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including summary

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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 2021 – 31 December 2021

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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. As a result, the 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), on the other. 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 issue has not been decided on by the Conseil d'État or the Constitutional Council.

The Constitutional Council has not yet explicitly protected sexual orientation as a ground of prohibited discrimination covered by the Constitution; rather, it has held that the scope of its protection is, according to the competence of Parliament, under its sovereign prerogative to define the protection of equal treatment.[3]

In 2020, the Observatory of Secularism estimated that the practising Muslim community in France represents 3 % of the population.[4] People born outside Europe represent 10 % of the population or 8.4 million people,[5] and people with at least one parent of foreign descent represent 11.2 % of the population.[6]

Around 95 % of Roma in France are French citizens, designated in the law as Travellers,[7] who represent approximately 700 000 people. Foreign Roma are mostly migrants from Romania and Bulgaria and are estimated to number 20 000, a figure that has been stable since 2005.[8] 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 French Roma and non-Roma) had a specific legal and administrative status. This

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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 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 Constitutional Council QPC No. 2010-39, 6 October 2010, available at: https://www.conseil-constitutionnel.fr/decision/2010/201039QPC.htm.

4 Observatory of Secularism (2020), *Chiffres-clefs*, (Key numbers) February 2021, available at: https://www.gouvernement.fr/rapport-des-francais-a-la-religion-et-aux-convictions-chiffres-cles.

5 National Institute of Statistics (INSEE) (2020), 'Insee première No. 1829', 9 December 2020, available at: https://www.insee.fr/fr/statistiques/4991700.

6 Carcillo, S., Valfort, A-M (2018), Les discriminations au travail, Presses de Sciences Po.

7 In France, the Law and administrative categories do not refer to the term Roma but names French Roma as Travellers (*gens du voyage*).

8 National Human Rights Consultative Commission, ROMS online updated data, available at: https://www.cncdh.fr/fr/dossiers-thematiques/roms.

derogatory status was declared unconstitutional by the Constitutional Council in 2012,[9] and was finally abrogated by the Law of 27 January 2017 on equality and citizenship.[10]

French Travellers live both in public housing and on privately and publicly owned land. The reluctance of the authorities to create dedicated parking sites for the Traveller community as provided for by the Besson Law[11] persists in some areas: 74.1% of the parking areas provided for by the law and half of the parking areas necessary to accommodate groups that ritually reunite for large events every year, have been established.[12]

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 targets precarious migrants as well.

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. Directives 2000/43/EC and 2000/78/EC were 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.[13]

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 (which is not defined in the law and can relate to civil status and parental responsibilities) 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 the General Code of Public Service[14] are not covered by the protections against discrimination and the

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

10 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.

11 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) available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033934948&categorieLien=id.

12 Directorate of Housing (2019) *La mise en œuvre des schémas départementaux d'accueil des gens du voyage, bilan au 31 décembre 2018* (The Implementation of parking areas for Travellers, audit at 31 December 2018), available at: https://www.gouvernement.fr/sites/default/files/contenu/piece-jointe/2020/02/dhup_bilan_mise_en_oeuvre_des_sdahgv_12_2018.pdf; Defender of Rights (2021) '*Gens du voyage': lever les entraves aux droits* ('Travellers': Overcoming barriers to access to rights), November 2021, available at: https://defenseurdesdroits.fr/sites/default/files/atoms/files/rap-gensvoy-num-04.10.21.pdf.

13 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.

14 General Code of Public Service, Article L6, available at: https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000044416551/LEGISCTA000044420579/2022-03-01/#LEGISCTA000044428009; https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000504704.

transposition of the directives provided by Article L131-1 of the General Code of Public Service. 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.[15] Since then, the Conseil d'État has repeatedly decided that all public agents, including agents of Parliament and magistrates, are covered by the law of 27 May 2008 stating the general regime of protection against discrimination in employment and access to goods and private and public services.[16]

In terms of public policy, the approach to the protection of persons with disabilities was renewed with the adoption of the Law of 11 February 2005 on equal opportunities and the integration of persons with disabilities which focuses on integration in all areas of life.[17] 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. 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.[18]

3. Main principles and definitions

The law does not define prohibited grounds of discrimination.

No application of the exceptions 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 Code[19] 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.[20] 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.

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[15] Council of State, No. 298348, 30 October 2009, available at: https://www.conseil-etat.fr/ressources/decisions-contentieuses/les-grandes-decisions-du-conseil-d-etat/conseil-d-etat-assemblee-30-octobre-2009-mme-perreux.

[16] Council of State, No. 393292, 27 July 2016; Council of State E, No. 40541825, October 2018.

[17] 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.

[18] 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.

[19] Penal Code (PC), Articles 121-6 and 121-7.

[20] Articles 2(3) and 8(3).

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 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.[21] Although discrimination by association is not expressly covered, except in case of explicit protection provided by law (e.g. parents caring for children with disabilities) there is jurisprudence extending the legal protection to associated persons in matters of discrimination related to trade union activities.[22] There is no legal rule expressly 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.[23]

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, without stating whether discrimination is direct or indirect. A person is covered by the protection 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. The Occupational health medicine is the authority that determines in concreto required reasonable accommodations for all employees. It can thus be considered to include assumed characteristics as well. It provides a definition of disability that complies with the CJEU in joined cases 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 often 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.

[21] Article 4.
[22] Caen Appeals Court, *Enault v. SAS ED*, 17 September 2010.
[23] 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.[24]

The admissibility of situation testing before criminal courts was introduced into the Penal Code in 2006,[25] and before the civil courts in 2017.[26] It has not yet been used as evidence in civil cases.

All complaints alleging discrimination against a private party (employer, service provider, landlord etc.) must be brought before the common civil regional courts (*tribunal judiciaire*). 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. Claims are subject to a statute of limitations of five years. Public agents (i.e. civil servants and non-statutory contractual public employees who are collectively called public agents in France) bring their claims before administrative courts.[27]

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.[28] 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 who has been dismissed. In cases involving dismissal, the Court of Cassation has developed an interpretation of the law providing for integral compensation until judgment without obligation of deducting any salaries otherwise gained by the employee during the period preceding the court decision.[29] 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 century[30] creates a legal framework allowing class action to put an end to a discriminatory behaviour (*action en cessation du manquement*) that can be brought before the regional court or the administrative court, and can be instituted exclusively by NGOs and trade unions. The first

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[24] Court of Cassation, social chamber, No. K 10-15873, *Airbus*, 15 December 2011.

[25] Article 225-3-1 PC.

[26] Article 42 of Law No. 2017- 86 of 27 January 2017 on Equality and Citizenship.

[27] 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; General Code of Public Service, Article L131-1 et seq., available at: https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000044416551/LEGISCTA000044420885/2022-03-01/#LEGISCTA000044427700.

[28] Code of Civil Procedure (*Code de procédure civile*), Article 31.

[29] Court of Cassation, social chamber, 2 February 2006, No. 03-47.481, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007049989&fastReqId=457446622&fastPos=1; Court of Cassation, social chamber, 25 November 2015, No. 14-20.527, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000031539577&fastReqId=2121562289&fastPos=1; Court of Cassation, social chamber, 9 July 2014, No. 13-16.434, 13-16.805 available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000029242137&fastReqId=1891561537&fastPos=1.

[30] 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 XXIe siècle*), Articles 62 to 88 available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033418805&categorieLien=id.

decision on the merits on the basis of this procedure was rendered on 15 December 2020[31] and considerably restricted the short-term impact of this evolution. The Paris Judiciary Court concluded that class actions are reserved to situations where the initiating behaviour and decisions had occurred after adoption of the law, i.e. after 18 November 2016.

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.

In 2018, the Government abrogated the decree establishing a positive action scheme to support employment of workers over 50 years of age.[32]

With regard to persons with disabilities, Law No. 2005-102 on Disability maintains the quota obligations for 6 % of employees with disabilities in the private and public sector, and sets out specific mechanisms for 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.[33] 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.[34]

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.[35] In December 2019, a similar reasoning was held by the Paris Labour Court in a case relating to the degrading working conditions of illegal migrant workers on constructions sites.[36]

6. Equality body

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 2011,[37] 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.

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[31] Judicial Tribunal of Paris, 15 December 2020, No. 18/04058, available at: https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2021/01/18-04058.pdf.

[32] 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.

[33] Ministerial Instruction 2012-143 of 2 October 2012, available at: https://www.gisti.org/spip.php?article2948.

[34] Court of Cassation, criminal chamber, No.17-81369, 23 January 2018, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036584795.

[35] Paris Court of Appeal, social chamber, No.15/11389, 31 January 2018.

[36] Labour Tribunal of Paris 17 December 2019, No. 17/10051, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=30907.

[37] 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.

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 also has a specific power to propose a settlement in cases of discrimination of a criminal nature covered by the Penal Code called '*la transaction pénale*' (penal transaction).

Its claims have increased by more than 40 % since the last full year of activity of the HALDE in 2010. Jacques Toubon was appointed Defender of Rights for six years in July 2014. He has set priorities in relation to the rights of migrants, communication strategy, ethics of the security forces and promotion of access to rights and research. He was replaced in July 2020 by Claire Hédon, a public radio journalist, who was previously president of the NGO ATD Quart Monde, dedicated to the fight against poverty.

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.[38] Although anti-discrimination law has been implemented by higher courts and has evolved since the creation of the national equality body in 2005, claimants still have to be ready to appeal to higher courts before obtaining a finding of discrimination.[39] 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.

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.[40]

In 2017, the post of Secretary of State for Persons with Disabilities, reporting to the Prime Minister, was created to mainstream all policies relating to disability. However, the minister struggles to sustain the advertised objective of improving accessibility of rights and services.

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[38] In Havelkova, B., Möschel, M., Anti-discrimination Law in Civil Law Jurisdictions, Oxford University Press, 2019, Hennette-Vauchez, S. and Fondimare, E., Incompatibility between the French Republican Model and Anti-discrimination law? Deconstructing a familiar trope of narratives of French Law, at pages 56 to 75.

[39] In 2016, the Defender of Rights co-financed three major studies on the effective enforcement of discrimination law: Gründler, T., Thouvenin, J-F, (2016) *La lutte contre le discriminations à l'épreuve de son efficacité* (The test of efficiency of the fight against discrimination), Université Paris Ouest Nanterre Le Défense, available at: http://www.gip-recherche-justice.fr/wp-content/uploads/2016/12/Rapport-discri.-Juin-2016-REVIS-def-8.11.pdf; 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.

[40] Hennette-Vauchez, S. and Fondimare, E. (2019), 'Incompatibility between the French Republican Model and Anti-discrimination law? Deconstructing a familiar trope of narratives of French Law' in Havelkova, B., Möschel, M. (Eds), *Anti-discrimination Law in Civil Law Jurisdictions*, Oxford University Press; pp. 56 to 75.

Since 2015 there has been a constant increase in incidents of hate speech, harassment and discrimination experienced by people of North African and Middle Eastern origin in the workplace and in access to goods and services.[41]

Meanwhile, the challenge to the right to express one's religious beliefs, particularly those of the Islamic faith, is constantly reiterated in French politics through various political stands, bills seeking to limit free expression of religion and policies to scrutinise radicalism.[42] In 2021, Parliament adopted Law No. 2021-1109 of 24 August 2021[43] relating to the respect of the principles of the Republic, which formally sets out the control by the State of respect for the principles of equality and secularism by public agents, on the one hand, and of the activities of NGOs and places of worship in order to combat radical Islamist actors, on the other.

In 2018 and 2019, the Secretary of State responsible for combating discrimination mainly focused on the promotion of equality between women and men.[44] Since the Defender of Rights' report of June 2020 on the current state of discrimination on the ground of origin in France,[45] signalling the gravity of the situation and the absence of public policy on discrimination on the ground of origin, the Government has manifested its intention to address the issue. A Ministry of Equality between Women and Men, Diversity and Equal Opportunities, was created to tackle discrimination on the ground of origin and social condition. The Minister carried out a wide consultation in 2021 and undertook to pilot a framework to allow employers to produce indicators of diversity called the Diversity Index.[46]

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41 Defender of Rights, Annual reports 2015, 2016, 2017, 2018, 2019 available at: https://www.defenseurdesdroits.fr/fr/publications?tid=7; 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, antisemitism and xenophobia), available at: https://www.cncdh.fr/fr/publications/rapport-2018-sur-la-lutte-contre-le-racisme-lantisemitisme-et-la-xenophobie.

42 Clavreul, G. (2008), *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, February 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) (2019), *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; Law No. 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, No. 402742, 402777, available at: http://caen.tribunaladministratif.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; Ministry of Education (2019) 'Vademecum Laicité à l'école' (Secularity in school handbook), September 2019, available at: https://eduscol.education.fr/cid126696/la-laicite-a-l-ecole.html: Bill consolidating Republican principles, submitted to Parliament on 9 December 2020, available at: 3649 - Valeurs de la République-découpé_pastillé-publication.

43 Law No. 2021-1109 of 24 August 2021, available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043964778.

44 See Agenda of the Secretary of State: https://www.egalite-femmes-hommes.gouv.fr/dossiers/.

45 Defender of Rights (2020), *Discriminations et origins: l'Urgence d'agir* (Discrimination and origins: the urgent need for action), June 2020, available in English at: https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/rap-origine-en-num-22.09.20.pdf.

46 Ministry of Labour, Employment and Inclusion (2022), *Expérimentation de l'Index Diversité: retour d'expérience* (Diversity Index pilot - feedback) 21 February 2022, available at: https://travail-emploi.gouv.fr/actualites/presse/communiques-de-presse/article/experimentation-de-l-index-diversite-et-inclusion-dans-le-monde-professionnel.

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.[47]

Public servants who take into consideration a criterion based on a prohibited ground of discrimination, such as religion or ethnic origin, can be sanctioned by their employer through the application of Article 131-12 of the General Code of Public Service, and prosecuted before criminal courts where, as public servants, they may receive aggravated sanctions for violating the criminal prohibition of discrimination at Articles 225-1 and 432-7 of the Penal Code.

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. However, the Law of 27 May 2008 also applies to public agents, social protection, access to education and public service.

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', 'race' or religion 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.

[47] 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.

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.

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 movement permit for Travellers should be repealed. Article 195 of Law No. 2017-86 of 27 January 2017 on equality and citizenship, which was adopted on 23 November 2016,[48] 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.

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).[49]

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. It amended the Labour Code and Law 83-634 of 13 July 1983 on the rights of public agents, and was codified in 2021 as the General Code of Public Service.[50]

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.[51]

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;
- protection for Article 19(1) TFEU grounds extends to all areas relating to employment provided in the directive, and beyond – housing law, social protection, health, social advantages, education, access to and supply of goods and services;

[48] Law No. 2017-86 of 27 January 2017 on equality and citizenship, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033934948&dateTexte=&categorieLien=id.

[49] Conseil d'Etat, 20 June 2016, No. 383333, regarding Article 5 of the CRPD.

[50] 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, gender identity and place of residence.

[51] 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 Law No. 1006-2001.

- protection on grounds beyond Article 19(1) TFEU grounds;
- protection of private and public employees as well as 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.[52]

[52] 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 Constitution of France 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'.[53]

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

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

In 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.[56]

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'.[57]

The material scope of the constitutional protection is broader than that 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 constitutional principle protecting equal treatment on the ground of age or sexual orientation, but has recognised the constitutional

[53] Declaration of the Rights of Man and of the Citizen of 26 August 1789 (*Déclaration des droits de l'homme et du citoyen de 1798*), 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'.

[54] Preamble to 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'.

[55] 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.'

[56] 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.

[57] 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'.

protection of the principle of equality in relation to disability.[58] These provisions are directly applicable.

The provisions of the Constitution can only be invoked by a private party as a means of defence in litigation against a private party or the State, by claiming that the legislation is unconstitutional, by way of a specific procedure called an 'Exception of unconstitutionality' (*Question prioritaire de constitutionalité – QPC*), requesting a referral to the Constitutional Council.

[58] 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.

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The grounds of discrimination explicitly prohibited in the main legislation transposing and implementing the two EU anti-discrimination directives (as listed in the Introduction above) are:

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

As expressly discussed in Parliament, the formulation of 'real or supposed ethnic origin, nation, race' is meant to emphasise the non-acceptance of the notions of race and ethnic groups.[59]

The ground of 'loss of autonomy' was created in 2015.[60] 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 French 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 persons with disabilities 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 persons with disabilities. 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,[61] in order to settle the debate on the relevance of the term 'sexual identity' and of its definition. There have not yet been any discrimination law cases invoking this ground. However, in its decision relating to the legality of the law adding this ground, the Constitutional Council decided that the term 'gender identity' targets the concept of gender in its largest definition, capturing a person's identity, whether or not it conforms to his or her legal identity or to various expressions of one's relation to the male or female sex.[62] According to parliamentary debates and preparatory commissions, the term 'gender identity' are meant to transcend any definition of gender and to cover unequal treatment and harassment related to transgender people as well as all other gender issues, whether cultural, psychological or physical, and whatever the characteristics of the person – whether they

[59] Parliamentary debates before the Senate on 9 January 2001 relating to amendment No. 15, available at: http://www.senat.fr/seances/s200101/s20010109/sc20010109007.html.

[60] 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.

[61] 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 XXIe siècle*), Articles 62 to 88 available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033418805&categorieLien=id.

[62] Constitutional Council, No. 2016- 745, 26 January 2017, available at: https://www.conseil-constitutionnel.fr/decision/2017/2016745DC.htm: 'le législateur a entendu viser le genre auquel s'identifie une personne, qu'il corresponde ou non au sexe indiqué sur les registres de l'état-civil ou aux différentes expressions de l'appartenance au sexe masculin ou au sexe féminin'.

be non-binary, heterosexual, gay or transgender.[63] In addition, in France, intersex discrimination is addressed through this category.[64]

The ground of 'economic vulnerability', created by Law No. 2016-832 of 24 June 2016 to fight discrimination relating to social precariousness,[65] 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 regional languages and to people of foreign origin who have an accent when speaking French.[66]

The list of prohibited grounds contained in the Labour Code was extended once again by Article 86 of Law No. 2019-1461 of 27 December 2019 relating to local political engagement and public action,[67] which created a discrimination ground related to the holding of a local political office ('*de son exercice d'un mandat électif local'*).

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 concepts of 'race' and 'ethnic origin' or to define them. As explicitly discussed in Parliament, the formulation of 'real or supposed ethnic origin, nation, race' is meant to emphasise the non-acceptance of the notions of race and ethnic groups.[68]

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.[69] Ethnic origin is not interpreted either, as it is

[63] Fondemare, E., (2014) '*Le genre, un concept utile pour repenser le droit de la non-discrimination'* (Gender - a useful concept to revisit anti-discrimination law), *Revue des droits de l'homme*, 2014, no. 6, available at: https://journals.openedition.org/revdh/755.

[64] Defender of Rights, Opinion 17-04 of 20 February 2017 relating to the respect of the rights of intersex persons, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=21115&opac_view=-1; Defender of Rights, Reform recommendation No. 10, available at: https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=19955.

[65] 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.

[66] Mehrez, F. (2017), '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.

[67] Law No. 2019-1461 of 27 December 2019 relating to local political engagement and public action (Loi n° 2019-1461 du 27 décembre 2019 relative à l'engagement dans la vie locale et à la proximité de l'action publique), available at: https://www.legifrance.gouv.fr/eli/loi/2019/12/27/TERX1917292L/jo/texte.

[68] Parliamentary debates before the Senate on 9 January 2001 relating to amendment No. 15, available at: http://www.senat.fr/seances/s200101/s20010109/sc20010109007.html.

[69] Dhume, F., Cohen, V. (2018) 'Mentioning Racism, Silencing race and Listening to the Nation' (*Dire le racisme, taire la race, faire parler la nation*), in *Mots. Les langages du politique* 2018/1 (No. 116), pp. 55 to 72, available at: https://www.cairn.info/revue-mots-2018-1-page-55.htm#; Lochak, D. (1992) 'Race: A

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.[70]

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.[71]

b) Religion or belief

No definition in the law.

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.[72] 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'.[73] Freedom of religion is considered to be an aspect of freedom of opinion.

Law No. 2021-1109 of 24 August 2021[74] relating to the respect of the principles of the Republic formally states the general principle of respect for the principles of equality and secularity of the public service at Article 1 and expressly establishes the duty of all private operators mandated by law to implement a public service to respect such principles of equality and secularity. Article 3 of the law provides for the training of all public agents in the principle of secularity and the designation in all public services of a dedicated officer responsible for managing all difficulties arising in relation to the application of the principle of secularity. His or her function will be further defined by a decree to be adopted by the Conseil d'État. Article 12 provides that all NGO applying for public subsidies must undertake formally a contract of Republican engagement to respect the principles of equality and not to challenge the secularity of the Republic. In the event of a violation of this contract, subsidies will be annulled and its status of public interest, which allows for tax exemptions, will be interrupted for at least two years. Similarly, any sports organisation that violates the contract will be denied access to public facilities for the practice of sport (Article 63). Articles 68 ff. amend the Law of 1905 to control the financing of places of worship and to combat radical Islamist actors.

Legal Category?' (*La race : une catégorie juridique ?*) in *Mots. Les langages du politique*, pp. 291-303, available at: https://www.persee.fr/doc/mots_0243-6450_1992_num_33_1_1760.

70 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.

71 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.

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

73 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'.

74 Law no 2021-1109 of 24 August 2021, available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043964778.

The Decree of 4 June 2021[75] created an inter-ministerial committee of secularism to coordinate governmental policy under the supervision of the Prime Minister.

In 2017, in the *Bougnaoui* decision which was rendered further to the decision of the CJEU,[76] 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.[77]

The Conseil d'État issued its first decision on the beard as a religious symbol on 12 February 2020. The Conseil d'État recognized that staff in public hospitals, although protected against discrimination on the ground of religion, is subject to the obligation of religious neutrality imposed on public service workers. It concluded that an intern who refused to reduce his beard and had not denied to be of Muslim faith could not be sanctioned, on the ground that the beard, whatever its shape, was not a manifestation of one's religion in the context of the public service. It is important to note that such assessment was reached as, in the present situation, there was no evidence of other manifestations of his religious convictions.[78]

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.[79]

c) Disability

Law No. 2005-102 of 11 February 2005 on equal opportunities and the integration of persons with disabilities (hereafter the Law on Disability)[80] 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)[81]

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[75] France, Decree No.2021-716 of 4 June 2021 instituting an inter-ministerial Committee of secularism, available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043604820#:~:text=Dans%20les%20r%C3%A9sum%C3%A9s-,D%C3%A9cret%20n%C2%B0%202021%2D716%20du%204%20juin%202021%20instituant,comit%C3%A9%20interminist%C3%A9riel%20de%20la%20la%C3%AFcit%C3%A9&text=Publics%20concern%C3%A9s%20%3A%20administrations%20de%20l,de%20service%20public%2C%20tous%20publics.&text=L'Observatoire%20de%20la%20la%C3%AFcit%C3%A9%20est%20supprim%C3%A9.

