Analytical Report on Legislation

RAXEN National Focal Point FRANCE

Agence pour le développement des relations interculturelles (ADRI) / Agency for the development of intercultural relations, Paris

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1. Executive summary

This report is an update of the work conducted for the RAXEN 2 and 3 exercises, which analysed the specific French approach, based on the theory of formal equality and criminal penalties for racist and discriminatory behaviour, as well as the new impetus given to anti-discrimination policy and European law.

Taking account of EUMC requirements, we present the theoretical legal framework of equal rights in the section on the "Cultural and political situation". The section entitled "Legal situation, new policies and initiatives" presents the legal principles relevant to anti-discrimination policy as well as progress made in transposing EU directives, and also presents French immigration, asylum and nationality law, including current reforms and the particular situation of unaccompanied foreign minors.

Statistical data on racism and racial discrimination and analysis of available sources and the difficulties raised by their origin and nature are dealt with in the section on "Available and missing data". The "Analysis" section summarizes developments in case law and analyses the most significant good practices and existing policies. It was also felt necessary to emphasize the emerging issue of double discrimination affecting women, who may be victims of mainstream racism as well as of minority gender discrimination.

The report offers not just an overview of the French context, but also an account of the considerable anti-discrimination awareness and mobilization work conducted in France since 1998, as well as of the impact of international current affairs on manifestations of racism, and of legal trends and dynamics of mobilization on issues peculiar to immigration and nationality law and anti-discrimination policy. However, this report does not cover systematically the policies and case law discussed in previous RAXEN reports. It provides rather an overview combined with a focus on new developments.

Analysis of trends in discrimination case law shows that, from virtually nothing, anti-racist mobilization and policy initiatives have not just brought specific cases to light but also given rise to a new kind of judicial practice, which has gradually developed a more analytical approach to evidence and a more adequate response to judicial claims. The limits of these trends are also perceptible: discrimination claims remain difficult to follow through in the ordinary context of criminal law.

In the special case of labor law, discrimination cases derive considerable benefiting from the cross-cutting nature of the relevant law. Case law based on sex and anti-union discrimination has been fruitfully applied to racial discrimination, making it possible to use comparative techniques, qualifying the prerogatives of the employer, and enabling the courts to draw inferences from certain facts of an employee's situation. Nonetheless, substantial application of the existing law is unlikely to occur in the absence of a higher degree of social mobilization on the issue than has hitherto been noted and of the establishment of an independent anti-discrimination authority. Thus principles remain largely theoretical, and have little purchase on behavior in the work place or in civil society. The law is hampered by sparse and scattered cases which underpin a very incomplete legal doctrine of discrimination.

In addition, we report here on current government projects concerning discrimination. We focus particularly on the exploratory mission on the creation of an independent Anti-Discrimination Authority and on the establishment of a Commission to consider the application of the constitutional principle of *laïcité* (religious neutrality). The Commission's remit to foster wide public debate and to produce recommendations on the legal changes that might be necessary to "reconcile national unity and state neutrality with recognition of diversity, especially with respect to religion".

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2. Introduction

The struggle against racism and xenophobia can rely in France on social mobilization dating back to the end of the 19th century and a significant legal framework of more than 30 years standing. The French conception of equality and human dignity rejects all distinctions on the basis of origin: the French people comprises all nationals regarded as human beings subscribing to the values of the Republic.

This anti-racist tradition has led to a legal framework of equality in which the constitutive reference points are quite different from those relevant to discrimination. It was in response to European law that, from the end of the 1990s, discrimination became a significant legal and policy issue in France, and profoundly affected the traditional legal approach to equality.

Since 1998, with the implementation of an active anti-racism and anti-discrimination policy, the challenge has been to incorporate new perspectives relevant to discrimination into a strong legal culture that is central to French national identity. The 114 / CODAC scheme has served to reveal the true significance of racist discrimination in French society, and alongside it a range of awareness-oriented schemes have been introduced to support the principle of non-discrimination. Furthermore, the new framework makes it possible, for the first time, to identify the actors really mobilized around discrimination and the difficulties they encounter in enforcing general principles of non-discrimination.

Anti-discrimination policy began to be implemented at a time when the international situation and the national political climate were feeding into manifestations of xenophobia and anti-Semitism, which reached very high levels in 2002. In view of the priority given to these issues, the state has responded rapidly and reassesses its policies on an ongoing basis. Finally, 2002 and 2003 were the years in which the place of Islam in France was recognized and a far-reaching debate was engaged on religion and secularism in French society.

At the same time, taking account of European Union deadlines, of the needs of tomorrow's society and of the resolution of immediate problems, the government has developed an immigration and asylum policy that is currently before Parliament.

2. Cultural and political situation

France condemns inequality based on "origin" and prohibits the use of criteria of "origin" for all policy purposes.[1] In parallel, a comprehensive legal framework has gradually been established providing for criminal sanctions against racial discrimination and prosecution of racist and xenophobic offences (see section 3A).[2]

The broader principle of non-discrimination as applicable to civil law and labor law, on the other hand, has been introduced more recently and largely derives from EC law. Initially incorporated in statute in 1982 on the occasion of the transposition of European directives relating to sex discrimination,[3] the principle has only really had effect since being recognized by the *Cour de Cassation* (the High Court of civil and criminal appeal) in the context of discrimination by employers against union members or delegates and of disputes about equal pay for equal work; it has been extended since 1998 to the whole range of labor law. In addition to case law, two European directives have been influential: directive 97/80 of December 15th 1997 relating to the burden of proof in cases of sex discrimination and directive 2000/43 of June 29th 2000 relating to the implementation of equal treatment between persons irrespective of race or ethnic origin.

2.1. FORMAL EQUALITY: AN OPERATIONAL BASIS FOR FRENCH LAW

The French tradition derives from the Enlightenment conception of equality enshrined in the 1789 Declaration of the Rights of Man and Citizen. The principle of equality is a constitutive component of it, "which expresses, along with the defence of liberty, the essential content of the Republican motto *(liberté, égalité, fraternité)*".[4] The French idea of equality has been shaped by an universalistic institutional setting based on the abstract principles of state, nation and citizenship.

It was only at the end of the Second World War that the prohibition of racism and discrimination was drawn out of fundamental rights and freedoms. The preamble of the constitution of 1958 gave constitutional status to the 1789 Declaration and to the preamble of the constitution of 1946, which gave extensive scope to fundamental human and social rights. These documents express the desire to combat racism on the basis of an absolute and abstract conception of human personhood, regarded as indissociable from respect for dignity, human rights and the universality of the principle of equality.

1 The phrase "origin" covers what in other countries might be referred to as "identity" or "membership" (of, e.g., an ethnic or racial group) but interprets it in a rather different way. The underlying debate is of considerable sociological and legal significance but cannot be addressed here.

2 Law n°72-546 of July 1 1972 relating to anti-racist policy, articles 6,7 and 8 of which created the criminal offence of racial discrimination.

3 Article 1 of Law n° 82-689 of August 4 1982 (known as the Auroux Law) inserted in the Labour Code a new article L122-45, which prohibits disciplinary action against or dismissal of an employee on the grounds of "origin or ethnic, national or racial belonging *[appartenance]*". Article 6 of Law n° 83-634 of July 13 1983, which related to the rights and duties of civil servants, restated the prohibition against distinctions between civil servants on the grounds of their "opinions (…) or ethnic belonging". Law n° 83-635 of July 13 1983 transposed European Council directive 76/207/CEE relating to equal treatment at work of men and women.

4 1996 Report of the Conseil d'État, *Sur le principe d'égalité* , La Documentation française, 1998, p. 15.

The inalienable rights deriving from this status are unrelated to any notion of "race", "ethnic group" or "origin". Specifically, no circumstances are considered to justify differential treatment on grounds of "race" or "origin". In its case law, the Constitutional Council has recognized only the French people, without distinction of origin, "race" or religion, and the law has consistently refused to admit such criteria as legal or administrative categories. Thus, no section of the French population may claim to be a "people", a "minority", or a "group", with cultural or other rights attaching to such status. The law grants to all individuals, and to their beliefs and allegiances, its uniform and impartial protection, but does so solely to them as individuals. For legal purposes, groups defined by such beliefs or allegiances simply do not exist.[5] The law regards human beings as essences detached from the subjective and cultural accidents of origin, which means that statistics or comparisons based on origin are illegitimate, even in the context of admitted socially constructed and constraining categories.

In French law, as interpreted by both the administrative and constitutional courts, rules are judged to meet the requirement of equality if they are the same for all. In theory, exceptions to the generality of the law are by their very nature illegal and the principle of equality is exhaustively expressed by equality before the law. This egalitarian approach is consonant with the political theory of the general will and with the affirmation of the unity of the Republic. On the other hand, it is incompatible with any pluralistic conception of equality. The French judiciary has been unwilling to consider that uniform treatment of different situations might give rise to legally sanctioned inequality.

By contrast, the conception of the principle of equality developed by the European Court of Justice appears broader, more concrete, and more sensitive to differences of circumstance. The ECJ requires, uncontroversially, that uniform rules be applied to identical situations, but also considers that uniform regulation of diverse situations (particularly in terms of origin) violates the principle of equality. European law thus demands consideration of the kinds of legal differentiation that constitute equal treatment in particular circumstances.

Needless to say, French law includes a wide range of rules that define differential treatment for diverse circumstances. In particular, such distinctions are essential to the very nature of the welfare state, and they may also be based on public policy in a number of other areas. The relevant categories (women, young people, the poor, etc.) are, however, accepted only to the extent that they rely on neutral criteria devoid of identity content.[6] They offer a range of indirect categorical approaches to racism and discrimination.

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. The most important recent case concerned the Framework Convention for the Protection of National Minorities drawn up by the Council of Europe, which commits signatory states to the recognition of national minorities. The *Conseil*

[5] In its Annual Report for 2001, the advisory *Haut Conseil à l'intégration* underlined the particular problems this creates for addressing or even identifying discrimination suffered by French citizens from the overseas departments and territories. Anecdotal evidence suggests that the problem is significant. See also the Conseil d'Etat's judgement of November 29 2002 voiding a ministerial instruction (*circulaire*) relating to bilingual Breton-French "immersion" teaching in Diwan schools (suits n° 248192 and 248204 brought by the Conseil national des groupes académiques de l'enseignement public).

[6] Gilles Pelissier, *Le principe d'égalité en droit public*, Paris, LGDJ, 1996 ; Conseil d'État, *Sur le principe d'égalité*, Paris, La Documentation française, 1996.

d'État considered, in its advice to the government of July 6th 1995, that the Convention was incompatible with the Constitution.

The refusal to use criteria of "origin" for legal purposes, on the basis of a "universalistic" conception of equality, naturally does not entail that such criteria are of no social significance. In recognizing and addressing racism and discrimination, French policy must therefore work within the differential categories that are judged to be legally and philosophically acceptable. It is as poor, young, or old people, as women, as inhabitants of socially deprived areas, and so on, that the victims of racism and discrimination may benefit indirectly from programmes that may, indeed, be defined with their specific concerns in mind. What is both legally impossible and socially unacceptable, on the other hand, is to design policies the beneficiaries of which are explicitly targeted in terms of their "origin", their "identity", or their "group" membership.

