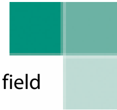


Executive summary 2006
French country report on measures to combat discrimination
by Sophie Latraverse

1. Introduction

France has traditionally been a centralised state, however it is becoming increasingly decentralised. It is divided into 22 regions and 95 departments. The policies relating to the banning of discrimination are created and implemented above all by the Ministry of Social Affairs and Labour. Certain local authorities, mostly departmental and managed through the prefect under the authority of the Ministry of Interior, also have an important role to play, particularly as regards policies relating to the Roma population. Social dialogue and consultation are at the core of the policy-making process in France. The first legislation implementing the directives, the Law of 16 November 2001, integrates the fight against discrimination as an objective in collective bargaining, branch (sub-sections of the labour force) negotiations and national negotiations.

The key to the French legal approach to racism and discrimination is a characteristic interpretation of the principle of equality within an abstract universalistic framework. Since the Second World War, it has been enshrined in a range of instruments, including the Constitutions of 1946 and 1958. The resulting legal framework has developed along two complementary lines: the condemnation of inequality based on "origin" and the refusal to use criteria of "origin" for policy and administrative purposes. There is, however, no constitutional text expressly prohibiting discrimination on the basis of age, disability, health or sexual orientation, but the list of prohibited grounds of discrimination in the Constitution is an open one according to the Constitutional Council.

In French law, rules are judged to meet the requirement of equality if they are the same for all. Needless to say, French law includes a wide range of rules that define differential treatment for diverse circumstances. They are considered to meet the requirement of the theory of equality if they are based on differences in situations or on considerations of public policy. The relevant categories are accepted only to the extent that they rely on neutral criteria, devoid of identity content such as socio-economic considerations. Specifically, no circumstances are considered to justify differential treatment on grounds of "race" or "origin".

The territorial policies specific to disadvantaged suburbs use neutral considerations to concentrate a number of actions targeting populations of immigrant origin. Over the years, the public service has developed a number of awareness-raising programmes. Most NGOs, whether anti-racist or promoting the rights of disabled, gay, sick or elderly people, are subsidised by the State, pursue dissemination activities and are regularly consulted in the policy-making and legislative process.

Recently, lobby groups have been organising within political parties, publishing reports and holding debates on the paramount necessity of addressing problems of racial discrimination in employment and access to housing which afflict the population of North African and African origin.

Meanwhile, there has been a renewal of the public policy's conception of disability with the adoption of the Law of February 11, 2005 which focuses on integration in all areas of life and all decrees to enforce those principles in the workplace, access to school, urban renovation and public support and creates quotas of employment in both the private and public sectors.

The Roma population in French is divided among French citizens, who represent 2/3rd of the population, and migrants from Romania and Bulgaria. Their difficulties and relations with the public service are very different. Until January 1st, the Bulgarian and Romanian Roma were considered as illegal residents and treated as such by the Ministry of Interior. On December 22nd, 2006, the Minister of Interior has published a Ministerial instruction no INTD06001150 regarding the attitude to be adopted by the authorities towards the Bulgarians and Romanians further to the integration of their country of origin in the European Union, in application of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States**.**

In 1990, the French Roma population was established as a population of 350 000 people and in 2004 it is estimated that they have reached 500 000. 70% of this population is less then 25 years of age, 40% is less then 16 and 90% are French citizens. Public awareness on the situation of the Roma population is very low. They have traditionally been managed by the Ministry of Interior and the Ministry of Education.

Because most social rights are managed on the basis of one's link to a place of residence, all French citizens who have a travelling way of life (including Roma and non-Roma) have a specific administrative status. Non travelling Roma are melted in the general travelling population, but constitute 80% of this administrative category. 1/3rd of the population is sedentary, 1/3rd travels part of the year and 1/3rd are travellers. 50% of the travelling children attend primary school, but only 30 % to 40 % of the time and less then 10% attend secondary school. 85% of the sedentary children attend standard primary school but their attendance to secondary school remains very low.

The sedentary population lives both in public housing and on privately owned land. In 2000, the Besson Law no 2000- 614 relating to the accommodation of the travelling population, imposed on all departments the adoption of accommodation schemes for travellers. After many extensions, in 2005 there were 93 departmental schemes adopted but only 8000 parking areas where the authorities recognise that 20 000 are needed (NGOs consider that 60 000 are needed). The scheme aims at stabilising residence and favour school attendance for the children , as all mayors are obliged to register children in school even for a few days (Article L131-10 and 131-11 of the Code of Education and 227-17-2 of the penal code). However, they tend to generate concentration and in some cities (Dijon- Nancy- Toulouse) there are schools that count a majority of Roma children.

