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Country report

Non-discrimination

Transposition and implementation at national level of
Council Directives 2000/43 and 2000/78

France

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Reporting period 1 January 2018 – 31 December 2018

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EXECUTIVE SUMMARY

1. Introduction

The key to the French legal approach to racism and discrimination is the abstract, universalist, 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 in combating discrimination (confirmed by the Constitutional Council). In 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, 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 parents and grandparents, in order to objectivise the construction of comparative categories.

Although 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. However, the Social Chamber of the Court of Cassation held in a decision of 15 November 2017,² in a case relating to the extent of compensation for discrimination on the ground of age, that non-discrimination on the ground of age did not constitute a fundamental right and freedom protected by the French Constitution. This position has not been confirmed by the Conseil d'État or the Constitutional Council.

The Roma population in France comprises French citizens, 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 20 000.³ The problems they experience and their relations with public services are very different. Historically, all French citizens who pursue a travelling way of life (including Roma and non-Roma) have had a specific legal and administrative status. After this was declared unconstitutional by the Constitutional Council in 2012,⁴ it was finally abrogated by the Law of 27 January 2017 on equality and citizenship.⁵

French Travellers live both in public housing and on privately and publicly owned land. The reluctance of the authorities to implement parking sites as provided for by the Besson Law⁶ on accommodation for the Traveller community persists: only two thirds of the parking areas and half of the areas for large events have been implemented.⁷ The reinforcement of parking prohibitions creates a situation where Travellers often have no

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>.

² 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&fastReqId=387503508&fastPos=1>.

³ France, Auditor General (2012) *L'accueil et l'accompagnement des gens du voyage* (Accommodation and support for Travellers), available at: http://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2016/05/ccomptes_rapport_thematique_gens_du_voyage.pdf.

⁴ Constitutional Council, 5 October 2012, (QPC- 2012-279).

⁵ France, Law No. 2017-86 of 27 January 2017 on Equality and Citizenship (*LOI n° 2017-86 du 27 janvier 2017 relative à l'égalité et à la citoyenneté*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033934948&categorieLien=id>.

⁶ France, Law No. 2000-614 of 5 July on accommodation for Travellers (*Loi n° 2000-614 du 5 juillet 2000 relative à l'accueil et à l'habitat des gens du voyage*) (the Besson Law) provides for an obligation for cities, towns and groups of towns to implement parking areas to allow Travellers to park their caravans for limited periods of time, available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033934948&categorieLien=id>.

⁷ France, National Consultative Commission on Travellers, Motion of 12 October 2017.

place to settle, even for a few days. This situation could be deemed to be a *de facto* non-compliance with Directive 2000/43/EC with regard to access to rights to housing, education, healthcare and services.

With regard to migrant Roma, the policy of evictions of Travellers and Roma from illegally occupied land and orders to leave French territory continues. This policy now targets precarious migrants as well. According to the survey carried out by the Human Rights League (*Ligue des Droits de l'Homme*) and the European Roma Rights Centre (ERRC),⁸ in 2017, 11 309 people were expelled from 130 living areas, i.e. 71 % of all slums in the country, particularly targeting those occupied by Roma. This represented an increase of 12 %. Compilations from summer 2018 indicate a progression in expulsions of 42 %.⁹

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 transposed by the Law of 16 November 2001, the Law of 30 December 2004 creating the equality body and the Law 2008-496 of 27 May 2008.¹⁰

General provisions prohibiting discrimination have always covered a number of prohibited grounds, providing legal regimes not only for the grounds covered by Article 19(1) of the Treaty on the Functioning of the European Union (TFEU), but also physical appearance, last name, customs, health, political opinions, trade union activities and involvement in mutual benefit organisations, family situation and genetic characteristics. The Law of 27 May 2008 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.

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 on the Rights and Obligations of Public Servants¹¹ 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 servants.¹²

In terms of public policy, the approach to the protection of people with disabilities was renewed with the adoption of the Law of 11 February 2005 on equal opportunities and

⁸ Human Rights League and the ERRC (2018), 'Recensement des évacuations forcées de lieux de vie occupés par des roms (ou des personnes désignées comme telles) en France en 2017' ('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/>.

⁹ Romeurope press release, 7 September 2018, available at: <http://www.romeurope.org/37-expulsions-de-squats-et-bidonvilles-cet-ete-pour-resorber-les-bidonvilles-il-est-urgent-de-changer-de-cap/>.

¹⁰ France, Law no. 2008-496 of 27 May 2008 (*Loi n° 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>.

¹¹ France, Law n° 83-634 of 13 July 1983 (*Loi n° 83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT00000504704>.

¹² Council of State, No. 298348, 30 October 2009.

the integration of disabled persons, which focuses on integration in all areas of life.¹³ The Law provides 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, reasonable accommodation obligations 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 liberal professions¹⁴ are still not formally covered by the reasonable accommodation obligation. It does not extend to goods and services. Regarding accessibility of public places, decrees established an implementation timetable that can extend from three months to five years and is subject to a number of derogations.¹⁵

3. Main principles and definitions

The Law does not define prohibited grounds of discrimination.

No application of the exception provided in Directive 2000/43/EC as regards race and ethnic origin was enacted into French law. The wording of the prohibition of discrimination on the ground of origin/race 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 the Law of 27 May 2008. 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 harassment and instruction to discriminate. Furthermore, incitement and instruction to discriminate correspond to the notion of complicity in the Penal Code¹⁶ and are covered by general principles of liability in civil law.

The Law of 27 May 2008 creates a possibility for employers to invoke genuine and determining occupational requirements on all grounds, provided they pursue legitimate objectives and are proportionate.¹⁷ Article L1133-2 of the Labour Code provides for a specific possibility to make exceptions to the prohibition of discrimination on the ground of age if they are reasonably justified by a legitimate aim in relation to health and safety, protection of young people and older workers, training requirements, reasonable period of employment before retirement, professional integration and proper compensation.

In addition, Article 4 of the Law of 27 May 2008 regarding the burden of proof allows the defendant to respond to the shift in the burden of proof by presenting elements

¹³ France, Law No. 2005-102 of 11 February 2005 (*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: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000809647>.

¹⁴ In France, this concept refers to the status of people who are not public servants and are not engaged in commercial activities and regulated by professional corporations. It includes medical doctors, dentists, lawyers, etc.

¹⁵ France, Law No. 2014-789 of 10 July 2014 authorising the Government to adopt legislative measures for the implementation of accessibility of public places (*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 and 19 to 22), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000029217888&categorieLien=id>.

¹⁶ France, Penal Code (PC), Articles 121-6 and 121-7.

¹⁷ Articles 2(3) and 8(3).

establishing that the alleged direct or indirect discrimination is justified by objective elements that are free of any discrimination. This provision could be interpreted as allowing the defendant to attempt to justify direct differential treatment in any situation.¹⁸ 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.¹⁹ There is no legal rule addressing multiple grounds of discrimination, but the courts have been prepared to make such findings when evidence shows unequal treatment resulting from a combination of grounds.²⁰

In the Law No. 2005-102 on Disability, the definition of the prohibition of discrimination in employment on the basis of disability covers limitations resulting from the environment. Therefore, a person is covered whether or not he or she formally declares his or her disability, and whether or not his or her limitations are perceptible to their employer. It can thus be considered to include assumed characteristics as well. It provides a definition of disability that complies with the CJEU in *case C-335/11 and C-337/11, Ring and Skouboe Werge*, which is not limited to access to professional life and encompasses limitations in all areas of life, related or not to consequences of health problems.

4. Material scope

The protection against discrimination in France provides for civil, administrative and penal redress for all TFEU protected grounds and areas of discrimination. 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.

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, even if the law does not create an exception regarding the protection of non-documented migrants, it does make access to certain rights, such as the right to work and access some social benefits, conditional on the individual having the status of a legally resident foreign national.

The scope of 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, education, social protection and social advantages.

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.

¹⁸ Article 4.

¹⁹ Caen Appeals Court, *Enault v. SAS ED*, 17 September 2010.

²⁰ Court of Appeal of Poitiers, No. 08/00461, 17 February 2009.

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.²¹

The admissibility of situation testing before criminal courts was introduced into the Penal Code in 2006,²² and before the civil courts in 2017.²³ It has not yet been used as evidence in civil cases. Developed by anti-racism NGOs, it is mostly used by them, but also by individual complainants, in criminal cases. The Criminal Chamber of the Court of Cassation has validated the legality and admissibility of testing organised by the public prosecution to establish discrimination on the ground of origin in access to a nightclub.²⁴ However, it will only trigger a 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. Most cases are brought before the labour courts. All other cases will be brought before the civil court (*tribunal de grande instance*). There is no statistical monitoring or systematic process for the publication of decisions.

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. The 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.²⁵ 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 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 reinstatement of the employee in case of dismissal. Claims are subject to a statute of limitations of five years.²⁶ In cases related to access to goods and services damages remain very low.

The Law on the modernisation of the justice system in the 21st century²⁷ amended the law of 27 May 2008 and the Labour Code to create a legal framework supporting class action that can be brought before the regional court or the administrative court, instituted exclusively by NGOs and trade unions to put an end to a discriminatory behaviour (*action en cessation du manquement*). Article 65 of the law defines remedies obtained by the action to put an end to discrimination as: 'an injunction to take all necessary measures'. Except on issues related to employment, this action for injunctive

²¹ Court of Cassation, Social Chamber, No. K 10-15873, *Airbus*, 15 December 2011.

²² Article 225-3-1 PC.

²³ Article 42 of Law No. 2017- 86 of 27 January 2017 on Equality and Citizenship.

²⁴ Court of Cassation, criminal chamber, No. 15-87378, 28 February 2017, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000034140789&fastRegId=1149594191&fastPos=1>.

²⁵ France, Code of Civil Procedure (*Code de procédure civile*), Article 31.

²⁶ Law No. 2008-561 of 17 June 2008 (*Loi n° 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>.

France, Law n° 83-634 of 13 July 1983 (*Loi n° 83-634 du 13 juillet 1983 portant droits et obligations des fonctionnaires*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000504704>.

²⁷ 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*), Articles 62 to 88 available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033418805&categorieLien=id>.

relief can be joined by an action for damages related to the discriminatory behaviour (*action en responsabilité*). In case of discrimination in employment, damages can only be sought for damages that arise after introduction of the action before the court (Article L1134-8 LC).

Since 2001, the Law has 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.²⁸

In 2018, the Government abrogated the decree establishing a positive action scheme to support employment of workers over 50 years of age.²⁹

With regard to disabled people, the Law No. 2005-102 on Disability maintains the quota obligations for 6 % of disabled employees, while extending it to the public sector, and sets out specific mechanisms of access to public employment and early retirement conditions.

There is a specific scheme, which targets Roma and Traveller children, in order to facilitate their access to education and integration into state schools.³⁰ However, their registration in school face reluctance on the part of Mayors. In a decision of 23 January 2018, the Criminal Chamber of the Court of Cassation decided that a mayor refusing school registration to Roma children living in an illegal camp constitutes the criminal offense of refusal of the benefit of a right as defined by Article 432-7 of the Penal Code.³¹

In France, state school cafeterias are managed and financed by cities and towns. The Dijon Administrative Appeal Court concluded in October 2018 that the decision of a public authority to provide meals accommodating a population on philosophical and religious grounds is not illegal, and that the suppression of such meals could not be justified by the application of the principle of secularism and religious neutrality, but could only be based on management and financial considerations.³²

Regarding systemic discrimination against migrant workers, in 2018 the Paris Court of appeal upheld a decision to condemn the national railway company for systemic discrimination on the ground of nationality towards 820 Moroccan employees who initiated an action relating to discrimination in their career on the ground that they were not hired under the same conditions as French employees and that their employment conditions were less favourable than those of French employees.³³

6. Equality bodies

On 21 July 2008, the Government passed a Constitutional Law modernising the institutions that established, through Article 71, a Defender of Rights. Its powers and jurisdiction were precisely defined by the Institutional Act (*loi organique*) of 29 March

²⁸ 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 combating discrimination in the workplace), 13 May 2015, available at: http://travail-emploi.gouv.fr/IMG/pdf/Rapport_Sciberras.pdf.

²⁹ France, Decree No. 2009-560 of 20 May 2009 (*Décret n° 2009-560 du 20 mai 2009*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020639752&categorieLien=id>.

³⁰ Ministerial Instruction 2012-143 of 2 October 2012, available at: <https://www.gisti.org/spip.php?article2948>.

³¹ Court of Cassation, Criminal Chamber, No.17-81369, 23 January 2018, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036584795>.

³² Dijon Administrative Appeal Court, No.17LY03323, 23 October 2018.

³³ Paris Court of Appeal, Social Chamber, No.15/11389, 31 January 2018.

2011,³⁴ which came into force on 1 May 2011. It merged 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). Institutional Act No. 2016-1690 of 9 December 2016 on the competence of the Defender of Rights has extended its mandate to cover the guidance and protection of whistle-blowers.

The Defender of Rights assumes the jurisdiction to investigate claims in all these areas, as well as competence to propose legislative reform, to pursue the promotion of rights and to carry out research in all its spheres of competence. It covers all grounds of discrimination, direct and indirect, prohibited by national laws and international conventions duly ratified by France.

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 all levels of jurisdiction, including the Conseil d'Etat, the Court of Cassation and, at European level, the European Court of Human Rights (ECtHR) and the European Committee of Social Rights. It presented its first observations before the Court of Justice of the European Union in 2018 in a case against Google relating to the right to erase traces on the internet. It also has a specific power to propose a settlement in cases 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. He has set priorities in relation to the rights of migrants, communication strategy, promotion of access to rights and research.

7. Key issues

The traditional formal theory of equality, the concept of fault in civil matters and the supremacy of Parliament remain the ultimate reference of the French legal framework. Although anti-discrimination law has been implemented by higher courts and has evolved over the last 15 years, claimants still have to be ready to appeal to higher courts before obtaining a finding concluding discrimination.³⁵ 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.

³⁴ France, Institutional Act No. 2011-333 of 29 March 2011 (*Loi organique n° 2011-333 du 29 mars 2011 relative au Défenseur des droits*), available at:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023781167&categorieLien=id>.

³⁵ In 2016, the Defender of Rights co-financed three major studies on the effective enforcement of discrimination law: 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* (Access to healthcare for children under child protection: access to and attitudes towards healthcare), Université Paris Ouest Nanterre Le Défense, 2016; available at: <http://www.defenseurdesdroits.fr>; Perelman, J., Mercat-Bruns, M. (2016), *Les juridictions et les instances publiques dans la mise en œuvre du principe de non-discrimination : perspectives pluridisciplinaires et comparées* (Jurisdictions and public bodies and the implementation of non-discrimination: multidisciplinary and compared perspectives), Sciences Po (Ecole 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; Laidie, Y. and Picard, P. (2016), *Le principe de non-discrimination: l'analyse du discours du juge administratif* (The principle of non-discrimination: analysis of the discourse of the administrative courts), Credespo – Université de Bourgogne, 2016, available at: <http://www.gip-recherche-justice.fr/wp-content/uploads/2016/10/Note-de-synth%C3%A8se-214.04.03.21-1.pdf>.

Moreover, it can be observed that Parliament and some representatives of the public service remain reluctant to abandon the rhetoric of the French legal theory of neutral equality to integrate the specific protection of the anti-discrimination legal framework.

Indirect discrimination was first invoked at the initiative of the Court of Cassation in a case in 2007,³⁶ and has been argued by lawyers only once in a case relating to discrimination on the ground of ethnic origin.³⁷

The significant increases in hate speech and violent manifestations of Islamophobia and anti-Semitism continue and were amplified in the context of the 'Yellow vests movement'. Claims received in 2018 by the Defender of Rights indicate that this context has had a significant impact on the emergence of social tensions leading to a normalisation of discriminatory discourse in relation to access to employment and access to goods and services. There has also been a constant increase since 2015 in situations of harassment and discrimination experienced by people of North African and Middle Eastern origin in the workplace and in access to goods and services.³⁸

The Secretary of State for Disabled People, reporting to the Prime Minister, was created to mainstream all policies relating to disability, but struggles to sustain the advertised objective of improving accessibility of rights and services.

In 2018, the Secretary of State responsible for combating discrimination has mainly focused on the promotion of equality between women and men.³⁹ As regards communities of foreign origin, governmental policies now focus on anti-poverty measures and working in the underprivileged suburbs under the supervision of the General Commissioner for Territorial Equality (Commissariat général à l'égalité des territoires, CGET).⁴⁰ A few particularly active cities, such as Paris, Rennes, Metz and Villeurbanne, continue to pursue a specific anti-discrimination agenda which is labelled as such.⁴¹

³⁶ This was 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.

³⁷ 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.

³⁸ Defender of Rights, Annual reports 2015, 2016, 2017, 2018, available at: <https://www.defenseurdesdroits.fr/fr/publications?tid=7>; France, National Consultative Human Rights Commission (*Commission nationale consultative des droits de l'homme - CNCDH*) (2018), *La lutte contre le racisme, l'antisémitisme et la xénophobie* (Combating racism, anti-Semitism and xenophobia), available at: <https://www.cncdh.fr/fr/publications/rapport-2018-sur-la-lutte-contre-le-racisme-lantisemitisme-et-la-xenophobie>.

³⁹ <https://www.egalite-femmes-hommes.gouv.fr/>.

⁴⁰ <https://www.cget.gouv.fr/>.

⁴¹ <http://www.resovilles.com/reseau-elus-contre-discriminations/>.

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 Supreme Administrative 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 monitor the conformity of national legislation.

The jurisdictional order is made up of two branches:

- Administrative courts have jurisdiction over all administrative litigation.
- Judicial courts have jurisdiction over criminal and private law.

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 anti-discrimination Law.⁴²

Administrative law, on the other hand, is mostly jurisprudential, and based on the implementation of a formal theory of equality: rules are held 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 racism 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.

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.

⁴² 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>.

List of main legislation transposing and implementing the directives

The European Convention on 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. A Decision by the Conseil d'Etat has recognised direct application of the protection against discrimination provided by the Convention on the Rights of Persons with Disabilities (CRPD).⁴³

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.⁴⁴

Article 158 of the Law on Social Modernisation No. 2002-73 of 17 January 2002 (entered into force on 18 January 2002) amending Law No. 89-462 of 6 July 1989 on relations between landlords and tenants covers all Article 19(1) TFEU grounds relating to access to housing.⁴⁵

Law No. 2008-496 of 27 May 2008 (entered into force on 27 May 2008 and amended many times):

- provides 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 beyond employment – housing law, social protection, health, social advantages, education, access to and supply of goods and services;
- provides protection on grounds beyond Article 19(1) TFEU grounds; membership of and involvement in professional or trade organisations, independent non-salaried workers;
- covers definitions of direct and indirect discrimination, harassment and instructions to discriminate.

Institutional Act (*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.⁴⁶

⁴³ Conseil d'Etat, 20 June 2016, n°383333, regarding Article 5 of the CRPD.

⁴⁴ France, Law No. 2001- 1006 of 16 November 2001 on 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>, 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.

⁴⁵ 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>, covers the grounds covered by the Law No. 1006-2001.

⁴⁶ France, Institutional Act 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>.

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 Rights of Man and of the Citizen 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'.⁴⁷

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'.⁴⁸

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'.⁴⁹

In addition, Article 10 of the Declaration of the Rights of Man and of the Citizen 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'.⁵⁰

The material scope of the constitutional protection is broader than those of the directives. The constitutional provisions cover race, origin, religion, opinions and sex. The Constitutional Council has held that the list of prohibited grounds of discrimination in the Constitution is an open one. It has not recognised a principle of equal treatment on the ground of age or sexual orientation, but has recognised the constitutional protection of the principle of equality in relation to disability.⁵¹

⁴⁷ France, Declaration of the Rights of Man and of the Citizen 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>. Article 1: 'Les hommes naissent et demeurent libres et égaux en droits/ Les distinctions sociales ne peuvent être fondées que sur l'utilité commune'.

⁴⁸ 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>. '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'.

⁴⁹ 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>. 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.'

⁵⁰ France, Declaration of the Rights of Man and of the Citizen 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>. 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'.

⁵¹ On sexual orientation, Constitutional Council QPC No. 2010-39, 6 October 2010, available at: <https://www.conseil-constitutionnel.fr/decision/2010/201039QPC.htm>; on disability No. 2011-639 DC, 289/07/2011, available at: <https://www.conseil-constitutionnel.fr/decision/2011/2011639DC.htm>.

These provisions are directly applicable.

The provisions of the Constitution can only be invoked by a private party by raising that legislation is unconstitutional as a means of defence in litigation against a private party or the State, by way of a specific procedure called an 'Exception of unconstitutionality', requesting a referral to the Constitutional Council.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

This is the explicit list of prohibited grounds of discrimination that is listed in the main legislation transposing the two EU anti-discrimination directives:

Mores (*moeurs*), 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, trade 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 a victim of bullying, banking residence (*domiciliation bancaire*).

The constant amendments to the long list of prohibited grounds over the years have created inconsistencies, and at one point excluded the ground of religion. This error has been corrected.

The ground of 'loss of autonomy' was created in 2015.⁵² It has been adopted in order to bring abusive behaviour towards people who are dependant under the scope of the prohibition of discrimination. It confers jurisdiction on the equality body in situations where people in a sheltered environment or in a situation of care are abusively treated, whether such environments are private homes, elderly people's care 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. However, the scope of this provision has not yet been interpreted.

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,⁵³ in order to settle the debate on the relevance of the term 'sexual identity' and of its definition. The new terms are meant to cover unequal treatment and harassment related to transgender people and other gender identity issues, whatever the characteristics of the person – whether they 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,⁵⁴ 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 formulated in a way that requires interpretation. Parliamentary discussions indicate that it was intended to extend the protection against discrimination both to people claiming their rights to

⁵² France, Article 23 of Law no. 2015-1776 of 28 December 2015 Adaptation to an Ageing Society (*Loi No. 2015-1776 du 28 décembre 2015 portant adaptation de la société au vieillissement*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000031700731&categorieLien=id>.

⁵³ 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*), Articles 62 to 88 available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033418805&categorieLien=id>.

⁵⁴ France, Law No. 2016-832 of 24 June 2016 to fight discrimination relating to social precariousness (*Loi n° 2016-832 du 24 juin 2016 visant à lutter contre la discrimination à raison de la précarité sociale*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032769440&categorieLien=id>.

regional languages and to people of foreign origin who have an accent when speaking French.⁵⁵

The list of prohibited grounds contained in the Law of 27 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*).⁵⁶ This ground intends to prohibit the refusal of credit or collateral based on the fact of residing in the French 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 long, 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.

a) Racial or ethnic origin

No definition in the law.

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 in the face of French refusal to take this category into consideration.⁵⁷

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, meaning 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.⁵⁸

b) Religion or belief

No definition in the law.

⁵⁵ Mehrez, F., *Les discriminations linguistiques font leur entrée dans le code du travail* (Linguistic discrimination enters the Labour Code), Editions Législatives, 13 January 2017, available at: <https://www.editions-legislatives.fr/actualite/les-discriminations-linguistiques-font-leur-entree-dans-le-code-du-travail>.

⁵⁶ 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>.

⁵⁷ 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>.

⁵⁸ 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>.

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.⁵⁹ Article 1 of this law states: 'The Republic guarantees freedom of belief. It guarantees freedom of worship; the only restrictions being stated therein in the pursuit of the interest of public order'.⁶⁰ Freedom of religion is considered to be an aspect of freedom of opinion.

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...'⁶¹

In 2017, in the *Bouagnaoui* decision which was rendered further to the decision of the CJEU,⁶² 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/EC to retain a notion of religion protecting both religion per se and the requirements of religious practice as subjectively defined by the individual.⁶³

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.⁶⁴

c) Disability

Law No. 2005-102 of 11 February 2005 on equal opportunities and the integration of disabled persons (hereafter the Law on Disability)⁶⁵ 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)⁶⁶

⁵⁹ France, Law of 09 December 1905 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>.

⁶⁰ 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'.

⁶¹ Paris Court of Appeal, 28 July 1997, JCP G 1998, II, 10025, note M.R Renard.

⁶² 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>.

⁶³ 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.

⁶⁴ 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>.

⁶⁵ France, Law No. 2005-102 of 11 February 2005 on Disability (*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.

⁶⁶ France, Law No. 2005-102 of 11 February 2005, on Disability 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

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.'⁶⁷

The prohibition of discrimination provided by Law No. 2001-1006 and Law No. 2008-496 covers disability according to the revised 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 with their employer. They can, however, argue their right to reasonable accommodation on the basis 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.⁶⁸

d) Age

No definition in the law.