[76] CJEU, 14 March 2017, C-188/15, *Asma Bougnaoui, ADDH v. Micropole SA*., EU:C:2017:204, 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.

[77] Court of Cassation, social chamber, 22 November 2017, No. 13-19855, *Asma Bougnaoui, ADDH v. Micropole SA*. https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/2484_22_38073.html.

[78] Conseil d'Etat, 12 February 2020, No. 418299, available at: https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-02-12/418299.

[79] 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.

[80] 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 itoyenneté des personnes handicapées*), available at: www/legifrance/gouv/fr/WAspad/UnTexteDeJorf?numjo=SANX0300217L.

[81] 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 'worker with disabilities' 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.'[82]

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 a person with disabilities. It can thus be considered that it includes assumed characteristics, that the discriminated person does not have to establish that she or he is a person with disabilities and that the action of the employer on the basis of the mere perception that a person has a disability is enough to trigger the protection against discrimination.

The definition 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 who are not recognised as such, or do not wish to be registered as a person with disabilities, may have difficulty in enforcing their right to reasonable accommodation with their employer. Nevertheless, the general protection against discrimination contained in Article L1132-1 (and following) LC, and Article 2(5) of Law No. 2008-496 of 27 May 2008, should be sufficient to ensure their protection and recognition by the courts.[83]

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.[84]

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.[85] 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'.

[82] 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.'

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

[84] 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.

[85] 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)[86] then in the Labour Code in 1986 (Law 86-76 of 17 January 1986[87] and Law 92-1446 of 31 December 1992).[88] 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, including smoking, behaviour covered by the right to privacy, etc. 'Sexual orientation' was not defined in the law. It is understood in common language to cover all sexualities such as bisexuality, heterosexuality and asexuality. The criminal chamber of the Court of Cassation has stated that homosexuality is a sexual orientation.[89] In a guide to combating discrimination related to sexual orientation and gender identity in employment, the French equality body, the Defender of Rights (Défenseur des droits), defined sexual orientation in the following terms:

> 'Sexual orientation refers to the sexual attraction and/or affection towards persons of the opposite sex (heterosexuality), of same sex (homosexuality) or either one or the other sex (bisexuality).'[90]

Sexual orientation has not been interpreted to cover discrimination towards transgender people.

2.1.2 Multiple discrimination

In France, multiple discrimination is not expressly prohibited by law.

However, the courts have admitted claims of multiple discrimination. They 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 the damages are compensatory: the law does not provide for the award damages for each incidence of discrimination or for punitive damages.

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

In a case brought before the Paris Administrative Court,[91] 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

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[86] 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=.

[87] 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=.

[88] 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.

[89] Court of Cassation, criminal chamber, 28 November 2017 No. 16-85637.

[90] Defender of Rights (2017) *L'orientation sexuelle fait référence à une attirance sexuelle et/ou affective envers des individus du sexe opposé (hétérosexualité), de même sexe (homosexualité) ou indifféremment pour l'un ou l'autre sexe (bisexualité): Défenseur des droits, Guide Agir contre les discriminations liées à l'orientation sexuelle et à l'identité de genre dans l'emploi*, May 2017, p. 10, available at: https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/guide-num-lgbt-06.05.19.pdf.

[91] Paris Administrative Court, *Saïd v. Greta*, 27 April 2009, No. 0905233.9.

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 emblematic *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.[92]

Studies indicate that the confusion between Arab and Muslim in the general public is such that Islam or North African origin become assumed characteristics that lead to large-scale multiple discrimination on the combined grounds of origin and religion that are reflected in the case law.[93] They also point to the combination of grounds of sex with origin and religion as regards women wearing the Islamic headscarf and women of African descent.[94]

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

In France, discrimination by assumption is explicitly prohibited on the grounds of belonging to an ethnic origin, a nation or a race, and is interpreted as being prohibited on all other grounds.

- 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 Articles L131-1 ff. of the General Code of Public Service that: 'discrimination exists in all distinctions between persons based on [followed by a list of grounds] … by reason of his or her belonging or not belonging, real or assumed, to an ethnic group a nation or a race …', [after which the list of grounds continues].

The law explicitly covers EU prohibited grounds and, in addition, the appearance of race, ethnic origin and religion, patronymic name, foreign language and banking domiciliation, 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

[92] Court of Cassation, social chamber, 3 November 2011 No. 10-20765, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000024764368.

[93] Defender of Rights (2018), 'Study on Access to Rights' (*Enquête sur l'accès aux droits*), published in its annual report of 2017; Defender of Rights (2018) *Survey on Discrimination in the legal profession*; Paris Court of Appeal, 05/12/2019, No. 17/10760.

[94] In one case relating to access to adult education by a student wearing the Islamic veil, the defendant argued that the petitioner's professional plans were not serious because she was pregnant, and therefore did not need the English classes she had registered for. The Court concluded that there was combined discrimination on the grounds of sex and religion; Administrative Tribunal of Paris, GRETA, 27 April 2009, No. 0905233/9.

that the discriminating party has taken into consideration characteristics related to prohibited grounds or assumptions related to prohibited grounds.[95]

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, as well as of sex, origin and religion.[96]

b) Discrimination by association

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

The 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, Article L131-1 of the General Code of Public Service, 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 based on *Coleman* v*. Attridge Law and Steve Law*, 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.[97]

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.

The law also protects persons who have caring responsibility for persons with disabilities. Article L3122-26 LC provides for a right to request an adjustment of working hours to the benefit of family members and carers of persons with disabilities and Article L1225-61 provides for an extension of parental leave after having a child with disabilities.

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,

[95] 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.

[96] Defender of Rights (2018), 'Study on Access to Rights' (*Enquête sur l'accès aux droits*), published in its *Annual Report of 2017*; Defender of Rights (2018) *Survey on Discrimination in the legal profession*.

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

Article 1 of Law No. 89-462 of 6 July 1989 on landlords and tenants[98] (known as the Mermaz Law), further to amendments introduced by the Law of 17 January 2002, and Article 6 of Law No. 83-634 of 13 July 1983 on the rights and obligations of civil servants, now Articles L131-1 and following of the General Code of Public Service).[99] These texts list the grounds and the prohibited discriminatory conduct.

Law No. 2008-496 of 27 May 2008 introduces in Article 1, paragraph 1, a definition of direct discrimination, which provides as follows:[100] '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.[101]

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'.[102]

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.'[103]

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[98] 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.

[99] General Code of the Public Service available at: https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000044416551/LEGISCTA000044420885/2022-03-01/#LEGISCTA000044427700.

[100] 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*.'

[101] 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&fastReqId=1975217984&fastPos=1.

[102] 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=LEGITEXT000006070719: '*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.*'

[103] 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*'.

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.[104]

The Court of Cassation decided that whatever the mandate of the police in 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.[105]

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 L131-1 of the General Code of Public Service). These texts list the grounds and the prohibited discriminatory behaviours.

Law No. 2008-496 of 27 May 2008 introduces at Article 1, paragraph 2, a definition of indirect discrimination, which provides as follows:[106] '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.

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[104] 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; *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'État, Plenary, No. 298348 30 October 2009, available at: https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000021219388.

[105] Court of Cassation, First Civil Chamber, 9 November 2019, No. 15-27876, available at: https://www.courdecassation.fr/communiques_4309/contr_identite_discriminatoires_09.11.16_35479.html.

[106] 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'.*

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 payment[107] 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.[108]

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.[109]

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.[110] 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.

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 freedom amended by Law No. 2018-493 of 23 June 2018 to conform to the General Data Protection Regulation 2016/679[111] 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 6(I) defines sensitive data, the collection of which is forbidden except as provided for in Article 6(II), referring to Article 9 of the EU General Data Protection Regulation. Sensitive data is any information that allows identification of a person relating to race, ethnic origin, philosophical and political opinions, religion, union activities, health, sexual activity or 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 (see Article 31(I), paragraph 2).

[107] Court of Cassation, social chamber, *M. Gabriel Aguera et al* v. *Société M2PCI et al.*, No. 03-40465, 16 February 2006.
[108] Court of Cassation, social chamber, *ESRF* v. *M. X.*, confirmed in another matter against ESRF on 17 April 2008 (Soc. 819 FS-P+B).
[109] 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.
[110] Conseil d'Etat, *Volot-Pfiser* v. *Ministry of Justice*, No. 347703, 11 July 2012.
[111] 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: https://www.cnil.fr/fr/la-loi-informatique-et-libertes#article6.

Articles 30, 31, 32 of the Law authorise the statistical treatment of personal data by the State and national government statistics institutes. Collection and handling activities are subject to consultation and authorisation by 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.[112]

In France, statistical evidence may be admitted before the courts in order to establish direct and indirect discrimination.[113]

Articles 6(II) and 31(I) of the CNIL Law and Article 9(2)(f) of GDPR provide 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 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. The law follows the general admissibility conditions of such evidence in court.

b) Practice

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

- 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)[114] 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.

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[112] 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.

[113] Court of Cassation, social chamber, 3 July 2012, No. 10-23013; Court of Cassation, social chamber, *Airbus*, No. K 10-15873, 15 December 2011.

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

However, such data can be collected in small-scale multi-criteria surveys and studies under the supervision of the national statistics agencies (based on a maximum representative sample of 5 000 selected people). The 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

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[115], and repeatedly recognised by the Court of Cassation in relation to anti-trade-union discrimination and other grounds of discrimination.[116]

In a decision of December 2019, the Paris Labour Tribunal admitted into evidence a sociological analysis of the management of the labour force in the construction industry to conclude that a system of employment and management organised around discriminatory practices had created an ethnic hierarchy of rights and functions on the construction site. The court found that the distribution of work on the ground of origin and imposing the most

[115] See for example, CJUE, 13 My 1986, Bilka- Kaufhaus Gmbh, no. C-170/84, CJUE, 17 October 1989, Danfoss, no. C-109/88, CJUE, 27 October 1992, Enderby, n. oC-127/92.

[116] Court of Cassation, social chamber, 3 July 2012, No. 10-23013; 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*.

difficult and degrading work on undocumented Malian workers, is at the core of the work organisation and abuse inflicted on the 25 Malian workers and constitutes systemic discrimination.[117] The court did not discuss whether discrimination was direct or not, but clearly concluded that the discriminatory practices were intentional.

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.[118]

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.[119] 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 a landmark decision of 14 June 2000,[120] the Court of Cassation decided that, in matters related to discrimination on the ground of trade union activities, the offence of discrimination may be established by comparative evidence and the judge has an obligation to investigate the situation of the employee comparative to that of others and to actively request the production of the necessary evidence by the defendant. Failure to undertake such a comparative analysis is the equivalent of refusing the claimant access to the enforcement of their rights to protection against discrimination.

The use of a quantitative analysis of the results of recruitment procedures excluding candidates on the grounds of origin and age was expressly recognised by the Court of Cassation and the courts of appeal of Paris, Toulouse and Poitiers as a valid approach to establishing a presumption of discrimination.[121]

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.[122]

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[117] Labour Tribunal of Paris 17 December 2019, No. 17/10051, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=30907; Decision 2019-108 of the Defender of Rights, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=29007&opac_view=-1.

[118] Conseil d'Etat, No.16-102017, 16 October 2017.

[119] Court of Cassation, social chamber, *Airbus*, No. K 10-15873, 15 December 2011.

[120] Court of Cassation, criminal chamber, CFDT Interco, No. 2792, 99-108, 14 June 2000.

[121] 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.

[122] Court of Cassation, Social Chamber, 15 December 2011, No. 10-15873, available at: https://www.legifrance.gouv.fr/juri/id/JURITEXT000024993730/.

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.[123]

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.

In France, harassment explicitly constitutes a form of discrimination.

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 employment situation; a legal regime related to sexual harassment; and a legal regime pursuant to the definition of discrimination in Article 1(1) of Law No. 2008-496 of 27 May 2008 that 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.'[124]

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.

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 and L1153-1 for

[123] 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.

[124] 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*.'

sexual harassment, Labour Code, and Article L133-1 et seq. of the General Code of Public Service).

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). It is applicable to both the private and public sectors and its definition covers acts perpetrated by superiors as well as by colleagues and volunteers.

In a decision of 2019, the Court of Cassation had to determine the extent of the obligation of the employer to intervene in a situation where volunteers in a de facto position of authority were harassing an employee.

The claimant was a woman employed by a tennis club in the context of a tutored social integration contract.[125] She was a victim of harassment at an event organised by the club where she was working in the kitchen with volunteers, in the presence of her tutor. The volunteers were only called to order after the event, when the claimant addressed a written complaint to her employer. The Court found that the employer had an obligation to take effective measures to protect their employees when it was in a situation to exert de facto authority over non-salaried persons who were responsible for the sexist harassing behaviour.[126] The Court specifically pointed out the lack of 'reaction' on the part of the tutor, which was the trigger for liability.

Article L1153-1 LC 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'.[127] The courts have decided that homosexual sexual advances are covered by the prohibition of sexual harassment.[128] They have held that this provision assimilates to sexual harassment all forms of sexual misconduct, including acts and statements of a sexual nature that are motivated by a person's sexual orientation or 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.

A picture of a chimpanzee on the door of a locker of an employee of African origin with racist remarks was held to be an isolated incident sufficient to establish a presumption of discriminatory harassment on the ground of origin.[129] In 2015, the Court of Cassation decided that the fact that an employee was subjected to a number of micro-aggressions

[125] This is an employment contract with specific tutoring in order to accompany the return to employment of persons in a very precarious situation.

[126] Court of Cassation, Social Chamber, 30 January 2019, No. 17-28905, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000038112097&fastReqId=1554383201&fastPos=1.

[127] 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*'.

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

[129] Rennes Court of Appeal, No.14-00134, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=13199&opac_view=-1.

creating a hostile environment could be sufficient to establish discriminatory harassment.[130]

The Court of Appeal of Orléans, the Administrative Tribunal of Dijon in 2017, and the Court of Appeal of Paris in 2019, 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, desecration of the Qur'an, or comments of a sexist or racist nature.[131]

b) Scope of liability for harassment

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

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.

In a decision of 17 March 2021, the Court of Cassation decided that in conformity with the employer's duty to intervene and take necessary measures to put an end to situations of harassment,[132] in a context where a team leader was accused by his or her team members of bullying, if the protection of team members so required, the employer could trigger and carry out an investigation leading to the dismissal of the accused employee, without informing him or her of the in-house investigation prior to the dismissal procedure.[133]

Law No. 2021-1109 of 24 August 2021 relating to the respect of the principles of the Republic introduced Article 6 *quater* A in the Law of 13 July 1983 on the rights of public agents,[134] now Article L135-6 of the General Code of Public Service, and created an obligation on all public services to create a complaints mechanism to protect public agents (i.e. civil servants and non-statutory contractual public employees who are collectively called public agents in France) against discrimination, violence and harassment.

In practice, the employer shares the liability with the harassing employee(s). In order 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.[135]

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[130] Court of Cassation, social chamber, No. 14-11563, 22/09/2015, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000031230475&fastReqId=1132526842&fastPos=1.

[131] Orléans Court of Appeal, No.15-02566, 07/02/2017; Dijon Administrative Tribunal, No.1702533, 29/12/2017, Montpellier Labour Court, No.13/00529, 26/05/205; Paris Court of Appeal, No. 17/10760, 05/12/2019.

[132] Court of Cassation, social chamber, 17 February, 2021, No. 19-18149, available at: https://www.legifrance.gouv.fr/juri/id/JURITEXT000043200378?init=true&page=1&query=19-18.149&searchField=ALL&tab_selection=all.

[133] Court of Cassation, social chamber, 21 March 2021, No. 18-25597, available at: https://www.legifrance.gouv.fr/juri/id/JURITEXT000043302170?init=true&page=1&query=18-25597&searchField=ALL&tab_selection=all.

[134] Law of 13 July 1983, Article 6*quater* A, available at: https://www.legifrance.gouv.fr/loda/article_lc/LEGIARTI000043982125, now Article L135-6 of the General Code of Public Service available at: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000044427582.

[135] Court of Cassation, social chamber, No. 14-11563, 22/09/2015, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000031230475&fastReqId=1132526842&fastPos=1, also: Court of Cassation, social chamber, 1 June 2016, No. 14-19702, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000032636211 ;Court of

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

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

In France, instructions explicitly constitute a form of discrimination.

Instructions to discriminate are not covered as such by the Labour Code, the Civil Code or the Penal Code. Law No. 2008-496, which provides the definition of discrimination applicable to all legal provisions, includes Article 1 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'.[136]

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).[137] 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.[138]

Law No. 2021-1109 of 24 August 2021[139] relating to the respect of the principles of the Republic, creates a new offence in the Penal Code at Article 223-1-1 of intentionally exposing persons to hatred and risk of violence by the publication of personal information.

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.

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.[140] 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 and then concludes as to the joint liability of the instructor and the author

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Cassation, social chamber, 13 December 2017, No. 16-14999, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000036216565&fastReqId=717589372&fastPos=1.

[136] Law of 27 May 2008, Article 1 para 5: '*Le fait d'enjoindre à quiconque d'adopter un comportement prohibé par l'article 2*'.

[137] 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.

[138] Court of Cassation, criminal chamber, 12 April 1976, and 22 May 1989.

[139] Law No. 201-1109 of 24 August 2021, available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043964778.

[140] High Judicial Court of Versailles, 2 April 2001. CA Paris, *Sté NIDEK Europarc*, No. 4835.96, 20 March 1997.

for the acts of the discriminator, but in general, the employer is the only person sued in the procedure before the labour court.[141]

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.[142]

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 persons with disabilities in the area of employment

In France, the duty on employers to provide reasonable accommodation for persons 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 workers with disabilities 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(5) 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 workers with disabilities 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'[143] (author's translation). Paragraph 4 of Article 5213-6 LC explicitly provides that 'failure to take all necessary measures can constitute discrimination as defined by Article L1132-1 LC' (author's translation).

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

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

[141] 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*.

[142] 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.

[143] 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*'.

employees, volunteers and liberal professionals). However, in the landmark *Bleitrach* case[144] the Conseil d'Etat recognised a duty on the state to take positive measures to provide access to court buildings for persons with disabilities working as auxiliaries of justice within a liberal profession (i.e. lawyers, bailiffs, etc.) 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 employer must establish the impossibility of providing reasonable accommodation in order to justify dismissal.

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;[145]
- Decree No. 2006-501 of 3 May 2006 on the fund for the professional integration of persons with disabilities.[146]

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 were integrated into Law 83-634 of 13 July 1983 on the rights and obligations of civil servants (now Article L131-8 and 131-12 of the General Code of Public Service).[147]

There is no provision defining a disproportionate burden.

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.[148] The guide intends to make explicit the scope of the obligation, its constraints and limits and its

[144] 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.

[145] 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.

[146] Decree No. 2006-501 of 3 May 2006 on the fund for the professional integration of persons with disabilities (*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.

[147] 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, (now Articles L131-1 and following of the General Code of Public Service), available at: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000044427698.

[148] Defender of Rights (2017), *Emploi des personnes en situation de handicap et aménagement raisonnable* (The employment of persons with disabilities and reasonable accommodation), December 2017: https://www.defenseurdesdroits.fr/fr/guides/guide-amenagement-raisonnable.

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

The guide clearly explains the many intricate regulatory texts and indicates that a failure to comply with general accessibility or building regulations will be relevant, and related costs will not be deemed disproportionate, unless the employer establishes that he benefits from a derogation because there are no available premises or the premises cannot technically be adapted. No case has yet been adjudicated in which the impossibility of adapting the premises has been raised.

b) Case law

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.[149] 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. 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.

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 accommodations into account.

Considering the reluctance of the public service to implement reasonable accommodation, there are a number of lower court decisions enforcing the obligation to proceed to implement reasonable accommodation measures and the proportionality of accommodation measures required.[150]

In November 2020, the Court of Cassation decided that the absence of a request to be reassigned on the part of the employee declared unable to perform his functions, does not exempt the employer from his duty to reassign him.[151]

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 workers with disabilities.

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

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

[151] Court of Cassation, social chamber 12/11/2020 n°19-12771: https://www.doctrine.fr/d/CASS/2020/JURITEXT000042552092.

These reasonable accommodation obligations can therefore benefit all employees with official recognition, those who have status of worker with disabilities, those who have suffered an accident at work resulting in a degree of disability greater than 10 % and who have received compensation in this regard, those in receipt of disability pensions and veterans with disabilities 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' (a concept that is not defined but which in practice generally relates to costs).

In terms of legal rights, a person who meets the definition of worker with disabilities 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.[152]

A person who de facto meets the definition of disability provided by Article 114 of the CSW, is covered by the protection 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. The occupational health medicine is the authority that determines in concreto required reasonable accommodations for all according to Article 5213-1 LC. Occupational health medicine will also determine all required accommodation relating to collective health or functional requirements for the preservation of health. The employer is required by law to implement the prescribed individual reasonable accommodation measure(s).

d) Failure to meet the duty of reasonable accommodation for persons with disabilities

In France, failure to meet the duty of reasonable accommodation in employment for persons with disabilities is recognised as a form of discrimination.

As regards private employment, most cases essentially sanction insufficient accommodation as constituting discrimination but do not discuss the sufficiency of accommodation measures undertaken.[153]

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

The law provides no precision as to when it will deem a refusal to make 'accommodation' (or take 'necessary measures') to be discrimination or what is a disproportionate burden. Where the courts have been called on to decide whether or not the disproportionate burden was established in respect of the requirement for reasonable accommodation, they have made their findings 'in fact' without further discussion defining the concepts of reasonable accommodation or disproportionate burden[154].

