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PROCEEDINGS

From collective mobilisation to the recognition of systemic discrimination in law

STUDY DAY 24 NOVEMBER 2021

In the eyes of the law, we are all equal

Défenseur des droits
RÉPUBLIQUE FRANÇAISE

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Rachel Kéké, representative of the chambermaids at the Ibis Batignolles hotel

SUMMARY

In the last twenty years or so, legal action against discriminatory situations has developed under the influence of European law and the mobilisation of stakeholders (unions, associations, citizens' groups, etc.). Despite the undeniable advances to which the HALDE and then the Defender of Rights have contributed, litigation remains largely pegged to an individualist and restorative vision of the law.

Although we are seeing signs of a shift in paradigm with a growing number of trials involving multiple plaintiffs, focused on challenging discriminatory systems anchored in the very functioning of organisations, this progress remains fragile.

On the basis of the challenges raised by research supported by the Defender of Rights following the proceedings of immigrant railway workers against SNCF and the presentation of other collective action, the idea behind this study day was to contribute to shared reflection on the future of non-discrimination law, in light of its ability to act at collective and corrective level, and not simply at individual and restorative level.

FOREWORD

CLAIRE HÉDON

The Defender of Rights

We are particularly pleased to be able to present the proceedings of the Study Day *From collective action to the recognition of systemic discrimination in law*.

This multidisciplinary study day was held on 24 November 2021 in Paris and was organised by the Defender of Rights.

I would like to take this opportunity to thank everyone who contributed to this event, in particular our foreign counterparts, Patrick Charlier, Director of Unia, an independent anti-discrimination organisation in Belgium, and Philippe-André Tessier, President of the *Commission des droits de la personne et des droits de la jeunesse* of Quebec, who had travelled for the occasion.

Like previous scientific events – I am thinking here of the 2018 symposium on the multiplication of discrimination criteria¹ – this new Defender of Rights study day illustrates our desire to encourage dialogue between the field of legal science and social sciences research and all legal professionals and our commitment to deepening collective reflection on non-discrimination law.

The effectiveness of non-discrimination law is at the heart of what the Defender of Rights does.

For 20 years, French non-discrimination law has undergone many improvements such as the integration of definitions of direct discrimination and indirect discrimination, understood in the light of their discriminatory effects rather than their intention; the shift of the burden of proof for the benefit of victims before civil courts; recognition of the ability of trade unions and associations to initiate

recourse on behalf of victims in the event of discrimination; acceptance of situation testing as evidence before civil and criminal courts, or the protection of employees against retaliation after they have reported a situation of discrimination².

Despite the legal developments noted, redress through the courts remains onerous and painful for victims and is not always effective. The rate of non-recourse remains very high: for example, of those who reported having experienced discrimination in employment on the grounds of their origin, only about 12% started legal proceedings according to the 14th survey of discrimination in employment³.

In order to listen to victims better, raise awareness of the Defender of Rights and encourage use of the law, a discrimination whistleblowing platform, announced by the President of the Republic in December 2020 and organised by the Defender of Rights, was launched on 12 February 2021. Entitled **3928 - antidiscriminations.fr**, this system is **a reporting service and provides support to victims of discrimination**. In one year, over 11,000 calls were recorded. The vast majority concern discrimination in the field of employment, but the finger is also pointed at public services. The two main discrimination criteria cited are origin and disability. It goes to show how much this new doorway, in making discrimination visible and offering recourse to those who feel they are victims, meets a great need.

The Defender of Rights' investigative powers and the solutions it proposes must help victims to recognise their rights but must also advance case law. In this regard, criminal justice remains a particularly arduous path: often victims cannot meet the very high demands

of judges in terms of proof of intent and come up against the opposition to change of the public prosecutors. Nevertheless, the expertise of the Defender of Rights' lawyers has helped move litigation and non-discrimination law in civil matters forward through the observations that the institution can submit when claimants bring matters before the judge.

AS A RESULT, THE INSTITUTION HAS ADVANCED CASE LAW ON HARASSMENT BASED ON A DISCRIMINATION CRITERION

The institution has helped a broader interpretation of sexual harassment to be recognised: according to our analyses and observations, sexual harassment should not be restricted solely to direct sexual acts on the victim. The Orléans Court of Appeal, in a ruling of 7 February 2017, followed our reasoning by considering that *“sexual harassment may consist of hostile environment harassment, whereby, without being directly targeted, the victim suffers obscene and vulgar provocations and jokes that become unbearable”*. And the employer was condemned for not protecting its employees against this *“hostile environment harassment”*⁴.

The Defender's legal investigations and analyses have also characterised the concept of discriminatory harassment and obtained judicial sanctions for such behaviour and for inaction by employers.

The Defender of Rights has also enabled such harassment to be characterised on the basis of a single serious act: the actions do not need to be repeated for a situation to be qualified as discriminatory harassment, which the Rennes Court of Appeal confirmed in an innovative decision of 10 December 2014⁵.

Since then, the Defender has helped other forms of discriminatory harassment to be recognised in other cases.

RECOGNITION BY JUDGES OF THE DISCRIMINATORY NATURE OF IDENTITY CHECKS

Doubly competent, on the one hand in the fight against discrimination, and on the other in respect for the ethics of the security forces, the Defender of Rights has invested in this subject for many years.

First of all, in 2016, it published the results of an unprecedented investigation into police-citizen relations that made it possible to objectify identity check practices in the absence of official activity data and to highlight discriminatory checks⁶. It put forward its recommendations on this issue in numerous opinions on proposals or draft laws⁷.

Above all, the observations submitted by the Defender of Rights contributed to the unprecedented sanction of discriminatory checks by judges in 2015 and 2016, showing how non-discrimination law, and in particular the shift of the burden of proof, should apply to identity checks⁸. The Court of Cassation took on board the Defender of Rights' analyses on the lack of traceability as an obstacle to effective recourse, stressing that identity checks *“are not registered”*⁹.

The Defender of Rights also presented its observations following the referral and recourse of a group of college students stopped at the Gare du Nord upon their return from a school trip¹⁰. In its judgment of 8 June 2021, the Paris Court of Appeal followed our observations and condemned the State due to the discriminatory nature of the identity checks of these three high school students of foreign origin¹¹.

In addition to sometimes particularly serious individual situations of discrimination, the institution is therefore interested in discrimination in its collective dimension, and in its prevention and correction.

Discrimination is not only the product of individual acts, it is also the result of a number of factors weighing on the behaviours of each individual. They combine

in the areas of daily life and are accentuated. That is why the institution uses the concept of systemic discrimination.

In opinion No. 20-11 of 11 December 2020¹², we recalled that in certain situations, it may be useful to consider certain discrimination *“from a systemic perspective, in other words in a broader context that takes into account: - stigmatising representations (stereotypes and prejudices); - interaction between the different types of discrimination suffered; - the broader socio-economic inequalities that structure society; - and the substantial part played by institutions in producing these discriminations.”*

This concept makes it possible to better understand the reasons why a group of individuals may be particularly disadvantaged compared to another, since differences in treatment often result from historical and social inequalities based on deep-seated and recurring stereotypes.

In our latest report on the implementation of the International Convention on the Rights of Persons with Disabilities by France¹³, as in the *Discriminations et origines : l'urgence d'agir* report published in June 2020¹⁴ or in our recent contribution on Travellers in October 2021¹⁵, the institution reiterated the magnitude of the cumulative and systemic discrimination facing these populations in France.

We also pointed out the risk of this systemic discrimination becoming automatic with the deployment of algorithms and other artificial intelligence tools that tend to integrate discriminatory biases and amplify systemic discrimination¹⁶.