The concept of age itself has not been defined by jurisprudence, it has been interpreted to cover situations relating to young and old age.⁶⁹

e) Sexual orientation

No definition in the law.

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.⁷⁰ Protection against discrimination based on sexual orientation was first introduced into French law

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'.

⁶⁷ 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.'

⁶⁸ Orléans Court of Appeal, *X. v. La poste*, No. 10/01990, 15 November 2011.

⁶⁹ Cass. soc. 17/03/2015 No.13-27142, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000030383142>; Conseil d'Etat, 27/10/2011, No.343943, available at: <http://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000024736716>.

⁷⁰ Constitutional Council, No. 80-125, 19 December 1980, 1980 RJC I-88.

under the term 'mores', first in the Penal Code in 1985 (Law 85-772 of 25 July 1985)⁷¹ then in the Labour Code in 1986 (Law 86-76 of 17 January 1986⁷² and Law 92-1446 of 31 December 1992⁷³). It referred both to sexual orientation and to 'morals'.

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. 'Mores' is now used for socially rejected behaviours, such as smoking, private behaviour etc.

'Sexual orientation' was not defined in the law and has not yet been defined by jurisprudence. It is understood in common language to cover all sexualities such as bisexuality, heterosexuality and asexuality.

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.⁷⁴ This term generated significant debate as being non-specific and incorrect to designate discriminations against transgender people.

Before it was interpreted by the courts, 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'.

2.1.2 Multiple discrimination

In France, multiple discrimination is prohibited in the law.

Courts have allowed claimants to claim that they have been cumulatively and simultaneously 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, cases of discrimination against women wearing the headscarf and cases of sexual harassment against cleaning women who are foreign nationals. 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:

⁷¹ 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=.](http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000317523&dateTexte=)

⁷² 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=.](http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000317532&dateTexte=)

⁷³ France, Law No. 92-1446 of 31 December 1992 relating to employment, development of part-time employment and unemployment insurance (*Loi No. 92-1446 du 31 décembre 1992 relative à l'emploi, au développement du travail à temps partiel et à l'assurance chômage*), available at:

[http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000542542&categorieLien=id.](http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000542542&categorieLien=id)

⁷⁴ 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.](http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026263463&dateTexte=&categorieLien=id)

In a case brought before the Paris Administrative Court,⁷⁵ 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 readmission was granted. The HALDE presented observations based on arguments founded on the principles of secularism, which had been advanced in the course of its investigation. The court held that the claimant's personal aims 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 educational aims were 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.

In the Dos Santos case, the Court of Cassation extensively discussed the details of the situation of an exploited illegal worker employed as a housemaid who had not been paid by her employer. The court expressly stated that the discrimination suffered by this woman did not require evidence by way of a comparison with other workers, considering the specific precariousness and difficulty of access to rights inherent to her situation. Thereby, without expressly referring to multiple discrimination, the court describes the specific impact of unequal treatment based on a combination of factors such as sex, origin, class and precarious status.⁷⁶

Studies indicate that the confusion between Arab and Muslim in the general public is such that Islam becomes an assumed characteristic that leads to large-scale multiple discrimination on the combined grounds of origin and religion.⁷⁷ It also points to the combination of grounds of sex with origin and religion as regards women wearing the Islamic headscarf and women of African descent.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In France, discrimination based on a perception or assumption of a person's characteristics is prohibited in national law.

- 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 state that: 'discrimination exists in all distinctions between persons based on (...) real or assumed (...)', followed by a list of grounds.

The law explicitly covers prohibited grounds and, in addition, the appearance of race, ethnic origin and religion, patronymic name and foreign language, which are also indications of origin, and physical appearance, which is also an indication of age or disability. The case law never discusses whether a person or a group meets the protected category. It implements the prohibition of discrimination by looking for evidence that the discriminating party has taken into consideration characteristics related to prohibited grounds or assumptions related to the prohibited ground.⁷⁸

⁷⁵ Paris Administrative Court, *Saïd v. Greta*, 27 April 2009, No. 0905233.9.

⁷⁶ Court of Cassation, Social Chamber, 3 November 2011 No. 10-20765, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000024764368>.

⁷⁷ Defender of Rights, Study on Access to Rights (*Enquête sur l'accès aux droits*), published in its annual report of 2017; Defender of Rights, Survey on Discrimination in the legal profession, 2018.

⁷⁸ 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>.

Studies indicate that the confusion between Arab and Muslim is such that Islam becomes an assumed characteristic that leads to systematic and large-scale multiple discrimination on the combined grounds of origin and religion, on the one hand, and of sex, origin and religion as well.⁷⁹

b) Discrimination by association

In France, discrimination based on association with people with particular characteristics is interpreted as being prohibited by national law.

These grounds are listed in the Law of 16 November 2001 No. 2001-1066 on the fight against discrimination, providing for the list 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, and Law No. 2008-496 of 27 May 2008 on various provisions implementing Community anti-discrimination Law.

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.⁸⁰

This interpretation seems to correspond to the definition of protection against discrimination in the Coleman case. However, there are no court decisions relating to a situation of discrimination by association as indirect discrimination as in the *CHEZ Razpredelenie Bulgaria* 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.

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

a) Prohibition and definition of direct discrimination

In France, direct discrimination is prohibited in national law. It 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 tenants⁸¹ (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 servants⁸²). These texts list the grounds and the prohibited discriminatory conduct.

⁷⁹ Defender of Rights, Study on Access to Rights (*Enquête sur l'accès aux droits*), published in its annual report of 2017; Defender of Rights, Survey on Discrimination in the legal profession, 2018.

⁸⁰ Caen Appeal Court, *Enault v. SAS ED*, No. 08/04500, 17 September 2010.

⁸¹ 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>.

⁸² 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>.

Law No. 2008-496 of 27 May 2008 introduces in Article 1, paragraph 1, a definition of direct discrimination, which provides as follows:⁸³ '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.⁸⁴

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'.⁸⁵

b) Justification for direct discrimination

Article 4 of the Law of 27 May 2008 and Article L1134-1 of the Labour Code regarding the burden of proof allow the defendant to respond to the presumption of discrimination by presenting elements establishing that the apparent direct or indirect discrimination alleged is justified by objective elements that are free of any discrimination. This provision could be interpreted as allowing the defendant to attempt to justify direct differential treatment in any situation.

'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.'⁸⁶

To determine whether this provision complies with Directives 2000/43/EC and 2000/78/EC interpretation is required. To date, court decisions have accepted discussion of issues where no direct evidence of unequal treatment was established and have expressly stated that they rejected justifications of direct discrimination, and especially on the ground of disability and origin.⁸⁷

⁸³ 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.'

⁸⁴ 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>.

⁸⁵ 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>: '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.'

⁸⁶ 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.'

⁸⁷ Court of Cassation, Social Chamber, *Airbus*, No.10-15873, 15 December 2011, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024993730>; 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, available at: https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/relatifs_contr_35473.html.

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 people of North African or African origin.

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 any means.

Article 42 of Law No. 2017-86 of 27 January 2017 on equality and citizenship,⁸⁹ 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 penal cases in relation to access to employment.

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

Conseil d'Etat, No. 301572, 22 October 2010, *Bleitrach*, available at: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000022952080&fastReqId=761863097&fastPos=1>; *Conseil d'Etat*, Plenary, No.298348 30 October 2009, available at: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000021219388>.

⁸⁸ France, Law No. 2006-396 on Equal Opportunities 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.

⁸⁹ France, Law No. 2017-86 of 27 January 2017 on equality and citizenship (*Loi n° 2017-86 du 27 janvier 2017 relative à l'égalité et à la citoyenneté*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033934948&categorieLien=id>.

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.⁹⁰

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.⁹¹ 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 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 in civil cases is supported by the Defender of Rights, but it has not yet been used in this context.

Testing has been a pillar of Governmental mobilisation against discrimination in employment in the last few years. In 2016, the Ministry of Employment and the Civil Service Ministry commissioned two research teams to evaluate discrimination on the ground of origin in access to employment. The work was carried out 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 recruitment methods. The tests performed 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 Civil Service Minister.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 Civil Service Minister to audit

⁹⁰ Court of Cassation, Criminal Chamber, No. 04-87354 of 7 June 2005.

⁹¹ Paris Court of Appeal, No. 07.04974, *Billau v. SOS Racism*, 17 March 2008.

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>.

⁹³ L'Horty, Y. (2016), 'Les discriminations dans l'accès à l'emploi public' (Discrimination in access to 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.

employment practices and for each public employer to submit action plans to improve their recruitment methods.⁹⁴

The same testing method was applied to evaluate the situation of discrimination on the ground of origin in relation to recruitment in the private sector. The results were presented to the companies concerned⁹⁵ and it was agreed that individual results would be kept confidential if the company agreed to an action plan to be evaluated by a specialised consultant. The results were published on 14 March 2017, together with the names of those businesses which did not collaborate, alongside renewed commitments by social partners regarding good recruitment practices to combat discrimination on the ground of origin.

The Youth Experimentation Fund tested several aspects of access to goods and services and found a great many discriminatory practices, particularly on the ground of age, which are currently ignored and undocumented.⁹⁶ In addition, it tested 455 advertisements for small flats in private housing throughout the French Metropolitan territory between November 2014 and December 2016.⁹⁷ The aim of the study was to assess the risk of discrimination in access to private housing for young people under 25. The results indicated an absence of risk of discrimination exclusively related to youth 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 and whether or not they come from an underprivileged suburb. In addition, where the results indicated a risk of discrimination towards people from underprivileged suburbs, this risk was less significant than that of discrimination on the ground of origin, as people from underprivileged suburbs appear to be preferred to people of North African origin.

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.

⁹⁴ Ministry for the Civil Service (2016), press release on 'Les discriminations dans l'accès à l'emploi public' (Discrimination in access to 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.

⁹⁵ 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>.

⁹⁶ Bunel, M. and L'Horty, Y. *Discrimination inter-age et selon d'autres motifs* (Discrimination based on age and other grounds), December 2016 INJEP, available at: http://www.experimentation.jeunes.gouv.fr/IMG/pdf/rapport_final_evaluation_apdiscri_06_diamant.pdf.

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

Law No. 2008-496 of 27 May 2008 introduces at Article 1, paragraph 2, a definition of indirect discrimination, which provides as follows:⁹⁸ '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 response 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 payment⁹⁹ 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.¹⁰⁰

In a landmark case from 2009 relating to unequal treatment of part-time workers in relation to 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 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 the efficiency of the service.¹⁰¹

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.¹⁰² 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 take into consideration only the claimant's performance in carrying out his redefined duties.

⁹⁸ 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*'.

⁹⁹ Court of Cassation, Social Chamber, *M. Gabriel Aguera et al c. Société M2PCI et al.*, No. 03-40465, 16 February 2006.

¹⁰⁰ Court of Cassation, Social Chamber, *ESRF c. M. X.*, confirmed in another matter against ESRF on 17 April 2008 (Soc. 819 FS-P+B).

¹⁰¹ 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>.

¹⁰² Conseil d'Etat, *Volot-Pfiser v. Ministry of Justice*, No. 347703, 11 July 2012.

2.3.1 Statistical evidence

a) Legal framework

In France, there is legislation regulating the collection of personal data.

Data collection is governed by Law 78-17 of 6 January 1978 on information systems, data and the protection of freedom¹⁰³ 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 that allows identification of a person relating to race, ethnic origin, philosophical and political opinions, religion, union activities, health or sexual activity (which is deemed by the CNIL to cover sexual activity and sexual orientation). Neither an employer nor anyone, in the course of business, may gather this information except in certain regulated circumstances related to specific small-scale studies or in arguing a case before the courts (cf. Article 8 II of the CNIL Law).

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

Article 8 II, paragraph 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 are 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.¹⁰⁴

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. Thus, claimants alleging racial discrimination are not

¹⁰³ 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>.

¹⁰⁴ 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>.

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. However, the 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.

- Surveys and studies

National statistics institutes regularly publish data relating to the economic situation and employment of people in relation to age and disability but statistics agencies (INSEE, DARES, DRESS and INED)¹⁰⁵ 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 or monitoring, do not exist. The use of data to produce ethno-racial profiles is not authorised by law and is considered abusive conduct.

Sensitive data is not collected by employers.

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 CNIL accepts that each protocol be evaluated but it requires that they be allowed only on a case-by-case basis. The CNIL issued a recommendation on 5 July 2005 on the collection of data by employers in order to monitor discrimination in the workplace.

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 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 individuals responsible for the study.

- Court cases

¹⁰⁵ 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*).

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 the 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 often 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.¹⁰⁶

The Conseil d'Etat has also recognised that statistics relating to the age of candidates held admissible by a jury can create a presumption of discrimination.¹⁰⁷

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.

- Construction of evidence

Sensitive data and data based on origin are admissible before the 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).

As regards 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

¹⁰⁶ 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*.

¹⁰⁷ Conseil d'Etat, No.16-102017, 16 October 2017.

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.

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 Court of Cassation and 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.

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 checks, public statistical research data were 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 checks and searches without being arrested. This was the first claim of its type in France.¹¹¹

In addition, the absence of a paper trail and the fact that studies established the existence of a widespread practice of racial profiling by the police (the studies sponsored in 2007/ 2009 by the Open Society Justice Initiative which gathered statistical data showed that some populations were systematically checked more often than others), had to be taken into consideration to support a lighter burden on the claimants and a shift in the burden of proof.

The Court of Cassation decided that, given the generally accepted situation supported by the studies and statistical data filed, the claimants did not have to establish the intention of the police officer in order to trigger an obligation on the part of the defendant to justify the reasons for the checks. However, the claimants had to establish the apparently discriminatory circumstances of each police check, through written statements from witnesses indicating differential treatment between citizens at the time of the checks, which would trigger the obligation of the State to justify the legitimacy of the checks.

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

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

It takes the form of sexual harassment, moral harassment and discriminatory harassment.

There are three 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

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 Paris Court of Appeal, Civil Chamber, on the liability of the State for racial profiling in police checks, 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 checks, 9 November 2016, https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/relatifs_contr_35473.html.

employment situation; a legal regime related to sexual harassment; 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.'¹¹²

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.

There is a legal advantage to invoking the legal regime of 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 reinstatement.

Outside discrimination law, the general regime of harassment is provided 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 for moral harassment, L1153-1 for sexual harassment, 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).

Article L1153-1 LC now defines sexual harassment as 'repeated statements or acts' or pressure that is repeated or not. These statements or acts are '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'. The definition also includes 'pressure with the perceived or real aim of obtaining sexual favours for a person's own benefit or the benefit of a third party'.¹¹³ The courts have decided that homosexual sexual advances are covered by the prohibition of sexual harassment.¹¹⁴ They have held that this provision covers all forms of sexual misconduct that can be assimilated to harassment on the ground of sexual orientation and gender identity.

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.

¹¹² 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.'

¹¹³ Article L1153-1 of the Labour Code, available at: <https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000026268379&cidTexte=LEGITEXT000006072050>: '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'.

¹¹⁴ Paris Court of Appeal, 18^e Ch., section C, *Ste Euro Disney v. Vallinas*, Juris Data No. 023467, 8 October 1992.

In 2014, the Rennes Court of appeal recognised that a situation where a picture of a chimpanzee was put on the door of a locker of an employee of African origin with racist remarks was an isolated incident sufficient to establish a presumption of discriminatory harassment on the ground of origin.¹¹⁵

In 2017, the Court of Appeal of Orléans, and the Administrative Tribunal of Dijon recognised the concept of a harassing atmosphere and held that the employer could be held liable for discriminatory harassment as a result of tolerating a working environment typified by bad jokes, obscene graffiti on the wall and comments of a sexist or racist nature.¹¹⁶

In 2015, the Court of Cassation decided that the fact that an employee was subjected to a number of micro-aggressions creating a hostile environment could be sufficient to establish discriminatory harassment.¹¹⁷

b) Scope of liability for harassment

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

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

To escape liability, the employer or person responsible must establish having taken all necessary preventive measures and having taken immediate measures in order to put an end to the alleged harassment.¹¹⁸

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

¹¹⁵ Rennes Court of Appeal, No.14-00134, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=13199&opac_view=-1 (accessed 29/12/2017).

¹¹⁶ Orléans Court of Appeal, No.15-02566, 07/02/2017, Dijon Administrative Tribunal, No.1702533, 29/12/2017, Montpellier Labour Court, No.13/00529, 26/05/2015.

¹¹⁷ Cass.soc. No. 14-11563, 22/09/2015, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000031230475&fastRegId=1132526842&fastPos=1>.

¹¹⁸ Cass.soc. No. 14-11563, 22/09/2015, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000031230475&fastRegId=1132526842&fastPos=1>.

applicable to all legal provisions, includes Article 1 para. 5, 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 established regarding incitement to discriminate, but such a prohibition 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 law does not define the word provocation. The Court of Cassation has clearly established that in cases of discrimination the prohibited provocation refers to instructions to commit discriminate as defined by Articles 225-1 and 225-2 PC.¹²¹

b) Scope of liability for instructions to discriminate

In France, the instructor, his or her supervisor and the discriminator are liable.

In labour law an employee’s superior and the employer entity bear liability for the actions of the entire chain of command 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, regardless of the absence of direct evidence, 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

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’ – in this case advocating violation of the principle of equality – which would disqualify it in the context of the national elections to elect labour court judges and union representatives.¹²⁴ The court decided that a trade union which promotes direct and indirect discrimination on the ground of origin does not satisfy the obligation to respect these values. 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

¹¹⁹ France, Law of 27 May 2008, Article 1 para 5: ‘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>.

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

¹²² High Judicial Court of Versailles, 2 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*.

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>.

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 the 'Corsicanisation' of employment is insufficient to constitute a provocation to discrimination and that such a provocation must clearly call for the pursuance of explicitly discriminatory behaviour, in the same manner as the fact of promoting feminisation in recruitment cannot be considered to lead, per se, to discriminatory behaviour.

The Conseil d'Etat, in considering, a complaint to the broadcasting regulator about a political polemicist who had criticised European anti-discrimination law on the panel of a political television show, decided that the prohibition of provocation to discriminate could not limit freedom of expression of reasoned philosophical and political criticism.¹²⁵

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 on employers to provide reasonable accommodation for people with disabilities is included in the law and 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 and reasonable accommodation of employees with disabilities in the workplace, as defined in Article L114 of the CSW, '(...), 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 and to have access to training adapted to suit their needs'¹²⁶ (author's translation). Therefore, failure to provide reasonable accommodation from application and recruitment 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 taking into consideration the possibilities of reasonable accommodation of the work environment and/or working conditions, does not constitute discrimination.

¹²⁵ Conseil d'Etat, No. 417228, 15 October 2018, available at: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000037499785&fastReqId=2109776164&fastPos=1>.

¹²⁶ 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'.

Law No. 2008-496 of 27 May 2008 did not extend the obligation of reasonable accommodation to non-salaried and independent workers (including third-party employees, volunteers and liberal professionals). 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 No. 2005-102 on Disability. 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.

The only applicable limitation to the obligation of reasonable accommodation which has been identified by the legislator are those that translate into '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 Disability, 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 severity of the disability;¹²⁸
- 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.

b) Practice and case law

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

¹²⁷ Conseil d'Etat, No. 301572, 22 October 2010, available at: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000022952080&fastReqId=761863097&fastPos=1>.

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>.

¹²⁹ France, Decree No. 2006-501 of 3 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>.

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>.

constraints and limits and its interaction with other applicable legal schemes. It remains the only comprehensive publication for employers on the subject.

The *Vaulot-Pfister* case is a landmark decision by the Conseil d'État on the issue of reasonable accommodation in the public service. The claimant was a magistrate with the public prosecution office who became deaf.¹³² His impairment led to a redefining of his duties and those of his colleagues, since he could no longer participate as a 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 bonus rate became the lowest in the jurisdiction. The justification for this was that the bonuses 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.

Considering the reluctance of the public service to implement reasonable accommodation, there are a number of lower courts decisions enforcing the obligation to proceed to implement reasonable accommodation measures and the proportionality of accommodation measures required.¹³³

As regards private employment, most cases essentially sanction insufficient accommodation as constituting a discrimination but do not discuss the sufficiency of accommodation measures undertaken.¹³⁴

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

¹³² Conseil d'Etat, No. 347703, 11 July 2012, available at: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000026198987>.

¹³³ Administrative Court of Appeal of Nancy, 20/02/2014 No. 13NC00931; Administrative Court of Nantes, 30/10/2009 No. 076871.

¹³⁴ Cass.soc. 6/03/2017 No.15/206037; Cass.soc. 28/01/2018 No. 42616; Douai Court of Appeal, 21/12/2012, No. 12/00623; Douai Court of Appeal, 29/01/2016 No. 15/00506; Bordeaux Court of Appeal, 20/10/2011 No. 10/03585.

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' (i.e. cost).

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 the 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.¹³⁵

A person who meets the definition of disability provided by Article 114 of the 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 the basis of disability, health or functional requirements for the preservation of health. The employer is required by law to implement the prescribed reasonable accommodation measure(s).

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 agents¹³⁶ 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 employees who are not 'officially' disabled. 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 Vaultot-Pfister cases (see above where the court did not refer to national legislation but to direct application of Directive 2000/78).

d) 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.

¹³⁵ Orléans Court of Appeal, *X. v. La poste*, No.10/01990, 15 November 2011.

¹³⁶ France, Law No. 84-16 of 11 November 1984 on the status of state contract agents (*Loi n° 84-16 du 11 janvier 1984 portant dispositions statutaires relatives à la fonction publique de l'Etat*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068830>.

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

One 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 people and could not therefore put forward an argument related to the resulting unreasonable costs of implementing this measure.¹³⁷

In another case the Court of Appeal of Toulouse decided that when the employer is not in a position to show that they looked for solutions to maintain the employee's employment in conformity with his or her qualifications seriously and in good faith, the employer cannot argue disproportionate burden.¹³⁸

- e) 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 outside the area of employment.

Education

The Law No. 2005-102 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 the Law No. 2005-102 on Disability.

Article 11 affirms a right of access to local mainstream schools and the right to an individual educational programme.¹³⁹

The Conseil d'Etat, in a decision of 15 December 2010 (Conseil d'Etat, No. 344729)¹⁴⁰ 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. 345434¹⁴¹ and 345442¹⁴²) that the

¹³⁷ Administrative Court of Caen, No. 0802480, 1 October 2009.

¹³⁸ Toulouse Court of Appeal, No. 17/01861, 26 January 2018.

¹³⁹ 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>.

¹⁴⁰ Conseil d'Etat, No. 344729, 15 December 2010, available at: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000023248217>.

¹⁴¹ Conseil d'Etat, No. 34534, 20 April 2011, available at: www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000023897748&fastReqId=911059899&fastPos=7.

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 logistical considerations.

Therefore, parents can benefit from injunctive relief ordering that all necessary measures be taken by the education authorities in order to satisfy the requirements of the implementation of this right.¹⁴³

The Law No. 2005-102 on Disability 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 No. 2005-102 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,¹⁴⁴ and by an insurer's abusive refusal to insure a person with a disability that did not have implications for their health.¹⁴⁵

On the basis of Articles 225-1 and 225-2 PC, the criminal courts have issued sanctions for a refusal to register a disabled person for an aqua gym class,¹⁴⁶ and a refusal to allow a person in a wheelchair access to a cinema.¹⁴⁷

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.¹⁴⁸

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

In matters relating to the free exercise of religion, all accommodation measures result from judicial decisions that evaluate whether the request for an authorisation of absence for a religious holiday or a religious practice creates a disruption of service to the organisation that is disproportionate. For example, the Conseil d'Etat has decided that

¹⁴² Conseil d'Etat, No. 345442, 20 April 2011, available at: www.legifrance.gouv.fr/affichJuriAdmin/do?oldAction=rechJuriAdmin&idTexte=CETATEXT000023897749&fastReqId=538455663&fastPos=12.

¹⁴³ France Article L 521-2 of the Code of Administrative Justice (*Code de Justice administrative*), available at: <https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006449327&cidTexte=LEGITEXT000060709338&dateTexte=20010101>.

¹⁴⁴ HALDE, Deliberation 2007-296. Available at: <http://www.defenseurdesdroits.fr>.

¹⁴⁵ HALDE, Deliberation 2007-234. Available at: <http://www.defenseurdesdroits.fr>.

¹⁴⁶ GAP Trial Court, No. 12025000010, 22/05/2014.

¹⁴⁷ Court of Cassation, Criminal Chamber, No. 05-85888, 20/06/2006, available at: <http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007640193>.