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 is completely transposed by Law no. 1006-2001 of 16 November 2001 (hereafter Law of 16 November 2001), the Law on Social Modernisation no. 2002-73 of 17 January 2002 (hereafter Law of 17 January 2002) and the Law creating the specialised body, the High Authority against Discrimination and for Equality, and completing the transposition of Directive 2000/43, which was passed on 21 December 2004 (hereafter HALDE Law). Except for this last law, which provides for a general regime prohibiting discrimination on the basis of race and origin, whether direct or indirect, in all areas covered by Directive 2000/43, general provisions prohibiting discrimination are transversal and cover not only the grounds covered by Article 13 of the Amsterdam Treaty but also physical appearance, last name, customs, health, political opinions, trade union activities and involvement in mutual benefit organisations, family situation and genetic characteristics.

Harassment is covered by separate legislation which requires reiterated acts and remains to be formally included in the definition of discrimination Art. L122-49 ff LC.

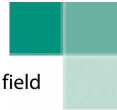
The law no 2005-102 of February 11, 2005, reviews the entire scheme relating to public support and legal protection of the disabled and completes transposition of Directive 2000-78 by providing a right to reasonable accommodation in the work place as well as a positive action programme imposing employment quotas for both the public and private sectors. Reasonable accommodation obligations therefore benefit only to employees who benefit from official recognition, have a status of disabled workers, to those who have suffered from an employment accident procuring a disability superior to 10% and who benefit from compensation in relation thereto, to beneficiaries of disability pensions and to disabled veterans. Therefore, non registered disabled people, non salaried disabled workers and disabled persons who are members of the professions are not covered by the obligation of reasonable accommodation.

The age discrimination requirements of Directive 2000/78 have been implemented by the general legal regime of the Labor Code and the Penal Code, thus covering salaried workers and non salaried activities. On July 26, 2005, the Law no 2005-846 of July 26, 2005 was adopted in order to habilitate Government to adopt emergency measures for employment by way of Governmental Decree, and was followed by many Executive orders.

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

So far, Directive 2000/78 has only been transposed with respect to employees covered by the Labour Code (L122-45 ff. LC) and to civil servants (Law 83-634 of 13 July 1983). The legislation transposing Directive 2000/78 does not cover the professions and unsalaried workers. They are considered to be covered by general principles of contractual and civil liability.

All legislation transposing both Directives provides for protection against direct and indirect discrimination and for the shift in the burden of proof, except for Law 83-634 concerning civil servants, prior to the administrative court the judge who now presides over the enquiry. Recourses in discrimination before the Civil courts created by explicit statute (Law of November 16, 2001, Law of January 17, 2002 and Law HALDE) benefit from the shift in the burden of proof (see section 6.3) but remain difficult to enforce. The judicial tradition is to go to civil court with the element of evidence readily available to the party, which explains why plaintiffs often go to criminal court to obtain access to evidence.



3. Main principles and definitions

All texts prohibiting discrimination in national legislation state an identical list of prohibited grounds without defining them. Since the law prohibits taking the concept of origin or race into consideration, they are not defined and no application of the exception provided in Directive 2000/43 was enacted in French Law.

The wording of the prohibition to discriminate in the Penal Code, the Labour Code and the Civil Code includes the concept of assumed characteristics on the grounds of origin, race and religion. The systematic reference to physical appearance and last name in the list of prohibited grounds of discrimination is also a way to cover assumed characteristics.

In the law of February 11, 2005 on disability the definition of the prohibition to discriminate in employment on the basis of disability is based on the employer's perception of the condition of the employee. It can thus be considered to include assumed characteristics as well.

Direct discrimination is covered by all legislation incorporating all prohibited grounds of discrimination. The Penal Code provides the following definition: "Any distinction by reason of origin, real or supposed membership of a particular ethnic group, nation race or religion constitutes discrimination". Since the statutes implementing the directives, the other texts prohibiting discrimination expressly refer to direct and indirect discrimination without providing a definition.

The concepts of direct and indirect discrimination are not defined by the legislation and therefore require judicial interpretation, which generally refers to the definition provided in the directives.

In French law, harassment takes the form of both sexual harassment and moral harassment. It is sanctioned by criminal law (Article 222-33 and 222-33-2 PC) and labour law (Articles L122-46 and L122-49 LC and Article 6 of Law no 83-634 of 13 July 1983 concerning civil servants). According to the Law of 17 January 2002, moral harassment covers *"repeated acts with the purpose or effect* of *a degradation of working conditions such as to violate the rights or dignity [of an individual], to alter [his/her] physical or mental health or to jeopardise [his/her] professional future"*.

Instruction to discriminate is not covered as such by the Labour Code, the Civil Code or the Penal Code. However, incitement and instruction to discriminate correspond to the notion of complicity in Articles 121-6 and 121-7 PC and are covered by general principles of liability in civil law. In public service, the same principles apply.