Structural discrimination can also be identified within organisations. The Defender of Rights has been contacted regarding, and has investigated and updated, collective discrimination situations in some organisations. Our analysis of systemic discrimination has helped to introduce this concept into case law. As part of the study day, you will revisit this 2019 case in which

the Defender of Rights highlighted the existence of systemic discrimination based on origin and nationality against a group of 25 Malian construction workers¹⁷.

HALDE and then the Defender of Rights contributed to the movement of appropriation of non-discrimination law by both applicants and judges. Of course, litigation is still widely linked to an individualist and restorative vision of the law: it is used first and foremost to restore the rights of a singular victim of discrimination. But we are seeing signs of a shift in paradigm, with a growing number of trials involving multiple plaintiffs, seeking to challenge discriminatory systems anchored in the very functioning of organisations.

This study day aims to show these advances, which are the result of the commitment of many stakeholders, but primarily victims, who have rallied to successfully exercise their right to recourse before the courts, despite the onerousness and length of the proceedings.

The recognition by civil courts of situations of systemic discrimination within certain working organisations constitutes a major step forward in non-discrimination law, such as the introduction of class action into our legislation. The work or cases presented here will help to deepen the necessary dialogue between law and social sciences. The work done in the world of research provides key points of support for lawyers, including the Defender of Rights, to contextualise discrimination, convince the judge and highlight their systemic dimension. The new forms of litigation have thus benefited from socio-legal reflections on the concept of systemic discrimination.

However, this progress remains fragile given the obstacles: proving collective unequal treatment remains difficult, collective action on discrimination requires a great deal of resources, the procedure for class action remains difficult to access and limited in its effects, and the judge's recognition of massive or even systemic discrimination within

an organisation remains rare. Finally, sanctions in the event of victory do not serve as much of a deterrent.

The study day *From collective action to the recognition of systemic discrimination in law* aims to build reflection on the future of non-discrimination law, on the ability of the law to act at the collective and corrective level, rather than simply at the individual and restorative level.

On the basis of research supported by the Defender of Rights on the proceedings by immigrant railway workers against SNCF and the presentation of other mobilisations and cases¹⁸, the four round tables planned constitute spaces for exchange and debate on these issues with the various parties involved.

The files show that it is essential to deepen collaboration between stakeholders, lawyers and sociologists in particular, with a view to using the law as a deterrent and a lever for structural change within organisations. I hope that these contributions will provide a useful foundation for achieving this shared objective.

CLAIRE HÉDON



Claire Hédon, Defender of Rights

PART I

TIME FOR MOBILISATION: RECOGNISING COLLECTIVE DISCRIMINATION

FOREWORD

LIORA ISRAËL

Sociologist of Law and Justice,
Director of Studies, EHESS

I would like to thank the Defender of Rights' teams for organising this event and Claire Hédon as the Defender of Rights for her introduction. As a sociologist of law and justice, I had the opportunity and great pleasure, together with students from the EHESS's Potential Social Sciences Workroom (OuSciPo), of working with the Defender's teams in 2018-2019. This collective investigation concerned the handling of claims filed with the institution, via the delegates of the Defender of Rights or in writing, and partly concerned the specificities of identifying and monitoring cases of discrimination.

Based on specific cases, this round table covers the conditions, steps and people necessary for the constitution of collectives. Nothing less obvious, in fact, than the constitution of collective action on the basis of discrimination, awareness of which often starts with a feeling, a sense of self.

How do we become aware that we have been, individually and collectively, the victims of discriminatory differential treatment? How can we make the shift from the individual case to the collective? How can the group take advantage of the law? What people and what support are needed? So many questions that have been addressed by the social sciences in recent years, but to which there are still too few answers.

The "ordeals of the collective" should therefore be mentioned in this round table: under what conditions and with what material and symbolic resources does a group of people wanting to make a complaint form and manage to keep going in time, despite the length of the procedure, the difficulties encountered and any conflicting interests within the group, so that one day, perhaps, a court decision might be reached that actualises the validity of a claim.

HOW DO WE BECOME AWARE THAT WE HAVE BEEN, INDIVIDUALLY AND COLLECTIVELY, THE VICTIMS OF DISCRIMINATORY DIFFERENTIAL TREATMENT? THE CASE OF CHAMBERMAIDS AT THE IBIS BATIGNOLLES HOTEL.

RACHEL KÉKÉ, SYLVIE KIMISSA

Representatives of the chambermaids at the Ibis Batignolles hotel

First of all, we would like to thank you for inviting us. We are really happy to be able to talk to you about the fight we have been through.

The action by the chambermaids at the Ibis Batignolles hotel lasted almost two years, and they were on strike for eight months.

The Ibis Batignolles hotel belongs to the Accor Group. There were 19 of us chambermaids employed by an agency. We did not have the same rights as our colleagues from the Accor Group, even though we worked on the same site. We could not eat at the same table as Accor Group employees, we could not hang around together even though we worked together. Only Accor employees received a meal allowance. Everyone else had to spend their own money to eat in the canteen, and even to buy a bottle of water.

The chambermaid profession is a tough job and the Accor Group has put in place a system that exploits the women who work there. Most of the women are immigrants. They are trapped, raped, humiliated. When guests go to the hotel to sleep, their room is clean and well prepared, but behind the scenes, there is a great deal of suffering and misery. Some women were crying because they had 40 to 50 rooms a day to clean, they were unable to work and they were told: *"You don't want to work, you're fired, you can always go and find another job!"*. We suffered terrible threats and went to work with a deep sense of dread: *"What guests will I find? How will the day go? Am I going to be attacked?..."*. The work is so difficult, it damages a woman's body, breaks your knees and back, but the agency and the boss say: *"You've got to work anyway"*. All they

are interested in is money. They couldn't care less about your way of life.

At one point, the managers wanted to transfer employees who were part-time for health reasons, considering them to be no longer effective. This decision is what triggered our movement, in light of the furious pace at which we had to work.

We stood up and said "no more!". Just because we work, because we need this job to feed our children, we shouldn't be "enslaved". When we went on strike, it was to denounce this system so that people could hear about what we experienced in this hotel.

We decided to set up a work collective and approached the CGT HPE union, which informed us about our rights.

We found a lawyer to defend us and explain our rights and what we were and weren't able to do. At the beginning, the Group said: *"They're not our employees, they're employed by the agency"*, but we continued to point the finger at the Accor Group as the principal. Faced with the intervention of the lawyer and the Defender of Rights, the Accor Group backed down.

The movement lasted 22 months. We fought and succeeded in winning most of our claims.

Our main demand was to be brought into the Accor Group, to bring agency work, in our opinion a form of abuse, to an end. Unfortunately we did not succeed with this. But we did manage to get the meal allowance, the clothing allowance and a decrease in our work rate.

It pays to fight. There's no denying it was hard work, the struggle was not easy, we were insulted, people even told us: *"Go home!"*. People threw bottles of water, cans and buckets of water at us in the middle of winter, we stood out in the rain and snow.

Guests mocked us through the windows. But we kept our dignity. We stood our ground and we can now walk with our heads held high. The struggle continues, we will stay strong. Thank you very much.

THE MOBILISATION OF YOUNG PEOPLE IN A DISTRICT OF THE 12TH ARRONDISSEMENT OF PARIS IN THE FACE OF ILLEGAL POLICE PRACTICES.

OMER MAS CAPITOLIN

Community Worker, Maison communautaire pour un développement solidaire (MCDS¹⁹)

I'm going to illustrate a mobilisation using a case concerning young people from the 12th arrondissement of Paris between 2013 and 2015.

A group of around twenty young people complained about the highly inappropriate behaviour and attitudes of a gendarmerie brigade. They were subject to repeated checks, were victims of racist insults, and were regularly victims of particularly humiliating behaviour such as touching of their genitals. They were forced to endure real “degradation ceremonies”. The events were happening in police stations or in public spaces where there were no cameras.