¹⁴⁸ Limoges Court of Appeal, 14 May 1991.

students could request authorisations to be absent on religious holidays or Saturdays (for Jewish students) as long as it was compatible with schoolwork and attending exams and respected public order within the school.¹⁴⁹

In the public service, Ministerial Instruction from the Ministry of Public Service No. 2106 of 14 November 2005 regarding authorisations of absence on religious grounds provides for a right for leave of absence on the ground of religious holidays except when it is impossible by reasons of necessity of service.¹⁵⁰

¹⁴⁹ Conseil d'Etat, 14 April 1995, No. 125148, available at:
<https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007837158>.

¹⁵⁰ France, Ministerial Instruction from the Ministry of Public Service No. 2106 of 14 November 2005 (*Instruction ministérielle n°. 2106 du 14 novembre 2005*), not published.

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 precarious migrants and undocumented 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 such as having the status of legal foreign resident for access to the right to work or to some social benefits.¹⁵¹ 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),¹⁵² 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.¹⁵³

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 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 anti-discrimination law covers the private and public sectors, including public bodies, for the purpose of protection against discrimination.

¹⁵¹ Constitutional Council, 89-296 DC, 22 January 1990, R.F.D.C. No. 2 1990, obs Favoreu.

¹⁵² First French anti-discrimination body created in 2000, which paved the way for the establishment of the HALDE.

¹⁵³ GELD (2000) Note No. 1 *Une forme méconnue de discrimination et les emplois fermés aux étrangers: secteur privé, entreprises publiques, fonctions publiques*, (Publication No. 1 on legal discrimination and employment which is inaccessible to foreign nationals), March 2000, available at: <http://www.gisti.org/doc/presse/2000/ged/index.html>.

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 the private and public sectors, 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, 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,¹⁵⁴ 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.¹⁵⁵

The extent of the protection and the legal regimes are translated in the Penal Code, the Labour Code and Law No. 83-634 of 13 July 1983 on the rights and obligations of civil servants. The material scope varies 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, 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.¹⁵⁶ Public servants working in parliament are also not subject to Law No. 83-634, since Article 3 provides that they are governed

¹⁵⁴ 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.

¹⁵⁵ The ground of banking residence has been incorporated only into the Law of 27 May 2008, which provides the civil legal framework of protection against discrimination.

¹⁵⁶ 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>.

by separate parliamentary rules. These texts have not been amended to implement Directives 2000/78/EC and 2000/43/EC and do not foresee any protection against discrimination on any grounds.

In its decision of 30 October 2009, the Conseil d'Etat decided that, given the failure of the Government to transpose Directive 2000/78/EC, it could be invoked directly by magistrates before administrative courts.¹⁵⁷

Article L1132-1 LC is the provision that states the material scope of the prohibition of discrimination in 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 Court of Cassation systematically states that the judge has the positive duty to control whether a collective agreement has a discriminatory impact on grounds protected by the law.¹⁵⁸

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.¹⁵⁹

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 13 July 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 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

¹⁵⁷ Conseil D'Etat, No. 298348, 30 October 2009.

¹⁵⁸ Court of Cassation, Social chamber, No. 16-19949, 17 January 2018, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do;jsessionid=FD99F0DAC9A8DFD35F7F0B494825155A.tplqfr28s_1?oldAction=rechExpJuriJudi&idTexte=JURITEXT000036584552&fastReqId=7189939.

¹⁵⁹ See Section 3.2.1 for there is a limitation with regard to the specific professions that are not covered by Law 83-634.

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*).

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.¹⁶⁰

In addition, the access of non-EU and non-French nationals 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 foreign nationals who cannot benefit from the terms of a bilateral convention between their country and France. A non-EU and non-French national 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 they have 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,¹⁶¹ 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 apprenticeships.

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

The Government adopted several decrees required to implement the Law No. 2005-102 on Disability and, on 21 December 2005, adopted Decree No. 2005-1617¹⁶² on accommodation for disabled candidates in competitive examinations for entry into the civil service.

Furthermore, in France, access to careers in the 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.

¹⁶⁰ France, Decree No. 2011-1309 of 17 October 2011 relating to the conditions of access to the profession of notary (*Décret n° 2011-1309 du 17 octobre 2011 relatif aux conditions d'accès aux fonctions de notaire*), available at:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000024682748&categorieLien=id>.

¹⁶¹ France, Executive order of 18 January 2008, NOR: IMID0800328A available at:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000017937372>.

¹⁶² 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>.

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

In France, national legislation prohibits discrimination in working conditions, including pay and dismissals, for all five grounds and for both private and public employment.¹⁶³

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.

This protection applies regardless of whether or not a person is a French citizen.

The CJEU decided that Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time applied to people attending work-based occupational centres targeted at people with disabilities, 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 people 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.¹⁶⁴

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 prohibits discrimination in vocational training outside the employment relationship, such as adult lifelong learning courses or vocational training provided by technical schools or universities.

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).

¹⁶³ See Section 3.2.1 for there is a limitation with regard to the specific professions that are not covered by Law 83-634.

¹⁶⁴ CJEU, No C-316/13, 26 March 2015, available at: <http://curia.europa.eu/juris/celex.jsf?celex=62013CJ0316&lang1=fr&type=TXT&ancre>; to date the status of people attending work-based occupational centres has not changed and there are cases pending that have not yet been decided.

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 13 July 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 targeted by this prohibition is stated in Article 225-1 PC and 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 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 the Law No. 2005-102 on Disability 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 Social Welfare Code – hereafter 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 non-EU and non-French nationals.

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 2015.¹⁶⁵ 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 workers 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 significant 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.

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 five 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 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 non-EU and non-French nationals find themselves in complicated situations where they are unable to establish their continuous presence in France for a period of 10 years.

¹⁶⁵ 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.

a) 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 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 contributory benefits.

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 2013.¹⁶⁶

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. 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 to extend to partners in same-sex couples the same family rights as members of married couples, such as family holidays for same-sex partners.

In a decision of 12 December 2013 referring to the situation before marriage was made accessible to same-sex couples, the CJEU decided, further to a referral from the Court of Cassation in the case of *Hay v. Crédit Agricole*,¹⁶⁷ that at the time when marriage was not accessible to same-sex partners, a salaried employee who entered into a contractual union with a same-sex partner, had a right to 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 constituted direct discrimination on the ground of sexual orientation.

¹⁶⁶ Constitutional Council, No. 2010-92 QPC, 28 January 2011.

¹⁶⁷ CJEU, C-267/12, *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, 12 December 2013.

The law has not been amended after the opening of marriage to same-sex couples. This may have a residual impact on people who were in a partnership with someone who died before the reform.

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 prohibits discrimination in 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). Therefore, discrimination in access to education is prohibited on all TFEU grounds of discrimination.

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 criterion 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.¹⁶⁸ 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 precarious migrant children and children of foreign origin in specific schools, where overall educational achievements are lower than in other schools.¹⁶⁹ In 2014-2015, 52 500 newly arrived non-French speaking pupils were integrated into 9 200 elementary and secondary schools, representing 0.56 % of the pupils.¹⁷⁰

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 criminal courts.

However, claims of discrimination in education involving the private sector, whether it be a private school or discrimination perpetrated by a private party in the context of an

¹⁶⁸ Grenoble Court of Appeal, 13 November 1991. TA Bordeaux, 14 June 1988, El Rhazouari, *Recueil Lebon*, p. 518.

¹⁶⁹ 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.

¹⁷⁰ France, Ministry of Education, Education evaluation service, 2015. Information note No. 35, October 2015, available at: <http://www.education.gouv.fr/cid132028/annee-scolaire-2014-2015-52-500-eleves-allophones-scolarises-dont-15-300-l-etaient-deja-l-annee-precedente.html>.

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.¹⁷¹

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).¹⁷² 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).¹⁷³ 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.¹⁷⁴

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

In the meantime, on 1 November 2012, the UN Human Rights Committee contradicted the European Court of Human Rights in relation to the complaint filed by Bikramjit Singh alleging that expulsion from school pursuant to the law of 15 March 2004 for wearing

¹⁷¹ 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>.

¹⁷² 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>.

¹⁷³ Available at: <http://www.education.gouv.fr/bo/2004/21/MENG0401138C.htm>.

¹⁷⁴ Conseil d'Etat, No. 285394, 5 December 2007; ECtHR, No. 25463.08, 30 June 2009.

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.¹⁷⁵

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 State had not established 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. France has not attempted to comply with this opinion of the Committee.

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, whether they are Catholic, Protestant, Jewish or Muslim.¹⁷⁶

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.¹⁷⁷ 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,¹⁷⁸ 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.¹⁷⁹

In addition, in a criminal case alleging discrimination on the ground of religion further to the exclusion of a student from an adult higher education apprenticeship programme because she was wearing a Muslim headscarf, which was deemed contrary to the internal regulations of the school,¹⁸⁰ on 8 June 2010 the Paris Court of Appeal, in application of

¹⁷⁵ UN Human Rights Committee, 106th session, no 1852/2008, 4 December 2012, *Bikramjit v. France*, available at: <http://hrlibrary.umn.edu/undocs/1852-2008.html>.

¹⁷⁶ 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>.

¹⁷⁷ 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>.

¹⁷⁸ Paris Administrative Court, *Saïd v. Greta*, No. 0905233.9, 27 April 2009.

¹⁷⁹ Paris Administrative Appeals Court, No. 0905232, 5 November 2011.

¹⁸⁰ Paris Court of Appeal, *Ms Boutaina Benkirane v. Centre universitaire de formation par l'apprentissage Sup* 2000, No. 08.08286, 8 June 2010.

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.

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.

- School Integration

The Law No. 2005-102 on Disability completely reforms the assistance and education of disabled children.¹⁸¹ 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.

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.¹⁸²

Since 2005, Title IV of the Law on Disability gives competence to the Commission for the Rights and Autonomy of Disabled Persons to assess the situation of the child and recommend 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. It must determine whether children, in consideration of the 'personal life plan' 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.¹⁸³

Parents cannot demand an educational 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).

¹⁸¹ 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>.

¹⁸² France, Decree No. 2006-583 of 23 May 2006 on the regulatory provisions of Book III 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>.

¹⁸³ 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>. 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>.

The Regional Administration of National Education (*Académie*) is part of this Commission, together with everyone involved in the support and education of the child. Parents can challenge the conclusions of the Commission before the high judicial court.

- The accommodation of disabled children and students in ordinary school system

When required by the Commission for the Rights and Autonomy of Disabled Persons, the obligation to provide a support assistant to the child extends to extracurricular activities, whether they are compulsory or not.¹⁸⁴

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

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

The Ministry of Education faces significant difficulties in financing adequate support for the satisfactory integration of disabled children into mainstream schools. Since the first decision of the European Committee of Social Rights (ECSR) in 2002, the French Government has taken action to address the situation of children and young people with autism. However, in its 2014 decision in the case of *European Action of Persons with Disabilities (Action européenne des handicapés, AEH) v. France*, the ECSR decided that these actions were insufficient, since only 14 000 children with autism would receive care and an estimated more than 40 000 would remain without proper care.¹⁸⁵

A report to the Minister of Social Affairs of 22 June 2014 estimates the number of disabled children without an adequate solution due to the lack of available facilities as being around 20 000.¹⁸⁶

In September 2005, the Administrative Court of Lyon decided that the failure of the state to provide access to school to a disabled child because of insufficient available adapted facilities makes the state liable for damages, regardless of whether or not it is at fault, the additional burden on the family being unreasonable.¹⁸⁷ The Supreme Administrative Court decided that the state bears the obligation that rests upon all authorities of the state to provide the necessary resources.¹⁸⁸

- Available data

In her 2018 report, the National Education Ombudsman reported on the situation of disabled children and students in the French education system on the basis of data from the school year 2015-2016.¹⁸⁹

In total, 23 257 disabled students obtained the Baccalaureate and were admitted to higher education (among whom 21 254 to universities and colleges of engineering),

¹⁸⁴ Nantes Administrative Court of Appeal, No. 17NT02962, 25 June 2018.

¹⁸⁵ ECSR No. 81/2012, issued 11 September 2013, published 5 February 2014, AEH vs France, available at: <http://hudoc/esc/coe/int/eng#%7B%22fulltext%22:%5B%22No.%2081/2012%20%20France%22%5D,%22ESCStateParty%22:%5B%22FRA%22%5D,%22ESCDcIdentifier%22:%5B%22reschs-2014-2-en%22%5D%7D>.

¹⁸⁶ Piveteau, D., Report "Zero Children without solution, (*Zéro sans solution*), June 2014, Ministry of Social Affairs available at: <http://www.accueil-temporaire.com/rapport-piveteau-zero-sans-solution-du-lourd-et-du-juste>.

¹⁸⁷ Administrative Court of Lyon, M. & Mme Hebri, No. 0403829, 29 September 2005, AJDA, 2005, 1874.

¹⁸⁸ Conseil d'Etat, Annie Beaufils, No. 31850, 16 May 2011; Conseil d'Etat, No. 418702, 28 March 2018.

¹⁸⁹ National Education Ombudsman, Annual report 2018, available at: http://cache.media.education.gouv.fr/file/06_-Juin/09/2/Rapport_du_Mediateur_2017_975092.pdf.

representing 1.22 % of students. A progression of 13.5 % per year since 2006 has been observed. Of these students, 59 % benefited from accommodation measures. There are no data on the number of graduating students. Statistics relate to the level of advancement of their studies: 22.6 % are registered for master's degree programmes, 7.7 % for PhDs and 79.39 % at the undergraduate level.¹⁹⁰

As regards elementary and secondary school, 278 900 pupils were enrolled, of whom 160 000 were in elementary school (70 % in ordinary classes), and 118 900 in secondary school, (70 % of whom in ordinary classes as well).

b) Trends and patterns regarding Roma pupils

In France, there are no specific trends and/or patterns in education regarding Roma pupils, such as segregation.

The number of school-age children identified as Travellers or living in slums was estimated at 80 000 in 2012.¹⁹¹ A total of 4 000 Traveller children (the number has remained stable for years) were not registered in the formal education system and attended between 10 and 50 half-days of school per year 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.

According to a study of 13 000 people living in slums and squats between 2012 and 2015, 8 000 to 10 000 were children.¹⁹² Furthermore, 88 % of school-age children who are living in slums, squats or otherwise illegally occupied land (the majority of whom are of Roma origin or Travellers), are not enrolled in school.¹⁹³

According to Romeurope, 5 000 to 7 000 Roma children in France today will or have attained the age of 16 without having really attended school, i.e. approximately half of the estimated Roma population present in France.¹⁹⁴

The education system provides for special classes to integrate newly arrived foreign migrant children and Traveller children¹⁹⁵ and Law No. 2000-614 of 5 July 2000, on the

¹⁹⁰ France, Ministry of Higher Education and Research (2017), *L'état de l'enseignement supérieur et de la recherche en France* (Higher education and research in France, facts and figures), available at: https://publication.enseignementsup-recherche.gouv.fr/eesr/10/EESR10_ES_14.php, in English: https://publication.enseignementsup-recherche.gouv.fr/eesr/10EN/EESR10EN_ES_14-students_with_disabilities_in_higher_education.php.

¹⁹¹ France, Auditor General (2012) *L'accueil et l'accompagnement des gens du voyage* (Accommodation and support for Travellers), available at: http://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2016/05/ccomptes_rapport_thematique_gens_du_voyage.pdf.

¹⁹² Defender of Rights/ Defender of Children (2016), *Rapport droit de l'enfant 2016. Droit fondamental à l'éducation : une école pour tous, un droit pour chacun*. The fundamental right to education: a school for all, a right for each child), Children's rights annual report 2016, available at: <https://www.defenseurdesdroits.fr/fr/rapports/2016/11/rapport-2016-consacre-aux-droits-de-lenfant-droit-fondamental-a-leducation-une>.

¹⁹³ 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 communities occupying illegal camps in Metropolitan France), 3 July 2014.

¹⁹⁴ Defender of Rights (2018) *Etude sur la scolarisation des élèves allophones nouvellement arrivés et des enfants issus de familles itinérantes et de voyageurs* (Study on the schooling of newly arrived foreign children and Traveller children), EVASCOL, (Institut national supérieur de formation et de recherche), June 2018, p.148, available at: <https://www.defenseurdesdroits.fr/fr/communiqu-de-presse/2018/12/etude-sur-la-scolarisation-des-eleves-allophones-nouvellement-arrivees>.

¹⁹⁵ 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; 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*

accommodation of Travellers, provides for a duty to accommodate the temporary school attendance of French Traveller children and Roma children.¹⁹⁶

The National Parking Accommodation Scheme for Travellers aims to stabilise residence and promote school attendance for children, as all mayors are obliged to accept enrolment 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 Traveller community on their rolls. In addition, in contradiction to the objectives of stability, 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.¹⁹⁷

Ministerial instruction No. 2012-142 of 2 October 2012 on school integration of Traveller children reiterates the duty to integrate Traveller and Roma children, regardless of their nationality, housing conditions and legal residency on French territory. This instruction was complemented by another Ministerial instruction¹⁹⁸ providing for the implementation in every school district 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.

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

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 Travellers and foreign Roma populations, resulting from Government policy against the unauthorised occupation of private and public property, significantly hinders children's access to education in practice.

A study conducted by the National Institute of Education and Research on the request of the Defender of Rights (*Défenseur des droits*), and published on 21 December 2018, on the pedagogical practices implemented in support of non-French-speaking and Traveller children, stressed the difficulties relating to the implementation of the public policy in support of their access to education. Many mayors overtly refuse to enrol Traveller and Roma children for school on the ground of their parent's illegal occupation of land, against the instructions of Government.

2012 relative à la scolarisation des élèves allophones nouvellement arrivés).

http://www.education.gouv.fr/pid25535/bulletin_officiel/html?cid_bo=61536; 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.

¹⁹⁶ 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>.

¹⁹⁷ Defender of Children (2016), *Rapport droit de l'enfant 2016. Droit fondamental à l'éducation : une école pour tous, un droit pour chacun* (Children's rights report 2016. The fundamental right to education: a school for all, a right for each child), available at:

<http://www.defenseurdesdroits.fr/fr/publications/rapports/rapports-annuels-droit-de-l'enfant/droit-fondamental-l'education-une-ecole>.

¹⁹⁸ 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.

Under pressure from the Defender of Rights and NGOs, the Ministry of Education authorities and prefects are intervening more and more to undertake unilateral enrolment of children in state schools.

As most mayors are also MPs, they often attempt to defer compliance with the demands of the governmental authorities until the eviction of campsites has been carried out by the local authorities. It is important to stress that they adopt this attitude even when the education authorities, courts or prefects intervene and request that children be enrolled.¹⁹⁹

In a decision of 23 January 2018, the Criminal Chamber of the Court of Cassation decided that a mayor refusing school enrolment to Roma children living in an illegal camp constitutes the criminal offence of refusal of the benefit of a right as defined by Article 432-7 of the Penal Code.²⁰⁰

In a decision of 19 December 2018, the Conseil d'Etat, for the first time, stated that illegal occupation of land does not justify a mayor in refusing school enrolment to the Roma children living therein.²⁰¹

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

In France, national legislation prohibits discrimination in 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 with the sum of EUR 2 000 each in damages and to give a symbolic EUR 1.00 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 staff and the systematic refusal of the company to allow disabled people to board a plane without verifying their capacity to travel alone constitutes a company policy specifically targeting 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.

¹⁹⁹ Defender of Rights (2018), *Etude sur la scolarisation des élèves allophones nouvellement arrivés et des enfants issus de familles itinérantes et de voyageurs* (Study on the schooling of newly arrived foreign children and Traveller children).

²⁰⁰ Court of Cassation, Criminal Chamber, No. 17-81369, 23 January 2018, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036584795>.

²⁰¹ Conseil d'Etat, 19 December 2018, No. 408710, available at: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000037834583&fastReqId=2123024625&fastPos=1>.

However, except with regard to race and ethnic origin, 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.'²⁰²

The law does not provide for a general reasonable accommodation duty in access to goods and service.

a) 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.²⁰³

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

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

Article 1, paragraph 3, of Law No. 89-462 of 6 July 1989 on relations between landlords and tenants was amended by Law No. 2014-366 of 24 March 2014 on promoting access to housing and regenerating urban planning to prohibit discrimination in access to rental housing, whether private or public, on all grounds of discrimination prohibited by Article 225-1 of the Penal Code.²⁰⁴ These provisions apply to national and non-nationals.

In France, there is an ongoing general practice of requesting security for the rent as a condition of the lease. The Law of 6 July 1989 on relations between landlords and tenants was amended in 2006 to prevent landlords from refusing security on the basis that the guarantor is in a foreign country or is a foreign national.²⁰⁵ Meanwhile, rejection of

²⁰² 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>.

²⁰³ 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>.

²⁰⁴ France, Law No. 2014-366 of 24 March 2014 on promoting access to housing and regenerating urban planning amending Law No.89-462 (*Loi No. 2014-366 du 24 mars 2014 pour l'accès au logement et un urbanisme rénové*), article 1: available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028772256&categorieLien=id>.

²⁰⁵ Article 22-1 of Law No. 89-462 as amended by Law No. 2006-396 of 31 March 2006 on equal opportunities.

security offered by an individual's parents who live abroad or in French overseas territories continues to be largely used as a reason to refuse to rent to non-nationals.

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 rentals or sales.

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.²⁰⁶

There is no governmental policy that targets discrimination against migrants in the field of housing. National housing policies focus on anti-poverty measures and on equality between areas.²⁰⁷

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 non-French nationals 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.²⁰⁸ 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 allocation committee proceeded in the selection of tenants. A social housing allocation committee, composed of people external to the social housing corporation itself, had dismissed an application on the ground that the candidate was of African or Caribbean origin. The committee argued that they did not meet the legal requirements relating to social mix, in the context of this particular social housing scheme. The Court of Cassation found criminal liability on the part of the social housing corporation.²⁰⁹

The Court stated that, by designating the allocation committee as the structure legally allocating social housing, Article 441-2 of the Construction and Housing Code confirms that these committees constitute an integrated structure of the social housing corporation and can thereby be found criminally liable 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

²⁰⁶ High Judicial Court of Paris, 17th Chamber, *Poncelet v. Lassailly*, No. 0402608235, 28 June 2005.

²⁰⁷ See programme of the General Commissioner for Territorial Equality (*Commissariat général à l'égalité des territoires, CGET*), available at: <https://www.cget.gouv.fr/>; see the programme of the National Agency of Urban Regeneration (*Agence nationale de renovation urbaine, ANRU*), available at: <https://www.anru.fr/>

²⁰⁸ High Judicial Court of St-Etienne, No. 204/09, 3 February 2009.

²⁰⁹ 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>.

Article L111-7 of the Construction and Housing Code²¹⁰ 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 2006 specifies that the obligation relates to common areas, internal and external, part of the parking space for vehicles, residential lifts, collective premises and equipment.²¹¹

Although the Law No. 2005-102 on Disability had imposed a deadline that all buildings open to the public must conform to accessibility requirements by 2015, this was postponed by Law No. 2014-789 of 10 July 2014 authorising Government to adopt legislative measures for the implementation of the accessibility of public places. This delay postponed 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. The decrees provide for extensions that can vary from three months to five years. This delay, and the enormous number of requests for derogations that have been deemed to be admitted as a result of delays and a failure to reject them within a two-month window, has postponed the prosecution and issuing of sanctions provided by the law of 2005. Requests for adaptation could be submitted until 31 March 2019. By 31 December 2018, 690 000 adaptation measures had been implemented.²¹²

After construction or renovation works have 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 registered disabled people and their families.

Meanwhile Law No. 2018-1021, adopted on 23 November 2018, has lowered the standards of accessibility of new housing by limiting the obligation to build lifts to buildings of four floors and more and by creating a duty of evolutionary adaptability, whereby the obligation is not to build accessible housing but housing that can be adapted

²¹⁰ France, Construction and Housing Code (*Code de la construction et de l'habitat*), available at: <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006074096>.

²¹¹ 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>.

²¹² France, Ministry for the Ecological and Inclusive Transition, Ad'Ap, available at: <https://www.ecologique-solidaire.gouv.fr/ladap-agenda-daccessibilite-programmee%20>.

to be accessible. This legislation has been held to be a substantial hindrance to the construction of accessible housing.²¹³

a) Trends and patterns regarding housing segregation for Roma

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

Travellers

The Traveller population is subject to specific accommodation rules. Municipalities of more than 5 000 inhabitants have an obligation to accommodate travelling populations by providing settlement areas as stipulated by Law No. 2000-614 of 5 July 2000, and the technical requirements of these areas are provided by Decree 2001-569 of 29 June 2001,²¹⁴ reviewing legislation that was first adopted in 1990 (Law No. 90-449 of 31 May 1990). This legislation was amended in 2018 by Law No. 2018-957 to modify the area of reference to define conformity in terms of obligations of parking sites for Travellers.²¹⁵

The installation of motor homes on unauthorised parking sites is sanctioned by administrative expulsion measures created by Law No. 2003-239 of 18 March 2003.²¹⁶ The law has restricted the obligations of small towns and, since Law No. 2018-957, defines the area of reference in relation to a group of municipalities. Although the law provides that a group of municipalities which has not satisfied its legal obligation cannot expel illegally parked Roma Travellers, the concentration of Travellers and the insufficiency of available space is still a major problem.