In practice, the disproportionate burden generally relates to costs. This is determined as a question of fact by the courts on a case-by-case basis, with little discussion of the criteria used to proceed to this evaluation since French judicial decisions are very synthetic and do not expand on principles but simply provide conclusions. A few cases provide some

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

[153] Court of Cassation, social chamber, 6/03/2017 No.15/206037; 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.

[154] Ibid.

guidance on the approach to evaluation by the court. The jurisprudence has decided that disproportionate costs must take into consideration any public financing available to put in place the reasonable accommodation, in line with Article 5 and Recital 21 of Council Directive 2000/78. In addition, it holds that the burden of evidence falls on the employer to provide proof that they had applied for money from the fund for the integration of persons with disabilities [155] and that this defence will not be available if the accommodation relates to the failure to implement accessibility obligations provided by law (see the discussion of the *Bleitrach* case in section 2.6.a, above).[156]

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 persons with disabilities and could not therefore put forward an argument related to the resulting unreasonable costs of implementing this measure.[157]

In another case, the court decided that when the required reasonable accommodation measures have not been implemented, the refusal to grant permanency to a public agent on the ground of his professional insufficiency constitutes a discrimination. The court thus declared the employer's decision's to be illegal and nul.[158]

In a decision of 30 January 2020, the Court of Appeal of Versailles[159] decided that an employer cannot be bound to create a post in order to implement reasonable accommodation requirements to reclassify an unfit employee. Dismissing an employee because of the unavailability of work in vacant positions corresponding to accommodation requirements prescribed by the occupational health and safety professional is not discrimination as defined by Article L1133-3 of the Labour Code.

In June 2020, the Court of Cassation decided that the failure of an employer to reassign an employee with disabilities to available vacant positions once he was declared unfit to pursue his previous tasks by the occupational health doctor, constitutes a failure to implement reasonable accommodation to allow him to keep his employment, and therefore the dismissal was discriminatory and nul.[160]

Furthermore, 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.[161]

[155] See note no 145, Administrative Court of Caen, No. 0802480, 1 October 2009.
[156] 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.
[157] Administrative Court of Caen, No. 0802480, 1 October 2009.
[158] Nantes Administrative Court, 30 September 2009, req. No. 076871 and No. 076996.
[159] Versailles Court of Appeal, 30 January 2020, No. 18/01698.
[160] Court of Cassation, social chamber, 03/06/2020 n°18-21993: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000041995790.
[161] Toulouse Court of Appeal, No. 17/01861, 26 January 2018.

e) Duties to provide reasonable accommodation in areas other than employment for persons with disabilities

In France, there is a duty to provide reasonable accommodation for persons with disabilities outside the area of employment.

Education

The Law No. 2005-102 on Disability provides for a duty to integrate children with disabilities into the mainstream school system. The right to education and to reasonable accommodation within education of children with disabilities 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.[162]

The Conseil d'Etat, in a decision of 15 December 2010 (Conseil d'Etat, No. 344729)[163] concluded that adapted access to education for children with disabilities 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. 345434[164] and 345442)[165] that the provisions of the individual educational programme paid for by the state authorities also covered needs related to extracurricular activities and therefore established an obligation which should be implemented without delay, regardless of budgetary and 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.[166]

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 students with disabilities.

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 persons with disabilities, 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

[162] 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 scolairisation*) available at: http://www.education.gouv.fr//bo/2006/32/MENE0602187C/htm.

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

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

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

[166] 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=LEGITEXT000006070933&dateTexte=20010101.

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,[167] and by an insurer's abusive refusal to insure a person with a disability that did not have implications for their health.[168]

On the basis of Articles 225-1 and 225-2 PC, the criminal courts have issued sanctions for a refusal to register a *person with disabilities* for an aqua gym class,[169] and a refusal to allow a person in a wheelchair access to a cinema.[170]

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.[171]

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 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.[172]

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.[173]

[167] HALDE, Deliberation 2007-296. Available at: http://www.defenseurdesdroits.fr.
[168] HALDE, Deliberation 2007-234. Available at: http://www.defenseurdesdroits.fr.
[169] GAP Trial Court, No. 12025000010, 22/05/2014.
[170] Court of Cassation, criminal chamber, No. 05-85888, 20/06/2006, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007640193.
[171] Limoges Court of Appeal, 14 May 1991.
[172] Conseil d'Etat, 14 April 1995, No. 125148, available at: https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007837158.
[173] Ministerial Instruction from the Ministry of Public Service No. 2106 of 14 November 2005 (*Instruction ministérielle n°. 2106 du 14 novembre 2005*), not published, completed by Ministerial Instruction of 10 February 20012, NOR:MFPF1202144C, available at: https://www.fonction-publique.gouv.fr/files/files/textes_de_reference/2012/C_20120210_0002.pdf.

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.[174]

However, 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),[175] 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.[176]

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, Articles L131-1 and following of the General Code of Public Service, 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, Articles L131-1 and following of the General Code of Public Service 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.

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

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

[176] 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 L6 of the General Code of Public Service.

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 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 relation to conditions for access to employment, self-employment or occupation, including selection criteria, whatever the branch of activity and at all levels of the professional hierarchy, for the five grounds and in both the private and public sectors, as described in the directives.

Further to the adoption of Law 2008-496, Article 2(1) and (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 extent of the protection and the legal regimes are translated in the Penal Code, the Labour Code and Articles L131 *et seq.* of the General Code of Public Service on the rights and obligations of public agents. 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.

Independent workers are expressly protected against all forms of discrimination by Article 2(1) and (2) of Law 2008-496 including access to employment, self-employment and occupation, recruitment conditions and promotion.

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, and covers different forms of the employment relationship from hiring to retirement, including selection criteria and recruitment conditions.

The criminal 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, for salaried employees, public agents and independent workers. It does not provide for a shift in the burden of proof and covers only direct discrimination.

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. 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,[177] 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.

Also, some professions are subject to a condition of nationality; the access of non-EU and non-French nationals to certain jobs is restricted.[178]

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 candidates with disabilities. The Government adopted several decrees required to implement the Law No. 2005-102 on Disability and, on 21 December 2005, adopted Decree No. 2005-1617[179] on accommodation for candidates with disabilities 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 candidates with disabilities.

3.2.2 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.

Employment and working conditions, including pay and dismissals, are covered by Article L1132-1 LC, Article L131-12 of the General Code of Public Service, Article 86 of Law No. 2019-1462 of 27 December 2019 regarding the exercise of an elective mandate 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.

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

[177] Executive Order of 18 January 2008, NOR: IMID0800328A available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000017937372.

[178] The GELD (see above) in March 2000 and then the HALDE in its deliberations of 2008 and 2009 (2008-189 and 2009-139) have drawn the attention of the Government to these forms of legal discrimination, 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*).

[179] Decree No. 2005-1617 of 21 December 2005 on the accommodation of examinations in higher education for students with disabilities (*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.

Cassation in the case of *Hay* v. *Crédit Agricole*,[180] that at the time when marriage was not accessible to same-sex partners, a salaried employee who entered into a contractual union (PACS) 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 of the employer to interpret the collective agreement as conferring such benefits to an employee constituted direct discrimination on the ground of sexual orientation. However, the Court of Cassation limited its decision to discussing the comparability of rights conferred by a PACS in comparison to those acquired by marriage.[181]

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 persons 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 persons with disabilities performing an activity in an occupational centre for persons with disabilities 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.[182]

Article L131-1 of the General Code of Public Service provides for the protection of public agents against direct and indirect discrimination on all the prohibited TFEU grounds. However, in Article L6 states 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 prosecution and state magistrates and to judges on the bench.[183] Public servants working in Parliament are also not subject to the General Code of Public Service since Article L6 provides that they are governed by separate parliamentary rules. These texts have not been amended to implement Directives 2000/78/EC and 2000/43/EC and do not provide any protection against discrimination on any grounds.

In its decision of 30 October 2009 relating to the *Perreux case*, 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.[184]

Since then, the Conseil d'État has repeatedly decided that all civil servants are covered by the Law of 27 May 2008, stating the general regime of protection against discrimination in employment and access to goods and private and public services applies, including when the legal regime dedicated to public agents has not been amended by transposition legislation.[185]

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[180] CJEU, judgment of 12 December 2013, *Frédéric Hay v. Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, C-267/12, EU:C:2013:823 ; Court of Cassation, social chamber, 5 July 2017, No. 15-21924.

[181] Court of Cassation, Social Chamber, 9 July 2014, No.10-18341, available at: https://www.legifrance.gouv.fr/juri/id/JURITEXT000029241843/.

[182] CJEU, judgment of 26 March 2015, *Fenoll*, C-316/13, ECLI:EU:C:2015:200, available at: https://curia.europa.eu/juris/document/document.jsf?text=&docid=163249&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=11363992; to date the status of people attending work-based occupational centres has still not changed and there are cases pending that have not yet been decided.

[183] 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.

[184] Conseil D'Etat, No. 298348, 30 October 2009 available at: https://www.conseil-etat.fr/ressources/decisions-contentieuses/les-grandes-decisions-du-conseil-d-etat/conseil-d-etat-assemblee-30-octobre-2009-mme-perreux.

[185] Council of State 27 July 2016, No. 393292, Council of State E, 25 October 2018, n°405418).

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, and covers all stages of the employment relationship from hiring to retirement.

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.[186]

The criminal regime (as established by Articles 225-1 and 225-2 PC and Article 4 of Law No. 2008-496) that provides protection against discrimination offers the only possible criminal action in the case of denial of a right granted by law (Article 432-7 PC) and hindrance of economic activity (Article 225-2, paragraph 2), which may cover independent employees. It does not provide for a shift in the burden of proof and covers only direct discrimination.

3.2.3 Access to all types and 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 L131-12 of the General Code of Public Service with respect to all the Article 19(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 all workers including independent and non-salaried workers, on all the Article 19(1) TFEU grounds (Article 2, paragraph 2).

3.2.4 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 relation to 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.

[186] Court of Cassation, social chamber, No. 16-19949, 17 January 2018, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do;jsessionid=FD99F0DAC9A8DFD35F7F0B494825155A.tplgfr28s_1?oldAction=rechExpJuriJudi&idTexte=JURITEXT000036584552&fastReqId=7189939.

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.

Articles L113-1 and L131-1 of the General Code of Public Service provide that in the public sector 'Union rights are guaranteed to civil servants.

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.

3.2.5 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.

There is also a specific provision for access to healthcare providing a general prohibition of discrimination in access to healthcare that does not specify a list of grounds in Article L1110-3 of the Public Health Code.[187]

Articles 11 to 18 of the Law No. 2005-102 on Disability provide for an unconditional right to social protection, including social security and healthcare of persons with disability.

In addition, for all grounds of discrimination and beyond, 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.

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

[187] Public Health Code, Article L1110-3, available here: https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000037950426&cidTexte=LEGITEXT000006072665&dateTexte=20191101.

by the ECtHR in a decision of 1 October 2015.[188] 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 Social Security Code imposes specific 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 (Article 816-1).

Although these rules implementing differential treatment rely on the ground of nationality, they create significant problems for poor, older non-EU citizens who have worked in France for many decades before requesting social benefits. As such, they could be argued to constitute indirect discrimination under the Directive.

Establishing proof of regular residence and presence for a period of 10 years for the old-age minimum allowance 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. 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.

In 2018, the Conseil d'Etat refused to make a referral to the Constitutional Council under the dedicated constitutional referral procedure, following the allegation that the legislation denying access to medically assisted procreation to lesbian couples was contrary to the principle of equality protected by the Constitution.[189] It does not discuss whether sexual orientation should be a ground protected by the Constitution. Applying traditional French equality law doctrine, it decided that, in accordance with classical jurisprudence, the principle of equality was not opposed to difference of treatment between persons who were in different situations, and that since the legislature had only intended to remedy the medical infertility of couples of the age to bear children, heterosexual couples suffering from medically diagnosed infertility were not in a comparable situation to couples of the same sex who were not suffering from a medical condition.

In addition, Article 2(3) of Law No. 2008-496 provides for a possibility to justify differential treatment on protected grounds in matters of health, social protection and social security and Article 2(6) allows for all derogations provided by law.

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.

Decree No. 2010-961 of 25 August 2010[190] provides for special conditions of access to social security minimum income for persons under 25 years of age, requiring them to have held a remunerated activity for a certain period of time – to be determined by regulation –

[188] 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.

[189] Conseil d'Etat (Supreme administrative court), 28/09/2018, No. 421899, available at: http://arianeinternet.conseil-etat.fr/arianeinternet/getdoc.asp?id=214297&fonds=DCE&item=1; However Law No.2021-1017 of 2 August 2021 on Bioethics, at article 1 amending Article 2141-2 of the Code of Public Health, extended access to medically assisted procreation to lesbian couples and single women.

[190] Decree No. 2010-961 of 25 August 2010 relating to the extension of social security minimum income for persons under 25 years of age, available at: https://www.legifrance.gouv.fr/loda/id/JORFTEXT000022741137/.

before being eligible. In 2011, the Conseil d'État held that the objective related to the requirement that young workers starting their integration in professional life at the end of their studies or professional training be encouraged to pursue a professional activity for a prolonged period of time in order to achieve integration in professional life, is justified as being of general interest.[191]

3.2.6 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 referring to 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.

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 residual 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.[192]

Article 2(3) of Law No. 2008-496 provides for a possibility to justify differential treatment on protected grounds in matters of health, social protection and social security and Article 2(6) allows for all derogations provided by law.

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

3.2.7 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.

The criterion of nationality is not taken into account, excluding regarding access to university where access is conditional upon the student's legal presence in the territory. 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

[191] Conseil d'État, 27 October 2011, N°. 343943, available at: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000024736716&fastReqId=770237236&fastPos=1.

[192] Constitutional Council, No. 2010-92 QPC, 28 January 2011.

to register children of North African origin at schools and school cafeterias.[193] Since then, this principle has been systematically enforced by administrative courts.

Law No. 2008-496 completes the implementation of Directive 2000/43/EC and provides (at Article 2 paragraph 3) 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.

Claims of discrimination in education involving the private sector, whether it be a private school or discrimination perpetrated by a private party in the context of an internship, benefit from no specific mean 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.

Origin

No official monitoring takes origin into account. However, due to geographical zoning there is a concentration of precarious migrant children in specific underprivileged suburbs, and studies show that overall educational achievements are lower for children of non-European origin and children living in underprivileged suburbs than in other schools.[194] According to a survey over the school year 2017-2018, 64 350 newly arrived non-French speaking pupils were integrated into 9 300 elementary and secondary schools, and 90 % of them benefited from linguistic support, which represents 0.68 % of pupils overall, while 2 382 children were not integrated into the school system.[195]

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.[196]

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).[197] 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

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

[194] Birnbaum, Yaël (2019), 'Education profiles of children of immigrants through High School : the impact of gender and origin' (*Trajectoires scolaires des enfants d'immigrés jusqu'au Baccalauréat : rôle de l'origine et du genre*), *Education et Formation*, No. 100, December 2019, available at: https://www.education.gouv.fr/sites/default/files/imported_files/document/depp-2019-EF100-article-04_1221890.pdf.

[195] Ministry of Education, Education evaluation service (2019) Information note No. 19.52, December 2019, available at: https://www.education.gouv.fr/sites/default/files/imported_files/document/depp-ni-2019-19-52-64350-eleves-allophones-nouvellement-arrives-en-2017-2018_1224318.pdf.

[196] 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.

[197] 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.

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).[198] 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.

Legal action brought before administrative courts in 2006 and, ultimately, before the ECtHR have been dismissed.[199] On 1 November 2012, the UN Human Rights Committee contradicted the European Court of Human Rights holding that expulsion from school pursuant to the Law of 15 March 2004 for wearing Sikh religious symbols was a violation of his right to freedom of religion pursuant to Articles 2, 17, 18 and 26 of the International Covenant on Civil and Political Rights.[200]

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.[201]

Students who will not submit to clothing requirements and secular public school teaching do not pursue their education in public school and instead register with private schools that are not subsidised by the state or 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, commentators and Government authorities note that the number of children who end up pursuing their studies through home schooling and private schools has substantially increased in the last few years. The central service of interior information, the General Directorate for Internal Security, estimates that there are 40 000 Salafi Muslims in France and 55 000 Muslim Brotherhood members,[202] while Muslim religious leaders estimate that there are more than 100 Muslim private schools,[203] which are supposedly attended by 9 000 children.[204]

In September 2019, after observing that the rise of radicalism was concentrated in some neighbourhoods and that there had been a rise in the number of children leaving public and private schools monitored by the Ministry of Education, the ministry launched an intervention framework to detect signs of religious radicalism that jeopardise the secularist values of the Republic by setting up a unit to fight against radical Islamism called CLIR (*Cellule de lutte contre l'islamisme radical et le repli communautaire*), which was formalised

[198] Available at: http://www.education.gouv.fr/bo/2004/21/MENG0401138C.htm.
[199] Conseil d'Etat, No. 285394, 5 December 2007; ECtHR, No. 25463.08, 30 June 2009.
[200] 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.
[201] 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.
[202] National Assembly, Hearing of 11 December 2019, available at: https://www.assemblee-nationale.fr/dyn/docs/CRCANR5L15S2020PO767517N014.raw.
[203] Trippenbach, I. (2019), 'Le grand malaise du gouvernement sur les écoles privées musulmanes', *L'Opinion*, 22 October 2019, available at : https://www.lopinion.fr/edition/politique/grand-malaise-gouvernement-ecoles-privees-musulmanes-200801.
[204] Peiron, D. (2020) 'Des écoles hors contrat musulmanes dans le viseur des autorités', 7 December 2020, *La Croix*, available at: https://www.la-croix.com/Famille/ecoles-hors-contrat-musulmanes-viseur-autorites-2020-12-07-1201128640.

by a ministerial instruction of 27 November 2019.[205] This approach has not yet given rise to claims of abuse and discrimination.

To combat out-of-school education and the establishment of radical Islamist schools, Law No. 2021-1109 of 24 August 2021 relating to the respect of the principles of the Republic imposes registration formalities on private schools in order to allow checks and monitoring. The school can be shut down in the absence of proper registration and those who do not submit to the requirements of the public authorities can be prosecuted and liable to one year imprisonment and a EUR 15 000 fine.

On the participation of parents wearing religious symbols in school activities, the Defender of Rights requested an opinion from the Conseil d'État in 2013 regarding the conditions of application of the rule of neutrality for public servants in relation to voluntary participants in public service. The Conseil d'État indicated that mothers accompanying their children to out-of-school activities do not have the legal status of a 'voluntary contributor to the public service', but are carrying out the role of parent, and that therefore the State cannot impose an obligation of religious neutrality on them. However, it stated that the competent authority, on a case-by-case basis, could recommend that they abstain from manifesting their religion and beliefs, if maintaining peace in a given situation or environment requires it.[206]

The situation remained stable until 2017, when Lyon school authorities refused to let mothers wearing Islamic veils access class activities in school. In July 2019, the Administrative Court of Appeal of Lyon decided that parents intervening in educational activities on school premises were participating in the public service and subject to the obligation of neutrality.[207] Parliament voted against an attempt to forbid parents wearing religious signs when participating in out-of-school activities during the passage of Law No. 2021-1109 of 24 August 2021 relating to the respect of the principles of the Republic.[208]

Disability

Law No. 2005-102 on Disability reformed the assistance and education of children with disabilities. It creates an express obligation on the state to ensure the education of all children with disabilities. The right to education and to reasonable accommodation within education of children with disabilities 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 persons with disabilities.[209]

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[205] Ministry of Education (2019), 'Vademecum Laicité à l'école' (*Secularity in school handbook*), September 2019, available at: https://eduscol.education.fr/cid126696/la-laicite-a-l-ecole.html and Prime Ministerial Instruction no 6328-G of 14 January 2022 relating to the CLIR Units, available at : https://www.legifrance.gouv.fr/download/pdf/circ?id=45275 that has been updated by the Prime Ministerial instruction no 6328 of 14 January 2022.

[206] 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.

[207] Lyon Administrative Appeal Court, 23 July 2019, No. 17LY04351, available at: https://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000038915805.

[208] Comparative text of Article 1 of the Bill relating to the respect of the principles of the Republic voted on 9 June 2021 by the National Assembly: https://www.assemblee-nationale.fr/dyn/15/rapports/csprincrep/l15b4239-compa_texte-comparatif.pdf.

[209] 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.

Title IV of the Law on Disability gives competence to the Commission for the Rights and Autonomy of persons with disabilities 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 persons with disabilities 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.[210] Parents cannot demand an educational orientation which differs from that proposed by the Commission for the Rights and Autonomy of Persons with Disabilities. They can challenge the conclusions of the Commission before the high judicial court.

In September 2005, the Administrative Court of Lyon decided that the failure of the state to provide access to school to a child with disabilities 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.[211] The Supreme Administrative Court decided that the state bears the obligation that rests upon all authorities of the state to provide the necessary resources.[212]

- The accommodation of children and students with disabilities in ordinary school system

When required by the Commission for the Rights and Autonomy of Persons with Disabilities, the obligation to provide a support assistant to the child extends to extracurricular activities, whether they are compulsory or not.[213]

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.

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.[214] By 2020, this number had been reduced to 8 000 children, (from 8 % to 4 % in the school year 2019-2020).[215]

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[210] Decree No. 2005-1587 of 19 December 2005 on the Departmental House [Authority] for the Persons with Disabilities, 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. Decree No. 2005-1752 of 20 December 2005 on schooling for students with disabilities 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.

[211] Administrative Court of Lyon, *M. & Mme Hebri*, No. 0403829, 29 September 2005, AJDA, 2005, 1874.

[212] Conseil d'Etat, *Annie Beaufils*, No. 31850, 16 May 2011; Conseil d'Etat, No. 418702, 28 March 2018.

[213] Nantes Administrative Court of Appeal, No. 17NT02962, 25 June 2018.

[214] ECSR *No. 81/2012,* issued 11 September 2013, published 5 February 2014*, AEH* v. *France*, available at: http://hudoc/esc/coe/int/eng#{%22fulltext%22:[%22No.%2081/2012%20%20France%22],%22ESCStateParty%22:[%22FRA%22],%22ESCDcIdentifier%22:[%22reschs-2014-2-en%22]}.

[215] Escudié, Jean-Noël (2020), 'Conférence nationale du handicap: zéro enfant sans scolarisation... et pas d'AAH dans le RUA', Banque des Territoires, 11 February 2020, available at : https://www.banquedesterritoires.fr/conference-nationale-du-handicap-zero-enfant-sans-solution-et-pas-daah-dans-le-rua.