At that time, I was asked by a team of local educators who had already tried in vain several times to enter into discussions with the local police forces. My contribution consisted of working with these young people to try to equip them with the tools and skills they needed to enter into discussions with the authorities, the police, the town hall and so on.

One day, I witnessed a police check in the middle of the afternoon, during which the police officer slipped his hand inside a young man's tracksuit bottoms. I saw and understood what was going on.

When the young person came in, I asked him to talk about what had happened. His voice was liberated. After talking to several young people, we learned that police officers had

been in the habit of touching the genitals of these young people for years. As it concerned their bodies and was a subject that was difficult to talk about, these young people had not even told their own parents.

In view of these observations, solutions were sought to address this problem. We tried to mobilise the law by appealing to two lawyers. Discussions took place between the young people, the victims, their parents and the lawyers. The lawyers were able to explain what the law states, what could be done by taking legal action, and from there the entire mobilisation took place.

As well as the competence of the lawyer, it should be noted that the individual's own commitment is essential. In mobilising with young people, the whole dynamic was maintained because the lawyer went to them. This was essential, to go further than educational work, to obtain awareness and to enable victims to understand that they could use the law. How can the law be made accessible to young people? How can we make them understand that the process is most likely going to be a long one?

Thanks to important media coverage (Médiapart and Le Monde), we were able to mobilise more widely, beyond just the victims and their families. A part of the population, not affected by these checks, discovered what was happening on their doorstep. The significant mobilisation has made it possible to organise exchanges with inhabitants and families, public debates, etc.

Discussions with lawyers, professionals and families have enabled the development of a strategy around legal proceedings. A joint complaint of “aggravated violence”, “aggravated sexual assault”, “arbitrary detention and arrest” and “discrimination” against the police officers was filed. Inhabitants then summonsed the state for “gross negligence” and for acts of “discriminatory harassment”. It is in the context of this summons that the Defender

of Rights was called upon to make its observations before the courts²⁰.

Beyond the legal aspects, this case has helped us to reflect on interactions between the police and citizens and alternative solutions to improve the relationship between these two communities. Thus, as justice can take a particularly long time, this made it possible to use the skills of a social sciences researcher to document police-citizen relations and have materials, tools, etc.

For example, the police officers said: *“We get a lot of calls from people saying that young people are making a lot of noise”*. “Exploratory walks” were then organised to objectify these phenomena, to understand why young people were hanging around their estates, and to find alternative solutions so that these young people had secure places to meet, without causing a nuisance for local residents.

To accompany the procedure, tools were needed, as was great creativity and fluidity in the exchanges between the lawyer, the inhabitants and the professionals. Collective construction was needed at every stage. A blog was set up to keep the population informed throughout the procedure.

This mobilisation proved to be very beneficial and its action went beyond the police-citizen problems that led to the mobilisation: locals have used their contacts to help young people look for work placements, for example, and work has been undertaken with young people in this neighbourhood to make them feel more like they belong. Illegal police practices also disrupted the dynamics of intrafamily education as fathers could not go to the police station to fetch their child or complain without fear of suffering the same degrading treatment. This jeopardised the feeling of authority they could have, hence the strong mobilisation of mothers and women in the neighbourhood.

In conclusion, the police were condemned at the first hearing, but acquitted on appeal. In civil law, the State was convicted of gross

negligence. In addition, the Defender of Rights has highlighted these systemic discriminations.

I would like to quickly mention the new mobilisation of the “Mums’ Brigades” in the Belleville neighbourhood. They are fighting a new weapon widely used by the police, that of fines²¹. Fines become automated with reasons that vary between “disturbance”, “breaking the curfew” when one was in place, “failure to wear a mask” when it was mandatory, “consumption of alcohol on the streets” and “littering”.

This phenomenon is the cause of the over-indebtedness of already vulnerable families and results in delinquency.

To the fines and unpaid debts are added possible visits by bailiffs, bank charges, strategies to prevent the income of young workers being directly hoovered up by the Treasury. Some young minors are in a considerable amount of debt. The only solution for them is to turn to drug dealing: *“Asking for gear and selling it in the street”*.

Faced with this situation, women are rallying in the neighbourhood. They head onto the streets to observe, to try to put pressure on the police so that they know that adults are there and are keeping an eye on what is going on. Legal clinics are organised to welcome young people and their families.

Documenting this reality has highlighted the large number of minors who are involved and find themselves before the courts as a result of these problems. Mobilisation is important to raise awareness among inhabitants, to put in place a pressure strategy so that police officers know that they can no longer act with impunity.

But there is something missing in our country. It is said that the law is accessible to all, but how can vulnerable young people and families finance such burdensome proceedings, which require significant work by many parties, over a long time? This is a key

issue, especially when dealing with systemic discrimination and racism. In the United States, the mobilisation of a number of important figures on these issues can be one solution. This does not exist in France. There is no denying that lawyers who take on this type of case put their own firms on the line.

Support for mobilisation is also essential. In our case, it was essential to organise the neighbourhood, to work in the local community to reassure victims because retaliation against complainants was known. The complaint was filed and the same police officers were still on duty in the neighbourhood. They continued to monitor the complainants on a regular basis, threatening them: “*Nobody is going to listen to you anyway...*”. It is essential to think about the type of mobilisation that is required and not approach mobilisation as something empirical and linear. People should be encouraged to join the solidarity effort and they should be made aware that these are issues of societal transformation.

FROM CONSTRUCTION OF THE COLLECTIVE TO CONSTRUCTION OF LEGAL ACTION.

SAVINE BERNARD

Lawyer, Paris Bar, 1948 Avocats

The intervention concerns the interference between the construction of the collective and the construction of legal action in the context of class action. There are two steps to tackle:

- Analysis of the situations and choice of legal action;
- The hardships faced by the collective when an action is decided.

I will look at the analysis of the situations and in part the choice of legal action. Clara Gandin will deal with the second part of the subject.

The intervention is carried out on the basis of my experience in four actions which can be considered as class actions: the Peugeot case²² and the case of the French miners

of 1948²³, two class actions ahead of their time, as well as the Safran case²⁴ and the Caisse d'Épargne Ile-de-France (CEIDF) case²⁵, two formal class actions pending before the courts. A common point in these cases is that when plaintiffs arrive at the lawyer's office, there is a significant past history of claims. In the Peugeot case, for example, individual cases of discrimination were brought, successfully, but in the end nothing changed within the company. In the case of the miners of 1948, there was a history of claims, but of a political nature, because the miners considered that it was the State that was responsible for their dismissal by Charbonnage de France. Thus, they had referred to the parliamentarians, the President of the Republic and other representatives of the State. In the Safran case, there are a lot of past individual cases. The Group's employees were among the first to take advantage of the right to build cases on trade union discrimination. In November 2004, 168 cases were filed against six group companies (Snecma at the time). These involved the accumulation of individual cases, grouped together with a view to constructing collective action. For Safran, the only company concerned by the class action, this resulted in damages of €3.5 million in the context of a global transaction for 86 employees. Finally, in the CEIDF case, there was also a history of annual declarations by the CGT during the analysis of the comparative situation report, but here again with the feeling for the CGT that nothing changed over the years.

Furthermore, it should be noted that in three out of the four cases (Peugeot, Safran and CEIDF), the claims were filed through trade union representatives. For the case of the miners of 1948, this was not the case, but we can note, however, the leading role of a former trade unionist, Mr Carbonnier.

Another essential element in the construction of the collective is that each case has a “leader” who organises the separate individuals and brings the matter to the law. This facilitator is essential throughout the

proceedings. It is a pivotal and essential role, often performed by women, even in environments where there is a majority of men, such as Safran.