According to the most recent official data referred to in a report by the Auditor General (*Cour des comptes*) from 2012 evaluating public policy on Travellers,²¹⁷ 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 sites for large-scale events had been implemented. Their manifest insufficiency therefore increases illegal parking, monitoring by the police and 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.

²¹³ France, Law No. 2018-1021 adopted on 23 November 2018 (*LOI n° 2018-1021 du 23 novembre 2018 portant évolution du logement, de l'aménagement et du numérique*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037639478&categorieLien=id>.

²¹⁴ 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=JORFTEXT00000583573>, see above note 191; Decree 2001-569 of 29 June 2001 relating to technical rules applicable to areas of accommodation for 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.

²¹⁵ France, Law No. 2018-957 of 7 November 2018 on accommodation for Travellers and combating illegal sites (*Loi n° 2018-957 du 7 novembre 2018 relative à l'accueil des gens du voyage et à la lutte contre les installations illicites*), available at: <https://www.legifrance.gouv.fr/eli/loi/2018/11/7/INTX1731081L/jo/texte>.

²¹⁶ France, Law No. 2003-239 of 18 March 2003 on internal security (*Loi No. 2003-239 du 18 mars 2003 pour la sécurité intérieure*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000412199>.

²¹⁷ France, Auditor General (2012) *L'accueil et l'accompagnement des gens du voyage* (Accommodation and support for Travellers), available at: http://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2016/05/ccomptes_rapport_thematique_gens_du_voyage.pdf.

When a group of municipalities fails to provide specific sites for the Traveller community, it is barred from seeking the removal of Travellers' trailers and from prohibiting parking²¹⁸ 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 accommodation.²¹⁹

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.²²⁰

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 precarious migrants

Since 2008, with an uninterrupted escalation since 2012, the Government has pursued a systematic policy against slums occupied by Roma and, since 2015, other homeless precarious 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 Travellers, 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 precarious migrants from illegally occupied land. The ministerial instruction has been used by NGOs before the courts to defer expulsion, but the available evaluations by the ministry of Social Affairs indicate that the authorities have not been complying with the instruction.

This policy, and large-scale forced returns 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 EU law rules relating to social protection requirements of freedom of movement 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/EC.

²¹⁸ High Judicial Court of Montauban, No. 02/00171, 3 May 2002. Available at: www.rajf.org/article/php3?id_article=1043.

²¹⁹ Versailles Court of Appeal, No. 16/02752, 1 June 2017, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000035083402>.

²²⁰ Bordeaux Administrative Appeals Court, No. 03BX00379, 1 December 2005.

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 on Accommodation and Access to Housing (DIHAL) was given a wider and stronger mandate. EUR 4 million was awarded to support integration processes for individual families who would remain in France. Since then eviction procedures have continued and the Defender of Rights still presents its conclusions before the courts in individual cases to support the suspension of eviction procedures.

On 25 January 2018, the Government published a ministerial instruction completing its instruction of 28 August 2012²²¹ to revisit its policy regarding evacuation of slums and illegal camps. This instruction raised significant hope on the part of NGOs such as Romeurope, since it integrated a number of their recommendations supporting a co-constructed approach concentrating on local consultation, the protection of rights and for the integration of the occupants. However, to date, the former evacuation policy seems to be ongoing.

On 18 March 2019, CNDH Romeurope²²² published its annual results collected by 48 NGOs, presenting civil society's national survey of Roma evacuations in 2018.

In 2018, 9 688 people were evicted from 171 different locations. The number of people evacuated decreased slightly in 2018 (5 %), but the number of evacuation operations increased substantially (+45 %). The highest number of evacuations was recorded in October, just before they were paused for the winter, when 1 884 people were evicted from 29 locations. This represented 20 % of all evictions in 2018. In 2018, 14 800 people were living in slums and squats in France, excluding overseas departments. Therefore, approximately 65 % of all the people concerned were evicted from their homes in 2018.

95 sites were slums, 62 sites were squats and six sites were other types of occupied areas. Some 77 sites were public property while 48 sites were owned by private persons. 63 % of the evictions occurred in the Paris region (Ile-de-France), i.e. 79 evacuations evicting at least 6 132 women, men and children.

At least 8 189 people (i.e. approximately 85 %) received no offer of shelter or housing after they were evicted.

Some stable housing solutions were offered to people who had been living in slums in some parts of the country. These operations had been prepared in advance in collaboration with local authorities and NGOs in the context of specific integration projects with selected individuals in application of the inter-ministerial instruction of 25 January 2018.²²³ This instruction intended to offer a policy going beyond an approach based on strict evacuations, with the aim of developing a strategy to eliminate slums and support integration.

At least 25 evacuations (19 %) occurred without any known legal basis, with public authorities generally alleging *flagrante delicto*.

²²¹ France, Instruction of Government supporting a renewed policy for the suppression of slums and illegal camps (*Instruction du Gouvernement visant à donner une nouvelle impulsion à la résorption des campements illicites et des bidonvilles*), No. NOR: TERL1736127, 25 January 2018, available at: http://circulaires.legifrance.gouv.fr/pdf/2018/01/cir_42949.pdf.

²²² CNDH Romeurope is an NGO which monitors and coordinates the activities of local NGOs in support of the rights of foreign Roma in France, monitoring published on 18 March 2019, available at: www.romeurope.org/wp-content/uploads/2019/03/Expulsions-bidonvilles-squats-2018-Note-d%C3%A9taill%C3%A9e-VF.pdf.

²²³ France, Inter-ministerial instruction of 25 January 2018, available at: <http://circulaire.legifrance.gouv.fr/index.php?action=afficherCirculaire&hit=1&r=42949>.

The very substantial increase in the number of evacuations reflects the 'fragmentation' of living areas resulting from the Government's systematic policy of repeated evictions since 2011.

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, which had been occupied for more than two years and where 40 families were living.²²⁴ The French Government ignored the order of the European Court and the site was dismantled on the order of the prefect of the department of Seine St-Denis. 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 Government since 2012, without proper alternative support, has led to increased precariousness in terms of access to all fundamental, economic and social rights.

²²⁴ ECtHR decision on petition No. 36779/16, available at: <http://www.romeurope.org/IMG/pdf/cedh.pdf>.

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 which has been relied upon to attempt to justify restrictions on wearing the Islamic headscarf and has generated a long stream of jurisprudence.

The possibility of raising a general exception introduced in 2008 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.'²²⁵

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.²²⁶

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.

Meanwhile, 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 given rise to a referral to the Court of Justice by the Court of Cassation in the *Bougnaoui* 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 be interpreted as

²²⁵ 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.'

²²⁶ France, Law No. 2016-1088 of 8 August 2016 on employment, the modernisation of social dialogue and the protection of professional careers (*LOI n° 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels*), 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.', available at: <https://www.legifrance.gouv.fr/eli/loi/2016/8/8/2016-1088/jo/texte>.

meaning that the wish of a customer of an information technology consulting company no longer to have the information technology services of that company provided by an employee, a design engineer, wearing an Islamic headscarf, is a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out?’

The European Court of Justice in the *Bougnoui* case²²⁷ 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 people 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’, which is something that is related to the activity itself when it is to be defined by the employer.

The Court of Cassation deciding the case²²⁸ 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/EC 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 headscarf when clients so demand, constitutes direct discrimination, and that therefore the only possible justification would be an exception provided by Article 4(1) of Directive 2000/78/EC, 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 fulfil the wishes of its clients 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 signs in the workplace do not constitute 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 people of a particular religion. In

²²⁷ CJEU, C-188/15, *Asma Bougnaoui, 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>.

²²⁸ Court of Cassation, No. 13-19855, *Asma Bougnaoui, ADDH v. Micropole SA.*, 22 November 2017, available at: https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/2484_22_38073.html.

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

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,²²⁹ 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.²³⁰

The petitioner was an Egyptian medical student who was admitted as a trainee for one year to the digestive surgery department of a public hospital in the Paris suburbs, pursuant to an agreement between the hospital and his university. Article 6 of the agreement 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 agreement and put an end to the 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 rather substantial; he was working in a multicultural environment; his beard was perceived to be a religious sign by members of staff; and he was invited to reduce the size of it so that it would not be perceived as an Islamic religious sign. In response, the petitioner refused to reduce the size of 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 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 the size of 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 servant does not have to express his

²²⁹ Conseil d'Etat, *Mlle Marteaux* No. 217017, 3 May 2000; Conseil d'Etat, No. 244428, 15 October 2003.

²³⁰ 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>.

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 servant. 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 headscarf. 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 officials 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 secularism and neutrality of public service over the right of the claimant to express her religion.²³¹

Finally, 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.²³² 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.

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.²³³ In 1993, the Court of Appeal of Montpellier concluded that provocative, distasteful behaviour could justify dismissal.²³⁴

²³¹ ECtHR, No. 64846/11, 26 November 2015, <http://hudoc.echr.coe.int/fre?i=001-158878>.

²³² Court of Cassation, No. 12-11.690 45, 19 March 2013.

²³³ Court of Cassation, Social Chamber, 17 April 1991, *Droit Social* 1991, 485.

²³⁴ 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 right to implement an exception of Article 3 (4) of Directive 2000/78/EC allowing derogations concerning criteria based on maximum age (for recruiting and active service) and on 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.

Maximum age limits pertain of between 63 and 67 for officers and 59 and 66 for under-officers.²³⁵

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'.²³⁶

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 2009²³⁷ and the report of the Defender of Rights on the fundamental rights of foreign nationals,²³⁸ over the years, French legislation has created some legal discrimination in access to specific professions and jobs (about 7 000 named jobs in a

²³⁵ France, Article L4139-16 of the Code of Defence, available at: <https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006071307&idArticle=LEGIARTI000037202061>.

²³⁶ 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>.

²³⁷ HALDE, decision 2009-139 of 30 March 2009, <http://www.defenseurdesdroits.fr>.

²³⁸ Defender of Rights (2016g), *Les droits fondamentaux des étrangers en France* (The fundamental rights of foreigners in France), May 2016, <http://www.defenseurdesdroits.fr>.

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 advancement possibilities. This is illustrated by a case decided by the Court of Appeal of Paris in 2018, 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 SNCF imposed a requirement of French nationality in order to be hired under its permanent employee status, North African employees were hired as contracted agents under a specific status, known as PS25, which was used for temporary employees and for people holding posts on a list of jobs that were not covered by the statutory regime. The claimants spent all of their careers at SNCF and sued for discrimination, claiming compensation for their entire career and retirement benefits.²³⁹

On 21 September 2015, the Paris Employment Tribunal gave a decision regarding the liability of SNCF. The claimants' specific employment conditions were de facto 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 for French citizens and all the other Moroccan employees hired in the 1970s kept their PS25 status.

The court held that jobs covered by the PS25 employment regulatory status 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 against these non-national migrant workers, contrary to Article 14 ECHR. 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.²⁴⁰

In France, many professions and professional activities impose national or European Union qualification requirements.

As regards access to the employment market, unless their residence permit is not related to work, i.e. it is for example based on a right related to health or family life, foreign nationals 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 an adequate candidate with the specified profile of skills in France.

As regards asylum seekers, French legislation applies the minimum requirements of Directive 2003/9/EC 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 needs, but only after their application for asylum has been duly registered, which often takes many months and leaves them without resources.

²³⁹ Paris Employment Tribunal, 21 September 2015, RG N°F 05/12309 and following.

²⁴⁰ Paris Employment Tribunal, RG N°F 05/12309 and following, 21 September 2015, *832 old North African migrant workers (Chibanis) v. French National Railway Company (SNCF)*, appeal dismissed by the Paris Court of Appeal, Social Chamber, No. 15/11389, 31 January 2018.

Access to health

Until they are officially authorised to reside in the country, undocumented migrants, including asylum seekers and unaccompanied minors, are covered by a specific public health insurance called State Medical Support (*Aide médicale d'état, AME*). This special regime de facto limits access of undocumented migrants to health services since many private health professionals illegally refuse to care for beneficiaries of AME and they essentially have access only to public health services.²⁴¹ Article L1110-3 of the Code of Public Health forbids unequal treatment on all grounds in access to health services. Such refusal has been held to constitute illegal unequal treatment and discrimination on the ground of origin and social situation by the Defender of Rights and the professional corporation regulating the ethics of medical doctors.²⁴²

Police checks

On 27 January 2017, the Constitutional Council expressly stated that the provisions of the Code of Penal Procedure and of the Code relating to the conditions of legal residence of non-nationals (Code de l'entrée et du séjour des étrangers et du droit d'asile-CESEDA) allowing the public prosecutor to mandate police to conduct checks without reason could not be interpreted in such a fashion as to authorise discriminatory checks on the ground of origin or to authorise police checks solely for the purpose of verifying the legality of the presence in France of the people subject to the check.²⁴³

b) Relationship between nationality and 'racial 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 to establish unequal treatment. Nationality is often assimilated with origin when the law does not explicitly allow restrictions based on nationality.

In many cases alleging criminal discrimination sanctioned by Article 225-1 and 255-2 of the Penal Code, the criteria of nationality have 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 on the ground of origin that allows for justification on the part of the employer.²⁴⁴ 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

²⁴¹ Defender of Rights (2016g), *Les droits fondamentaux des étrangers en France* (The fundamental rights of foreigners in France), May 2016, p. 36.

²⁴² Defender of Rights, Decision DDD 2017-136 of 3 April 2017 followed by a decision of the 11 May 2017 by the Order of medical doctors, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=21984&opac_view=-1.

²⁴³ 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>.

²⁴⁴ 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).

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.

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.

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 same-sex 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.

As regards extra days of holiday reserved for family events for married couples and establishing a bonus for employees' weddings in a collective agreement, the HALDE held that it constituted direct discrimination based on family status (prohibited by French law) and indirect discrimination based on sexual orientation.²⁴⁵

Law No. 2013-404 of 17 May 2013 opened marriage to same-sex couples²⁴⁶ and no opposition on the part of employers to implement benefits for 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 constitutes unlawful discrimination under Article L1132-1 of the Labour Code and Article 6 of Law 83-649 on the rights of civil servants if an employer only provides benefits to those employees with opposite-sex partners.

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

In France, there are no exceptions in relation to disability and health and safety as allowed under Article 7(2) of the Employment Equality Directive.

However, Article 24 II of the Law No. 2005-102 on Disability 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

²⁴⁵ HALDE, Deliberation No. 2007-366 of 11 February 2008, available at: <http://www.defenseurdesdroits.fr>.

²⁴⁶ France, Law No. 2013-404 of 17 May 2013, opening marriage to persons of the 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>.

health doctor (Article R. 4624-18 of the Labour Code), and the 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 people in employment is delivered by the specialised services of the Ministry of Employment.²⁴⁷

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 for a specific justification for direct discrimination on the ground of age.

National law also expressly provides for specific exceptions for differences in treatment on account of age.

Article 6 of Law No. 2008-496 creates Article L1133-2 of the Labour Code, which expressly states as non-discriminatory and legitimate references 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 workers' safety, professional integration facilitating access to employment, maintaining employment, redeployment or specific conditions of compensation for specific age groups in case of loss of employment, and when the means to attain these objectives are appropriate and necessary.

In addition, age limits 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 2017,²⁴⁸ 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 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 prohibition of discrimination on the ground of age is 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 of all revenue of replacement (unemployment insurance, redundancy allowance or wages) received by the claimant.

a) Justification of direct discrimination on the ground of age

In France, national law provides for justifications for 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

²⁴⁷ Assistance services in support of the continued employment of disabled persons (*services d'aide au maintien dans l'emploi des travailleurs handicapés*).

²⁴⁸ 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>.

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 this is argued, French courts have implemented strict tests verifying the objective pursued by the age limit and its proportionality.

Cases relating to statutory age limits in specific occupations have only been deemed justified as long as they required a stringent scrutiny of performance requirements in the case of pilots and air traffic controllers.²⁴⁹

However, they can never lead to retirement if the employee is not entitled to a full pension.²⁵⁰

Situations also arise which do not relate to the implementation of public policy but to decisions made by employers. A number of cases have held that differential treatment of older workers close to retirement age, in relation to redundancy compensation, was not discriminatory if it was reasonable and proportionate.²⁵¹

Justifications based on requirements of human resources management have been deemed too general and not proportionate in the private and public sectors.²⁵² 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.²⁵³

b) Permitted differences of treatment based on age

In France, national law permits 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 limits were removed by Article 1 of Executive Order 2005-901,²⁵⁴ 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;

²⁴⁹ 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>; Court of Cassation Social Chamber, No. 09-72061, 16 February 2011; Conseil d'Etat, No. 362785, 4 April 2014.

²⁵⁰ Court of Cassation Social Chamber, No. 08-4381, 11 May 2010.

²⁵¹ Court of Cassation Social Chamber, No. 09-42071, 17 November 2010; Court of Cassation Social Chamber, No. 10-24219, 5 December 2012.

²⁵² Court of Cassation Social Chamber, No. 10-10465, 16 February 2011; Conseil d'Etat, No. 373746, 26 January 2015, available at: <https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000030192187>.

²⁵³ Court of Cassation Social Chamber, No. 13-10294, 18 February 2014.

²⁵⁴ France, Executive Order No. 2005-901 of 2 August 2005 relating to conditions of age in accessing public service (*Ordonnance No. 2005-901 du 2 août 2005 relative aux conditions d'âge dans la fonction publique et instituant un nouveau parcours d'accès aux carrières de la fonction publique territoriale, de la fonction publique hospitalière et de la fonction publique de l'Etat*), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000262918&dateTexte=&categorieLien=id>.

- entry examination conditions for admission to a specialist school to follow an education programme of a duration of two years or more financed by the State. In this case, the Government should raise the age limit to 15 years from retirement.

Public sector agents benefit from security of employment and regulatory wage schemes based on years of service. There is no redundancy or severance.

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 entitlement 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 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).²⁵⁵ 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, and 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 apprenticeships, 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.

For a period of five years after having acquired full retirement rights, and in general between the age of 65 and the age of 70, Article L1237-5 of the Labour Code requires the employer to ask the employee every year whether they wish to stay in employment

²⁵⁵ 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>.

or to retire. During this period, the employer is bound to respect the employee's wishes and cannot impose retirement on the ground of age.

A number of provisions establish the possibility for 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 adjustment of working hours for an employee caring for a family member 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 a scheme to promote employment of young workers under 25 years of age, called 'Contract of employment for the future' (*Contrats emplois d'avenir*).²⁵⁶ It creates Articles L5134-110 ff. of the Labour Code, establishing a specific employment contract of one to three years, benefiting from a special social contribution regime and financing by the state. The aim is to facilitate access to employment and professional training for workers between the ages of 16 and 25, and 30 in the case of disabled people, who have low levels of qualifications in sectors with high employment development potential and sectors of social and environmental utility identified by the regional authority (*Conseil régional*). Decree No. 2012-1210 of 31 October 2012, modified by Decree No. 2014-188 of 20 February 2014, sets out the specific requirements and conditions of regional state financing.²⁵⁷

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 an age limit 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'.

²⁵⁶ France, Law No. 2012-1189 of 26 October 2012 creating jobs for the 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>.

²⁵⁷ France, Decree No. 2014-188 of 20 February 2014 modifying the decree relating to jobs for the 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>.

Further to the adoption of Law 2009-972 of 3 August 2009²⁵⁸ relating to mobility and professional careers in the public service, the Government adopted Decree 2013-593 of 5 July 2013²⁵⁹ on conditions of admission to entry examinations for access to the higher civil service, which provides at Article 13 that the Government may adopt age limits for access to corps of higher civil service by decree. Although this possibility remains, it has not adopted such a decree, therefore age limits 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 wishes to work longer, their pension can be deferred.

An individual can collect a pension and still work.

An employee can collect their pension from the age of 62, at which time the amount will depend on the number of years of contribution, in accordance with Law No. 2003-775 of 21 August 2003.²⁶⁰ Article 351-8 of the Social Security Code establishes as 65 (an age which will progressively increase to 67 by 2023) the age at which minimum the full state retirement pension 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 62 years of age 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, 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 %.²⁶¹

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.²⁶²

²⁵⁸ France, Law No. 2009-972 of 3 August 2009 relating to mobility and professional careers in the public service (*Loi n° 2009-972 du 3 août 2009 relative à la mobilité et aux parcours professionnels dans la fonction publique*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020954520&fastPos=1&fastReqId=1375373593&categorieLien=cid&oldAction=rechTexte>.

²⁵⁹ <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027666449&categorieLien=id>.

²⁶⁰ France, Law 2003-775 of 21 August 2003 reforming old age pensions (*Loi No. 2003-775 du 21 août 2003 portant réforme des retraites*), available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000781627>; France, Law No. 2006-396 of 31 March 2006 on equal opportunities (*Loi No. 2006-396 du 31 mars 2006 pour l'égalité des chances*) Article 2, available at: <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000268539>.

²⁶¹ 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>.

²⁶² 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*

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.²⁶³

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 and follow rules applicable to state pension schemes.²⁶⁴ Other employer-funded retirement benefits arrangements, over and above legal requirements, are purely contractual.

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

An individual can collect an occupational pension and still work.

c) State imposed mandatory retirement ages

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

Public servants 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. The condition to be met is to have the care of children who are either under the age of 18 or are still pursuing their education at any level (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 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.²⁶⁵ The employer can offer retirement to the employee at 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.

fonctionnaires handicapés), available at:

<http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000816584>.

²⁶³ National Collective Agreement safeguarding the personalised redeployment agreement (*Accord National Interprofessionnel de sécurisation de la convention de reclassement personnalisé*), 23 December 2008.

²⁶⁴ France, Law 2003-775 of 21 August 2003 reforming old age pensions. France, Law No. 2006-396 of 31 March 2006 on equal opportunities.

²⁶⁵ 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>.

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 allocation of teaching classes in order to promote the activity of young instructors. In its first decision dealing with maximum age limits imposed in the private sector, the Court of Cassation decided that the internal regulation violates Law No. 2008-496 of 27 May 2008 and Directive 2000/78/EC. It does not meet the requirements of Article 6(1)(a) of Directive 2000/78/EC 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.²⁶⁶

The Court applied the same reasoning in 2014, quashing age limits imposing mandatory retirement at age 60 provided by the collective agreement of engineers and managers in the steel industry.²⁶⁷

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights do apply to all workers irrespective of age, even if they remain in employment after attaining pensionable age or any other age.

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

f) Compliance of national law with CJEU case law

In France, national legislation is not in line with the CJEU case law on age regarding compulsory retirement. However, in France, the courts are bound by European and international law before national law. Since national courts deem Directive 2000/78/EC 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 limits, 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 has been reviewed in conformity with the requirement set out in the CJEU case law, but judicial challenges are effective, and the courts uphold CJEU case law.

²⁶⁶ 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>.

²⁶⁷ Court of Cassation, No. 12-29565, 20 May 2014, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000028977322>.

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.

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 period²⁶⁸ and, for those over 57 years of age, for a period that can continue until retirement age.²⁶⁹

As regards conventional compensation for redundancy, the Social Chamber of the Court of Cassation decided a landmark case on the limitation of compensation awarded to employees who are a few years away from full retirement on the ground of their age. The Court decided that the derogation to the prohibition of direct discrimination on the ground of age then provided by Article L1133-1 LC (now L1133-2) authorised an employer to limit compensation of older worker close to retirement. To take into account only the period prior to retirement is an admissible justification to direct discrimination on the ground of age that meets the requirements of reasonableness and proportionality provided by the exception authorised by Article 6 of Directive 2000/78/EC, given that the purpose of compensation is to indemnify loss related to unemployment.²⁷⁰

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.

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, disability and incapacity insurance as regards the ground of health (paragraph 1); refusal to hire an individual on the ground of their health or

²⁶⁸ 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>.

²⁶⁹ 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>.

²⁷⁰ Court of Cassation, Social Chamber, *Banque Finaref*, No. 09-42071, 17 November 2010.

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).

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

a) Scope for positive action measures

In France, positive action is permitted in national law in respect of disability and age.

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.²⁷¹

In its opening provision, the Law No. 2005-102 on Disability 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. However, in 2017, the Government abrogated the decree establishing a positive action scheme to support employment of workers over the age of 50.²⁷²

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

b) Quotas in employment for people with disabilities

In France, national law provides for a quota for people with disabilities in employment.