Much of the practical content of the legal principle of equality is to be found in administrative case law, where it serves to evaluate, in an ongoing and routine way, the full range of delegated legislation and administrative decisions. Administrative jurisprudence has developed historically around three dimensions of equality – with respect to taxation, access to public services, and public burdens and obligations – which, since 1946, have been constitutionalized as "general principles of law".[7]

Administrative tribunals have consistently struck down decisions using criteria of "origin" for purposes of adjudication: for instance, an instruction denying eligibility for leave to a category of civil servants on the grounds of ethnic origin,[8] the denial of school registration to foreign children,[9] or local policies giving preferential treatment to sections of the population on the basis of origin.

It should be stressed, however, that some specialists regard some recent equal opportunity policies as promoting a "differentialist" approach , leading to indirect implementation of quota or targeting systems that are deliberately designed in formally neutral terms, but in such a way as to take account of the social reality of "origin".[10]

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'État* has given 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.".[11]

Nonetheless, ten years after the first judgments of the *Conseil d'État*, there remains a debate about the limits of public and private with respect to the relation between the constitutional principle of religious neutrality, which is regarded as constitutive of French

[7] Preamble of the Constitution of 1946, paragraph 1.
[8] *Conseil d'État*, November 21st 1962, *République Malgache c/ Mme Rasafindranaly*, recueil Lebon page 618.
[9] TA Bordeaux, June 14th 1988, *El Rhazouani*, recueil Lebon page 518
[10] Maisonneuve, M., *Les discriminations positives ethniques ou raciales en droit public interne : vers la fin de la discrimination positive à la française*, AFDA, May-June 2002, 561.
[11] CE April 14th 1995, *Consistoire central des israélites de France, Mr Koen*, (2 judgements), Recueil Lebon page 169, Dalloz 1995, jur. page 481, note Koubi G.

Republican identity, [12] and religious manifestations within schools. The parameters of *laïcité* are brought into question by the practices and political demands of some groups, who claim that it is not incompatible with the public expression of faith. In response, the President has set up a Commission under the chairmanship of Bernard Stasi to « promote wide-ranging debate (…) on this foundational concept of the Republic". The Commission should report before the end of 2003.[13]

3. Legal situation, new policies and initiatives

This overview will address first anti-racism and anti-discrimination law, followed by immigration and asylum law, taking account in both cases of the current legal situation and proposed reforms.

3.1. ANTI-RACISM AND ANTI-DISCRIMINATION LAW

Until the recent emphasis on the principle of non-discrimination, racism, xenophobia and anti-Semitism have primarily been dealt with in terms of criminal law. All racist acts are exposed to criminal penalties, but the law is based on a conception of racism in which individuals cannot be categorized. The law thus focuses on analysis of the racist act itself rather than on the situation of the victim. It is a purely punitive law, which punishes the offender for lack of respect for the universal value and dignity of every human being.

3.1.1. The civil approach to discrimination

Two laws passed in 2001, in the context of wide-ranging reforms triggered by EU directives, made significant changes to the Labour Code: the Anti-Discrimination Act of November 16 2001[14] and the Social Modernisation Act of January 17 2002.[15]

The Anti-Discrimination Act was initially intended to transpose Directive 97/80 of December 15 1997 relating to the burden of proof in sex discrimination cases. It also provided an opportunity to transpose some features of Directives 2000/ 43 and 2000/78, and to give a statutory basis to the 114 / CODAC scheme. The Act extends the scope of anti-discrimination policy and institutes for the first time uniform legal treatment for all forms of discrimination thereby removing certain inequalities in legal protection. With respect to racial discrimination, the Act extends the discriminatory criteria defined in article L122-45 of the Labour Code to real or ascribed origin, physical appearance and name; age and sexual orientation are also covered in the same terms. The area in which discrimination is illegal is extended to internships and all aspects of working life. Furthermore, the law enshrines rights to judicial recourse already established by case

[12] Charlier-Dagras, M-D, *La laïcité française à l'épreuve de l'intégration européenne. Pluralisme et convergences*, L'Harmattan – Coll. Logiques Juridiques, 2002, 452p.

[13] « Décret simple no. 2003-607 du 3 juillet 2003 portant création d'une Commission chargée de mener ne réflexion sur l'application du principe de laïcité dans la République », Président de la république, JORF no. 153 du 4 juillet 2003 p. 11319 ; Speech by the President of the Republic on the occasion of the setting up of the Commission on the implementation of secularism (http:/www.elysee.fr).

[14] « Loi no. 2001-1066 du 16 novembre 2001 relative à la lutte contre les discriminations » (JORF no. 267 du 17 novembre 2001, p. 18311)

[15] « Loi no. 2002-73 du 17 janvier 2002 de modernisation sociale » (*JORF* no. 15, 18 January 2002, p. 1088)

law,[16] by protecting complainants against dismissal (article L122-45-2) and providing parallel protection against victimization and dismissal for witnesses. The Act also creates new opportunities for trades unions and anti-racist organizations to sue on behalf of victims, subject to their consent (L122-45-1).

The most substantial change effected by the law, however, is in the concept of discrimination and in questions of evidence (article L122-45). French law now recognizes, with respect to all forms of discrimination, the principles of direct and indirect discrimination, the reversal of the burden of proof and the interpretative framework of European law, which permits an analytical approach quite different from the traditional requirement in French law for specific proof of discriminatory intent. The potential implications are wide-ranging in terms of judicial strategy, approaches to evidence and the use of the law in order to reveal social practices of discrimination.

The law thus modifies the whole approach to evidence and places the onus of justification upon the employer. Furthermore, the validity of a deductive approach that does not depend on specific proof of discriminatory intent is finally recognized.

The Act was challenged before the Constitutional Council, which affirmed the constitutionality of the new rules governing the burden of proof under article L122-52, while noting, nonetheless, that the burden still lies with the plaintiff to establish "a precise and consistent material basis of fact" for the allegation that detrimental decision in the workplace constitutes harassment.[17]. It is only in response to such a basis that it is incumbent upon the defendant to provide justification.

The Act also extends the investigative powers of Labor Inspectors, and extends to discrimination issues the "alert" procedure that shop stewards may use to bring to the attention of the employers and of the courts infringements of individual rights or freedoms within the firm.

It remains to be seen, of course, how effective such changes will be in the absence of any legally admissible category of "origin" which would enable statistical assessment of unequal treatment. The risk is that the new legal principles and techniques might be applicable only to direct discrimination and provide no new remedies against indirect discrimination.

The Social Modernisation Act uses similar principles to create grounds for criminal and civil action against harassment *(harcèlement moral)* and for civil action against housing discrimination. Given that no specific provision dealt with discriminatory harassment or racial harassment, it would seem that moral harassment constitutes the transposition of the notion of " harassment" as required in the EU directives as a ground for discrimination.

However, on January 3 2003, the French Parliament passed Law no. 2003-6 to promote collective bargaining on lay-offs, which modified article L122-52 on moral harassment. Henceforth, it is required that the plaintiff should "establish the facts that provide a prima facie case for the existence of harassment". This phrasing, which is identical to that of the EU directive, points to a change in the burden of proof towards a more specific prima

[16] Cass.soc. 28 novembre 2000, Harba, Dr. Soc. 2001, 315, note Gérard Couturier.
[17] C.C. 12 janvier 2002, 2001-455 DC, par 76 à 90

facie requirement from the plaintiff before the employer can be required to provide justification.

Generally speaking, French experts have emphasized the difficulties ordinary courts face in dealing effectively with discrimination, especially on grounds of real or presumed origin, which the 114 / CODAC scheme has not removed (see section 6 : assessment of the 114 / CODAC scheme). This assessment comes at the very time when EU legislation requires independent procedures for access to law in the area of discrimination. As a result, a debate has emerged on the possible creation of an independent anti-discrimination authority in France. In response, the President made a declaration and set up a task-force, headed by the former Minister and Ombudsman Bernard Stasi, to engage in public hearings and to prepare a report to make recommendations of the main features of such an authority. The intention is that the new body should be established during 2004.[18]

Directives 2000/43 and 2000/78 have thus been partially transposed, particularly with respect to employees covered by the Labour Code, civil servants and access to housing. The new legislation does not however cover the professions or harassment as a constitutive element of discrimination. Furthermore, it provides only partial protection of victims and witnesses against reprisals: the only reprisals covered are dismissal or disciplinary measures, and it is for the employee to establish a prima facie case that the employer's action was illegitimate.

Finally, transposition remains to be accomplished in the following areas, which will need to incorporate actions for harassment and indirect discrimination and take account of the modified burden of proof and opportunities to sue for unions and anti-racist organizations:

- Social security
- Education
- Social welfare
- Access to goods and services

3.1.2. Criminal penalties against racism and discrimination – A bipolar structure based on the Criminal Code and on the law of July 29 1881 on the freedom of the press

Racist offences are material facts from which racist intent may be imputed. Some have no identified victim but are judged to impugn humanity or some section of it (e.g. press offences), to violate the respect due to the dead (e.g. the profanation of graves and other memorials), or to deny the indignity of past atrocities (e.g. Holocaust denial, usually called in French "*négationnisme*", which was made a specific offence by a law of 1990). What these acts have in common is that the very fact of committing them creates a presumption that they were intended to transgress the right to dignity, which is the core of the French legal conception of equality.

[18] Lettre de mission, Premier ministre, 2 juin 2003.

Historically, French legislation first considered racism and discrimination as aspects of freedom of expression and of the necessary legal restrictions thereto. A law of July 1 1972 modified the law of July 29 1881 on press freedom by introducing aggravated penalties for racist speech or writing. Subsequent legislation has enhanced this framework by clarifying its terms and extending its scope to acts as well as verbal utterances.

Separately, the new Criminal Code, which entered into force on March 1st 1994, and was amended by the Laws of November 16 2001 and February 3 2003, has made a number of changes to the provisions relating to racism and discrimination in the old Criminal Code, but has not affected the law on freedom of expression.

3.1.2.1. Racist offences in the Criminal Code

A distinction must be made between the law applicable to racial discrimination, which depends crucially on proof of discriminatory intent, which will be discussed below, and those miscellaneous provisions that define racist offences on the facts alone.

CRIMINAL PENALTIES AGAINST DISCRIMINATION (ARTICLES 225-1 AND 2 OF THE CRIMINAL CODE)

Article 225-1 defines unlawful grounds for discrimination that are subject to prosecution in very broad terms, which cover inter alia race, real or supposed origin, beliefs and opinions. Article 225-2 specifies the situations in which appeal to the unlawful grounds previously specified shall be punishable. The definition is more restrictive and covers only employment, provision of goods and services, and "interference in ordinary economic activity".

Furthermore, a civil servant (*agent du service public*) may be prosecuted under these articles, but is liable to aggravated penalties if the offence was committed in the context of a public service mission (article 432-7 of the Criminal Code).