- Available data

Between 2006 and 2019, integration of students with disabilities in ordinary schools increased by 132 % (and by 80 % since 2010). Individualised support has more than quadrupled (28 108 assistants in 2006 compared to 78 272 in 2019 and 125 500 in 2021). In 2019, such support was given to 28.7 % of all students in elementary school and 13.5 % of students in secondary school.[216] Data for 2021 is not yet available. In 2020, 385 000 pupils with disabilities were enrolled in ordinary school, of whom 194 500 were in elementary school (70 % in ordinary classes), and 166 700 in secondary school, (70 % of whom were in ordinary classes), which represents an overall increase of 7 %.[217] In 2020, there were 80 000 state-employed assistants dedicated to the individualised support of children, and 220 000 children benefited from this support, compared to 186 000 in 2019.[218]

In 2021, the Government created the National coordination committee for inclusive university education, which held its first meeting in May 2021 at which it announced the creation of a dedicated support platform and the adoption of an inclusion plan by 85 % of universities. It announced that around 40 000 students with disabilities were registered in the French higher education system.[219] A study available published in 2019 relating to higher education is based on the school performance of children with disabilities born in 2001 and their situation in the school system in 2018. It indicates that 70 % of the children attended up to the 9th grade level, and 33 % obtained the 9th grade diploma (*brevet*) between 2015 and 2018. The study found that 28 % passed the professional diploma and 9 % passed the general programme. The level of success of those who undertake the exams is equivalent to that of children without disabilities: 53 % pass the exam with a one-year delay compared to their peers.[220]

a) Trends and patterns regarding Roma pupils

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

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). Children have a right to attend school regardless of their situation, and 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.

The number of school-age children identified as Travellers or living in slums was estimated in 2012 at 80 000.[221] In 2019, a youth NGO created an association to fight for the effective attendance in school of children facing registration and attendance difficulties (L'École pour

[216] Ministry of National Education (2021), *Élèves en situation de handicap* (Students with disability), document de travail- série synthèses, No. 21 S02, August 2021, DEPP . Ministry of National Education (2021),'Access to school of children with disabilities', National coordination committee of 21 November 2021, available at: https://handicap.gouv.fr/comite-national-de-suivi-de-lecole-inclusive-0.

[217] Ministry of National Education (2021), 'Access to school of children with disabilities, national coordination committee of 9 November 2020, available at: https://www.education.gouv.fr/ecole-inclusive-comite-national-de-suivi-du-9-novembre-2020-307119

[218] Ibid.

[219] Ministry of Higher Education (2021), 'First National coordination committee for inclusive university education', press release, May 2021: https://www.enseignementsup-recherche.gouv.fr/fr/premier-comite-national-de-suivi-de-l-universite-inclusive-46887.

[220] Ministry of Education, Education evaluation service (2019) Information note No. 19.16, May 2019, available at: https://www.education.gouv.fr/17-ans-quatre-eleves-sur-dix-en-situation-de-handicap-nes-en-2001-ont-passe-le-diplome-national-du-5510.

[221] 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.

tous). These children are members of Roma, Traveller, migrant and very precarious communities and the association estimates that there are 100 000 such children.[222]

In 2016, a study supported by Romeurope reported that 67 % of children living in slums between the age of 12 and 16 did not really attend school.[223] Between 5 000 to 7 000 Roma children in France in 2016 reached the age of 16 without having really attended school, i.e. approximately half of the estimated Roma population present in France.

The education system provides for special classes to integrate newly arrived foreign migrant children and Traveller children[224] and Law No. 2000-614 of 5 July 2000, on the accommodation of Travellers, provides for a duty to accommodate the temporary school attendance of French Traveller children and Roma children.[225]

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 the scheme has been implemented, it tends 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 scheme's terms and conditions of occupation often provide for a maximum period of stay that forces parents to leave and interrupt the school year.[226]

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 instruction[227] 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

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[222] Petition promoted by École pour tous: https://www.change.org/p/m-jean-michel-blanquer-ministre-de-l-eduction-nationale-100-000-enfants-%C3%A0-la-porte-de-l-%C3%A9cole-m-blanquer-acceptez-nos-6-demandes-urgentes/u/30109915.

[223] Romeurope, CDERE (2016), 'Teenagers living in slums and squats: impossible school' (*Ados en bidonvilles et en squats: l'école impossible*), 27 September 2016, available at: https://www.romeurope.org/ados-en-bidonville-et-en-squats-lecole-impossible-etude-sur-la-scolarisation-des-jeunes-ages-de-12-a-18-ans-collectif-pour-le-droit-des-enfants-roms-a-leducation-2/.

[224] Defender of Rights (2018) *Etude sur la scolarisation des élèves allophones nouvellement arrives et des enfants issus de familles intinérantes 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/communique-de-presse/2018/12/etude-sur-la-scolarisation-des-eleves-allophones-nouvellement-arrives; 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 2012 relative à la scolarisatin 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.

[225] 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.

[226] 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.

[227] 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: https://www.education.gouv.fr/bo/12/Hebdo37/MENE1234234C.htm?cid_bo=61527.

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.

Under pressure from the Defender of Rights and NGOs, the Ministry of Education authorities and prefects are intervening directly 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.[228]

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.[229]

In a decision of June 2019, the criminal chamber of the Court of Appeal of Versailles deciding in a return decision after the Court of Cassation quashed the previous decision, concluded that the refusal of a mayor to register children in school, when those children are 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 constitute a civil fault for which the mayor is liable to the civil parties, and referred the case back to the Court of Appeal for further decision. The court stressed that the fundamental right to education, guaranteed by many provisions of national and international law, must be interpreted in such a way as to provide the Roma and Travellers an effective access to rights in terms of school registration. The court went so far as to state that particular attention must be paid to ensuring access to rights of the members of the Roma and Traveller communities, who cannot provide the usual justifications of residence but have a right of access to school that is independent of their conditions and period of residence in the territory of the town. In civil compensation of the discrimination,

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

[229] 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.

the court ordered the mayor herself (and not the municipality) to pay EUR 1 000 to each child plus EUR 500 of legal costs for each child.[230]

During 2020 and 2021, the COVID lockdown had an important impact on access to schooling for underprivileged children, particularly, migrants, Roma and Travellers. In line with national policy, measures were taken to address the needs of underprivileged children, within the practical constraints of local circumstances. From September 2020, all elementary school and secondary school pupils could attend school premises.[231] Computers were provided for all children attending high school. In addition, all children who needed special educational support were to receive special guidance online or in school.[232] No evaluation of these measures has been published.

In 2021, Ms Sandrine Mörch, Member of Parliament at the French National Assembly, was mandated by the Minister of Education to consult stakeholders and evaluate barriers to school registration and education of precarious and invisible social groups, such as Roma, Travellers, migrant and very poor children. Her report was presented in December 2021 to the Minister of Education.[233] She recognised the important problems that Roma, Traveller, migrant and some very poor children face in effective access to education. Considering the specific difficulties that these children and their parents face, she concludes that means of registration and mechanisms to reach out to the families of children who are not in school must be put in place to overcome the barriers to accessing school. In addition, she concluded that there are currently no mechanisms to evaluate the number of children without access to education and recommended that a large audit be undertaken to quantify and document the situation and in order to create thorough indicators to ensure the on-going quantification and identification of children who do not attend school.

3.2.8 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 the 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 for the systematic refusal of the company to allow persons with disabilities 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

[230] Court of Appeal of Versailles, 19 June 2019, n°18/01049. They were accompanied by Romeurope and two pro-bono lawyers, Jérôme Karsenty and Slim Ben Achour.

[231] National Education, Coronavirus, Measures for elementary, secondary and High School, available at : https://www.education.gouv.fr/covid19-mesures-pour-les-ecoles-colleges-et-lycees-modalites-pratiques-continuite-pedagogique-et-305467.

[232] National Education, Coronavirus FAQS, available at: https://www.education.gouv.fr/covid-19-questions-reponses.

[233] Mörch, Sandrine (2021), Access to Education and great precariousness: education for all (*Scolarisation et grande précarité: l'accès à l'éducation pour tous*), Report to the Minister of Education, December 2021, available at https://sandrinemorch.fr/wp-content/uploads/2022/01/Rapport-Scolarisation-et-grande-precarite-lacces-a-leducation-pour-tous.pdf.

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.

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.'[234]

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

In 2019, a case involved the situation where door-to-door rubbish collection was interrupted and each resident was obliged to take their rubbish to a collection area, which was 1 800 metres from the petitioner's house, with no alternative service. The petitioner, an older person who has been recognised as a person with disabilities and lives in a mountain village, initiated a motion to quash this decision by the local authorities. The Grenoble Administrative Court decided that the fact that the decision is an inconvenience to some residents is insufficient to justify its illegality as constituting a manifest error on the part of local authorities. However, local authorities have the obligation to identify residents who will not be in a position to adapt to this new method of collection and to provide an alternative service to accommodate those residents.[235]

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 and banks) and those that are only available privately (e.g. those restricted 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.[236]

3.2.9 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.

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[234] 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.

[235] Grenoble Administrative Court, 19 December 2019, No.1800836.

[236] 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.

Article 2(3) of the Law of 27 May 2008 prohibits all forms of discrimination in access to goods and services including housing, whether private or public, on all grounds prohibited by French law. These provisions apply to national and non-nationals and are enforceable before civil and administrative courts.

In addition, Article 1(3) of Law No. 89-462 of 6 July 1989 on relations between landlords and tenants, enforceable before the civil courts, prohibits discrimination in access to rental housing, whether private or social housing, on all grounds of discrimination prohibited by national law.[237] These provisions also apply to national and non-nationals.

Article 15 III of the Mermaz Law[238] provides special protection to older tenants: a landlord cannot avail him or herself of all available legal means to put an end to a lease in favour of persons aged 70 years and more who have resources inferior to 1.5 minimum wage, without proposing equivalent substitution housing located in the same geographical area.

This protection has led to refusals to rent housing to older persons. The courts have held that instructions given to real estate agents by landlords who refuse to rent housing to old people who, because of their statutory protection related to their age (70 years), cannot be evicted in order to repossess an apartment, must not be acted upon by the real estate agent and cannot be invoked by them in defence when they are accused in criminal and civil prosecutions of discrimination in access to goods and services on the ground of age.[239]

In France, there is an on-going 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.[240] Meanwhile, rejection of 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 person with disabilities.[241]

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 geographical areas.[242]

SOS Racism obtained a ruling against the St-Etienne social housing corporation on the basis of their ethnic management of the criteria of social mix and access to housing.[243] In

[237] 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.

[238] Law No. 89-462 of 6 July 1989 on landlords and tenants, known as the Mermaz Law.

[239] Versailles Correctional Court, 2 January 2012, No. 11126080164; Judicial Tribunal, 20 May 2011 No. 11-10-000481.

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

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

[242] See programme of the General Commissioner for Territorial Equality (*Commissariat général à l'égalité des territories, 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/.

[243] High Judicial Court of St-Etienne, No. 204/09, 3 February 2009, available at: http://www.jurislogement.org/wp-content/attachments/110_TGI%20Saint-Etienne%203%20fevrier%202009.pdf.

this case, the inter-ministerial mission for housing reported 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 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.[244]

Disability

Article L111-7 of the Construction and Housing Code[245] requires public and residential buildings to be designed and built to be accessible to persons with disabilities. The conditions governing the enforceability of this principle and the regulation of any delay in making the necessary adaptations were adopted by decree in 2006. Decree No. 2006-555 of 17 May 2007 specifies that the obligation relates to common areas, internal and external, part of the parking space for vehicles, residential lifts, collective premises and equipment.[246]

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).[247]

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 to be accessible. This legislation has been held to be a substantial hindrance to the construction of accessible housing.[248]

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[244] 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.

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

[246] 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.

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

[248] 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.

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 persons with disabilities and their families.

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 2019-1478 of 26 December 2019,[249] 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.[250]

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.[251] 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 from an audit of 31 December 2019 published by the Directorate of Housing in 2020,[252] 91 departmental schemes have been adopted, and they had all been revised except in one department. NGOs consider that 60 000 places are needed in total, but the authorities originally planned 41 589 places. Following revised plans, 74.8 % (27 311 places) of the programmed parking areas for Roma and Travellers were available (amounting to 100 % in 23 departments). Furthermore, 1 546 family places on 293 family plots were in place, and 27 % of sites for large-scale events had been implemented. However, the insufficiency of provision continues to generate 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.

[249] 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; Decree 2019-1478 of 26 December 2019 relating to technical rules applicable to areas of accommodation for Travellers (*Décret n°2019-1478 du 26 décembre 2019 relatif aux normes techniques applicables aux aires d'accueil des gens du voyage*), available at: https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000039683543.

[250] 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.

[251] 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.

[252] Directorate of Housing and Urban Planning (April 2020) *La mise en œuvre des schémas départementaux d'accueil des gens du voyage, bilan au 31 décembre 2019* (Implementation of parking areas for Travellers, audit on 31 December 2019), available at: https://www.ecologie.gouv.fr/sites/default/files/Mise%20en%20oeuvre%20des%20sch%C3%A9mas%20d%C3%A9partementaux%20d%E2%80%99accueil%20des%20gens%20du%20voyage.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 parking[253] 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 or de facto 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 eviction 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.[254]

Policy has evolved 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.[255]

Foreign Roma

According to official data, 15 000 persons of Roma origin live in 300 illegal camps and slums.[256]

Since 2008, with an uninterrupted escalation since 2012, the Government has pursued a systematic policy to eradicate slums occupied by Roma and, since 2015, other homeless precarious migrants as well. Their status has been qualified as that of unauthorised occupants of private and public property.

A ministerial instruction was published on 28 August 2012, intending to put in place a policy anticipating the dismantling of slums as being 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. All the available evaluations by the ministry of Social Affairs indicate that the local authorities have not been complying with the instruction and that the generalised eviction policy has generated a situation in which the constant evictions of Travellers, foreign Roma and other migrant populations, is not de facto accompanied by concrete measures of access to emergency shelter or housing.

In this context, the ministerial instruction of 28 August 2012 has been used by NGOs before the courts to obtain deferment of eviction orders before the court of enforcement responsible for execution of the judgment,[257] and counter what has become local policies of harassment. NGOs, with the support of the Defender of Rights, have been successful in deferring expulsion on the ground of the positive obligations of the state to accommodate

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

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

[255] Bordeaux Administrative Appeals Court, No. 03BX00379, 1 December 2005.

[256] Directorate of Housing and Urban planning, Résorption des campements illicites et des bidonvilles (*Resorption of illegal camps and slums*), September 2020, available at: https://www.ecologie.gouv.fr/resorption-des-campements-illicites-et-des-bidonvilles.

[257] High Judicial Court of Bobigny, JEX, 24 January 2013 No. 12/13284; Paris Court of Appeal, 29 January 2016, No. 14/21925.

the rights of Roma persons who are evicted, provided by the jurisprudence of the ECtHR[258] and the European Committee of Social Rights,[259] and to obtain enforcement of their access to decent emergency housing rights provided by A-article 412-3 and 4 of the Code of civil procedure of execution.[260]

On 25 January 2018, the Government published a ministerial instruction completing its instruction of 28 August 2012[261] to revisit its policy regarding eviction of slums and illegal camps in order to facilitate access of Roma and migrant homeless persons to housing rights. 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 eviction policy seems to be ongoing. In 2020, the budgetary envelope to support access to housing was increased from EUR 4 million to EUR 8 million. The ministry states that, since 2017, it has ensured access to housing for 3 000 persons and access to employment for 2 000 persons.[262] However, the Observatory of Collective Evictions notes that, in 2021, the evaluation that must precede each eviction took place only in 4 % of cases.[263]

On 16 December 2021, CNDH Romeurope, in collaboration with the Observatory of Collective Evictions, published a compilation of the evictions that took place between 1 November 2020 and 31 October 2021 from slums and illegal migrant camps. There were 1 330 evictions, with, on average, 146 persons being evicted in each eviction action. In 2021, 472 people were evicted every day, 91 % of whom were not offered an alternate living solution. In 147 cases, people who had been evicted were given temporary lodging, and long-term housing was provided in relation to 17 evictions. Personal belongings were destroyed in 44.5 % of evictions. During the spring lockdown as a result of the COVID-19 epidemic, there were 292 evictions.[264]

This indicates a constant substantial increase in the number of evictions, which reflects the 'fragmentation' of living areas resulting from the Government's systematic policy of repeated evictions since 2011.

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.

The Conseil d'Etat decided in February 2019 that, in the absence of imminent necessity, eviction could not be ordered without securing the rights of the illegal Roma occupants.[265]

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[258] ECtHR, *Yordanova*, 24 April 2012, No. 25446/06, available at: https://hudoc.echr.coe.int/eng#{%22appno%22:[%2225446/06%22]}; ECtHR, *Winterstein*, 17 October 2013, No. 27013/07, available at: https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-126910%22]}.

[259] ECSR, 11/09/2012, No. 67/2011, available at : http://hudoc.esc.coe.int/eng?i=cc-67-2011-dadmiss-fr.

[260] Articles L. 412-3 and 4 of the Civil Procedure Code on execution provide that the judge is competent to allow delays that can postpone expulsion from 3 months up to 3 years in order to satisfy obligations enforcing the rights to dignified and emergency housing.

[261] 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.

[262] Directorate of Housing and Urban Planning (2020), 'Résorption des campements illicites et des bidonvilles' (Reduction of illegal camps and slums), September 2020, available at: https://www.ecologie.gouv.fr/resorption-des-campements-illicites-et-des-bidonvilles.

[263] Romeurope (2021) *Observatoire des expulsions de lieux de vie informels* (Observatory of evictions from informal living spaces), 16 December 2021, available at : https://www.observatoiredesexpulsions.org/storage/wsm_publication/acAqJOl52HtcI7FvZEKeLigyadOflb7dOKP1QcDJ.pdf.

[264] Romeurope (2021) *Observatoire des expulsions de lieux de vie informels* (Observatory of evictions from informal living spaces).

[265] Council of State, 13 February 2019 No. 427423, available at: https://www.legifrance.gouv.fr/affichJuriAdmin.do;jsessionid=4B8116330BCFF04DC838B446306461F0.tplgf

Taking a contrary position, the Court of Cassation has held in two decisions of 2019 - one relating to the occupation of private land[266] and the other regarding the occupation of the property of a town - that the violation of the various rights of illegal occupants could not be disproportionate considering the gravity of the impact of their occupation on the right to property.

In two cases in 2019, the Court of Cassation in deciding whether to authorise eviction from illegally occupied land, held that, in assessing the necessity of the interference of eviction with the right of illegal occupants of property protected by Articles 14 and 8 of the Convention, in the face of the competing right to property protected by Protocol 1 of the ECHR, it was called on to strike a fair balance between conflicting rights protected by the Convention. The case law of the ECtHR and the UN HRC was argued by the counsel for the occupants but was not discussed by the Court. In both cases, the Court decided, contradicting the long-standing jurisprudence of the ECtHR protecting the conditions of eviction of Travellers and Roma (reiterated in 2020 in the *Hirtu* v. *France* case),[267] that eviction was the only measure that would allow the owners to recuperate the full measure of their right to property. Therefore, the interference resulting from the respect of the right to domicile of occupying Roma families protected by Articles 8 and 14 ECHR could not be allowed to become disproportionate in the face of the gravity of the violation of the right to property. The Court decided that considering the absolute character of the right to property, all occupation of the property of another without title, whether it be property of private owners[268] or public domain,[269] constitutes a manifestly illicit violation that allows the owner to obtain redress by way of expulsion by injunctive relief, regardless of the protected rights to housing of the Roma families occupying the land.[270] These decisions are being challenged before the ECtHR. However, they do not deal with a situation comparable to that of the *Hirtu* case, considering that in *Hirtu*, eviction was unilaterally ordered by the prefect, without prior protection measures, in violation of Ministerial Instruction of 28 August 2012, and subsequently challenged before the courts.

r25s_1?oldAction=rechExpJuriAdmin&idTexte=CETATEXT000038135472&fastReqId=614933702&fastPos=264.

[266] Court of Cassation, Third Civil Chamber, 4 July, 2019, No. 18-17119, available at: https://www.courdecassation.fr/jurisprudence_2/troisieme_chambre_civile_572/619_4_43088.html.

[267] ECtHR, *Hirtu* v. *France*, 14/08/2020, no. 24720/13, available at: http://hudoc.echr.coe.int/eng?i=001-202442.

[268] Court of Cassation Third Civil Chamber, 4 July 2019 No. E 18-17119, available at: https://www.gisti.org/IMG/pdf/jur_cas_2019-07-04.pdf.

[269] Court of Cassation, Third Civil Chamber, 28 November, 2019, No. 17-22810, available at : https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000039465719&fastReqId=246564261&fastPos= 1.

[270] Roma and Travellers' rights NGOs have indicated that they intend to take these cases to the ECtHR and the UN HRC.

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.'[271]

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 considered to be 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.[272]

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.[273]

The European Court of Justice stressed 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 employer's 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

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[271] 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*.'

[272] 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 religieuse 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.

[273] CJEU, judgment of 14 March 2017, *Asma Bougnaoui, ADDH* v. *Micropole SA*., C-188/15, EU:C:2017:204, 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.

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 case[274] 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 the employer'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 also decided in a decision of 1 July 2020,[275] that a security agent who was required to accompany foreign clients in the Middle East, who was dismissed for having refused to modify his beard, which was perceived by the client as a religious fashion, was a victim of direct discrimination.

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,[276] whether or not they are in contact with the public.

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.[277]

In a landmark decision regarding the clothing of people working for French social security – _a private employer executing the functions of a public service – _the Court of Cassation decided that a private employer executing a public service mission 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. This right of the employer is applicable to all employees, whether or not they are in contact with the general public. Restrictions on freedom of religion can be justified by the nature of the particular occupational activities concerned and the context in which they were carried out, and thereby constitute a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate and the in-house regulations specific and precise.

