



## Executive Summary

### Country Report France 2008 on measures to combat discrimination

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#### 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 and the Ministry of Immigration. 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 and traveller 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, integrated the fight against discrimination as an objective in collective bargaining, branch (sub-sections of the labour force) negotiations and national negotiations. It has been completed by Law no 2008-496 of May 27, 2008 relating to the adaptation of National Law to Community Law in Matters of Discrimination adopted on May 15, 2008.

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 the criteria of “origin” for policy and administrative purposes (confirmed by the Constitutional Council<sup>1</sup>). Even if there is no constitutional text expressly prohibiting discrimination on the basis of age, disability, health or sexual orientation, according to the Constitutional Council the list of prohibited grounds of discrimination in the Constitution is an open one.

In French law, rules are judged to meet the requirement of equality if they are the same for all. 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 propose a number of actions targeting a concentrated population of immigrant origin. Over the years, the public service has developed a number of awareness-raising programmes.

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<sup>1</sup> no 2007-557 DC, November 15, 2007

Most NGOs, whether anti-racist or promoting the rights of the disabled persons, 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 and pursuing a political shift toward the promotion of diversity. Further to his election, the President of the Republic has given mandate to Simon Weil to hold a consultation on the amendment of the Constitution to include the concept of diversity and make recommendations in order to make positive action possible. Her report, dated December 17, 2008, concluded that the Constitution did not require any evolution and favoured positive action based on indirect territorial and socio economic criteria. On 18 December 2008, the President of the Republic nominated Yasid Sabeg as the High Commissioner on diversity. Mr Sabeg is holding a wide consultation, as is the practice in France for the elaboration of integration and anti-discrimination policies, in order to submit a report in June 2009 and the measures to be taken in order to insure the promotion of diversity on the ground of origin.

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

The Roma population in France is divided among French citizens, who represent 2/3<sup>rd</sup> of this population, and migrants from Romania and Bulgaria. Their difficulties and relations with the public service are very different.

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 than 25 years of age, 40% is less than 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 Social Affairs.

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. Roma travellers are melted in the general travelling population, but constitute 80% of this administrative category. 1/3<sup>rd</sup> of the population is sedentary, 1/3<sup>rd</sup> travels part of the year and 1/3<sup>rd</sup> are travellers. 50% of the travelling children attend primary school, but only 30 % to 40 % of the time and less than 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, re-imposed on all departments the adoption of accommodation schemes for travellers, renewing requirements introduced into the law since 1990.

After many extensions, in 2005 there were 93 departmental schemes adopted but only 8000 parking areas where the authorities recognise that 40 000 are needed (NGOs consider that 60 000 are needed). The scheme aims at stabilising residence and favours 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. In 2007, the Ministry of Housing has opened financing to encourage municipalities to invest in these parking areas, with the objective of attaining 75% of the required parking space.

## 2. Main legislation

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

Directive 2000/43 was first transposed by Law no. 1006-2001 of 16 November 2001 (hereafter Law of 16 November 2001), the Law on Social Modernisation no. 2002-73 of 17 January 2002 (hereafter Law of 17 January 2002) 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 legislation, 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 have always been transversal, providing a uniform legal regime, 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 was covered by separate legislation which required reiterated acts and remained to be formally included in the definition of discrimination Art. L1151-1 et seq. LC.

On May 15, 2008 Parliament adopted Law no 2008-496 correcting transposition of the directives. It provides at article 1 for a definition of discrimination as covering direct and indirect discrimination and harassment, as well as instructions to discriminate, and defines all these concepts. The definition of direct discrimination does not allow for hypothetical comparison analysis, but the definition of harassment eliminates the previous requirement of moral harassment to establish repetitive behaviour. One single occurrence is sufficient to meet the new requirements of the law. The Law of May 15, 2008 also completes the protection against victimisations, covers non salaried and independent workers, but creates a possibility for employers to invoke occupational requirements on all grounds provided it pursues legitimate objectives and is proportionate.