Criminal sanctions against discrimination are tightly circumscribed both by the definition of the offence itself and by the rules of criminal procedure, which require proof of racist intent for an act that would otherwise be entirely lawful (e.g. a choice of tenant or employee) to be declared unlawful. It is of the nature of such acts that intent cannot typically be inferred from the decision, and even when direct proof of, say, racist prejudice is available, its specific contribution to the questionable act is extremely difficult to assess, and often obscure even to the perpetrator. Furthermore, the collection of such evidence as may be available is made difficult by the lack of legal protection against reprisals for prospective witnesses. There are, in particular, many indications that employees are reluctant to come forward with evidence that may assist in the prosecution of their employer.

RACIST OFFENCES

We discuss offences here in so far as racist intent is constitutive of them, and only substantively. There are no specific procedural rules relating to racist offences. The relevant offences are few in number and respond to very peculiar circumstances. In particular, racist intent is immaterial as far as the legal treatment of offences against the person or, in most cases, against property is concerned.

- Digital recording or storage of data comprising, directly or indirectly, a person's "racial origins", without that person's express consent and except where specifically authorized by law (art. 226-19 of the Criminal Code).
- Racist violation of the respect due to the dead (art. 225-18 of the Criminal Code).
- The wearing or public display of insignia, uniforms, or emblems, likely to remind the public of those characteristic of the perpetrators of crimes against humanity is an offence carrying a maximum fine of € 1,500 (art. R645-1 of the Criminal Code).
- A final offence is peculiar to sports meetings, including broadcasts of sporting events in stadia. Any person having, in any way whatsoever, incited spectators to hatred or violence against a person or group of persons faces a maximum sentence of 1 year's imprisonment and a € 15,000 fine (art. 42-7 of the law of July 16 1984, incorporated in art. 222-16 of the Criminal Code). Introduction, wearing, or display, in such gatherings of insignia, signs, or symbols, characteristic of racist or xenophobic ideology carries the same maximum sentence (art. 42-7-1 of the law of July 16 1984).

CURRENT REFORMS

In view of the growing number of attacks related to origin or religion, particularly targeting the Jewish and Muslim communities (cf. section 5A of this report), MPs Pierre Lellouche and Jacques Barrot tabled bills in August and November 2002 to increase criminal penalties when assault or damage to property are committed for racial or religious reasons. The latter bill eventually produced the Law of February 3 2003, which was adopted unanimously by the National Assembly and the Senate (Law n° 2003-88 of 03/02/2003 –JORF n°29 of February 4 2003).
The increased penalties are defined as follows:

- Premeditated murder (art. 221-4 6°CP): the standard sentence is raised from 30 years to life
- Tortures and barbaric acts (222-3 5° CP): from 15 to 20 years
- Murder (art.222-8 5° CP) : from 15 to 20 years
- Assault leading to permanent disability or mutilation (art.222-10 5° bis CP): from 10 years and / or a 150,000 € fine to 15 years
- Assault leading to extended unavailability for work (art. 222-12 5° bis CP): from 3 years and / or 45,000 € to 5 years and / or 75,000 €
- Common assault (art. 222-13 5° bis CP): from 1,500 € (3,000 € in case of a repeat offence) to 3 years and / or 45,000 €
- Racially qualified damage to property:
- General case (art. 322-2 al. 3 CP): from 2 years and / or 30,000 € to 3 years and / or 45,000€
- Damage caused by explosives, arson, or other means dangerous to human life (art. 322-8 3° Cp): from 10 years and / or 150,000 € to 20 years and / or 150,000 €

Finally, the law created a new offence of destruction of property with respect to places of worship, schools and educational or leisure facilities, or vehicles for the transport of children (art. 322-3 al. 2 CP), the penalty being 5 years imprisonment and / or a 75,000 € fine.

In the context of growing numbers of acts of racist or anti-Semitic violence, two instructions from the Justice Ministry (dated April 2 and 18 2002)[19] were circulated to prosecution offices restating the need for a firm response to such acts as soon as perpetrators are identified and for information on legal proceedings to be provided to victims and relevant local voluntary bodies.

3.1.2.2. Limits to freedom of expression in the law of July 29th 1881 on press freedom

The law of July 29th 1881 defines a number of offences deriving from the verbal (oral or written) and non-verbal expression of various forms of racism, specifically: racial defamation; racial insult; incitement to racial discrimination, hatred, or violence; denial of or apology for crimes against humanity.

REFORMS FACILITATING ENFORCEABILITY

During Parliamentary debate on the Law of February 3 2003, the Justice Minister Dominique Perben announced that a bill would be introduced to remove the 3 month time-limit for prosecution with respect to racist writing and speech. The rapporteur of the legislation Commission of the Senate, Patrice Gelard, also emphasized that the time-limit was an obstacle to effective repression.[20]

- This change has been demanded for many years by voluntary bodies in order to facilitate action against Web sites that disseminate openly racist, anti-Semitic and xenophobic with little risk of prosecution. On April 9 2003, the Minister tabled a bill on new forms of crime, which included inter alia new measures against racism. The strengthened law has four main components.
- - The time limit for prosecution of racist speech (insult, defamation, incitement to hatred, discrimination and violence) and Holocaust denial would be raised from 3 to 12 months. However, the bill fails to mention the offence of apology for crimes against humanity.
- - Harsher penalties would apply to offences of discrimination and refusal to permit access to an establishment open to the public (such as night-club, a shop, or an administrative office) would be made an aggravating circumstance.
- - The aggravating circumstance of racism would be extended to threats to persons, to theft and to extortion, thereby filling in gaps in the Law of February 3 2003.
- - The list of offences with respect to which anti-racist organizations can engage in prosecutions would be lengthened, subject to permission from the individual victim where one exists.
- The bill passed on first reading in the National Assembly on May 23 2003 and was then moved in the Senate. It may be finally adopted in the first semester of 2004.

[19] It was not possible to obtain copies of these documents.
[20] GELARD, Patrice, *Aggraver les peines punissant les infractions à caractère raciste, antisémite ou xénophobe*, Senate Legislation Committee, Report 139, January 2003

3.2. IMMIGRATION AND ASYLUM LAW

In its 2001 report, the *Haut Conseil à l'intégration* emphasized that, while there has been an increase in immigration for settlement since 1997, applications for French nationality have declined.[21]

The last major reform of immigration law took place in May 1998. After a period of stability in 2001-02, the Government announced in late 2002 its legislative intentions, taking account of the profoundly political nature of the immigration issues. Parliamentary debate started in the first half of 2003.

3.2.1. Immigration and residence

Nationals of EU and EEA member states enjoy freedom of circulation under Community law. Their entry into and residence in France are governed by decree n° 94-211 of November 11 1994, as modified. They may enter France and stay up to 3 months with a valid passport or national identity card. For longer periods, an EU- or EEA-national residence permit is required.

Entry to and residence in France of third-country nationals are governed by legislative decree *[ordonnance]* n° 45-2658 of November 2 1945, as modified. To enter France, for whatever purpose or duration, third-country nationals require a valid passport and a visa (of variable duration) issued by French consular authorities in their country of origin. Refusal to issue a visa may be appealed within two months to the *Commission de recours contre les refus de visa* (a discretionary appeal not bound by legal process: *recours gracieux*) and, if the Commission further rejects the appeal, to the *Conseil d'État* (in which case the appeal takes legal form and is bound by the due process rules of judicial review: *recours contentieux*).

Third-country nationals legally resident in Europe having transited through one of the signatory states of the Schengen Convention are exempted from French visa requirements, but may be required to provide evidence of the lawfulness of their entry into or residence within the Schengen Area.

Nationals of certain states (currently Argentina, Canada, Chile, Cyprus, Czech Republic, Croatia, Hungary, Israel, Japan, Malta, New Zealand, Poland, San Marino, the Holy See, Singapore, Slovakia, Slovenia, South Korea, the USA) are exempted from visa requirement for tourism or business for stays of up to 6 months. For longer periods, they must apply for a residence permit under the general rules.

Third-country nationals who have lawfully entered the Schengen Area (even with a visitors visa) and who wish to stay in France for more than 3 months must request a residence permit. Applicants receive a temporary extension while their case is dealt with. There are 3 types of permit:

- temporary permits for foreigners meeting the conditions specified under 11 to 12 ter of the decree. It is valid for a maximum of 1 year and may be renewed. It is

[21] *Rapport 2001 du groupe permanent chargé des statistiques*, HCI, 2002.

endorsed with one of the categories "visitor", "student", "tradesperson *[commerçant]*, artisan, farmer, business director *[industriel]*", "academic", "artistic or cultural profession" or "private and family life". The latter permit is automatically issued to persons meeting the conditions of article 12 bis of the decree, who are allowed to work.

- residence permit for third-country nationals meeting the conditions of articles 14 to 18 of the decree. It is valid for 10 years and automatically renewable. It enables the holder to work. It may be issued to persons legally resident in France for at least 3 years who can provide evidence of adequate means of support. It is also issued to persons legally resident in France who meet the conditions of article 15 of the decree.
- the retired persons' residence permit for persons meeting the conditions of article 18 bis of the decree. It is valid for 10 years and is automatically renewable.

Permits are issued by the same authorities as for EU and EEA nationals (see above). Refusal to issue a permit may be appealed within 2 months to the Préfet (*recours gracieux*) or the Administrative Court (*recours contentieux*).

Algerian and Tunisian nationals have a special status, with some specific privileges compared to other third-country nationals.

3.2.1.1. Ongoing reforms

On July 10 2003, the Government tabled a bill on immigration control and the residence of foreigners in France[22] taking up principles presented to Cabinet on April 30 2003. At the current stage of Parliamentary debate, the main reforms under consideration aim at more effective immigration control, tighter assessment of entitlement to residence and improved deportation procedures.

ENTRY

In principle, travelers refused entry to France can be deported only after 24 hours. The bill proposes that the traveler should be entitled to waive this faculty, and will be presumed to have done so by refusing to countersign the statement of refusal of entry. The bill also envisages*:*

- Creation of an asylum seekers' fingerprint database which will facilitate identification of overstayers.
- Increased penalties for the offence of direct or indirect assistance to an illegal resident in France or in the territory of any state that has ratified the protocol on human trafficking to the UN Convention on Cross-border Crime (Palermo – 12/12/2000).
- A tax of 15 € per visitor (credited to the *Office des Migrations Internationales* [OMI]) will be levied on requests for validation of commitments to receive visitors (which are required from a French resident in order for a prospective visitor to obtain a visa).

[22] *Projet de loi n°823 relatif à la maîtrise de l'immigration et au séjour des étrangers en France (10/07/2003)*

- Control of commitments to receive visitors by the municipal authorities, which may refuse validation if fraud is suspected or if inspection by local social services or the OMI shows the available housing to be inadequate.
- Extension of the time limit for administrative detention of prospective deportees from 12 to 32 days, the lower limit being considered incompatible with the time required to arrange passage and travel documents.
- Creation of a national commission to oversee detention centres with the remit to ensure protection of detainees' rights and proper accommodation.
- A new option for detention hearings to be held within or adjacent to holding areas or, subject to the approval of a judge and the consent of the detainee, via telecommunications.

