017).

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The French constitution includes the following articles dealing with non-discrimination. The Declaration of the Human and Civic Rights of 26 August 1789 states in Article I: 'Men are born and remain free and equal in rights. Social distinctions can have no other basis than common utility'.⁵³

The Preamble of the Constitution of 1946 states: 'In the morrow of the victory achieved by the free peoples over the regimes that had sought to enslave and degrade humanity, the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights... France shall form with its overseas peoples a Union founded upon equal rights and duties, without distinction of race or religion', and adds: 'Each person has the duty to work and the right to employment. No person may suffer prejudice in his work or employment by virtue of his origins, opinions or beliefs'.⁵⁴

Article 1 of the Constitution of 1958 states that: "[France] shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs".⁵⁵

In addition, Article 10 of the Declaration of the Human and Civic Rights of 26 August 1789 states: 'No one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order'.⁵⁶

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

These provisions are directly applicable.

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

⁵³ France, Declaration of the Human and Civic Rights of 26 August 1789 (*Déclaration des droits de l'homme et du citoyen de 1789*), available at: <http://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789> (accessed 6 July 2017). Article 1: 'Les hommes naissent et demeurent libres et égaux en droits/ Les distinctions sociales ne peuvent être fondées que sur l'utilité commune'.

⁵⁴ France, Preamble of the Constitution of 1946 (*Préambule de la Constitution de 1946*), available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/preambule-de-la-constitution-du-27-octobre-1946/5077/html> (accessed 6 July 2017). 'Au lendemain de la victoire remportée par les peuples libres sur les régimes qui ont tenté d'asservir et de dégrader la personne humaine, le peuple français proclame à nouveau que tout être humain, sans distinction de race, de religion ni de croyance, possède des droits inaliénables et sacrés/ Il réaffirme solennellement les droits et libertés de l'homme et du citoyen consacrés par la Déclaration des droits de 1789 et les principes fondamentaux reconnus par les lois de la République'.

⁵⁵ France, Constitution of 1958 (*Constitution de 1958*), available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/la-constitution-du-4-octobre-1958/texte-integral-de-la-constitution-du-4-octobre-1958-en-vigueur/5074/html#preambule> (accessed 6 July 2017). Article 1: Elle [La France] assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion/ Elle respecte toutes les croyances.'

⁵⁶ France, Declaration of the Human and Civic Rights of 26 August 1789 (*Déclaration des droits de l'homme et du citoyen de 1789*), available at: <http://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789> (accessed 6 July 2017). Article 10: 'Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la Loi'.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

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

mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed to an ethnic origin, nation, race or specific religion, physical appearance, last name, family situation, union activities, political and philosophical opinions, age, health, disability, genetic characteristics, loss of autonomy, place of residence, capacity to express oneself in a language other than French, economic vulnerability, refusal to be victim of bullying, banking residence (*domiciliation bancaire*).

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

The ground of gender identity was adopted in Law No. 2016-1547 of 18 November 2016 on the modernisation of the justice system in the 21st century, in order to settle the debate on the relevance of the term 'sexual identity,' which was meant to cover unequal treatment and harassment related to transgender persons, and other gender identity issues whatever the characteristics of the person – whether he or she be gay, transgender or intersex.

The ground of 'economic vulnerability', created by Law No. 2016-832 of 24 June 2016 to fight discrimination relating to social precariousness, is intended to cover unequal treatment on the basis of a person's poverty and action that takes advantage of the vulnerability of someone's economic situation.

The ground of 'expressing oneself in a language other than French' is intended to extend discrimination to include discrimination against people claiming their regional rights and persons of foreign origin who have an accent when speaking French.

Article 86 of Law No. 2016-1547 of 18 November 2016 on the modernisation of the justice system in the 21st century has implemented a unified list of grounds for most legal acts, reintroducing the concept of national origin through the use of the words 'belonging, whether real or supposed to ... a nation'. However, all texts were amended to designate the list of the Penal Code as a reference. As a consequence, and in an unintended error, the ground of belief (conviction) was dropped from the Law of 28 May 2008. The ground remains, however, in Law No. 83-634 protecting civil servants, the Labour Code (Article L 1132-1), and situations in which the ECHR is held to be directly applicable.

There was an attempt at correcting this error through Law No. 2017-86 of 27 January 2017 on equality and citizenship,⁵⁷ but the provision was quashed by the Constitutional Council by reason of a clerical error that made the text meaningless. Nevertheless, this law created a new ground of discrimination under the Penal Code: refusal to be victim of bullying.

⁵⁷ Law No. 2017-86 of 27 January 2017 on equality and citizenship (*Loi No. 2017-86 du 27 janvier 2017 relative à l'égalité et à la citoyenneté*) <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033934948&categorieLien=id>, accessed 27 February 2018; Constitutional Council, 26 January 2017, n° 2016-745 DC: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2017/2016-745-dc/decision-n-2016-745-dc-du-26-janvier-2017.148543.html>, accessed 27 February 2018.

The list of prohibited grounds contained in the law of 28 May 2008 was extended once again by Article 70 of Law No. 2017-256 of 28 February 2017 on the overseas territories with the adoption of one new ground: banking residence (*domiciliation bancaire*).⁵⁸ This ground intends to prohibit the refusal of credit or collateral based on the fact of residing in the overseas territories.

2.1.1 Definition of the grounds of unlawful discrimination within the directives

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

- Racial or ethnic origin

No definition.

The law actually refuses to validate the concept of 'race' and of 'ethnic origin' or to define them. Since the law prohibits taking these concepts into consideration to create legal categories, they are not defined. The concept of race is interpreted as being referred to in the Constitution as a prohibited concept. Ethnic origin is not interpreted either, as it is deemed to be a euphemism for race. That is why the 'nationality of origin', conceived as objective information on a person's ancestry, based on his or her nationality or the nationality of his or her parents, is deemed by the Constitutional Council to be the only objective reference to origin that is admissible as per French reservations.⁵⁹

The case law does not discuss whether a person or a group meets this category. It looks for evidence of the behaviour of the discriminating party or impact of indirect discrimination based on indications that lead to presumptions. It will never discuss the content of the concept of race or ethnic origin. Given that the law covers appearance of origin, meant as being foreign or of foreign descent or not, and that direct discrimination essentially addresses assumptions made by the discriminating party, evidence of direct discrimination based on origin or the judgment of a racist person, can be based on foreign physical appearance or attributed origin related to a person's external appearance or characteristics, such as their last name, mother tongue or accent.⁶⁰

- Religion or belief

No definition.

In French law there is no legal definition of religion or belief. The Law of 9 December 1905 on the separation of Church and State addresses the concepts of freedom of worship and beliefs.⁶¹ Article 1 of this law states: 'The Republic guarantees freedom of belief. It

⁵⁸ France, Law No. 2017-256 of 28 February 2017 on planning for real equality for the overseas territories (*Loi No. 2017-256 du 28 février 2017 de programmation relative à l'égalité réelle outre-mer et portant autres dispositions en matière sociale et économique*) <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034103762>, accessed 27 February 2018.

⁵⁹ Constitutional Council, No. 2007-557 DC, 15 November 2007. Available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2007/2007-557-dc/decision-n-2007-557-dc-du-15-novembre-2007.1183.html> (accessed 6 July 2017).

⁶⁰ Court of Cassation, No. K 10-15873, *Airbus*, 15 December 2011. Available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024993730&fastReqId=946410880&fastPos=1>, (accessed 6 July 2017).

⁶¹ France, Law of 09 December 2005 on the separation of Church and State (*Loi du 9 décembre 1905 concernant la séparation des Eglises et de l'Etat*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070169&dateTexte=20080306> (accessed 6 July 2017).

guarantees freedom of worship, the only restrictions being stated therein in the pursuit of the interest of public order'.⁶² Freedom of religion is considered to be an aspect of freedom of opinion. According to Jean Rivéro, an expert in public law, freedom of religion includes, on the one hand, freedom of belief, hence the freedom to choose between non-belief and membership of a religion, and on the other hand, freedom of worship, that is the individual or collective practice of a religion.

The Lyon Court of Appeal, in its decision relating to the Church of Scientology of 28 July 1997, offered the following definition: 'a religion can be defined by the convergence of two elements, an objective element, the existence of a community, even limited, and a subjective element, a common faith...'.⁶³

In 2017, in the *Bouagnaoui* decision which was rendered further to the decision of the CJEU,⁶⁴ the Court of Cassation explicitly referred to the reasoning of the Court of Justice as regards the scope of the protection afforded to religion and referred to Article 9 of the ECHR as well as Directive 2000/78 to retain a notion of religion protecting both religion per se, and the requirements of religious practice as subjectively defined by the beholder.⁶⁵

However, a legislative limitation on religious freedom exists in France. Indeed, sects are prohibited in France by Articles 223-15-2 to 223-15-4 of the Penal Code. Moreover, Law No. 2001-504 of 12 June 2001 allows the dissolution of any legal entity considered to be a sect. Such entities can also incur criminal sanctions.⁶⁶

- Disability

Law No. 2005-102 of 11 February 2005 on equal opportunities and the integration of disabled persons (hereafter the Law on Disability)⁶⁷ revised the definition of disability contained in Article L114 of the Code of Social Welfare (CSW). This definition applies for the purpose of implementing all provisions provided by French legislation, including anti-discrimination legislation:

'a disability is deemed to be any limitation of activity or restriction in relation to participation in life in society experienced by an individual in the context of his or her environment by reason of a substantial, lasting or definitive alteration of one or more physical, sensory, mental, cognitive or psychological faculties, of multiple disabilities or of a disabling illness' (author's translation).⁶⁸

⁶² Article 1: 'La République assure la liberté de conscience/ Elle garantit le libre exercice des cultes sous les seules restrictions édictées ci-après dans l'intérêt de l'ordre public'.

⁶³ Paris Court of Appeal, 28 July 1997, JCP G 1998, II, 10025, note M.R Renard.

⁶⁴ CJEU, 14 March 2017, C-188/15, *Asma Bouagnaoui, ADDH v. Micropole SA.*, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=188853&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=125215>, accessed 1 March 2018.

⁶⁵ Court of Cassation, Social Chamber, 22 November 2017, No. 13-19855, *Asma Bouagnaoui, ADDH v. Micropole SA.* https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/2484_22_38073.html

⁶⁶ France, Law No. 2001-504 of 12 June 2001 reinforcing the prevention and repression of sectarian movements violating human rights (Loi No. 2001-504 du 12 juin 2001 tendant à renforcer la prévention et la répression des mouvements sectaires portant atteinte aux droits de l'homme et aux libertés fondamentales), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000589924&categorieLien=id> (accessed 6 July 2017).

⁶⁷ France, Law No. 2005-102 of 11 February 2005 on Equal Opportunities and the Integration of Disabled Persons (*Loi n 2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées*), available at: www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=SANX0300217L (accessed 6 July 2017).

⁶⁸ France, Law No. 2005-102 of 11 February 2005, Article L 114: 'Constitue un handicap, au sens de la présente loi, toute limitation d'activité ou restriction de participation à la vie en société subie dans son environnement par une personne en raison d'une altération substantielle, durable ou définitive d'une ou plusieurs fonctions physiques, sensorielles, mentales, cognitives ou psychiques, d'un poly-handicap ou d'un trouble de santé invalidant'.

In addition, Article 5213-1 of the Labour Code provides a definition of 'disabled worker' as follows:

'any person whose ability to obtain or keep a job is effectively diminished as a result of the alteration of one or many physical, sensory, mental or psychological functions.'⁶⁹

The prohibition of discrimination provided by Law No. 2001-1006 and Law No. 2008-496 covers disability according to the definition of Article 114 of the CSW, which takes into consideration limitations resulting from the environment and the employer's subjective perception that the employee is disabled. It can thus be considered that it includes assumed characteristics and that the mere perception that a person has a disability is enough to trigger the protection against discrimination.

The protection of disability is broader than that of the CJEU in Case C-13.05, *Chacón Navas*, in that it is not limited to access to professional life and encompasses limitations in all areas of life, whether or not they are related to the consequences of health problems. However, although the definition of disability could be interpreted to be in conformity with the definition in CJEU joined cases C-335.11 and C-337.11, *Ring and Skouboe Werge* in as much as it situates the definition of disability 'in relation to participation to life in society experienced by an individual in the context of his or her environment', legislation is drafted in such a way that people who could satisfy the requirement of Article L114 of the CSW but do not wish to be registered as disabled may have difficulty in enforcing their right to reasonable accommodation. They can, however, argue their right to reasonable accommodation on the ground of the general protection against discrimination contained in Article L1132-1 ff. LC and Article 2 of Law No. 2008-496 of 27 May 2008, and their right will be recognised by the courts.⁷⁰

- Age

No definition.

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

- Sexual orientation

No definition.

In a decision of 19 December 1980, the Constitutional Council refused to include in the definition of discrimination based on sex, discrimination based on sexuality.⁷¹ Protection against discrimination based on sexual orientation was introduced into French law under the term 'mores', first in the Penal Code in 1985 (Law 85-772 of 25 July 1985)⁷² then in the Labour Code in 1986 (Law 86-76 of 17 January 1986⁷³ and Law 92-1446 of 31 December 1992).⁷⁴

⁶⁹ France, Labour Code, Article 5213-1: 'Est considérée comme travailleur handicapé toute personne dont les possibilités d'obtenir ou de conserver un emploi sont effectivement réduites par suite de l'altération d'une ou plusieurs fonctions physique, sensorielle, mentale ou psychique.'

⁷⁰ Orléans Court of Appeal, X. vs *La poste*, No. 10/01990, 15 November 2011.

⁷¹ Constitutional Council, No. 80-125, 19 December 1980, 1980 RJC I-88.

⁷² France, Law no 85-772 of 25 July 1985 relating to various social measures (*Loi No. 85-772 du 25 juillet 1985 portant diverses dispositions d'ordre social*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000317523&dateTexte=> (accessed 6 July 2017).

⁷³ France, Law No. 86-76 of 17 January 1986 relating to various social measures (*Loi No. 86-76 du 17 janvier 1986 portant diverses dispositions d'ordre social*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000317532&dateTexte=> (accessed 6 July 2017).

⁷⁴ France, Law No. 92-1446 of 31 December 1992 relating to employment, development of part time employment et unemployment insurance (*Loi No. 92-1446 du 31 décembre 1992 relative à l'emploi, au*

The term 'sexual orientation' was added to the Labour Code and the Penal Code by the Law of 16 November 2001. Henceforth, the terms 'mores' and 'sexual orientation' co-exist, although the term 'mores' previously referred to homosexuality, and 'sexual orientation' was not defined in the law and has not yet been defined by jurisprudence.

However, sexual orientation has not been interpreted to cover discrimination suffered by transgender people. In the past, transsexuals have argued for the use of the concept of discrimination based on 'sex' or discrimination based on 'mores' or physical appearance. In Law No. 2012-954 of 6 August 2012, the French legislator added a new ground of discrimination—sexual identity—to the list of prohibited grounds in private and public employment, in access to housing and in the Penal Code in order to forbid discrimination based on transgender identity.⁷⁵ The term 'sexual identity' was replaced by that of 'gender identity' by Law No. 2016-1547 of 18 November 2016 on the modernisation of the justice system in the 21st century in order to settle the debate on the relevance of the term 'sexual identity', which had been chosen initially.

2.1.2 Multiple discrimination

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

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

In France, the following case law deals with multiple discrimination.

The HALDE⁷⁶ (the French equality body which was the predecessor of the Defender of Rights) held that the erroneous refusal to admit the claimant into an adult education programme on the ground of her origin was influenced by a refusal to treat her situation on the basis of a subjective discrimination on the ground of her age (over 30) and the fact that she had young children.⁷⁷ The same could be found regarding the refusal of a social housing administrator to take into consideration the priority situation of a disabled person, on the basis of her origin,⁷⁸ or discrimination in hiring, the employer having evaluated the claimant, a woman of 44, as being very efficient while she was a temporary employee, but not dynamic enough when she applied to be hired in competition with young, inexperienced people.⁷⁹

In a case brought before the Paris Administrative Court,⁸⁰ the claimant was denied access to an adult education programme managed by a state secondary school on the ground that she wore a Muslim headscarf. An injunction ordering her immediate re-integration was granted. The HALDE presented observations based on arguments founded on the principles

développement du travail à temps partiel et à l'assurance chômage), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000542542&categorieLien=id> (accessed 6 July 2017).

⁷⁵ France, Law No. 2012-954 of 06 August 2012 relating to sexual harassment (*Loi No. 2012-954 du 6 août 2012 relative au harcèlement sexuel*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026263463&dateTexte=&categorieLien=id> (accessed 6 July 2017).

⁷⁶ French Equal Rights and Anti-Discrimination Commission (*Haute autorité de lutte contre les discriminations et pour l'égalité, HALDE*).

⁷⁷ Deliberation No. 2006-03, available at: www.defenseurdesdroits.fr (accessed 6 July 2017).

⁷⁸ Deliberation No. 2007-162, available at: www.defenseurdesdroits.fr (accessed 6 July 2017).

⁷⁹ Deliberation No. 2006-20, available at: www.defenseurdesdroits.fr (accessed 6 July 2017). The Court of Appeal of Poitiers followed the HALDE's analysis: Court of Appeal of Poitiers, 17 February 2009, No. 08.00461.

⁸⁰ Paris Administrative Court, *Saïd v. Greta*, 27 April 2009, No. 0905233.9.

of secularism, which had been advanced in the course of its investigation. The court held that the claimant's personal project could not be challenged and that the prohibition of religious symbols in state schools did not apply to adult education programmes. However, the issue of multiple grounds emerged as a result of the defence presented by the school authorities before the administrative court, which by way of an additional argument, questioned whether her personal education project was serious, because she was pregnant and her husband had substantial financial resources. This defence was held to be discriminatory and was dismissed by the court, but did not contribute to the evidence of discrimination *per se* determining the outcome of the case.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

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

- Law of 16 November 2001 No. 2001-1066 on the fight against discrimination, providing for the definition of grounds protected in Article 225-1 of the Penal Code, Article L1132-1 of the Labour Code and Article 6 of Law No. 83-634 of 13 July 1983 on civil servants states that it: 'constitutes a discrimination, all distinctions between persons based on (...) real or assumed (...)', followed by a list of grounds.

b) Discrimination by association

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

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

In a case alleging discrimination on the basis of Article L1132-1 of the Labour Code the court followed the arguments presented by the HALDE and concluded that differential treatment of an employee by reason of her relationship with an individual protected by the prohibition of discrimination on the ground of trade union activities is protected by the prohibition of discrimination.⁸¹

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

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

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

⁸¹ Caen Appeal Court, *Enault v. SAS ED*, No. 08/04500, 17 September 2010.

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

a) Prohibition and definition of direct discrimination

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

Direct discrimination is covered by all the legislation covering all the prohibited grounds of discrimination (Articles 225-1 and 2 PC, Articles 1132-1 ff LC and Article L1141-1 LC, Article 1 of Law No. 89-462 of 6 July 1989 on landlords and tenants⁸² (known as the Mermaz Law), further to amendments introduced by the Law of 17 January 2002, and Article 6 of Law No. 83-634 of 13 July 1983 on the rights and obligations of civil servants).⁸³ These texts list the grounds and the prohibited discriminatory conduct.

The Penal Code at article 225-1 refers to direct discrimination and provides the following definition: 'any distinction on the ground of a person's origin... actual or supposed membership or non-membership of a given ethnic group, nation, race or religion shall constitute discrimination'.⁸⁴

Law No. 2008-496 of 27 May 2008 introduces in Article 1, paragraph 1 a definition of direct discrimination, which provides as follows:⁸⁵ 'Direct discrimination shall be deemed to occur in a situation where, on the grounds of a person's actual or supposed membership or non-membership of an ethnic group or race, or of their religion, belief, age, disability, sexual orientation or sex, they are treated less favourably than another is, has been or will have been treated in a comparable situation.'

This is not literally the same as the definition contained in the directive in as much as it does not explicitly foresee a hypothetical comparison relating to how an individual 'would be treated in a comparable situation'. However, the French courts do use inferences and hypothetical comparisons.⁸⁶

b) Justification of direct discrimination

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

⁸² France, Law 89-462 of 06 July 1989 on relations between landlords and tenants (*Loi No. 89-462 du 6 juillet 1989 tendant à améliorer les rapports locatifs*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006069108> (accessed 6 July 2017).

⁸³ France, Law 83-634 of 13 July 1983 relating to rights and obligations of civil servants (*Loi No. 83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068812> (accessed 6 July 2017).

⁸⁴ Article 225-1 of the Penal Code (*Article 225-1 du Code pénal*), available at: <http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006417831&cidTexte=LEGITEXT00006070719> (accessed 6 July 2017): '*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.*'

⁸⁵ France, Law of 27 May 2008, Article 1: '*Constitue une discrimination directe la situation dans laquelle, sur le fondement de son appartenance ou de sa non appartenance, vraie ou supposée, à une ethnie ou une race, sa religion, ses convictions, son âge, son handicap, son orientation sexuelle ou son sexe, une personne est traitée de manière moins favorable qu'une autre ne l'est, ne l'a été ou ne l'aura été dans une situation comparable.*'

⁸⁶ For example, in a case relating to discrimination on the ground of origin, see Court of Cassation, Social Chamber, *Dos Santos*, No. 10-20765, 03 November 2011, available at: <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024764368&astReqId=1975217984&fastPos=1> (accessed 6 July 2017).

'in case of litigation... the job applicant... or employee presents factual elements from which the existence may be presumed of direct or indirect discrimination as defined by Article 1 of Law No. 2008-496 of 27 May 2008.

In the light of these elements, the defendant must establish that the measure or decision is justified by objective elements which are free of any discriminatory component.⁸⁷

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

2.2.1 Situation testing

a) Legal framework

In France, situation testing is clearly permitted in national law.

Article 45 of Law No. 2006-396 on equal opportunities of 31 March 2006⁸⁸ created Article 225-3-1 of the Penal Code which codifies the higher court's jurisprudence on the admissibility of situation testing for all prohibited grounds of discrimination to establish discrimination and to prove the criminal offence of discrimination provided by Articles 225-1 and 225-2 of the Penal Code.

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

In criminal matters the admissibility of evidence is not bound by criteria of fairness and evidence can be presented by every means.

Article 42 of Law No. 2017- 86 of 27 January 2017 on equality and citizenship, which was adopted on 23 November 2016 but enacted on 27 January 2017, following a decision of the Constitutional Council, provides for the admissibility of situation testing before the civil courts.

b) Practice

In France, situation testing has been used in practice before the criminal courts.

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

This method has also been used to trap discriminating parties in situations which leave no trace of discriminatory behaviour, such as pre-contractual relations leading to a refusal of access to goods and services (such as night clubs or rental housing) or access to

⁸⁷ France, Law of 27 May 2008, Article 4: '*Toute personne qui s'estime victime d'une discrimination directe ou indirecte présente devant la juridiction compétente les faits qui permettent d'en présumer l'existence. Au vu de ces éléments, il appartient à la partie défenderesse de prouver que la mesure en cause est justifiée par des éléments objectifs étrangers à toute discrimination. Le présent article ne s'applique pas devant les juridictions pénales*'.

⁸⁸ France, Law No. 2006-396 on Equal Opportunities (*Loi sur l'égalité des chances*) of 31 March 2006 (*Loi no 2006-396 du 31 mars 2006 pour l'égalité des chances*), available at: http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20060402&numTexte=1&pageDebut=04950&pageFin=04964 (accessed 6 July 2017).

employment. It offers a record of an objective situation from which discrimination can be inferred, in the absence of evidence by way of witnesses or written documents relating to the discriminatory basis for the decision.

In a landmark decision of 7 June 2005, the Criminal Chamber of the Court of Cassation admitted as evidence an instance of telephone testing, established by way of the testimony of a third party and the filing of the tape recording of the telephone conversation, in order to support criminal charges of discrimination in access to rental accommodation on the basis of Articles 225-1 and 225-2 of the Penal Code.⁸⁹

The first court of appeal decision following the adoption of Article 225-3-1 of the Penal Code providing for the admissibility of testing evidence in criminal cases of discrimination was issued by the Paris Court of Appeal.⁹⁰ It set the tone for further consideration of testing evidence in criminal cases. In evaluating whether the tests were conclusive and sufficient to establish discrimination, the court held that, in the context of evidence by way of testing:

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

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

In autumn 2008, the HALDE (former equality body) undertook a testing exercise with the prospect of generating criminal proceedings, attempting to meet the evidence requirements of the criminal courts. In total, 12 cases were prosecuted by the State and all of them were dismissed on the ground that fictitious candidates, set up by an equality body to trigger prosecution, altered the value of evidence. It was considered that investigating and passing cases to the state prosecution service puts the equality body in a position where the value of the evidence is altered, due to the accumulation of functions undertaken by the equality body in the procedure.⁹¹

In 2017, the Criminal Chamber of the Court of Cassation affirmed the legality and admissibility of testing evidence resulting from an operation organised by the office of the public prosecutor and followed by inquiries undertaken by the police documenting racial discrimination at the entrance of a nightclub.⁹²

Situation testing has not yet been used as evidence in civil cases.

In 2016, in the context of action taken to support the fight against discrimination in employment, the Ministry of Employment and the Ministry of Civil Service commissioned two research teams to evaluate discrimination on the ground of origin in access to employment, on the basis of a widespread campaign of discrimination testing, given that in the public service, 80 % of hiring is done outside of the traditional recruitment competitions to become a civil servant, by way of old-fashioned hiring methods.

⁸⁹ Court of Cassation, Criminal Chamber, No. 04-87354 of 07 June 2005.

⁹⁰ Paris Court of Appeal, No. 07.04974, *Billau v. SOS Racism*, 17 March 2008.

⁹¹ Paris Regional Court, No. 0907108445, 07 January 2011.

⁹² Court of Cassation, Criminal Chamber, No. 15-87378, 28/02/2017.

<https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000034140789&fastReqId=1149594191&fastPos=1> (accessed 28 February 2018).

The tests performed by the research team evaluating hiring practices in the public service used last names of typical French or North African origin and targeted five roles: national police, nurse, administrative manager, janitor and orderly. On 12 July 2016, the results were handed to the Prime Minister and Minister for the Civil Service:⁹³ there was no evidence of discrimination regarding the hiring of police officers, but ample evidence was found to conclude that there are discriminatory biases in local public service and public hospitals. The results of the tests prompted instructions from the Minister for the Civil Service to audit employment practices and for each public employer to submit action plans to improve their hiring methods.⁹⁴

The same testing method was applied to evaluate the situation of discrimination on the ground of origin in relation to hiring in the private sector. Further to the recommendations of the working group of social partners on the fight against discrimination put in place by the Minister of Employment in a report called the Sciberras report,⁹⁵ 43 businesses employing more than 1 000 employees were chosen to be tested, because they were carrying out mass hiring during the testing period. The tests used last names of typical French or North African origin. The results were presented to the businesses⁹⁶ and it was agreed that individual results would be kept confidential if the business agreed to an action plan to be evaluated by a specialised consultant. The results of the action plans will be published on 14 March 2017 together with the names of those businesses that did not collaborate, alongside renewed undertakings by social partners in favour of good practices in hiring to fight discrimination on the ground of origin.

A study,⁹⁷ financed by the Youth Experimentation Fund put in place by the Ministry of Youth and Sport in 2014 (now under the supervision of the Ministry of Education) to support the social integration of youths, tested 455 rental offers of small flats in private housing throughout the French Metropolitan territory between November 2014 and December 2016. The aim of the study was to assess whether the risk of discrimination in access to private housing for young people under 25, who were in their first job, related to specific profiles in relation to age only, or to age in combination with North African origin or the place of residence. The candidate's North African origin was indicated through his or her name and surname.

The results indicated an absence of risk of discrimination exclusively related to young age for both female and male candidates. However, candidates of North African origin are clearly exposed to a risk of discrimination, whether they are young or middle aged, or coming from an underprivileged suburb or not. In addition, where the results indicated a risk of discrimination towards people from underprivileged suburbs, this risk was less important than that of origin, as people from underprivileged suburbs will be preferred to people of North African origin.

⁹³ L'Horty, Yannick (2016), 'Les discriminations dans l'accès à l'emploi public' (Discrimination in Public employment), Report to the Prime Minister, 12/07/2016, http://www.fonction-publique.gouv.fr/files/files/Espace_Presse/girardin/Rapport_LHorty_final.pdf (accessed 6 July 2017).

⁹⁴ Ministry for the Civil Service (2016), press release on 'Les discriminations dans l'accès à l'emploi public' (Discrimination in Public employment), 12 July 2016. Available at: http://www.fonction-publique.gouv.fr/files/files/Espace_Presse/girardin/Les_discriminations_dans_l_acces_a_l_emploi_public.pdf (accessed 6 July 2017).

⁹⁵ Barbeziueux, Philippe (2016) *Rapport du 16 novembre 2016 sur le suivi de la mise en œuvre des propositions du groupe de dialogue sur la lutte contre les discriminations en entreprise* (Report on the follow-up to the implementation of the proposals of the working group on the fight against discrimination in business); <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/164000702.pdf>.

⁹⁶ Ministry of Employment, press release, 12 December 2016. Available at: <http://travail-emploi.gouv.fr/actualites/presse/communiqués-de-presse/article/resultats-de-l-enquete-discrimination-a-l-embauche-selon-l-origine> (accessed 6 July 2017).

⁹⁷ Argant, S., Cediey, E., *Testing in the private sector related to rental housing to evaluate the existence of discrimination against youth in relation to a combination of factors* (*Testing dans le parc locatif privé français sur l'existence de discriminations envers les jeunes et selon diverses combinaisons de critères*), ISM Corum, November 2017, available at: http://www.experimentation.jeunes.gouv.fr/spip.php?page=article&id_article=1271, accessed 3 March 2018.

Another study financed by the Youth Experimentation Fund to measure discrimination in access to various consumer markets, based on testing undertaken between September 2014 and September 2016, found a great many discriminatory practices, particularly on the ground of age, that are currently ignored and undocumented.⁹⁸

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

a) Prohibition and definition of indirect discrimination

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

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

Law No. 2008-496 of 27 May 2008 introduces at Article 1 paragraph 2 a definition of indirect discrimination, which provides as follows:⁹⁹ 'Indirect discrimination shall be deemed to occur where an apparently neutral provision, criterion or practice, which, on one of the grounds mentioned in paragraph 1, gives rise to a particular disadvantage for persons in comparison with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary'.

b) Justification test for indirect discrimination

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

At this stage, there are very few higher court decisions discussing the justification presented in reply to a presumption of indirect discrimination, and the decisions of the lower courts remain inconsistent. Effective implementation by trial judges and non-professional employment tribunal judges will require time and training.

The Court of Cassation has taken some decisions regarding arguments that could be used to justify unequal remuneration. It decided that they must be based on the justification of an objective difference proportional to the difference in payment¹⁰⁰ in order to defeat the argument of unequal treatment. Nevertheless, the Court of Cassation has also accepted arguments to evaluate the legitimate aim that could justify differential remuneration on economic grounds.¹⁰¹

⁹⁸ Bunel, M. and Lahorty, Y. *Inter age discrimination and other grounds, (Discrimination inter-age et selon d'autres motifs)*, December 2016 INJEP, available at: http://www.experimentation.jeunes.gouv.fr/IMG/pdf/rapport_final_evaluation_apdiscri_06_diamant.pdf, accessed 3 March 2018.

⁹⁹ France, Law of 27 May 2008, Article 1 : '*Constitue une discrimination indirecte une disposition, un critère ou une pratique neutre en apparence, mais entraînant, pour l'un des motifs mentionnés au premier alinéa, un désavantage particulier pour des personnes par rapport à d'autres personnes, à moins que cette disposition, ce critère ou cette pratique ne soit objectivement justifié par un but légitime et que les moyens pour réaliser ce but ne soient nécessaires et appropriés*'.

¹⁰⁰ Court of Cassation, Social Chamber, *M. Gabriel Aguera et al c. Société M2PCI et al.*, No. 03-40465, 16 February 2006.

¹⁰¹ Court of Cassation, Social Chamber, *ESRF c. M. X.*, confirmed in another matter against ESRF on 17 April 2008 (Soc. 819 FS-P+B).

In a landmark case of 2009 relating to unequal treatment of part-time workers in taking holidays, the Court of Cassation decided that where there is a presumption of indirect discrimination based on statistical evidence, the judge must take positive steps to question the reasons that behind the contested measure and to question the employer in relation to acceptable justifications, being specific and asking precise questions about the impact of taking holidays on the organisation and efficiency of the service.¹⁰²

In 2012, the *Conseil d'Etat* first used the concept of indirect discrimination in a landmark case concerning discrimination on the ground of disability and a reduction in the variable portion of the salary of a magistrate with the public prosecution office who had become deaf and whose pleading duties had been replaced by administrative functions.¹⁰³ The *Conseil d'Etat* decided that the rule applicable to variable salaries was not proportionate and had to be redefined to counter the adverse impact, so as to prevent salary loss in relation to the variable portion and only take into consideration the claimant's performance in carrying out his redefined duties.

c) Comparison in relation to age discrimination

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

2.3.1 Statistical evidence

a) Legal framework

In France, there are national rules permitting data collection.

Data collection is governed by Law 78-17 of 6 January 1978 on information systems, data and the protection of freedom¹⁰⁴ and covers the collection and manipulation of personal information relating to both computerised and non-computerised information and files. This legislation is enforced by the French Data Protection Authority (*Commission nationale informatique et liberté, CNIL*).

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

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

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

¹⁰² Court of Cassation, Social Chamber, No. 07-42801, 01 December 2009, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000021389648&fastReqId=205231441&fastPos=1> (accessed 6 July 2017).

¹⁰³ Conseil d'Etat, *Volot-Pfiser v. Ministry of Justice*, No. 347703, 11 July 2012.

¹⁰⁴ France, Law 78-17 of 6 January 1978 on information systems, data and freedoms (*Loi No. 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés*), available at: <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000886460> (accessed 6 July 2017).

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

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

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

In a decision of 15 November 2007, the Constitutional Council declared that studies relating to diversity of origin, discrimination and integration could be based on objective information but that ethnic origin and race are not objective concepts and are contrary to Article 1 of the Constitution.¹⁰⁵

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

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

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

b) Practice

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

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

National government statistics agencies (INSEE, DARES, DRESS and INED)¹⁰⁶ refuse to collect data on race and ethnic origin in the national census except regarding nationality and the origin of first degree ascendants for limited secondary studies. Therefore, racial and ethnic statistical indicators, allowing policy impact evaluation to be undertaken, or created for monitoring purposes, do not exist.

¹⁰⁵ Constitutional Council, No. 2007-557 DC, 15 November 2007, available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2007/2007-557-dc/decision-n-2007-557-dc-du-15-novembre-2007.1183.html> (accessed 6 July 2017).

¹⁰⁶ The National Institute of Statistics and Economic Studies (*Institut national de la statistique et des études économiques, INSEE*); the Directorate for Research, Studies and Statistics of the Ministry of Labour, Employment, Vocational Training and Social Dialogue (*Direction de l'animation de la recherche, des études et des statistiques, DARES*); the Directorate for Research, Studies, Assessment and Statistics of the Ministry of Social Affairs, Health and Women's Rights (*Direction de la recherche, de l'évaluation, des études et des statistiques, DRESS*); and the French Institute for Demographic Studies (*Institut national des études démographiques, INED*).

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

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

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

The general principles of interpretation allow judges to refer to the directives in order to interpret national law and their explicit reference to the use of statistics as a legal means of evidence of discrimination should be sufficient to justify the admissibility of statistics in evidence.

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

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

Statistics resulting from the comparative situation of employees of a common employer are now commonly used in labour law, based on the comparative approach developed by the CJEU in discrimination cases, and repeatedly recognised by the Court of Cassation in relation to anti-trade-union discrimination and other grounds of discrimination.¹⁰⁷

However, statistics resulting from research reports have not been used in civil and administrative procedures. Their admissibility would be subject to an evaluation of their relevance to the case in question, but does not raise per se ethical or methodological problems. The concepts of race, origin and ethnicity are not defined by French law, as they are not legal categories. Sensitive data and data based on origin are admissible before the

¹⁰⁷ Court of Cassation, Social Chamber, *P+B Fluchère, Dick and CFDT v SNCF*, No. 1027, 28 March 2000; CA Paris 17 October 2003. Appeal from Paris Regional Court 22 November 2002, D.O. July 2003 p. 284, 'Moulin Rouge' *SOS Racisme and Marega v Beuzit et Association du Moulin*.

courts.¹⁰⁸ They are empirically constructed and without technical constraints, their value being essentially subject to the evaluation of the judge. However, they are used regularly by the national equality body (HALDE and Defender of Rights).

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

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

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

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

In its decision of 14 June 2000,¹⁰⁹ the Court of Cassation decided that, in matters related to discrimination on the ground of trade union activities, the offence of discrimination may be established by comparative evidence and the judge has an obligation to investigate the situation of the employee comparative to that of others and to actively request the production of the necessary evidence by the defendant.

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

The use of a quantitative analysis of the results of recruitment procedures excluding candidates on the grounds of origin and age was expressly recognised by the courts of appeal of Paris, Toulouse and Poitiers as a valid approach to establishing a presumption of discrimination.¹¹⁰

The Airbus case is the landmark case that established the admissibility of statistics gathered in the workplace to provide an analysis on the ground of origin in discrimination cases, in relation to a claim alleging that people of North African origin were hired for short-term contracts at Airbus but almost never for contracts of indefinite duration. The evidence was based on enquiries by the HALDE relating to the list of employees, which indicated that among the staff recruited between 2000 and 2006, all had French citizenship and only two had a last name of North African origin. Moreover, for the period between January 2005 and July 2006, of the 43 employees hired for contracts of indefinite duration, none had a last name of North African origin. This evidence was sufficient to trigger a presumption of discrimination,¹¹¹ confirmed by the Court of Cassation.¹¹²

¹⁰⁸ Court of Cassation, Social Chamber, *Airbus*, No. K 10-15873, 15 December 2011.

¹⁰⁹ Court of Cassation, Criminal Chamber, *CFDT Interco*, No. 2792, 99-108, 14 June 2000.

¹¹⁰ Court of Appeal of Paris, *L'Oreal v. SOS Racism*, No. 06/07900, 06 July 2007; Court of Appeal of Poitiers, *Mont-Louis Bonnaire v. Crédit Agricole*, No. 08.00461, 17 February 2009; Court of Cassation, Social Chamber, *Airbus*, No. K 10-15873, 15 December 2011.

¹¹¹ Toulouse Court of Appeal, No. R 08.06630, 19 February 2010.

¹¹² Court of Cassation, Social Chamber, No. K 10-15873, 15 December 2011.

More recently, in the case decided by the Court of Cassation on 9 November 2016 on the liability of the State for racial profiling in police controls, public statistical research data was used as a context element to support the shift in the burden of proof. Thirteen claimants sued the state for damages for having been subjected to identity controls and searches without being arrested. This was the first claim of its type in France.¹¹³

Civil liability of the State for acts of the police requires evidence of intentional fault. The evidentiary issue was essentially related to the questions of whether the shift in the burden of proof would be implemented and how to establish sufficient elements to satisfy that burden given that racial profiling is a generalised practice, but one that, in the absence of arrest, leaves no paper trace. The lawyers of the claimants wrote to the police giving details of each control, requesting justification of the controls and received no answer. On this basis they sued the State for civil damages for liability for racial profiling in application of Article L141-1 of the Code of Judicial Organisation.