The Conseil d'État issued its first decision on the beard as a religious symbol on 12 February 2020. The Conseil d'État recognized that staff in public hospitals, although

[274] 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.
[275] Court of Cassation, social chamber, 1 July 2020, No. 18-23743, available at: https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/715_8_45097.html.
[276] Conseil d'Etat, *Mlle Marteaux* No. 217017, 3 May 2000; Conseil d'Etat, No. 244428, 15 October 2003.
[277] ECtHR, No. 64846/11, 26 November 2015, http://hudoc.echr.coe.int/fre?i=001-158878.

protected against discrimination on the ground of religion, is subject to the obligation of religious neutrality imposed on public service workers. It concluded that an intern who refused to reduce his beard and had not denied to be of Muslim faith could not be sanctioned, on the ground that the beard, whatever its shape, was not a manifestation of one's religion in the context of the public service. It is important to note that such assessment was reached as, in the present situation, there was no evidence of other manifestations of his religious convictions.[278]

The Conseil d'Etat stated that the beard in itself and the colleagues' impressions about it are elements insufficient to characterise it as a public manifestation of a religious belief. To identify a violation of the obligation of religious neutrality, the judge must seek objective manifestations of a person's religious convictions.

The Court of Cassation also decided in a decision of 14 April 2021, that in the absence of a written general instruction or general neutrality clause in the employer's in-house regulation, the chain's commercial policy relating to the physical appearance requiring a saleswoman to remove her Islamic veil could not constitute in itself a genuine and determining occupational requirement and resulted in direct discrimination on the ground of religion.[279]

As regards the genuine occupational requirement that a ticket inspector for a public transport network be sworn in in order to be authorised to issue contraventions, the Court of Cassation recognised that the inspector could require to be sworn in in accordance with the requirements of his or her faith and that he could not be dismissed for having refused to pronounce a statement unilaterally imposed by the judicial authorities that contradicted his or her religious beliefs.[280]

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 in the context of employment.

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.[281] Since an isolated decision of the Court of Appeal of Montpellier in 1993,[282] courts have not sanctioned behaviours manifesting the sexual orientation of an

[278] Conseil d'Etat, 12 February 2020, No. 418299, available at: https://www.conseil-etat.fr/fr/arianeweb/CE/decision/2020-02-12/418299.
[279] Court of Cassation, social chamber, 14 April 2021, No. 19-24079, available at: https://www.legifrance.gouv.fr/juri/id/JURITEXT000043473508.
[280] Court of Cassation, social chamber, 7 July 2021, No. 20-16206, available at: https://www.legifrance.gouv.fr/juri/id/JURITEXT000043782032?init=true&page=1&query=20-16.206&searchField=ALL&tab_selection=all.
[281] Court of Cassation, social chamber, 17 April 1991, Droit Social 1991, 485.
[282] Court of Appeal of Montpelier, 28 January 1993.

employee. On the contrary, employers who sanction employees on this ground are sanctioned by the courts.[283]

4.3 Armed forces and other specific occupations (Article 3(4) and Recitals 18 and 19, 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.

There are maximum age limits of between 63 and 67 for officers, and 59 and 66 for sub-officers.[284]

In France, the scope of the exception is limited to safeguarding the combat effectiveness of the armed forces. The scope of the exception does not extend to non-combat staff, such as civilians employed in administrative positions in the army.

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'.[285]

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 at Article 5(2), 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.

However, Article 2(6) of Law No. 2008-496 authorises differences in treatment created by laws and regulations.

[283] Court of Appeal of Paris, 21/06/2018 No. 16/02237; Conseil d'Etat, 11/06/2014, No. 369994; Court of Cassation, social chamber, 24/04/2013 No.11-5204; Court of Appeal of Versailles, 10/01/2012 No. 11-15204; Martigues Labour Court, 20 January 2003, *Boutin* v. *TNT*.

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

[285] 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.

Access to employment

As documented in the report produced by the GELD in 2000, the decision of the HALDE of 30 March 2009[286] and the report of the Defender of Rights on the fundamental rights of foreign nationals,[287] over the years, French legislation has created some legal discrimination in access to specific professions and jobs (about 7 000 named jobs in a number of different pieces of legislation), subjecting them to conditions of citizenship or national or European qualification requirements. 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.[288]

The Court held that the claimants' specific employment conditions were de facto less favourable than those applicable to French permanent employees. 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.[289]

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*).

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.[290]

[286] HALDE, decision 2009-139 of 30 March 2009, http://www.defenseurdesdroits.fr.
[287] Defender of Rights (2016g), *Les droits fondamentaux des étrangers en France* (The fundamental rights of foreigners in France), May 2016, http://www.defenseurdesdroits.fr.
[288] Paris Employment Tribunal, 21 September 2015, RG N°F 05/12309 and following.
[289] 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.
[290] 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.

Goods and services

Regional authorities regulate transportation tariffs in the greater Paris region (Île-de-France). In this context, Article L1113-1 of the Transport Code allows the region to implement a special tariff for persons who have income under the limit set out in Article L861-1 of the Social Security Code. On 17 February 2016, regional authorities of the Paris region adopted a decree providing that persons who are non-legal residents are excluded from the benefit of the special public transportation tariffs for the underprivileged, regardless of their income. After this decision was attacked before the administrative tribunal, the Conseil d'Etat decided that Article L1113-1 of the Transport Code did not allow any distinction on any ground other than financial resources. Therefore, the provision does not allow the region to create such a distinction without exceeding its authority and violating the principle of equality. The Conseil d'Etat quashed the decree as illegal without discussing arguments alleging discrimination argued by counsel.[291]

Access to education

As mentioned in section 3.2.7, public education is considered to be 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 on the ground of nationality is prohibited and it is a general principle of administrative law that, except for 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.[292] Since then, this principle has been systematically enforced by administrative courts.

For social scholarships to access higher education, Ministerial instruction No. 2019-096 of 18 June 2019 imposes a condition of legal residence of two years and more for non-EU foreign nationals.[293] The legality of this condition of residence as constituting discrimination on the ground of nationality was challenged before the Conseil d'État. Indirect discrimination on the ground of origin was not discussed. The Conseil d'État decided in a decision of 13 October 2021 that this time period was reasonable and proportionate.[294]

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 are 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 Articles 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.

[291] Conseil d'Etat , 9 October 2019, No. 423937, available at: https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000039198226&fastReqId=2097998677&fastPos=12.

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

[293] Minister of Education, Ministerial Instruction of No. 2019-096 of 18 June 2019, available at: https://www.education.gouv.fr/bo/19/Hebdo26/ESRS1916927C.htm.

[294] Conseil d'État, 13 October 2021 No. 434055, available at: https://juricaf.org/arret/FRANCE-CONSEILDETAT-20211013-434055.

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.[295]

In 2007, for the first time, the Constitutional Council explicitly endorsed the refusal by French doctrine to recognise or use the concepts of ethnic origin or race to construct legal, administrative or research categories on the basis of which differential treatment could be evaluated.[296] It indicated that any policy, legal text or study relating to origin must take into account objective indicators of a person's origin and cannot construct subjective categories such as white, black, multiracial, Asian, etc. Only concrete factors such as the name, the place of birth, the nationality of parents and grandparents or the department of birth in France will be deemed admissible.[297] Since this decision, most French studies on discrimination based on origin use the parameter of nationality of origin, meant as citizenship, to compile statistics in research and for monitoring purposes, since no other criterion is considered as sufficiently objective and generally admitted.

4.5 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 workers with disabilities and agents of the public service. They benefit from enhanced medical monitoring as determined by the occupational health doctor (Article R. 4624-18 of the Labour Code), and the 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 in employment of persons with disabilities is delivered by the specialised services of the Ministry of Employment.[298]

4.6 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)

4.6.1 Direct discrimination

a) Exceptions to the prohibition of direct discrimination on the ground of age

In France, national law provides for specific exceptions for direct discrimination on the ground 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

[295] 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).

[296] 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.

[297] National Assembly, Parliament Report No. 47 of 20 November 2020 of the hearing of the CNIL (Data Protection Authority) by the Mission on the Emergence and Evolution of different forms of racism (Mission d'information sur l'émergence et l'évolution des différentes formes de racisme) available at: https://www.assemblee-nationale.fr/dyn/15/comptes-rendus/racisme/l15racisme2021047_compte-rendu.

[298] Assistance services in support of the continued employment of persons with disabilities *(services d'aide au maintien dans l'emploi des travailleurs handicapés).*

in case of loss of employment, and when the means to attain these objectives are appropriate and necessary.

In addition, a number of texts regulating employment status, such as that of railway workers or civil servants, which provide for age limits, are still in force, and are being progressively challenged by employees and trade unions.

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.[299]

However, they can never lead to retirement if the employee is not entitled to a full pension.[300]

b) Justification of direct discrimination on the ground of age

In France, national law provides for justifications for direct discrimination on the ground of age.

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(2). In addition, Article 2(3) provides for the potential to justify differential treatment in matters of health, social protection and social security and Article 2(6), allows for all derogations provided by law.

In addition, Article 6 of the Law of 27 May 2008 and Article L1133-2 of the Labour Code, authorise the imposition of specific conditions of employment for the protection of young and older workers, and maximum age limits to take in considerations periods of training and reasonable period of work before retirement. However, if in practice they always justify derogations on that basis, the Law of 27 May 2008 itself does not indicate that these measures have to be adopted in relation to an employment policy, labour market and vocational training objectives, or specify any other criteria to evaluate whether they pursue a legitimate aim and respect the principle of proportionality.

The opportunity for each employer to create and justify exceptions to the prohibition of discrimination on the ground of age seems too wide and appears to delegate to individual employers the possibility given to the Government to create legitimate differences in treatment aimed at the protection of employees who may be vulnerable due to 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.

However, in a decision of 15 November 2017,[301] 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,

[299] 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.

[300] Court of Cassation, social chamber, No. 08-4381, 11 May 2010.

[301] 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.

compensation for discrimination on the ground of age will be strictly limited to general law compensatory damages, with a deduction from the unpaid salaries of all revenue of replacement (unemployment insurance, redundancy allowance or wages) received by the claimant. This decision of the French Supreme Court has led to significant controversy but has not yet been challenged.

Situations also arise which do not relate to the implementation of public policy but to decisions made by employers. A number of cases of the social chamber of the Court of Cassation and of the Conseil d'État for public agents, 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.[302]

Justifications based on requirements of human resources management have been deemed too general and not proportionate in the private and public sectors.[303] 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.[304]

c) 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.

Previous age limits were removed by Article 1 of Executive Order 2005-901 and Ordinance No. 2021- 1574 of 24 November 2021,[305] 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.
- Conditions of age related to genuine occupational requirements.[306]

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.

[302] Court of Cassation, social chamber, No. 09-42071, 17 November 2010; Court of Cassation, social chamber, No. 10-24219, 5 December 2012; Conseil d'État, 11 October 2021, No.440078, available at: https://www.legifrance.gouv.fr/ceta/id/CETATEXT000044200808?juridiction=CONSEIL_ETAT&juridiction=COURS_APPEL&juridiction=TRIBUNAL_ADMINISTATIF&juridiction=TRIBUNAL_CONFLIT&page=1&pageSize=10&query=440078&searchField=ALL&searchType=ALL&sortValue=DATE_DESC&tab_selection=cetat.

[303] 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.

[304] Court of Cassation, social chamber, No. 13-10294, 18 February 2014.

[305] 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.

[306] Articles L131-5 and L131-6 of the General Code of Public Service, available at: https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000044416551/LEGISCTA000044420885/2022-03-01/#LEGISCTA000044427700.

d) Fixing of ages for admission to occupational pension schemes

In France, national law does not allow occupational pension schemes to fix ages for admission to the scheme, taking up the possibility provided for by Article 6(2).

In France, occupational pension schemes are regulated by the state and based on a principle of actuarial neutrality that therefore do not use actuarial criteria.

4.6.2 Special conditions for younger or older workers

In France, there are special conditions set by law for older and younger workers in order to promote their vocational integration.

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 he or she wishes to stay in employment 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.

Article 2 of governmental decree 2005-901 of 2 August 2005 introduces 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*).[307] 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 persons with disabilities, 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.[308]

[307] 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.

[308] 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.

4.6.3 Minimum and maximum age requirements

In France, there are exceptions permitting minimum and maximum age requirements in relation to access to employment 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'.

Further to the adoption of Law 2009-972 of 3 August 2009[309] relating to mobility and professional careers in the public service, the Government adopted Decree 2013-593 of 5 July 2013[310] 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.

On 8 September 2021, the Conseil d'Etat was called upon to determine the legality of the minimum threshold of 31 years of age required to access the selection process that allows candidates that meet specific experience requirements to be admitted to the career of judicial judge by submitting a dossier. The State alleged the necessity to limit access to the National School of Magistrates (*Ecole nationale de la magistrature* - ENM), which confers more prestigious career possibilities, to candidates under 31 taking entry examinations, without giving further details. The Conseil d'État decided that the State did not present justifications that such a requirement refusing the option for those under 31 years to be recruited by dossier, was appropriate or necessary.[311]

4.6.4 Retirement

a) State pension age

In France, there is no state pension age at which individuals are obliged to begin to collect their state pensions.

However, there is a state pension age at which a person is allowed to collect their pension.

An individual can also 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

[309] 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.

[310] http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000027666449&categorieLien=id.

[311] Conseil d'État, 8 September 2021, No. 453471, available at: www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-09-08/453471.

21 August 2003.[312] 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. Employees with disabilities and employees caring for a child with disabilities 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 pension age giving the right to a full pension from 65 to 60 years of age in the private sector for persons with disabilities with a registered disability level of 80 %.[313]

On 27 June 2006 Law No. 2006-737 adopted increasing retirement benefits for public servants with disabilities to increase pension rights by 30 % for each year of disability during service and lowering the retirement age accordingly.[314]

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.[315]

b) Occupational pension schemes

In France, there is a standard age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements.

Occupational pension schemes are managed by the state and follow rules applicable to state pension schemes.[316] Other employer-funded retirement benefits arrangements, over and above legal requirements, are purely contractual.

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 is 62 years (since 2018), provided the employee has contributed for 42 years (the number of years may vary according to the retirement regime).[317] Exceptions to the general rule are also subject to age requirements.

[312] 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; 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.

[313] 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.

[314] Law No. 2006-737 of 27 June 2006 providing for an increase in pension for civil servants with disabilities (*Loi No. 2006-737 du 27 juin 2006 visant à accorder une majoration de pension de retraite aux fonctionnaires handicapés*), available at: http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000816584.

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

[316] Law No. 2003-775 of 21 August 2003 reforming old age pensions. Law No. 2006-396 of 31 March 2006 on equal opportunities.

[317] 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:

Article L1133-2 LC provides for the possibility to derogate in this regard from the prohibition of discrimination on the ground of age on the basis of employment policy.

If an individual wishes to work longer, payments from such 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.[318] 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 before they have reached 70.

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.[319]

http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000023022127&dateTexte=&categorieLien=id%20.

[318] 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.

[319] 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.

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.[320]

e) Employment rights applicable to all workers irrespective of age

The law on protection against dismissal and other laws protecting employment rights 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[321] 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.

4.6.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In France, national law permits age and seniority to be taken into account in selecting workers for redundancy as a preference maintaining older workers in employment. Article L1233-6 LC provides that, in cases of redundancy by an employer with 50 employees or more, conditions of dismissal are subject to the prior dismissal of younger employees.

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.

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

[321] CJUE, 13 September 2011, Prigge e.a., C_447/09.

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 period[322] and, for those over 57 years of age, for a period that can continue until they reach the age at which they are eligible for full pension i.e. an age that varies depending on the number of trimesters worked once a person has reached the age of 62.[323]

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.[324]

Article L1233-6 LC provides that, in case of redundancy by an employer with 50 employees or more, conditions of dismissal are required to meet specific requirements of compensation for employees beyond 50 years of age.

4.7 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.

4.8 Any other exceptions

In France, there are other exceptions to the prohibition of discrimination (on grounds covered by this report) provided in national law.

Article 2(6) of Law No. 2008-496 authorises differences in treatment created by laws and regulations.

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 disability, only when it results from a certificate of incapacity provided by the occupational health authorities (paragraph 2).

[322] 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.

[323] 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.

[324] Court of Cassation, social chamber, *Banque Finaref*, No. 09-42071, 17 November 2010.

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

a) Scope for positive action measures

In France, positive action is neither explicitly permitted nor prohibited in national law in respect of disability and age.

The French legal framework does not integrate a general derogatory provision authorising unilateral implementation of positive action measures.

French positive action, as conceived by the jurisprudence of the Conseil d'Etat, is based on apparently neutral and general grounds of distinction, such as sex, disability and age.[325]

Positive action measures *per se* have not been implemented by the legislature in relation to race, ethnicity, origin, religion, sexual orientation and opinions and convictions, as they are not reflected in legal categories recognised by law.[326] The legislature has structured its intervention around talent search and integration programmes for foreign nationals and by using proxies based on neutral factors, such as territorial links to designated geographical areas or socioeconomic considerations.

In its opening provision, the Law No. 2005-102 on Disability affirms the right of persons with disabilities 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 persons with disabilities 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.[327]

Meanwhile, Article 15 III of the Mermaz Law (No. 89-462 of 6 July 1989) provides special protection to older tenants: a landlord cannot avail him or herself of all available legal means to put an end to a lease in favour of persons aged 70 years and more who have resources inferior to 1.5 times the minimum wage, without proposing equivalent substitution housing located in the same geographical area.

b) Quotas in employment for persons with disabilities

In France, national law provides for a quota for the employment of persons with disabilities.

The Law on the Employment of Persons with Disabilities No. 87-157 instituted a quota system.[328] Despite the cost to employers of sanctions related to the failure to meet their

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

[326] 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.

[327] 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.

[328] Law No. 87-517 of 10 July 1987 to promote the employment of persons with disabilities (*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.

obligation to employ a quota of employees with disabilities, the Court of Cassation decided in May 2003 that workers with disabilities were not obliged to disclose their status to their employer.[329]

The Law No. 2005-102 on Disability creates a fund for the integration of registered persons with disabilities into both private and public employment, as well as providing for sanctions if the employment quota of 6 % imposed on all employers, 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 salaried workers with disabilities 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 workers with disabilities and public servants. The amount is fixed by Decree No. 2012-943 of 1 August 2012 and starts at 400 times the hourly minimum wage per missing employee per year for a business of 20 to 199 employees to a maximum of 1 500 times the hourly minimum wage per employee per year for businesses which employ no employees with disabilities, and creates a similar obligation for the public sector (see section 2.6, above, for reasonable accommodation financing).[330]

The latest evaluations of the rate of employment in the private sector were published in November 2021 by the statistics directorate of the Ministry of Employment and relate to 2019.[331] Although disability employment progressed between 2013 and 2016, it has remained stagnant since 2016. Workers with disabilities represent 3.5 % of the workforce (505 300 employees), while 9 % of employers prefer to pay fines and employ no workers with disabilities.

Data published in October 2021 by the AGEFIPH, which monitors employment rates and collects the fines for failure to fill employment quotas, indicates that 2.7 million members of the labour force, whether employed or not, were recognised as persons with disabilities (6.5 % of the total population). According to the data, 42 % of persons with disabilities were declared as active and 35 % or 955 000 held a job, while 14 % were unemployed and 63 % were long-term unemployed, whereas 8.3 % of job seekers are persons with disabilities.[332] Only 1.2 % of trainees in apprenticeship are persons with disabilities. The evaluation shows that 80 % of the 99 700 employers targeted by the quota obligations employed at least one person with disabilities and only 9 % did not employ any persons with disabilities, but satisfied their obligation entirely by paying the compensation fee. In addition, 26 % of people employed within the quota were official beneficiaries of allocations of support to persons with disabilities.

In 2021, the AGEFIPH indicates in its annual report for 2020 that unemployment of persons with disabilities has not been negatively impacted by the COVID-19 crisis. It collected EUR 503.4 million from 43 676 employers and operated a budget of EUR 498.7 million, i.e. an increase of 4 %, which it distributed to financing schemes to support the costs of investment for individual adaptations of workplaces and the various mechanisms to support workers with disabilities in the workplace.[333]

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[329] Court of Cassation, social chamber, No. 1083, 06 May 2003, *Revue de jurisprudence Sociale* 8-9/03, p. 733.

[330] Decree No. 2012-943 of 1 August 2012, available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000026252005&categorieLien=id.

[331] DARES (2021) *Analyses & Résultats No. 038*, 9 November 2021, available at: https://dares.travail-emploi.gouv.fr/publication/obligation-demploi-des-travailleurs-handicapes-en-2019.

[332] AGEFIPH (2021), *Emploi et chômage des personnes handicapées* (Employment and unemployment of persons with disabilities), October 2021, available at: https://www.agefiph.fr/sites/default/files/medias/fichiers/2021-10/Agefiph-TB-1sem21_BD.pdf.

[333] AGEFIPH (2021) *Rapport d'activité* (Annual report 2020), available at: https://www.agefiph.fr/sites/default/files/medias/fichiers/2021-04/Rapport_d%27activit%C3%A9_2020_Agefiph.pdf.

In 2020, the FIDHFP fund collected EUR 105.99 million to finance support schemes amounting to EUR 94.88 million. It reports an employment rate of 5.58 % in the public sector.[334]

[334] FIDHFP (2021) *Rapport d'activité 2020* (Annual report 2020), available at: http://www.fiphfp.fr/Mediatheque/Rapports-annuels-du-FIPHFP.

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 persons with disabilities' rights

Article 64 of the Law No. 2005-102 on Disability creates a Departmental Centre (*Maison départementale*) for persons with disabilities that is intended to centralise all administrative procedures for enforcing the rights of persons with disabilities. It further creates a claim reference person within these Departmental Centres (Article 146-13 CSW), who will transmit the person with disabilities' claim to the competent authority or jurisdiction. The decree establishing these Departmental Centres was adopted on 19 December 2005 (Decree No. 2005-1587).[335]

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 workers with disabilities (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 L131-12 of the General Code of Public Service sets out the principle of disciplinary sanction against any public servant committing discriminatory actions.

With respect to claims against the public service, mediation can be pursued by the Defender of Rights (*Défenseur des droits*) or one of the many mediators put in place by specific public services relating to social protection, education, public transport, the postal service, finance etc. This mediation is pursued without prejudice to the administrative legal action, which must be pursued independently.

[335] Decree No. 2005-1587 of 19 December 2005 on the creation of the departmental centre for persons with disabilities (*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.

Law No. 2021-1109 of 24 August 2021 relating to the respect of the principles of the Republic introduces Article 6 *quarter* A into the Law of 13 July 1983 on the rights of public agents,[336] now Article L135-6 of the General Code of Public Service, and creates an obligation on all public services to create a complaint mechanism to protect public agents from discrimination, violence and harassment.