RESIDENCE

The bill provides for:

- A lengthier period of cohabitation (2 years rather than 1) before a foreigner can obtain a residence permit on grounds of marriage with a French resident.
- Verification by registry officers of the residence status of prospective spouses. In the case of illegal residence, the Mayor may request a inquiry by the Prosecution Office into the true intentions of the prospective spouses.
- A new offence of organization of or participation in a bogus wedding, carrying a penalty of 5 years imprisonment and a 30,000 € fine.
- Parents of French nationals to be entitled to a residence permit as such only after two years of guardianship and financial support, with a view to combating bogus paternity claims.
- Lengthening from 3 to 5 years of the minimum residency to qualify for 10 a year residence permit and addition to the requirements of evidence of "integration of the foreign resident into French society", which is supposed to provide a "strong incentive to comply with the integration contract".[23]
- Implementation of the integration contract for new arrivals. Managed regionally primarily by the *Préfets*, the contract offers language and social training as well as individual support. Pilot implementation started in 14 *départements* in June 2003.[24]
- A 5 year waiting period before family members joining a resident can obtain a 10 year residence permit, on condition they have adequately integrated.
- Maintenance of the double criminal penalty of imprisonment followed by deportation for foreign offenders, but with certain new exemptions for persons born in France or present since before the age of 13, spouses of French nationals or residents, parents of French children and persons resident in France for more than 20 years. These exemptions do not apply to persons convicted of terrorism or violation of national security (*atteinte aux intérêts fondamentaux de l'État*).
- Removal of the exclusion from naturalization of persons sentenced to more than 6 months in prison, unsuspended, which derives from article 21-27 of the Civil

[23] On the integration contract, see the RAXEN 3 report.

[24] www.premier-ministre.gouv.fr/fr/p.cfm?ref=39063, « **Dossier : revitaliser le modèle d'intégration français ».**

Code, for persons who have been rehabilitated of whose sentence was excluded from their summary criminal record.

The primary role given to municipal authorities in validating commitments to receive foreign visitors and assessing residence status on the occasion of marriage raises many question about the procedural guarantees necessary to prevent abuse. Similarly, the requirement of "integration" for a residence permit to be granted creates the risk of arbitrary implementation, according to the National Human Rights Advisory Commission (*Commission nationale consultative des droits de l'homme* – CNCDH),[25] and makes the integration contract a threat rather than an opportunity.

The extended time limit for administrative detention has been judged contrary to fundamental freedoms by the CNCDH, which has on the other hand approved the creation of a national oversight commission, while noting that secondary legislation will be required to institute its precise and binding modus operandi.

Finally, reform of "double sentencing" (prison + deportation of criminally convicted non nationals[26]) has been widely welcomed, although this is qualified by the long list of offences that continue, for non-exempt foreigners, to carry a sentence of deportation as a corollary of criminal conviction.

3.2.2. Asylum law and refugee status

Since the entry into force of the Treaty of Amsterdam, asylum law has become a EU competence. The first phase of the "common European asylum regime" should be operational by May 2004.[27]

French asylum law is governed by Law n° 52-893 of July 25 1952, as modified, which provides for two categories of asylum involving distinct procedures and giving rise to distinct rights,[28] which were modified in the Spring of 2003. After summarizing the principles applicable to asylum in France, we shall provide an overview of reforms envisaged by the bill currently before Parliament.

[25] CNCDH *« Avis sur le projet de loi relatif à la maîtrise de l'immigration et au séjour des étrangers en France » (15/05/2003)*
[26] Service des études juridiques du Sénat, « La double peine- Etude de législation comparée », Sénat 2003.
[27] Thierry MARIANI Politique européenne d'asile, Assemblée nationale - Rapport d'information n°817 – avril 2003, Ce rapport présente le cadre général de la politique européenne d'asile et ses perspectives.
[28] *Loi no. 52-893 du 25 juillet 1952 relative au droit d'asile*.

3.2.2.1. Categories of asylum

Recognition of **refugee status** creates an entitlement to a **10 year** residence permit that is automatically renewable and allows the holder to work. The status may derive from two different sources:

- *Conventional asylum* derives from the Geneva Convention of 1951 and is granted to those foreigners who have a well founded fear of individual persecution in their country, on the grounds of their race, religion, nationality, membership of a social group or political opinions, perpetrated or facilitated by state authorities.
- *Constitutional asylum* derives from the preamble of the Constitution of 1946 and is granted to persons persecuted as a direct consequence of the action in favour of freedom.

Territorial asylum is a distinct status, which may be granted to a person who has established that his or her life or liberty is at risk in his or her country of origin or that he or she has well founded fear of being exposed to torture or inhuman or degrading treatment in contravention of Article 3 of the ECPHR (sc. whether or not such risk or fear is attributable to state authorities). The beneficiaries of territorial asylum are granted a temporary 1 year residence permit, which is automatically renewable and entitles them to work.

3.2.2.2. Procedure

Subject to the provisions of the Dublin Convention of June 15 1990, which may limit French jurisdiction over asylum applications, there are **3 phases**, of which the first 2 are common to territorial asylum and recognition of refugee status:

a) **Application for a residence permit pending application for asylum**, which may be made abroad (through a French consulate), at the border (where the applicant may be placed in a holding area pending preliminary assessment) or within France.

b) **Application for asylum at the Préfecture**. At either of these stages, applications may be rejected if judged manifestly unfounded or if presence on French territory is judged contrary to public policy. Both grounds are subject to appeal to the Administrative Court.

c) **Decision**, which is made in the case of applications for refugee status by the *Office français de protection des réfugiés et apatrides* (**OFPRA**). OFPRA decisions are subject to appeal to the *Commission des Recours des Réfugiés* (**CRR**), the decisions of which are subject in turn to judicial review by the *Conseil d'État* . Applications for territorial asylum are addressed to the Ministry of the Interior, the decisions of which are subject to appeal. In practice, territorial asylum is very rarely granted.

ONGOING REFORMS

In 2002, asylum reform was presented as a priority of the incoming Government. The main options were presented in the media in the Summer of 2002 and a bill[29] was tabled

[29] *Projet de loi n° 810 modifiant la loi n° 52-893 du 25 juillet 1952 relative au droit d'asile (15/04/2003)*

in April 2003. It was passed on first reading in the National Assembly on June 5 2003. The reform is expected to enter into force on January 1 2004.

ASSESSMENT OF APPLICATIONS

The bill envisages application of European Council ruling n° 343/2003 of February 18 2003 on criteria to determine which member state is responsible for asylum applications.

The main innovation is to make the *Office Français de Protection des Réfugiés et Apatrides* (OFPRA) and the *Commission de Recours des Réfugiés* (CRR) responsible for assessment of all requests for asylum, whether relating to refugee status or to territorial asylum (which will in future be known as "Subordinate protection").

Persecution taken into account for assessment will no longer necessarily have to derive from or be tolerated by state authorities, but may include parties or organizations that control the state or parts thereof or non-state actors against which the state is unable to provide protection. On the other hand, the notion of "internal asylum" will be introduced to exclude persons who could find refuge within the territory of their own state, including placing themselves under the protection of international organizations.

The bill also introduces the notion of safe countries from which asylum requests will be ipso facto ineligible. Pending EU regulations, the list of countries where the principles of liberty, democracy and the rule of law, as well as human rights and fundamental freedoms, are respected will be drawn up by the OFPRA Board.

The bill also provides, in cases of justified rejections of asylum applications, that deportation orders shall be transmitted to the Minister of the Interior, who, in order to ensure the effectiveness of deportation procedures, will also be empowered to obtain identity and travel documents required to determine the nationality of rejected asylum seekers.

The Government has announced the implementation of measures to reduce the determination period by OFPRA to a maximum of 2 months; if necessary, new measures will be submitted to Parliament in the Autumn of 2003.

Human rights associations as well as the CNCDH[30] have expressed their concern about several aspects of the proposed reform.

- Asylum restrictions, including in particular the introduction of the notions of "safe countries", non-state protection in the country of origin and internal asylum may deprive many asylum seekers of the opportunity to enter France.
- The lack of reference in the bill to systematic oral hearings by OFPRA and the right of claimants to legal assistance, despite the announcements to the contrary by the Foreign Minister on September 25 2002, appears to remove an essential procedural guarantee.

[30] *CNCDH « Avis sur le projet de loi modifiant la loi n° 52-893 relative au droit d'asile » (24/04/2003) – « Avis complémentaire sur le projet de loi relatif au droit d'asile » (15/05/2003)*

Finally, human rights associations challenge an approach to asylum policy that makes it an adjunct of immigration policy, as the increasing role of the Ministry of the Interior indicates. The CNCDH has particularly criticized the presentation of foreign presence in France in generally negative terms and pervasive suspicion about asylum seekers.

3.2.2.3. Unaccompanied foreign minors

The problem of children under 18 outside their country of origin without a parent or guardian to protect them remains of major significance in 2002, according to the Children's Defender.[31] A study commissioned by the Population and Migration Directorate (DPM) shows that, while the phenomenon is notoriously difficult to measure, it is nonetheless clear that the number of such minors is growing.[32] Thus, the Children's Social Help Department in Paris dealt with 847 cases in 2002, as against 527 in 2001 and 209 in 1999.[33]

The only proposed reform in this area derives from amendments in March 2002 to the law on parental authority,[34] which provides for the designation of an ad hoc tutor to represent such minors in procedures relating to placement or maintenance in holding areas and to applications for refugee status. The law provided for secondary legislation to establish a list of qualified persons, but this is still pending as of July 2003.

The CNCDH[35] along with human rights associations considers that admission of minors requesting asylum should be immediate, since detention in a holding area necessarily conflicts with the higher interest of the child as protected by the Convention on the Rights of the Child of November 20 1989.

[31] Brisset, C. *Rapport pour l'année 2002 du Défenseur des enfants au Président de la République et au Parlement*, La documentation française 2003. A special section of the report specifically deals with this issue.
[32] ETIEMBLE Angélina « Les mineurs isolés étrangers en France » *Migrations Etudes* n° 109 – September 2002.
[33] PLANTET J. « Que faire des mineurs étrangers isolés ? » *Lien social* n° 663, 24/04/2003.
[34] *Loi relative à l'autorité parentale n°2002-305 du 04/03/2002 (JORF du 05.03.2002).*
[35] CNCDH « Avis sur le projet de décret relatif aux modalités de désignation et d'indemnisation des administrateurs ad hoc représentant les mineurs étrangers isolés », 24/04/2003.

4. Theoretical and methodological approach

This report updates the overview provided in the RAXEN 2 and 3 reports. It is complemented by a documentary data base that serves as a bibliography. The references include, first, international, European, constitutional and statutory legal instruments relevant to general human rights principles, the principle of equality as applied in administrative law, anti-racism and anti-discrimination, and immigration and asylum law. Anti-Semitism is not dealt with separately in law but set within the broader context of anti-racism law.

The legal instruments are followed by a selection of recent case law, reports and jurisprudence, whether published in books, articles or law reports. It covers both theoretical issues relating to the principle of equality as it applies to racism and unequal treatment under French law and specific legal issues relating to criminal penalties against racism, to discrimination, and to immigration law.