Finally, each action is initiated by a trigger. In the Peugeot case, there was an unsubstantiated closing of the report of the labour inspectorate for discrimination against 21 employees, drawn up following the discovery of the Nathan-Hudson report on the company's human resources policy. It referred to a method of classification of employees distinguishing between good employees (allies) and other employees (revolutionaries). This tool revealed the policy of systemic discrimination established within Peugeot. Another trigger is the question of "transmission". The trade unionists considered the fact of being discriminated against as inherent in the mandate (a unionist is only good if he is discriminated against), but, as they aged, they saw that the issue of succession was being raised and that young people would not invest in the union if they did not end the discrimination they were subjected to. They therefore had to fight against their apprehension to bring an action to defend their own interests and to claim financial compensation in this respect.

In the case of the miners of 1948, two triggers are identified: the first emerges, again, through the concept of transmission. The victims were disappearing and the miners realised that despite the fact that they felt ashamed about having been dismissed, they were passing this story on to their children. It was a question of regaining their dignity by fighting before they disappeared (the 'fight of the Mohicans' that Tiennot Grumbach talks about²⁶). Thus, the case was brought before the employment tribunal 60 years later. The second trigger is the creation of the HALDE, which made it possible to identify somebody likely to play a role in the fight against the discrimination to which they had been subject and to generate a mediation procedure. It was following the failure of this mediation that they referred the matter to the courts.

In the Safran case, the final straw occurred on one of its sites, the Le Creusot site. Eleven employees referred the matter to the employment tribunal in summary proceedings which, by order of 26 April 2016, ordered the communication of information to their panel which showed that unionised CGT employees were paid less than the others. The question was then asked about repeating individual actions. Of the 11 victims, 5 had already received compensation as part of the first wave of mobilisation. The introduction of these new interlocutory proceedings showed them that the discriminatory processes continued without any change despite the first individual reparations obtained.

At the Caisse d'Épargne, there was a very interesting action, brought by 28 employees including 26 women, which gave rise to a judgment on 18 December 2014. The company had denounced a company agreement and, following this denunciation, maintained the payment of a bonus but prorated it for part-time employees. Action was then taken but the discrimination card was not played. While the case could have been handled from the perspective of indirect discrimination, it was not handled from this perspective but with the tools of "classical" employment law on the consequences of a termination of an agreement. The women were successful. It was thus possible to win the case without playing the discrimination card.

This latter illustration shows that there is another trigger for class action, the meeting between the collective and a lawyer who meets three criteria for this mobilisation to become an anti-discrimination class action:

- 1/ a lawyer specialising in employment law
- 2/ who uses the tools to combat discrimination
- 3/ who is a militant lawyer, in the sense that he also sees the law as a tool for combating systemic dysfunction.

Talking to the lawyer will allow an action to be constructed from a collective/class action perspective, the purpose of which is not only to obtain compensation for all members of the group discriminated against but also to obtain the necessary measures to put an end to the failures.

Often, it would be simpler for lawyers to add together individual cases before the employment tribunals, rather than taking the class action. In this case, however, systemic discrimination continues. Class action is new and is therefore complicated and onerous to implement. This means departing from an individual logic, including procedurally, which is currently very complex given the novelty of the tool for everyone, including the judge. The employee whose case is used to illustrate the class action may feel that the procedure is slower than if he or she had acted alone in an industrial dispute.

But we see the collective being built because employees get several advantages with class action, besides the fact that it is not them who has to take action, but the union, they work collectively and for the others, the group.

They know that although they dared to bring their case to illustrate the action taken by the union, others do not: they therefore work for their colleagues and have a real sense of pride in choosing this action. This is also the reason for class action: to allow access to the judge when employees do not dare individually to take action²⁷ against the discrimination they are subjected to. Another key aspect is that they know that with class action they are using a tool that attacks the causes to stop failures in the future, rather than just compensating them. They are having an influence on the company of tomorrow, a company that no longer discriminates.

Trade unionists on the ground also want to take advantage of the tool of class action, to bring it to life and to make it part of the legal culture. It is also a trade union policy tool.

ACTION BY MOROCCAN RAILWAY WORKERS AGAINST SNCF. FROM SOCIAL STRUGGLE TO LEGAL BATTLE.

VINCENT-ARNAUD CHAPPE

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We are going to talk about the action taken by Moroccan railway workers against SNCF, which led to SNCF being convicted for discrimination on grounds of nationality. We observed this action as social science researchers.

In the 1970s, nearly 2,000 Moroccan railway workers were recruited by SNCF, most of the time directly on site in Morocco. They were then “shipped” to France and distributed between different stations to work on the rails. From the outset, due to the existence of a nationality clause, they are recruited with a status other than that of the permanent framework. This status thus implies less favourable working conditions, particularly with regard to career development, salary, entitlement to occupational health, etc.²⁸

From the outset, the situation was unfair due to the conditions for recruitment of non-nationals and the existence of a nationality clause within the company. The first claims, identified as a result of interviews and work on archives, were brought in the 1970s. Some railway workers asked their station manager, a French colleague, a union colleague, and so on, to try to understand why their situation was different.

It was especially at the end of the 1990s that, through a local association (Ismâïlia) that brings together Moroccan railway workers in the north-east of Ile-de-France for other purposes (help with homework for children, for example), collective claims would be formulated. The members of the association questioned the Minister of Transport in the early 2000s when the first of them came

to retire and discovered the extent of the inequalities. These first retirements were thus a turning point in awareness and thus in mobilisation. The association, created for other reasons originally, provided support for the preliminary questioning of political figures.

However, it should be reiterated that since the 1980s and 1990s there had been a timid but existing trade union takeover by CFDT Cheminots, which then looked at these cases, not in relation to nationality, but rather in terms of the statutory and contractual inequalities. The claims were more related to non-access to the status. One possible solution then consisted of encouraging the railway workers to apply for citizenship to open negotiations on an ad hoc basis and to allow tenure of those who had been naturalised.

At the beginning of the 2000s, the chairman of the Ismaïlia association, a former Moroccan rail worker with trade union experience, with another statutory railway worker, was then going to engage in information work at national level. This “station tour” seems to have been fundamental. It provided a lot of information and a census of the persons concerned. It was carried out with the support of several Sud-Rail trade union activists who played a central role.

The railway workers met at the labour exchange on a regular basis for information purposes, but also to take heed of the size of the group and its ability to mobilise. This mobilisation led to the opening of negotiations in 2004.

In the mid-2000s, there was a total shift from social struggle to legal battle. This refocusing can be explained by the disappointment of some railway workers in the context of the agreement negotiated in 2004: it regulated a number of pension issues, but said nothing about discrimination. Some of the railway workers thus remained dissatisfied with the results of the union mobilisation.

However, legal action would take time to organise. It started in an ad hoc manner thanks

to the meeting of some of the Moroccan railway workers and the professor of law, also Moroccan, Bendali. He helped to relaunch the case before the courts, more precisely before the employment tribunals, highlighting the issue of the loss of monetary gain due to discrimination. The fight would last ten years, with an intermediate victory in 2015, and final victory in 2018, which recognised discrimination on the grounds of nationality and demanded financial compensation calculated according to each of the railway workers’ careers.

This mobilisation involved a configuration of different players:

- Professor Bendali, the central figure and resource, who built the entire strategy;
- The lawyers who succeeded one another, with a difficult place in this case, because they were often restricted to pleading before the judges, without the possibility of changing the strategy;
- The association Ismaïlia, which acted as an intermediary and sometimes as a buffer between the railway workers and the legal professionals. It organised legal clinics and collected documents to constitute the files;
- The Sud-Rail trade unionists, who continued to provide remote support by making material support available, but who doubted the “political” meaning of this case.