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.[337]

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.[338] 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).

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.

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 who decides, further to his 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.

[336] Law of 13 July 1983, Article 6 *quarter*, available at: https://www.legifrance.gouv.fr/loda/article_lc/LEGIARTI000043982125, now Article L135-6 of the General Code of Public Service, available at: https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000044416551/LEGISCTA000044420885/2022-03-01/#LEGISCTA000044427700.

[337] Court of Cassation, social chamber, 26 May 1999, Bull. Civ. V No. 238.

[338] Court of Cassation, social chamber, No. 06-40662, 06-40799 and 06-40.864, 20 December 2006.

Legal action against the state or a public service

All claims against public services, in matters related to the employment of public servants (Article L131-1 *et seq*. of the General Code of Public Service) and to access to public services (such as access to school and social rights) must be brought before the administrative courts, whether they relate to the application of Law No. 2008-496 completing the implementation of Directives 2000/43/EC and 2000/78/EC in all matters dealing with the public services including education, or rely on general principles of administrative law which also provide legal redress against discrimination. The administrative court may correct the situation and/or award damages.

Concerning legal action to obtain an order for desegregation of a school, such action has never been initiated. In two cases where specific segregated classrooms were implemented for a few weeks before the eviction of Roma from campsites, in order to satisfy the legal obligations of access to school for Roma children, the mayor was prosecuted in a criminal court, in application of Article 226-2 PC, and before the administrative court for illegal action, since segregation is forbidden by law.

Mechanisms to support access to justice

Since 1996, France has put in place a national network of points of access to rights (*points d'accès au droit*), offering legal expertise and free legal consultations. The network is managed by the Ministry of Justice and implemented through the Departmental Commission on Access to Rights under the supervision of the President of the First Instance District Court.

Law No. 2005-102 on 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 discrimination law and the implementation of the burden of proof;[339] 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

[339] 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.

labour inspectorate;[340] the penal reflex of victims who seek redress before the criminal courts;[341] 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 parking[342] 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.[343]

Absence of a specific means of legal action

There are no specific legal actions or sanctions before civil or administrative courts 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 individuals subjected to police checks, then the police force has the burden of justifying the relevance of the check.[344]

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 based on a hypothetical comparator, showing the limits of readily available means of action in first instance.[345] This decision was overturned by the Court of Appeal in June 2021, which concluded that the checks were based on the physical characteristics of the persons who were checked and constituted direct discrimination.[346]

[340] 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.

[341] 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.

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

[343] National Assembly (2019), *Information report on legal aid* No. 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 No. 19-09, Available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=28988.

[344] 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.

[345] Paris High Court, 17 December 2018, No. 17/06217, 17/06216, 17/06214, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=26661&opac_view=-1.

[346] Paris Court of Appeal, 8 June 2021, no RG 19/0065 and RG 19/00872, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=39429&opac_view=-1.

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.[347] 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).[348] A major reform of all statutes of limitations was adopted by Law No. 2008-561 of 17 June 2008,[349] 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.'

The Court of Cassation decided that the statute of limitations had no impact on the relevance of comparative evidence going beyond the prescribed period.[350] 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.[351] 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.

[347] Havelkova, B., Möschel, M. (2019) *Anti-discrimination Law in Civil Law Jurisdictions*, Oxford University Press, pp. 1 to 27.
[348] 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.
[349] 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.
[350] Court of Cassation, social chamber, No. 07-42697, 4 February 2009.
[351] Court of Cassation, social chamber, No. 05-45163, 22 July 2007.

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.[352] 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.[353]

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.[354]

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

[352] 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.

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

[354] 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: 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*), (2019) *Rapport 2018 sur la lutte contre le racisme, l'antisémitisme et la xénophobie* (Report 2018 on combating racism, antisemitism and xenophobia), available at: https://www.cncdh.fr/fr/publications/rapport-2018-sur-la-lutte-contre-le-racisme-lantisemitisme-et-la-xenophobie.

commercial courts (Law No. 71-1130 of 31 December 1974),[355] 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).[356]

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, statistics on the number of cases related to discrimination brought to justice are not available.

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 national court decisions on discrimination

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 in proceedings on behalf of victims of discrimination (representing them)

In France, associations, organisations and trade unions are entitled to act on behalf of victims of discrimination.

In France, all trade unions are legally constituted with the status of associations. The Law of 16 November 2001 provides the possibility to all representative trade unions and NGOs which have been in existence for over five years to act on behalf or in support of victims of discrimination (Article 2, Code of Penal Procedure). They can act for the claimant in actions for any apprentice, trainee, job applicant or employee who alleges that they have been a victim of discrimination (Article L1132-1 LC ff., Articles L113-2 of the General Code of Public Service in the public sector, Article 8, paragraphs 1 and 2 and Article 10 of Law No. 2008-496 of 27 May 2008).

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.

[355] 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.

[356] 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.

b) Engaging in proceedings 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, Article L113-2 of the General Code of Public Service, Article 8, paragraphs 1 and 2, Article 2 of Law No. 2001-1066 of 16 November 2001, Article 10 of Law No. 2008-496 of 27 May 2008).

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.

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.

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 century[357] 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.

On 5 February 2020, the Defender of Rights rendered an opinion to Parliament to stress various difficulties related to the enforcement of class action which alter its efficiency, such as the impact on access to redress for victims in employment matters related to the monopoly of trade unions, the absence of specific guidance relating to the procedural management of the case or the need to create a fund to ensure financing of recourses.[358]

[357] 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.

[358] Defender of Rights, Opinion No. 20-01 of 5 February 2020, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=31380&opac_view=-1.

The first decision on the merits of a class action based on Law No. 2016-1547 on the modernisation of the justice system in the 21st century, was rendered on 15 December 2020[359] and considerably restricted the short-term impact of this development. The court concluded that class actions were reserved to situations where the initiating behaviour and decisions had occurred after the adoption of the law, i.e. after 18 November 2016. This decision is being appealed.

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. 2001-1066 of 16 November 2001 at Article 1, 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.[360]
- 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.[361]
- 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.[362]
- 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.

[359] Judicial Tribunal of Paris, 15 December 2020, No. 18/04058, available at: https://www.dalloz-actualite.fr/sites/dalloz-actualite.fr/files/resources/2021/01/18-04058.pdf.

[360] Court of Cassation, social chamber, No. 10-20.765, 3 November 2011, https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000024764368&fastReqId=1647684556&fastPos=1; Court of Cassation, social chamber, No. 10-21489, 6 June 2012, https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000025994053&fastReqId=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&fastReqId=5930729&fastPos=1.

[361] Court of Cassation, social chamber, No. 17-18190, 19 December 2018, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000037851016.

[362] Defender of Rights, decision No. 2016-279, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=20596&opac_view=-1.

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 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.[363]

In 2019, the Court of Cassation reversed the long-standing jurisprudence stating that in relation to a negotiated agreement, the burden is on the claimant to establish that the differential treatment created arbitrary differences in the treatment of persons in comparable situations foreign to any professional consideration; it revisited its position regarding the presumption of validity of negotiated agreements and the burden of proof on the claimant in cases challenging the conformity to the principle of equality of differential treatment between employees resulting from collective and negotiated agreements.[364] The court decided that such a presumption imposed a burden on the claimant that was contrary to requirements of EU law as provided by the jurisprudence. Hence, it does not apply in cases relating to areas of competence of EU law, such as the principle of equal treatment, the principle of non-discrimination as provided by the EU directives, and freedom of movement.

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.'[365]

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

[363] Court of Cassation, social chamber, No. 10-20526, 19/12/2012, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000026815513&fastReqId=1621185582&fastPos=1.

[364] Court of Cassation, social chamber, No. 17-11970, 3 April 2019, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000038373553.

[365] Conseil d'Etat, No. 298348, 30 October 2009.

rely on research supporting the fact that racial profiling was a widespread practice, combined with witness statements describing the checks.[366] Meanwhile, the six cases that had been dismissed were brought to the ECtHR, raising the issues of the burden of proof of claimants and the admissibility of justifications relating to racial profiling.[367]

Meanwhile, lower courts still struggle to enforce the concept of unequal treatment on this matter. 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 the Gare du Nord alighting from the Eurostar train arriving from Brussels – that there was no evidence of discrimination. The Court failed to implement the provisions on the shift 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.[368]

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

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

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

In a decision of January 2021, the Court of Cassation has clearly indicated to employers that they must protect their employees against victimisation after a complaint, even when their enquiries are not conclusive, and that the burden of proof of bad faith of the employee is on the employer. In this case, the employer had established that the accusation of discrimination on the ground of origin was made in the context of a prior refusal of a new role, at a time when the employee intended to leave, was disengaged from his work, had never before raised facts supporting allegations of discrimination on the ground of origin, did not raise precise facts in support of his allegations and intended to use these accusations to negotiate his compensation package. In such a context of manifestly

[366] 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.

[367] ECtHR (5th section), *Seydi and others* v. *France*. See: Open Society Justice initiative press release (2017), available at: https://www.justiceinitiative.org/uploads/7b045d76-7c2f-43c8-a786-e197db09bfa2/litigation-echr-seydi-france-french-20170523.pdf.

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

unfounded allegations on the part of the employee, the Court concluded that the employer had satisfied his burden of establishing that the employee knew that these allegations were false and confirmed that the dismissal of this employee was well founded.[369]

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.

6.3 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).[370]

The Penal Code creates an aggravating factor in relation to a discriminatory refusal to sell or allow access to a public place (nightclubs, shops, public services etc.), sanctioned by a maximum of five years' imprisonment and a EUR 75 000 fine. In addition, the Penal Code allows accessory sanctions in Article 225-19 PC: posting or publication of the judgment, closing down of a public place, exclusion from procurement contracts, confiscation of a business, suspension of civil rights and a list of further penalties that are seldom imposed. The same sentence is applicable in cases of discrimination by public services (Article 432-7 PC).

Legal persons, including the state and all public services, can also be convicted by the criminal court, and this liability does not exclude that of the physical person.

In non-criminal matters only, compensatory remedies can be sought before the civil and administrative courts.

In cases involving the public services, legal actions must be brought before an administrative court. Two courses of action are available: one 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).

[369] Court of Cassation, social chamber, 13 January 2021, No. 19/21138, available at: https://www.courdecassation.fr/jurisprudence_2/arrets_publies_2986/chambre_sociale_3168/2021_9997/janvier_9998/64_13_46315.html.

[370] 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.

b) Compensation – maximum and average amounts

There is no maximum amount of compensation.

There is no statutory upper limit to compensation. However, according to lawyers who specialise in discrimination law,[371] and 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.[372]

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 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.[373]

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.[374]

In employment-related cases, however, it can be observed in practice that compensation is more significant and generally compensates the claimant's loss.[375] 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.

[371] 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-discri.pdf.

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

[373] Paris Court of Appeal, No. 10/10/2018, No. 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, No. 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.

[374] Montpellier High Court, 03/04/2008, No. 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, No. 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, No. 245/2016, awarded EUR 600 for discrimination on the ground of disability in access to rental housing.

[375] Paris Court of Appeal, 22/09/2016, No. 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, No. 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, No. 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.

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.[376] 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,[377] the social chamber of the Court of Cassation stated for the first time that principles applicable to the calculation of compensation could vary according to the ground of discrimination at issue. The Court, after concluding that a dismissal was null and void as a result of discrimination on the ground of age, decided that the purview of the compensation changed according to whether or not a ground of discrimination constitutes protection against a fundamental right or freedom protected by the French Constitution. In this case, the Court decided that since the ground of age did not constitute a fundamental right and freedom protected by the French Constitution, the compensation awarded would be limited to the loss of salary less the revenue of 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.[378]

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[376] 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.

[377] 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.

[378] Court of Cassation, social chamber, No. 14-21.325, 14 December 2016, available at: https://www.courdecassation.fr/publications_26/arrets_publies_2986/chambre_sociale_3168/2016_7412/decembre_7804/2344_14_35739.html.

Sexual orientation is not expressly referred to in the Constitution. The Constitutional Council has held that sexual orientation is not explicitly protected as a ground of unequal treatment covered by the open list of the Constitution, that the scope of its protection was according to the competence of Parliament, under its sovereign prerogative to define the protection of equal treatment.[379] However, this position does not mean that the Court of Cassation would not consider that it is a freedom protected by the ECHR and as such should benefit from this extension of compensation.

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.[380] 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.[381] 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.[382] The Court of Cassation upheld this sentence.[383]

[379] Constitutional Council QPC No. 2010-39, 6 October 2010, available at: https://www.conseil-constitutionnel.fr/decision/2010/201039QPC.htm.
[380] Court of Appeal of Nancy, fourth chamber, 8/10/2008, No. 08/00882.
[381] Thionville High Court, 17/04/2014 No. 11048000030.
[382] Paris Court of Appeal, 11 February 2014, No. 12/05062.
[383] 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 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 of the designated body

The Defender of Rights is a body that 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.[384]

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 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

[384] 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.

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,[385] 80 % of all claims are dealt with by the 520 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.

In addition, a dedicated national internet platform, Antidiscrimination.fr, to access information and address complaints was launched in February 2021 with the support of the Government, and of a national campaign increasing the visibility of the anti-discrimination complaint procedure by the Defender of Rights. This platform is staffed by seven new employees answering directly on a chat and rapid response scheme to facilitate access to rights and information, backed up by 10 employees dedicated to coordinating

[385] Defender of Rights (2021), *Rapport annuel d'activité 2020* (Annual report 2020), available at: https://www.defenseurdesdroits.fr/fr/rapports/2021/03/rapport-annuel-dactivite-2020.

the local response to discrimination claims addressed to the Defender of Rights by the local delegates of the Defender of Rights. It published its results after one year of activity: 14 000 requests, 3 000 chats, 1 500 000 consultations through the dedicated web-based application.[386]

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.

The Defender of Rights' annual report for 2021 will not be published until after the presidential and national election in June 2022.

In 2020, the Defender of Rights spent a budget of EUR 22 304 9707, which is stable compared to 2019. Its budget is structured without reference to allocation for each area of competence: 72 % of the budget of the institution is dedicated to staff (EUR 15 501 727) and 40 % of the remaining 28 % (EUR 5 821 029) is dedicated to the expenses of the delegates. Salaries and expenses in support of equality and anti-discrimination cases represent approximately 8 % of the overall budget (EUR 1 784 320).

In addition, in 2020, 2.1 % of the body's budget was dedicated to research (EUR 480 000) and 8 % to promotion and communication campaigns (EUR 1 800 000). 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

[386] Defender of Rights, Antidiscrimination.fr – une année au service des victimes de discriminations, available at: https://www.defenseurdesdroits.fr/actualites/2022/02/antidiscriminationsfr-une-annee-au-service-des-victimes-de-discriminations.

Assembly, one by the Conseil d'État 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.[387]

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 budget[388] 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.

[387] 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.

[388] Law No. 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; Law No. 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 indépendante*), 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.[389]

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 – 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.

[389] 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*), undertaking of a local political mandate.

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, 80 % 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 70 % of cases.

Throughout the country, 520 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. 8 % 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.[390] It employs two staff members to carry out surveys and studies and has a budget of EUR 480 000. In addition, some of its effort is spent commissioning public research groups to engage in surveys and studies regarding the situation of discriminated groups and/ or discrimination.

In 2021, it published seven reports on fundamental rights relating to discrimination issues: one report on the effective protection of the rights of Roma persons, one on the mental health of children and the right to wellbeing, one on the barriers to access to rights of Travellers, a parallel report to the UN Committee on the Rights of Persons with Disabilities,

[390] 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 lodgement* (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), available at: https://www.defenseurdesdroits.fr/fr/etudes-et-recherches/2017/01/enquete-sur-lacces-aux-droits-volume-1-relations-police-population-le.

one on the impact of biometric technologies on fundamental rights, one providing the Defender of Rights' recommendations in the context of the public consultation launched by Delegate Minister for Equal Opportunities, and one on the rights of older persons living in dedicated retirement homes.[391]

In addition, it published the results of four studies: its annual survey conducted with the ILO every year on the perception of discrimination in employment, with a particular emphasis on its impact on young persons,[392] as well as studies on difficulties of access to rights of persons and discrimination suffered by persons over 65, difficulties of access to education in French Guyana, and a sociological analysis of the judicial mobilisation against the national railroad company of Moroccan workers hired in the 70s challenging their derogatory special status as being discriminatory.[393]

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 annex relating to its function as the equality body (Article 36 paragraph II).[394]

iii) Recommendations

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

This activity is carried out through recommendations to Parliament and Government when reviewing and discussing public policies and legislation, and through the activity of lawyers in relation to claims (Articles 25 and 32).

Every year the Defender of Rights publishes independent reports addressed to the Government and recommendations to the Government and Parliament further to its findings of discrimination or in the course of the legislative process proposing legislative and regulatory reforms.

In 2021 it rendered 17 opinions to Parliament, 3 of which dealt directly with anti-discrimination issues: on obstacles to education for Roma, Traveller and migrant children in the context of the consultation conducted by MP Sandrine Mörch (see above), the situation of elderly and persons with disabilities in France, and the bill relating to the respect of the principles of the Republic. [395]

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 persons 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

[391] Defender of Rights (2021) *Pour une protection effective des droits des personnes Roms* (December 2021), *Rapport annuel Enfant – Santé mentale : le droit au bien-être* (November 2021), *Gens du voyage : lever les entraves aux droits* (October 2021), *Rapport parallèle du Défenseur des droits – Examen du rapport initial de la France sur la mise en œuvre de la CIDPH* (August 2021), *Technologies biométriques: l'impératif respect des droits fomentaux* (July 2021), *Consultation citoyenne sur les discriminations: Recommandations et propositions du Défenseur des droits* (June 2021), *Les droits fondamentaux de la personne âgée accueillie en EHPAD* (May 2021), all available at: https://www.defenseurdesdroits.fr/fr/publications?tid=7.

[392] Defender of Rights (2021) *14th Baromètre de la perception des discriminations dans l'emploi*, available at: https://www.defenseurdesdroits.fr/fr/etudes-et-recherches/2021/12/etude-et-resultats-14e-barometre-sur-la-perception-des-discriminations.

[393] Defender of Rights (2021) *Difficultés d'Accès aux droits et discriminations liées à l'âge avancé* (October 2021), *Guyane : Les défis du droit à l'éducation* (July 2021), *La mobilisation collective des cheminots PS25 contre la SNCF* (April 2021), available at: https://www.defenseurdesdroits.fr/fr/publications?tid=1793.

[394] Defender of Rights (2020), *Rapport annuel d'activité 2020* (Annual report 2020), available at: https://www.defenseurdesdroits.fr/fr/rapports/2021/03/rapport-annuel-dactivite-2020.

[395] Defender of Rights, Reports to Parliament, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=cmspage&pageid=12&id_rubrique=106&opac_view=11.

measures, with the exception of policies related to the fight against discrimination on the ground of sex, which have been at the centre of the current Government's political platform.

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.

According to its annual reports, in 2020, the Defender of Rights issued 234 recommendations. Approximately 62 % of recommendations made by the Defender of Rights are complied with and 35 % of its reform proposals are followed.[396]

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.[397]

To this end, it has published a number of terms of reference of good practice in the form of guides over the years.[398]

In 2018, it published:

- 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.

In 2019, it published:

- legal guidelines on the legal framework and evidence of discrimination related to union activities;

[396] Defender of Rights (2020), *Rapport annuel d'activité 2020* (Annual report 2020), available at: https://www.defenseurdesdroits.fr/fr/rapports/2021/03/rapport-annuel-dactivite-2020.
[397] Defender of Rights, Tools, (*Outils*), available at: https://www.defenseurdesdroits.fr/fr/outils.
[398] 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.

- legal guidelines relating to discrimination based on physical appearance (a protected ground of discrimination in French law that also impacts origin, sexual orientation, gender identity, sex, disability, health and religion);
- a guide for hiring processes without discrimination.

In 2020, it published:[399]

- *Sexual Harassment in the workplace: training manual*;
- *Discrimination testing: a methodological handbook*;
- framework decision on gender identity;
- a leaflet on discrimination related to sexual orientation and gender identity;
- a leaflet on discrimination related to pregnancy;
- short films against discrimination;
- a practical guide for social workers.

In 2021, it published a leaflet on the protections against discrimination.[400]

g) Legal standing of the designated body

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;
- has legal standing to intervene in legal cases concerning discrimination, for example, as an *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).

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 2020, it presented observations in 1 221 cases of which 42 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

[399] Defender of Rights, *Outils* (Tools), available at: https://www.defenseurdesdroits.fr/fr/outils.
[400] Defender of Rights, *Outils* (Tools), available at: https://www.defenseurdesdroits.fr/fr/outils.

observations relating to the burden of proof and the positive duty of the State to prevent racial discrimination on the part of the police.[401]

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.[402]

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 No. 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.[403]

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 2020 it received 69 705 telephone inquiries covering all areas of its competence, which is an increase of 45 %.

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 2020, delegates received 71 846 claims, of which 1 700 concerned discrimination issues. At the head office, the Defender of Rights registered 25 048 complaints, of which 5 196 concerned discrimination issues, which is a reduction of 4.6 % compared to 2019.[404]

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

The most common ground of discrimination invoked is 'origin', which covers race, nationality and ethnic origin. It represents 21.4 % of complaints. It is followed by the grounds of disability (21.2 %) and health (11.3 %). Age accounts for 5.7 % of complaints, sex and pregnancy, 8.2 %, religion and religious beliefs, 2.4 %, sexual orientation, 1.4 % and political opinions, 0.9 %.

In 2020, 43.8% of complaints relating to the anti-discrimination mandate alleged discrimination in employment (of which 24.6 % related to the ground of origin), 24 % in access to public services (of which 9.5 % related to the ground of origin), 7.6 % in access to education (of which 1.1 % related to the ground of origin), and 2.7 % in access to goods and services including housing (of which 2.9 % related to the ground of origin).

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[401] Defender of Rights, Decision 2016-132, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=18452%20; Court of Cassation, First Civil Chamber, No. 15-24208, 9 November 2016, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=18453.

[402] 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.

[403] Defender of Rights (2020), *Rapport annuel d'activité 2019* (*Annual report 2019*), available at: https://www.defenseurdesdroits.fr/fr/dossier-de-presse/2020/06/rapport-annuel-dactivite-2019.

[404] All data reported in this section is taken from the Defender of Rights' 2020 annual report.