It is important to note that discrimination case law is largely unpublished. For the purposes of this report, it was necessary to write to courts based on press information and to use information collated by voluntary networks active in judicial support. The amount of work, in order to survey only about 30 cases, was considerable: it would be quite impossible to provide exhaustive information in the absence of publication, publicity and access.

Two further notes are in order. First, the law does not easily lend itself to presentation solely in terms of events in 2000 and 2001. While no attempt is made to provide a history, the bibliographical selection, like this report, offers an overview of the French situation in the light of recent and ongoing developments. Secondly, data on racist violence are compiled from the CNCDH report of 2002 and Ministry of the Interior statistics for 2001 and 2002. Data on victims of discrimination derive from the 114 help-line.

USE AND LIMITATIONS OF DATA PROVIDED BY THE 114 ANTI-DISCRIMINATION HELP-LINE[36]

Help-line data give an insight – unprecedented in France – into discrimination and the perceptions of its victims. However, before looking at information derived from the data, three methodological limitations should be pointed, which indeed partly explain why analysis is still preliminary.

First, the source – unsolicited telephone calls – is inherently biased, and there is no adequate basis for statistical correction. It is impossible to know at this stage whether callers are representatives of the victims of discrimination as a whole.

Secondly, the only data set that can be analyzed is made up of those callers who are "referred" (*signalés*) : cases are not referred when they are judged unfounded or when the caller does not wish to be part of the process. Furthermore the caller's wishes may derive from a wide range of reasons: the call was purely for information, or purely for moral

[36] Based on comments made by the help-line management to the GELD.

support, or the victims fears institutional reprisals. Again, there is no way of knowing whether referral introduces a bias, and no statistical basis for correction.

Thirdly, help-line respondents are not sociological investigators, and have, obviously a quite different function, and the help-line was never intended to be a sociological tool. Any use of the material available must therefore take account of the fact that it is primarily oriented towards victim support.

As for data from the Ministry of the Interior published in the CNCDH annual report, the Minister himself has stressed the impossibility of exhaustive data collection. Data is necessarily dependent on the recording of facts reported to the law enforcement agencies.

5. Description of available and missing data

The legal principles of discrimination law and the practices of victim support, especially as regards 114 referrals, have been analyzed in depth by the GELD and NGO partners such as the MRAP, SOS Racisme and the Ligue des Droits de l'Homme.

This ongoing work feeds into the GELD website, www.le114.com, which provides technical information on rights and legal processes as well as a gateway to legal information. The GELD also publishes a bi-monthly Information Bulletin for CODAC permanent secretaries (see the institutional description hereafter) on legal developments and anti-discrimination news.

Anti-racist NGOs – MRAP, SOS Racisme, LICRA, Ligue des droits de l'homme – all have web sites providing practical information and case law summaries. MRAP published in November 2002 a guide to the law, and these NGOs, along with trades unions, ADRI and the FASILD, run training courses for anti-discrimination activists and employers.

Finally, a guide for anti-discrimination activists, bringing together legal principles, case law and practical information, is currently being developed jointly by GELD, ADRI and MRAP.

Furthermore, a number of associations provide legal and logistical support to foreigners: among the most prominent are GISTI and France Terre d'Asile. A new web site was set up in Autumn 2002 by CIMADE and GISTI: it provides a database on statute and case law covering immigration, residence, asylum and related areas.[37]

There are a number of local initiatives directed at discrimination awareness. However, in view of the decentralised engagement of a wide range of actors, professionalization is, in this new and complex field, a significant problem. While the existing dissemination work is highly valuable, capacity building will require, over the coming years, ongoing commitment and sensitivity to the diverse professional backgrounds and concerns of all actors.

[37] www.dequeldroit.net

5.1. DATA ON RACIST VIOLENCE AND THREATS

114 data are published on the GELD web site (www.le114.com) and in the annual reports of the CNCDH and the GELD. Furthermore, each French *département* receives on request data relevant to it, which fed into the departmental anti-discrimination plan, which each *Préfecture* was to develop in 2002. The data give an indication of the sheer scale of discrimination, and also point to the areas most affected and the range of social practices involved (see further section 6 of this report). They are of major significance for training design, and institutional and victim support.

Ministry of the Interior statistics are published in the annual CNCDH report.

5.1.1. Racist violence and threats in general

2002 statistics from the Ministry of the Interior, as analyzed in the 2002 CNCDH report,[38] show a massive increase in racist and anti-Semitic behaviour, which has reached a level unprecedented in the past decade. The low point was reached in 1998, with 27 recorded incidents.

In 2002, there were no fewer than 313 racist assaults or incidents of damage to property (as against some 200 in 2001), and 993 cases of racist speech or insults. One person was killed and 38 injured. In 2001, the CNCDH had noted that the main victims were the Jewish and Arab-Muslim communities, and had expressed particular concern about growing anti-Semitic threats and violence. The trend had been confirmed in 2002, when 60% of all racist violence targeted Jews, Arabs or Muslims being the second most affected group.

As noted previously by the CNCDH, there is a close connection between racist violence in France and the international situation *(September 11 and the worsening of the Israeli-Palestinian conflict): similar repercussions had been noted in 1991 (the Gulf War), 1995 (crisis in Algeria) and 2000 (start of the "Second Intifada").* The level of 2002 was similar to that in 1991. The CNCDH expressed particular concern at the prospect of war in Iraq (which appeared imminent when the 2002 report was published in March 2003).

During 2001, in mainland France, 38 acts of violence against populations of foreign origin were recorded, of which 11 targeted North Africans, similar numbers to 2000 but significantly less than in 1991 and 1995. Moreover, of the 163 acts of intimidation manifesting signs of racism and xenophobia (103 of which occurred during the last quarter), 115 victims were North Africans. Although this was a substantial increase over the three previous years, the numbers remained below those for 1991, 1995 or 1996.

In 2002, there were 261 cases of racist or xenophobic threats and 120 acts. It is worth noting that the role of the extreme right is in decline: it was responsible for fewer than 9% of incidents in 2002, as against 70% at the beginning of the 1990s.

[38] Op.Cit.

The geographical analysis of racist threats shows two regions to be particularly significant: Ile-de-France (Paris and its suburbs) with respect to anti-Semitism (114 incidents) and Corsica with respect to xenophobia (73). Furthermore, a large proportion of all threats occur in Ile-de-France (nearly 39%: 386 incidents, of which 348 anti-Semitic), followed at a distance by Provence - Alpes - Côte d'Azur (84) and Rhone-Alpes (74). The rest was evenly spread over the country. It is important to note that the Corsican situation is inseparable from the peculiar dynamics of regional nationalism, which seems to exhibit an increasingly xenophobic character.

5.1.2. Anti-Semitism

Whereas acts of anti-Semitism were relatively scarce in the last few years, the year 2000 has witnessed an unprecedented increase with 119 acts of violence, mainly in the last quarter, a period marked by the resumption of Israeli-Palestinian hostilities on September 28, 2000. However, this outburst rapidly lapsed and violence became residual by the end of the year.

In lower proportions, the year 2001 followed a similar pattern with a total of 29 violent acts and 171 threats. The first eight months recorded a level of violence similar to that of the same period in 2000: twelve incidents denoting signs of racism and an equal number of anti-Semitic acts. This specific violence mainly occurs in the Ile-de-France region, followed by Rhône-Alpes and Provence-Alpes-Côte d'Azur.

In 2002, there was a sharp rise in violence against the Jewish community: 193 incidents with 17 people injured, which represents 62% of all xenophobic violence.

5.2. DATA ON DISCRIMINATION FROM THE 114 HELP-LINE

5.2.1. Calls to the help-line : a survey up to May 15 2002 [39]

Between May 16 2000 and May 15 2002, the help-line received a total of **86,594 calls** relating to discrimination. Of these, **70,732** related to the first three mandates of the service: *Inform, Direct and Listen*, of which nearly two-thirds **(34,522)** required in-depth listening, discussion and analysis by the 114 team.

In many cases, callers regard themselves as victims of discrimination and strongly wish to bear witness, but are reluctant to register a formal complaint (a "*signalement"*). Some prefer to think it over; others, often because of concerns about reprisals, wish to go further only with the support of a voluntary group. In this case, they expect the help-line to point them in the right direction.

[39] Data from the 114 help-line coordination centre at GELD.

114 calls directly related to discrimination

Total	Listen, Inform, Direct	Formal complaints *(Fiches de signalement)*		Racist language
		Total	*Persons involved*	
86594	70732	77571	*10243*	4291

11,571 fiches, summarising formal complaints, involving **10,243 persons** (some of whom called several times, hence the discrepancy) were forwarded to a CODAC. On average, about one formal complaint in ten was lodged by a person who had already called once or several times.

It is noteworthy that a significant number of calls (4,291) were openly racist : the callers wished to register their objection to anti-discrimination policy, which supposedly creates "more privileges" for "foreigners".

After peaking at over 100 a day in the first month of operation, the number of complaints forwarded to the CODACs has steadily declined. One reason is limited knowledge of the scheme, which has probably further been eroded over time.

5.2.2. 114 : a source for every-day discrimination

By providing an official space for free expression, despite its low public profile, the 114 scheme immediately revealed the everyday significance of discrimination and the complex range of needs and expectations of its victims. Given the methodological reservations noted previously, the data analysis focuses on three questions: who calls? why? from where?

CALLERS

74% were French nationals, and 62% were men. Half claimed to have evidence or witnesses, and 15% had already pressed charges.

At its inception, the scheme was targeted at young people, whose informal complaints about discrimination were vigorous and well known. In fact, 67.1% of callers making a formal complaint (*signalement*) were aged between 26 and 59.

Age distribution of caller-complainants		
under 18	115	1.1%
18 to 25	2066	20.2%
26 to 39	4178	40.8%
40 to 59	**2697**	26.3%
over 59	241	2.4%
age not given	946	9.3%
Total	**10243**	**100.0%**

Complaints from young people mainly focused on access to leisure facilities such as night clubs (28% of calls); employment came a distant second (12%). Minors were concerned primarily with education (interrupted schooling, or difficulties at school deriving from their personal circumstances).

REASONS

Discrimination as reflected in complaints covered a wide range of areas, and the distribution is quite stable over time. A detailed breakdown of areas is given in the following table.

Callers' reasons

Area	**Number of persons**	
EMPLOYMENT	**3519**	**34.3%**
Work place	2165	21.1%
Job access	1058	10.3%
Training	296	2.9%
PROVISION OF GOODS AND SERVICES	**1955**	**19.1%**
Night clubs	1074	10.5%
Other	881	8.6%
RELATIONS WITH NEIGHBOURS	**1033**	**10.1%**
HOUSING	**874**	**10.1%**
Social housing	527	5.1%
Private rental	464	4.5%
RELATIONS WITH SECURITY FORCES	**799**	**7.8%**
Police	731	7.1%
Gendarmerie	68	0.7%
MISCELLANEOUS	**601**	**5.9%**
EDUCATION	**477**	**4.7%**
GOVERNMENT	**422**	**4.1%**
HEALTH	**170**	**1.7%**
JUSTICE	**156**	**1.5%**
TRANSPORTS	**120**	**1.2%**
Total	***10243***	

Men were more likely to be affected by employment discrimination, and massively more likely (especially among the young) to be affected by discrimination in access to leisure facilities. Women tended to refer more often to difficulties in education, housing, social

life, and relations with neighbours. Women were also the majority of callers speaking on behalf of a third party, typically a child.