Mobilisation also faces constraints related to the judicial process: length of the procedure (although the health of the railway workers is poor), the highly technical nature of the judicial processes that causes a lot of misunderstanding and/or miscommunication amongst the railway workers. Within this framework, the fight is largely delegated to the legal professionals who know how to move within this complex arena, while the railway workers are kept away. In this climate, the collective will experience many tensions that will weaken it, testifying to how difficult it is to mobilise a group of 800 people over the long time.

The central issue of money is an additional complexity factor. This involves both the issue of compensation for victims and the remuneration of the legal professionals accompanying them. The group faced major conflicts, which went as far as breaking it in 2018, on the question of the fair recognition and remuneration of each individual's work. These conflicts are in contrast with the first phase of mobilisation and the voluntary engagement of the trade unions.

Despite these difficulties, the impact of this mobilisation must not be underestimated. It allowed the construction of collective and political meaning, which emerged in the interstices of the trial, in the corridors, in front of the cameras, in the relations forged with anti-racism associations.

Even though this mobilisation was painful in some respects, it allowed a story to be written that was common at two levels: around a narrative shared by all these railway workers of institutional discrimination experienced in a similar way for everyone, and also around the narrative of pride, victory, a collective fight for official recognition and redress for discrimination. This makes it an important step in the history of post-colonial struggles in France.

THE ORDEALS OF THE COLLECTIVE IN LEGAL PROCEEDINGS.

CLARA GANDIN

Lawyer, Paris Bar, 1948 Avocats

Making legal work accessible to all is complicated. Legal professionals have a dry grammar and complex procedures. The work of the lawyers consists of building a case with the clients, but also managing the hardships generated by the action, which itself cements the group.

The construction of the file with the clients obviously involves, first and foremost, meetings with all those involved. Exchanges with clients and between clients are essential,

not only for them to become aware of what has happened, but to highlight common problems, and to document and dissect structural discriminatory processes. Lawyers, with their expertise, seek to understand what the discrimination involves, in order to tackle its causes. Class action aims to stop the failure²⁹: it is a question of identifying discriminatory processes for the judge to put in place actions to eliminate them.

The purpose of the meetings is to gather stories and evidence. This is not straightforward because the work involves a lot of spoken word, regardless of the company, and there is a lack of data on HR processes that are not necessarily transparent.

On the other hand, we are often faced with indirect discrimination, of which it is not easy to raise awareness. Thus, it is through numerous exchanges with and above all between clients that some have become aware that the refusal by their employer of their request for mobility, the absence of progression, the fact that on returning from maternity leave they are in branches where there is no possibility of progression, etc. were linked to the fact that they were women. It is by exposing their experiences that these collective treatments and their discriminatory roots emerged.

This stage also requires an analysis of agreements, social data, social analyses and comparative status reports, making it possible to compare access to training courses, calculate wage and progression differences. It is a question of using all the available figures to reveal how women, or trade unionists, are treated less well than others. The study of equal opportunities agreements in a company, for example, makes it possible to see to what extent the company is actually invested in the fight against discrimination against women.

As regards the construction of the collective, it seems preferable to rely on a single trade union organisation. This choice, which was ours, is questionable but it has proved

to be effective, and made it possible to avoid the union divisions that the employer could use to harm the action. In order to solidify this support, several levels of the trade union organisation need to be brought together: trade union, federation, etc. The aim is for trade unions to strengthen each other in the face of pressures, in the company, outside the company and at confederal level.

Finally, financial support for victims and/or the financing of actions remains a crucial point that the union cannot assume alone.

Faced with the hardships resulting from collective action, it is essential to have a strong collective, because this collective will have to face a triple dispossession:

- Individual dispossession of the file: from individual cases, a process is illustrated that is intended to be collective. The individual narrative is then lost in the crowd and becomes one example among others. All the more so since during the hearing there is no room for clients, the employees. These are proceedings before the court, written, sometimes before a judge who is not interested in the human aspect of the case. The lawyer is a facilitator so that all the victims can speak through him;
- Dispossession in terms of schedule. The Safran case, for example, took a year and a half for exchanges, conclusions and arguments between lawyers. The exchanges dragged on. A year and a half of preparations, plus delays in the event of appeals, is particularly long. Class action must be maintained despite this temporality, which may be a source of discouragement;
- Dispossession of the decision-making process insofar as decisions need to be taken together, respecting the rules and processes of all stakeholders. For example, trade unions are used to voting “by majority”. This calls for a great deal of trust between clients, unions and lawyers.

In addition to these tests, the collective must face adverse strategies the sole purpose of which is to make them fall, such as:

- Stigmatisation of the union: this involves pitting the other trade unions against the union behind the action. It is a strategy that can be effective against the employees at the origin of the action, and it can deter other employees from joining it;
- Alienation of lawyers by accusing them of exploiting the trade unions. This strategy can be extremely sound. The company ended up refusing to allow the presence of lawyers in the discussions;
- Denial of the collective aspect and will to systematically bring the discussion back to individual cases. In the Safran case, this worked because the judge considered that the class action was an accumulation of individual cases and he did not once mention the thirty pages on the discriminatory collective processes.

The lawyer is there to reassure clients, clarify the complex terms and procedures, manage the discomfort of the collective, the anger generated by the adverse defence strategies... The hearings, which consist of defending in 15 minutes a file that has taken months or even years to build, which concerns more than 30 or 40 people, can be extremely frustrating for the collective.

Finally, it must be noted that creation of the collective also has positive aspects. As well as the feeling of being listened to and recognised, victims who decide to mobilise collectively take on active roles in the fight against discrimination. Class action involves working for others, taking back some control and reversing the balance of power. It is important for the victims to be aware of this.

Class action allows the collective to become part of a broader, national, societal and global political struggle. Media coverage plays an important role here, as it confirms the merits of the struggle and consecrates the commitment and the justice of the cause.

PART II

THE TRANSLATION INTO LAW OF DISCRIMINATION: PROVING DISCRIMINATION

FOREWORD

SARAH BENICHO

Assistant to the Director, “Promotion of Equality and Access to Rights” Department, Defender of Rights

While the first round table was devoted to the people involved in collective action, this second round table addresses the stage of proof, of the characterisation of discrimination in law. This process sometimes reveals, from individual reports, collective discrimination.

Gathering evidence remains a difficult step, one that is not always successful.

Before the criminal courts, it is always difficult and complicated to demonstrate discrimination, due to the level of evidence required, particularly with regard to the intentional nature of discrimination, by criminal law and also by judges. However, there have been significant advances before the civil and administrative courts, with victims benefiting from the shift of the burden of proof³⁰. This arrangement, which does not constitute a reversal of the burden of proof, has been in force for twenty years: the applicant must first present facts allowing for the presumption of discrimination.

This is a major tool for victims, because, from the moment they have a bundle of evidence, the respondent must justify the measures that they have taken objectively and, if they fail to do so, discrimination will be characterised.

Over the years, the evidence mobilised has evolved. Alongside conventional means (testimony, writings, etc.), new tools such as testing or statistical comparisons have emerged, which reveal differences in treatment and their discriminatory basis. These tools have also revealed more collective or systematic discrimination based on trade union membership, gender or origin.

The situation testing technique, used twenty years ago to highlight discrimination based on origin on the doors of nightclubs, is now used in a much broader manner, to reveal discrimination in recruitment, housing or access to care for a number of criteria³¹.

Anti-discrimination protagonists have also been able to take advantage of the panel comparison method to update career discrimination. Created at the outset to demonstrate trade union discrimination by François Clerc of CGT, this method is now also used to demonstrate gender-based discrimination.

However, it has not always been easy to have these new tools and their probative value

recognised by the courts. The Defender of Rights participates in this legal education by mobilising a variety of legal evidence and analysis in its files.

All those involved in the fight against discrimination, such as trade unions, labour inspectorates, but also, of course, lawyers, researchers and equality promotion bodies, such as the Defender of Rights, have specific roles and specific skills to mobilise for this fight.