The general regime of civil liability of the State normally requires that intentional characteristic fault be established. The claimants and the Defender of Rights argued that evidence of intentional fault was not applicable to an action framed in the legal regime offering protection against discrimination. In addition, in the absence of a paper trail and given that studies established the existence of a widespread practice of racial profiling by the police (the studies sponsored in 2007/ 2009 by Open Society Justice Initiative that gathered statistical data showed that some populations were systematically more controlled than others), had to be taken in consideration to support a lighter burden on the claimants and a shift in the burden of proof. The Court of Cassation decided that given general knowledge supported by the studies and statistical data filed, the claimants did not have to establish the intention of the police officer to trigger an obligation on the part of the defendant to justify the opportunity of the control. However, the claimants had to establish the apparently discriminatory circumstances of each police control. These circumstances can be established by simple written statements of witnesses, indicating differential treatment between citizens at the time of the control, which would trigger the obligation of the State to justify the legitimacy of the control.

The Court of Cassation, decided that whatever the mandate of the police in the specific circumstances, it could not justify racial profiling. It has found discrimination in all cases where a witness was able to describe a selection process targeting persons of North African or African origin.

The Constitutional Council received a referral from the Court of Cassation regarding the conformity to rights and freedoms protected by the Constitution of Article 78-2 paragraph 6 of the Code of Penal Procedure (CPP) and of Articles L. 611-1 and L. 611-1-1 of the Code of Entrance and Residence of Foreigners and of Asylum Law (hereafter CESEDA). The challenged provisions of the CPP authorise the public prosecutor to issue orders requiring police identity controls in order to investigate possible perpetration of criminal offences, designating areas and specified periods during which the police can carry out such controls. The challenged provisions of the CESEDA allow the police to check, when enforcing an order of the public prosecutor issued pursuant to Article 78-2, paragraph 6 of the CPP, the legality of the presence in the territory of foreigners and to arrest them for the duration necessary to verify the legality of their presence in the territory.

¹¹³ Paris Court of Appeal, Civil Chamber, on the liability of the State for racial profiling in police controls, 24 June 2015; Court of Cassation, First Civil Chamber, Nos 15-24.207 to 15-25.877 regarding the liability of the State for racial profiling in police controls, 9 November 2016, https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/relatifs_contr_35473.html (accessed 6 July 2017).

On 24 January 2017, the Constitutional Council decided¹¹⁴ that the challenged provisions conformed to the Constitution while setting out some details (reservations of interpretation) regarding the proper interpretation of the purview of the controls they authorise:

- The enforcement of police controls by the police must be exclusively based on grounds that exclude all discrimination between persons.
- The public prosecutor cannot identify places and periods of time that have no relation to the investigation relating to the possible perpetration of criminal offences mentioned in the order.
- In addition, the public prosecutor cannot, by accumulating orders designating different places and time frames, authorise a constant and generalised use of police controls over time and space.

It is the responsibility of the judiciary to control the legality of police controls by condemning and sanctioning illegal actions taken and any resulting damages.

The provisions of the CESEDA were deemed to conform to the Constitution but the Council stressed that they cannot be interpreted so as to authorise police controls for the sole purpose of checking the legal status of a person's presence in French territory when that person is the subject of the control.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

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

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

Law No. 2008-496 of 27 May 2008 includes, at Article 1, paragraph 3, a definition of harassment as a form of discrimination, providing a distinct definition which does not require repeated acts:

'any behaviour related to one of the grounds mentioned in paragraph 1 and any behaviour of a sexual nature to which a person is subjected, with the purpose or effect of violating his or her dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment'.¹¹⁵

This definition covers situations that impact one person or several people. It provides the applicable definition to all civil and administrative legislation on discrimination, regarding individual actions and class actions.

¹¹⁴ Constitutional Council, Decision No. 2016-606/607 QPC, 24 January 2017, available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2017/2016-606/607-qpc/decision-n-2016-606-607-qpc-du-24-janvier-2017.148526.html>, accessed 3 March 2018.

¹¹⁵ France, Law of 27 May 2008, Article 1 paragraph 3: '*1° Tout agissement lié à l'un des motifs mentionnés au premier alinéa et tout agissement à connotation sexuelle, subis par une personne et ayant pour objet ou pour effet de porter atteinte à sa dignité ou de créer un environnement intimidant, hostile, dégradant, humiliant ou offensant.*'

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

The general regime of harassment is sanctioned by criminal law (Articles 222-33 and 222-33-2 PC), civil and administrative law in access to goods and services, social protection, access to education, housing (Article 2(3) of Law No. 2008-496 of 27 May 2008) and labour law (Articles L1152-1, L1153-1 and Article 6 of Law No. 83-634 of 13 July 1983 on civil servants).

It is applicable to both the private and public sectors and its definition covers acts perpetrated by superiors as well as by colleagues. The Labour Code specifically states that no employee should be the victim of such behaviour or be sanctioned for having testified or complained in relation thereto (Article L1152-2 LC).

In a decision of 4 May 2012, the Constitutional Council declared the provisions of the Penal Code (Article 222-33) regarding harassment unconstitutional on the ground that the prohibited behaviour was defined as 'Harassment is the fact of harassing', and did not provide sufficient details regarding the acts that were the target of criminal sanction, in violation of the requirements of criminal law that the behaviour sanctioned must be precisely defined.¹¹⁶ The Government adopted Law No. 2012-954 of 6 August 2012 to amend the definition of sexual harassment. Article L1153-1 LC now defines sexual harassment as 'repeated statements or acts' or pressure that is repeated or not 'of a sexual nature that violate a person's dignity because of their humiliating or degrading content or because they generate an intimidating, hostile or offensive environment', as well as 'pressure with the perceived or real aim of obtaining sexual favours for a person's own benefit or the benefit of a third party.'¹¹⁷ The courts have decided that homosexual sexual advances are covered by the prohibition of sexual harassment.¹¹⁸

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

b) Scope of liability for harassment

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

French principles of civil liability and French labour law provide that legal persons are responsible for the actions of their employees and legal representatives, which covers employees and managers of employees, trade unions and NGOs. In addition, the definition of harassment as prohibited by French labour law covers actions by people in authority and that of colleagues as well (Articles 1151-1, 1152-1 and 1153-1 LC). Furthermore, it provides for an obligation on the part of the employer to guarantee a safe work

¹¹⁶ Constitutional Council, QPC No. 2012-240 QPC, 04 May 2012, available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2012/2012-279-qpc/decision-n-2012-279-qpc-du-5-octobre-2012.115699.html> (accessed 6 July 2017).

¹¹⁷ Article L1153-1 of the Labour Code, available at: <https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000026268379&cidTexte=LEGITEXT000006072050> (accessed 6 July 2017): '*Aucun salarié ne doit subir des faits: 1° Soit de harcèlement sexuel, constitué par des propos ou comportements à connotation sexuelle répétés qui soit portent atteinte à sa dignité en raison de leur caractère dégradant ou humiliant, soit créent à son encontre une situation intimidante, hostile ou offensante ; 2° Soit assimilés au harcèlement sexuel, consistant en toute forme de pression grave, même non répétée, exercée dans le but réel ou apparent d'obtenir un acte de nature sexuelle, que celui-ci soit recherché au profit de l'auteur des faits ou au profit d'un tiers*'.

¹¹⁸ Paris Court of Appeal, 18^e Ch., section C, *Ste Euro Disney v. Vallinas*, Juris Data No. 023467, 8 October 1992.

environment free of harassment (Article 1152-4 LC). This provision creates an obligation on the part of the employer to take all necessary measures to put an end to harassment in the workplace. In the public services the same principles apply.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

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

In France, instructions explicitly constitute a form of discrimination.

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

'the fact of instructing anyone to adopt the behaviour defined in Article 2'.¹¹⁹

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

The Law on the Press of 1881 prohibits provocation to perpetrate racial, religious, sex, disability and sexual orientation discrimination, as well as complicity (Articles 23 and 24 of the Law on the Press of 1881 for public provocation, and Article R625-7 PC for non-public provocation).¹²⁰ The Court of Cassation has clearly established that the prohibited provocation refers to discrimination defined by Articles 225-1 and 225-2 PC.¹²¹

b) Scope of liability for instructions to discriminate

In France, the instructor and the discriminator are liable.

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

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

In a few cases, the exacting burden of proof with regard to the liability of senior management was met by way of inferences from the facts because the court was persuaded of its active involvement in what was a discriminatory policy.¹²² In fact, it is the manager giving instructions who is targeted by the procedure in criminal cases; the court is looking for evidence of the involvement of the decision-maker.¹²³

¹¹⁹ France, Law of 27 May 2008, Article 1(3): '*Le fait d'enjoindre à quiconque d'adopter un comportement prohibé par l'article 2*'.

¹²⁰ France, Law of 29 July 1881 on Freedom of the Press (*Loi du 29 juillet 1881 sur la liberté de la presse*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722&dateTexte=20080312> (accessed 6 July 2017).

¹²¹ Court of Cassation, Criminal Chamber, Cass. crim. 12 April 1976, Cass. crim. 22 May 1989.

¹²² High Judicial Court of Versailles, 02 April 2001. CA Paris, *Sté NIDEK Europarc*, No. 4835.96, 20 March 1997.

¹²³ High Judicial Court of Paris 14 November 2002 No. 0019304084 *Cantuel Horbette (Hotel La Villa)*, *Essindi et al.* Court of Appeal of Paris 17 October 2003. Appeal from High Judicial Court of Paris 22 November 2002, D.O. July 2003 p. 284, '*Moulin Rouge*' *SOS Racisme and Marega v. Beuzit et Association du Moulin*.

In December 2016, the Court of Cassation was called upon to decide whether the National Corsican trade union *Syndicat des travailleurs corses* (STC), which advocates 'Corsicanisation' of employment in Corsica, had behaved contrary to Republican values that would disqualify it in the context of the professional elections.¹²⁴ The court decided that a trade union that promotes direct and indirect discrimination on the ground of origin does not satisfy this requirement. However, the court considered that the concept of Republican values must not become a means of censorship and limitation of the legitimate expression of political opinions. It must therefore be interpreted in such a way as to accommodate freedom of political expression. Thus, the court concluded that the fact of promoting 'Corsicanisation' of employment is insufficient to constitute a provocation to discrimination, and that such a provocation must clearly call upon the pursuance of explicitly discriminatory behavior, in the same manner as the fact of promoting feminisation in recruitment cannot be considered to lead, per se, to discriminatory behavior.

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

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

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

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

In addition, this provision must be read in relation to Article L5213-6 LC and Article 2 of Law No. 2008-496 of 27 May 2008, which provide that in order to ensure respect for the principle of equal treatment of employees with disabilities in the workplace, as defined in Article L114 of the CSW, and reasonable accommodation '(...) in relation to disabled workers, as mentioned in Article 5212-13 LC, employers shall take appropriate measures, in accordance with the specific situation, to allow disabled workers to have access to or to maintain a position of employment which corresponds to their qualifications, to execute their work, to progress therein or to have access to training adapted to suit their needs'¹²⁵ (*author's translation*). Therefore, failure to provide reasonable accommodation from application and hiring through to retirement constitutes discrimination as provided by Article L1132-1 LC.

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

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

¹²⁴ Court of Cassation, Social Chamber, No. 16-25793, 12 December 2017, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000033631545&fastReqId=322200566&fastPos=1> (accessed 6 July 2017).

¹²⁵ Article L 5212-13 LC: '(...) les employeurs prennent, en fonction des besoins dans une situation concrète, les mesures appropriées pour permettre aux travailleurs handicapés d'accéder à un emploi ou de conserver un emploi correspondant à leur qualification, de l'exercer ou d'y progresser ou pour qu'une formation adaptée à leurs besoins leur soit dispensée'.

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

In the Volot-Pfiser case, the claimant was a magistrate with the public prosecution office who became deaf.¹²⁶ His impairment led to a redefinition of his duties and those of his colleagues, since he could no longer participate as prosecutor in public hearings. He was therefore exempted from hearings and these obligations were substituted for administrative duties. The hearings he would normally have participated in were reallocated to other magistrates. In France, the working conditions of magistrates are seriously impacted by their hearing obligations, since the court does not close, and the hearings go on until the roll call listing cases to be heard is finished, often late into the night. The same year this magistrate saw a significant reduction in the variable portion of his remuneration and, in fact, his premium rate became the lowest in the jurisdiction. The justification for this was that the premiums compensate for the objective burden of service and that his hearings burden had been reassigned to others who thus had their burden increased. Therefore, the adjustment in remuneration was considered to be objective and reasonable. The *Conseil d'Etat* reversed the lower courts' decisions and decided that, pursuant to Directive 2000/78/EC, the duty of reasonable accommodation on the part of the public employer creates a corresponding right to the benefit of the magistrate, guaranteeing that the measures taken will not create a disadvantage as regards remuneration or prevent proper professional progression. Maintaining pay was part of the reasonable accommodation. The fact of taking the disability into account to set objectives cannot generate unequal treatment as regards remuneration. The fact of comparing respective contributions as a result of the accommodation measures taken creates a situation whereby reasonable accommodation has an adverse impact on remuneration and becomes a factor in indirect discrimination. An evaluation must be made in the light of the objectives set, taking reasonable accommodation into account.

Law No. 2008-496 of 27 May 2008 did not extend the obligation of reasonable accommodation to non-salaried and independent workers. However, in the Bleitrach case¹²⁷ the *Conseil d'Etat* recognised a duty on the state to take positive measures to provide access to court buildings for people with disabilities working as auxiliaries of justice (a liberal profession) by direct application of Directive 2000/78/EC and the Law on Disability No. 2005-102. The same issue could be raised regarding access to many public places where non-employees come to perform their work, such as town halls, public clinics etc.

b) Practice

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

This law is supplemented by two decrees:

- Decree No. 2006-134 of 9 February 2006 on the recognition of the burden of disability;¹²⁸

¹²⁶ *Conseil d'Etat*, No. 347703, 11 July 2012.

¹²⁷ *Conseil d'Etat*, No. 301572, 30 October 2010.

¹²⁸ France, Decree No. 2006-134 of 9 February 2006 on the recognition of the burden of disability (*Décret no 2006-134 du 9 février 2006 relatif à la lourdeur du Handicap*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000458030> (accessed 6 July 2017).

- Decree No. 2006-501 of 3 May 2006 on the fund for the professional integration of disabled persons.¹²⁹

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

Similar provisions are integrated into Law 83-634 of 13 July 1983 on the rights and obligations of civil servants.¹³⁰

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

In 2017, further to a wide consultation of employers, NGOs and stakeholders, the Defender of Rights published a guide to provide employers and all agencies with a general framework for the implementation of the duty to provide reasonable accommodations.¹³¹ The guide intends to make explicit the scope of the obligation, its constraints and limits and its interaction with other applicable legal schemes.

c) Definition of disability and non-discrimination protection

The obligation to make reasonable accommodation established by Article L5213-6 LC provides for a protection to the benefit of any person designated in Article L5212-13 LC, which lists all the administrative statuses that would encompass disabled workers.

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

In terms of legal rights, a person who meets the definition of disabled worker under Article L5213-1 LC in a situation described in Article 114 of CSW can argue his or her right to reasonable accommodation on the ground of the general protection against discrimination contained in Article L1132-1 ff. LC and Article 2 of Law No. 2008-496 of 27 May 2008, and his or her right will be recognised by the courts.¹³²

A person who meets the definition of disability provided by Article 114 of CSW, and does not wish to be registered as disabled by the administrative authorities according to Article 5213-1 LC, will specifically be required to meet the occupational health professional who is responsible for determining the reasonable accommodation required for all employees on basis of disability, health or functional requirements for the preservation of health. The employer is required by law to implement the prescribed reasonable accommodation(s).

¹²⁹ France, Decree No. 2006-501 of 03 May 2006 on the fund for the professional integration of disabled persons (*Décret No. 2006-501 du 3 mai 2006 relatif au fonds pour l'insertion des personnes handicapées dans la fonction publique*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000814863&dateTexte=&categorieLien=id> (accessed 6 July 2017).

¹³⁰ France, Law No. 83-634 of 13 July 1983, complemented by Law 84-16 of 11 January 1984 on the civil service of the State, Law 84-53 of 26 January 1984 on the civil service for the local and regional levels of government and Law 86-33 of 9 January 1986 on the hospital civil service.

¹³¹ Defender of Rights (2017), *Emploi des personnes en situation de handicap et aménagement raisonnable* (The employment of people with disabilities and reasonable accommodation), December 2017: <https://www.defenseurdesdroits.fr/fr/guides/guide-amenagement-raisonnable>, accessed 28 February 2018.

¹³² Orléans Court of Appeal, *X. vs La poste*, No. 10/01990, 15 November 2011.

Finally, all contractual public servants who hold one of the various statuses that are excluded from the application of Law No. 84-16 of 11 November 1984 on the status of state contractual agents at Article 3, paragraph 5, are also excluded from all protections against discrimination for public servants provided by Law No. 83-634. None of these texts have been amended to implement Directive 2000/78/EC and do not contain any protection against discrimination on any grounds. It is important to note that all public servants who are not covered by the laws of transposition do not benefit from the right to reasonable accommodation in case of disability, unless they seek enforcement by the courts.

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

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

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

Education

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

Article 11 affirms a right of access to local mainstream schools and the right to an individual educational programme.¹³³

The *Conseil d'Etat*, in a decision of 15 December 2010 (*Conseil d'Etat*, No. 344729)¹³⁴ concluded that adapted access to education for disabled children at preschool level is a fundamental freedom, and failure of the school authorities to maintain the accommodation determined by the individual educational programme, in this case an education assistant, violates this freedom. The *Conseil d'Etat* went even further and decided in a landmark case of 20 April 2011 (Nos. 345434¹³⁵ and 345442)¹³⁶ that the provisions of the individual educational programme paid for by the state authorities also covered needs related to extracurricular activities and therefore established an obligation which should be implemented without delay, regardless of budgetary and logistic considerations.

¹³³ France, Ministerial Instruction No. 2006-126 of 17 August 2006 on the implementation of the individual educational programme (*Circulaire relative à la mise ne oeuvre et au suivi du projet personnalisé de scolarisation*) available at: <http://www.education.gouv.fr/bo/2006/32/MENE0602187C/htm> (accessed 6 July 2017).

¹³⁴ *Conseil d'Etat*, no 344729, 15 December 2010, available at: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000023248217> (accessed 6 July 2017).

¹³⁵ *Conseil d'Etat*, no 34534, 20 April 2011, available at: www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000023897748&fastReqId=911059899&fastPos=7 (accessed 6 July 2017).

¹³⁶ *Conseil d'Etat*, no 345442, 20 April 2011, available at: www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000023897749&fastReqId=538455663&fastPos=12 (accessed 6 July 2017).

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

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

Access to goods and services except buildings and infrastructures

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

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

The HALDE decided that this obligation was violated by a bank's requirement that visually impaired people mandate someone to manage their accounts,¹³⁷ and by an insurer's abusive refusal to insure a person with a disability that did not have implications for their health.¹³⁸

On the basis of Article 225-1 and 225-2 PC, the criminal courts have issued sanctions for a refusal to register a disabled person for an aquagym class,¹³⁹ and a refusal to allow a person in a wheelchair access to a cinema.¹⁴⁰

Except regarding access to mainstream schools, all the provisions create positive obligations without reference to alleviations or limitations related to the idea of disproportionate burden. The only admissible defence is based on established considerations of safety.¹⁴¹

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

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

The employer can refuse to implement reasonable accommodation in cases of disproportionate burden. Article L5212-6 paragraph 2 LC provides that 'the refusal to take such measures [*reasonable accommodation*] may constitute discrimination according to Article L1133-2 LC'. The claimant thus benefits from the legal regime of discrimination covering both direct and indirect discrimination, which gives them the benefit of the right to obtain access to evidence and of the shift in the burden of proof and consequences related to the nullity of the decision.

The law provides no precision as to when it will deem a refusal to make 'accommodation' (or take 'necessary measures') to be discrimination or what is a disproportionate burden. Moreover, the concept of reasonable accommodation has never been interpreted and is foreign to French law. Therefore, the specific content of this obligation will have to be

¹³⁷ HALDE, Deliberation 2007-296. Available at: <http://www.defenseurdesdroits.fr> (accessed 6 July 2017).

¹³⁸ HALDE, Deliberation 2007-234. Available at: <http://www.defenseurdesdroits.fr> (accessed 6 July 2017).

¹³⁹ GAP Trial Court, No. 12025000010, 22/05/2014.

¹⁴⁰ Court of Cassation, Criminal Chamber, No. 05-85888, 20/06/2006, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007640193> (accessed 7 May 2018).

¹⁴¹ Limoges Court of Appeal, 14 May 1991.

defined by the courts before further comment can be made with respect to the scope of the burden it imposes on employers.

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

The parties agreed that, without this vehicle, the claimant could not get to work and that no other measure could be put in place in substitution. The administrative court of Caen decided that the obligation of the employer to take 'necessary measures to provide access to work' covered measures allowing the person to get to work, and granted the request. It refused to discuss the defence of disproportionate costs on the ground that the employer did not provide evidence that they had applied for money from the fund for the integration of disabled persons and could not therefore put forward an argument related to the resulting unreasonable costs of implementing this measure.¹⁴²

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

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

- Race or ethnic origin

The education system provides for special classes to integrate newly arrived foreign migrant children for a transitional period of between a few months and a year, in order that they can be assessed and acquire sufficient language skills to integrate into mainstream school.¹⁴³

Law 2000-614 of 5 July 2000 provides for a duty to implement parking spaces for Travellers, failing which the local authorities must tolerate parking in the area, and Decree 2001-569 of 29 June 2001 (see Section 3.2.10 below) provides the technical requirements for these areas. This law also provides for a duty to accommodate the temporary school attendance of Traveller children.¹⁴⁴

In addition, in implementing the shift in the burden of proof provided by Article 1134-1 LC, and applying the test of proportionality to the justifications invoked by defendants, the courts have started to discuss whether reasonable measures could be taken to prevent discrimination. In a decision by the Court of Appeal of Versailles,¹⁴⁵ upholding the ruling by the lower court, the court followed the arguments presented by the Defender of Rights and decided that the refusal to send an employee abroad on an assignment to a particular country, on the ground of origin, alleging racism on the part of the citizens of that country and putting forward arguments around safety for the protection of the employee, could only be justified by documentation of the reality of this alleged racism and the attendant danger, and evidence of the scope of the risk, in order to justify the stated unreasonableness of the costs necessary to ensure the protection of the employee.

¹⁴² Administrative Court of Caen, No. 0802480, 01 October 2009.

¹⁴³ France, Ministerial Instruction No. 2012-141 of 02 October 2012 no REDE1236612C. RED - DGESCO A1-1 relating to the organisation of the integration of newly arrived children (*Circulaire relative à l'Organisation de la scolarité des élèves allophones nouvellement arrivés*), available at: http://www.education.gouv.fr/pid25535/bulletin_officiel/html?cid_bo=61536 (accessed 6 July 2017).

¹⁴⁴ France, Law No. 2000-614 of 05 July 2000 on the reception and accommodation of Travellers (*Loi No. 2000-614 du 5 juillet 2000 relative à l'accueil et à l'habitat des gens du voyage*), available at: <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000583573> (accessed 6 July 2017).

¹⁴⁵ Versailles Court of Appeals, No. 12.03739, 05 March 2014.

The Versailles Court of Appeal, in the application of the *Winterstein* ECHR jurisprudence, has defined positive obligations to protect the homes of Travellers under Article 8 of the ECHR (see section 3.2.10.1).¹⁴⁶

- Religion or belief

The jurisprudence of the *Conseil d'Etat* has defined a duty of reasonable accommodation on religious grounds in the duty of children to attend school for all religions confirmed in ministerial instructions of the Ministry of Public Service No. 2106 of 14 November 2005 regarding authorisations of absence on religious grounds that are to be granted unless they entail disruption, such as in the case of attending exams.¹⁴⁷

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

- Age

None.

- Sexual orientation

None.

g) Accessibility of services, buildings and infrastructure

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

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

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

¹⁴⁶ Versailles Court of Appeal, No. 16/02752, 1 June 2017, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000035083402>, accessed 7 March 2018.

¹⁴⁷ Conseil d'Etat, 14 April 1995, *Consistoire central des Israelites de France*, *Recueil Lebon*, p. 169, Dalloz 1995, jur. p. 481, note Koubi G.

deadlines for preparing and programming the works, taking the form of 'programmed accessibility timetables' (*agendas d'accessibilité programmée* – Ad'AP).

Law No. 2014-789 of 10 July 2014 authorising the Government to adopt legislative measures for the implementation of the accessibility of public places enabled the Government to determine the conditions and schedule for the implementation of accessibility for disabled persons in relation to 'buildings receiving the public', public transport, residential buildings and roads.¹⁴⁸

The Government then adopted Executive Order No. 2014-1090 of 26 September 2014,¹⁴⁹ providing the possibility to adopt decrees to specify schedules for each type of works (buildings, roads and public transport) and to proceed by means of Ad'AP.

Three decrees were adopted to specify the conditions for the implementation of these timetables, one for each type of works. Decree nos. 2014-1320¹⁵⁰ and 2014-1321¹⁵¹ of 3 November 2014 relate to public transport and Decree No. 2014-1327¹⁵² to public buildings and places open to the public. In addition, Decree No. 2014-1326¹⁵³ was adopted to review the standards of adaptation works relating to the accessibility of existing buildings.

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

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

The ministerial delegation on accessibility follows and monitors the implementation of all the Ad'AP implementation frameworks at the national level, and coordinates all of the accessibility orders that have been put in place to follow up all Ad'AP requests relating to work on accessibility in each department.

¹⁴⁸ France, Law No. 2014-789 of 10 July 2014 authorising the Government to adopt legislative measures for the implementation of the accessibility of public places (*Loi No. 2014-789 du 10 juillet 2014 habilitant le Gouvernement à adopter des mesures législatives pour la mise en accessibilité des établissements recevant du public, des transports publics, des bâtiments d'habitation et de la voirie pour les personnes handicapées*) available at: <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029217888&categorieLien=id> (accessed 6 July 2017).

¹⁴⁹ France, Executive Order No. 2014-1090 of 26 September 2014 relating to accessibility of public works (*Ordonnance No. 2014-1090 du 26 septembre 2014 relative à la mise en accessibilité des établissements recevant du public, des transports publics, des bâtiments d'habitation et de la voirie pour les personnes handicapées*), available at: <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029503268&categorieLien=id> (accessed 6 July 2017).

¹⁵⁰ Available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029701835&categorieLien=id> (accessed 6 July 2017).

¹⁵¹ Available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029707519&categorieLien=id> (accessed 6 July 2017).

¹⁵² Available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029708128&categorieLien=id> (accessed 6 July 2017).

¹⁵³ Available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029708064&dateTexte=&categorieLien=id> (accessed 6 July 2017).

However, stakeholders have pointed out difficulties related to the oversight of the procedure for requesting derogations from the obligation to implement adaptations, pursuant to Articles L111-7-3 and R111-19-10 of the Construction and Housing Code. Derogations can be requested in respect of the disproportionate cost of the work or its technical impossibility and, for existing private housing because of the refusal of the board of co-owners or due to the historical value of the building. The jurisprudence provides that in the absence of a notification of a decision of refusal of the request- that can be challenged before a court-¹⁵⁴ said request is deemed to have been authorised. Given that there have been significant delays in replying, partly due to the massive number of requests that have been submitted, the fact that a delay of two months can be interpreted as an absence of notification, means that all these requests are deemed to have been authorised, thereby generating a disproportionate number of authorised derogations. As a result, NGOs believe that the Government must again adopt a new scheme of action to correct the situation. Evaluations have been initiated by NGOs and they should report their conclusions by the end of 2018.

In 2017 a decree was adopted to facilitate the management of the conformity of buildings to 'programmed accessibility timetables'. Decree No. 2017-431 of 28 March 2017¹⁵⁵ provides that the operator of a structure open to the public must keep a register that is accessible on the premises indicating all measures taken to accommodate disabled persons and to ensure accessibility of the service to be provided.

The prohibition of discrimination on the ground of disability in access to goods and services provided by Articles 225-1 and 225-2 PC has been interpreted to impose a duty to comply with accessibility obligations.¹⁵⁶

The courts have held that the burden of establishing a defence of disproportionate costs for installing necessary equipment falls upon the defendant.¹⁵⁷

In the case of the *Communauté d'agglomération du pays de Voironnais*,¹⁵⁸ the *Conseil d'Etat* decided that Article 45 of the Law of 11 February 2005 on the rights of disabled persons, which provides for complete accessibility of public transport, except in the case of manifest technical unfeasibility, requires that such unfeasibility be evaluated on a case-by-case basis each time works are to be undertaken. The assessment of a project as being unfeasible should only result from a technical obstacle which would be impossible to overcome or one that would incur a manifestly disproportionate cost.

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

In the case of Ms Bleitrach against the State, the *Conseil d'Etat* found liability without fault on the part of the State on the basis of Directive 2000/78/EC, for failure to provide access to the court to a disabled judicial official who used a wheelchair - Ms Bleitrach is a qualified lawyer - who required this access in order to exercise her profession. Considering the scale

¹⁵⁴ Bordeaux Administrative Appeal Court, No. 96BX01453, 18 November 1999, available at: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000007495654&fastReqId=267826143&fastPos=1>, accessed March 2018.

¹⁵⁵ France, Decree No. 2017-431 of 28 March 2017, available at <https://www.legifrance.gouv.fr/eli/decret/2017/3/28/LHAX1702913D/jo/texte>, accessed 28 February 2018.

¹⁵⁶ Court of Cassation, Criminal Chamber, No. 05-85888, 20 June 2006.

¹⁵⁷ Administrative Court of Caen, No. 0802480, 01 October 2009.

¹⁵⁸ *Conseil d'Etat*, No. 343364, 22 June 2012, available at: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000026052824&fastReqId=72010635&fastPos=1> (accessed 6 July 2017).

of the necessary investments throughout France, the delay in implementing accessibility was held to be reasonable by the lower courts.¹⁵⁹ However, the *Conseil d'Etat* decided that it could not dismiss the liability for damages of the State solely by relying on the deadline for insuring accessibility provided by the Decree of 17 May 2006, which ran until 2015. Directive 2000/78/EC imposes a specific obligation in relation to professionals, i.e. lawyers in this case, in the provision of access to court buildings and the judge had to evaluate in this particular case whether the State had met its duties in this respect. The *de facto* inequality before 'public charges' (i.e. burdens imposed on citizens by the State) of lawyers who use a wheelchair is such as to incur liability without fault on the part of the State and the Administrative Supreme Court awarded EUR 20 000 in non-material damages, the claimant having failed to establish financial damages.

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

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

h) Accessibility of public documents

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

¹⁵⁹ *Conseil d'Etat*, No. 301572, 22 October 2010.

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

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

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

The general protection against discrimination covers everyone, including migrants, and the principle of equality is applicable to non-nationals unless the legislator can justify a difference in treatment based on conditions of public interest.¹⁶⁰ However, the law imposes conditions in access to certain rights, such as the right to work and some social benefits, restricting them to the people with the status of legal foreign resident. In addition, as was documented by a report prepared by the Group for Studying and Combating Discrimination (*Groupe d'Etude et de lutte contre les discriminations* – GELD),¹⁶¹ the law creates some legal discrimination in access to specific professions and jobs (about 7 000 named jobs), subjecting them to conditions of citizenship, whether French, of bilateral partner countries (such as some African countries) or of the European Union.¹⁶²

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

a) Protection against discrimination

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

b) Liability for discrimination

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

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

3.1.3 Private and public sector including public bodies (Article 3(1))

a) Protection against discrimination

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

¹⁶⁰ Constitutional Council, 89-296 DC, 22 January 1990, R.F.D.C. No. 2 1990, obs Favoreu.

¹⁶¹ First French anti-discrimination body created in 2000, which paved the way for the establishment of the HALDE.

¹⁶² GELD (2000) *Publication No. 1 on legal discrimination and employment inaccessible to foreign nationals* (Groupe d'Etude et de Lutte contre les Discriminations (GELD), 'Une forme méconnue de discrimination et les emplois fermés aux étrangers: secteur privé, entreprises publiques, fonctions publiques', Note No. 1 March 2000.), available at: <http://www.gisti.org/doc/presse/2000/ged/index.html> (accessed 6 July 2017).

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

b) Liability for discrimination

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

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

3.2 Material scope

3.2.1 Employment, self-employment and occupation

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

Further to the adoption of Law No. 2008-496, Article 2 provides that all employees, civil servants and state contracting agents as well as independent workers are protected against discrimination with respect to all the grounds covered by Article 19 TFEU and others specific to French law.

The list of grounds set out in the Penal Code is repeated in all legislation,¹⁶³ except in Law No. 83-634 of 13 July 1983 on the rights and obligations of civil servants, which includes the additional ground of opinion.¹⁶⁴

The extent of the protection and the legal regimes are translated in the Penal Code, the Labour Code and the Law No. 83-634 of 13 July 1983 on the rights and obligations of civil servants. They vary according to whether the situation is covered by the Penal Code, the Labour Code or administrative law and according to the ground of discrimination.

However, the Law No. 83-634 of 13 July 1983 on the rights and obligations of civil servants states in Article 3 that, in conformity with Article 64 of the Constitution of 1958, it does not cover the status of magistrates who are not considered as civil servants. Ordinance No. 58-1270 of 22 December 1958 regulates the rules applicable to both prosecution and state magistrates and judges on the bench.¹⁶⁵ Public servants working in parliament are also not subject to Law No. 83-634, since Article 3 provides that they are governed by separate parliamentary rules. These texts have not been amended to implement Directives

¹⁶³ The grounds are: mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed to an ethnic origin, a nation, a race or a determined religion, physical appearance, last name, family situation, union activities, political and philosophical opinions, age, health, disability, genetic characteristics, loss of autonomy, place of residence, capacity to express oneself in another language than French, and economic vulnerability.

¹⁶⁴ The ground of banking residence has been incorporated only into the Law of 28 May 2008, which provides the civil legal framework of protection against discrimination.

¹⁶⁵ France, Ordinance No. 58-1270 of 22 December 1958 relating to the status of magistrates (*Ordonnance No. 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature*), available at: <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000339259> (accessed 6 July 2017).

2000/78/EC and 2000/43/EC and do not foresee any protection against discrimination on any grounds.

In its decision of 30 October 2009, the *Conseil d'Etat* decided that, given the failure of the Government to transpose Directive 2000/78/EC, it could be invoked directly by magistrates before administrative courts.¹⁶⁶

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

Article L1132-1 LC is the relevant provision in respect of private employment. It applies to salaried workers as well as temporary employees and vocational apprenticeships.

In addition, the Labour Code forbids discriminatory provisions (L1121-1 LC) in in-house regulations (L1321-3 LC) and collective bargaining agreements (L2251-1 LC).

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

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

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

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

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

However, the law imposes conditions in access to certain rights, such as the right to work, restricting them to people with the status of legal foreign resident and creates some legal discrimination in access to specific professions and jobs. Some professions are subject to a condition of nationality. The GELD (see above) in March 2000 and then the HALDE in its deliberations of 2008 and 2009 (deliberations 2008-189 and 2009-139) have drawn the attention of the Government to these legal discriminations, requesting that an assessment be made of the legality of the conditions of nationality in access to certain professions, which should be limited to functions that entail the exercise of prerogatives of public authority (*prérogatives de puissance publique*).

¹⁶⁶ *Conseil D'Etat*, No. 298348, 30 October 2009.

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

In addition, the access of migrants to certain jobs is restricted. Articles R5221-17 to R5221-22 of the Labour Code provide that a migrant person must request a work permit in order to authorise the employer to sign an employment contract. This authorisation is required for all non-EU foreigners who cannot benefit from the terms of a bilateral convention between their country and France. A migrant person can be denied a work permit if local unemployment is too high and if the job applied for can easily be filled by local jobseekers. This condition can be satisfied if the employer establishes that he has been unable to fill the position by thorough research and making requests to employment services. A list of jobs that are deemed to be difficult to fill, determined by Executive order,¹⁶⁷ is exempt from this limitation on access to employment. In addition, some foreign students who have completed higher education diplomas in France are also exempt. Some exceptions also apply to unaccompanied minors and young adults in apprenticeship.

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

The Government adopted several decrees required to implement Law No. 2005-102 on equal opportunities and the integration of disabled persons and, on 21 December 2005, adopted Decree No. 2005-1617¹⁶⁸ on accommodation for disabled candidates in competitive examinations for entry into civil service.

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

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

In France, national legislation prohibits discrimination in the following areas: working conditions, including pay and dismissals, for all five grounds and for both private and public employment regardless of whether a person is a French citizen.

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

The CJEU decided that Directive 2003/88 of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time applied

¹⁶⁷ France, Executive order of 18 January 2008, NOR: IMID0800328A available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000017937372>, accessed 28 February 2018.

¹⁶⁸ France, Decree No. 2005-1617 of 21 December 2005 on the accommodation of examinations in higher education for disabled students (*Décret n°2005-1617 du 21 décembre 2005 relatif aux aménagements des examens et concours de l'enseignement scolaire et de l'enseignement supérieur pour les candidats présentant un handicap*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000456607> (accessed 6 July 2017).

to persons attending work based occupational centres as regards its provisions relating to working time, regardless of their worker's status in national law. The court did not discuss whether not recognising persons attending such occupational centres as workers was discriminatory. However, this decision reaches beyond European labour law since it in fact extends the purview of the protection against discrimination on the ground of disability in employment to disabled people performing an activity in an occupational centre for disabled people and therefore extends the scope of the application of the rule of equal treatment. Therefore, in the future, maintaining their present status and working conditions will be in many respects held to be discriminatory on the ground of disability.¹⁶⁹

3.2.3.1 Occupational pensions constituting part of pay

The Administrative Supreme Court, applying the principles set out by the CJEU in the Griesmar case,¹⁷⁰ considers that occupational pensions form part of remuneration and constitute a debt subject to Article 14 and Protocol 11 of the European Convention of Human Rights (ECHR) guaranteeing protection of property rights, and that non-occupational pensions constitute social security protected as such by the same provisions of the ECHR.¹⁷¹

The Court of Cassation has further interpreted Article 3221-2 of the Labour Code, to set a general principle of equality of remuneration,¹⁷² and the Administrative Supreme Court has decided that it applies to professional pension rights.¹⁷³

Partners in a PACS¹⁷⁴ cannot benefit from widow(er)s' pensions, the transfer of pension rights, rights accessible to spouses in relation to employment benefits or parental rights after the death of the spouse holding the parental rights.

Since the adoption of Law No. 2013-404 of 17 May 2013,¹⁷⁵ marriage is open to same-sex couples, putting an end to indirect discrimination on the ground of sexual orientation, based on the denial of access to widow(er)s' pensions for PACS partners for the future. However, this legislation has not put an end to PACS and couples, whether same sex partners or heterosexual, can remain under the PACS regime or decide to marry. As a result, differential treatment in relation to the legal status of couples is now argued as violation of the prohibition of discrimination against persons on the ground of their 'family situation'—a ground specific to French law.

¹⁶⁹ CJEU, No C-316/13, 26 March 2015, available at: <http://curia.europa.eu/juris/celex.jsf?celex=62013CJ0316&lang1=fr&type=TEXT&ancre> (accessed 6 July 2017).