The basis for discrimination was generally stated to be "real or supposed origin" (55% of callers); only one in ten referred to "skin colour" and less than 2% to "family name". Around 20% mentioned both "skin colour" and "origin" (see table below).

This emphasis on "origin" points to characteristic features of contemporary racism, which is less about pseudo-biological ideas of "racial hierarchy" (though it may use their language) than refusal of cultural difference in the name, typically, of "national identity". As much contemporary research has suggested, the resulting ideological configurations are subtle and slippery, and often fit poorly within established legal categories, even though their social destructiveness is enormous.

Grounds for discrimination as reported	**Number of persons**	
Total number of complaints	**10243**	
Real or supposed origin	5780	56.4%
Skin colour	1058	10.3%
Family name	175	1.7%
Other grounds related to real or supposed cultural membership	218	2.1%
Sub-total		***70.0%***
Origin and skin colour	2060	20.1%
Cumulative (Origin, name, skin colour and others)	952	9.4%

Qualitative analysis underlines the diversity of everyday discrimination and its essentially ordinary character. It feeds on silence, collective denial, the impunity of perpetrators and the fears of victims, for whom indifference is an additional assault. Routine denial in turn breeds distrust in institutions; indeed many callers expressed lack of confidence even in the help-line they decided to turn to.

GEOGRAPHY

Calls were strongly concentrated in regions where recent immigrants have mainly settled. Two-thirds of calls were concentrate in four regions : Ile de France, Nord-Pas-de-Calais, Rhône-Alpes and Provence-Alpes – Côte d'Azur. The Paris region alone accounted for 33% of calls; the top three *départements* were Paris (8.3 %), Nord (7.9 %) and Seine St Denis (6.1%). Again these statistics have proved very stable over the three years of operation of the help-line service.

6. Analysis of strategies, initiatives and good practices to combat racism and support diversity

After dealing with trends in judicial approaches with respect to criminal prosecutions and civil suits and evolutions in administrative law over 2002-03, we will present various initiatives based on affirmation of legal rights: the 114/CODAC scheme, the evolution of policy relating to the Roma population,[40] the creation of a French Muslim Council, and recent awareness of double discrimination suffered by migrant and minority women.

6.1. JUDICIAL STRATEGIES

6.1.1. Trends in actors' judicial strategies

6.1.1.1. Civil and criminal courts

CRIMINAL PROSECUTION

The criminal law is little used by plaintiffs and has never been successful in making non-discrimination a socially obligatory norm. Unions make little use of it in employment-related discrimination, although anti-racist associations have, in recent years, mobilized to demand application of existing criminal law. Their success remains limited because of the problems in collating evidence of racial discrimination and the heavy burden of proof demanded by the courts.

Analysis of successful prosecutions shows that evidence from witnesses, conclusive testing (public or private),[41] and written or recorded traces, are crucial.[42] When labour market intermediaries, public servants, bailiffs, estate agents, and others, have been prepared to testify as to matters of fact, their testimony has often been decisive in obtaining a conviction.[43] The efficacy of the criminal law, in other words, depends strongly on the commitment of witnesses. In their absence, the victim is largely powerless.

Nonetheless, SOS Racisme has conducted a campaign against discrimination especially in the fields of leisure (especially night clubs), employment and housing and, by using systematic testing, has been able to show the pervasiveness of discrimination and to disseminate good practices.[44] A striking example was the successful prosecution against the famous *Moulin Rouge* nightclub in Paris in November 2002. Following an

[40] In France, Roma are included, along with other nomadic populations, in the category travellers ("gens du voyage"). Conversely, sedentary Roma populations are invisible in statistical and administrative terms.
[41] The use of testing techniques was approved by the Criminal Bench of the Cour de Cassation in its decisions of September 12 2000 and June 11 2002: Cass. crim., 12 septembre 2000 n°99-87.25 ; Cass.crim. 11 juin 2002 n°0185559 et 0185560.
[42] C.A. Toulouse, 4 avril 2002 ; TGI Mont-de- Marsan, 26 février 2002 .
[43] C.A. Grenoble, 18 avril 2001 ; TGI Saintes, 24 janvier 2002 ; TGI Lille, 21 novembre 2001 ; TGI Versailles, 2 avril 2001 ; TGI Paris, 30 mai 2002 ; TGI Dijon, 19 décembre 2000.
[44] SOS Racisme, *Bilan d'activité dans l'accès au logement privé, 2003 ; la location sans discrimination*, Ministère du logement et SOS Racisme, DGHUC, 2003.

investigation by the Labour Inspectorate, which showed that the table and bar staff were 97% European whereas "colored" workers were numerous in the kitchens, and a taped telephone conversation from a testing exercise in which the manager stated that "colored" staff were not hired for table and bar service, the Paris Criminal Court found that illegal discrimination leading to "racialization" of work was implemented. The body employing the personnel of the club was sentenced to a 10,000 € fine, and the manager to a 3000 € fine and damages of 4500 € for the victim and 2300 € for SOS Racisme. The judge also ordered the judgment to be published in two daily newspapers, although the additional request that it should be posted on the door of the club was rejected.[45]

From the criminal case law on discrimination certain general principles have now emerged. For example, it is unlawful to demand from a lessee a financial guarantee provided by a French resident on grounds of the lessee's nationality.[46] Similarly, a Mayor may not use preemption rights to prevent people of foreign origin from acquiring property in the commune or a particular neighborhood; and reference to "immigrants" in a public declaration constitutes a group that may be regarded as subject to incitement to discrimination.[47]

In the area of more flexible burdens of proof, the Criminal Bench of the Cour de Cassation, in a decision of June 14 2000 (CFDT Interco) has accepted the use of comparative material in order to assess the reality of interference and anti-union discrimination in the career of an employee. In this case, as in a similar decision of the Tribunal de Grande Instance of Grenoble of March 20 2000 (Boumaza Farid) concerning hiring discrimination, the judges further ruled that proof of *exclusively* racist intent was not required in discrimination cases.

In 1999, convictions were obtained in 7 cases. The number rose in 2000 to 15.[48] Of these, 5 involved access to nightclubs and were supported by anti-racist organizations that used systematic testing to produce evidence. A further 7 were related to discriminatory employment advertisements. Only 3 cases involved discrimination in employment in the strict sense, of which concerned hiring and were supported by testing-based evidence. While comparable statistics for 2001-03 are not yet available, a preliminary analysis points to three convictions for refusal of entrance to a nightclub and three for hiring discrimination in 2002; and in 2003 two convictions for refusal to rent a private dwelling and one of a Mayor who instructed municipal staff to reserve Saturdays for "Christian" weddings and to schedule "Muslim" ceremonies at other times.[49]

In practice, most convictions relevant from an anti-racist perspective derive from the provisions of the law of July 29 1881 and were due to the strong support of anti-racist associations. There were 3 convictions for racial defamation in 1999 and 2 in 2000; 82 for public racial insult in 1999 and 89 in 2000; 15 for private incitement in 1999 and 7 in 2000; 2 for public incitement in 1999 and 4 in 2000; and for denial of crimes against humanity 2 each in 1999 and 2000.

More recent statistics are not available. However, based on evidence provided to the CNCDH by the Ministry of Justice, despite the creation of the 114 help-line, there has not

[45] TGI Paris, 22 novembre 2002, Marega c. Beuzit et Association du « Moulin Rouge »
[46] TGI Toulouse, 25 avril 2002, SOS Racisme c. Vollet, no. 0098092.
[47] C.A. Paris, 11 janvier 2001
[48] Ministry of Justice statistics, November 2001. Statistiques for 2001 and 2002 are not yet available.
[49] TGI Avesne- sur-Helpe, 12 mars 2003, Saïfi et al. c. Wilmotte no 99005744

been a significant increase in prosecutions, except in certain areas where the influence of the help-line is clearly ascertainable (including particularly Dijon, Châteauroux, Metz and Paris). In the last three years, there has been an annual increase of 10% in convictions for racist offences. 117 anti-Semitic incidents in 2002 led to 15 prison sentences.

Finally, with respect to violations of press law, it is important to note the conviction of the Director and a presenter of a television station in Guadeloupe (French West Indies) for comments made on air directly inciting to hatred and discrimination against Haitians. The guilty parties received suspended sentences of 4 months imprisonment.[50] Convictions were also obtained in cases related to online activities: a person found guilty of incitement to hatred against Jews in various Internet *fora* was sentenced to 18 months imprisonment (suspended) and three further years of probation.[51] On this point, the *Cour de Cassation* stated in May 2002 that the offence of incitement to discrimination does not require explicit incitement to commit one of the discriminatory offences specified by law. It is sufficient that the relevant text should tend to provoke "a feeling of hostility or rejection" against a certain group of people.[52]

Finally, it should be noted that there is a trend towards heavier sentences. Fines run at an average of € 2000 to 3000. Damages, obviously, vary according to the specifics of the case. Prison sentences are rarely passed, and, if at all, are short and suspended. Penalties such as loss of civil rights or closing of establishments are unheard of. In only a handful of recent cases have sentences been required to be published in local news media.[53]

Prosecution of and suits against corporate entities remain extremely rare, as do prosecution arguments for penalties against employers when specific employees are prosecuted. In one isolated case, however, the exacting burden of proof with regard to the culpability of senior management was met deductively because the court was persuaded of its complicity.[54]

CIVIL SUITS

With respect to discrimination, European directives n° 97/80 (December 15th 1997, relating to the burden of proof in sex-discrimination cases) and n° 2000/43 (June 29th 2000, relating to the implementation of equal treatment between persons irrespective of "race" and ethnic origin) have offered an opportunity to introduce consistency between different areas of discrimination law and to extend the range of available remedies. It is in this context that a new Law on action against discrimination was adopted on November 16 2001, and that sections of the Social Modernisation Law of January 17 2002 have created civil remedies for housing discrimination and harassment.

Remedies in housing cases under the Social Modernisation Law are still very recent, so that the only reform that can be assessed at this stage is the possibility under the Labour Code, article L122-45, to sue for damages, removal of discriminatory action and, in the case of dismissal, re-employment. From 1982 to the end of the 1990s, particularly in the area of racial discrimination, these provisions remained largely dormant. The civil law tradition required plaintiffs to produce evidence (such as personnel files etc.) that

[50] TGI Pointe à Pitre, 15 février 2002, MRAP et al. c. Canal 10 et IBO.
[51] TGI Paris 26 mars 2002, Mrap et al. c. Taleb no. 0028602422
[52] Cass. crim. 14 mai 2002, MRAP Isère c. Hugues, *Dr. Pénal* October 2002, 15.
[53] TGI Marmande, 14 mars 2002 .
[54] TGI Versailles, 2 avril 2001.

defendants had no obligation to disclose, and judges have traditionally interpreted their role in terms of strict impartiality in these matters. Furthermore, until the passing of the Law of November 16 2001, this article protected the employee only in terms of hiring, disciplinary measures, and dismissal (to which the case of the Cour de Cassation had added pay[55]).