The challenge is to combine, with all of these players, all these levers to build the body of evidence, particularly for cases of collective or even systemic discrimination, and to construct the litigation strategy.

UNDIGNIFIED WORKING CONDITIONS, MAFIA AND TRAFFICKING: THE ROLE OF THE LABOUR INSPECTORATE IN ACTION.

MARILYNE POULAIN

CGT Trade Unionist, UD Paris

Since 2007-2008, I have been one of the CGT activists who have accompanied the struggles and strikes of undocumented workers. The CGT and other organisations have mobilised for these strikes.

The first objective of these strikes was to denounce the working conditions of these workers and to enable them to find solutions to leave a complex and precarious administrative situation behind.

The mobilisations carried out in 2007, 2008 and 2009 led to circulars and texts, which are certainly imperfect, but which allowed the regularisation of workers without residence permits. One can cite in particular the circular of November 2012³², which governs the exceptional approval for a residence permit through work but also specifies the power that is given to the employer to regularise or not its employees without a work permit.



Maryline Poulain, CGT trade unionist, UD Paris

At that time, I followed the strike pickets of the Malian construction workers, who worked on the renovation of the buildings of the National Assembly, the OECD or the United States Embassy. They were working in unspeakable, appalling conditions.

It is recognised that the sectors of activity in which foreigners without residence permits are frequently employed are the sectors with the most difficult, most arduous work. There is systemic discrimination insofar as these people in an irregular situation with regard to residency are often assigned to the most poorly paid positions, exposed to undignified working conditions and also to abuse of their situation of obvious vulnerability.

In the face of these situations, there was some frustration in terms of law and in terms of redress. In recent years, the fight has been focused on this objective of redress beyond the issue of simple regularisation.

The case of the hairdressers at 57 boulevard de Strasbourg in 2014 allowed a milestone to be passed³³. For the first time, we met with undocumented workers who had organised themselves on this boulevard. Not paid for months, exploited and undeclared, they themselves decided to react and rally against their employers who were threatening to have them rounded up if they continued to complain. Faced with this threat, they decided to contact the CGT.

The conflict lasted eleven months, in a climate of extreme violence and great pressure on workers.

This case affected a very different group of people and posed problems of another kind: undeclared work, human trafficking and undignified working conditions. In this case, we worked on the issue of human trafficking in employment law, which was not recognised in a collective framework.

Together with a group of lawyers, we worked on these realities of discrimination, undignified working conditions and human trafficking. All the elements were gathered

to file a complaint of trafficking. We have also contacted a party that, in our opinion, is essential: the labour inspectorate³⁴.

Unfortunately, the subject of undocumented workers is an extremely sensitive issue in our society. When it is attacked, it quickly sparks words of extreme violence both in public opinion and on the part of politicians. Robust evidence is required. We built it together with the labour inspectorate.

We faced very different assessments, with the Paris Public Prosecutor's Office at the time, in particular. It chose to approach the foreigners sub-directorate of the *Direction du renseignement de la préfecture de Paris* (DRPP) to conduct the investigation. This sub-directorate adopted an approach more focused on combating illegal workers than combating illegal work. It therefore did not listen to the victims of trafficking. It tried to restrict the procedure.

The hairdressers on the Boulevard de Strasbourg asserted themselves as playing an active role in their struggle, and they won from the courts the recognition of human trafficking in the workplace. It was in 2018, a first, and allowed further cases to be launched subsequently.

The case of the Ukrainian women who subcontract for Airbnb³⁵ may benefit from this victory, as may other cases with workers in the associative sector, hired on the basis of volunteer agreements, employed with derisory wages (the "Lives of Paris" case³⁶).

On 6 September 2016, a Malian worker fell from scaffolding on a site on Avenue de Breteuil (7th *arrondissement* of Paris). Twenty-five Malian workers, all undocumented, were employed there.

In light of the situation, the employer refused to call the emergency services, which ended up making the Malian workers defy his prohibition. The police and the labour inspectorate arrived at the scene and noted the employment status of the Malian employees, the absence or almost the absence

of pay slips and employment contracts, and pay arrears of several months.

The fact that the workers, all without residence permits, of the same (Malian) nationality, decided to rebel themselves, constitutes the first elements of the proof of discrimination.

The next day, while their employer stopped them from entering the work site, the workers alerted the CGT and went on strike to obtain their pay slips and outstanding salary, but also the work permit applications, necessary for their regularisation. The working conditions were undignified in terms of safety and flexibility. And, above all, workers were forced into undeclared work due to lack of work permits. The findings of the labour inspectorate, drawn up on site, would constitute essential proof.

The CGT supported them during a two-month strike with occupancy of the site. A whole strategy was constructed around this mobilisation, which led, as in the context of hairdressers, to a 400-page report from the labour inspectorate³⁷. This report demonstrated the undignified conditions these workers were forced to work in. It is specified, and accepted by the employer, for example, that he nicknamed them all “Mamadou”, that he considered the employees interchangeable and that he saw them as nothing but a work force.

In both cases, the labour inspectorate’s reports were essential to establish proof of the work relationship, since the inspectorate was able to carry out its checks on the day the strike started, i.e. when the employees were at their place of work. The fact that the reality of these conditions is recorded in the labour inspectorate’s findings was a fundamental contribution to the mobilisation.

Discussions with the Defender of Rights³⁸, the lawyers and Nicolas Jounin, a sociologist, were then undertaken to determine how to construct the evidence and how to have this systemic discrimination, which had been around for years, recognised.

Because it is widely recognised that the construction sector mainly employs foreign workers, mostly from Sub-Saharan Africa, in often very poor conditions. As such, the employers were unscrupulously discharged through statements such as *“Yes, well, anyway, they’re all Malians, they’re all black, whether it’s one or the other, we don’t really care!”*.

In this fight, the principals and project owners discovered a situation, a reality that they were not expecting. By being confronted directly with what the workers had to say, they became aware of the working conditions imposed on these workers. This finding shows that some project owners are far removed from the reality of the work sites that concern them.

This mobilisation led to an initial recognition.

On 25 October 2021 more than 250 undocumented workers launched a vast strike movement in Ile-de-France, at the call of the CGT, to denounce their working conditions and demand their regularisation. The strike was the visible element but upstream we denounced these undignified working conditions and the labour inspectorate conducted several inspections on the site.

These checks established things and the findings.

In the case of the Sepur refuse collectors³⁹, it involved an organised racket, because the workers were forced to pay 10% of their salary to their team leader to work, some during lockdown had to do their business in cans, because they did not have allocated rooms, despite working as refuse collectors and classified as key workers. All these elements recorded by the labour inspectorate make these workers stronger and force the state to react.

In this particular case, for example, the Ministry of the Interior and the Ministry of Labour, were only able to observe these undignified working conditions. This is a victory from our point of view, because we are moving lines within the state apparatus and services.

INDIRECT DISCRIMINATION AND SHIFT OF THE BURDEN OF PROOF.

MATHILDE ZYLBERBERG

Head of the “Employment, Goods and Private Services” division, Defender of Rights

Litigation for discrimination is characterised by the inequality of the parties’ weapons, in particular with regard to access to evidence. In order to restore equality, driven by European law, the rule on the burden of proof arrangement in non-discrimination law has been accepted by national law. But this arrangement, however necessary it may be, leads to complexity in the civil process: apart from the fact that the judge, who is the one who must “form his conviction”⁴⁰, is not familiar with this rule, and that education is therefore necessary in the conclusions and observations, the assessment of the indicator provided by the plaintiff to presume discrimination leaves more room, in my view, for the subjectivity of the judge than the assessment of the evidence. This subjectivity is a source of some legal uncertainty.