However, this legislative evolution has brought about the suppression of national origin in the list of prohibited grounds covered, except in the Labour Code and the Penal Code. The Constitutional Council has explicitly endorsed the refusal by French doctrine to recognize the concepts of ethnic origin or race<sup>2</sup>, both as legal categories, as administrative categories, as research categories and as concepts on the basis of which differential treatment could be evaluated. It further requires that any approach of origin be based on objective indications such as nationality of the parents and grand parents in order to objectivise the construction of comparative categories. In this context, this legal evolution jeopardizes the effectiveness of the legal protection against discrimination in terms of the access to evidence and availability of comparative indicators in both matters of direct and indirect discrimination.

As regards the protection afforded to public agents, the Law no 83-634, 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 as civil servants. Ordinance no 58-1270 of December 22, 1958 regulates the rules applicable to both prosecution and state magistrates and judges on the bench. Public agents working within Parliament are as well not subject to the Law no 83-634 and are also governed by application of article 3 of the law by separate in-house rules of Parliament. Finally, all contractual public agents which hold on of the various status that are excluded from the application of the Law no 84-16 of 11 November 1984 on the status of contractual agents at article 3 paragraph 5, are also excluded from all protections against discrimination of public agents provided by the Law no 83-634. All these texts have not been amended to implement directive 2000/78 and do not foresee any protection against discrimination on any grounds, and it is important to note that all public agents that are not covered by transposition do not benefit from the right to reasonable accommodation in case of disability..

The Law no 2005-102 of February 11, 2005, reviews the entire scheme relating to public support and legal protection of the disabled person and completes transposition of Directive 2000-78 by providing a right to reasonable accommodation in the work place as well as positive action programmes imposing employment quotas for both the public and private sectors. Even after adoption of the Law no 2008-496 completing transposition, reasonable accommodation obligations still benefit only to employees who have obtained official recognition, have a status of disabled workers, to those who have suffered from an employment accident procuring a disability superior to 10% and who benefit from compensation in relation thereto, to beneficiaries of disability pensions and to disabled veterans. Therefore, non registered disabled people, non salaried disabled workers and disabled persons who are members of the professions are still not covered by the obligation of reasonable accommodation.

The obligation of reasonable accommodation has not been extended to non salaried and independent workers by the Law no 2008-496.

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.

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<sup>2</sup> Conseil Constitutionnel, 15 November 2007 no 2007-557 DC

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. The new Law no 2008-496 however, creates, at article 6 par 4, a possibility for employers to justify unequal treatment by legitimate objectives of insertion and protection.

Recourses in discrimination before the civil courts created by explicit statute (Law of November 16, 2001, Law of January 17, 2002, and Law no 2008-496) all benefit from the shift in the burden of proof (see section 6.3). However, the new law creates a regression by limiting defendant's burden to establish that his decision is objective and non discriminatory, without imposing any condition of proportionality and necessity.

The judicial tradition is to go before the 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 codified texts prohibiting discrimination in national legislation state a list of prohibited grounds without defining them. Since the law prohibits taking the concept of origin or race into consideration, they are not defined and no application of the exception provided in Directive 2000/43 was enacted into French law.

The wording of the prohibition to discriminate in the Penal Code, the Labour Code and the Civil Code includes the concept of assumed characteristics on the grounds of origin, race and religion. The systematic reference to physical appearance, national origin and last name in the list of prohibited grounds of discrimination is also a way to cover assumed characteristics. Although discrimination by association is not expressly covered, except in case of explicit protection provided by law (ex: caring parents of disabled children), there is one judgment extending the legal protection to associated persons<sup>3</sup>.

In the Law no 2005-102 of February 11, 2005 on Disability the definition of the prohibition to discriminate in employment on the basis of disability is based on the employer's perception of the condition of the employee. It can thus be considered to include assumed characteristics as well.

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".