¹⁷⁰ CJEU, No, C-366/99, 21 November 2001.

¹⁷¹ *Conseil d'Etat*, Nos. 212179 and 212211, 18 December 2002; CE 30 November 2001 DIOP, nos. 212179 and 212211, available at: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000008029234> (accessed 6 July 2017).

¹⁷² Court of Cassation, Social Chamber, 29 October 1996, *Delzongle v Ponsolle*, Dr.ouv. 1997, 149 comment Pascal Moussy.

¹⁷³ *Conseil d'Etat*, No. 291595, 13 December 2006, (9ème et 10ème sous-sections réunies).

¹⁷⁴ The Civil Solidarity Pact (*Pacte civil de solidarité*, PACS) was created to recognise life partnership before same-sex marriage was legalised in France.

¹⁷⁵ France, Law No. 2013-404 of 17 May 2013 opening marriage to same-sex couples (*Loi No. 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027414540&dateTexte&categorieLien=id> (accessed 6 July 2017).

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

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

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

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

In France, national legislation prohibits discrimination in the following areas: membership of, and involvement in workers' or employers' organisations as formulated in the directives for all five grounds and for both private and public employment.

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

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

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

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

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

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

In France, national legislation prohibits discrimination in the following area: social protection, including social security and healthcare, as formulated in the Racial Equality Directive. This prohibition also covers non-nationals.

Law No. 2008-496 completes the implementation of Directive 2000/43/EC by integrating, in Article 2 (3), a prohibition of all types of discrimination defined in Article 1 of the law, on the basis of all grounds listed at Article 1 and making provision for the shift in the burden of proof, as regards social protection, including social security and healthcare.

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

In addition, for all grounds of discrimination, the general principles of public law are based on a general principle of equality in the public service (see Section 0.1 and Section 1, Article 1, of the Constitution of 1958, the preamble of the Constitution of 1946 and the Declaration of the Rights of Man and of the Citizen of 1789) and a universal principle of non-discrimination in access to healthcare which is not restricted to any prohibited ground of discrimination (Article 1110-3 SWC). These principles also apply to civil servants. In addition, all residents in France benefit from the same social rights, regardless of nationality.

The law however provides for limits in the social protection afforded to migrants.

In France, the family allowance scheme covers 31.1 million people, including 13.8 million children. The allowances cover four areas: young children (2 million beneficiaries), childhood and youth (9.7 million beneficiaries), housing (6.3 million beneficiaries) and solidarity and integration (3.6 million beneficiaries).

There are restrictions on the access to all allowances for the support of migrant children who accompany their parents under Article 512-2 of the Social Security Code. Even if the parents are legal residents, if the children have not arrived in France through the procedure of family reunification, allowances will be denied unless the parents have received an exemption from the outset. These requirements relating to social and economic considerations have been considered to be within the margin of appreciation of the State by the ECtHR in a decision of 1 October 2015.¹⁷⁶ The only exceptions are enforced by the court in application of a bilateral convention or EU Conventions with third countries that provide for equal treatment of migrant worker in relation to social protection.

In addition, the law has created new requirements for foreign residents, including the requirement that they have a period of continuous legal residence before they are eligible for a number of allowances, including the minimum income benefit (*Revenu de solidarité active*), the allowance for adults with disabilities and old age minimum allowance.

These rules create important problems for poor, older workers who have been working in France for many decades.

Article L815-1 of the Code of Social Security holds that anyone residing regularly and continuously in France and having reached the age of retirement, i.e. 62, can benefit from the old age allowance. This allowance is aimed particularly at migrant workers who have been denied old age pensions because their employers have failed to contribute.

¹⁷⁶ ECtHR, *Okitaloshima Okonda Osungu et Selpa Lokongo v. France*, Nos 76860/11 and 51354/13, 1 October 2015, https://www.gisti.org/IMG/pdf/jur_cedh_2015-10-01_prestations_familiales.pdf (accessed 6 July 2017).

However, since 2007, Article L816-1 also requires that the non-French national be in a position to establish that they have resided continuously and regularly in France with authorisation to work for 5 years and, since 2012, for 10 years. These rules have been adopted to prevent immigration motivated by social protection advantages, and have been extended to cover access to the minimum income benefit, along with specific child-entry conditions to qualify for access to family allowances.

Establishing proof of regular residence and presence for a period of 10 years is very often de facto impossible for older migrant workers, who have been encouraged to return to their home countries for part of the year by the authorities: they are often practically illiterate, French customs seldom stamp their passports and they do not file income tax returns due to a lack of sufficient resources. These new rules have been used to suspend payment of social security to older migrant workers. Payments are therefore often suspended, sums paid are claimed back and older migrants find themselves in complicated situations where they are unable to establish their continuous presence in France for a period of 10 years.

3.2.6.1 Article 3.3 exception (Directive 2000/78)

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

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

In France, national legislation prohibits discrimination in the following area: social advantages as formulated in the Racial Equality Directive.

Article 2 (3) of Law No. 2008-496 completes the implementation of Directive 2000/43/EC by integrating a prohibition of all types of discrimination defined in Article 1 of the law, on all grounds covered by Article 1, and making provision for the shift in the burden of proof, as regards social advantages.

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

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

The PACS, which grants similar rights to those of married couples in many areas (access to social security, rights of residence etc.) and was the only form of union open to same-sex couples until Law No. 2013-404 of 17 May 2013 opening marriage to same-sex couples, does not provide the 'same rights' as marriage and therefore maintained some form of legal indirect discrimination against same-sex couples in relation to the rights denied due to the fact that marriage was not open to them before May 2013.¹⁷⁷

Partners in a PACS cannot benefit from widow(er)s' pensions, transfer of pension rights, rights accessible to spouses in relation to employment benefits or parental rights after the death of the spouse holding the parental rights. In a decision of 12 December 2013, the

¹⁷⁷ Constitutional Council, No. 2010-92 QPC, 28 January 2011.

CJEU decided, further to a referral from the Court of Cassation in the case of *Hay v. Crédit Agricole*,¹⁷⁸ that, if marriage is not accessible to same-sex partners, a salaried employee who enters into a contractual union with a same-sex partner, must benefit from the same advantages as those conferred upon his or her colleagues when they marry. The refusal to confer such benefits on an employee constitutes direct discrimination on the ground of sexual orientation. Prior to the law authorising marriage between same-sex couples, the French Government always refused to amend Articles 3142-1 ff. of the Labour Code, which denies family holidays for same-sex partners. The issue remains in relation to rights are still pending and which could be claimed by people in life partnerships during the period prior to Law No. 2013-404 of 17 May 2013 opening marriage to same-sex couples.

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

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

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

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

As explained in Section 1, it is a general principle of administrative law of constitutional value that origin cannot be taken into consideration, whether by legal texts or in management practices. Not only is the criteria of nationality not taken into account, but until university, if a child's parents are in France illegally, this cannot be taken into account to deny the child access to school or preschool. The Grenoble Appeal Court convicted a mayor for refusing to register children of North African origin at schools and school cafeterias.¹⁷⁹ Since then, this principle has been systematically enforced by administrative courts.

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

No official monitoring takes origin into account. However, due to geographical zoning there is a concentration of migrant children and children of foreign origin in specific schools, where overall educational achievements are lower than in other schools.¹⁸⁰

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

¹⁷⁸ CJEU, C-267/12, *Frédéric Hay Vs. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 December 2013.

¹⁷⁹ Grenoble Court of Appeal, 13 November 1991. TA Bordeaux, 14 June 1988, El Rhazouari, *Recueil Lebon*, p. 518.

¹⁸⁰ DEPP, Information note No.18, June 2016. http://cache.media.education.gouv.fr/file/2016/67/1/depp-ni-2016-18-evaluation-numerique-competences-socle-debut-sixieme-niveaux-performance-contrastes-selon-academies2_597671.pdf (accessed 6 July 2017).

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

Religion

The same principle of equality has been used to adjudicate on the applicability of the obligation to attend school to children whose religion enjoins worship on a day other than Sunday. In this case, the *Conseil d'Etat* gave priority to the protection of freedom of worship, arguing that compulsory school attendance is not intended to, and may not lawfully, deny to pupils who request it, such individual leave of absence as may be necessary for worship or celebration of a religious festival, at least in so far as their absence is compatible with performance of the tasks entailed by their studies and with the maintenance of good order (*ordre public*) in the school.¹⁸¹

The Law on the application of the principle of secularism in state schools was adopted on 15 March 2004 and published on 17 March 2004 (Law of 15 March 2004 No. 2004-228).¹⁸² It forbids '...in state primary, secondary and high schools, the wearing of symbols or clothing by which students manifest their religious affiliation' (author's translation). Discreet religious symbols remain authorised. The law further instructs each school to adopt in-house regulations in order to put in place a procedure of enforcement by disciplinary decision preceded by a mediation and dialogue process with the student.

The administrative instruction of 18 May 2004 on the conditions of enforcement of the above-mentioned law was published on 25 May 2004 (Ministerial instruction No.2004-084 of 18 May 2004).¹⁸³ It states that 'the prohibited symbols and clothing are those by which people are immediately identified with their religious beliefs, such as the Muslim headscarf, by which ever word it may be designated, the kippah or a cross of manifestly excessive dimension' (author's translation). However, it emphasises the necessity of organising a true dialogue between the student, the parents or legal representatives and the head teacher of the school, in order to limit disciplinary sanctions to cases of deliberate refusal by the student to abide by the law.

In 2006, unresolved cases were limited to boys from the Sikh community and a few cases related to the Muslim headscarf. Their legal action before administrative courts and, ultimately the ECtHR have been dismissed.¹⁸⁴

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

¹⁸¹ *Conseil d'Etat, Consistoire central des israélites de France*, Mr Koen, No. 157653, 14 April 1995, available at: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007855903> (accessed 6 July 2017).

¹⁸² France, Law No. 2004-228 of 15 March 2004 on the principle of secularism in state schools (*Loi No. 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité*), available at: <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000417977> (accessed 6 July 2017).

¹⁸³ Available at: <http://www.education.gouv.fr/bo/2004/21/MENG0401138C.htm> (accessed 6 July 2017).

¹⁸⁴ *Conseil d'Etat*, No. 285394, 05 December 2007; ECtHR, No. 25463.08, 30 June 2009.

In the meantime, on 1 November 2012, the UN Human Rights Committee contradicted the European Court of Human Rights in relation to the complaint filed by Mr Singh alleging that expulsion from school pursuant to the law of 15 March 2004 for wearing Sikh religious symbols was a violation of his right to freedom of religion pursuant to Articles 2, 17, 18 and 26 of the International Covenant on Civil and Political Rights.¹⁸⁵ The Committee decided that it must evaluate whether this restriction of freedom of religion complies with the requirements of being necessary and proportionate in accordance with Article 18, paragraph 3, of the Covenant. To be legitimate, the exercise of freedom of religion must be detrimental to a stated aim protecting public safety, order, health, morals or fundamental rights and freedoms of others. Even if secularism meets these requirements, given the importance of the male religious outfit in the Sikh religion, which forms part of the identity of a person, and the scope of the penalty on the pupil expelled from school, the Committee considered that the state had not established that wearing such a garment would present a threat to public order or to the fundamental rights and freedoms of others and that the sanction was proportionate. The Committee ordered the state to correct the individual situation and prevent further violations of the Covenant by the French education system.

In addition, the Law of 31 December 1959 recognises religious private schools and provides for financial support from the state for such schools which follow the national education programme.¹⁸⁶

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

The Defender of Rights requested an opinion from the *Conseil d'Etat* regarding the conditions of application of the rule of neutrality for public servants in relation to voluntary participants in public service. The *Conseil d'Etat* indicated that it does not impose religious neutrality on mothers accompanying their children to out-of-school activities, but it stated that the competent authority, on a case-by-case basis, can recommend that they abstain from manifesting their religion and beliefs, if maintaining peace in a given situation or environment requires it.¹⁸⁷ The Minister of Education has since declared that she would comply with this opinion.

In 2008 and 2009, the HALDE received a number of claims from women who were denied access to adult education delivered by the state school system on the ground that they wore a Muslim headscarf. In a case brought before the Administrative Court of Paris,¹⁸⁸ an injunction ordering the immediate re-integration of the claimant into the school was granted. The HALDE presented observations. The court decided that the ground of her exclusion was *prima facie* null and void, considering that the prohibition of religious symbols in state schools did not apply to adult education programmes. The decision was confirmed on its merits by the Paris Administrative Appeals Court.¹⁸⁹

In addition, in a criminal case alleging discrimination on the ground of religion further to the exclusion of a student from an adult higher education apprenticeship programme because she was wearing a Muslim headscarf, which was deemed contrary to the internal

¹⁸⁵ UN Human Rights Committee, 106th session, no 1852/2008, 4th December 2012, *Bikramjit vs. France*, available at: <http://unitedsikh.org/rtt/doc/BikramjitSinghDecision/pdf> (accessed 6 July 2017).

¹⁸⁶ France, Law No. 59-1557 of 31 December 1959 governing relations between the State and private schools (*Loi n° 59-1557 du 31 décembre 1959 sur les rapports entre l'Etat et les établissements d'enseignement privés*) available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000693420> (accessed 6 July 2017).

¹⁸⁷ Study conducted and adopted at the request of the Defender of Rights by the Plenary Assembly of the *Conseil d'Etat* on 23 December 2013, available at: <http://www.defenseurdesdroits.fr>, accessed 6 July 2017.

¹⁸⁸ Paris Administrative Court, *Said v. Greta*, No. 0905233.9, 27 April 2009.

¹⁸⁹ Paris Administrative Appeals Court, No. 0905232, 5 November 2011.

regulations of the school,¹⁹⁰ on 8 June 2010 the Paris Court of Appeal, in application of Article 225-2 of the Penal Code, condemned the education centre to a fine of EUR 3 275, its Director to a fine of EUR 1 250, and both were required to pay damages amounting to EUR 10 500.

Migrant children

The education system provides for special classes to integrate newly arrived foreign migrant children and Traveller children.¹⁹¹ In the school year 2014-2015, 52 500 non-francophone migrant children were integrated in 9 200 schools of the national school system: 25 500 in elementary school, 22 300 in secondary school and 4 700 in the *Lycée* (upper high school). Of the total, 71 % arrived during the course of the school year and nine out of 10 of them received classes in linguistic support.¹⁹² However, in many geographical sectors, newly arrived children must wait six to eight months after their evaluations before being integrated.¹⁹³

As regards the situation of non-accompanied minors, their increasing number has created tensions jeopardising the effective implementation of the system that is in place to protect them. In 2016, the Defender of Children regularly denounced the failure of the State to ensure their protection. This has direct implications for their access to education since school authorities will not register non-accompanied minors who have not yet been put under the protection of the Child Protection Services. In this context, the Defender of Rights and the Defender of Children have declared that the right to education of non-accompanied minors has no effect.¹⁹⁴

In May 2016, further to the recommendation of the Defender of Rights made in April 2016, deploring the lack of action by the Ministry of Education in respect of the migrant children of Calais, a class open to all children was put in place on the site of the Calais camp. However, since then the camp has been cleared and these children are dealt with through the national scheme of support for unaccompanied minors, which is financed by each department.¹⁹⁵

¹⁹⁰ Paris Court of Appeal, *Ms Boutaina Benkirane v. Centre universitaire de formation par l'apprentissage Sup 2000*, No. 08.08286, 8 June 2010.

¹⁹¹ Franchi, V. (2002), *Raxen 4 European Monitoring Centre on Racism and Xenophobia (EUMC) French national report on Education*, available at: http://fra.europa.eu/sites/default/files/fra_uploads/186-CS-Education-en/pdf (accessed 6 July 2017); Policy document No. 2002-102 issued on the 25 April 2002; On educational integration of newly arrived non-French speaking children see Ministerial instruction no 2012-141 of 2 October 2012 relating to the school integration of newly arrived non-French speaking children, (*circulaire no 2012-141 du 2 octobre 2012 relative à la scolarisation des élèves allophones nouvellement arrivés*). http://www.education.gouv.fr/pid25535/bulletin_officiel/html?cid_bo=61536 (accessed 6 July 2017); Ministerial Instruction No. 2012-142 of 2 October 2012 relating to the schooling of children from Traveller families and families without residence (*Circulaire no 2012-142 du 2 octobre 2012, REDE 236611C/ RED-DEGESCO A1-1 relative à la scolarisation de enfants issus de familles itinérantes et de voyageurs*), available at: http://www.education.gouv.fr/pid25535/bulletin_officiel.html?cid_bo=61529 (accessed 6 July 2017).

¹⁹² DEP, Information Note No. 35, October 2015, <http://www.education.gouv.fr/cid58968/annee-scolaire-2014-2015-52-500-eleves-allophones-scolarises-dont-15-300-l-etaient-deja-l-annee-precedente.html> (accessed 6 July 2017).

¹⁹³ Defender of Children (2016), *Annual report of the Defender of Children, The Fundamental Right to education: a school for all, a right for each child (Droit fondamental à l'éducation: une école pour tous, un droit pour chacun)*, 18 November 2016, <http://www.defenseurdesdroits.fr/fr/publications/rapports/rapports-annuels-droit-de-l'enfant/droit-fondamental-l-education-une-ecole> (accessed 6 July 2017).

¹⁹⁴ Defender of Children (2016), *Annual report of the Defender of Children, The Fundamental Right to education: a school for all, a right for each child (Droit fondamental à l'éducation: une école pour tous, un droit pour chacun)*, 18 November 2016, <http://www.defenseurdesdroits.fr/fr/publications/rapports/rapports-annuels-droit-de-l'enfant/droit-fondamental-l-education-une-ecole> (accessed 06 July 2017).

¹⁹⁵ Defender of Rights, Decision 2016-113 of 20 April 2016, <http://www.defenseurdesdroits.fr> (accessed 6 July 2017).

a) Pupils with disabilities

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

Law No. 2005-102 of 11 February 2005 on equal opportunities and the integration of disabled persons completely reforms the assistance and education of disabled children.¹⁹⁶ It creates an express obligation on the state to ensure the education of all disabled children. The right to education and to reasonable accommodation within education of disabled children is affirmed in Articles 19 to 22 of the Law on Disability. Article 11 affirms a right of access to local mainstream schools and the right to an individual educational programme.

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

Article 19 III creates an obligation to provide education to each child at every level of education and a right to access to mainstream school is conferred by Article L112-1 of the Code of Education. The adoption of the decrees necessary to implement institutional reforms pursuant to the adoption of the Law on Disability was completed in 2006. Decree No. 2005-1589 of 19 December 2005 was adopted to enforce the administrative simplification of the management of the various rights of disabled people.¹⁹⁷

Since 2005, amongst other tasks, the Commission for the Rights and Autonomy of Disabled Persons must determine whether children, in consideration of the 'personal life project' established by the Commission, should be placed in the mainstream educational system, in some cases with special support, in specialised classes (CLIS) or in specialised educational institutions.¹⁹⁸ The Regional Administration of National Education (*Académie*) is part of this commission, together with everyone involved in the support and education of the child. The remedies available to parents if they are opposed to the conclusions of the orientation process are dealt with in Section 6.1 of this report.

Parents cannot demand a schooling orientation which differs from that proposed by the Commission for the Rights and Autonomy of Disabled Persons. If access to the local mainstream school is not possible because of the physical condition of the premises, the extra cost of transport to another school is met by the municipal authorities (Article L112-1, paragraph 8, of the Code of Education).

¹⁹⁶ Regarding autism and access to facilities, education and support, a national plan was initiated in 2004 to provide resources at the regional level, followed by a plan for 2005/2006 to provide resources at the local level. Available at: <http://www.autismes.fr/fr/textes-rapports/html> (accessed 6 July 2017).

¹⁹⁷ France, Decree No. 2006-583 of 23 May 2006 on the regulatory provisions of Book II of the Code of Education J.O. No. 120, 24 May 2006 (*Décret n° 2006-583 du 23 mai 2006 relatif aux dispositions réglementaires du livre III du code de l'éducation*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000607176> (accessed 6 July 2017).

¹⁹⁸ France, Decree No. 2005-1587 of 19 December 2005 on the Departmental House [Authority] for the Disabled, J.O. no 295, 20 December 2005 (*Décret No. 2005-1587 du 19 décembre 2005 relatif à la maison départementale des personnes handicapées et modifiant le code de l'action Sociale et des familles*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000454078&dateTexte=&categorieLien=id> (accessed 6 July 2017). France, Decree No. 2005-1752 of 20 December 2005 on schooling for disabled students J.O. no 304, 31 December 2005, (*Décret n°2005-1752 du 30 décembre 2005 relatif au parcours de formation des élèves présentant un handicap*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000456016> (accessed 6 July 2017).

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

A report to the Minister of Social Affairs of 22 June 2014 estimates the number of disabled children without an adequate solution to the lack of available facilities as being around 20 000.²⁰⁰

b) Trends and patterns regarding Roma pupils

The education system provides for special classes to integrate newly arrived foreign migrant children and Traveller children²⁰³ and Law No. 2000-614 of 5 July 2000, on the accommodation of Travelling people (a euphemism that covers all travelling populations), provides for a duty to accommodate the temporary school attendance of French Traveller children and Roma children.²⁰⁴ Again, some mayors fail to respect the law. When they are brought before the courts they are sanctioned, but Traveller parents on the road will often

204 France, Law No. 2000-614 of 5 July 2000 relating to the accommodation of Travellers (*Loi No. 2000-614 du 5 juillet 2000 relative à l'accueil et à l'habitat des gens du voyage*).
<http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000583573> (accessed 6 July 2017).

leave without seeking enforcement. Moreover, as recognised in the ESRC decisions of 25 January 2012, *European Roma and Travellers Forum v. France*, and the decision issued further to the complaint of *Médecins du Monde v. France*, published 21 January 2013, the ongoing expulsion of Travelling people and foreign Roma populations, resulting from Government policy against the unauthorised occupation of private and public property, significantly hinders de facto children's access to education.

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

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

The National Parking Accommodation Scheme for Travellers aims to stabilise residence and favours school attendance for children, as all mayors are obliged to accept registration of children in school even for a few days, followed by registration by the school principal (Articles L131-10 and 131-11 of the Code of Education and 227-17-2 of the Penal Code). However, where these schemes have been implemented, they tend to generate concentrations, and in some cities (Dijon, Nancy and Toulouse), there are schools with a majority of children from the Travelling community on their rolls. In addition, the schemes' terms and conditions of occupation often provide for a maximum period of stay that forces parents to leave and interrupt the school year.²⁰⁵

Ministerial instruction No. 2012-142 of 2 October 2012 on school integration of Travelling children reiterates the duty to integrate Traveller and Roma children, regardless of their nationality, housing conditions and legal residency on the French territory. This instruction was completed by another Ministerial instruction (*circulaire* No. 2012-143 of 2 October 2012)²⁰⁶ providing for the generalisation to all rectorates of the CASNAV scheme (centres for the promotion of school attendance by non-French-speaking children who have recently arrived in France and Traveller children). In order to facilitate integration, children can register for school attendance directly with the CASNAV.

Many mayors overtly refuse to register Traveller and Roma children for school on the ground of their parent's illegal occupation of land, against the instructions of that Government. As most mayors are also MPs, they often attempt to defer compliance to the demands of Governmental authorities until effective eviction of campsites by local authorities. It is important to stress that they adopt this attitude even when education authorities, courts or prefects intervene and request registration of children.

Therefore, in many cases, local authorities discriminate in access to education and difficulties in enforcing the law create situations of discrimination contrary to Directive 2000/43. According to a study of 13 000 persons living in slums and squats between 2012 and 2015, 8 000 to 10 000 were children.²⁰⁷ Furthermore, 88 % of children of school age

²⁰⁵ Defender of Children (2016), *Annual report of the Defender of Children, The Fundamental Right to education: a school for all, a right for each child (Droit fondamental à l'éducation: une école pour tous, un droit pour chacun)*, 18 November 2016, <http://www.defenseurdesdroits.fr/fr/publications/rapports/rapports-annuels-droit-de-l'enfant/droit-fondamental-l-education-une-ecole> (accessed 6 July 2017).

²⁰⁶ France, Ministerial Instruction No. 2012-143 of 2 October 2012 relating to the organisation of CASNAV (*circulaire no 2012-143 du 02 octobre 2012 relative à l'organisation des CASNAV*), available at: http://www.education.gouv.fr/pid25535/bulletin_officiel.html?cid_bo=61527 (accessed 6 July 2017).

²⁰⁷ Defender of Children (2016), *Annual report of the Defender of Children, The Fundamental Right to education: a school for all, a right for each child (Droit fondamental à l'éducation: une école pour tous, un droit pour chacun)*, 18 November 2016, <http://www.defenseurdesdroits.fr/fr/publications/rapports/rapports-annuels-droit-de-l'enfant/droit-fondamental-l-education-une-ecole>, (accessed 6 July 2017).

who are living in slums, squats or otherwise illegally occupied land (the majority of whom are of Roma origin or Travellers), are not registered in school.²⁰⁸

In addition, the Government's policy of eviction of illegally occupied land de facto interrupts access to school of the children that are evacuated in 80 % of cases.²⁰⁹

In the meantime, under the pressure of the Defender of Rights and of NGOs, the Ministry of Education authorities and prefects intervene more and more to proceed to unilateral registration of children in public school.

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

In France, national legislation prohibits discrimination in the following area: access to and supply of goods and services as formulated in the Racial Equality Directive.

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

On 15 December 2015, the Court of Cassation's Criminal chamber sentenced EasyJet to a fine of EUR 50 000 and the subcontracting operating company was sentenced to a fine of EUR 25 000. Both companies were also jointly ordered to compensate the claimants the sum of EUR 2 000 each in damages, and to give a symbolic EUR 1 to the NGO *Association des Paralysés de France*. The Court of Cassation maintained the position of the Court of Appeal of Paris that the decision of EasyJet not to train its personnel and the systematic refusal of the company to allow disabled people to board a plane without verifying their concrete capacity to travel alone constitutes an overall policy based on disability.

Further to the adoption of Law No. 2016-1547 of 18 November 2016 on the modernisation of the justice system in the 21st century, Article 2(3) of Law No. 2008-496 completes the implementation of Directive 2000/43/EC by prohibiting all types of discrimination defined in Article 1 of the law, with the benefit of the shift in the burden of proof before administrative and civil jurisdictions in access to goods and services, whether private or public, on the basis of all grounds prohibited by French law, including 'race' and ethnic origin.

However, paragraph 2 of Article 2(3) generalises the possibility of justifying discrimination in access to goods and services, social protection, social advantages, health and education in the following terms:

'This principle does not preclude difference of treatment based on one of the grounds mentioned in Article 1 when they are justified by a legitimate aim and the means to pursue this objective are necessary and appropriate.'²¹⁰

Article 2(3), paragraph 3, expressly states that such justification is not admissible for Article 19 TFEU grounds.

²⁰⁸ GIP Habitat et Intervention sociale pour les mal logé (2014), *Avis sur la situation des populations des campements en France métropolitaine* (Opinion on the situation of the populations occupying illegal camps in Metropolitan France), 3 July 2014.

²⁰⁹ GIP Habitat et Intervention sociale pour les mal logé (2014), *Avis sur la situation des populations des campements en France métropolitaine* (Opinion on the situation of the populations occupying illegal camps in Metropolitan France), 03 July 2014.

²¹⁰ France, Law No. 2008-496, 27 May 2008, Article 2(3): 'Ce principe ne fait pas obstacle à ce que des différences soient faites selon l'un des motifs mentionnés au premier alinéa du présent 3° lorsqu'elles sont justifiées par un but légitime et que les moyens de parvenir à ce but sont nécessaires et appropriés.', <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000018877783> (accessed 6 July 2017).

3.2.9.1 Distinction between goods and services available publicly or privately

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

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

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

However, the Perben Law No. 2004-204 of 9 March 2004, adapting justice to developments in criminality creates an aggravated sanction in the case of a discriminatory refusal to sell goods or to provide access to public places.²¹¹

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

In France, national legislation prohibits discrimination in the following area: housing as formulated in the Racial Equality Directive.

Article 158 of the Law of 17 January 2002 amended Article 1, paragraph 2, of Law No. 89-462 of 6 July 1989 on relations between landlords and tenants, and forbids discrimination in access to rental housing, whether private or public, on all grounds of discrimination prohibited by French law except age, and provides for civil remedy and a shift in the burden of proof. In 2014, Law No. 89-462 on relations between landlords and tenants was amended to extend the prohibition to all grounds prohibited by article 225-1 of the Penal Code, by Article 1 of Law No. 2014-366 of 24 March 2014 on promoting access to housing and regenerating urban planning (ALUR Law).²¹² These provisions apply to national and non-nationals.

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

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

There can be no exception to the prohibition of racial discrimination in French law, and the law provides no exception to the principle of non-discrimination in housing. Even safety considerations cannot justify discriminating in renting an apartment to a disabled person.²¹³

²¹¹ France, Law No. 2004-204 of 9 March 2004, adapting justice to developments in criminality (*Loi No. 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000249995&dateTexte=&categorieLien=id> (accessed 6 July 2017).

²¹² France, Law No. 2014-366 of 24 March 2014 on promoting access to housing and regenerating urban planning (*Loi No. 2014-366 du 24 mars 2014 pour l'accès au logement et un urbanisme rénové*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028772256&categorieLien=id> (accessed 6 July 2017).

²¹³ High Judicial Court of Paris, 17th Chamber, *Poncelet v. Lassailly*, No. 0402608235, 28 June 2005.

There is no policy that aims to address discrimination against migrants in the field of housing.

There is no major anti-discrimination case law in the field of housing that discusses access to housing of migrants or discrimination relating to the fact of being a migrant. There are cases that deal with issues relating to long-term foreign residents and migrants that discuss the issue in terms of discrimination on the ground of origin.

However, social housing institutions have interpreted the concept of social mix, which must govern allocation, as including a reference to origin in order to prevent concentrations that would lead to segregation. In a context where the concentration of people of foreign origin and migrants in social housing is a characteristic of the suburbs, the prohibition against any consideration of origin *de facto* conflicts with desegregation policies and management practices.

SOS Racism obtained a ruling against the St-Etienne social housing corporation on the basis of their ethnic management of access to housing.²¹⁴ In this case, the inter-ministerial mission for housing reported in July 2005 that the file of each tenant contained an indication of their racial/ethnic origin.

In July 2017, the Criminal Chamber of the Court of Cassation decided for the first time that a social housing corporation was legally responsible for the conditions in which the commission of attribution proceeded to the selection of tenants. The Court decided that the decision taken by a commission of attribution of social housing, composed of persons external to the social housing corporation itself, that dismissed an application on the ground that the candidate of African or Caribbean origin did not meet the legal requirement relating to social mix, in the context of a particular social lodging, engaged the criminal liability of the social housing corporation.²¹⁵

The Court stated that, by designating the commission of attribution as the structure legally attributing social housing, Article 441-2 of the Code of Construction and Housing confirms that these commissions constitute an integrated structure of the social housing corporation and can thereby engage its criminal liability under article 225-2 of the Penal Code. In addition, the Court, for the first time, concluded that taking into consideration the racial or ethnic origin of an applicant in order to determine whether the social mix requirement was met, constituted discrimination in access to goods and services, as understood by the Criminal Code.

Disability

Article L111-7 of the Construction and Housing Code requires public and residential buildings to be designed and built to be accessible to people with disabilities. The conditions governing the enforceability of this principle and the regulation of any delay in making the necessary adaptations were adopted by decree in 2006. Decree No. 2006-555 of 17 May 2007, specifies that the obligation concerns common areas, internal and external, part of the parking space for vehicles, residential lifts, collective premises and equipment.²¹⁶

²¹⁴ High Judicial Court of St-Etienne, No. 204/09, 3 February 2009.

²¹⁵ Court of cassation, Criminal Chamber, 11 July 2017, 16-82426, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000035192594&fastReqId=1856731927&fastPos=1>, accessed 1 March 2018.

²¹⁶ France, Decree No. 2006-555 of 17 May 2006 on the accessibility of buildings receiving the public and residential buildings and modifying the Construction and Housing Code, J.O. No. 115, 18 May 2006 (*Décret No. 2006-555 du 17 mai 2006 relatif à l'accessibilité des établissements recevant du public, des installations ouvertes au public et des bâtiments d'habitation et modifiant le code de la construction et de l'habitation*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000819417&dateTexte=&categorieLien=id> (accessed 6 July 2017).

Although the Law of 11 February 2005 had imposed a deadline that all buildings open to the public conform to accessibility requirements by 2015, this was postponed by Law No. 2014-789 of 10 July 2014 authorising the Government to adopt legislative measures for the implementation of the accessibility of public places. This delay postpones the prosecution and issuing of sanctions provided by the law of 2005 beyond 1 January 2015. In exchange, operators of public places (i.e. private and public managers) must formally undertake to abide by a specific calendar for each type of works, providing for a timetable of between three months and nine years, according to the type of works. The calendar sets out detailed deadlines for preparing and programming the works, taking the form of 'programmed accessibility timetables' (*agendas d'accessibilité programmée* – Ad'AP). Three decrees were adopted to specify the conditions for the implementation of these timetables, one for each type of works. Decree 2014- 1327 relates to public buildings and public places open to the public. In addition, decree 2014-1326 was adopted to review the standards of adaptation works in relation to the accessibility of existing buildings.

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

Articles L441-1, 441-3 and 441-5 of the Construction and Housing Code provide for a priority in the allocation of social housing for disabled persons and their families, however decrees of application necessary to the enforcement of these provisions have not been adopted. The HALDE recommended their adoption in 2006.²¹⁷ To date, the Government has not acted on the HALDE's recommendation.

3.2.10.1 Trends and patterns regarding housing segregation for Roma

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

Travellers

The Traveller population is subject to specific rules of accommodation. Municipalities of more than 5 000 inhabitants have an obligation to accommodate travelling populations by providing settlement areas as stipulated by Law No. 2000-614 of 5 July 2000, and the technical requirements of these areas are provided by decree 2001-569 of 29 June 2001²¹⁸ reviewing legislation that was first adopted in 1990 (Law No. 90-449 of 31 May 1990).

The installation of motor homes on unauthorised parking spaces is sanctioned by administrative expulsion measures created by Law No. 2003-239 of 18 March 2003.²¹⁹ Although the law provides that a municipality which has not satisfied its legal obligation cannot expel illegally parked Roma Travellers, the concentration of Travellers and the insufficiency of available space is a major problem.

²¹⁷ Halde Deliberation 2006-150, available at: <http://www.defenseurdesdroits.fr>.

²¹⁸ France, Law of 5 July 2000, see above note 135; Decree 2001-569 of 29 June 2001 relating to technical rules applicable to areas of accommodation of Travellers (*Décret n°2001-569 du 29 juin 2001 relatif aux normes techniques applicables aux aires d'accueil des gens du voyage*), available at: http://www.legifrance.gouv.fr/jopdf/common/jo_pdf.jsp?numJO=0&dateJO=20010701&numTexte=6&pageDebut=10540&pageFin=10540 (accessed 6 July 2017).

²¹⁹ France, Law No. 2003-239 of 18 March 2003 on interior security (*Loi No. 2003-239 du 18 mars 2003 pour la sécurité intérieure*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000412199> (accessed 6 July 2017).

According to the most recent data referred to in a report by the Auditor General (*Cour des comptes*) of 2012 evaluating public policy on Travellers,²²⁰ 96 departmental schemes were adopted. Of the 41 589 places planned by the authorities (NGOs consider that 60 000 are needed), 52 % of the programmed parking areas for Roma and Travellers and 27 % of areas for large-scale events had been implemented. Their manifest insufficiency therefore increases illegal parking, monitoring by the police and the criminalisation of the way of life of Roma and Travellers, since they are concentrated in areas that have satisfied their legal obligations, while offering an insufficient number of spaces.

When a municipality fails to put in place specific sites for the travelling population, it is barred from seeking the removal of Travellers' trailers and from prohibiting parking²²¹ and can be challenged for this failure before the administrative courts.

The Versailles Court of Appeal, in the application of the *Winterstein* ECHR jurisprudence, decided that where there has been long-term ownership and occupation of land by Travellers, the site would have acquired the status of a home. Therefore, in order to meet the requirement that an order for evacuation is a proportionate infringement of the right to a private life and respect for home protected by Article 8 of the ECHR, the duty is on the town mayor to establish that the occupation infringes the rights of neighbours, that it constitutes a threat to security and that the town has taken every measure to provide alternative housing.²²²

There is no widespread policy to facilitate the settlement of Travellers.

Some families attempt to purchase land, which for economic reasons is often situated in areas where residential construction is not permitted, and they thereby enter into complicated legal conflicts with municipalities with respect to their conditions of occupation of the land. Many mayors adopt decrees to forbid motor home parking on their entire territory, in order to prevent authorised parking on private land. Even though such decrees have systematically been found to be illegal, this situation increases monitoring, evictions and an overall atmosphere of a denial of access to rights.²²³

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

Foreign Roma and other migrants

Since 2008, with an escalation from 2012, the Government has pursued a systematic policy against slums occupied by Roma, and since 2015, other unsheltered migrants as well, defining it as the unauthorised occupation of private and public property. This has generated a situation in which there are constant evictions of Travelling people, foreign Roma and other migrant populations.

A ministerial instruction was published on 28 August 2012, putting in place a policy anticipating the dismantling of illegal camps, in order to implement humanitarian conditions in relation to access to housing, education and social rights in the context of each eviction of Travellers, Roma and other migrants from illegally occupied land. The

²²⁰ France, Auditor General, The accommodation of Travellers, 10 December 2012, (*Cour des comptes*, 10 décembre 2012, *L'accueil et l'accompagnement des gens du voyage*) available at: http://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2016/05/ccomptes_rapport_thematique_gens_du_voyage.pdf (accessed 6 July 2017).

²²¹ High Judicial Court of Montauban, No. 02/00171, 03 May 2002. Available at: www.rajf.org/article/php3?id_article=1043 (accessed 6 July 2017).

²²² Versailles Court of Appeal, No. 16/02752, 1 June 2017, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000035083402>, accessed 7 March 2018.

²²³ Bordeaux Administrative Appeals Court, No. 03BX00379, 1 December 2005.

ministerial instruction is used by NGOs before the courts to defer expulsion, but the available evaluations by the ministry indicate that the authorities are not complying with the instruction. According to the census carried out by the Human Rights League and the European Roma Rights Centre (ERRC), re-housing solutions were implemented in relation to 29 Roma campsites in 2015, compared to 71 accommodation solutions in respect of the 138 evictions of Roma campsites that had taken place in 2014. Therefore, issues of enforcement relate to political will and policy.

This policy, and massive forced return involving escorting foreign Roma to Romania and Bulgaria, has had a huge impact on the situation of Roma people, and can be considered as indirect discrimination using the rule relating to social protection requirements of freedom of circulation in the EU to threaten access of foreign Roma to all fundamental rights including housing, education, health and employment in accordance with Directive 2000/43.

In 2013, the Defender of Rights reported on the situation of Roma in France. The report found that 21 000 people were evicted from illegally occupied campsites. Further to this report, the inter-ministerial delegation for precarious housing (DIHAL) was given a wider and stronger mandate. EUR 4 million was awarded to support integration processes for individual families who would remain on French territory. Since then eviction procedures continue and the Defender of Rights still presents its conclusions before the courts in individual cases to support the suspension of eviction procedures.

To this day, this policy is still being pursued by the Government.