The Law on the Employment of Disabled Persons No. 87-157 instituted a quota system.²⁷³ 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.²⁷⁴

The Law No. 2005-102 on Disability 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 the AGEFIPH for the private sector and FIDHFP for the public sector), which finances the integration of disabled workers and public servants. The amount is fixed by Decree no. 2012-943 of 1 August 2012 and starts at 400 times the minimum wage per missing employee for a business of 20 to 199

²⁷¹ Conseil d'Etat (1996), 'Public report No. 48', pp. 86 and 91.

²⁷² France, Decree No. 2009-560 of 20 May 2009 amended by Executive Order No. 2017-1387 of 22 September 2017 (Article 9), available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020639752&dateTexte=20190225>.

²⁷³ France, Law No. 87-517 of 10 July 1987 to promote the 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>.

²⁷⁴ Court of Cassation, Social Chamber, No. 1083, 06 May 2003, *Revue de jurisprudence Sociale* 8-9/03, p. 733.

employees to a maximum of 1 500 times the minimum wage per employee for businesses which employ no disabled employees, and creates a similar obligation for the public sector (see Section 2.6 for reasonable accommodation financing).²⁷⁵

The latest evaluations of the rate of employment in the private sector were published in November 2018 by the statistics directorate of the Ministry of Employment and relate to 2016.²⁷⁶

According to the 2015 census, 2.7 million members of the labour force, whether employed or not, were recognised as disabled: 43 % of disabled people were declared as active, 35 % or 938 000 held a job and 19 % were unemployed. In 2016, there were 102 100 qualifying private employers who met the legal requirements, i.e. an effective employment rate of 3.4 % in the private sector and 4.5 % in the public sector, thus the quota requirements have not yet been met.²⁷⁷ 1.2 % of trainees in apprenticeship are disabled. 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 people employed within the quota were officially recognised as disabled workers. 135 000 people were employed in adapted workshops.

In 2017, the AGEFIPH, which receives the sanction fees, collected EUR 408.5 million and operated a budget of EUR 429.9 million, which it distributed to financing schemes to support the costs of investment for individual adaptations of workplaces and the various mechanisms to support disabled workers in the workplace.²⁷⁸

The FIDHFP fund collected EUR 132 million to finance support schemes amounting to EUR 157 million.²⁷⁹

²⁷⁵ France, Decree no. 2012-943 of 1 August 2012, available at:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026252005&categorieLien=id>.

²⁷⁶ DARES Analyses, November 2018, No. 051, available at:

https://dares.travail-emploi.gouv.fr/IMG/pdf/2018-051_v2.pdf.

²⁷⁷ AGEFIPH (2018), *Les personnes handicapées et l'emploi, Chiffres clés* (Disabled people and employment. Key figures), June 2018, available at: <https://www.agefiph.fr/sites/default/files/medias/fichiers/2019-03/CHIFFRE-CLES-2017.pdf>.

²⁷⁸ AGEFIPH (2017) *Rapport d'activité* (Annual report 2016), available at: <https://www.agefiph.fr/Actus-Publications>.

²⁷⁹ FIPHP (2017) *Rapport d'activité 2016* (Annual report 2016), available at: <http://www.fiphfp.fr/Le-FIPHP/Actualites-du-FIPHP/Le-rapport-d-activite-du-FIPHP-pour-l-annee-2016-vient-d-etre-publie>.

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 Disability 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).²⁸⁰

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 investigative 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, computerised 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 proposed to all parties as 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. However, it is not compulsory.

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

²⁸⁰ France, Decree No. 2005-1587 of 19 December 2005 on the creation 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>.

postal service, finance etc. This mediation is pursued without prejudice to the administrative legal action, which must be pursued independently.

In addition, the Defender of Rights, the French equality body, can investigate any claim alleging discrimination on any ground covered by French law and present observations before a judge, as *amicus curiae* (see Section 7). However, its decisions are not binding.

Legal actions against private parties

Legal actions may be brought before the employment tribunal (*Conseil de Prud'hommes*) in matters related to employment, private sector salaried employees or contracted public servants 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 employees' representative's right of alert 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.²⁸¹

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.²⁸² 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

The Law on the modernisation of the justice system in the 21st century²⁸³ amended the Law of 27 May 2008 and the Labour Code to create a legal framework supporting class action that can be brought before the regional court or the administrative court. It is instituted exclusively by NGOs and trade unions to put an end to a discriminatory behaviour (*action en cessation du manquement*). Article 65 of the law defines remedies obtained by the action to put an end to discrimination as: 'an injunction to take all necessary measures'. Except on issues related to employment, this action for injunction can be joined by an action for damages related to the discriminatory behaviour (*action en responsabilité*). In case of discrimination in employment, damages can only be sought for damages that arise after introduction of the action before the court (Article L1134-8 CT).

Criminal procedure

Pursuant to Article 28 of the Institutional Act (*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.

²⁸¹ Court of Cassation Social Chamber, 26 May 1999, Bull. Civ. V No. 238.

²⁸² Court of Cassation Social Chamber, No. 06-40662, 06-40799 and 06-40.864, 20 December 2006.

²⁸³ Articles 62 to 88 of Law No. 2016-1547 of 18 November 2016, available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033418805&categorieLien=id>.

Articles 121-1 and 121-2 PC establish the criminal responsibility of physical and legal persons. Article 225-2 PC, in the case of a private party, and Article 432-7 PC, in the case of a public servant or public authority, provide for a criminal complaint filed with the police or public prosecutor. The prosecution acts based on police enquiries (Article 15-3 CPP) after the victim's complaint or further to notice given by any public servant (Article 40 CPP). Victims and NGOs can also directly notify the public prosecutor. It is the public prosecutor which decides, further to its enquiries, whether to prosecute or not. A private party and the Defender of Rights, if the respondent refuses a settlement, can also initiate proceedings by way of direct citation (*citation direct*) but then they bear 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.

The Law No. 2005-102 on Disability 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. It can be observed in practice that 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 on the part of 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;²⁸⁴ 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;²⁸⁵ the penal reflex of victims who seek redress before the criminal courts;²⁸⁶ 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 parking²⁸⁷ 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, as observed in practice, Travellers and Roma communities find it difficult to access legal aid, enforced under the control of the president of the court of appeal, due to the complexity of the administrative requirements.²⁸⁸

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. No study or statistics are available on this issue but very few cases are initiated.

Regarding the prohibition of police forces carrying out racial profiling in police checks, 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 practised, civil action for 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

²⁸⁴ In 2016, the Defender of Rights co-financed three major studies on the effective enforcement of discrimination law: 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* (Access to healthcare for children under child protection: access to and attitudes towards healthcare), Université Paris Ouest Nanterre Le Défense, 2016; available at: <http://www.defenseurdesdroits.fr>; Perelman, J., Mercat-Bruns, M. (2016), *Les juridictions et les instances publiques dans la mise en œuvre du principe de non-discrimination : perspectives pluridisciplinaires et comparées* (Jurisdictions and public bodies and the implementation of non-discrimination: multidisciplinary and compared perspectives), Sciences Po (Ecole 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; Laidie, Y. and Picard, P. (2016), *Le principe de non-discrimination: l'analyse du discours du juge administrative* (The principle of non-discrimination: analysis of the discourse of the administrative courts), Credespo – Université de Bourgogne, 2016, available at: <http://www.gip-recherche-justice.fr/wp-content/uploads/2016/10/Note-de-synth%C3%A8se-214.04.03.21-1.pdf>.

²⁸⁵ Auditor General (2016) *Rapport public de la Cour des comptes sur l'inspection du travail* (Public report on the Labour Inspectorate), February 2016, available at: <https://www.ccomptes.fr/sites/default/files/EzPublish/11-inspection-du-travail-RPA2016-Tome-1.pdf>.

²⁸⁶ Auditor General (2016) *Rapport public de la Cour des comptes sur l'inspection du travail* (Public report on the Labour Inspectorate), February 2016, available at: <https://www.ccomptes.fr/sites/default/files/EzPublish/11-inspection-du-travail-RPA2016-Tome-1.pdf>.

²⁸⁷ High Judicial Court of Montauban, No. 02/00171, 3 May 2002, available at: http://www.rajf.org/article/php3?id_article=1043.

²⁸⁸ France, National Assembly, Information report on legal aid n° 2183 of 29 July 2019, Available at: <http://www.assemblee-nationale.fr/15/pdf/rap-info/i2183.pdf>; Defender of Rights, Report to the National Assembly legal aid information committee, Avis n° 19-09, Available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=28988.

individuals subjected to police checks, then the police force has the burden of justifying the relevance of the check.²⁸⁹

However, in the absence of evidence of differential treatment, when faced with a group of young people exclusively composed of individuals of African or North African origin, the Paris High Court refused to find evidence of direct discrimination by way of hypothetical reasoning, showing the limits of the available means of action.²⁹⁰

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 to be 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).²⁹¹ A major reform of all statutes of limitations was adopted by Law No. 2008-561 of 17 June 2008,²⁹² 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 on 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 a significant 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.'

²⁸⁹ 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.

²⁹⁰ Paris High Court, 17 December 2018, n° 17/06217, 17/06216, 17/06214, available at : https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=26661&opac_view=-1.

²⁹¹ 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.

²⁹² 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>.

The Court of Cassation decided that the statute of limitations had no impact on the relevance of comparative evidence going beyond the prescribed period.²⁹³ 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.²⁹⁴ The only time limit therefore results from another rule, provided in Article 2232 of the Civil Code, which limits the suspension of statute of limitations by 'ignorance' of the facts, in all cases, to 20 years.

The criminal courts are competent in matters related to recruitment, sanctions and dismissals in the workplace, and 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 no 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 no 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.²⁹⁵ 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.²⁹⁶

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.²⁹⁷

²⁹³ Court of Cassation, Social Chamber, No 07-42697, 4 February 2009.

²⁹⁴ Court of Cassation, Social Chamber, No. 05-45163, 22 July 2007.

²⁹⁵ Auditor General (2016) *Rapport public de la Cour des comptes sur l'inspection du travail* (Public report on the Labour Inspectorate), February 2016, available at : <https://www.ccomptes.fr/sites/default/files/EzPublish/11-inspection-du-travail-RPA2016-Tome-1.pdf>.

²⁹⁶ Articles L 8112-2, L 8113-7 and seq. and L 8113-10 of the Labour Code.

²⁹⁷ France, Ministerial Instruction from the Minister of Justice on the creation of anti-discrimination units within the prosecutor's office, of 11 July 2007, available at:

Conditions of access to litigation

Representation by a lawyer is not mandatory before employment tribunals, the district courts and the criminal courts. It is, however, usual to be represented before such jurisdictions. Representation by a lawyer is mandatory before the regional courts, the commercial courts (Law No. 71-1130 of 31 December 1974),²⁹⁸ the administrative courts (regulation of 4 May 2000), Court of Appeal and the Court of Cassation (Article 974 ff. of the New Code of Civil Procedure, NCCP), which de facto limits access to recourse.

Legal aid is available to individuals on low incomes (Law No. 91-647 of July 1991 on legal aid).²⁹⁹

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 gathered by the Ministry of Justice 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.

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

https://static1.1.sqspcdn.com/static/f/1307504/26140450/1429087996290/circ_110707_discriminations.pdf?token=%2BwOT5FwwRMbuheDeG%2FIFkyE4pMw%3D; National Consultative Human Rights Commission (Commission nationale consultative des droits de l'homme - CNCDH), *Rapport 2018 sur la lutte contre le racisme, l'antisémitisme et la xénophobie* (Report 2018 on combating racism, anti-Semitism and xenophobia), available at: <https://www.cncdh.fr/fr/publications/rapport-2018-sur-la-lutte-contre-le-racisme-lantisemitisme-et-la-xenophobie>.

²⁹⁸ 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>.

²⁹⁹ 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>.

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 connected to anti-discrimination law related to TFEU grounds. The Ministry of Justice does not publish statistics in this regard, but it is observed in practice that NGOs practically never use this procedural possibility.

b) Engaging in support of victims of discrimination (joining existing proceedings)

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 Institutional Act (*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 the Law No. 2005-102 on Disability, Article L1134-2 was created in order to provide standing to trade unions and Article L1134-3 to provide standing to NGOs to intervene before the courts in matters of discrimination.

c) Actio popularis

In France, national law allows associations/organisations/trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*).

Article 31 of the Code of Civil Procedure provides, as a general principle, that legal action is open to anyone who has a legitimate interest in the success or the dismissal of a legal claim.

R779-9 of the Code of Administrative Justice provides that trade unions and NGOs which have been registered for at least five years and have an anti-discrimination agenda can institute any action in support of the recognition of rights provided by legislation prohibiting discrimination.

Article 33 of the Institutional Act (*loi organique*) creating the Defender of Rights also provides that the Defender can present observations as *amicus curiae* in any case before any jurisdiction and thus in the context of the *actio popularis* initiated by another party as well.

The Labour Code also provides that trade unions can challenge collective agreements that are contrary to public order, provisions on discrimination being part of the list of provisions that are deemed to form part of public order (Articles L2251-1 and L2132-3 LC).

d) Class action

In France, national law allows associations and trade unions to act unilaterally in the interest of more than one individual victim (class action) for claims arising from the same event or similar facts.

Article 163 of Law No. 2002-73 allows NGOs to act on behalf of a number of claimants in access to housing.

In addition, Law No. 2016-1547 on the modernisation of the justice system in the 21st century³⁰⁰ amended the law of 27 May 2008 and the Labour Code to create a legal framework supporting class action that can be brought before the regional court or the administrative court at Articles 62 to 88 of the Law.

The class action is instituted to put an end to a discriminatory behaviour (*action en cessation de manquement*).

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 to initiate an action for 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) in its own name.

NGOs are excluded from employment matters, where the action must be initiated by a trade union in its own name, except as regards discrimination in accessing employment or training (Article 87).

Article 65 of the law defines remedies obtained by the action to put an end to discrimination as: 'an injunction to take all necessary measures' to put an end to the discriminatory situation or practice, within a specified period under sanction of a fine.

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. Except on issues related to employment, Article 10-1 of the Law of 27 May 2008 provides that this action for injunction can be joined by an action for damages to be compensated for the discriminatory behaviour (*action en responsabilité*).

In cases relating to discrimination in employment, however, the legal regime is more restrictive, the procedure favouring out of court discussions to put an end to the discriminatory practice or policy. Compensation can only be sought for damages that arise after introduction of the action before the court (Article L1134-8 CT). However, initiation of the class action does not interrupt the right of complainants to seek redress before the labour courts in individual cases (Article 71).

Victims can always pursue a separate action if they do not wish to be represented by the group (Article 71). They do not have to wait for the final judgment or opt out of the class action. The procedure is one allowing private parties to opt into the group within a period specified by the judge to benefit from the findings of the court's decision (Article 72). At the time of the enforcement of the judgment and determination of damages, members of the group can give a mandate to the association or trade union to represent them.

³⁰⁰ Articles 62 to 88 of Law No. 2016-1547 of 18 November 2016, available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033418805&categorieLien=id>.

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 their 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.³⁰¹
- The Court of Cassation regularly reiterates that the complainant's burden is to establish facts that taken as a whole lead to a presumption of discrimination.³⁰²
- Having satisfied this requirement, the defendant must establish in all cases, that their decision was justified by objective elements, which have nothing to do with discrimination.
- In practice, it can be observed that to meet the test refuting apparent discrimination, the objective elements presented to justify the absence of discrimination may be required to meet the requirement of proportionality. For instance regarding discrimination in access to goods and services, differential tariffs on the ground of age to encourage access to culture will have to be strictly proportionate to targeted groups to meet the tests of pursuing non-discriminatory objectives.³⁰³
- The definition of indirect discrimination includes the requirement that, in case of a presumption, the defendant must justify proportionality and necessity (Article 1 par 2).
- 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 he or she is 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).

Traditional civil procedure does not allow the complainant to have access to the defendant's evidence to present their case. However, in discrimination cases, the Court

³⁰¹ Court of Cassation, Social Chamber, No. 10-20.765, 3 November 2011, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024764368&astReqId=1647684556&fastPos=1>; Soc 6 juin 2012, n° 10-21489, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000025994053&astReqId=501301758&fastPos=60>; Court of Cassation, Social Chamber, No. 05-43962, 9 January 2007, <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000017624898&astReqId=5930729&fastPos=1>.

³⁰² Cass.soc. No.17-18190, 19 December 2018, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000037851016>.

³⁰³ Defender of Rights, decision n° 2016-279, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=20596&opac_view=-1.

of Cassation has recognised that to establish the facts that will lead to a presumption of discrimination, the complainant has a right to have access to the documents necessary to compare their situation to that of others.³⁰⁴

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.'³⁰⁵

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, 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 records of the checks that do not lead to arrest. In the absence of any record 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 checks.³⁰⁶

Meanwhile, lower courts still struggle to enforce the concept of unequal treatment. In a decision of 17 December 2018, the Paris High Court decided – in a case alleging racial profiling of three black and North African students in Gare du Nord alighting from the Eurostar train arriving from Brussels – that there was no evidence of discrimination. The Court failed to implement the rhetoric of the burden of proof. In the face of an argument based on the fact that, despite an immediate request by the students' lawyer, the police failed to provide the tapes of the checks, the Court decided that the argument that the students' bags were large in a context of terrorism-related checks was deemed sufficient evidence that the checks were legitimate. The Court held that, since all members of the class were of non-European origin, allegations of unequal treatment on the ground of origin failed considering there was no evidence of differential treatment.³⁰⁷

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

³⁰⁴ Cass.soc. No. 10-20526, 19/12/2012, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000026815513&fastReqId=1621185582&fastPos=1>.

³⁰⁵ Conseil d'Etat, No. 298348, 30 October 2009.

³⁰⁶ 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.

³⁰⁷ Paris High Court, 17 December 2018 : n° 17/06217, 17/06216, 17/06214, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=26661&opac_view=-1.

In France, there are legal measures of protection against victimisation.

Article 3 of Law No. 2008-496 of 27 May 2008 established a specific protection against victimisation applicable to the entire scope of civil legal actions alleging direct or indirect discrimination covered by the directives, which provides that no person, having testified in good faith about discriminatory behaviour, can be treated unfavourably on such a ground. No decision can be taken against a person because they were a victim of discrimination or because of their refusal to submit to discrimination as prohibited in Article 2.

This protection clarifies that it extends to victims and non-victims but does not provide any indication as to the burden of proof applicable to claims of victimisation and does not assimilate victimisation with discrimination.

Finally, the Penal Code protects victims and witnesses. Article 434-15 PC sanctions threats and intimidation towards a witness, and Article 434-5 PC towards a victim, with a maximum penalty of three years' imprisonment.

It is important to note that, in reaction to actions relating to discrimination and sexual harassment, there has been an ever-growing defence strategy leading to the filing of criminal complaints for slanderous complaint (226-10 PC) in order to intimidate complainants. These have sometimes given rise to investigation.

As for other grounds of criminal complaints, there are no statistics or studies as to the number of such complaints and their results, since they are integrated into global statistics relating to slanderous complaints.

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

a) Applicable sanctions in cases of discrimination – in law and in practice

There are compensatory damages, injunctions in the form of orders to put an end to discrimination (in case of class actions) and penal fines in case of criminal prosecution, but there are no punitive sanctions in non-criminal cases.

Criminal sanctions incurred in relation to the criminal offence of discrimination amount to a maximum of three years' imprisonment and a EUR 45 000 fine (Article 225-2 PC).³⁰⁸

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.

³⁰⁸ 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>.

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 the petition for excess of power on the part of the public authority, in order to annul the decision challenged, or the full jurisdiction petition, in order to obtain not only annulment of the decision but damages as well.

In addition to criminal and administrative legal actions, a civil servant can also be subject to disciplinary sanctions in application of Article 66 of Law No. 84-16 of 11 January 1984, Article 89 of Law No. 84-53 of 26 January 1984 and Article 81 of Law No.86-33 of 9 January 1986.

Before the employment tribunal, the claimant may seek compensation and annulment of the discriminatory measure, thereby requesting reinstatement in case of dismissal (Article L1132-4, Labour Code).

b) Ceiling and amount of compensation

There is no ceiling on the amount of compensation.

There is no statutory upper limit to compensation. However, according to lawyers who specialise in discrimination law,³⁰⁹ analysis that is confirmed by the review of the jurisprudence, French legal practice is still very reserved in awarding moral damages and compensation awards 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.³¹⁰

Since then, it has been observed in practice 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, the courts award a compensation that stands as a substitute in the face of difficulties in establishing damages. For example, in 2010 the court awarded EUR 20 000 in non-pecuniary damages related to discrimination in hiring practices and Eur 20 000 for absence of accessibility of the premises of the judicial tribunal (Airbus case, see above, and Bleitrach case, see above).

However, it can be observed in practice that the courts often award no moral damages, expressly stating the lack of evidence from the claimant.³¹¹

³⁰⁹ Seminar co-organised by the Court of Cassation the Conseil d'Etat at the National Bar Association and the Defender of Rights on ten years of anti-discrimination litigation on 5 October 2015, Boussard-Verrechia, E. *L'émergence du contentieux de l'égalité femme/homme dans l'emploi*, page 102, available at: <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/colloque-10ans-droits-discr.pdf>.

³¹⁰ District Court of Montpellier, *Drucker v. Galerie Gregoire RG*, No. 11-07-001540, 3 April 2008.

³¹¹ Paris Court of Appeal, n° 10/10/2018, n°15/11617, awarding EUR 2 000 for moral damages in relation to discrimination on the ground of ethnic origin in the complainant's career over the course of 30 years; Paris High Court, 10/12/2013, n°11087008177, awarding EUR 1.00 symbolic damages for discrimination on the ground of ethnic origin in a case against a real estate agent refusing visits to prospective tenants of North African origin.

In matters related to access to goods and services, cases are so rare and compensation so low that remedies do not cover the costs of the proceedings and they cannot be considered to be effective and dissuasive.³¹²

In employment-related cases, however, it can be observed in practice that compensation is more significant and generally compensates the claimant's loss.³¹³ Nevertheless, few workers bring their cases to court, enforcement of the non-discrimination rule is not widespread, and cases are isolated. Because of this issue of under-reporting, the mere existence of legal remedies does not constitute an effective and dissuasive deterrent to discriminatory practices in the workplace.

Executive Order No. 2017-1387 relating to the predictability and security of labour relations intends to facilitate recruitment and dismissal in the labour market and to standardise the procedure and amount of dismissal awards.³¹⁴ 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-related litigation, the victim of discrimination or harassment may request reinstatement 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.

There are no studies or statistics available on compensation. The expert's analysis is based on practice and jurisprudence.

c) Assessment of the sanctions

There is no punitive sanction in civil and administrative matters.

However, in a decision of 15 November 2017,³¹⁵ 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

³¹² Montpellier High Court, 03/04/2008, N° 11/07/001540, awarded EUR 300 for discrimination on the ground of origin in access to rental housing; Aix-en-Provence High Court, 14/06/2010, N° 10/2162, awarded EUR 1 000 for discrimination on the ground of origin in access to rental housing; Grenoble Court of Appeal, 25/04/2016, N° 245/2016, awarded EUR 600 for discrimination on the ground of disability in access to rental housing.

³¹³ Paris Court of Appeal, 22/09/2016, N° 623, awarded EUR 210 000 in lost remuneration and EUR 400 000 in damages further to harassment leading to dismissal on the ground of sexual orientation; Rouen Court of Appeal, 22/03/2018, N° 17/01333, awarded EUR 30 000 in damages in relation to delay in implementing reasonable accommodation in relation to disability in employment; Court of Appeal of Toulouse, 29/01/2016, N° 14/360, awarded EUR 10 000 in damages for harassment on the ground of origin, EUR 45 000 for damages and EUR 14 000 in leave compensation in relation to dismissal further to discrimination on the ground of origin.

³¹⁴ 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>.

³¹⁵ 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&fastReqId=387503508&fastPos=1>.

loss of salary less the revenue of replacement (unemployment insurance, redundancy allowance or wages) received by the claimant between dismissal and reinstatement.

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.

This position has been seriously criticised by doctrine and may not be followed by the Conseil d'État and the Constitutional Council.