It is therefore essential in disputes relating to discrimination, whether in individual disputes or in collective disputes, to determine which elements are likely to shift the burden of proof to the employer, providing protection against the judge’s subjectivity, in order to carry its conviction.

This presentation will be devoted to these elements of presumption, first those specific to the discrimination experienced individually but that can be used in collective action litigation, then those which involve a plural assessment objectifying because they concern a group to which the one alleging discrimination belongs.

1· THE ELEMENTS OF PRESUMPTION SPECIFIC TO THE PARTICULAR SITUATION USED IN INDIVIDUAL DISPUTES

The law says nothing about the question of elements of presumption. It does not exist in terms of legal proof. But the provisions of Article 1358 of the French Civil Code according to which “*evidence can be provided by any means*” are applicable to the elements of presumption insofar as this provision is not excluded by the texts relating to the burden of proof arrangement in matters of discrimination. Obviously, simple unsubstantiated allegations are not enough, even if the Court of Cassation had to reiterate it⁴¹.

A prerequisite: the elements of presumption presented must be assessed as a whole

The Social Law Chamber of the Court of Cassation ruled⁴² on the basis of Articles L.1132-1 and L.1134-1 of the French Labour Code that “*if the employee presents factual elements constituting, according to him, direct or indirect discrimination, it is up to the judge to assess whether these elements taken as a whole suggest the existence of such discrimination*”. It repeated this through a published order⁴³. In the latter case, the trial judges, after successively assessing each of the ten elements cited by the employee, had rejected his claim on the grounds that none of the evidence established allowed the employee to be considered the victim of discriminatory measures. The Court of Cassation quashed the judgment, finding that it resulted from these elements assessed as a whole that the employee “*had presented factual elements suggesting the existence of trade union discrimination*”.

1.1· The chronology of the elements, and in particular the concomitance between the unfavourable measure and the employer’s knowledge of the criterion affecting the employee

In order for this concomitance to be of a probative nature, it is necessary to provide in advance information on the employer’s knowledge of the presence for the employee of the discrimination criterion.

The Social Law Chamber of the Court of Cassation upheld this concomitance as an element of presumption of discrimination in relation to several criteria, for example:

- The criterion of pregnancy: the Court of Cassation thus ruled that the concomitance between the announcement of pregnancy and the termination of the probationary period leads to the presumption of the unfounded nature of the reasons for the termination⁴⁴. This example illustrates the importance of the rule on the burden of proof arrangement. The link between the pregnancy announcement and the termination of the probationary period, which does not have to be reasoned, cannot be proven with certainty but the concomitance between the two events raises doubts as to the causes of the termination and it will then be up to the employer to demonstrate that these causes are unrelated to the employee’s pregnancy;
- The criterion of sexual orientation: the Court of Appeal, which had recognised discrimination, found that one month after learning of his employee’s sexual orientation, his employer had taken a case from him and dismissed him for serious misconduct. The Court of Cassation held that the Court of Appeal, which had also found that the employer did not prove that its decision resulted from objective elements unrelated to any discrimination, had legally justified its decision⁴⁵;
- The criterion of state of health: the Court of Cassation validated the analysis of the

Court of Appeal, which had ruled that “*the concomitance between a reduction in bonus and the periods of absence for the employee’s illness*” constitutes an element of presumption⁴⁶.

This element can be used whenever the discrimination criterion “occurs” or when it could be unknown to the employer and suddenly brought to its attention, but not when it is inherent to the individual.

This concomitance is often combined with the lack of prior criticism of the unfavourable measure. For which the employee, alleging that they are the victim of discrimination, will produce their previous appraisals. But sometimes proof of the absence of previous criticism is very difficult or even impossible to report, for example when an employee does not have a previous appraisal, which is the case with termination of the probationary period. Then the concomitance on its own is a sufficient indication to reverse the burden of proof.

Similarly, in the absence of evidence that the criterion has been brought to the employer’s attention, the suddenness of a decision to terminate a contract, or a probationary period, “by convenience”, in a period when the employee learns that they are ill, pregnant, etc. can be a sufficient indication of presumption.

1.2· The difference in treatment of employees in comparable situations (in particular a difference in remuneration)

The Court of Justice of the European Union (CJEU) itself upheld this element of presumption while determining the method. Thus, in the Susanna Brunnhofer case of 26 June 2001⁴⁷, after indicating that the applicant alleged to have been discriminated against on grounds of gender, because she was paid less than a male colleague of the same rank, the Court stated that it was up to the applicant to first prove that her remuneration was lower than that of her male colleague and, secondly, that the work she

performed was of the same value, and that the production of evidence in this regard would be sufficient to make the presumption that the difference in treatment could only be explained by reference to the applicant's gender and that it would then be up to the employer to refute this presumption.

The Court of Cassation also accepted this element of presumption.

It thus retained as an element of presumption the slowness of career development, compared to all employees in a comparable situation, finding, for example, that *“the Court of Appeal, which found that Mr X had experienced career development less favourable than that of other employees of the company in a comparable situation and held that the employer did not justify this difference in treatment for objective reasons unrelated to any discrimination, thus characterised discrimination related to the representation mandate of the interested party”*⁴⁸.

The Court of Cassation accepts, in order to establish the difference in treatment, the use of panels made up of employees of the same company, hired and promoted to similar levels of qualification, with similar remuneration and holding the same functions. The employees do not need to be in an identical situation, they just need to be in an “equivalent”⁴⁹ situation or in a “comparable situation”⁵⁰.

Please note: discrimination can be upheld even if comparison is not possible: *“The existence of discrimination does not necessarily imply a comparison with the situation of other employees.”* A Court of Appeal cannot therefore dismiss *“the claimant of his claims for trade union discrimination on the grounds that the employee does not produce any element of comparison with the situation of other employees”*⁵¹.

1·3· The absence of transparency and the absence of response from the employer

The CJEU thus considers that the refusal of *“access to information on the part of a defendant may constitute one of the elements to be taken into account when establishing the facts that make it possible*

*to presume the existence of direct or indirect discrimination”*⁵².

The absence of transparency in an employer's method of recruitment may also constitute an element of presumption⁵³.

1·4· Other miscellaneous examples

The following elements were accepted as raising a presumption of discrimination:

- Applying fourteen times for a position as assistant director or an equivalent level job, being one of the best qualified candidates and obtaining testimonials relating to a homophobic atmosphere⁵⁴;
- No promotion for fourteen years and the mention in the appraisal sheet of employment-related and trade union activities⁵⁵;
- Transfer to a post with no substance⁵⁶.

2· PRESUMPTION “BY THE GROUP” TO CLAIM/PROVE COLLECTIVE DISCRIMINATION

The absence of class action until Law No. 2016-1691 of 9 December 2016 on transparency, the fight against corruption and the modernisation of economic life (known as the Sapin II Act) did not prevent the understanding of collective and structural discrimination and the elements allowing for this aspect were used as elements of presumption of discrimination.

2·1· Unfavourable treatment of an employee suffered by other employees in the same situation

Unfavourable treatment is considered discriminatory for an employee, to the extent that other employees in the same situation have been victims previously.

Thus, the Court of Cassation ruled that the dismissal of a striking employee is presumed to be discriminatory in particular because the dismissals occurring after the strike action concerned mostly strikers, the Court of Appeal having noted the concomitance between the strike action and the implementation of dismissal procedures⁵⁷.

2.2· The use of statistics or the quantitative approach

The CJEU accepts the use of statistics as an element of presumption of discrimination. In this respect, it has specified which statistical data could be taken into account. It ruled on the violation of the principle of equal pay for men and women for the same work⁵⁸.

“It is up to the national court to assess whether it can take this statistical data into account, i.e. whether it relates to a sufficient number of individuals, whether it is not the expression of purely incidental or cyclical phenomena and whether, in general, it appears significant”⁵⁹.