According to the census carried out by the Human Rights League and the ERRC,²²⁴ in 2017, 11 309 people were expelled from 130 living areas, (71 % of all slums); such action was particularly targeted at those slums occupied by Roma. This is an increase of 12 % when compared to the 10 119 persons evicted in 2016. In addition, 2 055 persons left their living areas under threat of eviction by the police. Of these evictions, 51 % related to public land that is not in use and that could be made available to implement a policy that would support the reduction of slums and the social integration of these populations, as was done with slums in the 1960s. Instead, the person living in a slum is treated as though they are delinquent and must be eradicated (see reports and press releases of the Council of Europe Commissioner for Human Rights²²⁵ and the UN Human Rights High- Commissioner).²²⁶ Most evictions have not been followed by emergency housing measures.

According to the Romeurope report of January 2017,²²⁷ on the first three quarters of 2016, a total population of 15 600 foreign Roma live in slums: 74 % had no rubbish bins or public collection of rubbish, 88 % were not connected to electricity and 77% had no access to water. Furthermore, 58 % of the sites are in dangerous locations.

The prefect of Ile de France (Paris region), which is where 50 % of slum dwellers live (7 000 people), has put in place a working group to enforce a strategy for the management

²²⁴ Human Rights League and the ERRC (2018), 'Census of forced evictions in living areas occupied by Roma (or people designated as such) in France', available at : <https://www.ldh-france.org/recensement-evacuations-forcees-lieux-vie-occupes-roms-personnes-designees-telles-en-france-en-2017/>

²²⁵ Council of Europe (2015), *Report of Nils Muižnieks, Commissioner for Human Rights, on his visit to France from September 2014*, 05/03/2015, <http://www.cncdh.fr/fr/actualite/rapport-par-nils-muiznieks-commissaire-aux-droits-de-lhomme-du-conseil-de-leurope> (accessed 6 July 2017); Letter of the Council of Europe Commissioner for Human Rights to the French Minister of the Interior: http://www.romeurope.org/IMG/pdf/lettre_comm_dg_coe_france_roms_26.01.16.pdf, accessed 6 July 2017.

²²⁶ Alert of the UN High-Commissioner on Human Rights, 11 September 2015: <http://www.un.org/apps/newsFr/storyF.asp?NewsID=35536#.WDGyhsn0-LU> (accessed 6 July 2017).

²²⁷ Romeurope (2017), '20 propositions pour une politique d'inclusion des personnes vivant en bidonville et squat', (20 proposals for an inclusion policy for people living in slums and squats), 16 February 2017; http://www.romeurope.org/wp-content/uploads/2017/02/Rapport_2017_20-propositions-1.pdf (accessed 6 July 2017).

of the sites and the eviction and provision of social support for their residents. On 20 October 2016, a group of NGOs wrote to the Minister for Housing and the prefect to complain that the working group was not pursuing its alleged objectives, that the eviction policy was pursued without interruption or renewed measures for the integration of families, education of children or access to healthcare for the occupants of these sites, and that the announced intention to secure living conditions on the campgrounds had not been pursued.²²⁸

On 6 July 2016, the ECtHR, in the context of an emergency procedure, issued an order to the French Government to suspend the execution of the planned clearance of a campsite called *Coignet*, in the city of St-Denis (93), which had been occupied for more than two years and where 40 families were living.²²⁹ The French Government ignored the order of the European Court, and the campground was dismantled on the order of the prefect of the department of Seine St-Denis (93). Only four families received social support in accordance with the ministerial instruction of 26 August 2012.

The policy of systematic eviction of Travellers and Roma for illegally occupying land, pursued by the current Government since 2012, without proper alternative support, has led to increased precariousness in terms of access to all fundamental, economic and social rights.

²²⁸ <http://www.romeurope.org/>.

²²⁹ ECtHR decision on petition No. 36779/16, available at: <http://www.romeurope.org/IMG/pdf/cedh.pdf> (accessed 6 July 2017).

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

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

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

Article 6, paragraph 3 of the Law provides:

'The prohibition of discrimination does not forbid difference in treatment if it constitutes a genuine and determining occupational requirement, as long as the objective pursued is legitimate and the requirement proportionate.'²³⁰

Further to constant debates in France on the ability of employers to adopt restrictions on wearing or displaying religious symbols, during discussion of Law No. 2016-1088 of 8 August 2016 on employment, the modernisation of social dialogue and the protection of professional careers, Parliament unanimously adopted a provision (Article 2) which amends the Labour Code to create, at Article L 1321-2-1, the ability for employers to set out in their in-house regulations the principle of neutrality as a rule and to stipulate restrictions on expressions of belief by employees. These restrictions have been justified by the exercise of other fundamental rights and liberties or by the necessities of the good functioning of the service, as long as they are proportionate to the objective pursued.²³¹

In-house regulations that have to be followed by the employees are regulated by Article 1321-1 of the Labour Code. Article 1321-1 provides that such regulations are unilaterally determined by the employer. If union representatives consider that their content violates the fundamental rights of employees their only recourse is to challenge them before the courts, based on the protection offered by article L1121-1 LC.

The issue of whether restrictions on wearing or displaying religious symbols in the workplace can constitute genuine and determining occupational requirements of the employment contract has been a subject of discussion for a number of years. It has given rise to the following question being referred to the Court of Justice by the Court of Cassation in the *Boungaoui* case:

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

²³⁰ France, Law 27 May 2008, Article 6 Para. 3: '*L'article L. 1133-1 est ainsi rétabli: 'Art. L. 1133-1.-L'article L. 1132-1 ne fait pas obstacle aux différences de traitement, lorsqu'elles répondent à une exigence professionnelle essentielle et déterminante et pour autant que l'objectif soit légitime et l'exigence proportionnée.'*

²³¹ France, Law No. 2016-1088 of 8 August 2016 on employment, the modernisation of social dialogue and the protection of professional careers, Article 2: '*Le règlement intérieur peut contenir des dispositions inscrivant le principe de neutralité et restreignant la manifestation de convictions religieuses des salariés, si ces restrictions sont justifiées par l'exercice d'autres libertés et droits fondamentaux ou par les nécessités du bon fonctionnement de l'entreprise et si elles sont proportionnées au but recherché.*', <https://www.legifrance.gouv.fr/eli/loi/2016/8/8/2016-1088/jo/texte> (accessed 6 July 2017).

the particular occupational activities concerned or of the context in which they are carried out?’

The European Court of Justice in the *Boungaoui* case²³² has held that an internal rule that forbids expression of religious, political and philosophical beliefs does not constitute direct discrimination. However, if this rule creates a disadvantage for persons of certain faiths, it could constitute indirect discrimination on the ground of religion or belief in the sense of Article 2(2)(b) of the directive. The Court concludes that pursuing a policy of neutrality towards the public can constitute a legitimate aim, but the means to carry out this objective must be proportionate and necessary.

The European Court of Justice further examined whether religious neutrality can constitute a genuine and determining occupational requirement. It stresses that the requirement must not be related to the protected ground of discrimination itself, but must be a characteristic related to this ground. It stresses further that it is only in very limited circumstances that religion will be held to constitute a genuine and determining occupational requirement, subject to a strict necessity and proportionality test.

Examining the request of the client in this case, the Court found that the desire of an employer to meet a client’s particular wishes cannot be considered to be a genuine and determining occupational requirement. The Court took that view, given that such a desire is not related to ‘the nature of the particular occupational activities concerned or of the context in which they are carried out’, that is something that is related to the activity itself when it is to be defined by the employer.

The Court of Cassation deciding the case²³³ followed the reasoning of the Court of Justice. First, it explicitly refers to the reasoning of the Court of Justice as regards the scope of the protection afforded to religion and refers to Article 9 of the ECHR as well as Directive 2000/78 to maintain a concept of religion that protects both religion per se, and the requirements of religious practice as subjectively defined by the beholder. Secondly, it concludes that Micropole’s decision to dismiss the claimant by reason of her refusal to remove her veil when clients so demand, constitutes a direct discrimination, and that therefore the only possible justification would be an exception provided by Article 4(1) of Directive 2000/78, regarding genuine and determining occupational requirements, such requirements being justified by the nature of the task to be executed. In evaluating whether Micropole’s justifications meet this requirement, it refers to the decision of the Court of Justice stating that the will of an employer to meet the desire of its client cannot be considered as a genuine and determining occupational requirement.

The Court of Cassation continues by adding an *obiter dictum* referring to the decision of the Court of Justice in the *Achbita* case, a liberty it seldom takes. Anticipating issues related to the legality of in-house regulations that will be adopted in the application of Article 1321-2-1 of the Labour Code - allowing restriction on the expression of belief by employees- it expressly sets out the conditions of compliance with the requirements of the European Court of Justice: it states that in-house regulations forbidding any philosophical, political or religious sign in the workplace do not constitute a direct discrimination on the ground of religion, but that such a restriction may give rise to indirect discrimination if it has an adverse impact on persons of a particular religion. In such a case, the restriction will only be justified if it pursues the legitimate objective of a policy of neutral political, philosophical and religious identity towards its clients and that the means to implement this objective are appropriate and necessary - a test which is to be evaluated by the National Court,

²³² CJEU, C-188/15, *Asma Boungaoui, ADDH v. Micropole SA.*, 14 March 2017, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=188853&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=125215>, accessed 1 March 2018.

²³³ Court of Cassation, No. 13-19855, *Asma Boungaoui, ADDH v. Micropole SA.*, 22 November 2017, available at: https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/2484_22_38073.html, accessed 1 March 2018.

which would include evaluating whether another job without contact with clients could be proposed to the employee. It concludes by stating that in the *Bouganoui* case there was no neutrality rule justifying disciplinary action, but an ad hoc rule targeting a specific religious sign.

In a decision regarding the clothing of people working for French social security - which is a private employer executing the functions of a public service - the Court of Cassation decided that a private employer executing a public service can adopt and enforce in-house regulations in order to implement the principle of secularism contained in Article 1 of the Constitution in relation to its employees, even if they are subject to a private law contract governed by the Labour Code.²³⁴ This right of the employer is applicable to all employees, whether or not they are in contact with the general public. Restrictions on freedom of religion can be justified by the nature of the particular occupational activities concerned and the context in which they were carried out, and thereby constitute a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate and the in-house regulations specific and precise. The case concerned here provides an example of a restriction which is sufficiently precise to satisfy the requirements of precision and proportionality of a genuine and determining occupational requirement and holds as acceptable a prohibition targeting clothing and a general rule of neutrality covering not only religion but also ethnic origin or ideological conviction.

Regarding the public service, external symbols of an individual's religion, such as wearing a headscarf, are forbidden for all members of the public service, who must respect the principle of neutrality,²³⁵ whether or not they are in contact with the public.

The Versailles Administrative Court of appeal was the first jurisdiction called upon to take a decision on the issue of the beard as a religious sign in the public service.²³⁶

The petitioner is an Egyptian medical student who was admitted as trainee for one year in the digestive surgery department of a public hospital of the Paris suburbs, pursuant to a convention between the hospital and his university. Article 6 of the convention states that the trainee will be bound to respect the rules of discipline provided by the Code of Public Health, which among other requirements, sets out a rule of religious neutrality. The director of the hospital enforced the rules after taking advice from the medical practitioner supervising the trainee. Four months after he took up his traineeship, the hospital annulled the convention and put an end to petitioner's training, on the ground that he wore an Islamic beard. The supervising practitioner was consulted and issued a favourable recommendation because 'of the perturbation created by this situation' within the work environment.

The court adopted its decision in consideration of the following facts: the petitioner's beard was very imposing; he was working in a multicultural environment; his beard was perceived to be a religious sign by members of personnel; and he was invited to have it reduced so that it would not be perceived as an Islamic religious sign. In reply, the petitioner refused to reduce his beard invoking his right to privacy. The petitioner's refusal was stated without referring to his religion, but without making a statement denying that his appearance could be held to manifest an Islamic religious sign.

The court holds that a beard, even a long one, cannot be held to constitute in itself a religious sign, in the absence of other factors confirming that it is, in the circumstances, the manifestation of a religious sign. However, although the beard was not combined with

²³⁴ Court of Cassation, No. 12-11.690 45, 19 March 2013.

²³⁵ *Conseil d'Etat, Mlle Marteaux* No. 217017, 3 May 2000; *Conseil d'Etat*, No. 244428, 15 October 2003.

²³⁶ Versailles Administrative Court of Appeal, 19 December 2017, N° 15VE03582, available at: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000036252625&fastReqId=110506859&fastPos=1>, accessed 3 March 2018.

any religious proselytising behaviour, or remarks on the part of patients and the public, the court still holds that the request of the hospital authorities for the petitioner to reduce his beard was justified by the necessity to enforce the principle of neutrality on the premises, particularly in a multicultural environment. The court does not further explain its decision. In these circumstances, the court's decision must be interpreted as a finding that, given the context giving rise to the appearance that the beard is a religious sign, the petitioner was required to establish that his beard was not such a sign in order to be allowed to keep it, which he did not.

Most commentators consider that the court's reasoning is flawed, since it is contradictory, recognising that a beard is not a religious sign per se, but imposing on the petitioner the burden of proving that his beard is not related to a religious practice, in contradiction with the principle holding that a public agent does not have to express his or her religious belief, or absence of belief. In addition, it seems to hold that the multicultural environment of the hospital has an impact on the enforcement of the rule. This indirectly refers to the right of the public authority to take into consideration the risk of disturbance caused by the behaviour of a public agent. However, in this case, the court expressly states that it created no disturbance for the public and patients.

In *Ebrahimian v. France*, a public hospital refused to renew the short-term contract of the claimant on the ground that she refused to remove her Islamic veil. The ECtHR validated the doctrine that a rule resulting from the constant jurisprudence of the *Conseil d'Etat* and imposing an obligation of religious neutrality on civil servants and public agents met the requirements of Article 9 of the ECHR, as it was held to have a sufficient legal basis and remain within the margin of appreciation of the State to give priority to the principle of secularity and neutrality of public service over the right of the claimant to express her religion.²³⁷

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

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

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

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

Ever since the decision of the Court of Cassation on 17 April 1991 in *Fraternité Ste Pie*, the religious orientation of the employer does not justify an exception to the application of Article L122-45 LC (now Article L1132-1 ff. LC). In this landmark case, which preceded the directive, the court decided that the sexual orientation of the employee was not in and of itself sufficient to justify dismissal. At the time, it considered that the employer was required to establish that the behaviour of the employee had, considering their function and their objective behaviour, generated substantial disruption (*'trouble caractérisé'*) within the community.²³⁸ In 1993, the Court of Appeal of Montpellier concluded that provocative distasteful behaviour could justify dismissal.²³⁹

- Religious institutions affecting employment in state-funded entities

²³⁷ ECtHR, No. 64846/11, 26 November 2015, <http://hudoc.echr.coe.int/fre?i=001-158878> (accessed 6 July 2017).

²³⁸ Court of Cassation, Social Chamber, 17 April 1991, *Droit Social* 1991, 485.

²³⁹ Court of Appeal of Montpellier, 28 January 1993.

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

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

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

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

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

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

In France, nationality (as in citizenship) has been held by courts to be explicitly mentioned as a protected ground in all anti-discrimination legislation under the term 'nation'.²⁴⁰

The definition of the scope of the protection against discrimination in Article 1 of Law No. 2008-496, Article 225-1 of the Penal Code and Article 1132-1 of the Labour Code have been unified on the basis of the list in the Penal Code since the adoption of Article 26 of Law No. 2016-1547 of 18 November 2016.

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

Access to Employment

As documented in the report produced by the GELD in 2000, the decision of the HALDE of 30 March 2009²⁴¹ and the report of the Defender of Rights on the fundamental rights of foreigners,²⁴² over the years, French legislation has created some legal discrimination in access to specific professions and jobs (about 7 000 named jobs in a number of different pieces of legislation), subjecting them to conditions of citizenship, whether national, from bilateral partner countries, such as some African countries, or from the European Union. This list, which covers liberal professions and a number of jobs in the private sector financed by the state (public transport, power companies etc.), has not evolved significantly since 2000.

This condition of nationality has historically been used to justify the unequal treatment of foreign citizens in relation to working conditions, retirement advantages and career

²⁴⁰ Court of Cassation, Criminal Chamber, No. 01-85650, 17 December 2002, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007070672&fastReqId=831302130&fastPos=6> (accessed 6 July 2017).

²⁴¹ HALDE, decision 2009-139 of 30 March 2009, <http://www.defenseurdesdroits.fr> (accessed 6 July 2017).

²⁴² Defender of Rights (2016g), *Les droits fondamentaux des étrangers en France* (The Fundamental Rights of Foreigners in France), May 2016, <http://www.defenseurdesdroits.fr> (accessed 6 July 2017).

advancement possibilities. This is illustrated by a case presently pending before the Court of Appeal of Paris, relating to the career and working conditions of 832 migrant workers who started their career with the French National Railway Company (SNCF) in the 1970s. As the regulatory status of the SNCF imposed a requirement of French nationality in order to be hired under its permanent employee status, North African employees were hired as contractual agents under a specific status, known as PS25, which was used for temporary employees and for persons holding a list of jobs that were not covered by the statutory regime. The claimants spent all of their careers at SNCF and are now suing for discrimination claiming compensation for their entire career and retirement benefits.²⁴³

In addition, many professions and professional activities impose national or European Union diploma requirements.

As regards access to the employment market, unless their residence permit is not related to work, i.e. is for example based on a right related to health or family life, foreigners who have obtained a work permit only have access to a limited list of jobs that are defined by each department, based on the fact that there is a lack of candidates or that the employer has not been able to find the adequate candidate with the specified profile of skills in France.

As regards asylum seekers, French legislation applies the minimal requirements of Directive 2003/9 of 27 January 2003, and therefore suspends access to employment until a decision has been taken on their application for a maximum period of nine months. In the meantime, asylum seekers receive an allowance for material reception conditions, but only after their application for asylum has been duly registered, which often takes many months and leaves them without resources.

Access to Health

Until they are officially authorised to reside in the territory, migrants, including asylum seekers and unaccompanied minors, are covered by a specific health insurance called State Medical Support (*Aide médicale d'état* - AME). This special regime de facto limits access to health services since many health professionals do not accept beneficiaries of AME and they essentially have access only to public health services.²⁴⁴

Police controls

On 27 January 2017, the Constitutional Council expressly stated that the provisions of the Code of Penal Procedure and of the CESEDA allowing the public prosecutor to mandate police to proceed to police controls without cause, could not be interpreted in such a fashion as to authorise discriminatory controls or to authorise police controls solely for the purpose of verifying the legality of the presence in French territory of the people subject to the control.²⁴⁵

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

In relation to discrimination based on 'nation' (meant as country of origin or citizenship), race or ethnic origin, whether it is direct or indirect, nationality and nationality of origin is regularly treated as an acceptable indication to constitute the comparable group in order

²⁴³ Paris Employment Tribunal, 21 September 2015, RG N°F 05/12309 and following.

²⁴⁴ Defender of Rights (2016g), *Les droits fondamentaux des étrangers en France* (The Fundamental Rights of Foreigners in France), May 2016, p. 36.

²⁴⁵ Constitutional Council Decision, No. 2016-606/607 QPC, 24 January 2017, available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2017/2016-606/607-qpc/decision-n-2016-606-607-qpc-du-24-janvier-2017.148526.html>, accessed 3 March 2018.

to establish unequal treatment. Nationality is often assimilated with origin when the law does not explicitly allow restrictions based on nationality.

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

In civil cases the Court of Cassation has treated discrimination based on nationality as a source of apparent indirect discrimination that allows for justification on the part of the employer.²⁴⁶ In this case, since 1993 a collective agreement had stipulated that employees of foreign nationality received a yearly bonus, even after having been in post with the company in France for a number of years (in some cases 20 years). In this situation, the court was faced with unequal financial benefits that could not be justified by the specifics of the work performed by the employee. First, the court decided that Article 12 of the EU Treaty did not cover this situation. In relation to the argument of indirect discrimination on the ground of origin, it further held that, in a high technology research installation, the business need to attract talented scientists from abroad, and the necessary compensation related to the expatriation of their families, were sufficient justifications of the adverse effect on the basis of origin to allow unequal remuneration based on nationality: attraction of workforce when proportionate is objectively justified.

On 21 September 2015, the Paris Employment Tribunal gave a decision regarding the liability of the SNCF (French National Railway Company) towards 832 migrant workers of Moroccan nationality, who were hired to fill lower execution jobs but were not hired under the same conditions as the French employees — the regulatory status of the SNCF imposed a requirement of French nationality to be hired under the permanent employee status. The claimants' specific employment conditions were less favourable than those applicable to French permanent employees. Although half of the 2 000 Moroccan employees became French citizens, only 113 obtained the permanent employee status reserved to French citizens and all the other Moroccan employees hired in the 1970s kept the PS25 status.

The court held that jobs covered by employment status PS25 were comparable to those held by French employees, but were only designated otherwise in order to employ foreign employees under another employment status and meet the formal requirements of the two employment statuses. Therefore, the claimants' employment status was held to constitute direct discrimination on the ground of nationality and the criteria of nationality was the basis of indirect discrimination on the ground of the origin of these non-national migrant workers. Claims were admitted, except in a few cases, and the claimants were awarded damages ranging from EUR 150 000 to EUR 250 000. SNCF's subsequent appeal before the Paris Court of Appeal was dismissed.²⁴⁷

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

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

a) Benefits for married employees

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

²⁴⁶ Court of Cassation, Social Chamber, *ESRF v. M. X.*, No. 03-47720, 9 November 2005, confirmed in another matter against ESRF on 17 April 2008 (Soc. 819 FS-P+B).

²⁴⁷ Paris Employment Tribunal, RG No.F 05/12309 and following, 21 September 2015, *832 Migrant workers v French National Railway Company (SNCF)*, appeal dismissed by the Paris Court of Appeal, Social Chamber, No. 15/11389, 31 January 2018.

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

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

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

In 2007 the HALDE concluded that reserving extra days of holiday for family events for married heterosexual couples and creating a premium for employees' weddings in a collective agreement constituted direct discrimination based on family status and indirect discrimination based on sexual orientation.²⁴⁸ The Government took the position that the PACS was a civil contract which was not aimed at creating a family status, and that therefore this reasoning did not apply. The Court of Cassation referred a preliminary ruling on this issue to the CJEU on 23 May 2012, in a case challenging the provisions of a collective agreement of the *Crédit Agricole*.

In a decision of 12 December 2013, the CJEU decided, further to a referral from the Court of Cassation in the case of *Hay v. Crédit Agricole*,²⁴⁹ that, if marriage is not accessible to same-sex partners, a salaried employee who enters a contractual union with a same-sex partner must benefit from the same advantages as those conferred upon their colleagues when they marry. The refusal to confer such benefits on an employee constitutes direct discrimination on the ground of sexual orientation. Prior to the law legalising marriage between same-sex partners, the French Government had always refused to amend Articles 3142-1 ff. of the Labour Code, which denies family holidays for same-sex partners.

Law No. 2013-404 of 17 May 2013 opened marriage to same-sex couples²⁵⁰ and no opposition on the part of employers to implement benefits to spouses in same-sex marriages has been observed. Therefore the issue of access to benefits only remains with respect to rights that are not accessible to non-married couples and that would have arisen in the period prior to the adoption of same-sex marriages.

b) Benefits for employees with opposite-sex partners

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

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

a) Exceptions in relation to disability and health/safety

In France, Article 24 II of Law 2005-102 on the rights of disabled people does not provide for exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78/EC).

However it provides for specific protection of health and safety for disabled workers and agents of the public service. They benefit from enhanced medical monitoring as determined by the occupational health doctor (Article R. 4624-18 of the Labour Code), and the

²⁴⁸ HALDE Deliberation No. 2007-366 of 11 February 2008, available at: <http://www.defenseurdesdroits.fr>.

²⁴⁹ CJEU, C-267/12, 12 December 2013.

²⁵⁰ France, Law No. 2013-404 of 17 May 2013, opening marriage to persons of same sex (*Loi No. 2013-404 du 17 mai 2013 ouvrant le mariage aux couples de personnes de même sexe*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027414540> (accessed 6 July 2017).

employer must ensure the accessibility of sanitary facilities and catering installations (Article R. 4225-6 of the Labour Code).

In addition, a specific scheme to support employers in maintaining disabled persons in employment is delivered by the specialised services of the Ministry of Employment.²⁵¹

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

4.7.1 Direct discrimination

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

Article 6 of Law No. 2008-496 allows the recognition of a legitimate reference to age in the following circumstances: when they are reasonably and objectively justified by a legitimate objective, such as those specified in the law, namely health requirements and worker's safety, professional insertion, maintaining employment, redeployment or compensation in case of loss of employment, and when the means to attain these objectives are appropriate and necessary.

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

However, in a decision of 15 November 2017,²⁵² relating to compensation for a dismissal that was null and void because it resulted from discrimination on the ground of age, the Social Chamber of the Court of Cassation has stated for the first time that principles applicable to the calculation of compensation could vary according to the legal character of the ground of discrimination at issue. Thereby, it creates a hierarchy between grounds and takes a stand that the ground of age is a ground of lesser gravity as it is not a fundamental right or freedom protected by the French Constitution. Hence, compensation for discrimination on the ground of age will be strictly limited to compensatory damages, with a deduction from the unpaid salaries all revenue of replacement (unemployment insurance or compensation) received by claimant.

a) Justification of direct discrimination on the ground of age

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

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

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

Cases relating to statutory age limitations in specific employment have only been deemed justified after a stringent scrutiny of performance requirements in the case of pilots and

²⁵¹ Assistance services in support of the continued employment of disabled persons (*services d'aide au maintien dans l'emploi des travailleurs handicapés*).

²⁵² Court of Cassation, Social Chamber, No. 16-14.281, 15 November 2017, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036053048&fastReqId=387503508&fastPos=1>, accessed 7 March 2018.

air traffic controllers.²⁵³ However, they can never be deemed justified if the employee is not entitled to a full pension.²⁵⁴

Situations also arise which do not relate to the implementation of public policy but decisions made by employers. A number of cases have held that differential treatment of older workers closes to retirement age, in relation to redundancy compensation, was not discriminatory if it was reasonable and proportionate.^{255 256}

Justifications based on requirements of human resources management have been deemed too general and not proportionate.²⁵⁷ In a 2014 decision, the Court of Cassation decided that overtly denying pilots access to training on a new plane because of imminent retirement constitutes age discrimination, since retirement age can be postponed in France and younger workers can also leave the company.²⁵⁸

b) Permitted differences of treatment based on age

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

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

Previous age limitations were removed by Article 1 of Executive Order 2005-901,²⁵⁹ except in access to public service in the following cases:

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

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

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

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

The provisions on occupational pension schemes are aligned with those on the state pension. The general rule stated in Articles 17 and 18 of Law No. 2010-1330 of 9 November

²⁵³ Court of Cassation Social Chamber, No. 08-45307, 11 May 2010, available at: <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000022214723&fastReqId=419955441&fastPos=1> (accessed 6 July 2017); Court of Cassation Social Chamber, No. 09-72061, 16 February 2011; *Conseil d'Etat*, No. 362785, 4 April 2014.

²⁵⁴ Court of Cassation Social Chamber, No. 08-4381, 11 May 2010.

²⁵⁵ Court of Cassation Social Chamber, No. 09-42071, 17 November 2010.

²⁵⁶ Court of Cassation Social Chamber, No. 10-24219, 5 December 2012.

²⁵⁷ Court of Cassation Social Chamber, No. 10-10465, 16 February 2011.

²⁵⁸ Court of Cassation Social Chamber, No. 13-10294, 18 February 2014.

²⁵⁹ France, Executive Order No. 2005-901 of 2 August 2005 relating to conditions of age in accessing public service (*Ordonnance No. 2005-901 du 2 août 2005 relative aux conditions d'âge dans la fonction publique et instituant un nouveau parcours d'accès aux carrières de la fonction publique territoriale, de la fonction publique hospitalière et de la fonction publique de l'Etat*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000262918&dateTexte=&categorieLie n=id> (accessed 6 July 2017).

2010 is that the age of entitlement increases by four months each year from 2010 until it reaches a maximum of 62 years in 2018, provided the employee has contributed for 42 years (the number of years may vary according to the retirement regime).²⁶⁰ Exceptions to the general rule, identified in Section 4.7.4 b), are also subject to age requirements. Article L1133-2 LC provides for the possibility to derogate from the prohibition of discrimination on the basis of employment policy.

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

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

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

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

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

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

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

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

The Government adopted Law No. 2012-1189 of 26 October 2012 to put in place in 2012 a scheme to promote employment of young workers under 25 years of age, called 'Contract of employment for the future' (*Contrats emplois d'avenir*).²⁶¹ It creates Articles L5134-110 ff. of the Labour Code, creating a specific employment contract of one to three years, benefiting from a special social contribution regime and financing by the state in order to facilitate access to employment and professional training for workers between the ages of

²⁶⁰ France, Law No. 2010-1330 of 9 November 2010 reforming retirement schemes (*Loi No. 2010-1330 du 9 novembre 2010 portant réforme des retraites*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023022127&dateTexte=&categorieLien=id%20> (accessed 6 July 2017).

²⁶¹ France, Law No. 2012-1189 of 26 October 2012 creating jobs for a future (*Loi No. 2012-1189 du 26 octobre 2012 portant création des emplois d'avenir*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026536632&dateTexte=&categorieLien=id> (accessed 6 July 2017).

16 and 25, and 30 in the case of disabled people, who have low levels of qualifications in sectors with high employment development potential and sectors of social and environmental utility identified by the regional authority (*Conseil régional*). Decree No. 2012-1210 of 31 October 2012, modified by Decree No. 2014-188 of 20 February 2014, sets out the specific requirements and conditions of regional state financing.²⁶²

4.7.3 Minimum and maximum age requirements

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

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

There is no maximum age in the private sector. Moreover, Article L5331-2 LC forbids offers of employment containing a limitation of age that would not otherwise be imposed by law.

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

Further to the adoption of Law 2009-972 of 3 August 2009²⁶³ relating to mobility and professional career in the public service, the Government adopted Decree 2013-593 of 5 July 2013²⁶⁴ relating to conditions of admission to entry examination of access to higher civil service, which provides at article 13 that the Government may adopt age limitations to access to corps of higher civil service by decree. Even if this possibility remains, it has not adopted such a decree, therefore age limitations which previously applied are no longer in force.

4.7.4 Retirement

a) State pension age

In France, there is no state pension age at which individuals must begin to collect their state pensions.

If an individual wish to work longer, their pension can be deferred. An individual can collect a pension and still work.

An employee can collect their pension from the age of 60 (an age which will progressively increase to 62 by 2018), at which time the amount will depend on the number of years of contribution, in accordance with Law No. 2003-775 of 21 August 2003.²⁶⁵ Article 351-8 of

²⁶² France, Decree No. 2014-188 of 20 February 2014 modifying the decree relating to jobs for a future (*Décret No. 2014-188 du 20 février 2014 portant modification du décret No. 2012-1210 du 31 octobre 2012 relatif à l'emploi d'avenir*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000262918&dateTexte=&categorieLien=id> (accessed 6 July 2017).

²⁶³ France, Law No. 2009-972 of 3 August 2009, available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020954520&fastPos=1&fastReqId=1375373593&categorieLien=cid&oldAction=rechTexte> (accessed 6 July 2017).

²⁶⁴ <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027664449&categorieLien=id> (accessed 6 July 2017).

²⁶⁵ France, Law 2003-775 of 21 August 2003 reforming old age pensions (*Loi No. 2003-775 du 21 août 2003 portant réforme des retraites*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000781627> (accessed 6 July 2017); France, Law No. 2006-396 of 31 March 2006 on equal opportunities (*Loi No. 2006-396 du 31 mars 2006*

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

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

However, people who began to work before 18 years of age can claim a state pension at 58 years of age, provided they have contributed for 41.5 years, plus two years. Disabled employees and employees caring for a disabled child can benefit from full retirement at the age of 65 even if they have not contributed the required number of years (Article L351-8 of the Social Security Code). Article 18 of the Law No. 2010-1330 of 9 November 2010 lowers the retirement age giving the right to a full pension from 65 to 60 years of age in the private sector for disabled people with a registered disability level of 80 %.²⁶⁶

On 27 June 2006 Law No. 2006-737 adopted increasing retirement benefits for disabled public servants to increase pension rights by 30 % for each year of disability during service and lowering the retirement age accordingly.²⁶⁷

Employees caring for a disabled child can also benefit from the possibility of an early pension.²⁶⁸

Since 1984, in order to receive a state pension, a salaried worker must resign from their current employment, but they can thereafter find another employment in the private sector. If they collect their state pension, they can continue to work. However, from the time they start collecting their state pension, employees cannot collect unemployment benefits.²⁶⁹

Public agents face an age limit in employment that triggers payment of their occupational and state pensions. This limit is 67 years of age and can be extended for a maximum of three years if they still care for children who are under 18 or still studying.

b) Occupational pension schemes

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

pour l'égalité des chances) Article 2, available at:

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000268539> (accessed 6 July 2017).

²⁶⁶ France, Law No. 2010-1330 of 9 November 2010 reforming retirement (*Loi No. 2010-1330 du 9 novembre 2010 portant réforme des retraites*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023022127> (accessed 6 September 2016).

²⁶⁷ France, Law No. 2006-737 of 27 June 2006 providing for an increase in pension for disabled civil servants (*Loi No. 2006-737 du 27 juin 2006 visant à accorder une majoration de pension de retraite aux fonctionnaires handicapés*), available at:

<http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000816584> (accessed 6 July 2017).

²⁶⁸ France, Decree No. 2005-1774 of 30 December 2005, relating to pension increase on the ground of disability, *Journal officiel*, No. 304, 31 December 2005, p. 20856, (*Décret No. 2005-1774 du 30 décembre 2005 relatif à la détermination de la majoration de pension applicable aux assurés Sociaux handicapés bénéficiant de l'abaissement de l'âge de la retraite*) available at:

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000265458&dateTexte=&categorieLien=id> (accessed 6 July 2017).

France, Decree No. 2005-1761 of 29 December 2005 relating to financial support for single parents of handicapped children (*Décret n°2005-1761 du 29 décembre 2005 relatif à la majoration spécifique pour parent isolé d'enfant handicapé*) available at:

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000268753> (accessed 6 July 2017).

²⁶⁹ National Collective Agreement safeguarding the personalised redeployment agreement (*Accord National Interprofessionnel de sécurisation de la convention de reclassement personnalisé*), 23 December 2008).

and follow rules applicable to state pension schemes.²⁷⁰ Other employer-funded retirement benefits arrangements, over and above legal requirements, are purely contractual.

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

An individual can collect an occupational pension and still work.

c) State imposed mandatory retirement ages

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

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

d) Retirement ages imposed by employers

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

Further to the adoption of Law No. 2008-1330 of 17 December 2008, Article 1237-5 of the Labour Code refers to Article 351-8 of the Social Security Code to determine the age at which an employer can impose the retirement of an employee on the ground of age.²⁷¹ The employer can propose retirement to the employee at age 65, and each year thereafter. The employee may, however, defer such imposed retirement until they reach the age of 70.

Article L1237-5-1 LC states that conditions of retirement in collective agreements and labour contracts are applicable as long as they do not contradict legal principles. Thus, all provisions of collective agreements and other labour contracts are null and void which would provide for the automatic interruption of the labour contract by reason of the age of the employee or because they would be entitled to benefit from an old age pension.

In 2012, the national ski instructors' union adopted a regulation limiting ski instructors' activity after 62 years of age and favouring young recruits in the distribution of teaching classes in order to favour the activity of young instructors. In its first decision dealing with maximum age limitations imposed in the private sector, the Court of Cassation (Supreme Court) decided that the internal regulation violates Law No. 2008-496 of 28 May 2008 and Directive 2000/78; it does not meet the requirements of Article 6(1)(a) of Directive 2000/78 because it favours the purely individual private interests that are specific to ski schools and their concern to satisfy the requests of their clients, which therefore do not qualify as legitimate aims as provided by article L1133-2 of the Labour Code.²⁷²

e) Employment rights applicable to all workers irrespective of age

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

²⁷⁰ France, Law 2003-775 of 21 August 2003 reforming old age pensions. France, Law No. 2006-396 of 31 March 2006 on equal opportunities.

²⁷¹ France, Law No. 2008-1330 of 17 December 2008, on financing social security (*Loi No. 2008-1330 du 17 décembre 2008 de financement de la sécurité Sociale pour 2009*) available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019942966> (accessed 6 July 2017).

²⁷² Court of Cassation, No. 13-27142, 17 March 2015, available at: <http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000030383142&fastReqId=964259005&fastPos=50> (accessed 6 July 2017).

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

f) Compliance of national law with CJEU case law

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

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

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

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

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

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

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

b) Age taken into account for redundancy compensation

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

The legal protection against dismissal is applicable to all workers regardless of age. Article R5123-9 ff. LC sets a special regime to indemnify workers over 50 years of age for a longer

period²⁷³ and for those over 57 years of age, for a period that can continue until retirement age.²⁷⁴

As regards conventional compensation for redundancy, the Social Chamber of the Court of Cassation decided that the limitation of compensation for redundancy because of age on the ground that an employee is two years from full retirement meets the requirements of reasonableness and proportionality provided by the exception authorised by Article 6 of Directive 2000/78/EC implemented by Article L1133-1 of the Labour Code.²⁷⁵

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

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

4.9 Any other exceptions

In France, there are other exceptions to the prohibition of discrimination provided in national law.

Article 225-3 PC enumerates a list of admissible exceptions to the principle of non-discrimination set out in Articles 225-1 and 225-2 PC. These are: insurance operations related to life expectancy, invalidity and incapacity insurance as regards the ground of health (paragraph 1); refusal to hire an individual on the ground of their health or disability, only when it results from a certificate of incapacity provided by the occupational health authorities (paragraph 2); and refusal to provide goods and services in relation to the place of residence because of a situation of manifest danger (paragraph 6).

²⁷³ France, General Regulation annexed to the Collective Agreement of 14 May 2014 relating to the indemnification of unemployment, (*Règlement général annexé à la Convention du 14 mai 2014 relative à l'indemnisation du chômage*), Article 18, <http://www.unedic.org/article/reglement-general> (accessed 6 July 2017).

²⁷⁴ France, Decree No. 2016-961 of 13 July 2016 on the unemployment insurance system, (*Décret n° 2016-961 du 13 juillet 2016 relatif au régime d'assurance chômage des travailleurs involontairement privés d'emploi*), <https://www.legifrance.gouv.fr/eli/decret/2016/7/13/ETSD1618113D/jo/texte> (accessed 6 July 2017).

²⁷⁵ Court of Cassation, Social Chamber, *Banque Finaref*, No. 09-42071, 17 November 2010.

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

a) Scope for positive action measures

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

French positive action, as conceived by the jurisprudence of the *Conseil d'Etat* is based on neutral and general grounds of distinction such as sex, disability, territorial links to designated geographical areas or socio-economic considerations.²⁷⁶

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

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

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

b) Main positive action measures in place on national level

A- Quota system

1. Quota for disabled people

The Law on the Employment of Disabled Persons No. 87-157 instituted a quota system.²⁷⁷ Despite the cost to employers of sanctions related to the failure to meet their obligation to employ a quota of disabled employees, the Court of Cassation decided in May 2003 that disabled workers were not obliged to disclose their status to their employer.²⁷⁸

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

The latest evaluations of the rate of employment in the private sector were published in May 2017 by the statistics directorate of the Ministry of Employment and relate to the

²⁷⁶ *Conseil d'Etat* (1996), 'Public report No. 48', pp. 86 and 91.