However, this creates a situation where the regime of compensation for discrimination before judicial courts can cumulate awards that have the nature of sanction, over and above 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.³¹⁶

Sexual orientation is not expressly 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 pecuniary loss, despite provisions of the law, which allow for fines ranging up to EUR 45 000 and three years' imprisonment, the review of the cases indicates that criminal fines issued by the courts range from a few hundred to a few thousand euros. They can be accompanied by suspended prison sentences and symbolic damages. 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 120 fine and a two-month suspended prison sentence.³¹⁷ Meanwhile, in a 2014 decision relating to a denial of access to a gym to an individual wearing a headscarf, the sentence was a EUR 250 fine.³¹⁸ 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.³¹⁹ The Court of Cassation upheld this sentence.³²⁰

³¹⁶ France, Court of Cassation, Social Chamber, No. 14-21.325, 14 December 2016, available at: https://www.courdecassation.fr/publications_26/arrets_publicies_2986/chambre_sociale_3168/2016_7412/decembre_7804/2344_14_35739.html.

³¹⁷ Court of Appeal of Nancy, 4 chamber, 8/10/ 2008, n° 08/00882.

³¹⁸ Thionville High Court, 17/04/2014 n° 11048000030.

³¹⁹ Paris Court of Appeal, 11 February 2014, No. 12/05062.

³²⁰ Court of Cassation Criminal Chamber, No. 13-81586, 15 December 2015, available at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000031658282&fastReqId=1575884415&fastPos=4>.

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 (*Défenseur des droits*) established by Institutional Act (*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 individual appointed by the Council of Ministers as the Defender of Rights.

- b) Political, economic and social context for the designated body

The Defender of Rights is a body which resulted 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 undocumented migrants, enforcement of the state of emergency further to the terrorist attacks, reforms of criminal procedure in relation to combating terrorism, protection of personal data, police checks, equal pay, rights of transgender people 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 and the courts.³²¹

Although the Defender of Rights' 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

In France, the designated body forms part of a body with multiple mandates.

The Defender of Rights integrated the former equality body, HALDE, into a new, constitutionally independent authority (Article 2 of the Institutional Act), 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

³²¹ Defender of Rights (2019), *Rapport annuel d'activité 2018* (Annual report 2018), available at: <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/raa-2018-num-19.02.19.pdf>.

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 France, and in assisting and protecting whistle-blowers.

In this context, it has a mandate to promote the UN CRC and provide independent reports to the UN Committee on the Rights of the Child, 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 regarding 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.

According to annual reports published by the institution,³²² 80 % of all claims are dealt with by the 501 volunteer delegates disseminated throughout the national territory. The delegates are usually 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 foreign nationals, rights of children, public and private employment law, access to public services, 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 people in matters such as access to rights of children, social protection law and rights of foreign nationals 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 foreign nationals and the unit dealing with claims relating to private law, which essentially deal with discrimination in employment and 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.

³²² Defender of Rights (2019), *Rapport annuel d'activité 2018* (Annual report 2018), available at: <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/raa-2018-num-19.02.19.pdf>.

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 2018, the Defender of Rights spent a budget of EUR 21 618 096, increased by 1.7 % compared to 2017. Its budget is structured without reference to allocation for each area of competence. 70 % of the budget of the institution is dedicated to staff (EUR 15 706 408) and 40 % of the remaining 30 % (EUR 5 911 688) 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 % in 2017 and 5.7 % in 2018 of the body's budget was dedicated to research (EUR 480 314) and 34 % 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 involvement 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 beyond the strict application of anti-discrimination law.

It has carried out substantial campaigns on the rights of Roma, the fundamental rights of foreign nationals, the rights of unaccompanied migrant children, harassment as a means of discrimination, measuring discrimination through data analysis and combating discrimination in employment and housing.

d) Status of the designated body– general independence

i) Status of the body

Institutional Act No.2011-333 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 individual appointed by the Council of Ministers as the Defender of Rights after consultation with both chambers of Parliament. The position cannot be revoked and the mandate is non-renewable. (Article 1)

The Defender of Rights personally nominates three deputies, one for each of the fields of action (Article 11 of Law No. 2011-333). In addition, the Defender is assisted by three commissions (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 Institutional Act) 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 Institutional Act)). However, the Defender of Rights is not bound by any internal counter power and 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 recruit and manage staff (Article 37 Institutional Law No. 2011-333).

The Defender also decides what claims to pursue (Article 24 of the Institutional Act).

The budget of the Defender of Rights is decided by Government and voted by Parliament as part of the Prime Minister's budget. However, the Defender of Rights has control over the execution of its budgetary envelope (Article 10 Law No. 2011-334).

The Defender of Rights is accountable to Parliament and the President of France 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 Institutional Act expressly provides that the Defender of Rights is independent and 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 Institutional Act provides that the Defender's mandate cannot be renewed and that the appointment cannot be revoked except upon his or her request or for reasons related to his or her ability to perform the functions of the role, as defined in Articles 3 to 5 of Decree No.2011-905 of 29 July 2011.³²³

The Defender of Rights has free management of its budget and staff. However, the body's financial resources are limited. The applicable budgetary legislations provide that they are derived completely from public funds, which are voted on by Parliament every year as part of the Prime Minister's budget³²⁴ and thereby could be subject to budgetary cuts. In practice, such action 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 the deputies must resign from all other positions (Article 3 of the Institutional Act).

The present Defender of Rights does not hesitate to take an independent stand before Parliament, jurisdictions and towards private respondents and public services.

³²³ 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>.

³²⁴ France Law n° 2001-692 of 1 August 2001 relating to budgetary laws (*Loi organique n° 2001-692 du 1 août 2001 relative aux lois de finances*), at Article 7, available at:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000394028>; France, Law n° 2017-55 of 20 January 2017 on the status of public administrative authorities (*Loi n° 2017-55 du 20 janvier 2017 portant statut général des autorités administratives indépendantes et des autorités publiques indépendantes*), at Article 23, available at : <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033897475&categorieLien=id>.

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 international conventions. It is therefore readily adaptable to any future legal developments. 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 around rights and freedoms relating to the 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 and equality 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 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 foreign nationals and the rights of undocumented migrants.

f) Competences of the designated body/bodies – and their independent 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, help 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 their 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 significant difficulties of claimants in obtaining access to comparative evidence in the French judicial procedure, which accounted for difficulties in accessing effective redress from the courts until the creation of the HALDE, this power of investigation has represented 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 conduct visits to 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 Institutional Act, 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 or water and forest 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.

According to its annual reports, 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). According to its annual reports, its observations before the courts are followed by judges in 76 % of cases.

Throughout the country, 501 delegates directly receive and assist the public and deal with cases by way of mediation. Claims that require formal investigation are then addressed to the central head office. 4 % of the activity of delegates is devoted to claims alleging discrimination.

Given that the investigations are carried out by trained lawyers supervised by experts, that the equality body remains able to investigate as many claims as it receives each year and that it completes its investigations within a reasonable timeframe, 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 external surveys/studies and finances a number of independent scientific research surveys and studies in the field of discrimination.³²⁵ It employs three staff

³²⁵ In 2016, the Defender of Rights co-financed three major studies on the effective enforcement of discrimination law: 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* (Access to healthcare for children under child protection: access to and attitudes towards healthcare), Université Paris Ouest Nanterre Le Défense, 2016; available at: <http://www.defenseurdesdroits.fr>; Perelman, J., Mercat-Bruns, M. (2016), *Les juridictions et les instances publiques dans la mise en œuvre du principe de non-discrimination : perspectives pluridisciplinaires et comparées* (Jurisdictions and public bodies and the implementation of non-discrimination: multidisciplinary and compared perspectives), Sciences Po (Ecole 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; Laidie, Y. and Picard, P. (2016), *Le principe de non-discrimination: l'analyse du discours du juge administratif* (The principle of non-discrimination: analysis of the discourse of the administrative courts), Credespo – Université de Bourgogne, 2016, available at: <http://www.gip-recherche-justice.fr/wp-content/uploads/2016/10/Note-de-synth%C3%A8se-214.04.03.21-1.pdf>. Further reports include: Defender of Rights (2016a), *Résultats de l'appel à témoignages: Jeunes, origines et discriminations à l'embauche* (Results of the call for testimony: young people, origins and discrimination in employment), available at: <http://www.defenseurdesdroits.fr/fr/outils/etudes/etudes-et-resultats-acces-lemploi-et-discrimination-liees-aux-origines>; Defender of Rights (2016c), *L'effet direct des stipulations de la Convention internationale relative aux droits des personnes handicapées (CIDPH)* (The direct effect of the provisions of the Convention on the Rights of Persons with Disabilities (CRPD)), available at: <http://www.defenseurdesdroits.fr>; Defender of Rights (2017) *Enquête sur l'accès aux droits Volume 5 - Les discriminations sur l'accès au logement* (Survey on access to rights Volume 5 – Discrimination in access to housing), available at: <https://www.defenseurdesdroits.fr/fr/etudes-et-recherches/2017/12/enquete-sur-lacces-aux-droits-volume-5-les-discriminations-sur-lacces>; Defender of Rights (2017), *Enquête sur l'accès aux droits Volume 1 - Relations police / population : le cas des contrôles d'identité* (Survey on access to rights Volume 1 – Police-community relations: the case of identity checks),

members to carry out surveys and studies and has a budget of EUR 300 000. In addition, some of its effort is spent requesting public research groups to engage in surveys and studies regarding the situation of discriminated groups and/ or discrimination.

In 2018, it published three reports on fundamental rights addressing discrimination issues in relation to the situation of undocumented migrants in Calais,³²⁶ the destruction of precarious migrants' homes in Mayotte,³²⁷ and police ethics in demonstrations,³²⁸ as well as two studies on discrimination, dealing with access to education for migrant children³²⁹ and Traveller children, and discrimination in the legal profession.³³⁰

In addition, with the ILO, it publishes its annual report every year on the perception of discrimination in employment.³³¹ In 2018, this report discussed the exposure to harassment and violence in the workplace experienced by victims of discrimination.³³²

Furthermore, the law provides that each year the Defender of Rights will submit a report to the President of France and Parliament on its activity with a specific annexe relating to its function as the equality body (Article 36 par II).³³³

iii) Recommendations

In France, the designated body does have the competence to issue independent recommendations on discrimination issues.

available at: <https://www.defenseurdesdroits.fr/fr/etudes-et-recherches/2017/01/enquete-sur-lacces-aux-droits-volume-1-relations-police-population-le>.

³²⁶ Defender of Rights (2018), *Exilés et droits fondamentaux, trois ans après le rapport Calais* (Fundamental rights of migrants in Calais, three years after the Calais report), December 2018, available at: <https://www.defenseurdesdroits.fr/fr/rapports/2018/12/exiles-et-droits-fondamentaux-trois-ans-apres-le-rapport-calais>.

³²⁷ Defender of Rights (2018), *Rapport sur les opérations de décasage à Mayotte* (Report on the destruction of migrants' homes in Mayotte), May 2018, available at: <https://www.defenseurdesdroits.fr/fr/rapports/2018/05/rapport-sur-les-operations-dites-de-decasage-a-mayotte-0>.

³²⁸ Defender of Rights (2018), *Le maintien de l'ordre au regard des règles de déontologie* (Ethics and maintaining law and order during demonstrations), January 2018, available at: <https://www.defenseurdesdroits.fr/fr/rapports/2018/01/le-maintien-de-lordre-au-regard-des-regles-de-deontologie>.

³²⁹ Defender of Rights (2018), *Etude sur la scolarisation des élèves allophones nouvellement arrivés et des enfants issus de familles itinérantes et de voyageurs* (Study on the schooling of newly arrived foreign children and Traveller children), EVASCOL, (Institut national supérieur de formation et de recherche), June 2018, available at: <https://www.defenseurdesdroits.fr/fr/communiquede-presse/2018/12/etude-sur-la-scolarisation-des-eleves-allophones-nouvellement-arrivees>.

³³⁰ Defender of Rights (2018), *Conditions de travail et expériences de discriminations dans la profession d'avocats en France* (Working conditions and experiences of discrimination in the legal profession in France), April 21018, available at: <https://www.defenseurdesdroits.fr/fr/etudes-et-recherches/2018/05/conditions-de-travail-et-experiences-des-discriminations-dans-la>.

³³¹ Defender of Rights (2017) *10e Baromètre de la perception des discriminations dans l'emploi* (10th barometer of perceptions of discrimination in employment), available at: <https://www.defenseurdesdroits.fr/fr/outils/etudes/10e-barometre-de-la-perception-des-discriminations-dans-l%27emploi>.

³³² 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* (Practices in medical and dental care – between differentiation and discrimination. An analysis of the discourse of doctors and dentists), available at: <https://www.defenseurdesdroits.fr/fr/outils/etudes/des-pratiques-medicales-et-dentaires-entre-differenciation-et-discrimination>.

³³³ Defender of Rights, *Rapport annuel d'activité 2016* (Annual report 2016), available at: <https://www.defenseurdesdroits.fr/fr/rapports-annuels-dactivite/2017/02/rapport-annuel-dactivite-2016>.

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).

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.³³⁴

In 2018, it rendered 29 opinions to Parliament, seven of which dealt with anti-discrimination issues: on disabled public servants; access to public service for people with disabilities; housing rights of people with disabilities; funding of equal opportunities and integration policy; implementation of the Recommendation CM/Rec (2010) 5 on combating discrimination based on sexual orientation and gender identity; opportunity collect data relating to indicators of discrimination in private employment; and housing rights of Travellers and Roma.³³⁵

Recommendations of the Defender of Rights are often expressly sought by Parliament and are taken seriously. They are also very often taken in consideration, particularly as regards the rights of people with disabilities and access to the public service in general. However, on issues such as the implementation of non-financial data relating to discrimination, Parliament and Government remain reluctant to take on such mandatory, result-oriented measures, with the exception of policies related to discrimination on the ground of sex.

One of the possible outcomes of claims investigations is for the body to make general recommendations, for example if 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 the 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 condemnation 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 its observations before the court.

General recommendations and proposals for reform are issued by way of a formal decision whenever the finding of the Defender of Rights in an individual case indicates deficiencies in a law, rule or practice that justifies the issuing of a general recommendation.

³³⁴ In 2016, the Defender sent 21 such reports to the Parliament and 11 reports to the Government and, in 2017, sent 14 opinions to Parliament, four of which related to discrimination issues <http://www.defenseurdesdroits.fr>.

³³⁵ Defender of Rights, Opinions to Parliament, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=etagere_see&id=36.

According to its annual reports, approximately 60 % of recommendations made by the Defender of Rights are complied with and 20 % of its reform proposals are followed.

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).

These competences are exercised in an independent manner in practice.

To this end, it has published a number of terms of reference of good practice in the form of guides over the years.³³⁶

In 2018, it published:³³⁷

- Guidelines for employers dealing with discriminatory harassment in the workplace;
- A guide for victims of refusal of medical care;
- A presentation of available tools in sign language;
- A guide for victims of sexual harassment in the workplace.

g) Legal standing of the designated body/bodies

In France, the designated body:

- Does not have legal standing to bring discrimination complaints (on behalf of identified victims) to court;
- Does not have legal standing to bring discrimination complaints (on behalf of non-identified victims) to court;
- Does not have legal standing to bring discrimination complaints *ex officio* to court;
- Does have legal standing to intervene in legal cases concerning discrimination, such as *amicus curiae*.

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 position 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 Institutional Act creating the Defender of Rights).

³³⁶ In 2017 it published guides on the following topics: a guide on the framework for the enforcement of the employer's duty of reasonable accommodation; a guide on combating discrimination in local public employment; a guide on combating discrimination on the ground of sexual orientation and gender identity in employment; a guide for professionals, *Renting without discriminating*; a guide to promote the application of the UN CRPD.

³³⁷ Defender of Rights, Tools, (*Outils*), available at: <https://www.defenseurdesdroits.fr/fr/outils>.

In practice, the Defender of Rights only intervenes to present its independent view of the case in matters that have already been brought before the court by the claimant and files the result of its investigation.

According to its annual reports, 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 2018, it presented observations in 108 cases of which 44 related to 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.³³⁸

In 2011, the Court of Cassation concluded that data analysis on the ground of origin based on the last name of staff 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 by the former equality body, the HALDE.³³⁹

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 (Article 33 of the Institutional Act n°2011-311 of 29 March 2011 creating the Defender of Rights).

i) Registration by the body 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.). These data are available to the public in its annual report.³⁴⁰

The Defender of Rights does not formalise telephone contacts or requests for information as complaints. However, it operates a telephone service. According to its annual report, in 2018 it received 46 243 telephone inquiries covering all areas of its competence.

Claims are divided between claims received by delegates and claims received at the head office. All claims that require formal inquiries are dealt with at head office level. In 2018, delegates received 71 148 claims of which 1 800 concerned discrimination issues. At the head office, the Defender of Rights registered more than 20 000 complaints, of which 5 631 concerned discrimination issues, which is an increase of 4.2 % compared to 2017.³⁴¹

The distribution of claims between grounds has been stable for a number of years.

³³⁸ Defender of Rights, Decision 2016-132, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=18452%20; 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.

³³⁹ HALDE, Deliberation 2009-42, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=659; Court of Appeal of Toulouse, No. 08/06630, 19 February 2010 available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=13838; Court of Cassation, Social Chamber, No. 10-15873, 15 December 2011, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=5773.

³⁴⁰ Defender of Rights (2019), *Rapport annuel d'activité 2018 (Annual report 2018)*, available at: <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/raa-2018-num-19.02.19.pdf>.

³⁴¹ All data reported in this section are taken from the Defender of Rights 2018 Annual report.

The most common ground of discrimination invoked is 'origin', which covers race, nationality and ethnic origin. It represents 25.1 % of complaints. It is followed by the grounds of disability (22.8 %) and health (10.5 %). Age accounts for 5.0 % of complaints, sex and pregnancy, 8.2 %, religion and religious beliefs, 3.0 %, sexual orientation, 2.1 % and political opinions, 0.9 %.

In 2018, 48.3 % of complaints relating to the anti-discrimination mandate alleged discrimination in employment (of which 8.6 % related to the ground of origin), 22.3 % in access to public services (of which 2.2 % related to the ground of origin), 9.3 % in access to education (of which 1.6 % related to the ground of origin), 6.5 % in access to housing and 13.5 % in access to other goods and services (of which 1.7 % 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 the courts. In 2018, the Defender of Rights attained amicable resolutions in 80 % of claims in which it intervened.

In 2018, it adopted 295 formal decisions, 156 of which relate to discrimination claims: 31 decisions related to discrimination on the ground of origin, 27 on sex, 33 on disability, 7 on age, 4 on sexual orientation, 6 on religion and 1 on political convictions. There were 17 decisions that discussed discrimination relating to multiple grounds.

In 2018, the Defender of Rights presented observations before the courts in 108 cases, of which 44 related to discrimination cases, and addressed five opinions to the Public Prosecutor.

j) Stakeholder engagement

In France, the designated body does engage with stakeholders as part of implementing its mandate.

The Institutional Act 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 people;
- NGOs representing LGBTI people;
- NGOs involved in campaigning against discrimination on the ground of origin;
- NGOs involved in the promotion of children's rights;
- NGOs involved in the rights of older people;
- operators and intermediaries in access to employment and hiring practices.

In addition, the Defender of Rights is the designated body for promoting the UNCRPD and the Convention on the Rights of the Child and presents a report before the committees of the UN on the monitoring of the implementation of these 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.

k) Roma and Travellers

On 29 October 2016, the President of France recognised for the first time the responsibility of the French Republic in the persecution and internment of French Travellers during the Second World War, at the inauguration of the commemorative site of the internment camp for Travellers at Montreuil-Bellay. The President further affirmed his conviction that the Travellers' movement permit should be repealed. Article 195 of Law No. 2017-86 of 27 January 2017 on equality and citizenship, which was adopted on 23 November 2016,³⁴² 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 residence and required them to carry special internal passports and report regularly to local authorities.

Regarding the situation of foreign Roma, since 2010 the Government has been pursuing a policy of expulsion, escorting Romanian and Bulgarian Roma back to their respective countries. However, at the end of each year the number of Romanian and Bulgarian Roma in France remains constant, year after year, at a total estimated to be 20 000.³⁴³

In addition, the Government maintains a policy of pursuing illegal settlers on improvised campsites which targets Roma and Travellers and, since 2016, precarious migrants too. This results in constant evictions and checks, which create anxiety and insecurity for everyone living on the streets and, in particular, for these communities.

A report on the implementation of the Ministerial Instruction of 26 August 2012 relating to the condition of eviction of occupants of illegal campsites,³⁴⁴ 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.³⁴⁵

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

³⁴² 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>.

³⁴³ France, National Consultative Human Rights Commission (*Commission nationale consultative des droits de l'homme - CNCDH*), Report 2018 on the fight against racism, anti-Semitism and xenophobia, available at: <https://www.cncdh.fr/fr/publications/rapport-2018-sur-la-lutte-contre-le-racisme-lantisemitisme-et-la-xenophobie>; Human Rights League and the ERRC (2018), 'Recensement des évacuations forcées de lieux de vie occupés par des roms (ou des personnes désignées comme telles) en France en 2017' ('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/>; Defender of Rights (2019), *Rapport annuel d'activité 2018* (Annual report 2018), available at: <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/raa-2018-num-19.02.19.pdf>.

³⁴⁴ France, Ministerial Instruction of 26 August 2012 relating to the condition of eviction of occupants of illegal campsites (*Circulaire du 26 août 2012 relative à l'anticipation et à l'accompagnement des opérations d'évacuation des campements illicites*), available at: <https://www.gisti.org/spip.php?article2923>.

³⁴⁵ Defender of Rights (2013), *Rapports sur la mise en œuvre des évacuations en application de la circulaire du 24 Août 2013*, (Report on the implementation of evictions in application of Ministerial Instruction 24 August 2012), June 2013, available at: <http://www.defenseurdesdroits.fr>.

requirements of the rule of law in relation to migrant, Roma and Traveller communities, which are vulnerable and stigmatised.

The Defender of Rights indicates that it continues to receive a number of claims relating to the refusal of mayors to enrol Roma and migrant children in schools or school cafeterias, preferring to let the public authorities of the prefect and the Ministry of National Education intervene, rather than directly enrolling the children, as is their duty. In practice, some experts and some NGOs observe that this is a means to show their electorate that they are resisting the long-term settlement of these populations in their territory.³⁴⁶

The Defender of Rights systematically reports to Parliament on bills relating to the rights of Roma, Travellers and foreign nationals.

In 2017, the Defender of Rights submitted a report to Parliament on bills No. 557 and No. 680, which proposed 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 sites (campsites), which in the end were not adopted.³⁴⁷ In 2018, the Defender of Rights presented observations against bill No. 346 proposing to limit the obligation to provide parking sites and the ensuing rights to restrict parking by Travellers.³⁴⁸ This bill was adopted on 7 November 2018.³⁴⁹

Since 2015, the Defender of Rights has set the issue of fundamental rights of precarious migrants and foreign nationals as a priority for the institution. The Defender has therefore put in place an interdisciplinary task force, which has become a full-service permanent team, to build up expertise and address all the claims and issues relating to any violations of migrants' rights in areas such as access to residence permits, access to social protection, healthcare, education, emergency housing, family rights, employment and so on. To this end, the Defender has published a number of reports drawing attention to the claims in which it has to intervene and all pending legislative, administrative and legal issues regarding the rights of foreign nationals and precarious migrants.³⁵⁰

³⁴⁶ France, National Consultative Human Rights Commission (*Commission nationale consultative des droits de l'homme - CNCDH*), *Rapport 2018 sur la lutte contre le racisme, l'antisémitisme et la xénophobie* (Report 2018 on the fight against racism, anti-Semitism and xenophobia), available at: <https://www.cncdh.fr/fr/publications/rapport-2018-sur-la-lutte-contre-le-racisme-lantisemitisme-et-la-xenophobie>; Human Rights League and the ERRC (2018), 'Recensement des évacuations forcées de lieux de vie occupés par des roms (ou des personnes désignées comme telles) en France en 2017' ('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/>; Defender of Rights (2019), *Rapport annuel d'activité 2018* (Annual Report 2018), available at: <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/raa-2018-num-19.02.19.pdf>.

³⁴⁷ Defender of Rights, Avis 17-11; available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=23045.

³⁴⁸ Defender of Rights, Avis 18-10, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=24506&opac_view=-1.

³⁴⁹ France, Law No. 2018-957 of 7 November 2018 (*Loi n° 2018-957 du 7 novembre 2018 relative à l'accueil des gens du voyage et à la lutte contre les installations illicites*), available at: <https://www.legifrance.gouv.fr/eli/loi/2018/11/7/INTX1731081L/jo/texte>.

³⁵⁰ Defender of Rights (2016), *Les droits fondamentaux des étrangers en France* (The fundamental rights of foreigners in France), available at: <https://www.defenseurdesdroits.fr/fr/rapports/2016/05/les-droits-fondamentaux-des-etrangers-en-france>, and supra section F) ii).