The investigations of the Defender of Rights can give rise to settlements, recommendations, proposals for reform and intervention before the courts. In 2020, the Defender of Rights attained amicable resolutions in 80 % of claims in which it intervened.

In 2020, it adopted 245 formal decisions, 122 of which relate to discrimination claims: 33 decisions related to discrimination on the ground of origin, 17 on sex, 15 on disability, 4 on age, 3 on sexual orientation, 4 on religion and none on political convictions, while 46 relate to other grounds. There were 21 decisions that discussed discrimination relating to multiple grounds.

In 2020, the Defender of Rights presented observations before the courts in 122 cases, of which 42 related to discrimination cases, and addressed two opinions to the Public Prosecutor.

j) Roma and Travellers

A report on the implementation of the Ministerial Instruction of 26 August 2012 relating to the condition of eviction of occupants of illegal campsites,[405] 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.[406]

Claims received by the Defender of Rights do not per se raise issues of discrimination law, they nevertheless underline problems in relation to public servants and the requirements of the rule of law in relation to migrant, Roma and Traveller communities, which are vulnerable and stigmatised.

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.[407]

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

Since 2015, the Defender of Rights has set the issue of fundamental rights of precarious migrants and foreign nationals, including non-national Roma, as a priority for the

[405] Ministerial Instruction of 26 August 2012 relating to the condition of eviction of occupants of illegal campsites (*Circulaire du 26 aout 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.

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

[407] National Consultative Human Rights Commission (*Commission nationale consultative des droits de l'homme - CNCDH*) (2019), *Rapport 2018 sur la lutte contre le racisme, l'antisémitisme et la xénophobie* (Report 2018 on the fight against racism, antisemitism 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.

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.[408] In 2021, the Defender published three reports on the effective protection of the rights of Roma persons, on the barriers to access to rights of Travellers and on access to education for Roma, Traveller and migrant children, (see above, section 7(f)(ii)).[409]

[408] 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 report section available at: https://www.defenseurdesdroits.fr/fr/publications?tid=7.

[409] Defender of Rights (2021) *Pour une protection effective des droits des personnes Roms* (December 2021) and *Gens du voyage : lever les entraves aux droits* (October 2021), available at: https://www.defenseurdesdroits.fr/fr/publications?tid=7; Opinion 21-17 to Parliament on the obstacles to education of Roma, Traveller and migrant children in the context of the consultation conducted by MP Sandrine Mörch, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=41656&opac_view=-1.

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 la haine anti-LGBT,* DILCRAH). The delegate provides support for local and national initiatives for mobilising civil society in relation to the fight against racism and homophobic hatred. It 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, with a particular interest in antisemitism and the historical-philosophical basis of anti-racism in France.

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.

The Defender of Rights organised a number of events and seminars relating to the 10th anniversary of the national equality body,[410] a conference to mark 10 years since the ratification of the International Convention on the Rights of Persons with Disabilities and an international two-day seminar on the multiplication of anti-discrimination grounds.[411] Similar activities have been hindered since the beginning of the COVID-19 crisis. In 2021, it launched the national anti-discrimination web platform alongside four national information and access to rights online campaigns.[412]

Most NGOs, whether anti-racist or promoting the rights of persons with disabilities, LGBT people, people with certain health conditions or elderly people (including MRAP, SOS Racism, LICRA, LDH, SIDA Info services, AIDES, LGBT, APF etc.),[413] are subsidised by the State and pursue information dissemination activities. These activities include dissemination from their own websites, presenting legal precedents and legal tools, many of which are adapted for the visually impaired, as well as seminars and events.

Article 61*bis* of Law No. 2017- 86 of 27 January 2017 on equality and citizenship has adopted Article L1131-2 of the Labour Code creating an obligation for all recruitment departments of organisations of more than 300 employees to undertake training to correct discriminatory biases and implement transparent processes at least every five years.

In addition, since 1 January 2021, according to Decree No. 2020-1259 of 14 October 2020,

[410] 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.

[411] 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.

[412] Defender of Rights, Antidiscrimination.fr – une année au service des victimes de discriminations, available at: https://www.defenseurdesdroits.fr/actualites/2022/02/antidiscriminationsfr-une-annee-au-service-des-victimes-de-discriminations.

[413] 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 antisemitism), 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).

all real estate professionals must complete at least two hours of sensitivity training on discrimination.[414] Article 3 of Law No. 2021-1109 of 24 August 2021 relating to the respect of the principles of the Republic provides for training of all public agents on the principle of secularity and the designation in all public services of a dedicated officer on issues of secularity, called referent secularity, responsible for managing all difficulties arising in relation to the application of the principle of secularity.[415]

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*).[416] 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 persons with disabilities and enforcing their rights, such as the National Consultative Council of Persons with Disabilities (*Conseil National Consultatif des Personnes Handicapées*) and its local counterparts, around the participation of NGOs representing persons with disabilities (Article 1 of the Law creating Article L146-1 A CSW). It further creates a Departmental Commission for the Rights and the Autonomy of Persons with Disabilities, which is competent for all decisions relating to the orientation of persons with disabilities (see section 6.1, above). Its members are representatives of public services, NGOs, trade unions and social partners and at least 30 % are persons with disabilities (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 persons with disabilities 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, rights of persons with disabilities, 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. From 2019, there is also a committee on the rights of older people.

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. It also chairs the consultative committee composed of all public and NGO stakeholders in the field of the protection and representation of persons with disabilities, following the implementation of the CRPD.

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[414] France, Decree 2020-1259 of 14 October 2020, available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042427805.

[415] Law No. 2021-1109 of 24 August 2021, available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043964778.

[416] 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.

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

The Delegate Minister for Equal Opportunities carried out a vast consultation on discrimination for all stakeholders and citizens through an online platform in April 2021, asking respondents for: their opinions on existing institutional and legal frameworks of protection; opinions on several targeted measures, such as the creation of a framework to allow the voluntary implementation by employers of indicators of diversity; examples of their own good practice; and their own suggestions. The consultation was visited by 134 732 people, received 5 143 contributions and collected 45 100 votes on proposed targeted measures. A report and analysis of the contributions was published on 7 July as a basis for future governmental action and of the trial phase of deployment of the proposed data collection framework to allow employers to produce indicators of diversity.[417]

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 persons with disabilities. In addition, social partners participate in the Departmental Commission for the Rights and Autonomy of Persons with Disabilities.

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 (Articles L221-1 to L227-4 of the General Code of Public Service).

The Government's active policy to address discrimination on the TFEU grounds in the workplace, which was pursued between 2012 and 2017, has been reinvested with the

[417] Minister of Equal Opportunities (2021) CP-*Consultaiton citoyenne*, 7 July 2021, available at:https://www.egalite-femmes-hommes.gouv.fr/cp-consultation-citoyenne-sur-les-discriminations-07-07-2021/.

creation of the Ministry of Equality between Women and Men, Diversity and Equal Opportunities[418] and gave rise to the launching of a renewed policy in 2021.

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 evictions on their housing rights. However, data published by CNDH Romeurope in December 2021 indicates a continuing progression of the policy of systemic expulsion from living areas, in very precarious conditions. In 2021, 91 % of expulsions were implemented without ensuring basic housing rights and shelter protection.[419]

The National Consultative Commission on Travellers (*Commission nationale consultative des gens du voyage*) was reinstated from February 2015 to February 2020, and a decree of 9 May 2017 has revised its composition, increasing the presence of representatives of public authorities.[420] It manages relations between Travellers and Government with respect to the development of parking infrastructure, education, and legislation. It is supported administratively by the DIHAL.[421]

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.[422]

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[418] Ministère chargé de l'égalité entre les femmes et les hommes, de la diversité et de l'égalité des chances.

[419] Romeurope (2021) *Observatoire des expulsions de lieux de vie informels* (Observatory of evictions from informal living spaces), report of 16 December 2021, available at : https://www.observatoiredesexpulsions.org/storage/wsm_publication/acAqJOl52HtcI7FvZEKeLigyadOflb7dOKP1QcDJ.pdf.

[420] Decree No. 2017-921 of 9 May 2017 modifying Decree of 25 June 2001 relating to the composition and functioning of the National consultative commission on Travellers, (*Décret n° 2017-921 du 9 mai 2017 modifiant le décret n° 2001-540 du 25 juin 2001 relatif à la composition et au fonctionnement de la commission départementale consultative des gens du voyage*), available at: https://www.legifrance.gouv.fr/eli/decret/2017/5/9/LHAL1703414D/jo/texte.

[421] France, DIHAL, available at: https://www.gouvernement.fr/commission-nationale-consultative-des-gens-du-voyage-4906.

[422] Romeurope (2021) *Observatoire des expulsions de lieux de vie informels* (Observatory of evictions from informal living spaces), report of 16 December 2021, available at: https://www.observatoiredesexpulsions.org/storage/wsm_publication/acAqJOl52HtcI7FvZEKeLigyadOflb7dOKP1QcDJ.pdf; see above, section 7(f)(ii). Defender of Rights (2018) *Exiles and fundamental right, three years after the Calais report*, December 2018, available at: https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/synth-rapportcalais-eng-ipcan-num-07.12.18.pdf; Defender of Rights (2021), *Pour une protection effective des droits des personnes Roms* (December 2021) and *Gens du voyage: lever les entraves aux droits* (October 2021), available at: https://www.defenseurdesdroits.fr/fr/publications?tid=7; Opinion 21-17 to Parliament on the obstacles to education of Roma, traveller and migrant children in the context of the consultation conducted by MP Sandrine Mörch, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=41656&opac_view=-1.

8.2 Measures to ensure compliance with the principle of equal treatment (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Compliance of national legislation (Articles 14(a) and 16(a))

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.

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. In addition, Law No. 2021-1109 of 24 August 2021 relating to the respect of the principles of the Republic introduces Article 6 *quater* A to the Law of 13 July 1983 on the rights of public agents (now Article L135-6 of the General Code of Public Service),[423] and creates an obligation on all public services to create a complaints mechanism to protect public agents against discrimination, violence and harassment.

Articles L131-1 ff. of the General Code of Public Service are rules of general application and public order. They must be respected in all regulatory acts or decisions regarding a public servant.

The general principle 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.[424]

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

However, there is no process of administrative codification of all laws and regulations in France. Therefore, legislation is not reviewed through an administrative audit and very old laws and regulations that are obsolete and have not been repealed, are in force until they are discovered and repealed.

b) Compliance of other rules/clauses (Articles 14(b) and 16(b))

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.

The Labour Code 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).

[423] Available at: https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000044416551/LEGISCTA000044421001/2022-03-01/#LEGISCTA000044427584.

[424] Conseil d'État, No. 298348, 30 October 2009.

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

9 COORDINATION AT NATIONAL LEVEL

The National Action Plan against Racism 2018-2022,[425] in accordance with public policy since 2012, has made combating racism and antisemitism a priority. It is being implemented with the support of an inter-ministerial delegate against racism and antisemitism (*délégué interministériel à la lutte contre le racisme, l'antisémitisme et la haine anti-LGBT,* DILCRAH) reporting to the Prime Minister and the Minister of the Interior, to initiate, coordinate and evaluate Government action.[426] Sophie Elizéon was nominated to the post on 21 February 2021.

The DILCRAH is responsible for coordinating all public action against racism and antisemitism, as well as combating discrimination and anti-LGBTI hate crime. Since 2015, its action has been focused on combating hate crime, racism on the internet and antisemitism. In 2021, Sophie Elizéon moved its focus to supporting NGOs and stakeholders.

In 2017, the post of Secretary of State for persons with disabilities, reporting to the Prime Minister, was created to mainstream all policies relating to disability, which had been designated as a priority of the mandate of the French President. The current Secretary of State is Sophie Cluzel.

In 2020, after ten years without a specific anti-discrimination policy, limiting the action of the state to the DILCRAH and the Ministry of Territorial Cohesion (*Ministère de la cohésion des territoires*), public policies tackling discrimination on the ground of origin, social situation and the promotion of equality have been handed to the Ministry of Equality between Women and Men, Diversity and Equal Opportunities, working in an inter-ministerial approach with the Ministry of Interior, the Ministry of Employment and the Ministry of Urban Affairs. In 2021, the Minister launched the wide consultation announced in 2020 and actively supported the creation of the Antidiscrimination.fr complaints and information platform. She also worked in collaboration with all stakeholders on the creation of a framework to allow the implementation of indicators of diversity by employers called the Diversity Index.[427]

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 the 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. In addition, the ministry in charge of sport, has a dedicated mission to fight against discrimination in sport.

The Inter-ministerial Delegation on Emergency Accommodation and Access to Housing (*Délégation interministérielle à l'hébergement et à l'accès au logement*, DIHAL) is actively working on its mandate to establish dialogue with NGOs and implement a specific programme on access to rights (including health, education, employment, accommodation and housing) and the integration of foreign Roma and Travellers.

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[425] France (2018), *National action plan against racism and antisemitism* (*Plan national d'action contre le racisme et l'anti-sémitisme*), available at: https://www.dilcrah.fr/le-plan-national-de-lutte-contre-le-racisme-et-lantisemitisme/.

[426] Decree No. 2012-221 of 16 February 2012 creating a delegate against racism and antisemitism (*Décret No. 2012-221 du 16 février 2012 instituant un délégué interministériel à la lutte contre le racisme et l'antisémitisme*), available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000025372209&categorieLien=id.

[427] Ministry of Labour, Employment and Economic Inclusion (2022) *Expérimentation de l'Index Diversité: retour d'expérience* (Diversity Index pilot: feedback) 21 February 2022, available at: https://travail-emploi.gouv.fr/actualites/presse/communiques-de-presse/article/experimentation-de-l-index-diversite-et-inclusion-dans-le-monde-professionnel.

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.

Government
The Ministry of the Interior, Ministry of Education, Ministry of Justice, Ministry of Social Affairs, Ministry of Employment, Ministry of Territorial Cohesion, Ministry of Equality between Women and Men, Diversity and Equal Opportunities and the Secretary of State for Persons with Disabilities.

Government departments
The Women's Rights Service (SdFe) has become a service of the Ministry of Equality between Women and Men, Diversity and Equal Opportunities; 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 (DGAFP); 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 and their Visibility
Inter-ministerial Delegation on the Prevention of and Fight Against Poverty
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 Persons with Disabilities
Inter-ministerial Delegation on Urban Affairs and Development
Inter-ministerial Delegation against Racism, Antisemitism and Anti-LGBT Hate (DILCRAH)
Inter-ministerial Delegation on the Support of Victims
Inter-ministerial Delegation for the Orientation and Integration of Refugees
Inter-ministerial Delegation for a National Strategy for Autism
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)
National Agency for Territorial Cohesion (ANCT)
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 persons with disabilities
High Council for Professional Equality between Men and Women
Commission for Political Equality between Men and Women

Specialised administrative bodies
DDD (Defender of Rights - Défenseur des droits)
CNIL (National Data Protection Authority)
CSA (Higher Council for Radio and Television)
CADA (Commission for Access to Administrative Documents)

Justice
Anti-discrimination division (part of all public prosecution offices)

10 CURRENT BEST PRACTICES

- 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 (see section 8.1).
- School integration system for Roma and Traveller children (CASNAV) (see section 5(b)).
- Employment quotas for persons with disabilities in the public and private sectors (see section 5(b)).
- The annual joint barometer of the Defender of Rights and the ILO on discrimination in employment in France (see section 7(f)(ii) above).
- The joint working group of the Equality Body and the French Data Protection Authority, CNIL, is addressing issues related to discriminatory biases in artificial intelligence, such as self-induced biases of work processes or self-learning software in the use of algorithms, and has organised a first seminar in May 2020.[428]
- Diversity Index, experimental framework to allow the implementation of indicators of diversity by employers initiated by the Minister delegate for Equal Opportunities.[429]

[428] CNIL, Defender of Rights (2020), *Joint Recommendations*, 2 June 2020, available at: https://www.cnil.fr/fr/algorithmes-et-discriminations-le-defenseur-des-droits-avec-la-cnil-appelle-une-mobilisation.

[429] AFP (2021), 'Bientôt un index diversité pour les entreprises volontaires', 26 January 2021, Challenge, available at: https://www.challenges.fr/societe/bientot-un-index-de-la-diversite-pour-les-entreprises-volontaires-annonce-moreno_747849; Ministry of Labour, Employment and Economic Inclusion (2022), *Expérimentation de l'Index Diversité : retour d'expérience* (*Diversity Index pilot: feedback*) 21 February 2022, available at: https://travail-emploi.gouv.fr/actualites/presse/communiques-de-presse/article/experimentation-de-l-index-diversite-et-inclusion-dans-le-monde-professionnel.

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives at the national level

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.

The General Code of Public Service regulating employment law in the public services, which was amended to cover discrimination by the above-mentioned transposition legislation, states at Article L6 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 the protection afforded by the General Code of Public Service and are also governed by application of Article L6 of the Law by separate in-house rules of Parliament. Finally, all public servants who hold one of the various statuses that are excluded from the application of the General Code of Public Service at Article L6 are also excluded from all protections provided by the General Code of Public Service against discrimination. None of these texts have been amended to implement Directive 2000/78/EC or Directive 2000/43/EC and do not contain any protection against discrimination on any grounds. The Conseil d'État decided in 2009 that the anti-discrimination directives are of direct application before administrative courts.[430] Since then, the Conseil d'État has repeatedly decided that all public agents whatever their status, including agents of Parliament and magistrates, were covered by the Law of 27 May 2008 stating the general regime of protection against discrimination in employment and access to goods and private and public services.[431]

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.

11.2 Other issues of concern

Anti-discrimination law continues to attract resistance from some 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.[432]

[430] Council of State, No. 298348, 30 October 2009, available at: https://www.conseil-etat.fr/ressources/decisions-contentieuses/les-grandes-decisions-du-conseil-d-etat/conseil-d-etat-assemblee-30-octobre-2009-mme-perreux.

[431] Council of State 27 July 2016, No. 393292, Council of State E, 25 October 2018, No. 405418.

[432] Hennette-Vauchez, S. and Fondimare, E. (2019) 'Incompatibility between the French Republican Model and Anti-discrimination law? Deconstructing a familiar trope of narratives of French Law' in Havelkova, B., Möschel, M. (Eds.) *Anti-discrimination Law in Civil Law Jurisdictions*, Oxford University Press, pp. 56 to 75.

This constitutes the core of very strong ideological objections to the framework of anti-discrimination law within the central state institutions.[433]

- 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 is receiving more and more complaints, has to set priorities among a number of topics and faces heavy pressure to manage its activities with contained resources. Thus, the allocation of resources for the treatment of claims brought by victims of discrimination is under constraint.

While its action in pursuing claims and the implementation of anti-discrimination law remains intact, in the expert's opinion, its 2019 and 2020 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 police and 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, police 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.[434] Claimants still have to be ready to face multiple appeals before their cases are properly examined. There remain many barriers to the systematic implementation of discrimination law in France. Legal action is still not considered as a useful means of advocacy by civil society. Very few NGOs are knowledgeable in the management of judicial remedies[435] 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 is practically non-existent. Targeted training for judges, lawyers, police, trade unions and NGOs is a long-term process that remains indispensable.

The national equality body works with the legal profession to ensure that anti-discrimination law is addressed in the continuing professional training of lawyers,

[433] 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.

[434] 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.

[435] 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 femme, 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.

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.

The only training for the police on the concept of discrimination and ethical issues in relation to discriminatory practices and racial profiling in police work is a session given by the Equality Body in a two-hour presentation during initial training at police school.[436]

- Extensive interpretation of secularism and scrutiny of the Islamic faith in employment, access to goods and services and in recognition of NGO status

Debates regarding the right to express one's religious beliefs, particularly in the Islamic faith, are ongoing in the French democratic political dialogue .[437]

These tensions are finding echoes in the general public and before national courts in arguments promoting the idea of extending the duty of neutrality of public servants to beneficiaries of the public service and private sector employees.

- 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 persons with disabilities 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 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

[436] Defender of Rights (2020), *Annual report 2019*, page 57: available at: https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/raa-2019_en_numaccessopti_07-09-2020.pdf.

[437] 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; Law No. 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, No. 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; Ministry of Education, Vademecum Laicité à l'école (2019) (*Secularity in school handbook*), September 2019, available at: https://eduscol.education.fr/cid126696/la-laicite-a-l-ecole.html.

accessible. This legislation has been held to be a substantial hindrance to the construction of accessible housing.[438]

With regard to education, the integration of children with disabilities into the education system and access to education is constantly improving from one year to the next, reaching an overall increase of 132 % since 2005. Measures taken to deal with the situation of children with severe disabilities, 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,[439] most mayors, who are also MPs, often refuse to abide by the demands of governmental authorities, even when public education authorities or prefects intervene. In December 2021, a Parliamentary consultation and report was submitted to the Minister of Education, recommending among other measures, that the Government take the necessary steps to precisely measure this population and its geographical location.[440]

The abrogation of the status of Travellers, further to the decision of the Constitutional Council of 5 October 2012,[441] quashing Law 69-2 regulating their status and rights, was adopted by Article 195 of the Law on Equality and Citizenship,[442] after being on the legislative agenda since 2012.

However, measures to address their difficulties regarding occupation of private land (*terrains familiaux*) with their caravans, implemented through the Consultative National Commission for Travellers and DIHAL, remain difficult to enforce with local authorities because of the reluctance of mayors and local political forces to accommodate travellers.[443]

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[438] Law No. 2018-1021 adopted on 23 November 2018, available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037639478&categorieLien=id.

[439] National Consultative Human Rights Commission (*Commission nationale consultative des droits de l'homme - CNCDH*) (2019), *Rapport 2018 sur la lutte contre le racisme, l'antisémitisme et la xénophobie* (Report 2018 on the fight against racism, antisemitism 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.

[440] Mörch, Sandrine (2021) *Access to Education and Great Precariousness* (*Scolarisation et grande précarité: l'accès à l'éducation pour tous*), Report to the Minister of Education, December 2021, available at https://sandrinemorch.fr/wp-content/uploads/2022/01/Rapport-Scolarisation-et-grande-precarite-lacces-a-leducation-pour-tous.pdf.

[441] Constitutional Council, No 2012-279, 5 October 2012, available at: https://www.conseil-constitutionnel.fr/decision/2012/2012279QPC.htm. Through the National Consultative Commission for Travellers and DIHAL.