²⁷⁷ France, Law No. 87-517 of 10 July 1987 in favour of employment of disabled people (*Loi No. 87-517 du 10 juillet 1987 en faveur de l'emploi des travailleurs handicapés*), available at: <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000512481> (accessed 6 July 2017).

²⁷⁸ Court of Cassation, Social Chamber, No. 1083, 06 May 2003, *Revue de jurisprudence Sociale* 8-9/03, p. 733.

year 2015²⁷⁹ and July 2017 by AGEFIPH.²⁸⁰ In 2017, employment of disabled people increased by 1.1 %, due to a significant growth in the private sector at the same time as the employment rate decreased in the public sector.

In 2015, 2.7 million active people were recognised as disabled: 43 % of disabled people were declared as active, 35 % or 938 000 held a job and 8 % were unemployed. There were 103 300 qualifying private employers that met the legal requirements, i.e. an employment rate of 4.5 %. The evaluation shows that 78 % of employers employed at least one disabled person and only 8 % did not employ any disabled people, but satisfied their obligation entirely by paying the compensation fee. In addition, 73 % of persons employed within the quota were officially recognised as disabled workers.

In 2016, the AGEFIPH, which receives the sanction fees, collected EUR 404.5 million and operated a budget of EUR 450.2 million, which it distributed to finance schemes to support the costs of investment for individual adaptations of the workplace and the various mechanisms to support disabled workers in the workplace.²⁸¹

The latest information about the public sector relates to 2016. The rate of employment has risen to an average of 5.32 %, representing 232 200 beneficiaries of the employment obligation. The FIDHFP fund has collected EUR 132 million to finance support schemes to the amount of EUR 157 million.²⁸²

2. Quota for people over 50

Decree No. 2009-560 of 20 May 2009²⁸³ imposing minimum quotas of employees over 50 creates Article R138-25 ff. of the Social Security Code and provides that businesses employing 50 people or more must either be bound by branch collective agreements to implement a contractually defined obligation of employment of older employees or must negotiate an agreement or engage in an action plan in favour of the employment of workers over 50 in order to meet their obligation in this regard.

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

They must cover the employment of older workers, their career development projections, improvement of working conditions and protection related to the physical burden of work, access to training and skills development, accommodation of working conditions at the end of the older worker's career and transition towards retirement, as well as the development of tutorial and knowledge transfer programmes.

Reports on these agreements must be submitted to departmental labour authorities. The sanction for not undertaking such an agreement and of not following its objectives is to

²⁷⁹ DARES Analyses, May 2017, No. 032, <http://dares.travail-emploi.gouv.fr/IMG/pdf/2017-032.pdf> (accessed 5 May 2018).

²⁸⁰ AGEFIPH (2018), 'Emploi et chômage des personnes handicapées', No. 2018-1, 18 April 2018, <https://www.agefiph.fr/Actus-Publications/Publications-et-etudes> (accessed 5 May 2018)

²⁸¹ AGEFIPH (2017) *Annual Report 2016*, <https://www.agefiph.fr/Actus-Publications> (accessed 5 May 2018).

²⁸² FIPHFP (2017) *Annual Report 2016*, <http://www.fiphfp.fr/Le-FIPHFP/Actualites-du-FIPHFP/Le-rapport-d-activite-du-FIPHFP-pour-l-annee-2016-vient-d-etre-publie> (accessed 5 May 2018).

²⁸³ France, Decree No. 2009-560 of 20 May 2009 relating to the content and the validation of conventions and action plans in favour of employment of old workers (Décret No. 2009-560 du 20 mai 2009 relatif au contenu et à la validation des accords et des plans d'action en faveur de l'emploi des salariés âgés), available at: <http://www.legifrance.gouv.fr/eli/decret/2009/5/20/ECED0901854D/jo/texte> (accessed 6 July 2017).

pay a special retirement contribution amounting to 1 % of the total gross salaries of all employees paid by the employer.

There are no available indicators of the rate of compliance and its impact on the improvement of the rate of employment of persons over 50. However, the statistics directorate of the Ministry of Employment has published the rate of employment of people over 54, which indicates that it has significantly increased from 39 % in 2009 to 50.2 % in 2016, and for the 54-59-year group, from 58 % in 2009 to 70.7 % in 2016.²⁸⁴

B- Broad social policy

1. Disadvantaged suburbs

In a context of significant concentrations of migrants and people of foreign descent in disadvantaged suburbs, the criteria of socio-economic status and territorial links to designated geographical areas mean to indirectly target discrimination based on origin. In this context, some experts regard certain recent equal opportunities policies as promoting a 'differentialist' approach, leading to indirectly implementing quotas or targeting systems that are deliberately designed in formally neutral terms but in such a way as to take account of the social reality of 'origin'.²⁸⁵

As a matter of fact, the policy focusing on disadvantaged suburbs (called '*politique de la ville*'), concentrates a number of actions targeting communities of foreign origin which encourage integration and combat discrimination.

The major instruments of this policy are municipality contracts ('*contrats de ville*'), including thematic agreements addressing issues of discrimination, Major City Projects (*Grands Projets de Ville, GPV*), Urban Stimulation Zones (*Zones de redynamisation urbaine, ZRU*) and Priority Education Zones (*Zones d'éducation prioritaires, ZEP*).

C- Preferential treatment narrowly tailored

1. Integration measures for school attendance by migrant and Traveller children

The Ministry of Education has issued several directives in order to facilitate school attendance by Traveller children: Ministerial instruction (Ministerial instruction No. 91-220 of 30 July 1991) instructed school principals to admit children to classes, even for a few days, without requirements for formal registration with the municipal authorities. In 2002, the Ministry of Education rationalised and put in place a formal notice instructing all education authorities and school principals as to the organisation of support for the education of Roma children (Ministerial instruction No. 2002-101 of 25 April 2002).²⁸⁶ Ministerial instruction 2002-102 creates a coordinating training and documentation structure at the rectorate level (local administrative unit of national education), called the CASNAV,²⁸⁷ which is supposed to provide support to integration classes and local initiatives.

²⁸⁴ DARES (2017), 'Activité des seniors et politiques de l'emploi, Mars 2017'.

²⁸⁵ Maisonneuve, M. (2002), *Les discriminations positives ethniques ou raciales en droit public interne: vers la fin de la discrimination positive à la française* (Positive ethnic and racial discrimination in public law: towards an end to French positive action), AFDA, p. 561.

²⁸⁶ France, Ministerial Instruction No. 2002-101 of 25 April 2002 relating to school integration of Traveller children (*circulaire no 2002-101 du 25 avril 2002 scolarisation des enfants du voyage et de familles non sédentaires*) available at: <http://www.education.gouv.fr/botexte/sp10020425/MENE0201120C.htm%20> (accessed 6 July 2017).

²⁸⁷ Centres for the promotion of school attendance by non-French-speaking children who have recently arrived in France and Traveller children (*Centre académique pour la scolarisation des enfants allophones nouvellement arrivés et des enfants issus de familles itinérantes et de voyageurs, CASNAV*): Ministerial Instruction No. 2012-143 of 2 October 2012 relating to the organisation of CASNAV (*circulaire no 2012-143 du 2 octobre 2012 relative à l'organisation des CASNAV*), available at: http://www.education.gouv.fr/pid25535/bulletin_officiel.html?cid_bo=61527 (accessed 6 July 2017).

In total 34 such centres coordinate 104 local networks. Their effectiveness depends on political orientation at the local level.

Ministerial instruction No. 2012-142 of 2 October 2012 regarding School Integration of Traveller Children reiterates the duty to integrate the children of foreign nationals, Travellers and Roma, regardless of their nationality, conditions of housing and official status in France.²⁸⁸ This instruction was completed by another instruction (*circulaire* No. 2012-143 of 2-10-2012 BOEN special No. 37 of 11 October 2012) providing for the generalisation of the CASNAV scheme to all rectorates. In order to facilitate integration, children can register for school attendance directly with the CASNAV.²⁸⁹

2. Integration measures for migrants

Upon arrival in France, documented foreign nationals enter a programme for a period of five years in order to facilitate their integration through personalised social support, French language classes and training for economic integration. This programme is implemented by local authorities under the supervision of a directorate of the Ministry of the Interior called the DAAEN²⁹⁰ with the support of the OFII²⁹¹ which is the financial and executive operator of this policy.

Special training programmes designed to facilitate access to employment by legally authorised migrants are implemented by the French Association for the Professional Training of Adults (AFPA),²⁹² operated under the supervision of the Ministry of Employment in coordination with local authorities.

²⁸⁸ On educational integration of newly arrived non-French speaking children see Ministerial Instruction no 2012-141 of 2 October 2012 relating to the school intergration of newly arrived non-French speaking children, (*circulaire no 2012-141 du 2 octobre 2012 relative à la scolarisatin des élèves allophones nouvellement arrivés*) http://www.education.gouv.fr/pid25535/bulletin_officiel.html?cid_bo=61536 (accessed 6 July 2017); Ministerial Instruction No. 2012-142 of 2 October 2012 relating to the schooling of children from Traveller families and families without residence (*Circulaire no 2012-142 du 2 octobre 2012, REDE 236611C. RED-DEGESCO A1-1 relative à la scolarisation de enfants issus de familles itinérantes et de voyageurs*), available at: http://www.education.gouv.fr/pid25535/bulletin_officiel.html?cid_bo=61529 (accessed 6 July 2017).

²⁸⁹ France, Ministerial Instruction No. 2012-143 of 2 October 2012 relating to the organisation of CASNAV.

²⁹⁰ Directorate for Support, Integration and Access to Citizenship for Foreign Nationals (*Direction de l'accueil, de l'accompagnement des étrangers et de la nationalité*).

²⁹¹ French Office of Immigration and Integration (*Office français de l'immigration et de l'intégration*).

²⁹² AFPA: *Association professionnelle pour la formation des adultes*.

6 REMEDIES AND ENFORCEMENT

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

- a) Available procedures for enforcing the principle of equal treatment

In France, the following procedures exist for enforcing the principle of equal treatment (judicial, administrative and alternative dispute resolution such as mediation).

There are judicial and non-judicial means of legal action in France.

Administrative procedure for access to disabled people's rights

Article 64 of the Law No. 2005-102 on equal opportunities and the integration of disabled persons creates a Departmental Centre (*Maison départementale*) for people with disabilities that is intended to centralise all administrative procedures for enforcing the rights of disabled people. It further creates a claim reference person within these Departmental Centres (Article 146-13 CSW), who will transmit the disabled person's claim to the competent authority or jurisdiction. The decree establishing these Departmental Centres was adopted on 19 December 2005 (Decree No. 2005-1587).²⁹³

Non-judicial means of intervention

Both private and public employers can initiate a non-judicial in-house inquiry if a victim of harassment brings to their attention, or if they suspect, an incidence of discrimination, as they must guarantee a working environment free of such practices.

Staff representatives, the human resources manager or work councils (*Comité d'entreprise*) also have the power to request social dialogue on the integration of disabled workers (L2241-5, L2242-13 and L2242-14 of the Labour Code (LC)), and working conditions (L2241-3 and L2241-44 LC).

Labour Inspectors have reinforced investigation powers. They can enter all premises (Article L8113-5 LC), obtain communication of any document or information providing evidence of the facts, whether on paper, computerized support or other (L8113-4. LC). They may also draft a contravention report certifying their observations (L8113-7 LC) and submit this report to the Public Prosecutor (Article 40 Code of Penal Procedure, CPP).

With regard to mediation, Articles 21 and 131 of the New Code of Civil Procedure expressly refer to the duty of the judge to favour mediation and to designate a third-party mediator upon obtaining the consent of the parties to that end. Conciliation is the first stage of any legal action before the Employment Tribunal in application of Article L1423-13 LC. The labour inspector (L611-1 ff.) can also initiate these non-judicial means of action.

Article 6 quinquies of Law No. 83-634 sets out the principle of disciplinary sanction against any public servant committing discriminatory actions.

With respect to claims against the public service, mediation can be pursued by the Defender of Rights (*Défenseur des droits*) or one of the many mediators put in place by specific public services relating to social protection, education, public transport, the postal service, finance etc. This mediation is pursued without prejudice to the administrative legal action, which must be pursued independently.

²⁹³ France, Decree No. 2005-1587 of 19 December 2005 relating to the creating of the departmental centre for disabled people (*Décret No. 2005-1587 du 19 décembre 2005 relatif à la maison départementale des personnes handicapées*), available at: <http://www.legifrance.gouv.fr/eli/decret/2005/12/19/SANA0524615D/jo> (accessed 6 July 2017).

In addition, the Defender of Rights, the French equality body, can investigate any claim alleging discrimination on any ground covered by French law and present observations before a judge, as *amicus curiae* (see Section 7). However, its decisions are not binding.

Legal actions against private parties

Legal actions may be brought before the employment tribunal (*Conseil de Prud'hommes*) in matters related to employment, private-sector salaried employees or contractual public agents of an industrial or commercial public service.

In cases of discrimination in employment, Article L1133-3 LC provides for action seeking damages as well as the possibility of requesting the annulment of a discriminatory measure before the employment tribunal.

The right of alert of the employees' representative in case of violations of human rights and freedoms in the workplace, stipulated in Article L2313-2 LC, entitles the representative to file an emergency petition for injunctive relief before the employment tribunal and applies to cases of discrimination.²⁹⁴

It is important to note that on 12 December 2006 the Court of Cassation decided that employment tribunals had jurisdiction over pre-contractual matters and were competent in cases related to access to employment and apprenticeship.²⁹⁵ Moreover, the Court of Cassation decided to establish a specialised chamber of the Social Chamber to deal with the enforcement of anti-discrimination law in labour cases.

Legal actions may also be brought before the district court (*tribunal d'instance*) or regional court (*tribunal de grande instance*) depending on the amounts involved or claimed (in cases relating to all other matters such as housing and access to goods and services).

Class action

Law No. 2016-1547 of 18 November 2016 on the modernisation of the justice system in the 21st century in Articles 62 to 88, has created a legal framework supporting class action to put an end to a discriminatory behaviour (*action en manquement*) or for liability related to discriminatory acts (*action en responsabilité*), which can be brought before the regional court or the administrative court.²⁹⁶

Criminal procedure

Pursuant to Article 28 of the Organic Law (*loi organique*) of 29 March 2011 creating the Defender of Rights, under the supervision of the public prosecutor the Defender of Rights can negotiate a settlement.

Articles 121-1 and 121-2 PC establish the criminal responsibility of physical and legal persons. Article 225-2 PC, in the case of a private party, and Article 432-7 PC, in the case of a public servant or public authority, provide for a criminal complaint filed with the police or public prosecutor. The prosecution acts based on police enquiries (Article 15-3 CPP) after the victim's complaint or further to notice given by any public servant (Article 40 CPP). Victims and NGOs can also directly notify the public prosecutor. It is the public prosecutor which decides, further to its enquiries, whether to prosecute or not. A private party and the Defender of Rights, if the respondent refuses a settlement, can also initiate

²⁹⁴ Court of Cassation Social Chamber, 26 May 1999, Bull. Civ. V No. 238.

²⁹⁵ Court of Cassation Social Chamber, No. 06-40662, 06-40799 and 06-40.864, 20 December 2006.

²⁹⁶ France, Law No. 2016-1547 of 18 November 2016 on the modernisation of the justice system in the 21st century (Loi No. 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI^e siècle) <https://www.legifrance.gouv.fr/eli/loi/2016/11/18/JUSX1515639L/jo>, accessed 10 March 2017.

proceedings by way of direct citation (*citation direct*) but then they carry the entire burden of proof.

Legal action against the state or a public service

All claims against public services, in matters related to the employment of public servants ((Article 6 et. s. of Law No. 83-634) and to access to public services (such as access to school and social rights) must be brought before the administrative courts, whether they relate to the application of Law No. 2008-496 completing the implementation of Directives 2000/43/EC and 2000/78/EC in all matters dealing with the public services including education, or rely on general principles of administrative law which also provide legal redress against discrimination. The administrative court may correct the situation and/or award damages.

Concerning legal action to obtain an order for desegregation of a school, such action has never been initiated. In two cases where specific segregated classrooms were implemented for a few weeks before the eviction of Roma from campsites, in order to satisfy the legal obligations of access to school for Roma children, the mayor was prosecuted in a criminal court in application of Article 226-2 PC, and before the administrative court for illegal action, since segregation is forbidden by law.

Mechanisms to support access to justice

Since 1996, France has put in place a national network of Points of access to rights (*points d'accès au droit*), offering legal expertise and free legal consultations. The network is managed by the Ministry of Justice and implemented through the Departmental Commission on Access to Rights under the supervision of the President of the First Instance District Court.

Law No. 2005-102 on equal opportunities and the integration of disabled persons recognises the right of people with impaired hearing to a sign language interpreter before the civil and criminal courts, and the right of the visually impaired to the provision in Braille of civil and criminal court records (Article 76), all these measures being provided at the cost of the state.

Public buildings and courts must be accessible to the public (Article L111-7 of the Construction and Housing Code) unless they have obtained special authorisation from the prefect (Ministerial Instruction No. 94-55 of 7 July 1994, R111.19.3 CCH. Construction and Housing Code). Article L152-4 of the Construction and Housing Code foresees enforcement of this principle through criminal fines and injunctive relief.

b) Barriers and other deterrents faced by litigants seeking redress

Legal expertise

Litigants seeking redress are faced with a number of barriers, whether they result from their situation or from insufficient legal expertise on the part of judicial actors. The main problems they experience are insufficient legal expertise on the part of NGOs supporting people in situations of great social and financial distress and anti-discrimination NGOs in general, non-specific legal action regarding access to goods and services, insufficient legal skills of legal actors regarding the implementation of the burden of proof, the complexity of the statute of limitations regarding actions in matters related to employment, the preliminary requirements before enforcing rights against the state, the inadequate resources of the labour inspectorate, the penal reflex of victims who seek redress before the criminal courts and conditions of access to litigation.

As regards access to redress for Travellers, if a municipality fails to put in place specific parking sites for the travelling population, it is barred from seeking removal of the Travellers' trailers and from prohibiting parking²⁹⁷ and can be challenged for this failure before the administrative courts. However, these are very technical remedies, which require the assistance of a lawyer and Travellers and Roma communities find it difficult to access legal aid due to the complexity of the administrative requirements.

Absence of a specific means of legal action

There are no specific legal actions or sanctions in matters related to education, housing or goods and services in general. For instance, in case of harassment in education related to internship programmes with a private employer, no specific means of legal action is available. Claimants must put their claim before the civil courts or, if they wish to challenge the state in cases relating to public housing and state education, they must apply to the administrative court like any other claimant.

Regarding the prohibition of police forces carrying out racial profiling in police control measures, the Court of Cassation decided on 9 November 2016 that, given the obligation of the state to ensure access to judicial redress, in the absence of formal judicial procedures and of a procedure to keep evidence of the police checks performed, and in a context where racial profiling is widely practiced, civil action in damages against the state can take advantage of the shift in the burden of proof. Therefore, if the claimant establishes by way of a witness statement that there was differential treatment in the selection of persons subjected to police checks, then the police force has the burden of justifying the relevance of the check.²⁹⁸

Shift in the burden of proof

Legal actions relating to discrimination which come before the civil courts benefit from the shift in the burden of proof, as established by explicit statute (Law of 16 November 2001, Law of 17 January 2002 and Law No. 2008-496) (see Section 6.3) but remain difficult to enforce. The judicial tradition is to go to a civil court with the elements of evidence readily available to the party, which explains why claimants often go to the criminal courts to obtain access to evidence. In addition, in cases of discrimination, the evidence is very often in the hands of the defendant and not accessible to the claimant without intervention by a judge. Moreover, in France, making copies of documents belonging to the employer is considered theft. The rules of civil procedure make access to evidence in the hands of the other party or a third party, by way of what is called 'investigative measures' (*mesure d'instruction*), very difficult, as this is considered as an exceptional measure and is conditional upon having already provided sufficient evidence to the court. It is not in the legal culture of judicial actors, judges and lawyers to use these procedural means of access to evidence, as the judge in civil matters is seen as not inquisitorial and not part of the process leading to the introduction of evidence before the court.

Complexity of statute of limitations for instituting legal action in employment matters

In 2005 the Court of Cassation decided that discrimination claims related to the execution of a contract were subject to a statute of limitations of 30 years (Article 2262 CC).²⁹⁹ A major reform of all statutes of limitations was adopted by Law No. 2008-561 of 17 June

²⁹⁷ High Judicial Court of Montauban, No. 02/00171, 3 May 2002, available at: http://www.rajf.org/article/php3?id_article=1043 (accessed 6 July 2017).

²⁹⁸ Court of Cassation, First Civil Chamber, 9 November 2016, Nos 15-24.207 to 15-25.877; https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/relatifs_contr_35473.html (accessed 6 July 2017).

²⁹⁹ Court of Cassation, Social Chamber, *Renault v. Morange*, No. - 02-43.616, 15 March 2005, *Dictionnaire permanent Social* (Dictionary of Social welfare law), 4114, Bulletin 814.

2008,³⁰⁰ reducing the time limit for instituting any personal and moveable property actions to five years (Article 2224 Civil Code).

Moreover, further to complaints and lobbying on the part of employers as to the unmanageable scope of their risk, the statute of limitations for instituting an action in discrimination before the employment tribunal was lowered to five years, as is the case for claims relating to salaries (Article L1134-5 of the Labour Code). This reform entails an important regression in the scope of protection against discrimination. Article L1134-5 LC provides:

‘any action in compensation of damages resulting from discrimination shall lapse after five years from the incidence of discrimination becoming known.’

‘Compensation covers the damages in their entirety resulting from the whole duration of the discrimination.’

The Court of Cassation decided that prescription had no impact on the relevance of comparative evidence going beyond the prescribed period.³⁰¹ It has further decided that the concept of ‘the discrimination becoming known’ in Article 1134-5 of the Labour Code meant that the statute of limitations starts only when the victim has exact knowledge of the necessary comparative elements and their evidence.³⁰² The only time limit therefore results from another rule, provided in Article 2232 of the Civil Code, which limits the suspension of prescription by ‘ignorance’ of the facts, in all cases, to 20 years.

The criminal courts are competent in matters related to hiring, sanctions and dismissals in the workplace, access to goods and services (including all public services such as public housing, education, social rights etc.). They may impose criminal sanctions (i.e. fines, prison, loss of civil rights) and damages if the claimant has lodged a civil complaint before the criminal court. The time limits for the prosecution of discrimination through a criminal action are three years (Article 8 CPP).

Preliminary requirements for enforcing rights against the state

However, under all legislation governing civil servants, the time limit for presenting a claim to challenge a decision taken by a public employer must be preceded by a written request to have the decision reconsidered. This must be submitted within two months of the dismissal and followed by a formal administrative legal petition filed not earlier than two months after this written request. The claim for damages against the state must also be preceded by a written request which is not subject to a statute of limitations, but the administrative legal action must be filed not earlier than two months after the written request.

Insufficient resources of the Labour Inspectorate

The limited numbers of labour inspectors, who have the burden of pursuing all violations of the Labour Code, reduces the efficiency of this body, whose members are entirely free to choose the situations they investigate. In addition, their investigations lead exclusively to criminal claims and they do not transmit the results of their investigations to the parties or to the civil judge.

³⁰⁰ France, Law No. 2008-561 of 17 June 2008 reforming the civil statute of limitations (*Loi No. 2008-561 du 17 juin 2008 portant réforme de la prescription en matière civile*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019013696> (accessed 6 July 2017).

³⁰¹ Court of Cassation, Social Chamber, No 07-42697, 4 February 2009.

³⁰² Court of Cassation, Social Chamber, No. 05-45163, 22 July 2007.

The tendency of victims to file criminal complaints

The main reason so many people resort to the criminal courts is that it gives them access to evidence through the judge's investigation. In addition, in the context of criminal claims, they do not have to get involved or need a lawyer; the prosecution takes charge of the investigation and the prosecution. The public prosecutor nevertheless has the choice to investigate and pursue the matter or not in the name of the state. For a long period, very few discrimination complaints were prosecuted.

Since 2007, the Ministry of Justice has put in place a policy of specialisation, instituting a dedicated service to treat discrimination-related criminal complaints at the public prosecutor's office with the objective of increasing the rate of criminal prosecutions. However, the requirements of evidence in criminal matters lead to few decisions being issued in favour of the claimant, despite the significant number of complaints.

Conditions of access to litigation

Representation by a lawyer is not mandatory before employment tribunals, the district courts and the criminal courts, or before the appeals court when appealing from the latter jurisdictions. Representation by a lawyer is mandatory before the regional courts, the commercial courts (Law No. 71-1130 of 31 December 1974),³⁰³ the administrative courts (regulation of 4 May 2000) and the Court of Cassation (Article 974 ff. of the New Code of Civil Procedure, NCCP).

Legal aid is available to individuals on low incomes (Law No. 91-647 of July 1991 on legal aid).³⁰⁴

Since the equality body cannot initiate judicial proceedings, victims have the burden of instituting action and finding financing for their own litigation costs.

c) Number of discrimination cases brought to justice

In France, there are no available statistics on the number of cases related to discrimination brought to justice.

Any quantitative study involves going to each district and evaluating the archives. In addition, the only statistics available concern convictions based on Article 225-2 of the Penal Code and relate only to convictions registered in the individual's criminal records. Therefore there are no statistics concerning the number of complaints lodged or the treatment they receive. Since 1998, the statistics show an average of 10 criminal convictions per year for an approximate number of complaints evaluated at about 7 000 per year.

d) Registration of discrimination cases by national courts

In France, discrimination cases are not registered as such by national courts.

³⁰³ France, Law No. 71-1130 of 31 December 1971 reforming certain judicial professions (*Loi No. 71-1130 du 31 décembre 1971 portant réforme de certaines professions judiciaires et juridiques*). Available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068396> (accessed 6 July 2017).

³⁰⁴ France, Law No. 91-647 of 10 July 1991 relating to legal aid (*Loi No. 91-647 du 10 juillet 1991 relative à l'aide juridique*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006077779> (accessed 6 July 2017).

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

a) Engaging on behalf of victims of discrimination (representing them)

In France, associations, organisations and trade unions are entitled to act on behalf of victims of discrimination.

In France, all trade unions are legally constituted with the status of associations. The Law of 16 November 2001 provides the possibility to all representative trade unions and NGOs which have been in existence for over five years to act on behalf or in support of victims of discrimination (Article 2, Code of Penal Procedure). They can act for the claimant in actions for any apprentice, trainee, job applicant or employee who alleges that they have been a victim of discrimination (Article L1132-1 LC ff., Law No. 83-634 of 13 July 1983 in the public sector Article 8, paragraphs 1 and 2).

However, they have no legal duty to act. Trade unions regularly engage in judicial proceedings on behalf of victims, but seldom in proceedings related to anti-discrimination law. NGOs practically never use this procedural possibility.

b) Engaging in support of victims of discrimination

In France, associations, organisations and trade unions are entitled to act in support of victims of discrimination.

In France, trade unions are legally constituted with the status of associations. Trade unions and NGOs can act in support and on behalf of victims of discrimination before any jurisdiction: Article R779-9 of the Code of Administrative Justice, Article 3 of the New Code of Civil Procedure, Article 2, Code of Penal Procedure; Articles L1134-2 and L1134-3 of the Labour Code, Law No. 83-634 of 13 July 1983 in the public sector Article 8, paragraphs 1 and 2).

Article 33 of the Organic Law (*loi organique*) creating the Defender of Rights also provides that the Defender can present observations in any case before any jurisdiction.

In addition, the Labour Code was amended by Law No. 2005-102 on equal opportunities and the integration of disabled persons, Article L1134-2 was created in order to provide standing to trade unions and Article L1134-3 to provide standing to NGOs acting to uphold the rights of disabled people to intervene before the courts in matters of discrimination.

c) Actio popularis

In France, Law No. 2001-1006 allows associations, organisations and trade unions to act in the public interest on their own behalf, without a specific victim to support or represent.

The standing of any person who has a legitimate interest in the dismissal or granting of the action in all civil cases pursuant to Article 31 NCCP and Article R779-9 of the Code of Administrative Justice has been created in order to award standing to NGOs when they established that the facts at issue violated the collective interest they represented as declared in their constituting associative purpose pursuant to the Law of 1 July 1901.³⁰⁵

d) Class action

In France, national law allows associations and trade unions to act in the interest of more than one individual victim (class action) for claims arising from the same event.

³⁰⁵ Civ. 2e, 21 July 1986: Bull. Civ.II, No. 119.

Article 163 of Law No. 2002-73 allows NGOs to act on behalf of a number of claimants in access to housing.

In addition, Articles 62 to 88 of Law No. 2016-1547 of 18 November 2016 on the modernisation of the justice system in the 21st century have created a legal framework supporting class action to put an end to a discriminatory behaviour (*action en manquement*) or for liability related to discriminatory acts (*action en responsabilité*), that can be brought before the regional court or the administrative court.³⁰⁶

The class action must be preceded by a formal letter of demand requesting the correction of the discrimination. It can be initiated to request that the discriminatory measure be stopped and/or an action in liability with a request for damages to the benefit of all members of the group (Article 62).

In matters of discrimination in general, such a class action must be instituted by an NGO that has been operating for at least five years in the domain of disability or discrimination (Articles 63 and 86 creating an Article 10 to the law of 27 May 2008). NGOs are excluded from employment matters, and the action must be initiated by a trade union (Article 87).

The procedure does not separate judgment on the merits from the decision determining whether the situation is representative of a collective situation allowing for a class action. At the time of enforcement of the judgment and determination of damages, members of the group could give a mandate to the association to represent them.

Victims can pursue a separate action if they do not wish to be represented by the group (Article 71).

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

In France, national law requires a shift of the burden of proof from the complainant to the respondent.

The shift in the burden of proof has expressly been transposed in all matters that concern Directives 2000/43/EC and 2000/78/EC by Law No. 2008-496 at Article 4 and Article 158 of the Law of 17 January 2002 in matters of housing (modifying Article 1, paragraph 3 of Law no 89-462 of 6 July 1989).

- The claimant must present facts leading to a presumption of direct or indirect discrimination.
- The claimant is not required to compare his situation with that of other employees to establish discrimination, whether direct or indirect. The Court of Cassation considers that syllogism of legal reasoning is sufficient to identify rules that necessarily have an adverse impact on certain groups and therefore qualify as discrimination.³⁰⁷
- Having satisfied this requirement, the defendant must establish that their decision was justified by objective elements, which have nothing to do with discrimination. It does not require that the defendant justify proportionality and necessity. Since this requirement is not intrinsically included in the definition of direct discrimination in

³⁰⁶ France, Law No. 2016-1547 of 18 November 2016 on the modernisation of the justice system in the 21st century (*Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXI^e siècle*) <https://www.legifrance.gouv.fr/eli/loi/2016/11/18/JUSX1515639L/jo> (accessed 10 March 2017).

³⁰⁷ Court of Cassation, Social Chamber, No. 10-20.765, 3 November 2011, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024764368&fastReqId=1647684556&fastPos=1> (accessed 8 March 2017); Soc 6 juin 2012, n° 10-21489, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000025994053&fastReqId=501301758&fastPos=60> (accessed 8 March 2017). Court of Cassation, Social Chamber, No. 05-43962, 9 January 2007, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000017624898&fastReqId=5930729&fastPos=1> (accessed 8 March 2017).

Article 7, the burden of proof ends up being lighter for defendant in direct discrimination cases than in indirect discrimination cases. This does not appear to comply with the requirements of the directive.

- The judge forms an opinion after having ordered, if necessary, any investigative measures they consider useful.
- In matters of direct discrimination, the claimant never has to establish that they are a member of a group targeted by the discrimination ground. Only the behaviour of the defendant who has assumed the existence of a discrimination ground is considered. This applies to all grounds including disability.

This shift in the burden of proof is thus applicable in all non-criminal legal actions (in the case of self-employed workers and the liberal professions, private and public employees, access to goods and services in the private and public sector and claims against services provided by the state).

For claims relating to the public sector that are brought before the administrative court, the administrative procedure is inquisitorial and is covered by the derogation provided in Article 8(5) of Directive 2000/43/EC and Article 10(5) of Directive 2000/78/EC.

Article R411-1 of the Code of Administrative Justice provides that 'the procedure alleges the facts, arguments and conclusions submitted to the judge'. Thus, the claimant is deemed not to have the burden of proof. However, in a plenary decision, the *Conseil d'Etat* has spelled out indications to lower administrative courts as regards the implementation of the burden of proof in discrimination cases:

'while it is for the claimant to submit to the judge elements of facts that could lead the judge to presume a violation of the principle of non-discrimination, the respondent must adduce in evidence any elements that could justify that the decision challenged is based on objective elements devoid of discriminatory objectives. The decision of the judge is based on this exchange of contradictory elements. In case of doubt, the judge must complete the investigation by ordering any investigatory measure (or the filing of any element) that they deem necessary.'³⁰⁸

In fact, this definition of the shift in the burden of proof is very close to the definition implemented in Article L1134-1 of the Labour Code.

The First Civil Chamber of the Court of Cassation, in the first decision relating to the liability of the State for racial profiling, which was rendered on 9 November 2016, has explicitly stated the necessity to apply the shift in the burden of proof in order to provide effective remedy in cases of racial profiling, given the absence of traces of the control measures that do not lead to arrest. In the absence of any trace of the police check, the argument for the shift in the burden of proof and a request for the justification of the specific control by the State must rely on research supporting the fact that racial profiling was a widespread practice, combined with witness statements describing the control measures.³⁰⁹

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

In France, there are legal measures of protection against victimisation.

Article 3 of Law No. 2008-496 of 27 May 2008 established a specific protection against victimisation applicable to the entire scope of civil legal actions alleging direct or indirect discrimination covered by the directives, which provides that no person, having testified in good faith about discriminatory behaviour, can be treated unfavourably on such a ground.

³⁰⁸ *Conseil d'Etat*, No. 298348, 30 October 2009.

³⁰⁹ Court of Cassation, Civil Chamber, Nos 15-24.207 to 15-25.877, 9 November 2016, https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/relatifs_contr_35473.html (accessed 7 March 2017).

No decision can be taken against a person because they were a victim of discrimination or because of their refusal to submit to discrimination as prohibited in Article 2.

This protection clarifies that it extends to victims and non-victims but does not provide any indication as to the burden of proof applicable to claims of victimisation and does not assimilate victimisation with discrimination.

Finally, the Penal Code protects victims and witnesses. Article 434-15 PC sanctions threats and intimidation towards a witness, and Article 434-5 PC towards a victim, with a maximum penalty of three years' imprisonment.

It is important to note that, in reaction to actions relating to discrimination and sexual harassment, there has been an ever-growing defence strategy leading to the filing of criminal complaints for slanderous complaint (226-10 PC) in order to intimidate complainants. These have sometimes given rise to investigation.

As for other grounds of criminal complaints, there are no statistics or studies as to the number of such complaints and their results, since they are integrated in global statistics relating to slanderous complaints.

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

- Applicable sanctions in cases of discrimination – in law and in practice

There are damages but there are no punitive sanctions in non-criminal cases.

The Perben II Law on adapting justice to developments in criminality was adopted on 9 March 2004.³¹⁰ Criminal sanctions incurred in relation to the criminal offence of discrimination are increased to a maximum of three years' imprisonment and a EUR 45 000 fine (Article 225-2 PC).

The Penal Code creates an aggravating factor in relation to a discriminatory refusal to sell or allow access to a public place (nightclubs, shops, public services etc.), sanctioned by a maximum of five years' imprisonment and a EUR 75 000 fine. In addition, the Penal Code allows accessory sanctions in Article 225-19 PC: posting or publication of the judgment, closing down of a public place, exclusion from procurement contracts, confiscation of a business, suspension of civil rights and a list of further penalties that are seldom imposed. The same sentence is applicable in cases of discrimination by public services (Article 432-7 PC).

Legal persons, including the state and all public services, can also be convicted by the criminal court, and this liability does not exclude that of the physical person.

In non-criminal matters only compensatory remedies can be sought before the civil and administrative courts.

In cases involving the public services, legal actions must be brought before an administrative court. Two courses of action are available: one for excess of power to annul the decision challenged or the full jurisdiction petition, in order to obtain not only annulment of the decision but damages as well.

In addition to criminal and administrative legal actions, a civil servant can also be subject to disciplinary sanctions in application of Article 66 of Law No. 84-16 of 11 January 1984,

³¹⁰ France, Law No. 2004-204 of 9 March 2004, adapting justice to developments in criminality (*Loi No. 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068396> (accessed 6 July 2017).

Article 89 of Law No. 84-53 of 26 January 1984 and Article 81 of Law No.86-33 of 9 January 1986.

Before the employment tribunal, the claimant may seek compensation and annulment of the discriminatory measure, thereby requesting reintegration in case of dismissal (Article L1132-4, Labour Code).

- Ceiling and amount of compensation

There is no ceiling on the amount of compensation.

There is no statutory upper limit but French legal practice is still very conservative in calculating pecuniary loss, and amounts awarded remain rather low and depend on the evidence adduced.

The first civil case against a private real estate agent was successfully brought before the civil courts in 2008, before the Montpellier district court (*tribunal d'instance*).

The court awarded EUR 3 000 in non-pecuniary damages, stating for the first time that suffering discrimination deserved specific compensation for non-pecuniary damages, which ought to be significant.³¹¹ Since then, it has been observed that, when the claimant fails to quantify financial loss through concrete evidence, in situations such as discrimination in access to employment, or loss of business due to failure to gain access to the court building, in 2010 the courts awarded EUR 20 000 in non-pecuniary damages, an award that stands as a substitute in the face of difficulties in establishing damages (Airbus case, see above, and Bleitrach case, see above).

However, the court often awards no moral damage, expressly stating the lack of evidence from the claimant.

In matters related to access to goods and services, cases are so rare and remedies so low that they cannot be considered to be effective and dissuasive.

In employment-related cases, however, compensation is more significant. Nevertheless, while it compensates the claimant's losses, enforcement of the non-discrimination rule is not widespread and cases are isolated. Therefore, judicial convictions are not yet effective and dissuasive.

Executive Order No. 2017-1387 relating to the predictability and security of labour relations intends to facilitate hiring and dismissal in the labour market and to standardise the procedure and cost of dismissal awards.³¹² In order to do so, it provides for scales and ceilings regarding damages awarded in relation to all causes of action in respect of the dismissal of an employee (Article L 1235-3 of the Labour Code). However, Article L 1253-3-1 provides that this mandatory scale is not applicable when the judge finds that the dismissal is null and void because it results from the violation of a fundamental right, harassment or discrimination prohibited by law. In derogation of other labour relation litigation, the victim of discrimination or harassment may request reintegration and claim damages and all wages owed for the duration of the time elapsed since dismissal until full compensation, without financial ceiling or time limit.

- Assessment of the sanctions

³¹¹ District Court of Montpellier, *Drucker v. Galerie Gregoire RG*, No. 11-07-001540, 3 April 2008.

³¹² France, Executive Order No. 2017-1387 of 22 September 2017 relating to the predictability and security of labour relations, (*Ordonnance n° 2017-1387 du 22 septembre 2017 relative à la prévisibilité et la sécurisation des relations de travail*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000035607388&fastPos=4&fastReqId=1725531780&categorieLien=cid&oldAction=rechTexte>, accessed 7 March 2018.

There is no punitive sanction in civil matters.