Change in this area has been driven by discrimination against trades-union members. Since 1997, an extensive case law has developed bringing into the framework of French law with reference to discrimination in general, which have prepared the application of the new article L122-45. In its decisions of November 23 1999, March 28 2000, July 4 2000 and December 19 2000, the Social Bench of the *Cour de Cassation* used comparative principles established by the European Court of Justice in order to assess for civil-law purposes apparent anti-union and sexist discrimination in the career development of an employee.[56] This approach admits evidence of a comparative or statistical nature showing systematically unequal treatment that may, *prima facie*, point to discrimination, without demanding direct evidence of intent. It is then up to the employer to show that discrimination has not in fact occurred. For instance, the Court has accepted analytical evidence comparing the situation of a union member to that of other employees in similar positions. It follows that the Court is called upon to play a much more active role in establishing and checking facts, without relying solely on the plaintiff's legal capacity.[57]

Nonetheless, major difficulties remain. The standard of proof required by Labour Tribunals in order to establish *prima facie* discrimination is generally very high. In addition, Tribunal adjudicators are reluctant to grant employees' requests for production of evidence in the employer's possession. A refusal to require disclosure is difficult to challenge and often fatal to the suit. Racial discrimination has been particularly affected by these obstacles. Between 1987 and 2000, the Social Chamber of the *Cour de cassation* adjudicated on only two cases in these areas, and in both discrimination was direct and blatant.[58]

More recently, in 2001, an administrator recruited by the *Préfet* to manage the postal service in the islands of Wallis and Futuna was prevented from taking up her position because of an employees' strike in protest at her "non-Wallisian ethnic origin". After being dismissed, she successfully sued the territorial administration for damages.[59] In 2002, the RATP was also judged to have committed racial discrimination in the form of harassment, and was required to pay damages to an employee assessed as back-pay for inadequate career development.[60] Here too, the discrimination was direct and blatant.

In 2002, consideration was given to the impact of the level of proof required for the employer to justify apparent discrimination and to the wide discretion granted to national

[55] Cass. soc. 29 October 1996, Société Delzongle c/ Ponsolle, *Droit ouvrier* 1997, p.149, note P. Moussy ; Dalloz 1998, somm.com. page 259, note M.T. Lanquetin ; Cass.soc. 23 May 2001 CRAMIF.
[56] Lanquetin, Marie-Thérèse, « Un tournant en matière de preuve de discrimination », *Dr. Soc.* 2000, 589, Maury c. Société SOVAB, 4 July 2000, Dr.Soc. 2000, 1152, note Marie-Thérèse Lanquetin, Ste Pyrénées Labo Photo c. Mme Cassou et a., 19 December 2000, Dr.Soc. 2001, 314, note Christophe Radé.
[57] Cass. soc., March 28th 2000, *Fluchère*. Cf. Marie-Thérèse Lanquetin, "Un tournant en matière de preuve des discriminations", *Dr. Soc.*, 2000, 589.
[58] *Schlumbergerc. Celik,* December 10th 1987, *Dr. Soc.*, 1990, 106 ; *Boufagher c. Penly*, April 8th 1992, *Bull.*, 856.
[59] Cass.soc. 23 May 2001.
[60] C.A. Paris, 29 January 2002

jurisdictions, which makes major discrepancies between member states possible. In particular, the trade off between issues of equality and market outcomes, whereby an employer may seek to compensate discrimination financially, is likely to be received differently in the various countries of the EU.[61]

Nonetheless, despite the absence of statistics, an assessment of recent legal trends shows that a traditionally narrowly circumscribed law has succeeded in gradually extending the principle of equality so as to move from the prohibition to illegal discrimination towards the affirmation of a general principle of non-discrimination.[62]

6.1.2. Administrative law and use of suits to promote legal change

Administrative procedure is a central guarantee of the rule of law. It has naturally become the main legal framework for mobilization and for the demand that various legal instruments should conform to the constitutional principles embodied in international conventions and to human rights. The Conseil d'État is thus at the heart of judicial review of conformity to treaty obligations, and conversely administrative law is an instrument in the effective implementation of such obligations and of European commitments.

PENSIONS PAID TO RETIRED CIVILIAN AND MILITARY COLONIAL OFFICIALS

Since 1961, pensions received by nationals of former colonies in respect of civilian or military service have not been adjusted for inflation.[63] This mode of calculation has been challenged on the basis of article 141 of the EC Treaty and of the principle of non-discrimination.[64]

On November 29 2001, the Conseil d'État granted the request for judicial review of pensions arrangements of a Senegalese former Army Sergeant-Major on the grounds that the relevant Law of 1961 was discriminatory.[65] Furthermore, in the absence of any justification for differentiation according to nationality, French law and practice was in contravention of article 14 of the European Convention on Human Rights. Since that landmark decision, some 20 further cases have been similarly adjudicated,[66] along with a series of parallel decisions on the pensions paid to the widows of civil servants.[67]

On this occasion, the *Conseil d'État* found not only that nationality is an inappropriate consideration on which to base a difference in pension calculation, but furthermore that "if the objective of French law was to draw the consequences from the independence of the former colonies and their distinct development, the difference of treatment thus created cannot be regarded as based on a criterion consistent with the objective, and that

[61] Moreau, MA, « Les justifications des discriminations », *Dr. Soc*. 2002, 1112. These principles are applied in Cass. soc. 26 November 2002, Sté Peintamelec no. 0041633.
[62] Leroy, Y. « L'égalité professionnelle : vers une approche générale et concrète », *RJS* 2002, 832 ; Wacquet, P. « Le principe d'égalité en droit du travail », *Dr. Soc.* 2003, 276. Cass. soc. 8 January 2003, Société SEM Area no. 01-40618 ; CA Rennes 5 February 2002, Sté Cogifer c . Ferre, no. 0100393 à 0100396 Cass. soc. 8 January 2003, Société SEM Area no. 01-40618 ; X c. Goethe Institut, no. 0042158.
[63] See GISTI, « Les spoliés de la décolonisation », *Plein droit* no. 56, March 2003,
[64] Hantali, N. « Le code des pensions civiles et militaires à l'épreuve du droit communautaire », *Dr. Ouv.* No ; 657 April 2003, 141, Prétot X. « Les pensions civiles et militaires et le droit communautaire : de l'application du principe de l'égalité de traitement », *Dr. Soc.* 2002, 1131.
[65] CE, 30 November, DIOP, no. 212179,212211
[66] 28 December 2001, Ministre de la défense c. Diaw.
[67] 6 February 2002, Ministre de la défense c. Madame Doukouré.

the provisions are therefore inconsistent with article 14 of the European Convention on Human Rights".

In December 2002, the second interim Finance Act[68] abrogated the law of 1961. Henceforth, pensions and annuities paid to former members of the armed forces and former civil servants not resident in France will be assessed in light of the average purchasing power of the country of residence.

OTHER ADMINISTRATIVE ISSUES

Certain aspects of ministerial instructions relating to the implications of the newly created civil union (*pacte civil de solidarité*) were struck down as discriminatory by the *Conseil d'État*. The Minister had acted unlawfully in instructing that, for the purpose of acquisition of residency, the duration of cohabitation should be 3 years for partners of French or European nationals, but 5 years for partners of third-country nationals. Furthermore, the instruction specified that the partners of foreign students should not have rights in this respect.[69]

Finally, the *Conseil d'État* ruled that quotas applicable to third-party nationals in French basketball teams contradicted the terms of the association agreement between Poland and the EU, and should therefore be struck down.[70]

6.2. INITIATIVES, PROGRAMMES AND OUTCOMES

The policies presented in this report do not exhaust the good practices in French action against racism and discrimination. They all point to the gap between the recognition of rights and their effective implementation, the difficulties victims face in using the rules that are supposed to protect them, and the need to act on the uncertainties of implementation in order for principles to become established and widely respected norms of conduct.

6.2.1. Assessment of the 114/CODAC scheme[71]

As required by the ministerial circular of October 30 2001, a systematic analysis of the 10,243 cases forwarded to the CODACs since the help-line opened has been undertaken.

It was clear at the outset that the procedures laid down for the scheme were poorly adapted to the context and to administrative implementation. The results, therefore, have been disappointing.

Five key points emerge from the assessment:

- the scheme is opaque,

[68] Article 68 de la seconde loi de finances rectificative pour 2002 n°2002-1576 du 30/12/2002 (JORF du 31/12/2002 p.22070).
[69] CE, 29 July 2002, GISTI, Mrap et Femme de la terre no. 231158
[70] CE, 30 December 2002, Malaja c . Fédération française de basket-ball, no. 219646
[71] See the 2002 Report of the CNCDH, Op. Cit.

- civil servants are reluctant to work with non civil service referral officers,
- criminal charges are pressed frequently but often inappropriately,
- there are difficulties in providing genuine assistance to victims,
- civil remedies and labor law are insufficiently called upon.

Furthermore, the CODACs do not always provide a follow-up of cases forwarded to them. When they do, documents are often incomplete and provide inadequate information on how complaints were dealt with and what results were achieved. Experience to date and assessment of the scheme points to the need for a deepening of the knowledge of participants (administrative and voluntary) about the legal framework, for professionalization of actors and for better institutional coordination of their action.

In addition, the lack of results shows the difficulties the legal system faces in sanctioning unintentional discrimination. Once there is doubt about the moral culpability of the person charged with discrimination, actors have problems in going through with cases. The notion of fault is so deeply rooted in the French legal system that doubts about the appropriateness of punishment, the Public Prosecutor's discretion in prosecuting and the problems of evidence combine to hamper implementation of the principle of non discrimination by ordinary recourse to law.

This assessment has led both the state and voluntary organizations to consider the creation of an independent administrative authority as a means to implement the spirit of EU directives and to produce greater effectiveness in legal responses to discrimination.

In the context of the possible creation of an independent authority, the GELD Steering Committee, the term of which expired in December 2002, has not been renewed and GELD working groups have been suspended. As a result the GELD has redirected its activities towards preparation of and support for the feasibility mission for an independent authority set up under the chairmanship of Bernard Stasi (see section 3).

6.2.2. Assessment of mobilization on planning issues with reference to *"gens du voyage"*

Despite the efforts of the state to ensure implementation of the laws of May 31 1990 and July 5 2000[72], local authority action to provide facilities for Roma and other travelers remains insufficient. The lack of parking areas and their inadequate quality has consequences for relations with local residents and encourages illegal camping against the whole thrust of current policy.

According to the Travelers' Consultative Commission (Commission consultative des gens du voyage), there were as of June 30 2002 2,700 places responding to the technical standards required by law, as against an estimate of 38,000 permanent places required.[73]

[72] Cf. *Les aires d'accueil des gens du voyage*, DGHUC, 2002 (guide for local authorities prepared by the national planning and housing directorate).
[73] *Rapport annuel 2002, Commission nationale consultative des gens du voyage*, Sylvette St-Julien et Jean Blocquaux, Ministère des affaires sociales, du travail et de la solidarité, 2003.