The concepts of direct and indirect discrimination are defined in Law no 2008-496 article 1. Whereas the definition of indirect discrimination conforms to the directives, that of direct discrimination does not.

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<sup>3</sup> Enault vs. SAS ED, Conseil de Prud'hommes de CAEN, 11/25/2008,F06/00120



It excludes the possibility to proceed by way of hypothetical analysis: the expression “would have been” has been replaced by “will have been”. In addition, the law extends the definition of discrimination to a correct definition of harassment, which eliminates the previous requirement for repeated, and instruction to discriminate. In addition, incitement and instruction to discriminate correspond to the notion of complicity in Articles 121-6 and 121-7 PC and are covered by general principles of liability in civil law.

The protection of plaintiffs and witnesses against victimisation is covered by Article 3 of the Law no 2008-496.

The new law also revises provisions relating to genuine occupational requirements. Where there was no possible exception, the law created at article 2 par. 3 and article 6 par 3, a general possibility to justify genuine occupational requirements “as long as it is legitimate and proportionate”.

Differences in treatment on the basis of age have been extended by Law no 2008-496, and are not discriminatory when they are reasonably and objectively justified by a legitimate objective, such as professional insertion, health, safety, maintaining employment etc...

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

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 systematic method developed to apprehend the specificity of multiple ground claims. It essentially impacts on evidence strategy, facts 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, national origin- in some legislation- appearance of origin, race, sex, pregnancy, family situation, physical appearance, last name, health, disability, genetic characteristics, mores, sexual orientation, age, union activities, and religion, political and religious convictions (which are interpreted broadly to encompass all philosophical or mystical endeavours). After the transposition of 2001, there was a uniform transversal legal regime covering all grounds and areas of discrimination. Since the Law of 27 May 2008, the regime is variable according to protected grounds and areas of discrimination. There is an extended material scope covering social protection, social advantages, education, access to health services, and goods and services that applies only to ethnic origin and race. Protection of access to professional organisations and of non salaried and independent workers apply only to article 13 EC grounds (Law no 2008-496 article 2). The Labour Code and the Penal Code cover national origin and there are still no provisions for reasonable accommodation of non salaried and independent workers.

The general protection against discrimination covers all individuals, from the public and private sector, and is enforceable against both private and public persons. The principle of equality is applicable to non-nationals unless the legislator can justify a difference in treatment on the basis of conditions of public interest.

However, the law makes access to certain rights, such as the right to work and some social benefits, conditional on the individual having the status of legal foreign resident. 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, from bilateral partner Countries, such as some African countries, or from the European Union.

The scope of the Law no 2005-102 of February 11, 2005 on Disability provides a definition of disability that is broader than that of the ECJ 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.

## 5. Enforcing the law

In France, since the law is transversal for a great part of its protection, cases are referred to as precedents whether or not they discuss issues related to the same ground of discrimination. 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 the comparative 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 Cour de 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<sup>4</sup> 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.

<sup>4</sup> CRIM 2006-16 E8/26-06-2006

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 that there is no offence and the situation cannot lead to prosecution and 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 L1134-4 LC provided for the possibility of also requesting the annulment of the discriminatory measure concerned, resulting for example in the reintegration of the employee in case of dismissal or in judicial reconstitution of his or her career if discrimination occurred during the development of his or her career. This provision has been amended by the Law no 2008-561 of June 17, 2008, to limit plaintiff’s rights to compensation in damages.

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 reinforced the powers of the High Authority against discrimination and for Equality (HALDE) in 2006.

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 Code of Criminal Procedure 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 - 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*). 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 submit its observations before any jurisdiction. To date, Halde’s observations before the courts have been received favourably in 84% of the cases, for 85 cases argued and 79 cases pending.

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 observations before the Courts after proper investigation. Between June 2005 and December 2008, the HALDE has received over 20 000 complaints based on all grounds and area of discrimination, solved 14000 complaints and its Commission has rendered 1600 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.