However, in a decision of 15 November 2017,³¹³ the Social Chamber of the Court of Cassation stated for the first time that principles applicable to the calculation of compensation could vary according to the ground of discrimination at issue. The Court, after concluding that a dismissal was null and void as a result of discrimination on the ground of age, decided that the purview of the compensation changed according to whether or not a ground of discrimination constitutes protection against a fundamental right or freedom protected by the French Constitution. In this case, the Court decided that since the ground of age did not constitute a fundamental right and freedom protected by the French Constitution, the compensation awarded would be limited to the loss of salary less the revenue of substitution received by claimant between dismissal and reintegration.

By deciding that compensation is dependent upon the legal character of the ground of discrimination that has been violated, the Court creates a hierarchy between grounds and takes a stand on the ground of age, defining it as a secondary ground of lesser gravity that is not characterised as a fundamental right or freedom protected by the fundamental law of the State.

Therefore, the regime of compensation for discrimination can cumulate awards that have the nature of sanction, over and beyond pecuniary loss, in the application of the legal theory of nullity in labour law, when the ground of discrimination at issue is qualified as a right and freedom protected by the Constitution. This would be the case for discrimination based on the grounds of race, origin, religion, sex, the right to strike or union activities, health, philosophical and political opinions and harassment.³¹⁴ Sexual orientation is not referred to in the Constitution, but one could argue that since the list of grounds covered is an open one, it should qualify as a right and freedom protected by the Constitution.

Criminal sanctions represent about five to 10 cases a year. Given that they occur in matters related to goods and services with little evidence of significant damages, despite provisions of the law which allow for fines ranging up to EUR 45 000 and three years' imprisonment, the criminal sanctions awarded by the courts are very low, ranging from a few hundred to a few thousand euros. They can be accompanied by suspended prison sentences. In a 2007 decision relating to a denial of access to a hotel for an individual wearing a headscarf, the hotel manager was sentenced to a EUR 1 000 fine and a four-month suspended prison sentence. Meanwhile, in a 2014 decision relating to a denial of access to a gym to an individual wearing a scarf, the sentence was a EUR 250 fine. Such sanctions are not effective and dissuasive.

However, in a Court of Appeal of Paris decision of 11 February 2014 against EasyJet's repeated refusal to admit people in wheelchairs aboard their planes, EasyJet was sentenced to a total fine of EUR 50 000 (in relation to many occurrences), lowering a sentence of a fine of EUR 70 000 imposed by the trial court.³¹⁵ The Court of Cassation upheld this sentence.³¹⁶

³¹³ France, Court of Cassation, Social Chamber, No. 16-14.281, 15 November 2017, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036053048&astReqId=387503508&fastPos=1>, accessed 7 March 2018.

³¹⁴ France, Court of Cassation, Social Chamber, No. 14-21.325, 14 December 2016, available at: https://www.courdecassation.fr/publications_26/arrets_publics_2986/chambre_sociale_3168/2016_7412/decembre_7804/2344_14_35739.html, accessed 7 March 2018.

³¹⁵ Paris Court of Appeal, No. 12/05062, 11 February 2014.

³¹⁶ Court of Cassation Criminal Chamber, No. 13-81586, 15 December 2015, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000031658282&astReqId=1575884415&fastPos=4> (accessed 6 July 2017).

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

- a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive

A specialised body has been designated for the promotion of equal treatment irrespective of racial or ethnic origin according to Article 13 of the Racial Equality Directive. It is the Defender of Rights established by Organic Law (*loi organique*) No.2011-333 of 29 March 2011 pursuant to Article 71-1 of the Constitution.

It is a nominative institution personified by the person appointed in Council of Ministers as the Defender of Rights.

- b) Political, economic and social context for the designated body

The Defender of Rights is a new body resulting from the merger of pre-existing bodies in May 2011. It has been recognised for its activism and independence, taking due care to explain its function within the French institutions as an independent advocate of rights within its domain of competence.

It has made recommendations and made its voice heard before all public authorities, Parliament and Government, whether in the context of legislative reform, public policies or arguing the requirements of European Law before the Supreme Courts. Since 2011, it has taken a firm stand on many policy issues such as Roma rights, the rights of migrants, enforcement of the state of emergency further to the terrorist attacks, reforms of criminal procedure in relation to the fight against terrorism, protection of personal data, police controls, equal pay, rights of transgender persons and access to rights.

One can observe a willingness of respondents, public and private, to cooperate and a continuous progression of requests for interventions by the Defender of Rights from Members of Parliament, Government or the courts.

Although his position on specific subjects might not always receive political support, to date such disagreements have not had an impact on governance or given rise to interference from public authorities. There is no evidence of disproportionate budgetary cutbacks.

Generally, popular debate and authorities are supportive of equality, diversity and the work of the designated body.

- c) Institutional architecture

The Defender of Rights integrated the former equality body, HALDE, into a new constitutionally independent authority (Article 2 of the Organic Law), which merged a number of pre-existing specialised bodies, from 1 May 2011.

It is competent in respect of all discrimination prohibited by French law and international conventions ratified by France. As a result of the powers exercised by the former Ombudsman (*Médiateur de la République*), the Defender of Rights is competent in matters relating to illegal and unfair decisions taken by Government services and to the rights and freedoms of users of public services. This extends the body's competence to human rights, public policy and public services. In addition, it is competent in respect of defending and promoting the superior interest and the rights of children, monitoring the ethical behaviour of persons assuming security functions in the territory of the Republic, and in assisting and protecting whistleblowers.

In this context, it has a mandate to promote the UN CRC and provide independent reports to the UN Committee on the Rights of Children, and to promote the UN CRPD and report to the UN Committee on the Rights of Persons with Disabilities.

One of the three deputies of the Defender of Rights and one of its commissions are exclusively dedicated to issues related to non-discrimination and promotion of equality.

Claims relating to issues of equality law either concern general public law relating to the application of the principle of equality, or the anti-discrimination legal framework, which in France is a distinct legal framework. Claims can be investigated at one of two possible levels of intervention. Eighty percent of overall claims are dealt with by the 475 volunteer delegates disseminated throughout the national territory. The delegates are usually former retired civil servants, lawyers, judges and so on. Delegates receive complainants in relation to all competences of the Defender of Rights. Discrimination claims represent 8 % of their activity.

Twenty percent of overall claims – including equality public law claims- and 80 % of anti-discrimination claims, are investigated at the head office in one of the nine investigation units, distributed according to domains of competence in public or private law. These units are organised as follows: social protection, access to justice, rights of patients and dependent persons, rights of foreigners, rights of children, public and private employment law, access to public service, access to goods and services, and ethics in security. This allows the institution to mobilise integrated legal strategies beyond the strict application of anti-discrimination legislation, and to defend the rights of vulnerable populations and persons in matters such as access to rights of children, social protection law, and rights of migrants and Roma.

Although all investigation units deal with discrimination cases within their realm of competence, three units receive a higher number of discrimination claims: the unit dealing with claims regarding employment in the public service, the unit dealing with claims relating to fundamental rights of foreigners and the unit dealing with claims relating to private law, which essentially deal with discrimination in employment and discrimination in access to private goods and services. This activity is analysed by regular audits revisiting investigation practices and approaches developed by the institution to address claims related to particular issues or a particular ground.

There are approximately 130 lawyers who may all deal with equality and discrimination cases for 10 % of their time, and 30 lawyers who have a case load that particularly concentrates on discrimination cases. The investigation and review processes are overseen by six experts in discrimination law who ensure that they are given appropriate attention. Overall, approximately 30 % of the head office's legal work is dedicated to discrimination claims.

Regarding the promotion of rights, a service comprising three units and 30 staff members contributes approximately 80 % of its activity to research in the anti-discrimination field and promoting equality and anti-discrimination.

In 2017, the Defender of Rights spent a budget of EUR 21 245 400. Its budget is structured without reference to allocation for each area of competence and 70 % of the budget of the institution is dedicated to personnel (EUR 15 494 000) and 40 % of the remaining 30 % (EUR 5 751 000) is dedicated to the expenses of the delegates. Salaries and expenses in support of equality and anti-discrimination cases represent approximately 10 % of the overall budget (EUR 1 641 400).

In addition, 3.1 % of the body's budget is dedicated to research (EUR 480 314) and 12.4 % to promotion and communication campaigns (EUR 1 859 280). More than 50 % of this budget is dedicated to its equality/anti-discrimination mandate.

Statistics on the activity of the Defender of Rights show that its implication in anti-discrimination issues and the investigation of cases has not been altered by the integration of the equality body into a larger body.

The mandate of the former equality body was exclusively dedicated to the application of anti-discrimination law, but the visibility of the Defender of Rights and the attention given to its positions draws significant attention to anti-discrimination issues.

It has carried out substantial campaigns on the rights of Roma, the fundamental rights of foreigners, the rights of unaccompanied migrant children, the measurement of discrimination through data analysis, and the fight against discrimination in employment and housing.

d) Status of the designated body – general independence

i) Status of the body

Organic Law No.2011-333 establishing the Defender of Rights integrated the HALDE into a new, constitutionally independent authority (Article 2), which merged a number of pre-existing specialised bodies, from 1 May 2011.

It provides for the centralisation of all powers within the control of the person of the Defender of Rights. It is a nominative institution personified by the person appointed in Council of Ministers as the Defender of Rights after consultation with both chambers of Parliament. The position cannot be revoked and his mandate is non renewable. (Article 1)

The Defender of Rights personally nominates three deputies, one for each of his fields of action (Article 11 of Law No. 2011-333). In addition, he is assisted by three collegial bodies (one for rights of children, one for ethics in security and one for discrimination). The members of these councils are designated by Parliament and the supreme courts. When new matters arise, the Defender can consult the collegial body dedicated to discrimination issues (Article 15 of the Organic Law) comprising eight members nominated by various institutions (three by the Senate, three by the National Assembly, one by the *Conseil d'Etat* and one by the Court of Cassation - Articles 11 and 13 of the Organic Law). However, the Defender of Rights is not bound by any internal counter power, and he or she is not bound to follow the position of the collegial body.

Furthermore, the process of appointment of the members of the collegial body of the Defender of Rights continues to be influenced strongly by political forces (six out of eight members are appointed directly by political authorities).

The Defender of Rights has the power to decide what claims to pursue (Article 24 of the Organic Law).

The Defender of Rights is accountable to Parliament and the President of the Republic, and must report each year on its activity (Article 38 II).

ii) Independence of the body

The body can be held to be independent in theory and in practice.

Article 2 of the Organic Law expressly provides that the Defender of Rights takes no instruction. The administrative status of the Defender of Rights is not subject to the hierarchical authority of Government. In addition, Article 1 of the Organic Law provides that his or her mandate cannot be renewed and that his

or her appointment cannot be revoked except upon his or her request or for reasons related to his or her ability to perform his or her functions, as defined in Articles 3 to 5 of Decree No.2011-905 of 29 July 2011.³¹⁷

The Defender of Rights has free management of its budget and staff. However, the body's financial resources are limited and derived completely from public funds, which are voted on by Parliament every year as part of the Prime Minister's budget, and thereby could be subject to budgetary cuts. In practice, such a reaction by the Government has not occurred.

Whereas the HALDE's president's functions could be combined with an elected office, public employment or any other professional activity, the Defender of Rights and his deputies must resign from all other positions (Article 3 of the Organic Law).

The present Defender of Rights does not hesitate to take an independent stand before Parliament, jurisdictions, and toward private respondents and public services.

e) Grounds covered by the designated body

The Defender of Rights has the same field of competence as the HALDE in all forms of discrimination, direct and indirect, prohibited by French law and therefore is readily adaptable to any future legal developments as provided by Article 5(3) of the Organic Law. The Defender of Rights covers discrimination on the ground of mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed to an ethnic origin, a nation, a race or a determined religion, physical appearance, last name, family situation, union activities, political opinions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in a language other than French, economic vulnerability, philosophical opinions. It also covers grounds recognised by international law and jurisprudence that are not expressly stated in French legislation, including social origin, birth and language, in all areas regulated by law or covered by international conventions. Its scope goes beyond the requirements of Directives 2000/43/EC and 2002/73/EC.

In addition, given its competence with regard to all issues relating to claims against Government and public services, the 'superior interest of children', as defined in Article 3 of the UN Convention on the Rights of the Child, ethics in the activities of public and private security forces, as well as its new responsibility regarding the protection of whistle-blowers, its range of intervention covers most human rights issues, except as regards immigration law and defence rights in criminal law.

The Defender of Rights executes its mandate first by investigating claims and secondly by pursuing a broad spectrum of actions relating to the promotion of rights such as the publication of guides, surveys, research, training, consultation with stakeholders and communication campaigns.

Within the nine investigation units of the body which all deal with discrimination claims within their area of expertise, three units receive a higher concentration of anti-discrimination claims.

The purpose of investigation by the Defender of Rights is to find evidence of discrimination in each case and there is no strategy per se to promote specific grounds or seek particular

³¹⁷ France, Decree No. 2011-905 of 29 July 2011 relating to the organisation of the Defender of Rights (*Décret No. 2011-905 du 29 juillet 2011 relatif à l'organisation et au fonctionnement des services du Défenseur des droits*) available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000024414634&categorieLien=id> (accessed 6 July 2017).

approaches in individual investigations. However, whenever evidence indicates structural or multiple discrimination, the institution will pursue the argument in order to seek recognition of its components by courts and respondents.

The investigation and review processes are overseen by experts who ensure that they are given appropriate attention.

Overall, the institution is vigilant in addressing the seven TFEU grounds, with a particular focus on origin, sexual orientation, gender, the rights of foreigners and the rights of migrants.

- f) Competences of the designated body – and their independent and effective exercise
 - i) Independent assistance to victims

In France, the designated body does have the competence to provide independent assistance to victims.

The Defender of Rights receives individual complaints and assists each person in formalising their claim and finding the proper recourse. Its delegates receive the victim in person, helps them to formalise their claim and can offer mediation services. If the situation cannot be mediated, it is transferred to the head office.

The head office also receives claims directly. When a claim is within its area of competence, it will assist the claimant in formalising his or her claim and will then seek justification from the respondent. It will investigate individual and collective complaints, whether the investigation is initiated of its own accord or following a written request from the claimant, a trade union or an NGO.

Its legal investigative powers allow the Defender of Rights to request explanations from any public or private person, including the communication of documents and the hearing of relevant witnesses (Article 20). Considering the important difficulties of claimants in obtaining access to comparative evidence in the French judicial procedure, which accounted for difficulties in accessing effective redress from courts until the creation of the HALDE, this power of investigation represents a substantial part of the institution's role in assisting victims since the creation of the HALDE.

In case of non-cooperation with its investigative services, the Defender of Rights can request a court order and can also pursue the respondent for contempt (Article 21). The Defender of Rights may also ask that all required investigations be carried out by any service of the state and carry out visits in any non-private premises after due notice and with the consent of the owner (Article 18). Finally, the law gives the investigators authority to issue a sworn statement concluding that discrimination has taken place, which can only be contradicted by way of substantial evidence before the courts (Article 22).

In the case of a criminal offence, the Defender of Rights may submit the claim to the criminal courts or proceed with a penal settlement (Article 28). This is a kind of negotiated criminal sanction offered to perpetrators of direct discrimination by application of Article 28 of the Organic Law, enforced exclusively by the Defender of Rights. It means that the Defender of Rights, following the investigation of a complaint resulting in a finding of direct intentional discrimination by the person or entity investigated, is authorised to suggest a specific criminal sanction to the perpetrator, which they can either accept or reject. This could be a fine or publication (for instance in a press release) of the fact that discrimination has taken place and, if relevant, an

award of compensation to the victim. If the proposed negotiated criminal sanction is rejected or if there is a subsequent failure to comply with its conditions, the Defender of Rights may initiate a criminal prosecution, in place of the public prosecutor, before a criminal court (Article 33). This system has much in common with the procedures followed by other administrative authorities, which have the power to propose on-the-spot fines for an infringement of the criminal law, such as the tax, customs and water or woodland authorities.

Otherwise, the Defender of Rights can deal with any case by pursuing an equitable settlement (Articles 26 and 28), which in French law consists of proposing a solution correcting the unfairness of a strict application of the law despite the absence of effective means of legal action (Article 25), and it may recommend mediation to the parties.

When the Defender of Rights completes the investigation, if it finds that a claimant's allegation appears to be well founded, it will first address its conclusions in fact and in law to the respondent and all interested parties to request their response.

It will, in a second phase, issue conclusions and recommendations to the parties who are given a certain amount of time to comply (Article 25). These recommendations can include a request for disciplinary sanctions (Article 29). The Defender of Rights can also make general recommendations to the parties, Government, public bodies or interest groups and propose legislative and regulatory reforms and the amendment of existing legislation.

In cases of non-compliance, the Defender has the power to issue 'injunctions', failing which the body will draw public attention to its recommendations and the failure to comply (Article 25). In addition, it may alert the relevant authorities if disciplinary sanctions against the respondent are required.

Overall, 78 % of its mediations are successful and 60 % of individual recommendations are complied with.

It may also present independent observations before the courts in support of the position of the victim, filing evidence gathered through its investigation in the court record (Article 33). Its observations before the courts are followed by judges in 76 % of cases.

- Independence

The competence of the Defender of Rights is exercised in an independent manner. The Defender of Rights has the power to decide what claims to pursue (Article 24 of the Organic Law) and takes no instruction.

The present Defender of Rights does not hesitate to take an independent stand before Parliament, jurisdictions, and toward private respondents and public services. He intervenes regularly in public and before Parliament to assert his mandate to provide a fundamental rights approach to situations that challenge public opinion and the political positions of Government. His independent observations before courts have substantively contributed to effective enforcement in France and the development of jurisprudence in matters of discrimination. This has influenced the evolution of the interpretation of the law, as discussed through the examples presented in this report.

- Effectiveness

As regards its effectiveness, since 2014, it investigates as many claims as it receives, and any delays in its investigations and decisions are reasonable, allowing the institution to present its observations before the courts in due time and to make relevant recommendations.

- Resources

There are approximately 130 lawyers who may all deal with discrimination cases for 10 % of their time, and 30 lawyers who have a case load that particularly concentrates on discrimination cases. The investigation and review processes are overseen by six experts in discrimination law who ensure that they are given appropriate attention. Overall, approximately 30 % of the institution's legal work is dedicated to discrimination claims.

The body's staff who are dedicated to the investigation of claims have never been subjected to budgetary cuts.

In addition, 475 delegates throughout the territory receive and assist the public and deal with cases by way of mediation. Claims that require formal investigation are then addressed to the head office. For such delegates, 8 % of their activity is devoted to claims alleging discrimination.

Given that the investigations are carried out by trained lawyers supervised by experts, that - to date - the equality body remains able to investigate as many claims as it receives each year and that it has reasonable delays in investigations, it can be considered to have sufficient resources.

ii) Independent surveys and reports

In France, the designated body does have the competence to conduct independent surveys and publish independent reports.

The Defender of Rights conducts or participates in some exterior survey/studies and finances a number of independent scientific research surveys and studies in the field of discrimination.

It also publishes an annual public survey implemented in collaboration with the French ILO authorities regarding the situation of discrimination in employment.

In 2016, the Defender of Rights co-financed three major studies on the effective enforcement of discrimination law.³¹⁸

³¹⁸ Euillet, S., Halifax, J, Moisset, P. and Severac, N. (2016), *L'accès à la santé des enfants pris en charge au titre de la protection de l'enfance (ASE/PJJ) : accès aux soins et sens du soin*, Université Paris Ouest Nanterre Le Défense, 2016; available at: <http://www.defenseurdesdroits.fr> (accessed 1 March 2017) ; Perelman, J., Mercat-Bruno, M. (2016), *Les juridictions et les instances publiques dans la mise en œuvre du principe de non-discrimination : perspectives pluridisciplinaires et comparées*, Sciences Po (École de droit/CEVIPOF) et Université Panthéon-Assas- CERSA, 2016, available at: http://www.gip-recherche-justice.fr/wp-content/uploads/2016/11/GIP_RapportFinal_LES-JURIDICTIONS-ET-LES-INSTANCES-PUBLIQUES-LA-NON-DISCRIMINATION-FINAL.pdf (accessed 1 March 2017); Laidie, Y. and Picard, P. (2016), *Le principe de non-discrimination : l'analyse du discours du juge administratif*, Credespo – Université de Bourgogne, 2016; <http://www.gip-recherche-justice.fr/wp-content/uploads/2016/10/Note-de-synth%C3%A8se-214.04.03.21-1.pdf> (accessed 1 March 2017).

It also published the result of its survey on 'Employment and Discrimination on the Ground of Origin: Results of the Call for Witnesses'³¹⁹ and a legal study on the 'Direct Effect of the Provisions of the International Convention on the Rights of Persons with Disabilities'.³²⁰

In 2017, it published various aspects of a wide survey on access to rights, also presenting results relating to discrimination:

- in access to housing;³²¹
- in relations between the police and population;³²²
- in relations with public services.³²³

In addition, with the ILO, it published its annual report on the perception of discrimination in employment³²⁴ and a study on the attitude of medical practitioners towards discrimination in access to dental and medical care.³²⁵

Every year the Defender of Rights publishes independent reports addressed to the Government and recommendations to the Government and Parliament further to its findings of discrimination or in the course of the legislative process proposing legislative and regulatory reforms. In 2016, the Defender sent 21 such reports to the Parliament³²⁶ and 11 reports to the Government,³²⁷ four of which related to discrimination issues:

- The Fundamental Right to Education: a School for All, a Right for Each Child;³²⁸
- The Employment of Women with Disabilities;³²⁹
- The Legal Protection of Vulnerable Adults;³³⁰
- The Fundamental Rights of Foreigners in France.³³¹

³¹⁹ Defender of Rights (2016a), *Résultats de l'appel à témoignages : Jeunes, origines et discriminations à l'embauche*, available at: <http://www.defenseurdesdroits.fr/fr/outils/etudes/etudes-et-resultats-acces-emploi-et-discrimination-liees-aux-origines>, accessed 1 March 2017.

³²⁰ Defender of Rights (2016c), *L'effet direct des stipulations de la Convention internationale relative aux droits des personnes handicapées (CIDPH)*, available at: <http://www.defenseurdesdroits.fr> (accessed 2 March 2017).

³²¹ Defender of Rights, (2017) *Enquête sur l'accès aux droits Volume 5 - Les discriminations sur l'accès au logement*, available at: <https://www.defenseurdesdroits.fr/fr/etudes-et-recherches/2017/12/enquete-sur-lacces-aux-droits-volume-5-les-discriminations-sur-lacces>, (accessed 14 February 2018).

³²² Defender of Rights, (2017), *Enquête sur l'accès aux droits Volume 1 - Relations police / population : le cas des contrôles d'identité*, available at: <https://www.defenseurdesdroits.fr/fr/etudes-et-recherches/2017/01/enquete-sur-lacces-aux-droits-volume-1-relations-police-population-le>, (accessed 14 February 2018).

³²³ Defender of Rights, (2017), *Enquête sur l'accès aux droits Volume 2 - Relations des usagers avec les services publics*, available at: <https://www.defenseurdesdroits.fr/fr/publications/rapports/rapports-thematiques/enquete-sur-l%27acces-aux-droits-volume-2-relations-des>, (accessed 14 February 2018)

³²⁴ *10e Baromètre de la perception des discriminations dans l'emploi*, available at: <https://www.defenseurdesdroits.fr/fr/outils/etudes/10e-barometre-de-la-perception-des-discriminations-dans-l%27emploi>, (accessed 14 February 2018).

³²⁵ Despres, C. and Lombrail, P., LEPS Research Unit, (2017) *'Des pratiques médicales et dentaires entre différenciation et discrimination'. Une analyse de discours de médecins et dentistes*, available at: <https://www.defenseurdesdroits.fr/fr/outils/etudes/des-pratiques-medicales-et-dentaires-entre-differenciation-et-discrimination> (accessed 14 February 2018).

³²⁶ <http://www.defenseurdesdroits.fr> (accessed 2 March 2017).

³²⁷ <http://www.defenseurdesdroits.fr> (accessed 2 March 2017).

³²⁸ Defender of Children (2016), *Droit fondamental à l'éducation : une école pour tous, un droit pour chacun*, available at: <http://www.defenseurdesdroits.fr> (accessed 2 March 2017).

³²⁹ Defender of Rights (2016e), *L'emploi des femmes en situation de handicap*, available at: <http://www.defenseurdesdroits.fr> (accessed 2 March 2017).

³³⁰ Defender of Rights (2016f), *Protection juridique des majeurs vulnérables*, <http://www.defenseurdesdroits.fr> (accessed 2 March 2017).

³³¹ Defender of Rights (2016g), *Les droits fondamentaux des étrangers en France*, available at: <http://www.defenseurdesdroits.fr> (accessed 2 March 2017).

Because of the elections, 2017 has not been an active year for legislation. However, the Defender of Rights has rendered 14 opinions to Parliament, including opinions on:

- The Government's integration policy.³³²
- The right to park of Travellers.³³³
- The rights of intersex persons.³³⁴
- The support of unaccompanied migrant minors.³³⁵
- Two opinions on policies relating to the rights of migrants and asylum seekers.³³⁶

In addition, it has published three reports to the Government, two of which address issues of discrimination: a report on access to rights and public services in Guyana,³³⁷ and a report on the abuses of the fight against fraud in social protection services.³³⁸

Furthermore, the law provides that each year the Defender of Rights will submit a report to the President of the Republic and Parliament on its activity with a specific annexe relating to its function as the equality body (Article 36 par II).³³⁹

- Independence

Its surveys and reports are conducted in an independent manner. The institution controls the use of its budget allocated to reports and research, it determines its agenda and mandates the best respected research teams to provide supporting expertise for its conclusions so as to add to their impact.

The Defender of Rights also invests in the promotion and distribution of its report in order to ensure that it will be noticed, and its conclusions taken in consideration. Over the years, it has supported many reforms, for example on the legislation applicable to Travellers, to migrants and foreigners, to unaccompanied minors or the anti-discrimination legal framework.

- Effectiveness

Its surveys and reports are conducted in an effective manner through a combination of in-house resources and independent expertise. In

³³² Avis 17-12: available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=23082 (accessed 14 February 2018).

³³³ Avis 17-11: available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=23045 (accessed 14 February 2018).

³³⁴ Avis 17-04: available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=21115, (accessed 14 February 2018).

³³⁵ Avis 17-03: available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=21075, (accessed 14 February 2018).

³³⁶ Avis 17-14 : available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=23580; Avis 17-09 : available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=22848, (accessed 14 February 2018).

³³⁷ Defender of Rights (2017), *Accès aux droits et services publics en Guyane* (Access to rights and public service in Guyana), available at: <https://www.defenseurdesdroits.fr/fr/rapports/2017/03/acces-aux-droits-et-aux-services-publics-en-guyane>, (accessed 14 February 2018).

³³⁸ Defender of Rights (2017) *Lutte contre la fraude aux prestations sociales: A quel prix pour les droits des usagers?* (The fight against fraud in social benefits: what price for the rights of beneficiaries?) available at: <https://www.defenseurdesdroits.fr/fr/rapports/2017/09/lutte-contre-la-fraude-aux-prestations-sociales-a-quel-prix-pour-les-droits-des-usagers>, (accessed 14 February 2018).

³³⁹ Defender of Rights, *Rapport annuel d'activité 2016* (2016 annual report), available at: <https://www.defenseurdesdroits.fr/fr/rapports-annuels-dactivite/2017/02/rapport-annuel-dactivite-2016>, (accessed 14 February 2018).

addition, it pursues a strategy of mainstreaming, to promote the development of research on discrimination issues by public research institutes.

- Resources

The Defender of rights employs three staff members to carry out surveys and studies and has a budget of EUR 300 000. In addition, some of its effort is spent requesting that public research groups engage in surveys and studies regarding the situation of discriminated groups and/ or discrimination.

- iii) Independent recommendations

In France, the designated body does have the competence to issue independent recommendations on discrimination issues.

This activity is carried out through recommendations to Parliament and Government when reviewing and discussing public policies and legislation, and through the activity of lawyers in relation to claims (Articles 25 and 32).

One of the possible outcomes of claims investigations is for the body to make general recommendations, for example when the lawyer finds an incoherence or inadequacy in the law or ministerial instructions. The recommendation can take the form of a demand to create policy or make legislative reforms.

When his or her findings indicate a discriminatory practice, for example, by an employer or a service provider, or an inadequacy in the way discrimination problems are addressed, the Defender of Rights can also address a general recommendation to any respondent, whether private or public, to modify or improve this rule or practice.

This power of recommendation is sustained by the power to request that the respondent reports back on measures taken to implement the said recommendations. If the respondent fails to implement the recommendation of the Defender of Rights, the Defender can issue an injunction, followed by a public denunciation of the discriminatory practice and the failure to follow the Defender of Rights' recommendation. If the claimant then chooses to go to court, the Defender of Rights will present his observation before the court.

- Independence

This competence is effectively exercised in an independent manner, in practice. The authority of the institution is embodied in the outcome of the inquiries and research of the Defender of Rights, which is reflected in the fact that they are substantially followed. In 2017, 696 recommendations and decisions were addressed to Government, public services and private physical or moral persons.

- Effectiveness

General recommendations and reform proposals are issued by way of a formal decision whenever the finding of the Defender of Rights in an individual case indicates deficiencies in the law, a rule or practice that justifies the issuing of a general recommendation.

Approximately 60 % of recommendations made by the Defender of Rights are complied with and 20 % of its reform proposals are followed.

- Resources

There are approximately 130 lawyers who may all deal with discrimination cases for 10 % of their time, and 30 lawyers who concentrate on discrimination cases in particular. The investigation and review processes are overseen by six experts in discrimination law who ensure that they are given appropriate attention. Overall, approximately 30 % of the institution's legal work is dedicated to discrimination claims.

In addition, as regards general recommendations, three dedicated staff members follow the Defender of Rights' activity in relation to reform proposals.

(iv) Other competences

The Defender of Rights also has competence in matters related to the promotion and support of good practice, awareness raising, training and communication (Article 34).

To this end, it has published a number of terms of reference of good practice in the form of guides over the years. In 2017 it published the following guides:

- A guide relating to the framework of enforcement of the duty of reasonable accommodation of the employer;³⁴⁰
- A guide relating to the fight against discrimination in local public employment;³⁴¹
- A guide to fight against discrimination on the ground of sexual orientation and gender identity in employment;³⁴²
- A guide for professionals, *Renting Without Discriminating*;³⁴³
- A guide to promote the application of the UN CRPD;³⁴⁴

It is also competent to provide advice to the Government (Article 32).

These competences are exercised in an independent manner in practice.

(v) Positive duties

French legislation only provides for positive duties as regard disabled persons and the ground of age: the integration of disabled children in school, quotas

³⁴⁰ Defender of Rights, *Emploi des personnes en situation de handicap et aménagement raisonnable*, (Employment of people with disabilities and reasonable accommodation), December 2017: available at: <https://www.defenseurdesdroits.fr/fr/guides/guide-amenagement-raisonnable>, accessed 28 February 2018.

³⁴¹ Defender of Rights, *Act against discrimination and harassment in the local public service, Agir contre les discriminations et le harcèlement dans la fonction publique territoriale*, November 2017, available at <https://www.defenseurdesdroits.fr/fr/guides/agir-contre-les-discriminations-et-le-harcèlement-dans-la-fonction-publique-territoriale>, accessed 28 February 2018

³⁴² Defender of Rights, *Agir contre les discriminations liées à l'orientation sexuelle et à l'identité de genre dans l'emploi*, (Acting against discrimination on the grounds of sexual orientation and gender identity in employment), May 2017, available at <https://www.defenseurdesdroits.fr/fr/outils-list?tid=572>, accessed 28 February 2018.

³⁴³ Défenseur of Rights, *Louer sans discriminer*, Renting without discriminating, March 2017, available at: <https://www.defenseurdesdroits.fr/fr/guides/guide-louer-sans-discriminer>, accessed 28 February 2018

³⁴⁴ Defender of Rights, *La convention internationale des personnes handicapées* (A guide for the application of the UNCRPD), February 2017, at <https://www.defenseurdesdroits.fr/fr/guides/guide-convention-internationale-des-droits-des-personnes-handicapees-cidph>, accessed 25/02/2018.

and reasonable accommodation in employment and implementation of accessibility requirements.

If compliance with these legal obligations on a case-by-case basis forms part of its investigation mandate when it receives a claim, the Defender of Rights does not have a role in monitoring, evaluating or supervising duty bearers.

g) Legal standing of the designated body/bodies

In France, the designated body has legal standing to intervene in legal cases concerning discrimination.

The Defender of Rights has been conceived as a 'judicial official' (Article 33): the law creates the possibility for the criminal, civil and administrative courts to seek its observations in cases already under adjudication. In addition, the Law on Equal Opportunities extended its power to the submission of observations on its own initiative before the criminal, civil and administrative courts.

Constitutional law requires that the positioning of all public institutions be impartial. Therefore, the Defender of Rights cannot bring a case before the court on its own behalf or on behalf of a victim, except when it acts as public prosecutor as regards direct citations before the criminal courts in the event of a refusal by a respondent to comply with the demands of a penal transaction or settlement (Article 28 of the Organic Law creating the Defender of Rights).

In practice, the Defender of Rights only intervenes to present his independent view of the case in matters that have already been brought before the court by the claimant and files the result of his investigation.

Over the years, the Defender of Rights has presented observations in an average of 100 cases per year and has substantially contributed to the development of jurisprudence in France. In 2017, it presented observations in 119 discrimination cases.

In 2016, the Court of Cassation concluded the civil liability of the State in five cases of racial profiling, adopting the reasoning presented by the Defender of Rights in its observations relating to the burden of proof and the positive duty of the State to prevent racial discrimination on the part of the police.³⁴⁵

In 2011, the Court of Cassation concluded that data analysis on the ground of origin based on the last name of personnel hired over a period of six years was admissible evidence in support of a presumption of discrimination in hiring practices, further to evidence filed in the court record from the investigation of the former equality body, the HALDE.³⁴⁶

³⁴⁵ Defender of Rights, Decision 2016-132, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=18452 (accessed 14 February 2018); Court of Cassation, 1st Civil Chamber, No. 15-24208, 9 November 2016, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=18453 (accessed 14 February 2018).

³⁴⁶ HALDE, Deliberation 2009-42, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=659 (accessed 14 February 2018); Court of Appeal of Toulouse, No. 08/06630, 19 February 2010 available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=13838 (accessed 14 February 2018); Court of Cassation, Social Chamber, No. 10-15873, 15 December 2011, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=5773 (accessed 14 February 2018).

h) Quasi-judicial competences

In France, the body is not a quasi-judicial institution. Although it pursues investigations and renders decisions, such decisions have the status of administrative decisions. It does not hold hearings and its decisions are not binding.

i) Registration by the body/bodies of complaints and decisions

In France, the designated body registers complaints and the number of complaints and decisions (by ground, field, type of discrimination, etc.). This data is available to the public in its annual report.³⁴⁷

The Defender of Rights does not formalise telephone contacts or requests for information as complaints. However, it operates a telephone service and in 2017 it received 51 069 telephone inquiries covering all areas of its competence.

Claims are divided between claims received by delegates and claims received at head office. All claims that require formal inquiries are dealt with at head office level. In 2017, delegates received 70 718 claims of which 2 714 concerned discrimination issues. At the head office, the Defender of Rights registered 22 653 complaints, of which 5 405 concerned discrimination issues, which is an increase of 3.9 % compared to 2016 and 15 % compared to 2014.

The allocation of claims between grounds has been stable for a number of years.

The most common ground of discrimination invoked is 'origin', which covers race and ethnic origin. It represents 21.3 % of complaints. It is followed by the grounds of disability (19 %), health (11.6 %) and nationality (6.6 %). Age accounts for 5.7 % of complaints, sex and pregnancy, 7.2 %, religion and religious beliefs, 3.7 %, sexual orientation, 1.8 % and political opinions, 1.6 %.

In 2017, 50.8 % of complaints relating to the anti-discrimination mandate alleged discrimination in employment (of which 9.1 % related to the ground of origin), 21.5 % in access to public services (of which 5.7 % related to the ground of origin), 7.9 % in access to education (of which 1 % related to the ground of origin), 6.4 % in access to housing and 13.4 % in access to other goods and services (of which 2.9 % related to the ground of origin).

The investigations of the Defender of Rights can give rise to settlements, recommendations, proposals for reform and intervention before courts. In 2017, the Defender of Rights attained amicable resolutions in 80 % of claims in which he intervened.

It adopted 312 formal decisions (compared to 248 in 2016), 165 of which relate to discrimination claims: 67 decisions related to discrimination on the ground of origin, 24 on sex, 49 on disability, 7 on age, 2 on sexual orientation, 3 on religion and 4 on political convictions. There were 70 decisions that discussed discrimination relating to multiple grounds.

The Defender of Rights presented observations before the courts in 119 discrimination cases, addressed four opinions to the Public Prosecutor and adopted 31 decisions relating to the fundamental rights of migrants, of which 25 have given rise to the presentation of observations before the courts.

³⁴⁷ Defender of Rights (2016h), *Annual Report 2016*, available at: <http://www.defenseurdesdroits.fr/fr/publications/rapports/rapports-annuels-d'activite/rapport-annuel-d'activite-2016> (accessed 2 March 2017), (accessed 14 February 2018).

j) Planning

The designated body does not have a strategic plan and has made no implementation evaluation.

The designated body does not have an annual work plan except as regards the budget allocation. Projects and initiatives in all areas are undertaken throughout the year and each project follows its own planning, which in the end structures what is expected to be published and planned in a given year and the next one.

To engage in strategic planning is considered a hindrance the reactivity and capacity of the designated body to adapt to events and get involved in cases or follow the Government and parliamentary agendas.

The designated body publishes an annual report that is submitted to Parliament and the President of the Republic that reflects its activity of the past year (Article 36 II of the Organic Law).

k) Stakeholder engagement

The Organic Law creating the equality body expressly provides that NGOs and Members of Parliament can address complaints to the Defender of Rights. The law further provides that the Defender of Rights can be consulted by the Government on any subject on which it is competent.

The equality body has formally organised *Comités d'entente* (consultation committees), which are a platform for dialogue with civil society for mutual consultation and information; each committee meets twice a year. The committees are:

- For NGOs representing disabled persons;
- For NGOs representing LGBTI persons;
- For NGOs involved in the fight against discrimination on the ground of origin;
- For NGOs involved in the promotion of the rights of children;
- For operators and intermediaries in access to employment and hiring practices.

In addition, the Defender of Rights is the designated body to promote the UNCRPD and the Convention on the Rights of the Child and present a report before the committees of the UN on the monitoring of the implementation of the conventions.

Furthermore, it sets up different projects relating to, for example, the promotion of research and training in cooperation with NGOs and various government stakeholders.

The institution fosters an approach of openness and availability and encourages contacts with all stakeholders in the promotion of equal rights.

To date, its interpretation of the requirements of its independence has precluded the Defender of Rights from engaging in projects with private interests.

l) Accessibility

The designated body/bodies does/do have an accessible and publicly visible office.

The designated body/bodies does/do not have local or regional offices, but it offers consultation by 475 delegates throughout the national territory in the public premises of services dedicated to the access to rights (*Maisons de justice et du droit, Maisons des services publics*, City Hall) each week.

The designated body does not conduct outreach actions to local areas or communities, but it maintains continuous relations with NGOs in matters related to the different grounds of discrimination as well as the rights of Roma and migrants.