[442] Law No. 2017-86 of 27 January 2017 on equality and citizenship, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033934948&dateTexte=&categorieLien=id.

[443] Conseil d'Etat, No. 359223, 19 November 2014.

The Defender of Rights adopted many decisions[444] to formally request that Parliament and the Government proceed with making the necessary legislative reforms with regard to long-term occupation of private land (*terrains familiaux*) and families 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. 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.[445]

In 2015, Romeurope declared that it estimated the policy of evictions from illegally occupied land to cost EUR 30 million to 40 million per year and the clean-up operation for each campsite approximately EUR 50 000 to 700 000.[446]

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 resigned in July 2014, in the face of the absence of political will to tackle discrimination and facilitate Roma integration.

As discussed in this report, according to the report by the Human Rights League and the ERRC on the number of evictions,[447] the ongoing policy of forced eviction from illegal campsites has resulted in the eviction 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.

Although the Conseil d'Etat, the supreme court of administrative law, decided in February 2019 that in the absence of imminent necessity, eviction could not be ordered by an administrative authority without securing the rights of the Roma illegal occupants,[448]

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[444] Defender of Rights, Decision MLD 2014-152 of 24 November 2014; Defender of Rights (2021) *Travellers: Eliminate barriers to rights* (Gens du voyage : lever les entraves aux droits) (October 2021), available at: https://www.defenseurdesdroits.fr/fr/publications?tid=7.

[445] National Consultative Human Rights Commission (*Commission nationale consultative des droits de l'homme - CNCDH*) (2019), *Rapport 2018 sur la lutte contre le racisme, l'antisémitisme et la xénophobie* (Report 2018 on the fight against racism, antisemitism 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.

[446] *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.

[447] Romeurope (2020) 'Observatoire des expulsions de lieux de vie informels', report of 10 November 2020, available at: https://www.romeurope.org/wp-content/uploads/2020/11/OBSERVATOIRE_NOTE_20192020.pdf; Romeurope (2021) 'Observatoire des expulsions de lieux de vie informels' (Observations of evictions from informal living spaces), report of 16 December 2021, available at : https://www.observatoiredesexpulsions.org/storage/wsm_publication/acAqJOl52HtcI7FvZEKeLiqyadOflb7dOKP1QcDJ.pdf.

[448] Conseil d'Etat, 13 February 2019 No. 427423, available at: https://www.legifrance.gouv.fr/affichJuriAdmin.do;jsessionid=4B8116330BCFF04DC838B446306461F0.tplgfr25s_1?oldAction=rechExpJuriAdmin&idTexte=CETATEXT000038135472&fastReqId=614933702&fastPos=264.

the Court of Cassation, the supreme court of private law, has held in two decisions, one relating to the occupation of private land[449] and the other regarding the occupation of the property of a town,[450] that the various rights of illegal occupants of land could not be preserved by the judicial judge on account of the disproportionate impact of an eviction, because of the gravity of the impact of their occupation on the right to property of the owners, which would be denied if it was not to be enforced by the court.[451]

- Racial discrimination

In practice we can observe that more cases reach trial and are successful, but they mainly concern direct discrimination and discriminatory harassment 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,[452] 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.[453] 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 to fight racial discrimination in the workplace.

As regards police checks, since the landmark decision of the Court of Cassation of 9 November 2016,[454] 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.[455]

In its report of June 2020, the Defender of Rights warned of the constant increase of discrimination on the ground of origin and the need for a concerted public policy targeting employers and economic operators.[456]

- Discrimination 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.

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[449] Court of Cassation, Third Civil Chamber, 4 July, 2019, No. 18-17119, available at: https://www.courdecassation.fr/jurisprudence_2/troisieme_chambre_civile_572/619_4_43088.html.

[450] Court of Cassation, Third Civil Chamber, 28 November, 2018, No. 17-22810, available at: https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000039465719&fastReqId=246564261&fastPos=1.

[451] In French jurisprudence, the Conseil d'État and the Court of Cassation regularly disagree. Roma and Travellers' rights NGOs have indicated that they intend to take these cases to the ECtHR and the UN HRC.

[452] 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*.

[453] Court of Cassation, social chamber, *Airbus Operations SAS*, No. K 10-15873, 15 December 2011.

[454] 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.

[455] Paris High Court, 17 December 2018: Nos 17/06217, 17/06216, 17/06214, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=26661&opac_view=-1, overturned by the Court of Appeal of Paris, 8 June 2021, no RG 19/0065 and RG 19/00872, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=39429&opac_view=-1.

[456] Defender of Rights (2020) *Discriminations et origines: l'urgence d'agir* (Report on the situation of discrimination on the ground of origin in France), June 2020, available at: https://www.defenseurdesdroits.fr/fr/rapports/2020/06/discriminations-et-origines-lurgence-dagir.

According to the Defender of Rights and some NGOs,[457] 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.

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 Rights 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.[458]

In addition, one can observe 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.

- Homophobia

The adoption of the legislation authorising marriage for same-sex couples and medically assisted reproduction for lesbians has given rise to a significant traditional, religious, family rights political lobby called La Manif Pour Tous (Protest 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

[457] 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; Committee for migrants' access to healthcare (*Comité pour l'accès à ala santé des exiles*), (2019) *Annual report 2018*, available at: www.comede.org/wp-content/uploads/2019/06/Rapport-Comede-2019.pdf.

[458] 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 No. 2018-003, presenting observations before the ECtHR, available at: https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=24750&opac_view=-1.

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.

- Artificial intelligence

The use of digital tools based on artificial intelligence and algorithms is constantly increasing, although often hidden from the general public. AI and algorithms are currently used in the management of access to social security, in police work, case management by the judiciary or for hiring purposes, and while they constitute an element of progress they also carry significant risks for fundamental rights. Beyond the apparent neutrality of algorithms, the ongoing research of CNIL and the Defender of Rights is showing important biases integrated in their conception or resulting from the data bases that feed them, their self-analysing stereotyping factors and their deployment regarding sex, origin, age and social condition (a ground covered by French legislation). Both institutions pursue work in order to propose policies and good practices to correct and limit the impact of such algorithms by informing the public of these biases and their rights,[459] and by proposing measures imposing forms of human evaluation, monitoring and correction of self-learning software.[460] The French Data Protection Authority, CNIL, is launching a consultation on issues related to 'intelligent cameras' in city spaces, with the objective of publishing a position paper in 2022.[461]

[459] Defender of Rights (2021), *Kit pédagogique du citoyen numérique* (Educational Kit for the Digital Citizen), January 2021, available at: https://www.defenseurdesdroits.fr/fr/guides/kit-pedagogique-du-citoyen-numerique.

[460] CNIL, Defender of Rights (2020), Joint Recommendations, 2 June 2020, available at: https://www.cnil.fr/fr/algorithmes-et-discriminations-le-defenseur-des-droits-avec-la-cnil-appelle-une-mobilisation.

[461] CNIL (2022) 'Caméras dites "intelligentes" ou "augmentées" dans les espaces publics: la CNIL lance une consultation publique' ('Intelligent' or 'augmented' cameras in public spaces: CNIL consultation launch'), press release, 14 January 2022, available at: https://www.cnil.fr/fr/cameras-dites-intelligentes-ou-augmentees-dans-les-espaces-publics-la-cnil-lance-une-consultation.

12 LATEST DEVELOPMENTS IN 2021

12.1 Legislative amendments

Law No. 2021-1017 of 2 August 2021 on Bioethics.[462]

Law No. 2021-1109 of 24 August 2021 relating to the respect of the principles of the Republic.[463]

Codification of all legislation applicable to public agents by Ordinance No. 2021-1574 of 24 November 2021, abrogating Law No. 83-634 on the rights of public agents and creating a General Code of Public Service.[464]

12.2 Case law

Victimisation

Relevant discrimination ground(s): Race and ethnic origin
Name of the court: Court of Cassation
Date of decision: 13 January 2021
Name of the parties: N\A
Reference number: No. 19/21138
Address of the webpage:
https://www.courdecassation.fr/jurisprudence_2/arrets_publies_2986/chambre_sociale_3168/2021_9997/janvier_9998/64_13_46315.html
Brief summary:
The Court started by reiterating the principle of protection against victimisation stated at Article L1132-3 of the Labour Code: no sanction can be taken against an employee for making a claim of discrimination unless bad faith is demonstrated. To establish bad faith, the employer cannot rely on the sole conclusion that the facts alleged have not been established. He must prove that the employee had knowledge that the facts alleged in support of his claim were false. In this case the employer had established that the accusation of discrimination on the ground of origin was made in the context of a prior refusal of a new role, at a time when the employee intended to leave, was disengaged from his work, had never before raised facts supporting allegations of discrimination on the ground of origin, did not offer precise facts in support of his allegations and intended to use these accusations to negotiate his compensation package. In the context of such unfounded allegations, the Court concluded that the employer had satisfied his burden of establishing that the employee knew that these allegations were false and confirmed that the dismissal of the employee was well founded.

Origin

Relevant discrimination ground(s): Race and ethnic origin
Name of the court: Court of Appeal of Paris
Date of decision: 8 June 2021
Name of the parties: N\A
Reference number: No. RG 19/0065 and RG 19/0072
Address of the webpage:
RG 19/00865:
https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=39451&opac_view=-1

[462] Available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043884384.
[463] Available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043964778.
[464] Available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044411525.

RG 19/00872:
https://juridique.defenseurdesdroits.fr/index.php?lvl=notice_display&id=39444&opac_view=-1.
Brief summary:
On March 1 2017, three male high school students, of Moroccan, Comorian and Malian origin respectively, returning with their class and professor from a two-day school trip to visit the European Commission in Brussels, were the only persons checked by police on the platform descending from the Thalys train. When their professor intervened to request a justification from the police agents carrying out the checks, she was asked to step away and provided with no explanation. The students' lawyer addressed a registered letter to the police authorities to demand a justification for their targeted check within 5 days of the police check. The police authorities never answered.

The claimant initiated a recourse against the State for racial profiling and addressed a complaint to the Defender of Rights, who is competent both in matters of discrimination and police ethics.

The case was dismissed by the first instance court on the ground that the checks were justified by methods of general police work in relation to public order and that the police could not have discriminated since the entire class was composed of students of foreign origin.[465] The Court of Appeal concluded that a police check based on the physical characteristics of the persons being checked is discriminatory and constitutes a fault triggering the liability of the State. Studies show that stereotyping of police checks targets mainly young men of foreign origin.[466] Since it is established that the young women of the group, adults getting out of the train and persons who were not members of minorities were not checked, there is sufficient evidence to conclude a presumption of discrimination on the combined grounds of origin, age and sex.

The State argued that it was not in a position to establish the identity of persons checked by paper trail, and that videos from public space cameras were only kept for 72 hours, and thus unavailable. The Court answered that street videos were kept for 62 days, that police services should have proceeded to the required verifications and documented the circumstances of the checks when it received the request for justification on the part of the three claimants' lawyer within five days of the checks, which it did not. The State also alleged that the checks were based on the behaviour of the people subject to the checks since, according to one policeman, two of the claimants had big bags and were suspicious since they stood apart from the group. Its evidence in defence is based on the testimony of one policeman, whereas the checks were performed by three police officers. The Court considers that this report, written more than two months after the facts, following the prosecution of the State by the claimants, was insufficient and had no evidentiary value. The Court concluded that the State did not satisfy its burden of justification after the shift in the burden of proof and sentenced the State to pay EUR 1 500 in damages to each claimant and EUR 2 000 for the costs of each proceeding.

Disability

Relevant discrimination ground(s): Disability
Name of the court: Court of Cassation
Date of decision: 12 May 2021
Name of the parties: N/A
Reference number: No. 20-10512

[465] Judicial High Court of Paris 9 TGI) 17 December 2018, RG no 17/06217 and RG 17/06214.
[466] Defender of Rights (2017) *Relations police/population: le cas des contrôles d'identité*: https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/enquete-relations-police-population-final2-11012017.pdf; Jounin, Nicolas, (2015) *Le faciès du contrôle l'Harmattan*;, Goris, Indira (2009) *Police et minorités visibles: les contrôles d'identité à Paris*, Open Society.

Address of the webpage:
https://www.legifrance.gouv.fr/juri/id/JURITEXT000043565870?init=true&page=1&query=arr%C3%AAt+20-10.512&searchField=ALL&tab_selection=all
Brief summary:
The claimant was dismissed for fault after having verbally assaulted his superior in a context where the physical assault was prevented through the intervention of a third party. The claimant alleged that it could not constitute a fault given that it was the result of an altered mental state requiring psychiatric care.

The claimant filed 36 testimonies confirming that he was a reliable employee whose behaviour was proper and polite, very calm and professional, and established that he had never been sanctioned before.

The judge of the facts concluded that, given that the verbal aggression at the origin of the claimant's dismissal was a result of his mental pathological state, after having been a victim of moral harassment, it could not constitute a fault and the dismissal therefore constituted discrimination on the grounds of health and disability. The Court clearly stated that rules relating to sanctions of fault leading to dismissal do not apply to situations that can be linked to a mental illness, imposing an obligation on the employer to adapt their internal rules to deal with the situation and find resources to manage it.

Therefore, the employer will have to address this situation not as a disciplinary issue but as a question of reasonable accommodation to maintain the employment of an employee whose behaviour is altered by psychic mental disability.

Religion

Relevant discrimination ground(s): Religion, physical appearance
Name of the court: Court of Cassation, Social Chamber
Date of decision: 14 April 2021
Name of the parties: N/A
Reference number: No.19-24079
Address of the webpage:
https://www.courdecassation.fr/jurisprudence_2/chambre_sociale_576/479_14_46873.html
Brief summary:
The claimant was a saleswoman in a chain fashion store. Upon her return from parental leave, she showed up wearing an Islamic veil covering her head and neck up to her chin. She was asked to remove it by her superior. When she refused, her employer asked her to work in the back store. She refused this proposition and was put on paid leave while a decision was taken on her situation. She was finally dismissed for refusing to abide by the fashion chain's dress code. This dress code was not in writing.

The social chamber of the Court of Cassation first stated that according to L1321-3 (2) of the Labour Code, the employer cannot impose restrictions to religious freedoms that are not required by a genuine and determining occupational requirement. A genuine and determining occupational requirement must be demanded by the nature and the conditions of execution of a specific professional activity. Dress codes cannot be the basis of a limitation of religious freedom. If the employer intends to impose restrictions on rights and freedoms through the imposition of a neutrality policy, it may only do so through the adoption of a neutrality clause in a written general instruction or in its in-house regulation, in application of Article L1321-5 of the Labour Code.

The Court decided that in the absence of a written general instruction or general neutrality clause in the employer's in-house regulation, the Court of Appeal righteously held that the obligation imposed on the employee to remove her Islamic veil constituted direct discrimination on the ground of religion. In addition, its analysis that the chain's

commercial policy relating to the physical appearance of saleswomen could not form the basis of a genuine and determining occupational requirement was also well founded.

Relevant discrimination ground(s): Religion
Name of the court: Court of Cassation
Date of decision: 7 July 2021
Name of the parties: N/A
Reference number: No. 20-16206
Address of the webpage:
https://www.legifrance.gouv.fr/juri/id/JURITEXT000043782032?init=true&page=1&query=20-16.206&searchField=ALL&tab_selection=all
***Brief summary*:**
The claimant was hired as an intern to check the tickets of passengers on the public transport network of Paris (RATP). She was subsequently hired as mobile inspector, her permanent post being conditional on being sworn in in order to be authorised to issue contraventions She was summoned to be sworn in before the High Judicial Court at a particular date. Upon reading the secular pledge provided by the Court, she refused to proceed and swear according to this pledge, on the ground that it was incompatible with her Christian religion. The judge refused to allow her to swear on the Bible and she was therefore not sworn in. As a consequence, she was dismissed, the employer alleging that her refusal to proceed with the pledge was a fault that did not allow her to pursue her role and hold the status of permanent employee.

The Court of Cassation held that the duty of neutrality of the State is such that none of its agents has a power to appreciate the legitimacy of religious beliefs, expressions and practices. The duty of neutrality does not entail that the religious freedom of public employees and agents should not be respected. However, the claimant's dismissal was not null and void because it was not deemed to be based on her religion. It was considered to be based on the fact that the claimant could not be sworn in, by reason of the decision of a third party, the judge. Her dismissal was nevertheless without cause, considering that she had a right to be sworn in in a fashion that met the requirements of her faith.

Age :

Relevant discrimination ground(s): Age
Name of the court: Conseil d'État
Date of decision: 8 September 2021
Name of the parties: N/A
Reference number: No. 453471
Address of the webpage:
http://www.conseil-etat.fr/fr/arianeweb/CE/decision/2021-09-08/453471
Brief summary:
In France, judicial judges are recruited through various selective processes that give them access to a two-year training programme at the National Magistrates School (*École nationale de la magistrature*, ENM) or to access directly a probationary period of two years. Decree No. 72-355 of 4 May 1972 relating to the National Magistrates School, provides for different selective processes to access the one and only ENM's two-year training programme, depending on the age of candidates. Candidates under 31 years of age and civil servants with 4 years of experience in the civil service under 40 years of age are selected to attend the ENM programme through a series of competitive examinations.
Persons over 31 and under 40 years of age with 8 years of various professional experience or with a legal education and 4 years of experience of legal work can be selected by submitting a dossier based on their education and legal experience.

The claimant meets the requirements to submit a candidacy based on her education and 4 years of experience of legal work, but she is under 31 years of age. She was denied access to the procedure to access ENM through submission of a dossier. She challenged

before the Supreme Administrative Court, the Council of State (Conseil d'État) the legality and conformity of the conditions of Decree No. 72-355 of 4 May 1972 with the Constitution and EU Directive 2000/78, alleging that it was discriminatory on the ground of age.

The Conseil d'État based its decision on Article 21 of the Charter of Fundamental Rights of the European Union, which prohibits discrimination on the ground of age and Article 2(2) of Directive 2000/78. To be justified, a differential treatment on the ground of age must be based on the nature of the professional activity, its conditions of execution or it must be justified by a legitimate aim and the means for achieving that aim must be appropriate and necessary.

The Court concluded, without commenting on the substance of the arguments presented by the French Government, that given that students can access the ENM before 31 years of age, the State did not present evidence that age constitutes a genuine and determining occupational requirement for this specific selection process. The State alleged the necessity to limit access to ENM for candidates under 31 through entry examinations, but did not present justifications that such a requirement for this age group is appropriate or necessary. The Conseil d'État concluded that these provisions were illegal as they were contrary to Directive 2000/78 and ordered the State to proceed to their abrogation within three months. This case gave the Conseil d'État the opportunity to challenge the choice to create separate tracks of recruitment according to age excluding persons under 31 years of age of all means of access that are not based on entry examinations, by using the legitimacy and proportionality tests imposed by EU law.

ANNEX 1: MAIN TRANSPOSITION AND ANTI-DISCRIMINATION LEGISLATION

Country: **France**
Date: **1 January 2022**

Title of Law : Law No 83-634 on the Rights of Public Agents, now General Code of Public Service. Date of adoption: 6 July 1983 Date of Entry into Force: 6 July 1983 Latest relevant amendment: Ordinance No. 2021-1574 of 24 November 2021 Internet Link: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000044416551/2022-03-01/ Grounds covered by the article: mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed to an ethnic origin, a race, physical appearance, last name, philosophical, political and religious opinions, family situation, union activities, age, health, disability. Material Scope: public employment Article L131-1
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 No. 2017-86 of 27 January 2017 Internet link: http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719 Grounds protected: origin, mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed, to an ethnic origin, a nation, a race or a 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, apparent economic vulnerability, refusal to be a victim of bullying, loss of autonomy. 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 amendment: 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: origin, mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed, to an ethnic origin, a nation, a race or a particular 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, apparent economic vulnerability refusal to be a victim of bullying, loss of autonomy, 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 amendment: Article 86 of Law No. 2016-1547 of 18 November 2016 Internet link: http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000588617&dateTexte=&categorieLien=id Grounds protected: origin, mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed, to an ethnic origin, a nation, a race, religion, physical appearance, last name, family situation, philosophical convictions, trade union activities, political opinions, age, health, disability. 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 covered by article 225-1 of the Penal Code Grounds: origin, mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed, to an ethnic origin, a nation, a race or a particular 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, apparent economic vulnerability, refusal to be a victim of bullying, loss of autonomy. 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 amendment: N/A 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 Persons with Disabilities Date of adoption: 11 February 2005 Entry into force: 11 February 2005

Latest relevant amendment: 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 amendment: 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 amendment: Article 70 of Programming Law No. 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: origin, mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed, to an ethnic origin, a nation, a race or a particular religion, physical appearance, last name, family situation, trade union activities, political opinions, age, health, disability, genetic characteristics, place of residence, or banking residence, capacity to express oneself in a language other than French, apparent economic vulnerability, loss of autonomy 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 amendment: N/A 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: general principle of equality, origin, mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed, to an ethnic origin, a nation, a race or a particular religion, physical appearance, last name,

family situation, trade union activities, political and philosophical opinions, age, health, disability, genetic characteristics, place of residence or banking residence, capacity to express oneself in a language other than French, apparent economic vulnerability, loss of autonomy, refusal to be a victim of bullying 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
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 amendment: N/A 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
Title of law: Law No. 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 amendment: N/A Internet link: https://www.legifrance.gouv.fr/loda/id/JORFTEXT000033418805/ Grounds covered: origin, mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed, to an ethnic origin, a nation, a race or a particular religion, physical appearance, last name, family situation, trade union activities, philosophical and political opinions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in a language other than French, apparent 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
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 Internet link: https://www.legifrance.gouv.fr/loda/id/JORFTEXT000033934948/ Grounds covered: origin, mores, sexual orientation, sex, pregnancy, gender identity, belonging, whether real or supposed, to an ethnic origin, a nation, a race or a particular religion, physical appearance, last name, family situation, trade union activities, philosophical and political opinions, age, health, disability, genetic characteristics, place of residence, capacity to express oneself in a language other than French, apparent, economic vulnerability, banking residence, loss of autonomy, refusal to be a victim of bullying 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 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: INTERNATIONAL INSTRUMENTS

Country: **France**
Date: **1 January 2022**

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 Discrimina-tion	07.03.1966	28.07.1981	No	No	No
ILO Convention No.111 on Discrimination	25.06.1958	15.06.1960	No	No	No

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?
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 September1997, 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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