In this context, the town of Montauban, which had provided the Roma population with an insalubrious and dangerous site, was refused an injunction by the local Court to expel them from a sporting facility that they had subsequently occupied. The Court ruled that it was the local authority that was responsible for the public disorder it complained of, by failing to meet its obligation to provide a camping area compatible with proper living conditions. The right to decent housing is a constitutional principle, which is regarded as constitutive of the protection of human dignity. [74]

In September 2002, the Minister of the Interior emphasized in an administrative memorandum that local authorities (*départements* in this case) must meet the relevant obligations stipulated by law within 2 years and also created a new offence of trespass (*installation illicite sur le terrain d'autrui* : Criminal Code, article 322-4-1).[75]

6.2.3. Establishment of a French Muslim Council (*Conseil français du culte musulman*)

Numerically, Islam is the second largest religion in France, where there are estimated to be 4 to 5 million Muslims. While covered by the legal framework applicable to religions in general,[76] Islam was unique among major religions in having no national representative body. For over a decade, successive governments have been trying to create a body to serve both as a partner [the usual French word is interlocuteur someone to talk to] of the French government and as a place to promote the interests of French Islam.

Following the work conducted since the Summer of 2002 by the Interior Ministry and the Commission set up to organize elections in the Muslim community (Commission d'organisation de la consultation des musulmans de France – COMOR), an agreement to set up a French Muslim Council (Conseil français du culte musulman, or CFCM: the word culte emphasizing that the remit of the new body is to be exclusively religious) was signed on December 9 2002 by the three main constituents of the French Muslim community: the Fédération Nationale des Musulmans de France (FNMF), the Institut Musulman de la Mosquée de Paris (GMP), and the Union des Organisations Islamiques de France (UOIF).[77]

In February 2003, the COMOR reached final agreement on the operation of the CFCM and its regional offshoots (Conseils régionaux du culte musulman) and on the organization of elections to these new bodies.

The CFCM is a federation of associations governed by the general law on associations (Law of July 1 1901). Its general assembly comprises representatives of the regional councils, umbrella associations set up to manage Muslim religious buildings, and the associations that manage the main mosques.

[74] TGI Montauban, 3 mai 2002, Mairie de Montauban c . George C . et al., no. 02-00171
[75] Lettre-circulaire relative aux dispositifs d'accueil départementaux des gens du voyage, BO METL no. 6, 10 April 2003 ; « Circulaire relative aux conditions d'application de l'infraction illicite sur un terrain appartenant à autrui », ministère de l'Intérieur et des libertés locales, March 2003.
[76] Marongui O. & D'un monde à l'autre, *Droit français des cultes appliqués à l'Islam*, 2002 ; Open Society Institute of Budapest, *La situation des musulmans en France*, 2002 .
[77] *Protocole d'accord pour la création du Conseil français du culte musulman* (CFCM), December 2002.

In April 2003, 4032 electors representing 995 Muslim religious facilities (their number based on surface area rather than on number of worshippers) elected the members of the 17 regional councils. The CFCM elected as its President Dalil Boubakeur, the Rector of the Paris Mosque. He is flanked by two co-presidents, one representing the UOIF and one the FNMF.

The CFCM will begin to operate in September 2003. 11 committees have been established to make proposals on such subjects as worship, religious neutrality and the definition of French Islam. A major conference on Islam in France and in Europe was planned for late 2003.

6.2.4. Emergence of double discrimination suffered by women

Violence directed at young women from immigrant backgrounds has achieved considerable media prominence. Combined with the publication of several studies on the subject, this has led to the emergence of a new issue: the multiple forms of discrimination suffered by women from some immigrant backgrounds. They are discriminated against in their own communities, to the point in some cases of losing access to their most basic rights, and they are discriminated against by the wider society as women and as foreigners.

The Haut Conseil à l'Intégration (HCI), which has been chaired since October 2002 by the philosopher Blandine Kriegel, has been asked by the Prime Minister to consider the issues raised by the persistence in France of customs deriving from countries of emigration such as repudiation, forced marriages, polygamy and genital mutilation. In a report published on July 2 2003, the HCI stressed the deterioration of the conditions of women, to the extent that they are affected by customs prevalent in France that have evolved, or been banned, in their countries of origin. Furthermore, the HCI criticized the bilateral treaties that France has concluded with certain countries and that operate to the detriment of immigrant women: the report proposed that the law of the country of residence should apply when it is more favourable to women, as is the case in the UK, Spain and Belgium. With respect to forced marriages, the HCI also proposed a change in divorce law to make it possible for the Public Prosecutor to annul a marriage when consent was obtained by fraud, violence or duress.[78]

Two major studies were published in 2003 that sought to clarify how cumulative discrimination suffered by women operates. The first, conducted by the CADIS research centre,[79] uses interviews with women at various levels of education to assess how cumulative pressure – from society, and equally from family and community – affects professional and personal development. The second study considers the legal dimension of the issue. It shows that the difficulties faced by women, which are widespread and extensively verified in statistical terms, would be better dealt with in law if the quantitative approach developed in EU law were used for the purposes of sex discrimination determinations.[80]

[78] « D**roit des femmes immigrées: le Haut conseil à l'intégration remet son avis au Premier ministre »** (www.premier-ministre.gouv.fr/fr/p.cfm?ref=40034).
[79] Guénif & Boubeker, *Entre discrimination et construction de soi*, CADIS, March 2003.
[80] Lanquetin, M.-T., *La double discrimination à raison du sexe et de la race ou de l'origine ethnique – Approche juridique*, Association ADRESSE, FASILD, 2003

7. Conclusion

The year 2002 witnessed a worrying rise in xenophobic and anti-Semitic violence in response to tensions in national and international affairs (cf. Pages 17 and 18). The Government responded by proposing changes to the criminal law and, during the first half of 2003, promoting mobilization on issues of religious neutrality (*laïcité*) and organization of Islam in France, and preparing the creation of an independent anti-discrimination authority. On the latter point, the preliminary mission is charged with making proposals for implementation in 2004.

French anti-discrimination policy is of recent origin and clashes with an established legal tradition in which equality is regarded as prior to social relations, that takes for granted universalism and formal equality, that is based upon the notion of culpability, and that is reluctant to take on board a judicial approach in terms of elaboration of proof in the course of a hearing without reference to a perpetrator's intention. It follows that action against discrimination must start from training of relevant actors and development of tools to ensure dissemination of EU law.

Assessment of the 114/CODAC anti-discrimination scheme, as well as analysis of experience of obstacles to the effective implementation of the norm of non-discrimination in the private sector (housing and work) have shown that, despite strong policy impetus, the law has limited capacity to provide remedies to victims. These indications must be central to planning of the objectives and means of a future independent anti-discrimination authority.

Among the aspects of anti-racist policy that tend to be forgotten, it is important to highlight the situation of immigrant women, who suffer from isolation and violence. Only because of intense media interest, during 2002 and 2003, in violence against young women and in their own mobilization against it did this neglected issue achieve prominence. The condition of immigrant women must now be seen as central to integration policy as well as to policy against racism and discrimination.

Finally, the Government, in the face of real difficulties in receiving asylum seekers, has sought to clarify and reinforce the procedures of immigration policy. As a result, numerous reforms of immigration and asylum law have been proposed. These reforms are currently being debated in Parliament and are expected to be finalized during the first half of 2004.

8. Glossary

CFCM / Conseil français du culte musulman : Federation of associations represented in a national body representing the Muslim religion in relation with governmental and social institutions.

Children's defender – *Défenseur des enfants* : Agency advising the President of the Republic in all matters concerning the rights of the child and intervening in all recourses regarding the implementation of children's rights

Citizenship – *citoyenneté* : Philosophical concept referring to the ideas of responsibility, integration, and participation in the life of the nation

CNCDH / Commission nationale consultative des droits de l'homme : National Human Rights Advisory Commission : Commission advising the Prime Minister on the situation of human rights in France, which prepares opinions on draft legislation and delivers an annual report on the situation of racism in France.

CODAC / Commission d'accès à la citoyenneté: Commissions set up at the level of the department and chaired by the prefect to monitor the situation of local populations and coordinate local action against discrimination in employment, housing etc…In addition the CODACs handle at a local level victims' complaints transmitted by the 114 help line.

COMOR / Commission d'organisation de la consultation des musulmans de France : Consultative body for the organization of the Muslim cult.

Conventional asylum – *asile conventionnel*: derives from the Geneva Convention of 1951 and is granted to those foreigners who have a well founded fear of individual persecution in their country, on the grounds of their race, religion, nationality, membership of a social group or political opinions, perpetrated or facilitated by state authorities

Constitutional asylum – *asile constitutionnel* : derives from the preamble of the Constitution of 1946 and is granted to persons persecuted as a direct consequence of their action in favour of freedom.

Constitutional Council – *Conseil constitutionnel* : Constitutional Court, empowered to strike down legislation prior to promulgation if requested to review it by the President, Prime Minister, Speaker of either House of Parliament or a specified number of Parliamentarians (note: unlike in many countries, the C*onseil constitutionnel* does not act as a final court of appeal in civil, criminal or administrative cases.

Conseil d'État : High court of appeal in all suits involving the state or administrative law

Cour de cassation : High Court of appeal in civil and criminal matters.

CRCM/ Conseils régionaux du culte musulman : regional representatives of the CFCM.

CRR / Commission de recours des réfugiés : Refugee appeal commission: Appelate body for the decisions of the OFPRA regarding applications for refugee status, which are in turn subject to judicial review by the Conseil d'Etat.

Double sentence – *double peine* : administrative order of deportation joined to a prison sentence that is to be executed on release from detention, which is exclusively implemented against non-nationals.

Department – *département* : Administrative territorial unit. France comprises 100 *départements*.

HCI / Haut Conseil à l'Intégration : High Integration Council : Advisory council to the President of the Republic on the situation of populations of foreign origin.

Negationism – *négationnisme* : Criminal offence related to Holocost denial.

OFPRA/ Office français de protection des réfugiés et apatrides/ French office for refugees: Decisional body in matters of applications for refugee status.

Prefecture : State administration of the administrative unit or department.

Prefect - *préfet* : Head Representative of the central state in the administrative unit or department.

Religious neutrality – *laïcité* : Foundational principle of the French Republic, which considers religion as a private matter which must not impinge on the public sphere of relations amongst citizens and with the state. *Laïcité* refers matters of religion to the private sphere and requires the protection of religious neutrality.

Roma - *Gens du voyage* : In France, Roma are designated as travellers (*"gens du voyage"*), a category that also includes other nomadic populations.

Territorial asylum - *asile territorial* : is a distinct status, which may be granted to a person who has established that his or her life or liberty is at risk in his or her country of origin or that he or she has a well founded fear of being exposed to torture or inhuman or degrading treatment in contravention of Article 3 of the ECPHR (sc. whether or not such risk or fear is attributable to state authorities).

114: Hot line for the victims of racism and racial discrimination which provides support, orientation and receives complaints to be treated by the CODACs.