The designated body does have procedures in place to identify and respond to the access needs of specific complainants (e.g. people with disabilities, people with caring responsibilities, people speaking different languages, people with literacy issues and so on). Its offices, the buildings where its delegates hold their visiting hours locally, and its website are accessible to disabled persons.

It is part of the mandate of its delegates throughout the national territory to assist complainants in formalising their complaints.

Interpreter services for complainants who speak foreign languages are not officially available.

The equality body has made every effort to be accessible to disabled persons and persons with literacy problems. It offers extensive office opening hours to receive complainants. However, it does not accommodate per se the needs of people to access services in a foreign language.

m) Roma and Travellers

As regards the Roma and Traveller populations, the anti-discrimination agenda is based on the first works of the HALDE, the institution that framed all recommendations regarding access to education and housing and the derogatory administrative conditions relating to travelling with regard to driving licences, identity cards, occupation of non-building land (*terrain non constructible*), access to amenities etc.

It recommended a reform of the status of Travelling people in order to eliminate all specific identity papers and all measures resulting in increased police checks (HALDE Deliberation No.2007-372 of 17 December 2007, recommending reform of the legal regime applicable to Travellers (*gens du voyage*)).³⁴⁸

The Defender of Rights reiterated HALDE's position and requested a reform of the legislation as regards access to voting rights in decision No. 2011-11 addressed to the Minister of Interior, who replied in February 2012 by referring to a proposed overall reform of the status of Travellers after the elections in autumn 2012. On 5 October 2012, the Constitutional Council quashed this aspect of the legislation and a legislative reform was expected. This recommendation was reiterated by the Defender of Rights in its decision of 24 November 2014.³⁴⁹

On 29 October 2016, the President of the Republic recognised for the first time the responsibility of the French Republic in the persecution and internment of French Travellers during World War 2, at the inauguration of the commemorative site of the internment camp for Travellers at Montreuil-Bellay. The President further affirmed his conviction that the circulation permit of Travellers should be repealed. Article 195 of Law No. 2017-86 of 27 January 2017 on equality and citizenship, which was adopted on 23 November 2016,³⁵⁰ finally abrogated Law 69-3 on the status of Travellers. This provision thereby puts an end to the derogatory status of travellers which limited their right to choose a town of elective

³⁴⁸ HALDE Deliberation No. 2007-372, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=12946 (accessed 14 February 2018).

³⁴⁹ Defender of Rights decision no MLD-MSP 2014-152, 24 November 2014, available at: <http://www.defenseurdesdroits.fr>, (accessed 14 February 2018).

³⁵⁰ France, Law No. 2017-86 of 27 January 2017 on equality and citizenship, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033934948&dateTexte=&categorieLien=id> (accessed 2 March 2017).

residence, required them to carry special interior passports and to report regularly to local authorities.

In parallel, on 1 December 2011, the Defender of Rights submitted a new proposal to the Minister of the Interior and all the mayors of France in order to request that all proceedings to cut access to electricity and water by reason of illegal use of land be suspended in the winter period on the basis of humanitarian considerations combined with the public duty of all public authorities to first consider in all matters the higher interest of the child. This recommendation was followed by some municipal authorities.

Regarding the situation of foreign Roma, in 2012 the Ministry of Immigration confirmed that it had escorted 14 000 Romanian Roma back to Romania, compared with 1 600 in 2007. This policy has been pursued ever since. However, at the end of each year the number of Romanian and Bulgarian Roma in France remains constant, year after year. The total is estimated to be 20 000 and the same groups seem to keep coming back after they are sent back to Romania.

In addition, the Government maintains a policy of pursuing illegal settlers on improvised campsites which targets Roma and Travellers, and, since 2016, migrants too. This results in constant evictions and checks, which create anxiety and insecurity for all persons living on the street and in particular for these communities. Further to these evictions, police forces organise collective expulsions from France of Romanian and Bulgarian Roma, contrary to Article 4 of the 4th Protocol to the European Convention on Human Rights.

The situation regarding Roma in 2012 led to many NGO complaints to the Defender of Rights in all its capacities, whether relating to the defence of children, ethics in the security services, combating discrimination or inequality and illegal acts by the public services. There were an estimated 20 claims relating to 14 Departments, on 25 sites, concerning approximately 1 625 people in all, plus 1 000 people in Seine St-Denis (Department 93). The Defender of Rights presented observations before the courts in support of the suspension of 30 eviction procedures, in order to require that the prefect implement conditions of humanitarian support, as defined in the Ministerial instruction of 26 August 2012. In addition, the Defender of Rights systematically sent questionnaires to prefects concerning each eviction asking them to report on measures taken to implement humanitarian eviction procedures.

A report on the implementation of this Ministerial Instruction since September 2012 was published by the Defender of Rights in June 2013, in order to alert the Government to the inadequate respect for humanitarian requirements. It requested that financial means be provided to support the implementation of the inter-ministerial instruction relating to evictions of illegal campsites and access to rights, and that further coordination at European level ensure strong public policy in support of Roma integration. It was also intended to provide NGOs with a legal *vade mecum* in order to empower support networks to use judicial proceedings to ensure access to rights for these groups.³⁵¹

The National Commission on Security Ethics (CNDS) (which was merged with the HALDE as of 1 May 2011 to form the Defender of Rights) has reported disproportionately violent evictions, which gave rise to unjustified violence by police forces. In one case, its investigation established the existence of instructions to target the eviction and the police control of Roma persons (MDS-MLD 2015-057) and in another, instructions to systematically check the identity of persons who appeared to be Travellers (MDS 2016-319).

³⁵¹ Defender of Rights (2013), *Rapports sur la mise en œuvre des évacuations en application de la circulaire du 24 Aout 2013*, (Report on the implementation of eviction in application of Ministerial Instruction 24 August 2012), June 2013, available at: <http://www.defenseurdesdroits.fr> (accessed 6 July 2017).

In 2017, although claims received by the Defender of Rights do not per se raise issues of discrimination law, they nevertheless underline problems in relation to public servants and the requirements of the rule of law in relation to migrant, Roma and Traveller communities, which are vulnerable and stigmatised.

This year, once again, the Defender of Rights received a number of claims relating to the refusal of mayors to register Roma and migrant children in school or to school cafeteria, preferring to let the public authorities of the prefect and the Ministry of National Education intervene, rather than directly enrolling the children, as it is their duty. This is a means to show to their electorate that they are resisting the long-term settlement of these populations in the territory.

The Defender of Rights systematically reports to Parliament on a bill relating to the rights of Roma, Travellers and Migrants.

In 2017, the Defender of Rights submitted a report to Parliament on bills No. 557 and No. 680, which propose widening the right of small towns to evict Travellers and Roma without the authorisation of judges and lowering the level of the duty of small towns to create parking space (stopping sites).³⁵² The report highlighted the insufficiency of reforms undertaken to review the situation of Travellers and inadequate implementation of the parking areas required by law, which creates important difficulties in parking for Travellers. Contrary to the propositions of the two bills, the Defender of Rights reaffirmed the necessity to strengthen the power of direct action of the prefect to compensate the lack of implementing parking areas that has been going on for more than 15 years. It questioned the purview of the two bills and invited Parliament to adopt a global approach to the situation and the rights of Travellers as recommended for a number of years.

Since 2015, the Defender of Rights has set the issue of fundamental rights of migrants and foreigners as a priority for the institution. He has therefore put in place a transversal task force, which has become a full-service permanent team, to build up expertise and address all claims and issues relating to all violations of migrants' rights in areas such as access to residence, access to social protection, healthcare, education, emergency housing, family rights, employment and so on. To this end, he has published an important report drawing attention to the claims in which he has to intervene and all pending legislative, administrative and legal issues regarding the rights of foreigners and migrants (see the report, *The Fundamental Rights of Foreigners in France*).³⁵³

³⁵² Avis 17-11; available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=23045 (accessed 14 February 2018).

³⁵³ Defender of Rights (2016g), *Les droits fondamentaux des étrangers en France*, available at: <http://www.defenseurdesdroits.fr> (accessed 2 March 2017).

8 IMPLEMENTATION ISSUES

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

- a) Dissemination of information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

An inter-ministerial delegate coordinates Government action with regard to racism (*Délégué interministériel à la lutte contre le racisme et l'homophobie, DILCRAH*). He managed initiatives for the mobilisation of civil society and has put in place a vast training programme for 50 000 civil servants in contact with the public, in order to train them to offer adequate support and guidance for victims of racism and to respond to situations of overt racism.

The Defender of Rights pursues communications activities through its website, the publication of leaflets, posters in all public services, its network of local delegates and its media strategy, as well as regularly contributing to training programmes for civil servants and civil society. In 2012 and 2013, it used Progress project funding to publish a handbook for local authorities to provide them with guidance regarding the requirements for implementing the anti-discrimination policy.³⁵⁴

On 5 October 2015, the Defender of Rights co-organised with the Judicial Supreme Court (Court of Cassation, *Cour de Cassation*), the Administrative Supreme Court (*Conseil d'Etat*) and the National Bar Association a one-day seminar at the Court of Cassation to celebrate the 10th anniversary of the national equality body.³⁵⁵ On 13 December 2016, it organised a conference on the 10 years of ratification of the International Convention on the Rights of Disabled Persons and published a report on the principles of application of the provisions of the convention.

Most NGOs, whether anti-racist or promoting the rights of disabled people, gay people, people with certain health conditions or the elderly (including MRAP, SOS Racism, LICRA, LDH, SIDA Info services, AIDES, LGBT, APF etc.),³⁵⁶ are subsidised by the State and pursue information dissemination activities. These activities include dissemination from their own websites, presenting legal precedents and legal tools, many of which are adapted for the visually impaired, as well as seminars and events.

Article 61 bis of Law No. 2017- 86 of 27 January 2017 on equality and citizenship has created an obligation for all hiring committees of organisations of more than 300 employees to undertake training to correct discriminatory biases and implement transparent processes

³⁵⁴ Defender of Rights (2014), 'Local authority guide to accessibility' (*Collectivités territoriales: Guide pour l'accessibilité des établissements recevant du public*), March 2014, available at: <http://www.defenseurdesdroits.fr> (accessed 6 September 2016).

³⁵⁵ Defender of Rights, *Colloque 10 ans de droit de la non discrimination*, (Seminar 10 years of anti-discrimination law), October 2015, available at: <https://www.defenseurdesdroits.fr/fr/rapports/2016/12/actes-du-colloque-dix-ans-de-droit-de-la-non-discrimination>, accessed 7 March 2018

³⁵⁶ MRAP (*Mouvement contre le racisme et pour l'amitié entre les peuples* - Movement against racism and for friendship between peoples), SOS Racism, LICRA (*Ligue internationale contre le racisme et l'antisémitisme* - International League against Racism and anti-Semitism), LDH (*Ligue des droits de l'homme* - Human Rights League), SIDA Info services (Aids hotline), AIDES (Rights of people suffering from Aids), LGBT (Lesbian, Gay, Bisexual and Trans coalition), APF (*Association des paralysés de France* - French Association of Victims of Paralysis).

- b) Measures 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)

Under the authority of the Ministry of Interior and the prefect, the departmental bodies dedicated to combating racial discrimination are the commissions for the promotion of equality and citizenship (*Commissions pour la promotion de l'égalité des chances et la citoyenneté, COPEC*).³⁵⁷ They bring together all local actors under the authority of the representative of the national state in the department (the Prefect). They are intended to generate cooperation and dialogue for the promotion of equality and access to rights addressing all grounds of discrimination.

In addition, Law No. 2005-102 on equal opportunities and the integration of disabled persons structures all the national and local commissions involved in establishing policies concerning disabled people and enforcing their rights, such as the National Consultative Council of Disabled Persons (*Conseil National Consultatif des Personnes Handicapées*) and its local counterparts, around the participation of NGOs representing disabled people (Article 1 of the Law creating Article L146-1 A CSW). It further creates a Departmental Commission for the Rights and the Autonomy of Disabled Persons which is competent for all decisions relating to the orientation of disabled people (see Section 6.1). Its members are representatives of public services, NGOs, trade unions and social partners and at least 30 % representatives of disabled persons (Article 66 of the Law on Title 1V of the Code of Social Welfare). NGOs in France have traditionally had the tasks of the public sector delegated to them in terms of support for disabled people and their families.

The Defender of Rights coordinates several consultative committees with NGOs on all grounds of discrimination. These six-monthly meetings provide an opportunity to keep NGOs informed of the Defender of Rights' actions and likewise to keep the Defender of Rights informed of the concerns of NGOs. There are such committees on LGBTI rights, disabled people's rights, on discrimination in housing and employment, and since 2017, a committee dedicated to consultation with NGOs on the subject of discrimination on the grounds of origin and religion, interaction between the two grounds and intersectional discrimination.

On 13 December 2016, the Defender of Rights organised a one-day seminar for the 10th anniversary of the Convention on the Rights of Persons with Disabilities on the subject of 'ICRPD/ what new rights?' to promote the convention before all NGOs in the field and public services, and present the legal possibilities it opens up in terms of strategies for claiming and enforcing rights with resources.

In parallel, the National Consultative Commission on Human Rights (*Commission nationale consultative des droits de l'homme, CNCDH*), counsel to the Prime Minister, is composed of representatives of all the major human rights and anti-racism NGOs, trade unions and branches of the public sector. It is consulted on all legislative reforms affecting human rights and provides advice and recommendations to the Government. It is organised into six sub-commissions, one of which is responsible for the annual publication of a report on racism and anti-Semitism.

³⁵⁷ France, Ministerial Instruction, New missions for the Departmental Commissions on Access to Citizenship and the Commissions for the Promotion of Equality, (*Circulaire COPEC NOR/INT/K/04/00117/C*, 20 September 2004, *Missions nouvelles des commissions départementales d'accès à la citoyenneté (CODAC), commissions pour la promotion de l'égalité des chances et la citoyenneté' (COPEC)*, available at: <http://i.ville.gouv.fr/index.php/reference/3016/circulaire-nor-int-k-04-00117-c-du-20-septembre-2004-relative-aux-missions-nouvelles-des-commissions-departementales-d-acces-a-la> (accessed 6 July 2017).

- c) Measures 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)

Article 4 of the Law of 16 November 2001 integrates the fight against discriminations as an objective in collective bargaining, in branch (sub-sections of the labour force) negotiations and national negotiations dealt with at the level of the National Commission on Collective Bargaining.

Article L2261-22 LC was modified in order to extend the equality objective not only in terms of access to employment but in terms of training and the employee's career as well. However, it limits this objective to the criteria of race and ethnic origin.

In addition, the commission responsible for monitoring professional equality between men and women in the workplace has seen its competence extended to discrimination based on race and ethnic origin (Article L2271-1, paragraph 8 LC). Elements concerning racial and sex discrimination have become a mandatory provision in all branch collective agreements. However, beyond informal affirmation, these undertakings have not generated any specific negotiation in relation to equality.

Article 25 of the Law No.2005-102 on equal opportunities and the integration of disabled persons modifies Articles L2241-1 and L2242-1 LC, which concern mandatory annual negotiations between social partners, to create an obligation to hold annual negotiations concerning measures necessary for the professional integration of disabled people. In addition, social partners participate in the Departmental Commission for the Rights and Autonomy of Disabled Persons.

In the public services, social dialogue is a basic organisational principle, since all levels of human resources management are dealt with in a joint decision system where representatives of the state and unions are equally represented (Law No.83-634 of 1 July 1983, Article 9, paragraph 1).

In addition to the legal framework, the Government has been active in pursuing a policy to address discrimination in the workplace. The Minister of Employment, François Rebsamen, initiated a working group meeting every other week from October 2014 to June 2015, bringing together social partners, NGOs, the French equality body and recognised experts, in order to confer on good practices and difficulties related to the implementation of anti-discrimination policy and legislation. The group issued a report on 13 May 2015, called the Sciberras report, which recommended the development of reporting obligations on discrimination in the context of the adoption of obligations regarding the disclosure of diversity and non-financial information.³⁵⁸

The Minister Miriam El Khomri, who succeeded François Rebsamen, pursued the policy of implementing public policy for the promotion of the fight against discrimination in employment through a social partner working group also coordinated by Jean-Christophe Sciberras. The working group published an implementation report on 16 November 2016,³⁵⁹ which records the success of awareness-raising campaigns on the promotion of talent in hiring and management practices. However, it stresses the lack of progress in the implementation of a network of referees mandated by their employers to promote and implement equal opportunities through social dialogue. The working group attributes the

³⁵⁸ Sciberras, Jean-Christophe (2015), *Rapport de synthèse des travaux du groupe de dialogue inter-partenaires sur le lutte contre les discriminations en entreprise*, 13 May 2015, http://www.ville.gouv.fr/IMG/pdf/rapport_sciberras.pdf (accessed 6 July 2017).

³⁵⁹ Barbezieux, Philippe (2016) *Rapport du 16 novembre 2016 sur le suivi de la mise en œuvre des propositions du groupe de dialogue sur la lutte contre les discriminations en entreprise* (Report on the follow-up to the implementation of the proposals of the working group on the fight against discrimination in business); <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/164000702.pdf>.

responsibility of this lack of progress to the difficulties of social dialogue in the workplace and the reluctance and lack of participation of employer social partners.

In addition, following the recommendations of the working group, a vast campaign of testing of discrimination in hiring on the ground of origin was commissioned, resulting in individual employers making undertakings to implement action plans. The results of this exercise were made public on 14 March 2017 and the Minister of Employment publicly designated the Courtepaille restaurant chain and Accord Hotels as having insufficient policies in place to limit discriminatory biases in hiring practices.³⁶⁰

d) Addressing the situation of Roma and Travellers

There is no specific body appointed on a national level to address Roma issues, given that there is no such legal category. Their problems are addressed as problems of migrants, of persons without proper domicile or of persons in a precarious situation.

In August 2012, the Government gave a specific mandate to the Interministerial Delegation on Emergency Accommodation and Access to Housing (*Délégation interministérielle à l'hébergement et à l'accès au logement, DIHAL*) to establish dialogue with NGOs and implement a specific programme on access to rights (including health, education, employment, accommodation and housing) and integration of foreign Roma and Travellers. It published programmes, including good practices for local authorities and coordination of public policy, throughout 2013. Since autumn 2013, it is mandated to coordinate the implementation of integration policies targeting the Roma and initiating preparatory work to launch a review of the status of Travellers.

The National Consultative Commission on Travellers (*Commission nationale consultative des gens du voyage*) was reinstated in 2015 and a decree of 9 May 2017 has revised its composition, increasing the presence of representatives of public authorities.³⁶¹

Regarding emergency housing for persons living in slums and squats, in 2016 the overall governmental policy towards illegal occupation of land and the strategy of evictions was aggravated by the situation of unsheltered migrants in Calais, Paris and Lyon. Romeurope published 20 proposals addressed to the presidential candidates for the 2017 election to set out the outline of a humanitarian policy.³⁶² In 2017, since the evacuation of the Calais camp, the policy of eviction and clearing and the ensuing humanitarian crisis have intensified.

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

a) Mechanisms

French law does not require that express legislation be introduced in order to ensure the superiority of the principle of equality to other sources of rights. Equal treatment is a constitutional principle and a rule of public order sanctioned by the Penal Code. Article 6 of the Civil Code further expresses the following general principle: 'One cannot derogate

³⁶⁰ <http://travail-emploi.gouv.fr/actualites/presse/communiqués-de-presse/article/resultats-de-l-enquete-discrimination-a-l-embauche-selon-l-origine>; http://travail-emploi.gouv.fr/IMG/pdf/discours_evenement_discrim_14_final.pdf (accessed 7 March 2017).

³⁶¹ France, Decree No. 2017-921 of 9 May 2017 modifying Decree of 25 June 2001 relating to the composition and functioning of the National consultative commission on Travellers, (*Décret n° 2017-921 du 9 mai 2017 modifiant le décret n° 2001-540 du 25 juin 2001 relatif à la composition et au fonctionnement de la commission départementale consultative des gens du voyage*), available at: <https://www.legifrance.gouv.fr/eli/decret/2017/5/9/LHAL1703414D/jo/texte>, accessed 7 March 2018.

³⁶² Romeurope, *20 propositions pour une politique d'inclusion des personnes vivant en bidonville et squat*, (20 proposals for an inclusion policy for people living in slums and squats), 16 February 2017, http://www.romeurope.org/wp-content/uploads/2017/02/Rapport_20-propositions-1.pdf (accessed 3 March 2017).

from laws that concern public order by way of a particular agreement', thus rendering this type of agreement null and void. Articles 1382 ff. and 1146 ff. of the Civil Code implement a general regime of civil and contractual liability which adapts to the evolution of custom and of superior rules of law, thereby adapting to Directives 2000/43/EC and 2000/78/EC. Article L1134-4 LC further expressly states that any such act is null and void and Article 2 of Law No.2008-496 of 28 May 2008 expressly covers independent activities.

Articles 6 and 6 quinquies of Law No.83-634 of 1 July 1983 are rules of general application and public order. They must be respected in all regulatory acts or decisions regarding a public servant.

The general principle *lex posterior derogat legi priori* applies to human rights and therefore implies the inapplicability of all non-conforming legislation and conventions. Finally the Conseil d'Etat held in its decision of 30 October 2009, that EU Directive 2000/78/EC provided sufficiently precise rules that were of direct application in cases of insufficient transposition that insured its application to all working relationships.³⁶³

b) Rules contrary to the principle of equality

There is no process of periodic legislative audit or restatement in France and the state has not undertaken an audit in order to verify compliance of all texts in force with the directives. Such legislation must be challenged before the *Conseil d'Etat* or the Court of Cassation, which are responsible for the control of conventionality, or before the European Court on a case-by-case basis. The HALDE, and now the Defender of Rights, have regularly raised issues related to the non-conformity of specific legislation or regulation with European anti-discrimination law.

As regards national collective agreements and contractual undertakings, they could be questioned by way of social dialogue but, in fact, must, on most issues, be challenged before the courts.

³⁶³ *Conseil d'Etat*, No. 298348, 30 October 2009.

9 COORDINATION AT NATIONAL LEVEL

From 2012, the National Action Plan against Racism 2012-2014³⁶⁴ set the fight against racism and anti-Semitism as a priority, to be implemented with the support of an inter-ministerial delegate against racism and anti-Semitism (*délégué interministériel à la lutte contre le racisme et l'antisémitisme*) reporting to the Prime Minister and the Minister of the Interior, to initiate, coordinate and evaluate Government action.³⁶⁵ Régis Guyot was nominated as the inter-ministerial delegate (DILCRA) and was kept in post by the new Government. Another inter-ministerial delegate, Gilles Clavreul, was nominated on 26 November 2014, and published his own action plan for the fight against racism and anti-Semitism on 19 April 2015, with the public support of the Prime Minister, the Education Minister, the Justice Minister, the Minister of Interior, the Minister of Culture, and state secretaries in charge of digital information and urban management policy.

The plan announced a budget of EUR 100 million over three years, to implement 40 measures under the supervision of the DILCRA who reports annually to the National Consultative Human Rights Commission, the Economic and Social Council and European human rights institutions. EUR 25 million per year was to be used for projects in the suburbs in the context of the national urban management's policy against discrimination and racism. A specific action plan was implemented in the national education programme.³⁶⁶ Measures were also taken to improve safety around places of worship and faith schools. The repression of hate crime on the internet was reinforced.

The new Government installed a new inter-ministerial delegate, Frédéric Potier, on 15 May 2017 and the mandate of the delegation has been extended to include anti-LGBTI hate crime.

An evaluation of the national education programme was initiated and has rendered its conclusions:³⁶⁷ 23 of the 40 projected measures have been implemented and 40 of the EUR 100 million announced have been allocated to projects supported by the plan. The report recommends dissemination of the programme at all levels and reinforcing legal tools to fights against racism on the internet.

The post of Secretary of State for disabled persons, reporting to the Prime Minister, has been created to mainstream all policies relating to disability, which has been designated as a priority of the mandate of the President of the Republic. The Secretary of State in office is Sophie Cluzel.

Finally, most public policies relating to the fight against discrimination on the ground of origin and social condition, and promotion of equality, have been re-centred within urban affairs policy (*Politique de la ville*), which is supervised by the Ministry for the Cohesion of the Territories (*Ministère de la cohésion des territoires*). It is managed by the General Commissioner for Territorial Equality (*Commissariat général à l'égalité des territoires, CGET*), Jean-Benoit Albertini, appointed on 6 September 2017. This structure took over the budget and resources of the ANCSEC - the National Agency for Social Cohesion and Equal Opportunities (*Agence nationale pour la cohésion sociale et l'égalité des chances*,

³⁶⁴ France, National action plan against racism and anti-Semitism (*Plan national d'action contre le racisme et l'anti-sémitisme*), available at: http://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2015/09/racisme_antisemitisme-dilcra.pdf (accessed 6 July 2017).

³⁶⁵ France, Decree No. 2012-221 of 16 February 2012 creating a delegate against racism and anti-semitism (*Décret No. 2012-221 du 16 février 2012 instituant un délégué interministériel à la lutte contre le racisme et l'antisémitisme*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000025372209> (accessed 6 July 2017).

³⁶⁶ <http://www.gouvernement.fr/planantiracisme-eveiller-les-consciences-agir-ne-plus-rien-laisser-passer>.

³⁶⁷ France, IGA/ IGAS, Evaluation of the inter-ministerial plan to fight against racism 2015-2017, *Évaluation du plan interministériel de lutte contre le racisme et l'antisémitisme [2015-2017]*, January 2018, Report 17078, available at: http://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2018/02/bf2018-01-17078_-_pilcra.pdf, accessed 7 March 2018.

ANCSEC), which historically funded NGOs and actors in the fight against discrimination.³⁶⁸ It is mandated to implement access to rights and anti-discrimination policy, targeting the underprivileged areas of the country.

The Youth Experimentation Fund (*Fonds d'expérimentation pour la jeunesse*) has been very active in pursuing and financing research projects relating to discrimination in access to goods and services and initiating projects to support inclusion of young people. Formerly under the supervision of the Ministry of Youth and Sports, it is now under the supervision of the Directorate of Youth, Community Education and NGO activities (*Direction de la jeunesse, de l'éducation populaire et de la vie associative* (DJEPVA)), under the authority of the Ministry of Education.

Public policy for the promotion of the fight against discrimination in employment should give rise to specific action in 2018. In the meantime, it continues to be followed through the Sciberras working group put in place in October 2014, under the auspices of the Minister of Employment, with the support of the general directorate of the ministry (the General Delegation for Employment and Professional Training - DGEFP). The working group published an implementation report on 16 November 2016,³⁶⁹ which praises the success of the awareness-raising campaign on the promotion of talent in hiring and management practices but stresses the lack of progress regarding the implementation of the projected action plan based on social dialogue in the workplace due to tensions in social dialogue and the reluctance and lack of participation of employer social partners.

One can clearly observe that the consequences of these political choices is that all public policies relating to the fight against discrimination either target victims of discrimination in underprivileged suburbs or, in employment, depend on social dialogue. Therefore, public policies relating to the fight against discrimination have no autonomous agenda independent of local choices relating to underprivileged suburbs or the priorities of social dialogue and employers.

Government

The Ministry of the Interior, Ministry of Education, Ministry of Justice, Ministry of Social Affairs, Ministry of Employment, the Ministry for the Cohesion of the Territories, the Secretary of State in charge of equality between women and men, the Secretary of State for disabled persons.

Government departments

The Women's Rights Service (SdFe) has become a simple service of the General Directorate for Social Cohesion (DGCS, below) within the Ministry of Social Affairs, under the supervision of the Secretary of State in charge of equality between women and men; the Directorate for Reception, Integration and Citizenship, under the auspices of the Ministry of the Interior was replaced by the Directorate of Foreigners in France, which is responsible for both the reception and integration of foreigners and asylum seekers; the Directorate of Labour Relations (DRT); the General Directorate for Social Cohesion (DGCS); the General Directorate for Health (DGS); the General Delegation for Employment and Professional Training (DGEFP); the Directorate for the Coordination of Research, Studies and Statistics (DARESS); the Directorate for Research, Evaluation and Statistics (DRESS); the Directorate for Public Liberties, Ministry of the Interior (Roma and Travellers); General Directorate for the Management of the Public Services (DGAFP); General Commissioner for

³⁶⁸ It was dissolved by Law No. 2014-173 of 21 February 2014 on town planning and urban cohesion (*Loi No. 2014-173 du 21 février 2014 de programmation pour la ville et la cohésion urbaine*) after its mission had been thwarted to concentrate on urban regeneration projects, available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028636804> (accessed 6 July 2017).

³⁶⁹ Barbezieux, Philippe (2016) *Rapport du 16 novembre 2016 sur le suivi de la mise en œuvre des propositions du groupe de dialogue sur la lutte contre les discriminations en entreprise* (Report on the follow-up to the implementation of the proposals of the working group on the fight against discrimination in business); <http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/164000702.pdf>.

Territorial Equality (CGET), the Directorate of Youth, Community Education and Community Life (DJEPVA).

National Research Institutes

INSEE (National Institute of Statistics)

INED (National Demographics Institute)

CAS (Centre for Strategic Analysis, *Centre d'analyse stratégique*)

Interministerial Delegations

Interministerial Delegation on Emergency Accommodation and Access to Housing (DIHAL)

Interministerial Delegation on Equal Opportunities for French Nationals from the Overseas Territories

Interministerial Delegation on the fight against poverty of children and youth

Interministerial Delegation on French language for social cohesion

Interministerial Delegation for the Rights of Persons with Disabilities

Interministerial Delegation for accessibility for Disabled Persons

Interministerial Delegation on Urban Affairs and Development

Interministerial Delegation against Racism and anti-Semitism (DILCRA)

Interministerial Committee on Disability (CIH)

Public bodies

National Agency for Urban Regeneration (*Agence nationale de rénovation urbaine, ANRU*)

French Office of Immigration and Integration (*Office français de l'immigration et de l'intégration, OFII*)

General Commissioner for Territorial Equality (*Commissariat général à l'égalité des territoires, CGET*)

Consultative bodies

National Consultative Commission on Travellers

National Consultative Commission on Human Rights

National Consultative Commission for the Retired and Older People

National Consultative Commission on Accessibility and Safety

National Consultative Commission of Persons with Disabilities

Commission on the Rights and Autonomy of Disabled People

High Council for Professional Equality between Men and Women

Commission for Political Equality between Men and Women

Specialised administrative bodies

Merged to form the Defender of Rights:

Ombudsman for the public sector (*Médiateur de la République*)

National Commission on Security Ethics (*Commission nationale de déontologie de la sécurité, CNDS*)

Children's Defender (*Défenseur des enfants*)

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

CNIL (National Commission for IT and Liberty)

CSA (Higher Council for Radio and Television)

CADA (Commission for Access to Administrative Documents)

Justice

Anti-discrimination division (part of all public prosecutor's offices)

10 CURRENT BEST PRACTICES

- Defender of Rights guide on reasonable accommodation in employment, November 2017 (Section 7).
- Equality body consultative committees bringing together NGOs to share information and for consultation on different subjects e.g. disability, LGBTI, discrimination in employment, discrimination in housing (Section 8.1).
- School integration system for Roma and Traveller children (CASNAV) (Section 5b)4)).
- Employment quotas for disabled persons in the public and private sectors (Section 5b)1)).
- The joint guidelines published by CNIL and the Defender of Rights promoting the monitoring and measuring of discrimination in employment (Section 2.3.1 b)).
- National network of free legal consultations managed by the Ministry of Justice through the Departmental Commission on Access to Rights under the supervision of the President of the First Instance District Court. (Section 6.1)a)).
- Mandate of the social partners working group (Sciberras working group) to propose a policy programme to fight against discrimination in employment, followed by a mandate to implement it.
- Testing relating to discrimination in hiring on the ground of origin, organised by the Government, followed by undertakings of the faulty employers, whether public or private, to implement an action plan.³⁷⁰
- Testing relating to discrimination in access to goods and services by the Youth Experimentation Fund (Section 2.2.1 b)).
- Obligation imposed on all hiring committees of organisations of more than 300 employees to undertake a training course to correct discriminatory biases and implement transparent processes (Section 8.1 a)).

³⁷⁰ In private employment: <http://travail-emploi.gouv.fr/actualites/presse/communiqués-de-presse/article/resultats-de-l-enquete-discrimination-a-l-embauche-selon-l-origine> (accessed 9 March 2017); in the public sector: http://www.fonction-publique.gouv.fr/files/files/Espace_Presse/girardin/Les_discriminations_dans_l_acces_a_l_emploi_public.pdf (accessed 9 March 2017).

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

Even if the courts will not hesitate to proceed by way of direct application of the Directives, some discrepancies remain in national legislation and the precisions they provide for those who enforce them.

Law No.83-634 regulating employment law in the public services, which was amended to cover discrimination by the above-mentioned transposition legislation, states at Article 3 that, in conformity with Article 64 of the Constitution of 1958, it does not cover the status of magistrates, who are not considered to be civil servants. Ordinance No.58-1270 of 22 December 1958 regulates the rules applicable to both prosecution and state magistrates and judges on the bench. Moreover, public servants working within Parliament similarly not subject to Law No.83-634 and are also governed by application of Article 3 of the Law by separate in-house rules of Parliament. Finally, all contractual public servants who hold one of the various statuses that are excluded from the application of Law No.84-16 of 11 November 1984 on the status of state contractual agents at Article 3, paragraph 5, are also excluded from all protections against discrimination for public servants provided by Law No.83-634. None of these texts have been amended to implement Directive 2000/78/EC and do not contain any protection against discrimination on any grounds. It is important to note that all public servants who are not covered by the laws of transposition do not benefit from the right to reasonable accommodation in case of disability, unless they seek enforcement by the courts.

The definition of direct discrimination still does not expressly include the possibility of proceeding by means of hypothetical comparison. This appears not to comply with the directive. There have been no cases arguing the possibility to proceed by way of such comparison on the basis of direct application of the directive.

The definition of the burden of proof only requires in defence that the defendant establish that the decision was objective and non-discriminatory, and does not require that defendant establish appropriateness and necessity, which seems to be in breach of the directive.

Law 2008-496 completes the framework of protection against victimisation for all Article 19(1) TFEU grounds (Article 3). However, this definition provides no indication as to the applicable burden of proof and seems to remain inadequate.

Whereas in former legislation the French state had not availed itself of the possibility of providing for exceptions based on professional requirements, except on the ground of age, it adds a paragraph to the Labour Code which allows a characteristic based on any of the prohibited grounds to be presented by the employer as a professional requirement as long as 'its objective is legitimate and the requirement proportionate' (Article 6 of Law 2008-496 of 27 May 2008 amending article L1133-1 of the Labour Code). This framework does not appear to conform to the requirements of the directives.

Further to constant debates in France to allow employers to limit the display of religious symbols, during discussion of Law No. 2016-1088 of 8 August 2016 on employment, the modernisation of social dialogue and the protection of professional careers, Parliament adopted Article 2 which amends the Labour Code to create Article L 1321-2-1 which provides that an employer's in-house regulations can set out the principle of neutrality as a rule and stipulate restrictions to the principle of religious freedom for employees if these restrictions are justified by the exercise of other fundamental rights and liberties or by the necessities of the good functioning of the service, as long as they are proportionate to the objective pursued. This provision allows social partners to adopt at will, limitations on

religious expression and dress in the workplace. It could be deemed not to comply with requirements of Directive 2000/78.

The law has implemented a unified list of grounds, reintroducing national origin. However, most texts were amended to designate the list of the Penal Code as a reference. As a consequence, the ground of belief (*conviction*), was omitted from the law of 28 May 2008 by error. It only remains in legislation relating to employment. There was an attempt at correcting this error in the Law of 27 January 2017 on equality and citizenship, but the provision was quashed by the Constitutional Council by reason of a clerical error that made the text illegible. However, political convictions and religious convictions are still covered by Article L1132-1 of the Labour Code and by Article 6 of Law No. 83-634 of 13 July 1983 on the rights and obligations of civil servants.

11.2 Other issues of concern

Anti-discrimination law continues to focus resistance on what is perceived as community-based analysis of social tensions. This constitutes the core of very strong ideological objections to the framework of anti-discrimination law within the central state institutions.

- The equality body

The rate of success in discrimination cases before the courts has significantly improved with the contributions of the HALDE and the Defender of Rights. However, the capacity of the Defender of Rights to fully pursue this mission, in the context of the institutional reform that led to the merger of the HALDE, the Children's Defender, the Public Service Ombudsman and the National Commission on Security Ethics, is still in question, since the institution has to set institutional priorities among a number of topics and faces heavy pressure to cut resources.

- Difficulties relating to the implementation and training of judicial actors

Non-discrimination law is a derogatory legal regime. It continues to be perceived by many legal actors as a foreign approach and the choice to analyse a situation by referring to its mechanisms is considered by many jurisdictions as a means of undermining national law. The traditional formal theory of equality, the concept of fault in civil matters and the supremacy of Parliament remain the ultimate reference of the legal system. At trial level, the shift in the burden of proof and the concept of indirect discrimination are perceived as means to sanction liability without fault and confer special rights to members of certain groups. Finally, it is an intrusion on sovereignty that judges are not willing to use frequently.

Even though it has been implemented by the higher courts and has evolved over the last ten years, lawyers in general practice and first instance judges often lack proper training to implement its rules of evidence, the latest jurisprudential developments and the particulars of its rhetoric. Claimants still have to be ready to face multiple appeals before winning their cases. Discrimination cases are heard much more favourably at the appellate level and the rate of success before the courts has been significantly improved by the contribution of observations presented by the HALDE and the Defender of Rights.

There remain many barriers to the systematic implementation of discrimination law in France. Legal action is still not considered as a useful means of advocacy by civil society. Very few NGOs are knowledgeable in the management of judicial remedies³⁷¹ or have the

³⁷¹ In the fields covered by the non-discrimination directives, including discrimination based on sex, there are only two NGOs specialised in bringing legal action. The first is active in the sector of sexual and moral harassment: the Association to Combat Violence against Women (*Association contre la violence faite aux femme, AVFT*)-). The second focuses on the legal rights of foreign nationals: the Migrant's Information and

means to pursue judicial cases. Implementation of anti-discrimination law has progressed with the evolution in the practice of judicial actors and in the way NGOs and trade unions perceive their functions in the judicial process and social dialogue, but technical progress and financing remains necessary to ensure its efficient application. Funding of NGOs and trade unions to pursue test cases remains critical. Targeted training for judges, lawyers, trade unions and NGOs is a long-term process that remains indispensable.

Indirect discrimination is still a misunderstood concept that lawyers seldom argue and is often directly invoked by the court unilaterally.³⁷² It has been raised only once in a case relating to discrimination on the ground of origin.³⁷³

The national equality body works together with the legal profession to ensure that anti-discrimination law is addressed by the continuing professional training of lawyers, employment tribunal non-professional judges and professional judges. However, evidence law and anti-discrimination law are not substantial subjects in law school, and the subject remains a field of specialists.

The Government is still focusing resources and energy on the implementation of anti-discrimination law before the criminal courts in the National Action Plan against Racism, reiterating the policy put in place since July 2007. This programme instituted a dedicated service to treat criminal discrimination complaints at the public prosecutor's office, with the objective of increasing the rate of criminal prosecutions. However, to date, this policy has generated little activity: few anti-discrimination services are active, and they have not led to an increase in the number of criminal convictions.