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, l'antisémitisme et l'homophobie, DILCRAH*). The delegate has managed initiatives for mobilising 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 anti-discrimination policy.³⁵¹

On 5 October 2015, the Defender of Rights, together with the Judicial Supreme Court (Court of Cassation, *Cour de Cassation*), the Supreme Administrative Court (Conseil d'Etat) and the National Bar Association, organised a one-day seminar at the Court of Cassation to celebrate the 10th anniversary of the national equality body.³⁵² On 13 December 2016, it organised a conference to mark 10 years since the 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.

In January 2018, the Defender of Rights and the research body of the Minister of Justice (GIP Justice), co-organised an international two-day seminar on the multiplication of anti-discrimination grounds.³⁵³

Most NGOs, whether anti-racist or promoting the rights of disabled people, LGBT people, people with certain health conditions or elderly people (including MRAP, SOS Racism, LICRA, LDH, SIDA Info services, AIDES, LGBT, APF etc.),³⁵⁴ 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.

³⁵¹ Defender of Rights (2014), *Collectivités territoriales: Guide pour l'accessibilité des établissements recevant du public* (Local authority guide to accessibility), March 2014, available at: <http://www.defenseurdesdroits.fr>.

³⁵² 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>.

³⁵³ Defender of Rights, *Actes du colloque 'Multiplication des critères de discrimination. Enjeux, effets et perspectives'*, (Seminar, Multiplication of grounds of discrimination: Stakes, impact and perspectives), January 2018, available at: <https://www.defenseurdesdroits.fr/fr/rapports/2019/01/actes-du-colloque-multiplication-des-criteres-de-discrimination-enjeux-effets-et>.

³⁵⁴ 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).

Article 61 bis of Law No. 2017- 86 of 27 January 2017 on equality and citizenship has created an obligation for all recruitment departments of organisations of more than 300 employees to undertake training to correct discriminatory biases and implement transparent processes

- 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 the 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*).³⁵⁵ They bring together all local actors under the authority of the national state representative 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, the Law No. 2005-102 on Disability 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 % are disabled people (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, the 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 to 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*), advisor 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

³⁵⁵ 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>.

is organised into six sub-commissions, one of which is responsible for the annual publication of a report on racism and anti-Semitism.

- 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 anti-discrimination measures 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 Disability modifies Articles L2241-1 and L2242-1 LC, on mandatory annual negotiations between social partners, to create an obligation to hold annual negotiations on measures 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).

The Government's active policy to address discrimination on the TFEU grounds in the workplace, which was pursued between 2012 and 2017, has been abandoned. Public policy has been reoriented towards traditional categories of French public policy: anti-racism, promoting equality between women and men and combating poverty and promoting the rehabilitation of disadvantaged areas.

- 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 precarious migrants, people without proper housing and people in vulnerable situations.

Since 2012, the Government has given a specific mandate to the Inter-ministerial 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. Since autumn 2013, it has been mandated to coordinate the implementation of integration policies targeting the Roma, focusing mainly on the impact of forced evacuations on their housing rights.

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.³⁵⁶

Regarding emergency housing for people living in slums and squats, since 2016 the overall governmental policy towards the illegal occupation of land and the strategy of evictions has been aggravated by the situation of homeless precarious migrants in Calais, Paris and Lyon. Despite repeated reports of NGOs and the Defender of Rights, since the evacuation of the Calais camp, the policy of evictions and clearing and the ensuing humanitarian crisis have intensified.³⁵⁷

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 expresses the following general principle: 'One cannot derogate from laws that concern public order by way of a particular agreement', thus rendering this type of agreement null and void.

Articles 1382 ff. and 1146 ff. of the Civil Code implement a general regime of civil and contractual liability which adapts to the evolution of custom and of superior rules of law, thereby adapting to Directives 2000/43/EC and 2000/78/EC.

Law No. 2008-496 of 27 May 2008 provides civil and administrative recourses relating to all grounds and material scope covered by Directives 2000/78/EC and 2000/43/EC covered by the law.

In addition, all claims related to the application of the principle of equality can be brought before the administrative courts in application of the general public law legal framework based on the legal theory of equality.

Articles L. 600-1-2 and R.632-1 of the Code of Administrative Justice provide for voluntary interventions by trade unions and NGOs with an interest in the case.

Article L1134-4 LC expressly states that any act taken against an employee contrary to the prohibition of discrimination is null and void.

The Labour Code also provides that trade unions can challenge collective agreements that are contrary to public order, provisions on discrimination being part of the list of provisions that are deemed to relate to public order (Articles L2251-1 and L2132-3 LC).

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.

³⁵⁶ 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/fo/texte>.

³⁵⁷ 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_2017_20-propositions-1.pdf; see supra section 7 f) ii).

The general principle of *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 which are of direct application in cases of insufficient transposition to ensure its applicability to all working relationships.³⁵⁸

Therefore, any rule contrary to the directives or the general principle of equality can be challenged before the court.

b) Rules contrary to the principle of equality

To our knowledge, no rule contrary to the principle of equality is currently in force.

³⁵⁸ Conseil d'Etat, No. 298348, 30 October 2009.

9 COORDINATION AT NATIONAL LEVEL

From 2012, the National Action Plan against Racism 2012-2014³⁵⁹ set combating 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*, DILCRAH) reporting to the Prime Minister and the Minister of the Interior, to initiate, coordinate and evaluate Government action.³⁶⁰ Frédéric Potier was nominated on 3 May 2017.

The DILCRAH is responsible for coordinating all public action against racism and anti-Semitism, as well as combating discrimination. The mandate of the delegation has been extended to include anti-LGBTI hate crime. Since 2015, its action has been centred on combating hate-crime, anti-Semitism and racism on the internet.

The post of Secretary of State for disabled people, 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 French President. The Secretary of State in office is Sophie Cluzel.

Finally, most public policies to tackle discrimination on the ground of origin and social situation and the promotion of equality have been refocused within urban affairs policy (*Politique de la ville*), which is supervised by the Ministry of Territorial Cohesion (*Ministère de la cohésion des territoires*). It is managed by the General Commissioner for Territorial Equality, Serge Morvan, a prefect specialist in territorial policy, who succeeded Jean-Benoit Albertini on 4 April 2018. 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*, ANCSEC), which had historically funded NGOs and actors tackling discrimination.³⁶¹ It is mandated with territorial 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.

The National Solidarity Fund for Independence (*Caisse nationale de solidarité pour l'autonomie* - CNSA) coordinates inter-ministerial policy to anticipate funding, support and independence for elderly and very elderly people in an ageing society.

Public policy on anti-discrimination in employment has been suspended since 2017, concentrating instead on equality between women and men and abandoning the follow-up to the Sciberras report (16 November 2016)³⁶² which praised the success of the

³⁵⁹ 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.

³⁶⁰ 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>.

³⁶¹ 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>.

³⁶² Barbezioux, P. (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

awareness-raising campaign on the promotion of talent in recruitment and management practices but stressed the lack of progress regarding the implementation of social dialogue and good practices in the workplace.

It is clear that the consequences of these political choices are that all public anti-discrimination policies have been delegated to social partners or governmental authorities monitoring policy relating to disability or tackling poverty in territorial development. As a result, these policies have exclusively been focusing on victims of discrimination on the ground of disability, local projects in underprivileged suburbs or in employment and initiatives resulting from social dialogue. Therefore, except as regards disability, public anti-discrimination policies 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, Ministry of Territorial Cohesion, the Secretary of State in charge of equality between women and men and the anti-discrimination and 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 General Directorate for Foreign Nationals in France, which is responsible for both the reception and integration of foreign nationals 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 Civil Liberties, Ministry of the Interior (Roma and Travellers); General Directorate for the Management of the Public Services (DGAFF); General Commissioner for Territorial Equality (CGET), and 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*)

France Stratégie

Inter-ministerial delegations

Inter-ministerial Delegation on Emergency Accommodation and Access to Housing (DIHAL)

Inter-ministerial Delegation on Equal Opportunities for French Nationals from the Overseas Territories

Inter-ministerial Delegation on Combating Poverty among Children and Young People

Inter-ministerial Delegation on the French Language for Social Cohesion

Inter-ministerial Delegation for the Rights of Persons with Disabilities

Inter-ministerial Delegation for Accessibility for Disabled Persons

Inter-ministerial Delegation on Urban Affairs and Development

Inter-ministerial Delegation against Racism and anti-Semitism (DILCRAH)

implementation of the proposals of the working group on combating discrimination in business);
<http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/164000702.pdf>.

Inter-ministerial 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*)

National Solidarity Fund for Independence (*Caisse nationale de solidarité pour l'autonomie, CNSA*)

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:

CNIL (National Commission on 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, rights of older people and discrimination in housing (Section 8.1).
- School integration system for Roma and Traveller children (CASNAV) (Section 5b)4)).
- Employment quotas for disabled people 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)).

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives

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 indications 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 are 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 of proceeding by way of such comparison on the basis of a direct application 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, Article 6 of Law 2008- 496 adds Article L1133-1 to the Labour Code which allows the employer to justify as a professional requirement any characteristic based on any of the prohibited grounds as long as its objective is legitimate and the requirement proportionate. This framework allowing any employer to unilaterally create their own professional requirements does not appear to conform to the requirements of the directives.

There have been constant debates in France to allow employers to restrict 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. This article 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. However, these restrictions must be justified by the exercise of other fundamental rights and liberties or by the necessities of the good functioning of the service and they must be 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 the requirements of Directive 2000/78/EC.

11.2 Other issues of concern

Anti-discrimination law continues to attract resistance from politicians, commentators and civil servants on what is perceived as the promotion of the rights of communities, whereas French law recognises only one social corpus, the French Nation. This constitutes the core of very strong ideological objections to the framework of anti-discrimination law within the central state institutions.³⁶³ As a result, the Government has abandoned its specific anti-discrimination policy. Public policy has been reoriented towards traditional categories of French public policy: anti-racism, promoting equality between women and men, the rights of people with disabilities and combating poverty and promoting the rehabilitation of disadvantaged areas.³⁶⁴

- 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 equality body into a larger institution, is still in question, since the institution has to set priorities among a number of topics and faces heavy pressure to cut resources.

While its action in pursuing claims and the implementation of anti-discrimination law remains intact, in the expert's opinion, its 2017 and 2018 annual reports reflect the fact that the visibility of the institution's anti-discrimination agenda has declined.

- 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. It is an area of practice reserved to specialists. 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 on members of certain groups.

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. The National Bar Association, responsible for the training of lawyers, and the National School of Magistrates, responsible for the training of judges, have put in place specific training initiatives to address this issue.³⁶⁵ Claimants still have to be ready to face multiple appeals before their cases are properly examined. There

³⁶³ In 2016, the Defender of Rights co-financed three major studies on the effective enforcement of discrimination law: 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* (Access to healthcare for children under child protection: access to and attitudes towards healthcare), Université Paris Ouest Nanterre Le Défense, 2016; available at: <http://www.defenseurdesdroits.fr>; Perelman, J., Mercat-Bruns, M. (2016), *Les juridictions et les instances publiques dans la mise en œuvre du principe de non-discrimination : perspectives pluridisciplinaires et comparées*, Sciences Po (Ecole 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; Laidie, Y. and Picard, P. (2016), *Le principe de non-discrimination: l'analyse du discours du juge administratif* (The principle of non-discrimination: analysis of the discourse of the administrative courts), Credespo – Université de Bourgogne, 2016, available at: <http://www.gip-recherche-justice.fr/wp-content/uploads/2016/10/Note-de-synth%C3%A8se-214.04.03.21-1.pdf>.

³⁶⁴ <https://www.egalite-femmes-hommes.gouv.fr/>; <https://www.cget.gouv.fr/>; <https://www.gouvernement.fr/dilcrah>.

³⁶⁵ Partnership Agreements with the National Bar Association of 03/05/2012 and with the National School of Magistrates of 03/07/2018, providing for ongoing training programmes.

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 remedies³⁶⁶ or have the 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 was first invoked on the initiative of the Court of Cassation in a case in 2007,³⁶⁷ and has been argued by lawyers only once in a case relating to discrimination on the ground of ethnic origin.³⁶⁸

The national equality body works together with the legal profession to ensure that anti-discrimination law is addressed in 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 for specialists.

- 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 political stands and bills seeking to limit free expression of religion.³⁶⁹

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 and the *Bougnaoui* case, regarding possible limitations to the duty of neutrality imposed through in-house regulations on private employees working in a day-care centre by reason of the ethos and belief of the day-care centre.

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 day-

³⁶⁶ 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 emotional harassment: the Association to Combat Violence against Women (*Association contre la violence faite aux femmes, AVFT*). The second focuses on the legal rights of foreign nationals: the Migrants' Information and Support Group (*Groupe d'information et de soutien des immigrés, GISTI*). More generalist NGOs mostly intervene in criminal actions, but do not focus their activity on legal actions.

³⁶⁷ 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.

³⁶⁸ 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.

³⁶⁹ Clavreul, G., *Laïcité, valeurs de la République et exigences minimales de la vie en société* (Secularism, the values of the Republic and minimum requirements of life within society), Ministry of the Interior, 02/2008, available at: <http://www.laicite-republique.org/rapport-clavreul-laicite-valeurs-de-la-republique-et-exigences-minimales-de-la.html>; Observatory of Secularism (*Observatoire de la laïcité*), Annual report to the President of the Republic 2017-2018, available at: <https://www.gouvernement.fr/rapport-annuel-de-l-observatoire-de-la-laicite-2017-2018-et-sa-synthese>; France, Law n° 2016-1088 of 8 August 2016, available at: <https://www.legifrance.gouv.fr/eli/loi/2016/8/8/2016-1088/jo/texte>; Conseil d'Etat, 26 August 2016, n° 402742, 402777, available at: <http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-ordonnance-du-26-aout-2016-Ligue-des-droits-de-l-homme-et-autres-association-de-defense-des-droits-de-l-homme-collectif-contre-l-islamophobie-en-France>.

care centre was not an organisation with an ethos and belief to be protected pursuant to Article 9 ECHR, since its main purpose was not to promote or hold religious convictions, but to provide care for young children.

The plenary session of the Court of Cassation did not discuss whether or not this was discrimination, direct or indirect, and whether or not it was justified. It followed an altogether different justification, 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.

The position of the Plenary session of the Court of Cassation in the *Baby-Loup* case has been held by the UN Committee of Human Rights to violate Article 18, paragraph 3, of the International Covenant on Civil and Political Rights and to constitute intersectional discrimination based on gender and religion violating Article 26 of the Covenant.³⁷⁰ The Committee holds that the State does not explain how wearing an Islamic headscarf is incompatible with the capacity of the claimant to ensure social stability, kinship and the rights of the children and their parents. Moreover, the State does not explain how wearing the Islamic headscarf is incompatible with the purpose of the day-care centre to 'work in support of early childhood in deprived areas and to promote the social and professional integration of women'. For the Committee, it is also not clear from the State's arguments how it interferes with the fundamental rights and freedoms of children and parents at the day-care centre. Wearing the Islamic headscarf does not constitute a proselytising act. The restriction imposed is therefore not a measure proportionate to the objective pursued.

In the meantime, the Paris Court of Appeal reopened the conflict by rendering a contrary decision in the *Bouagnaoui* case. This open defiance led the Court of Cassation to address a referral to the European Court of Justice, 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 headscarf.³⁷¹

Further to the decision of the European Court of Justice in the *Bouagnaoui* case,³⁷² the Court of Cassation deciding the case³⁷³ intended to settle all issues. It followed the reasoning of the Court of Justice, concluding that Micropole's decision to dismiss the claimant by reason of her refusal to remove her headscarf when clients so demanded, constitutes a direct discrimination and confirmed that the will of an employer to fulfil the wishes of its clients could not be considered as a genuine and determining occupational requirement. The Court continued 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 would be adopted in the application of Article 1321-2-1 of the Labour Code – allowing restrictions to the expression of belief by employees. The Court expressly set out the conditions of compliance with the requirements of the European Court of Justice outlining that restrictions may give rise to indirect discrimination if they have an adverse impact on people of a particular religion.

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³⁷⁰ HR Committee, 18 June 2018, UN Complaint procedure CCPR/c/123/D/2662/2015, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=CCPR%2F2662%2F2015&Lang=en.

³⁷¹ 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.

³⁷² CJEU, C-188/15, *Asma Bouagnaoui, 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>.

³⁷³ Court of Cassation, No. 13-19855, *Asma Bouagnaoui, ADDH v. Micropole SA.*, 22 November 2017, available at: https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/2484_22_38073.html.

In autumn 2014, the Minister of Education, Najat Vallaud-Belkacem allowed mothers wearing the headscarf to participate in school activities thereby ending the controversy around the prevention of mothers wearing a Muslim headscarf from accompanying state school children on out-of-school excursions that was ongoing since the decision of the Montreuil Administrative Court concluding that they concurred to public service and therefore could not participate in school activities.³⁷⁴ 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.³⁷⁵ 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 secularism in schools.³⁷⁶

- 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-wing 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.³⁷⁷

- Disability

The Law No. 2005-102 on Disability provides, in addition to accessibility of new buildings, for the obligation to proceed with the necessary works in order to ensure accessibility of 'buildings open to 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 open to the public' and public transport.

Law No. 2014-789 of 10 July 2014 authorising the Government to adopt legislative measures to ensure the accessibility of public places enabled the Government to determine the conditions and schedule for the implementation of accessibility for disabled people in relation to 'buildings open to the public', public transport, residential buildings and roads. Decrees adopted in application thereto provide for extensions that can vary from three months to five years. This delay, and the enormous number of requests for derogations that have been deemed to be admitted as a result of delays and a failure to

³⁷⁴ Montreuil Administrative Court, No. 1012015, 22 November 2011.

³⁷⁵ 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.

³⁷⁶ 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>.

³⁷⁷ France, National Consultative Human Rights Commission (*Commission nationale consultative des droits de l'homme - CNCDH*), *Rapport 2018 sur la lutte contre le racisme, l'antisémitisme et la xénophobie* (Report 2018 on the fight against racism, anti-Semitism and xenophobia), available at: <https://www.cncdh.fr/fr/publications/rapport-2018-sur-la-lutte-contre-le-racisme-l-antisemitisme-et-la-xenophobie>.

reject them within a two-month window, has postponed the prosecution and issuing of sanctions provided by the law of 2005 beyond 1 January 2015.

Meanwhile Law No. 2018-1021 adopted on 23 November 2018 has lowered the standards of accessibility of new housing by limiting the obligation to build lifts to building of four floors and more and by creating a duty of 'evolutionary adaptability', whereby the obligation is not to build accessible housing but housing that can be adapted to be accessible. This legislation has been held to be a substantial hindrance to the construction of accessible housing.³⁷⁸

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 % since 2005. 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 children with autism in France. Measures taken to deal with the situation of severely disabled children, young adults and children with autism remain insufficient. The fourth plan for people with autism (2017-2022), launched by the President of France in September 2017, awarded EUR 344 million for research, better diagnosis and support for people with autism and their families.

- Travellers and Roma

Travellers

The French Traveller population's rate of school attendance remains extremely low and illiteracy rates in the community have been systematically growing since compulsory military service was discontinued in 1995, as it 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 according to the testimony of organisations working in the field,³⁷⁹ most mayors, who are also MPs, often refuse to abide by the demands of Governmental authorities, even when public education authorities or prefects intervene.

The abrogation of the status of Travellers, further to the decision of the Constitutional Council of 5 October 2012,³⁸⁰ quashing Law 69-2 regulating their status and rights, was adopted by Article 195 of the Law on Equality and Citizenship,³⁸¹ 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

³⁷⁸ France, law No. 2018-1021 adopted on 23 November 2018, available at:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037639478&categorieLien=id>.

³⁷⁹ France, National Consultative Human Rights Commission (*Commission nationale consultative des droits de l'homme - CNCDH*), *Rapport 2018 sur la lutte contre le racisme, l'antisémitisme et la xénophobie* (Report 2018 on the fight against racism, anti-Semitism and xenophobia), available at:

<https://www.cncdh.fr/fr/publications/rapport-2018-sur-la-lutte-contre-le-racisme-lantisemitisme-et-la-xenophobie>; Human Rights League and the ERRC (2018), 'Recensement des évacuations forcées de lieux de vie occupés par des roms (ou des personnes désignées comme telles) en France en 2017' ('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/>; Defender of Rights (2019), *Annual Report 2018*, available at: <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/raa-2018-num-19.02.19.pdf>.

³⁸⁰ Constitutional Council, No 2012-279, 5 October, 2012, available at: <https://www.conseil-constitutionnel.fr/decision/2012/2012279QPC.htm>.

³⁸¹ 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>.

their caravans – despite a number of convictions against this status of exception since 2012 (in 2013 by the European Court of Human Rights and the European Committee of Social Rights, and the decisions by the UN Human Rights Committee of 28 March 2014³⁸² and the Conseil d’Etat of 19 November 2014).³⁸³ The Defender of Rights adopted a decision to formally request that Parliament and the Government proceed with making the necessary legislative reforms.³⁸⁴ 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 enrol children in school and refusing to connect facilities to water and electricity supplies.

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.³⁸⁵

In 2015, Romeurope declared that it estimated the policy of expulsions from illegally occupied land to cost EUR 30 to 40 million per year and the clean-up operation for each campsite approximately EUR 50 000 to 700 000.³⁸⁶

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 26 August 2012. The Prefect who held this position, Alain Régnier, resigned in July 2014, in the face of the absence of political will to tackle discrimination and facilitate Roma integration. He was replaced by Sylvain Mathieu.

As discussed in this report, according to the report by the Human Rights League and the ERRC on the number of evacuations,³⁸⁷ the ongoing policy of forced eviction from illegal campsites has resulted in the evacuation of a substantial proportion of Roma, which has had a very detrimental impact on the wellbeing and access to all basic social rights of these communities.

³⁸² UN Human Rights Committee, 10th session, No 1960/2010, *Ory vs France*, 28 March 2014.

³⁸³ Conseil d’Etat, No. 359223, 19 November 2014.

³⁸⁴ Defender of Rights, Decision MLD 2014-152 of 24 November 2014.

³⁸⁵ France, National Consultative Human Rights Commission (*Commission nationale consultative des droits de l’homme - CNCDH*), *Rapport 2018 sur la lutte contre le racisme, l’antisémitisme et la xénophobie* (Report 2018 on the fight against racism, anti-Semitism and xenophobia), available at: <https://www.cncdh.fr/fr/publications/rapport-2018-sur-la-lutte-contre-le-racisme-lantisemitisme-et-la-xenophobie>; Human Rights League and the ERRC (2018), ‘Recensement des évacuations forcées de lieux de vie occupés par des roms (ou des personnes désignées comme telles) en France en 2017’ (‘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/>; Defender of Rights (2019), *Annual Report 2018*, available at: <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/raa-2018-num-19.02.19.pdf>.

³⁸⁶ *Le Parisien*, 25 September 2015, available at: <http://www.leparisien.fr/info-paris-ile-de-france-oise/si-cheres-expulsions-de-bidonvilles-23-09-2015-5119735.php>.

³⁸⁷ Human Rights League and the ERRC (2018), ‘Recensement des évacuations forcées de lieux de vie occupés par des roms (ou des personnes désignées comme telles) en France en 2017’ (‘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/>.

- Racial discrimination

In practice we can observe that more cases reach trial and are successful, but they mainly concern direct discrimination in labour anti-discrimination cases and criminal prosecutions based on Articles 225-1 and 225-1 of the Penal Code prohibiting discrimination on the grounds of sex, age and disability,³⁸⁸ relating to access to housing, goods and services and employment.

Evidence of discrimination on the ground of origin can benefit from comparative panels establishing a difference in treatment between people on the basis of their origin, inferred from the employees' surnames.³⁸⁹ 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. Hence, considering the insufficient availability of comparative panels, in France, legal action is not an effective means of redress in cases of racial discrimination.

As regards police checks, the decision of the Court of Cassation of 9 November 2016,³⁹⁰ and constant publicity about abusive checks have created a lot of tension in relations between the police and the population. The lower courts continue to show a lack of understanding of the definition of unequal treatment, displaying reluctance to find discrimination in the absence of evidence of immediate differential treatment when facing groups that are exclusively composed of young people of African and North African origin.³⁹¹

- Discriminations against precarious and undocumented 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 large-scale repression and a restrictive approach to their access to rights. This is particularly the case in Guyana and Mayotte.

According to the Defender of Rights and some NGOs,³⁹² the present policy is to limit the budgetary means and human resources necessary to ensure access to political, civil, economic and social rights of precarious migrants, particularly for asylum seekers and unaccompanied minors. Public authorities complicate the conditions of access to legal residence and increase checks in order to bring into 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 precarious migrants by NGOs and individuals and to allow extensive police checks 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.