The protection of plaintiffs and witnesses against victimisation is covered by Article L122-45 LC but covers only disciplinary action or dismissal by the employer (rather than any reprisal that he or she may effect).

The implementation of reasonable accommodation requirements in France is limited to disabled workers and provided by the Law of February 11, 2005 on disability.

Article 225-3 PC contains a list of admissible exceptions to the principle of non-discrimination set out in Articles 225-1 and 225-2 PC: in relation to health, operations related to life, invalidity and incapacity insurance (paragraph 1); refusal to hire related

to health or disability when this results from a certificate of incapacity delivered by the employment medicine(paragraph 2); and discrimination on the basis of gender when gender constitutes a determining factor of employment (paragraph 3). The list of these latter professions is fixed by decree in Article R123-1 LC. It limits exceptions to the following: actor, fashion model and artistic model. In transposing Directive 2000/78 by adopting the Law of 16 November 2001, the legislator did not foresee any exception to the principle of non-discrimination on the basis of faith or opinions, and since the new texts the courts have not adjudicated on this issue.

Differences in treatment on the basis of age are not discriminatory when they are reasonably and objectively justified by a legitimate objective, such as objectives of employment policy, and when the means to attain these objectives are appropriate and necessary, such as the protection of young and old workers, age requirements based on experience or the expectation of a reasonable period of employment before retirement.

There is no legal rule addressing multiple grounds of discrimination. Claimants can claim to be cumulatively discriminated for a number of grounds, but there is no method developed for each case in order to apprehend the specificity of multiple ground claims. It essentially impacts on evidence strategy, fact to be put in evidence. There is still little research on intersectional discrimination and multiple grounds of discrimination in France and it does not yet allow for the development of an approach susceptible of being transposed in a legal approach.

4. Material scope

The law covers all grounds prohibited by Article 13 EC and a number of other grounds: origin, appearance of origin, race, sex, family situation, physical appearance, last name, health, disability, genetic characteristics, mores, sexual orientation, age, union activities, religion, political and religious convictions (which are interpreted broadly to encompass all philosophical or mystical endeavours).

The general protection against discrimination covers all individuals, from the public and private sector, and the principle of equality is applicable to non-nationals unless the legislator can justify a difference in treatment on the basis of conditions of public interest. However, the law makes the access to certain rights, such as the right to work and some social benefits, conditional on the individual having the status of legal foreign resident. In addition, the law creates some legal discrimination in access to specific professions and jobs (about 7,000 named jobs), subjecting them to conditions of citizenship, either French or from the European Union.

The scope of the law of February 11, 2005 on disability provides a definition of disability that is broader then that of the ECJ in *case C-13/05, Chacón Navas*, in that it is not limited to access to professional life and encompasses limitation in all areas of life.

5. Enforcing the law

In France, since the law is transversal for all grounds of discrimination, cases are referred to as precedents whether or not they discuss issues related to the same grounds of discrimination. There are very few cases for each ground. They all benefit from the shift in the burden of proof but remain difficult to enforce. It is not in the legal culture of judicial actors, judges and lawyers, to use procedural means of access to evidence, as the civil case is perceived as a non investigative forum and the judge is

not taking part in the process leading to the presentation of evidence before the court.

General principles of evidence in criminal cases allow proof to be made by all means and consider means of evidence to be unlimited. Therefore admissible means of evidence should include the use of statistics. Article 8 II paragraph 5 of the Law 78-17 of January 6, 1978 relating to information systems, data and the protection of freedom states that personal data can be used in the context of any administrative and judicial proceeding pursuant to the defence or the exercise of a legal right. Statistics resulting from comparing the situation of employees of a common employer are now commonly used in labour law on the basis of the comparative approach developed by the ECJ in discrimination cases, and repeatedly recognized by the Cour de cassation. Statistics resulting from research reports are not yet commonly used in civil and administrative procedures, but are taken in consideration by the Halde (Equality Body).

Situation testing has been held admissible as evidence of discrimination in criminal courts by the jurisprudence of the Court of Cassation, on the basis of the principle of complete freedom of evidence in criminal cases, and this principle has been introduced to the Penal Code at article 225-3-1 PC by the law of March 9, 2006. The Ministry of Justice issued a ministerial instruction CRIM 2006-16 E8/26-06-2006 to public prosecutors and the President of each Court in order to present the conditions of enforcement of the situation testing principle introduced in the Penal Code. It explains that evidence of discrimination is admissible even when it results from action perpetrated by the victim with the intention of provoking the differential treatment and with the intention to collect evidence of discriminatory behaviour. The intention of the victim has no bearing on the offence if the discriminator intentionally committed the discriminatory act. However, it cannot be used in the context of a fictitious offer or with persons acting under a false identity pursuing a false scenario. The victim has to act under his or her identity, be a truly unequally treated person. If the refusal was given to a false reality, the Ministry holds there is no offence and the situation cannot lead to condemnation.