- Extensive interpretation of secularism in employment

The scrutiny of the right to express one's religious beliefs is constantly reiterated in French politics through various parliamentary bills seeking to limit free expression of religion.

In addition, these tensions are finding echoes before national courts in arguments promoting the idea of extending the duty of neutrality of public servants to private sector employees. This tension was translated in 2013 through the conflict between the Social Chamber of the Court of Cassation and the Versailles and Paris Courts of Appeal in the Baby Loup case, regarding possible limitations to the duty of neutrality imposed through in-house regulations of private employees working in a daycare centre by reason of its ethos and belief. This case was heard again by the plenary session of the Court of Cassation, which issued its decision on 25 June 2014.

In plenary session, the Court of Cassation rejected all arguments holding that the principle of secularism is applicable to private employers. It further decided that the daycare centre was not an organisation with an ethos and belief to be protected pursuant to Article 9 ECHR, since its main purpose was not to promote or hold religious convictions, but to provide care for young children.

The plenary session of the Court of Cassation did not discuss whether or not this was discrimination, direct or indirect, and whether or not it was justified. It followed an altogether different justification, based on Article 1121-1 LC, which allows limits to the fundamental rights and freedoms of employees justified by the nature of the functions of the employee, to conclude that the claimant's dismissal was legal, based on legitimate restrictions to a fundamental freedom.

Support Group (*Groupe d'information et de soutien des immigrés, GISTI*). More generalist NGOs mostly intervene in criminal actions, but do not focus their activity on legal actions.

³⁷² The first case concluding indirect discrimination, where it was raised by the Court of Cassation, Social Chamber, No. 05-04962, 9 January 2007.

³⁷³ Court of Cassation, Social Chamber, No. 10-20765, 3 November 2011.

The Paris Court of Appeal reopened the conflict by rendering a contrary decision in the *Bougnaoui* case. This open defiance led the Court of Cassation to address a referral to the European Court of Justice on questioning the Court as to whether a private employer could dismiss an employee on account of a client's request that she remove her Islamic veil.³⁷⁴

In autumn 2014, the Minister of Education, Najat Vallaud Belkacem, ended the controversy around the prevention of mothers wearing a Muslim headscarf from accompanying state school children on out-of-school excursions, further to a decision by the Montreuil Administrative Court.³⁷⁵ This position was adopted after the publication of the opinion of the *Conseil d'Etat*, further to a request from the Defender of Rights, where it reiterated that the right to freedom of religion for accompanying mothers should be respected and that the proportionality of limitations imposed on the basis of local circumstances should be examined on a case-by-case basis.³⁷⁶ On 10 December 2017, the new minister of education, Jean-Michel Blanquer declared that he considered that a parent accompanying children on an out-of-school day trip should not wear religious signs. He has announced a decision to put in place local and national teams to prevent and intervene in case of difficulties relating to the implementation of the principle of secularity in schools.³⁷⁷

- Significant increase in hate speech and violent manifestations of Islamophobia and anti-Semitism

The French authorities can be observed to have made considerable efforts to promote the action plan against racism and anti-Semitism as mentioned above (see section 9) to organise a proportionate and democratic response to xenophobic reactions to terrorist violence and the geopolitical context, which is exploited by extreme right populist politicians. Nevertheless, the political context and the fight against terrorism has had a significant impact on the number of discriminatory responses in relation to access to employment and access to goods and services experienced by people of foreign origin.

- Disability

The Law on Disability No. 2005-102 of 11 February 2005 provides, in addition to accessibility of new buildings, for the obligation to proceed with the necessary works in order to ensure accessibility of 'buildings receiving the public' (*établissements recevant du public*) and of existing public transport, within a deadline of 10 years (i.e. 1 January and 13 February 2015).

Due to delays in implementing the law and the impossibility of abiding by the planned schedule, on 26 February 2014 the Prime Minister confirmed the postponement of the 2015 deadline for 'buildings receiving the public' and public transport.

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

³⁷⁴ Court of Cassation, Social Chamber, No. 13-19855, 9 April 2015, available at: https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/630_9_31521.html (accessed 1 June 2018).

³⁷⁵ Montreuil Administrative Court, No. 1012015, 22 November 2011.

³⁷⁶ *Conseil d'Etat*, Plenary session, 23 December 2013, Study adopted on the request of the Defender of Rights by the Plenary Assembly of the *Conseil d'Etat* on 19 December 2013, available at: http://www.observatoire-collectivites.org/IMG/pdf/Etude_du_Conseil_d_Etat_sur_la_laicite_rendue_le_19_Decembre_2013_sur_com_mande_du_Defenseur_des_droits.pdf (accessed 6 July 2017).

³⁷⁷ France, Declaration of the Minister of Education to the Cabinet, 8 December 2017, *Communication en conseil des ministres: la laïcité à l'école*, available at: <http://www.education.gouv.fr/cid124231/communication-en-conseil-des-ministres-la-laicite-a-l-ecole.html>, accessed 8 March 2018.

for extensions that can vary from three months to five years. This delay, and the massive number of requests for derogations that have been deemed to be admitted as a result of delays and a lack of denial within a two-month window has postponed the prosecution and issuing of sanctions provided by the law of 2005 beyond 1 January 2015.

With regard to education, the integration of disabled children into the education system and access to education is constantly improving from one year to the next, reaching an overall increase of 80 %. However, some children with particular kinds of disabilities still face inadequate access to education and once again, on 11 September 2013, in case No. 81.2012, published in January 2014, the European Committee of Social Rights issued a decision alerting France to the inadequacy of the measures taken to ensure access to mainstream and special education for autistic children in France. Measures taken to deal with the situation of severely disabled children, young adults and autistic children remain insufficient. The fourth plan for autistic persons (2017-2022), launched by the President of the Republic in September 2017, starts with a six-month phase of massive consultation, which has already raised controversy.

- Travellers and Roma

Travellers

The French Traveller population's rate of school attendance remains extremely low and illiteracy rates among the community have been systematically growing since compulsory military service was discontinued (10 years ago), which had fulfilled the function of providing young men with basic reading and writing skills. Many mayors overtly refuse to register Traveller and Roma children for school on the ground of their illegal occupation of land. This is theoretically opposed by the Government (Ministerial Instruction No. 2012-143 of 2 October 2012), but most mayors are also MPs, and even when education authorities or prefects intervene, they often refuse to abide by the demands of Government authorities.

The abrogation of the status of Travellers, further to the decision of the Constitutional Council of 5 October 2012,³⁷⁸ quashing Law 69-2 regulating their status and rights, was adopted by Article 195 of the Law on Equality and Citizenship,³⁷⁹ after being on the legislative agenda since 2012. However, the Government failed to take measures to address their difficulties regarding occupation of private land (*terrains familiaux*) with their caravans – despite a number of convictions against this derogatory status since 2012 (in 2013 by the European Court of Human Rights and the European Committee of Social Rights, and the 2014 decisions by the UN Human Rights Committee of 28 March 2014³⁸⁰ and the *Conseil d'Etat* of 19 November 2014³⁸¹ (see below)). The Defender of Rights adopted a decision to formally request that Parliament and the Government proceed with making the necessary legislative reforms.³⁸² These reforms should address problems related to the Travellers' daily lives with regard to long-term occupation of private land (*terrains familiaux*) and travelling with their caravans. Urban planning regulations are systematically used as a justification for evictions, refusing to register children at school and refusing to connect facilities to water and electricity supplies.

³⁷⁸ Constitutional Council, No 2012-279, 5 October, 2012, available at: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2012-279-qpc/decision-n-2012-279-qpc-du-05-octobre-2012.115699.html> (accessed 6 July 2017).

³⁷⁹ France, Law No. 2017-86 of 27 January 2017 on equality and citizenship, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033934948&dateTexte=&categorieLien=id> (accessed 2 March 2017).

³⁸⁰ UN Human Rights Committee, 10th session, No 1960/2010, *Ory vs France*, 28 March 2014.

³⁸¹ *Conseil d'Etat*, No. 359223, 19 November 2014.

³⁸² Defender of Rights, Decision MLD 2014-152 of 24 November 2014.

Roma

Since the June 2012 national elections and the 2017 elections in France, each Minister of the Interior has intensified the previous policy of evictions for illegal land occupation. In autumn 2013, the Government opened a EUR 4 million fund to finance integration measures for families who are deemed able to be integrated, while pursuing its eviction policy. Data on the impact of this policy are not available, since there are no ethnic data in France and therefore no specific statistics on Roma. However, NGOs estimate that the number of foreign Roma on French territory is stable, regardless of the Government's expulsion policy, since families keep coming back after expulsion.

The DIHAL (Inter-ministerial Delegation on Emergency Accommodation and Access to Housing), for homeless people and people with inadequate housing, was given a mandate to coordinate the state's policy on the integration of Roma and Travellers without housing and resources, and to put in place the conditions to allow the proper implementation of the Ministerial Instruction of 28 August 2012. The Prefect who held this position, Alain Régnier, resigned in July 2014, in the face of the absence of political will to fight discrimination and facilitate the integration of Roma. He was replaced by Sylvain Mathieu.

As discussed in this report, present evaluations estimate that the on-going policy of forced eviction from illegal campsites has had a very detrimental impact on the wellbeing and access to all basic social rights of these populations.

- Racial discrimination

More cases reach trial and are successful, but they mainly concern direct discrimination in criminal or labour cases on the grounds of sex, age and disability,³⁸³ relating to access to housing and employment.

Evidence of discrimination on the ground of origin can benefit from comparative panels establishing a difference in treatment between persons on the basis of their origin inferred from the employees' surname.³⁸⁴ However, this depends on the availability of a sufficient number of employees and candidates to build a comparative panel, and these are seldom available in cases of racial and ethnic discrimination in access to employment. In France, legal action is not an effective means of redress in cases of racial discrimination.

As regards police control measures, the decision of the Court of Cassation of 9 November 2016,³⁸⁵ and constant publicity about abusive controls have created a lot of tension in relations between the police and the population that are being exploited by political parties in the context of the Presidential election.

- Discriminations against migrants

Beyond Metropolitan France, overseas departments are subject to the pressure of a huge influx of migrants attempting to reach the territory, which triggers the implementation of a policy of massive repression and a restrictive approach to their access to rights. This is particularly the case in Guyana and Mayotte.

More generally the present policy is to limit the budgetary means and human resources necessary to ensure access to political, civil, economic and social rights of migrants - particularly for asylum seekers and unaccompanied minors - to complicate the conditions

³⁸³ Lanquetin, M.-T., Grevy, M. (2005) *Bilan de la mise en oeuvre de la loi du 16 novembre 2001* (Audit of the impact of the Law of 16 November 2001), *rapport final DPM*.

³⁸⁴ Court of Cassation, Social Chamber, *Airbus Operations SAS*, No. K 10-15873, 15 December 2011.

³⁸⁵ Court of Cassation, Civil Chamber, Nos 15-24.207 to 15-25.877, 9 November 2016, https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/relatifs_contr_35473.html, accessed 7 March 2017.

for access to legal residence, and to multiply controls in order to question the permanence of rights to legal residence and the continuity of social protection benefits. This creates a situation where thousands of people—adults and children—are left without shelter, seek refuge in informal campsites, and survive with the support of NGOs. In addition, the Government seeks to hinder the support given to migrants by NGOs and individual persons, and to allow extensive police controls within the facilities of humanitarian NGOs. This creates tensions with NGOs and local populations, particularly in the Paris region, the Calais region, Northern France and the South of France.

Thus, the refusal of the French Government to put in place appropriate shelters in order to deter migrants from choosing to come to France, and Calais in particular, and therefore prevent massive arrivals, coupled with its policy of systematically clearing illegal campsites, increases the vulnerability of unsheltered migrants and threatens all of their rights.

This national and local policy to hinder the access to rights of migrants goes so far as to multiply procedures to question by all means the minority (age) of unaccompanied minors, in order to deny them the legal and material support that they are guaranteed by French law.

In addition, one can see the organisation of a restrictive management of access to rights and social protection of foreigners who, because of their personal circumstance, enter in the category of those who are subject to control measures. This is particularly the case for older migrant workers who regularly return in their home country and who are denied old-age allowances because they are not in a position to establish continuous residence in France for the last ten years.

Finally, the present public policy feeds the defiance of an increasing majority of the national population who see migrants as an unaffordable group who consume the national wealth, and who openly assert their xenophobia.

- Homophobia

The adoption of the legislation authorising marriage for same-sex couples has given rise to a significant traditional, religious, family rights political lobby called 'Manifestation for all', which also campaigns against adoption by gay couples and recognition of civil rights for children born through surrogate motherhood abroad. However, this movement has not translated into an increase in the number of complaints alleging homophobia in employment or access to goods and services before the Defender of Rights or before the courts.

- Sanctions

While the law provides for integral compensation, in the absence of punitive damages, the difficulty of establishing damages regarding access to goods and services or access to employment often limits the awards of the courts to symbolic moral damages.

In addition, in a context where the judicial system still holds a very conservative conception of damages, which are strictly limited to demonstrated pecuniary losses and undervalues moral damages, and where employees seldom engage in litigation against their employer, the sanction for discrimination is not dissuasive. It remains more financially advantageous for employers to wait for prosecution than to anticipate and engage in a process of correcting discriminations of the employment and salary framework.

In criminal cases, the law provides for fines, which can reach EUR 45 000, but in practice such fines are extremely low. Convictions can lead to fines as low as EUR 250 for refusal to admit a person wearing a Muslim headscarf to a gym, and rarely reach more than a few thousand euros.

- The repression of radicalism

In the context of its fight against terrorism, the Government announced on 23 February 2018, the development of the previous policy of repression of radicalism. It proposes the implementation of a comprehensive plan to prevent radicalism called 'Prevent to Protect'.³⁸⁶ The plan intends to increase surveillance in order to facilitate the identification of networks and fight against propaganda on the internet, schools, prisons, the public service and private workplaces. It generalises the hotline, allowing anyone to report on any person or situation and creates a unit at the departmental level to allow the intervention of public authorities in charge of repression of radicalism. This programme includes the implementation of a system of identification of radicalised public agents at all levels of the public service, in order to provide for administrative inquiries³⁸⁷ and a committee ready to take any measure to immediately relieve them of their post and even dismiss them if relevant. In addition, the programme provides for the organisation of a system of identification and denunciation of radicalised employees.

Many stakeholders worry that this policy could legitimize massive surveillance and foster suspicion and discrimination against certain groups in relation to their origin or religious practice.

³⁸⁶ Prime Minister of France, February 2018, *Plan national de prévention de la radicalisation*, (National Plan for the prevention of radicalism), available at: <http://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2018/02/2018-02-23-cipdr-radicalisation.pdf>, accessed 8 March 2018.

³⁸⁷ France, Decree No. 2018-141 of 27 February 2018 in application of Article L114-1 of the code of internal security, (*Décret n° 2018-141 du 27 février 2018 portant application de l'article L. 114-1 du code de la sécurité intérieure*), available at: <https://www.legifrance.gouv.fr/eli/decret/2018/2/27/CPAF1801965D/jo/texte>, accessed 8 March 2018.

12 LATEST DEVELOPMENTS IN 2017

12.1 Legislative amendments

- Law No. 2017-86 of 27 January 2017 on equality and citizenship;
- Law No. 2017-256 of 28 February 2017 on a programme for the overseas territories.

12.2 Case law

Name of the court: Constitutional Council

Date of decision: 24 January 2017

Name of the parties: N/A

Reference number: No. 2016-606/607 QPC

Address of the webpage: <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2017/2016-606/607-qpc/decision-n-2016-606-607-qpc-du-24-janvier-2017.148526.html>

Brief summary: The Constitutional Council received a referral by the Court of Cassation regarding the conformity to rights and freedoms protected by the Constitution of Article 78-2 paragraph 6 of the Code of Penal Procedure (CPP) and of Articles L. 611-1 and L. 611-1-1 of the Code of Entrance and Residence of Foreigners and of Asylum Law (hereafter CESEDA). The challenged provisions of the CPP authorise the public prosecutor to issue orders requiring police identity checks in order to investigate the possible perpetration of criminal offences, designating areas and specifying periods during which the police can carry out such controls. The challenged provisions of the CESEDA allow the police to check, when enforcing an order of the public prosecutor issued pursuant to Article 78-2, para 6 of the CPP, the legality of the presence of foreigners in the territory and to arrest them for the period necessary to verify the legality of their presence in the territory.

The Constitutional Council decided that the challenged provisions conformed to the Constitution while setting out some details (reservations of interpretation) regarding the proper interpretation of the purview of the controls they authorise: the enforcement of police controls by the police must be exclusively based on grounds that exclude all discrimination between persons; the public prosecutor cannot identify places and periods of time that have no relation to the investigation of the possible perpetration of criminal offences mentioned in the order; the public prosecutor cannot, by accumulating orders designating different places and time frames, authorise a constant and generalised use of police controls over time and space. It is the responsibility of the judiciary to control the legality of police controls by condemning and sanctioning any illegal actions and the resulting damages.

The provisions of the CESEDA were deemed to conform to the Constitution but the Council stressed that they cannot be interpreted to authorise police controls for the sole purpose of verifying the legality of the presence in French territory of the people subject to the control.

Name of the court: Court of Cassation, criminal Chamber

Date of decision: 28 February 2017

Name of the parties: N/A

Reference number: No. 15-87378

Address of the webpage:

<https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000034140789&fastReqId=1149594191&fastPos=1>

Brief summary: The Criminal Chamber of the Court of Cassation affirmed that testing evidence resulting from an operation organised by the office of the public prosecutor, documenting racial discrimination at the entrance of the night club, which was supported by inquiries made by the police on the premises of a night club, was legal and admissible to establish discrimination in a criminal case.

Name of the court: Court of Justice of the European Union

Date of decision: 14 March 2017

Name of the parties: *Asma Bougnaoui, ADDH v. Micropole SA.*

Reference number: C-188/15

Address of the webpage:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=188853&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=125215>

Brief summary: Ms Bougnaoui first contacted the respondent employer in October 2007 about the prospect of an internship, at an event for the recruitment of young graduates. The employer is an IT engineering firm that undertakes work on clients' premises. At the time of this first contact, it was mentioned to her that wearing the Islamic veil might pose a problem with certain clients. She was recruited.

She arrived at her internship wearing a bandana and eventually attended work wearing an Islamic veil. She was hired at the end of her internship on a permanent contract as an IT study engineer in July 2008. In May 2009, a client requested that she remove her veil if she was to return to their premises. In June 2009, Micropole requested that she remove her veil when she was called upon to work with clients. She was fired for refusing to remove her veil when in contact with clients. Ms Bougnaoui brought a claim of discriminatory dismissal before the courts, and the Court of Cassation referred the case to the CJEU for a preliminary ruling, asking whether the request of a client that an employee remove her Islamic veil can be held to be a genuine and determining occupational requirement.

Directive 2000/78 does not define the notion of religion, however in its first recital it refers to the ECHR, which, at Article 9, defines the protection of freedom of religion as covering the right 'to manifest [one's] religion or belief, in worship, teaching, practice and observance.' In the same recital, the directive refers to the Charter of Fundamental Rights, which affords the same protection at Article 10(1). Therefore, Directive 2000/78 must be interpreted as following the same conception of freedom of religion, which protects not only private faith but also the public expression of religious faith.

The Court decided that an internal rule that forbids expression of religious, political and philosophical beliefs does not constitute a direct discrimination. However, if this rule creates a disadvantage for persons of certain faiths, it could constitute an indirect discrimination on the ground of religion or belief in the sense of Article 2(2)b) of the directive. The court concluded that pursuing a policy of neutrality towards the public can constitute a legitimate aim, but the means to carry out this objective must be proportionate and necessary.

The Court further examined whether religious neutrality can constitute a genuine and determining occupational requirement. It stressed that the requirement must not be related to the forbidden ground of discrimination itself but must be a characteristic related to this ground. It stresses further that it is only in very limited circumstances that religion will be held to constitute a genuine and determining occupational requirement, subject to a strict necessity and proportionality test.

Examining the request of the client in this case, the Court found that a genuine and determining occupational requirement cannot take the form of just the desire of an employer to meet a client's particular wishes. The court seems to consider that given that such wishes will not be related to 'the nature of the particular occupational activities concerned or of the context in which they are carried out', that is related to the activity itself rather than something that is subjectively defined by the employer.

Name of the court: Court of Cassation, Social Chamber

Date of decision: 22 November 2017

Name of the parties: *Asma Bougnaoui, ADDH v. Micropole SA.*

Reference number: No. 13-19855

Address of the webpage:

https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/2484_22_38073.html

Brief summary: The Social Chamber of the Court of Cassation has rendered its decision discussing in detail the application of the decision of the CJEU.

First, it explicitly refers to the reasoning of the Court of Justice as regards the scope of the protection afforded to religion and refers to Article 9 of the ECHR as well as Directive 2000/78 to retain a notion of religion that protects both religion per se, and the requirements of religious practice as subjectively defined by the beholder.

Secondly, it concludes that Micropole's decision to dismiss the claimant by reason of her refusal to remove her veil when clients so demand, constitutes a direct discrimination, and that therefore the only possible justification would be an exception provided by Article 4(1) of Directive 2000/78, regarding genuine and determining occupational requirements, such requirements being justified by the nature of the task to be executed.

In evaluating whether Micropole's justifications meet this requirement, it refers to the decision of the Court of Justice stating that the will of an employer to meet the desire of its client cannot be considered as a genuine and determining occupational requirement.

The Court continues by adding an *obiter dictum* referring to the decision of the Court of Justice in the *Achbita* case, a liberty it seldom takes.

It states that in-house regulations forbidding any philosophical, political or religious sign in the workplace do not constitute a direct discrimination on the ground of religion, but that it may give rise to indirect discrimination, if it has an adverse impact on persons of a particular religion. That in such a case, it will only be justified if it pursues the legitimate objective of a policy of neutral political, philosophical and religious identity towards its clients and that the means to implement this objective are appropriate and necessary, a test that is to be evaluated by the National Court, including evaluating whether another job without contact with clients could be proposed to the employee. It concludes by stating that in the *Bouganoui* case there was no neutrality rule justifying disciplinary action, but an ad hoc rule targeting a specific religious sign.

The decision of the Paris Court of Appeal of 18 April 2013 is quashed and the case was sent back before another chamber of the Court, where the Court of Appeal will render a new decision and should apply the principles set out by the Social Chamber, thereby concluding that the claimant's dismissal was discriminatory and awarding damages to claimant.

Name of the court: Versailles Court of Appeal

Date of decision: 1 June 2017

Name of the parties: *Herblay v. X.*

Reference number: No 16/02752

Address of the webpage:

<https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000035083402>

Brief summary:

Ms X. owns a piece of land where she has been living for more than 10 years and has installed a few caravans, shacks, garden huts and prefabricated garage, in violation of the rules of urban planning. She and her husband are aged 61 and 60 years and live on welfare. They have two daughters who are married and live on the land with their two children. Their third child is severely disabled. The caravans are connected to electricity but not to water. No situation of danger or imminent damage has been alleged by the respondent city authorities.

The town has adopted an order refusing parking on the territory of the town on the basis of its future construction of an area for parking for Travellers, but it has not yet initiated the construction of this site. It requests eviction of the site for illegal parking and occupation of land.

The case returned to the court of appeal after a quashing decision of the Court of Cassation.³⁸⁸

The Court of Cassation decided that the Court of Appeal should have verified whether the measures taken by the mayor were proportionate regarding the right to the protection of one's family, home and private life guaranteed by Article 8 ECHR, in application of the *Winterstein* jurisprudence.

The Versailles Court of Appeal decided that in the presence of long-term ownership and occupation of land by Travellers, the site has acquired the status of home. Therefore, it is the responsibility of the mayor to establish that the occupation infringes the rights of neighbours, that it constitutes a threat to security and that the town has taken every measure to provide alternative housing, in order to meet the requirement that its order of eviction is a proportionate infringement of the right to private life and protection of home protected by Article 8 of the ECHR.

Name of the court: Court of Cassation, Criminal Chamber

Date of decision: 11 July 2017

Name of the parties: N/A

Reference number: No. 16-82426

Address of the

webpage: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000035192594&fastReqId=1856731927&fastPos=1>

Brief summary: The Criminal Chamber of the Court of Cassation decided for the first time that a social housing corporation was legally responsible for the conditions in which the commission of attribution proceeded to the selection of tenants. The Court decided that the decision taken by a commission of attribution of social housing, composed of persons external to the social housing corporation itself, that dismissed an application on the ground that the candidate of African or Caribbean origin did not meet the legal requirement relating to social mix, in the context of a particular social lodging, engaged the criminal responsibility of the social housing corporation. The Court stated that, by designating the commission of attribution as the body legally attributing social housing, Article 441-2 of the Code of Construction and Housing confirms that these commissions constitute an integrated body of the social housing corporation and can thereby engage its criminal responsibility under Article 225-2 of the Penal Code. In addition, the Court, for the first time, concluded that taking into consideration racial or ethnic origin of an applicant in order to determine whether the social mix requirement was met, constituted discrimination in access to goods and services, as meant by the Criminal Code.

Name of the court: Court of Cassation, Social Chamber

Date of decision: 15 November 2017

Name of the parties:

Reference number: n° 16-14.281

Address of the webpage:

<https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036053048&fastReqId=387503508&fastPos=1>, accessed 7 March 2018.

Brief summary: The Social Chamber of the Court of Cassation has stated for the first time that principles applicable to the calculation of compensation could vary according to the ground of discrimination at issue. The Court, after concluding that a dismissal was null and

³⁸⁸ Court of Cassation, 3rd Civil Chamber, No. 14-22095, 17 December 2015: available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000031651958&fastReqId=2009270912&fastPos=7> (accessed 8 May 2018).

void as a result of discrimination on the ground of age, decided that the scope of the compensation changed according to whether or not a ground of discrimination constitutes protection against a fundamental right or freedom protected by the French Constitution. In this case, the Court decided that since the ground of age did not constitute a fundamental right and freedom protected by the French Constitution, the compensation awarded would be limited to the loss of salary less the revenue of substitution received by the claimant between dismissal and reintegration (unemployment insurance and any compensation).

Name of the Court: Administrative Court of Appeal of Versailles

Date of the decision: 19 December 2017

Name of the parties: N/A

Reference number: No. 15VE03582

Address of the webpage:

https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CE_TATEXT000036252625&fastReqId=110506859&fastPos=1

Brief summary: The petitioner is an Egyptian medical student who was admitted as trainee for one year in the digestive surgery department of a public hospital in the Paris suburbs, pursuant to a convention between the hospital and his university. Article 6 of the convention states that the trainee will be bound to respect the rules of discipline provided by the Code of Public Health, which among other requirements, sets out a rule of religious neutrality. The director of the hospital enforced the rules, after taking advice from the medical practitioner supervising the trainee. Four months after he began the traineeship, the hospital annulled the convention and put an end to petitioner's training, on the ground that he wore an Islamic beard. The supervising practitioner was consulted and issued a favourable recommendation because 'of the perturbation created by this situation' within the work environment.

The Court adopted its decision in consideration of the following facts: the petitioner's beard was very imposing; he was working in a multicultural environment; his beard was perceived as a religious sign by members of personnel; he was invited to have it reduced so that it would not be perceived as an Islamic religious sign and in response, the petitioner refused to reduce his beard invoking his right to privacy. The petitioner's refusal was stated without referring to his religion, but without making a statement denying that his appearance could be held to manifest an Islamic religious sign.

The Court held that a beard, even a long one, cannot be held to constitute in itself a religious sign, in the absence of other factors confirming in the circumstances that it was the manifestation of a religious sign. However, although the beard was not combined with any religious proselytising behaviour, or remarks on the part of patients and the public, the Court still held that the request of the hospital authorities to reduce the petitioner's beard was justified by the necessity to enforce the principle of neutrality on the premises, particularly in a multicultural environment. The Court does not further explain its decision. The Court's decision must be interpreted as a finding that, given the context giving rise to the appearance that the beard is a religious sign, the petitioner was required to establish that his beard was not such a sign in order to be allowed to keep it, which he did not.

The Court's decision has not been challenged before the *Conseil d'Etat* and is final. Most commentators consider that the Court's reasoning is flawed, since it is contradictory, recognising that a beard is not a religious sign per se but imposing on the petitioner the burden of proving that his beard is not related to a religious practice, in contradiction with the principle holding that a public agent does not have to express his or her religious belief, or absence of belief. In addition, it seems to hold that the multicultural environment of the hospital has an impact on the enforcement of the rule. This indirectly refers to the right of the public authority to take into consideration the risk of disturbance as a result of behaviour by a public agent. However, in this case, the Court expressly states that it created no disturbance towards the public and patients.

ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

The **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: France
Date: 1 January 2018

Title of legislation (including amending legislation)	<p>Law No.92-686 of 22 July 1992 adopting the new Penal Code Date of adoption: 22 July 1992 Date of entry into force: 22 July 1992 Latest amendment: Article 177 of the law n° 2017-86 of 27 January 2017 Internet link: http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719 Grounds protected: all grounds: mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed to an ethnic origin, a nation, a race or a determined religion, physical appearance, last name, family situation, union activities, political opinions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in another language than French, economic vulnerability, refusal to be a victim of bullying.</p> <p>Criminal Law</p> <p>Material scope: hiring, sanctions and dismissal, access to professional training, goods and services</p> <p>Principal content: prohibition of intentional discrimination in hiring sanctions, dismissal, access to professional training and access to goods and services, Articles 225-1 and 225-2 and 432-7 PC</p>
Title of legislation (including amending legislation)	<p>Law on the press of 1881 Date of adoption: 29 July 1881 Date of entry into force: 29 July 1881 Latest amendments: Law No.2010-1 of 4 January 2010 Internet link: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722&dateTexte=20080312 Grounds covered: all grounds covered by French law by interpretation: mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed to an ethnic origin, a nation, a race or a determined religion, physical appearance, last name, family situation, union activities, political opinions, philosophical convictions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in another language than French, economic vulnerability.</p> <p>Criminal law</p> <p>Material scope: Discriminatory discourse in all situations</p> <p>Principal content: Provocation to discrimination as defined by article 225-1 and 225-2 PC The Law on the HALDE incorporates prohibition of provocation to discrimination on the basis of sex and sexual orientation and disability</p>
Title of legislation (including amending legislation)	<p>Law No.2001- 1066 of 16 November 2001 relating to the fight against discriminations Date of adoption: 16 November 2001 Entry into force:16 November 2001 Latest amendments: Article 86 of the law n° 2016-1547 of 18 November 2016 . Internet link:</p>

	http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000588617&dateTexte=&categorieLien=id Grounds protected: all grounds: mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed to an ethnic origin, a nation, a race or a determined religion, physical appearance, last name, family situation, philosophical convictions, union activities, political opinions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in another language than French, economic vulnerability, philosophical opinions. Civil, administrative, criminal law Material scope: Salaried employment, civil service and criminal law (goods and services) However, it does not cover the status of Magistrates and public agents working within parliament. Principal content: prohibition of direct and indirect discrimination, harassment in employment and in criminal law extension of the grounds and powers of the Labour inspector
Title of legislation (including amending legislation)	Law of social modernisation No.2002-73 Date of adoption: 17 January 2002 Entry into force: 17 January 2002 Latest amendments: Article 15 of the Law No.2014-366 of 24 March 2014. Internet link: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000408905&categorieLien=id Grounds covered: All grounds Grounds: sex, pregnancy, of belonging, whether real or supposed to an ethnic origin, a nation, a race or a determined religion, sexual orientation, sexual identity, age, family situation, genetic characteristics, physical appearance, last name, health, disability, union activities, political convictions, place of residence Civil/administrative and criminal law Material scope: Private and public housing, Harassment Principal content: prohibition of direct and indirect discrimination in public and private housing Harassment in public and private employment Harassment in the Penal Code
Title of legislation (including amending legislation)	Law no 2001-434 of recognition of slavery and human trade as crime against humanity Date of adoption: 23 May 2001 Entry into force: 23 May 2001 Latest amendments: none Internet link: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000405369&categorieLien=id Grounds covered: race Criminal law Material scope: All forms of activity and employment Principal content: Recognize that slavery as it was practised in Africa and the Indian Ocean was a crime against humanity and support research and education on this part of French history
Title of legislation (including amending legislation)	Law no 2005-102 of February 11, 2005 for equal opportunities and integration of disabled persons Date of adoption: 11 February 2005 Entry into force: 11 February 2005 Latest amendments: Law no 2014-789 of 10 July, 2014 Habilitating Government to Adopt Legislative Measures by Way of Executive Order for the Implementation of Accessibility of Public Places Internet link:

	http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000809647 Grounds covered: Disability Civil/administrative law Material scope: Employment, education, goods and services, social rights, access to health Principal content: Completes transposition vs/ reasonable accommodation duties and positive action, covers employment access to goods and services, access to education and right to public support
Title of legislation (including amending legislation)	Law no 2005-841 of July 26, 2005 habilitating the Government to adopt emergency measures for employment by way of Governmental Decree: Date of adoption: 13 July 2005 Entry into force: 27 July 2005 Latest amendments: 7 March 2007 Internet link: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000632799&dateTexte=&categorieLien=id Grounds covered: Age Administrative law: Material scope: Employment public sector Principal content: Remove age limits for recruitment in the public sector
Title of legislation (including amending legislation)	Law no 2008-496 of 27 May 2008 relating to the adaptation of National Law to Community Law in matters of discrimination Date of adoption: 27 May 2008 Date of entry into force: 27 May 2008 Latest amendments: Article 70 of Programming Law n° 2017-256 of 28 February 2017 for the overseas territories. Internet link: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000018877783 Grounds covered: Article 19 TFEU Grounds: Grounds protected: all grounds: mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed to an ethnic origin, a nation, a race or a determined religion, physical appearance, last name, family situation, union activities, political opinions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in another language than French, economic vulnerability. Civil and administrative law Material scope: All fields: public employment, private employment, access to goods or services (including housing), social protection, social advantages, education Principal content: Correcting implementation of directives 2000/43 and 2000/78 by providing definitions of direct and indirect discrimination, including harassment and instructions to discriminate to the definition of discrimination, completing prohibition of retorsion and creating new exceptions.
Title of legislation (including amending legislation)	Title of the law: Organic Law no 2011-333 of 29 March 2011 creating the Defender of Rights. Abbreviation: N/A Date of adoption: 29 March 2011 Entry into force: 29 March 2011 Latest amendments: None Internet link: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023781167 Grounds protected: all grounds covered by French law and International conventions ratified by France/ Open list including: mores, sexual

	<p>orientation, sex, pregnancy, gender identity, belonging, whether real or supposed to an ethnic origin, a nation, a race or a determined religion, physical appearance, last name, family situation, union activities, political and philosophical opinions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in another language than French, economic vulnerability.</p> <p>Civil. Administrative and criminal law</p> <p>Material scope: All fields: public employment, private employment, access to goods or services (including housing), social protection, social advantages, education, civil rights.</p> <p>Principal content: Integrates HALDE with other human rights administrative body in a unique Constitutional Independent Authority; powers of the Equality Body</p>
Title of legislation (including amending legislation)	<p>Law No.2012-954 of 6 August 2012 relating to Sexual Harassment</p> <p>Date of adoption: 6 August 2012</p> <p>and entry into force: 6 August 2012</p> <p>Latest amendments: none</p> <p>Internet link: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026263463&dateTexte=&categorieLien=id</p> <p>Grounds covered: sex and sexual identity</p> <p>Civil. Administrative and criminal law</p> <p>Material scope: Public employment, private employment, access to goods or services (including housing)</p> <p>Principal content: reviewing the definition of sexual harassment and creating the ground of sexual identity at Article 4</p>
Title of legislation (including amending legislation)	<p>Law n° 2016-1547 of 18 November 2016 of modernisation of the XXIst Century</p> <p>Date of adoption: 18 November 2016</p> <p>and entry into force: 18 November 2016</p> <p>Latest amendments: none</p> <p>Internet link: none</p> <p>Grounds covered: mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed to an ethnic origin, a nation, a race or a determined religion, physical appearance, last name, family situation, union activities, political opinions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in another language than French, economic vulnerability, .</p> <p>Civil and Administrative Law</p> <p>Material scope: Public employment, private employment, access to goods or services (including housing) public and private.</p> <p>Principal content: Article 86 the unification of the legal protection against discrimination on all grounds covered by French law and creating two new grounds: gender identity, in substitution of sexual identity, and the capacity to express oneself in another language than French; Articles 60 to 87creating a civil and administrative class action in matters of discrimination.</p>
Title of legislation (including amending legislation)	<p>Law no. 2017- 86 of 27 January 2017 on Equality and Citizenship,</p> <p>Date of adoption: 23 November 2016</p> <p>Date of entry into force: 27 January 2017</p> <p>Grounds covered: mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed to an ethnic origin, a nation, a race or a determined religion, physical appearance, last name, family situation, union activities, political opinions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in another language than French, economic vulnerability, banking residence</p>

	Civil and Administrative Law
	Material scope: Public employment, private employment, access to goods or services (including housing) public and private.
	Principal content: Article 37: Reform of the penal legal regime of repression of provocation to discrimination Article 42, authorising testing in civil cases Article 47: Creating a right of access to school catering without discrimination at article L131-12 of the code of education Article 61 bis: Creating an obligation for all hiring committees of organizations of over 300 employees to follow a training to correct discriminatory biases and implement transparent processes Article 177 prohibiting in the penal code the ground of discrimination " refusal to be the victim of bullying" Article 195: Abrogating the law 69-3 relating to the status of travelers, thereby puts an end to the derogatory status of travelers

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: France
Date: 1 January 2018

Instrument	Date of signature (if not signed please indicate) Dd.mm. yyyy	Date of ratification (if not ratified please indicate) Dd.mm. yyyy	Derogations. reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	04.11.1950	03.05.1974	No	Yes	Yes
Protocol 12, ECHR	04.11.2004	No	No	No	No
Revised European Social Charter	03.05.1996	07.05.1999	No	Ratified collective complaints protocol? Yes	No
International Covenant on Civil and Political Rights	16.12.1966	04.11.1980	Yes, article 13 towards rights relating to the expulsion of foreigners	No	No
Framework Convention for the Protection of National Minorities	No	No	N.A		
International Covenant on Economic, Social and Cultural Rights	16.12.1966	04.11.1980	Yes, articles 6, 9, 11 and 13 must not be interpreted as limiting sovereignty over access to work and social rights of foreigners	No	No
Convention on the Elimination of All Forms of Racial Discrimination	07.03.1966	28.07.1981	No	No	No
Convention on the Elimination	18.12.1979	03.09.1981	No	Yes	Yes

Instrument	Date of signature (if not signed please indicate) Dd.mm.yyyy	Date of ratification (if not ratified please indicate) Dd.mm.yyyy	Derogations. reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
of Discrimination Against Women					
ILO Convention No.111 on Discrimination	25.06.1958	15.06.1960	No	No	No
Convention on the Rights of the Child	26.01.1990	06.09.1990	Yes, article 6 cannot be interpreted to limit the application of French law on abortion; Article 30 cannot apply because of article 2 of The French constitution; Article 40 par 2b)V shall be interpreted as a general principle to which limited exception can be opposed by way of legislation, such as for certain criminal infractions.	Yes	Yes, some dispositions have been interpreted by the Conseil d'Etat as directly opposable to the State. CE, September 22, 1997, GISTI,
Convention on the Rights of Persons with Disabilities	30.03.2007	18.02.2010	No	Yes	Yes, some dispositions Could be interpreted as directly opposable to the State.

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