³⁸⁸ 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*.

³⁸⁹ Court of Cassation, Social Chamber, *Airbus Operations SAS*, No. K 10-15873, 15 December 2011.

³⁹⁰ 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.

³⁹¹ Paris High Court, 17 December 2018: n° 17/06217, 17/06216, 17/06214, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=26661&opac_view=-1.

³⁹² Defender of Rights, *Exilés et droits fondamentaux, trois ans après le rapport Calais* (Fundamental rights of migrants in Calais, three years after the Calais report), December 2018, available at: <https://www.defenseurdesdroits.fr/fr/rapports/2018/12/exiles-et-droits-fondamentaux-trois-ans-apres-le-rapport-calais>; Committee for migrants' access to healthcare (*Comité pour l'accès à la santé des exilés*), Annual report 2018, available at: www.comede.org/wp-content/uploads/2019/06/Rapport-Comede-2019.pdf.

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 large-scale arrivals, coupled with its policy of systematically clearing illegal campsites, increases the vulnerability of homeless precarious migrants and threatens all of their rights.

According to some NGOS, the Defender of Rights³⁹³ and the claims it receives, this national and local policy to hinder precarious migrants' access to rights goes so far as to increase procedures to question by any means possible 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 for foreign nationals who, because of their personal circumstance, fall into the category of those who are subject to control measures. This is particularly the case for older migrant workers who regularly return to their home country and who are denied old-age allowances because they are not in a position to establish that they have been continuously resident in France for the last ten years.

Finally, the present public policy feeds the defiance of an increasing proportion of the population of France who openly assert their xenophobia and see migrants as an unaffordable group who consume the national wealth.

- 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 continues to campaign against family rights for gay couples, access to medically assisted conception by lesbians 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

It is observed in practice and in the jurisprudence that while the law provides for integral compensation, in the absence of punitive damages, the difficulty of establishing pecuniary loss regarding access to goods and services or access to employment often limits the awards from 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 discrimination in 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 they rarely reach more than a few thousand euros.

³⁹³ Defender of Rights (2019), *Annual report 2018*, available at: <https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/raa-2018-num-19.02.19.pdf>, Defender of Rights, Decision n° 2018-003, presenting observations before the ECtHR, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=24750&opac_view=-1.

- The repression of radicalism

In the context of its fight against terrorism, the Government announced on 23 February 2018 the implementation of a comprehensive plan to tackle radicalisation called 'Prevent to Protect'.³⁹⁴ The plan intends to increase surveillance in order to facilitate the identification of networks and fight against propaganda on the internet and in schools, prisons, the public service and private workplaces. It established a hotline, allowing anyone to report any person or situation of concern and created a unit at the Departmental level to allow intervention by the public authorities in charge of combating radicalism. This programme includes the implementation of a system for identifying radicalised public servants at all levels of the public service, in order to provide for administrative inquiries³⁹⁵ and a committee ready to take any measure necessary to immediately suspend them from their posts and even dismiss them if appropriate. In addition, the programme provides for the organisation of a system for the identification and reporting of radicalised employees to their hierarchy.

Many stakeholders consider that this policy legitimises large-scale surveillance and fosters suspicion as well as ethnic and religious discrimination against certain groups in relation to their origin or religious practice.³⁹⁶

³⁹⁴ Prime Minister of France, February 2018, *Plan national de prevention de la radicalisation*, (National Plan for the prevention of radicalisation), available at: <http://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2018/02/2018-02-23-cipdr-radicalisation.pdf>.

³⁹⁵ 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>.

³⁹⁶ France, National Consultative Human Rights Commission (*Commission nationale consultative des droits de l'homme - CNCDH*), *Rapport 2018 sur la lutte contre le racisme, l'antisémitisme et la xénophobie* (Report 2018 on the fight against racism, anti-Semitism and xenophobia), available at: <https://www.cncdh.fr/fr/publications/rapport-2018-sur-la-lutte-contre-le-racisme-lantisemitisme-et-la-xenophobie>; Decision of 18 May 2017, available at: www.cncdh.fr/fr/publications/avis-sur-la-prevention-de-la-radicalisation, JORF n°0077 of 1 April 2018, text n° 46.

12 LATEST DEVELOPMENTS IN 2018

12.1 Legislative amendments

No legislation relating to anti-discrimination law has been adopted.

12.2 Case law

Disability

Name of the court: Conseil d'Etat

Date of decision: 22 February 2018

Name of the parties: N/A

Reference number: n°397360

Address of the webpage:

https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CE_TATEXT000036637082&fastReqId=929507833&fastPos=20

Brief summary: A number of NGOs have challenged the legality of the provisions of Decree n° 2015-1770 of 24 December 2015 (Articles 3, 4, and 6 para. 1) allowing that alternative solutions to regulated technical requirements to meet accessibility standards be put in place in newly built private housing, contradicting the requirements of the law of 11 February 2001 for equal opportunities and integration of disabled persons.

In a decision of 3 February 2016 (n°386951), the Conseil d'État (Council of State, Supreme Administrative Court) had previously decided that, with regards to existing buildings open to the public (precisely defined by various decrees and executive orders), provisions allowing that accessibility requirements be met by implementing 'solutions of equivalent effect' were legal. Solutions of equivalent effect would be the installation of a lift instead of a ramp, the implementation of a rotating disk in the floor instead of the required space to turn a wheelchair around, access through a separate door instead of redesigning the main entrance to a building, etc.

In February 2018, the Council of State (acting as the Supreme Administrative Court) ruled that 'solutions of equivalent effect' were legal as regards newly constructed buildings for private housing. The Court held that the provisions relating to 'solutions of equivalent effect' in newly built private housing are meant to allow the implementation of technological innovations with the objective of attaining results comparable to the technical norms stated in the regulations relating to accessible design, and that they do not *per se* put into question the principle of accessibility.

Origin

Name of the court: Paris Court of Appeal, Social Chamber,

Date of decision: 31 January 2018

Name of the parties: 848 Moroccan Railroad workers vs SNCF

Reference number: No. 15/11389

Address of the webpage:

https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=24074

Brief summary: In the 1970s, SNCF (French public railway service) hired 2 000 Moroccan employees through a 12-month recruiting process, to fill lower skilled jobs. However, they were not hired under the same conditions as French employees. The regulatory statutes of the SNCF imposed a requirement of French nationality for recruitment under permanent employee status. Therefore, the Moroccan employees were hired as contracted agents, under a specific status 'PS25', used for temporary employees and for people holding posts on a list of jobs that were not covered by the statutory regime. The claimants spent all of their careers at SNCF. Their specific employment conditions were less favourable than those applicable to French permanent employees:

they did not have access to career development beyond a certain level of lower skilled jobs (while only 2 % of French employees with permanent status ended their career at these levels). These jobs were also more physically strenuous, and this had an impact on their physical condition at retirement. They had lower salary increases, less favourable overtime conditions and less favourable retirement conditions in terms of period of service and age requirements for access to a full pension, financial conditions for retirement and financial conditions for their widows' pension rights (an average of EUR 300 per month). While half became French citizens, only 113 of the 2 000 Moroccan employees obtained permanent employment status and the rest kept the PS25 status. The claimants, represented by a private attorney on a retainer, who refused the support of NGOs or the proposed involvement of the Defender of Rights, filed suit after retirement, claiming damages for their career and retirement conditions.

The Court of Appeal submitted the appeal to the Defender of Rights for an opinion. The Court confirmed the decision of the Labour Court and concluded there was discrimination in the career and retirements rights of the employees.

Given the weight of evidence relating to the career and functions of the Moroccan employees, the judge held that the shift in the burden of proof applicable in matters of discrimination imposes on the employer the obligation to justify that the difference of treatment was justified by objective elements free of any discrimination based on nationality.

The employer argued that the regulation reserving the permanent employee status for French nationals was justified because the railway was considered at the time to form part of the public service. The Court of Appeal held that this argument is not admissible, as the SNCF's representative had argued many times over the years that the text was not modified because of the financial burden that would result from integrating foreign workers into the status of French workers.

The Court concluded that the condition of nationality contravenes the bilateral conventions between France (and the EU) and Morocco and that this condition of nationality constitutes a violation of Article 14 ECHR and Protocol No. 1 to the ECHR.

The Court awarded compensation to each of the claimants of EUR 173 000 for the loss of career as well as EUR 60 555 for loss of pension benefits, EUR 3 000 for loss of training and EUR 5 000 for moral damages. These decisions are immediately enforceable. Given that there are 848 claimants, the overall liability of the SNCF as a result of the decisions of the Court of Appeal is estimated at EUR 180 million.

Name of the court: Paris Tribunal de Grande Instance

Date of decision: 17 December 2018

Name of the parties: N/A

Reference number: n° 17/06217, 17/06216, 17/06214

Address of the webpage: N/A

Brief summary: Three high school students from Epinay-sur-Seine in Seine-St-Denis, were returning from a school day trip with their teacher to Brussels on 1 March 2017. When they alighted from the train in Gare du Nord, they were the only passengers subjected to police checks on the train platform.

They were represented by a private attorney, with support from the Open Society Justice Initiative. They initiated a claim for civil damages against the State, alleging discrimination by the police on the ground of origin.

The State argued that, considering that the class was exclusively composed of black and North African teenagers, the decision to check the three students could not be based on their origin.

The Court dismissed the claim for the State's liability on the ground of discrimination by the police, stating that, considering the composition of the class, the choice of these students for checks could not be based on their racial origin, and that the State provided sufficient justification of the legal grounds for the checks.

Roma and Travellers

Name of the court: Court of Cassation, Criminal Chamber

Date of decision: 23 January 2018

Name of the parties: N/A

Reference number: n° 17-81369

Address of the webpage:

<https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036584795>

Brief summary: A mayor was prosecuted before the penal court for discrimination on the ground of ethnic origin and place of residence. He had refused to enrol in elementary school five Roma children who were living in a camp that was under an evacuation order issued by the mayor a few weeks before on the basis of health and safety requirements.

The parents were accompanied by NGO representatives who testified that the communal services (local authorities) did not provide clear guidance about the documents and proof of residence necessary to enrol the children, nor officially inform the families of the refusal to enrol the children.

The Criminal Court dismissed the case. The public prosecutor did not appeal and only the civil parties (the children and their parents) brought the case to appeal. The Criminal Court of Appeal also dismissed the case, for lack of evidence of discriminatory intent in the absence of an investigation into the knowledge of the communal services and the mayor about the children's situation and place of residence.

The Court of Cassation held that evidence showed that the communal services knew who the five children were and where they lived in the town. The Court considered that the trial judge had failed to verify whether or not the pretext of requesting formal documents and proof of residence to refuse enrolment of the children was intended to conceal unequal treatment of the children because they were members of the Roma community.

In addition, the Court took into consideration the legal duty of the mayor to identify all children to be enrolled in school, and concluded that the trial judge had failed to verify whether the failure of the mayor to enquire into the situation of the children or to officially inform the parents was not intended to hide intentional unequal treatment.

The Court concluded that the refusal of a mayor to enrol children in school, when those children are in fact living in a precarious camp and are members of the Roma community, constitutes the offence of refusal of the benefit of a right as defined by Article 432-7 of the Penal Code. The Court further concluded that this offence and the failure to comply with her duties as mayor also constituted a civil fault for which the mayor was liable in relation to the civil parties.

The Court of Cassation referred the case back to the Court of Appeal for further decision on the sanction.

The children have long since been expelled from the illegally occupied land and could not be found to be enrolled in school further to the decision.

Religion

Name of the court: Dijon Administrative Appeal Court

Date of decision: 23 October 2018

Name of the parties: Town of Chalons sur Saône

Reference number: n° 17LY03323

Address of the webpage:

https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=26346&code=987a505c8a9d6714bcb4fb21ee363883&emplogin=servicedocumentation&date_conex=1540392485

Brief summary: In France, state school cafeterias are managed and financed by cities and towns. Since 1984, the town of Chalon-sur-Saône provided alternative meals for children in the school cafeteria when serving pork.

The mayor of Chalon-sur-Saône made a public statement to the press that substitute meals would no longer be served in state school cafeterias in order to enforce the secularism and neutrality of the public service. The municipal council abrogated the municipal by-law authorising substitute meals on the ground that it was illegal and contrary to the principles of neutrality and secularism of the public service and adopted a new by-law to approve a catering programme that does not provide alternative meals when pork is on the menu.

The Administrative Court of Appeal maintained the arguments put forward by the claimant and the Defender of Rights to annul the by-law. It stated that the principles of secularism and neutrality of the public service do not prevent the provision of alternative meals in substitution of pork, and that modifications to the organisation of a public service could only result from considerations related to constraints due to necessities of service provision.

The municipal council had not submitted any element that would indicate that the provision of this service for more than 30 years created difficulties in the management of school catering. Thus, considering that this decision was exclusively based on considerations of secularism and neutrality, the municipal council's decision was illegal.

This decision asserts that the decision of a public authority to provide meals accommodating a certain group on philosophical and religious grounds is not illegal and cannot be revoked on account of secularism.

Name of the court: UN Human Rights Committee

Date of decision: 17 July 2018 (published 22 and 17 October 2018)

Name of the parties: N/A

Reference number: Committee Complaint procedure CCPR/c/123/DR/2747/2016 and CCPR/c/123/DR/2807/2016

Address of the webpage:

CCPR/c/123/DR/747/2016:

https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/FRA/CCPR_C_123_D_2747_2016_27806_F.pdf

CCPR/c/123/DR/2807/2016:

https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/FRA/CCPR_C_123_D_2807_2016_27805_F.docx.

Brief summary: In 2010, France adopted Law no 2010-1192 of 11 October 2010, which states, in Article 1 that 'No one may, in a public space, wear any apparel intended to conceal the face.' Article 2 defines the concept of public place as 'public streets and walkways and places open to the public or designated for a public service'. The prohibition does not apply if the garment is prescribed 'by legislative or regulatory provisions...', is justified for health reasons or on professional grounds, or is part of sporting, artistic or traditional festivities or events'.

As a result, the law prohibits garments that cover the whole body including the face and those that leave only a small opening for the eyes, such as the niqab or the integral veil or burqa.

The UN Human Rights Committee received two complaints in 2016 from two women of French nationality who were prosecuted and condemned to penal sanctions for wearing garments intended to cover their entire body including their face.

On 6 October 2011 and 21 November 2011, both complainants were stopped in the street in Nantes wearing niqabs. They were prosecuted and found guilty of wearing garments which concealed their faces in public. They were each ordered to pay a EUR 150 fine.

The Committee concludes that the general prohibition, subject to penal sanctions, imposed by French law on anyone who wears the niqab in public places constitutes a disproportionate interference with the right of the two complainants to freely express their religion.

The Committee considers that France has not established that this prohibition was necessary whether it be for reasons of safety, to protect women or to preserve the conditions of common social life ('vivre ensemble') in French society.

The Committee admits that the State can require that individuals show their face in specific circumstances for identification checks, but it considers that the systematic prohibition of the niqab is too radical and is not proportionate. It considers that it will, on the contrary, marginalise women by condemning them to stay at home and denying them access to public services.

The French Minister of Foreign Affairs immediately replied that he would report back to the UN Human Rights Committee that France maintained its position that the Law of 2010 properly imposed such a prohibition, because concealing the face in a public space is incompatible with the principle of fraternity and the minimum requirements necessary to support the values of a democratic and open society.

Name of the court: UN Human Rights Committee

Date of decision: 18 June 2018 (published 10 August 2018)

Name of the parties: Ms Hafif vs France

Reference number: Complaint procedure CCPR/c/123/D/2662/2015

Address of the webpage:

https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F123%2FD%2F2662%2F2015&Lang=en

Brief summary: The claimant was employed from 1993 to 2003 first as an educator and then as deputy director of a day-care centre for underprivileged children. From 2003 to 2008, she was on maternity and parental leave. Returning to work on 8 December 2008, she was dismissed for wearing an Islamic headscarf to work in violation of internal regulations. She filed a complaint with the Labour Court alleging that the dismissal was null and void as it violated the principle of non-discrimination on the ground of religion protected by Articles L1121-1 and 1132-1 of the Labour Code (LC).

A first decision from the Social Chamber of the Court of Cassation stated that the principle of neutrality did not apply to private employment and concluded that the dismissal of the claimant was discriminatory.³⁹⁷ The Court of Appeal of Paris then contradicted the Social Chamber of the Court of Cassation and concluded that the

³⁹⁷ Social Chamber of the Court of Cassation, *Baby-Loup Case* n°536 of 19 March 2013 (11-28.845), ECLI:FR:CCASS:2013:SO00536. Available at: https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/536_19_25762.html.

prohibition of the Islamic headscarf could be an occupational requirement based on the secular ethos of the child-care centre.³⁹⁸

The case returned before the plenary assembly of the Court of Cassation.³⁹⁹ The Court did not discuss whether the principle of neutrality could form the basis of an exception based on occupational requirements and excluded all arguments holding that the principle of secularism was applicable to private employers.

The Court's analysis followed one of the arguments of the Paris Court of Appeal and discussed the issue on the basis of the only legislative path available in French legislation: that of legitimate restrictions to rights and freedoms that can be imposed by an employer on the basis of Articles L1121-1 and L1321-3 LC, through the adoption of in-house regulations. The Court transformed its analysis into a pure consideration of the facts relating to whether or not these restrictions were legitimate, given the circumstances of the execution of the employment contract based on the evidence presented.

Before the Human Rights Committee the claimant argued that the decision of the plenary assembly of the Court of Cassation is a violation of Article 18 (freedom of religion) and 26 of the Covenant (non-discrimination). It is a restriction to freedom of religion that is not foreseen by law; it is not necessary in a democratic society since it cannot be justified by the protection of security, public order or public health; it is not proportionate since it gave rise to her dismissal without compensation; and finally, the internal regulation which is being discussed is illegal because it is general, imprecise and disproportionate.

The Committee holds that the State does not explain how wearing the Islamic headscarf is incompatible with the capacity of the claimant to ensure social stability, kinship and the rights of children and their parents. Moreover, the State does not explain how wearing the Islamic headscarf is incompatible with the purpose of the day-care centre to 'work in support of early childhood in deprived areas and to promote the social and professional integration of women'. For the Committee, it is also not clear from the State's arguments how it interferes with the fundamental rights and freedoms of children and parents at the day-care centre.

Wearing the Islamic headscarf does not constitute a proselytising act. The restriction imposed is therefore not a measure proportionate to the objective pursued. The claimant's dismissal further to her refusal to remove the Islamic headscarf is not in conformity with Article 18, paragraph 3, of the Covenant and constitutes intersectional discrimination based on gender and religion, violating Article 26 of the Covenant.

³⁹⁸ Appeal Court of Paris, *Baby-Loup* Case n°13/02981 of 27 November 2013. Available at: <http://combatsdroitshomme.blog.lemonde.fr/files/2013/11/CA-Paris-27-novembre-2013-13-02981-c-A-BabyLoup.pdf>.

³⁹⁹ Plenary Court of Cassation, *Baby-Loup* Case n° 612 of 25 June 2014 (13-28.369), ECLI:FR:CCASS:2014:AP00612. Available at: https://www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/612_25_29566.html.

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: 31 December 2018

Title of law: 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 relevant 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 specific religion, physical appearance, last name, family situation, trade union activities, political opinions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in a language other than French, economic vulnerability, refusal to be a victim of bullying

Criminal law

Material scope: public and private employment, recruitment, sanctions and dismissal, access to professional training, goods and services

Principal content: prohibition of intentional discrimination in recruitment, sanctions, dismissal, access to professional training and access to goods and services;

Articles 225-1 and 225-2 and 432-7 PC

Title of law: Law on the press of 1881

Date of adoption: 29 July 1881

Date of entry into force: 29 July 1881

Latest relevant 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 specific religion, physical appearance, last name, family situation, trade union activities, political opinions, philosophical convictions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in a language other than French, economic vulnerability

Criminal law

Material scope: Discriminatory discourse in all situations

Principal content: Provocation to discriminate as defined by Articles 225-1 and 225-2 PC

The Law on the HALDE incorporates prohibition of provocation to discriminate on the basis of sex and sexual orientation and disability

Title of law: Law No. 2001-1066 of 16 November 2001 on the fight against discrimination

Date of adoption: 16 November 2001

Entry into force: 16 November 2001

Latest relevant amendments: Article 86 of Law [n° 2016-1547 of 18 November 2016](#)

Internet link:

<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 specific religion, physical appearance, last name, family situation, philosophical

convictions, trade 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

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 servants 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 law: Law No. 89-462 of 6 July 1989 on relations between landlords and tenants (as amended by the Law of Social Modernisation no. 2002-73)

Date of adoption: 6 July 1989

entry into force: 6 July 1989

Latest relevant amendment: Law no 2014-366 of 24 March 2014 for Access to Housing and Renovated Urban Planning, at Article 1

Internet link:

<https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000509310>

Grounds covered: All grounds

Grounds: sex, pregnancy, belonging, whether real or supposed, to an ethnic origin, a nation, a race or a specific religion, sexual orientation, sexual identity, age, family situation, genetic characteristics, physical appearance, last name, health, disability, trade 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

Title of law: 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 relevant 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: recognise 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 law: Law no 2005-102 of 11 February 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 authorising the 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 law: Law no 2005-841 of 26 July 2005 authorising 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 relevant 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 law: 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 relevant 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 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 specific religion, physical appearance, last name, family situation, trade union activities, political opinions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in a language other 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/EC and 2000/78/EC by providing definitions of direct and indirect discrimination, including harassment and instructions to discriminate to the definition of discrimination, completing prohibition of victimisation and creating new exceptions

Title of the law: Institutional Act 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 relevant 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 orientation, sex, pregnancy, gender identity, belonging, whether real or supposed, to an ethnic origin, a nation, a race or a specific religion, physical appearance, last name, family situation, trade union activities, political and philosophical opinions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in a language other than French, economic vulnerability

Civil, administrative and criminal law

Material scope: all fields: public employment, private employment, access to goods or services (including housing), social protection, social advantages, education, civil rights.

Principal content: Integrates HALDE with other human rights administrative body in a

unique Constitutional Independent Authority; powers of the Equality Body
<p>Title of law: Law No.2012-954 of 6 August 2012 relating to sexual harassment Date of adoption: 6 August 2012 and entry into force: 6 August 2012 Latest relevant amendments: none Internet link: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026263463&dateTexte=&categorieLien=id Grounds covered: sex and sexual identity Civil, administrative and criminal law Material scope: public employment, private employment, access to goods or services (including housing) Principal content: reviewing the definition of sexual harassment and creating the ground of sexual identity at Article 4</p>
<p>Title of law: Law n° 2016-1547 of 18 November 2016 of modernisation of the XXIst Century Date of adoption: 18 November 2016 and entry into force: 18 November 2016 Latest relevant amendments: none Internet link: https://www.legifrance.gouv.fr/eli/loi/2016/11/18/JUSX1515639L/jo Grounds covered: mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed, to an ethnic origin, a nation, a race or a specific religion, physical appearance, last name, family situation, trade union activities, political opinions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in a language other than French, economic vulnerability Civil and administrative law Material scope: public employment, private employment, access to goods or services (including housing) public and private 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 a language other than French; Articles 60 to 87 creating a civil and administrative class action in matters of discrimination</p>
<p>Title of law: Law no. 2017- 86 of 27 January 2017 on Equality and Citizenship Date of adoption: 23 November 2016 Date of entry into force: 27 January 2017 Grounds covered: mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed, to an ethnic origin, a nation, a race or a specific religion, physical appearance, last name, family situation, trade union activities, political opinions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in a language other than French, economic vulnerability, banking residence 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 discriminate; 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 recruitment departments of organisations of over 300 employees to undertake training to correct discriminatory biases and implement transparent processes; Article 177: prohibiting in the Penal Code discrimination on the ground of 'refusal to be</p>

the victim of bullying’;

Article 195: abrogating Law 69-3 relating to the status of Travellers, thereby putting an end to the status of exception applicable to Travellers

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: France

Date: 31 December 2018

Instrument	Date of signature	Date of ratification	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 on rights relating to the expulsion of aliens	No	No
Framework Convention for the Protection of National Minorities	No	No	NA		
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 foreign nationals	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	Date of ratification	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 offences.	Yes	Yes, some provisions have been interpreted by the Conseil d'Etat as directly opposable to the State. CE, 22 September 1997, GISTI,
Convention on the Rights of Persons with Disabilities	30.03.2007	18.02.2010	No	Yes	Yes, some provisions could be interpreted as directly opposable to the State.

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