It has not yet been used as evidence in civil cases. However, considering the inadmissibility of evidence obtained illegally in civil cases and the strict requirements of fairness enforced in civil procedure, it is doubtful that situation testing would be held admissible on the basis of general rules of evidence. Developed by anti-racist NGOs; it is mostly used by them, but as well, by individual plaintiffs. It has been used in racial and disability discrimination cases to establish refusal of access to goods and services. Some associations have recently used it in age discrimination cases in access to employment.

All recourses alleging discrimination against a private party – employer, service provider, landlord etc. – must be brought before the civil courts. The salaried employee (in the private sector or contractual agent of an industrial or commercial public service) must bring his or her claim before the Labour Court. All other cases will be brought before the District Court (tribunal d'instance – TI) or Regional Court (tribunal de grande instance – TGI) depending on the amounts involved or claimed.

The Law of 16 November 2001 provides the possibility for representative trade unions and NGOs which have been in existence for over five years to take part in the action.

Article 31 of the New Code of Civil procedure recognises the legal status before the civil courts of any person who has a legitimate interest in the dismissal or granting of the action. In case of discrimination in housing, the Law of 17 January 2002 extends the right of action of NGOs to collective and individual recourse. Article 2-1 of the Code of penal procedure further foresees the possibility for NGOs which work to combat discrimination on the grounds of ethnic origin, race and religion to constitute themselves as a civil party in penal actions pursuant to a violation of Article 225-2 PC. Discrimination cases receive a lot of coverage by the Media

The general principle in French civil law is to remedy the prejudice by the award of compensatory pecuniary damages, indemnifying the financial and moral damage, without further pecuniary sanction or punitive damages. In cases of discrimination at work, Article L122-45 LC provides for the possibility of also requesting the annulment of the discriminatory measure concerned, resulting for example in the reintegration of the employee in case of dismissal or in judicial reconstitution of his or her career if discrimination occurred during the development of his or her career. In penal matters, the Law on the Adaptation of Justice to Developments in Criminality increases sanctions incurred in relation to the offence of discrimination and makes provision for aggravating factors in relation to the discriminatory refusal to sell an item or to provide access to a public place (discos, shops, public services etc.). The Penal Code allows additional sanctions in Article 225-19 PC, such as posting or publication of the judgement, closing down of a public place etc. Before the civil courts, damages correspond to national norms in terms of indemnity. Penal sanctions however remain symbolic most of the time.

In order to remedy the lack of significant criminal response to common discriminatory offence, the law on Equal opportunities reinforces the powers of the High Authority against discrimination and for Equality (HALDE). By virtue of Articles 11-1, 11-2 and 11-3 of Law 2004-1486, as amended by Law 2006-396 on Equal Opportunities and Article D.1-1 of the Criminal Procedure Code as amended by Decree 2006-641 of 1 June 2006, a new power was conferred upon the HALDE, that of proposing a so-called "*transaction pénale*" - a kind of negotiated criminal sanction - to perpetrators of direct discrimination. This entails the HALDE, following an investigation of a complaint resulting in a finding of direct intentional discrimination by the person or entity investigated, proposing a specific criminal sanction to the perpetrator which he can either accept or reject. This could be a fine - a fine amounting to 3000€ to physical persons and 15 000€ to moral persons - 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.

6. Equality bodies

The HALDE has been operational since June 2005. It has the competence over all forms of discrimination, direct and indirect, prohibited by the laws of France. It is therefore readily adaptable to any future legal developments.

The High Authority has competence to investigate individual and collective complaints, whether the investigation is initiated of its own accord or following a written request from the claimant, NGOs, trade unions or Members of Parliament. Its investigative powers allow it to request explanations from any public or private person, including the communication of documents and the hearing of relevant

witnesses. In the event of non-cooperation with the investigation services, the law provides that the High Authority be in a position to request a court order. It may also ask that all necessary investigations be carried out by any service of the state and may undertake visits to all non-private premises after due notice and with the consent of the owner.

In the case of a criminal offence, the High Authority transmits the claim to the penal courts or proposes a *transaction pénale- see section 5)*. Alternatively, it may offer mediation to the parties or complete the investigation, in which case it will issue its conclusions and recommendations to the parties who will have a certain amount of time to comply. In case of non-compliance, the High Authority has the power to call public attention to its recommendations and may alert the relevant authorities in cases that require disciplinary sanctions against the respondent.

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

The evolution in judicial practice will benefit from the many actions of training aiming at judicial actors (both judges and lawyers) initiated by the HALDE since 2005 and from the HALDE's observation before the Courts after proper investigation. Between June 2005 and March 2007, the HALDE has received over 7000 complaints based on all grounds and area of discrimination, solved 3256 complaints and its Commission has rendered 577 recommendations.

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