The CJEU then specified that the data must demonstrate the existence of long-term phenomena, again to rule out events that could be qualified as incidental⁶⁰.

The use of statistics as an emblematic element of the presumption of discrimination was accepted in proceedings in which the High Authority for the Fight against Discrimination and for Equality (HALDE) – whose competence and powers have been taken over by the Defender of Rights – intervened⁶¹ and which finally led to a judgment of the Court of Cassation⁶².

The claimant, employed by an aerospace company, had had several temporary employment contracts, as a milling machine operator, then as a sharpener, before applying in 2005 for a position as a tool sharpener on a permanent contract. His application was not accepted.

The unsuccessful candidate was French of Algerian origin and had a foreign-sounding name. He claimed discrimination on the grounds of his origin and his paronym.

HALDE, in addition to having established that the claimant had the skills for the position since he had worked as a temporary worker, carried out a quantitative analysis of the employees of the company in question using data based on the sound of names (onomastics method⁶³) and the quantitative

analysis of the recruiting ground concerned using the same method.

The personnel register showed that out of 288 people recruited between 2000 and 2006, all had French nationality and only 2 of them had a patronym of North African origin.

The extract from the single personnel register for the period from 1 January 2005 to 30 July 2006 also highlighted that out of 43 “qualified agents” hired under permanent employment contracts, all were of French nationality and none of them had North African-sounding names.

HALDE thus concluded that, in view of these elements, it appeared that people of North African origin were unjustifiably under-represented, in particular with regard to jobseekers registered with the region’s National Employment Agency (ANPE) and with the qualifications required for the manufacturing jobs within the company. This proportion therefore did not correspond to that of the recruitment ground.

It considered that these elements, combined with the lack of transparency in the recruitment procedure, were sufficient to allow for the presumption of discrimination.

The Court of Appeal, also based on the analysis of the personnel register, followed the analysis of HALDE and the Court of Cassation⁶⁴ and found that the Court of Appeal had correctly ruled that the candidate presented elements suggesting discrimination in hiring.

Today, the Defender of Rights continues to use statistics and the onomastics method, including by receiving personnel registers.

It should nevertheless be noted that although the statistics tool is useful, it is not necessarily accessible, which led the CJEU to judge in a decision of 3 October 2019⁶⁵ that *“Article 19(1) of Directive 2006/54 should be interpreted as meaning that it does not require the party which considers itself wronged by indirect discrimination on grounds of gender to produce, in order*

to establish an appearance of discrimination, statistics or specific facts targeting the workers concerned by the national legislation in question if that party does not have access to, or has trouble accessing, such statistics or facts”.

Consequently, the victim of indirect discrimination cannot be blamed for any failure to produce in court the statistical data that would be most relevant if it does not exist, if it is not accessible or even if it is difficult to access.

A question to end with: will class action lead to the signs being read differently and therefore result in a different strategy of proof?

With regard to class action, the definition of discrimination is the same, and the burden of proof arrangement also applies. The trade union organisation or the association coordinating the action must present to the judge elements of presumption of discrimination concerning several employees.

It should be noted that the law does not require elements of presumption of limitation in the pre-litigation phase. Article L.1134-9 of the French Labour Code provides only that trade unions or associations ask the employer “*to put an end to the alleged collective discrimination situation*”. Nevertheless, it seems wise to have determined at least in part, from this first phase, the elements of presumption of discrimination.

Obviously the indicators accepted and listed so far can be used, but the essential question that arises is whether an element that, when taken individually, would be insufficient to constitute a presumption of discrimination, would become one if as long as all the members of the group have suffered it. For example, does a transfer refusal deemed insufficient to presume discrimination become sufficient if all employees with the same criteria have been refused such a transfer?

It can be assumed that the accumulation of such indicators could lead to systemic discrimination being identified.

Faced with class action judges, who are not necessarily used to dealing with discrimination law as they are judges of the judicial tribunal, in a context where the existence of structural and collective discrimination is still challenged by some, creativity and imagination will be needed when presenting the elements of presumption to, as I said in the introduction, taking into account the subjectivity of the judge, make a compelling argument. This study day will certainly be very useful for this.

THE INTEREST OF SITUATION TESTING TO COMBAT DISCRIMINATION.

PATRICK CHARLIER

Director, Interfederal Centre for Equal Opportunities (UNIA) in Belgium

Before presenting situation testing, we first need to clarify some terminology. The concept of testing for procedural purposes is different from the other types of testing commonly used.

First, there are tests for research purposes or for scientific purposes, which give results demonstrating that an individual is likely to be treated unequally, according to one criterion or another. For example, when sending 2,000 or 3,000 CVs, by modifying a single characteristic on some of them.

There are then tests carried out for awareness-raising and communication purposes, to illustrate a topic: for example, when journalists go to a location, such as an estate agency, with a hidden camera to capture reality in action and demonstrate discriminatory practices or attitudes. Similarly, when this type of test is carried out as part of an awareness-raising campaign.

A company or sector may also conduct self-testing to improve its practices.

In Belgium, for example, the temping sector uses situation testing to improve the practices of its members.

Finally, public authorities sometimes carry out tests to assess the impact of policies put in place to combat discrimination. For example, in Belgium, the city of Ghent has a defined policy for combating discrimination in housing. In this context, it regularly relies on situation testing conducted by Ghent University to determine whether estate agents have discriminatory practices. This system allows the city to engage with estate agents and encourage them, if necessary, to change their practices.

Testing for procedural purposes involves using tests with a view to producing them in legal proceedings, as evidence, as an element suggesting a form of discrimination.

The use of situation testing as evidence, recognised in legislation, is a difficult, bumpy road. The EU anti-discrimination directives provide for the mechanism of shifting the burden of proof in the event of a presumption of the existence of direct or indirect discrimination. Thus, the elements from which it may be presumed that there has been discrimination make it possible to shift the burden of proof to the respondent. It is up to the latter to demonstrate that there has been no discrimination.

Unfortunately, the European directives do not provide for testing as evidence. This procedure, although not excluded, is not recognised.

In Belgium, the first anti-discrimination laws providing for the possibility of using situation testing to raise a presumption of discrimination were adopted in 2003. Although this law was passed, the use of situation testing is the subject of discussion and the subject of resistance from some.

A royal government decree needed to be adopted in order to be able to carry out situation testing. It never has been and, in the meantime, anti-discrimination laws have changed.

Between 2003 and 2007, Belgium faced an outcry, mainly from employers, in view of the proposal to use situation testing. This movement has raised awareness amongst a series of policy-makers. When the 2007 Act was passed, the words “situation testing” had become taboo; it was a red rag. Therefore, the term does not appear in this law. The concept of “comparability test” was preferred. This is a euphemism for situation testing.

The person must then provide evidence showing that he or she is the victim of more unfavourable treatment compared to a situation of a reference person.

There is considerable regression between the 2003 and the 2007 Acts. However, it should be noted that even if the law does not provide for the use of situation testing, it does not prohibit it. As a result, its use has been introduced little by little. Situation testing was first used in individual situations, to serve as evidence where appropriate.

Its use calls for rigorous work to be done by implementing a robust protocol for organising testing. When Unia implements this type of testing, we systematically rely on the services of a bailiff to get an official report that we can then legitimately use.

To date, situation testing has been used in very specific situations, when there was alleged discrimination following a court ruling, or following an agreement, a recognised situation of discrimination or a commitment by the respondent to change practices. Testing was introduced a few months after these decisions in order to see the changes.

By way of illustration, an establishment on the Belgian coast refused to serve veiled women, a bowling alley in Brussels refused access to women wearing a hijab, and a disco in Liège turned away people of African origin. The situation testing carried out after judgments or agreements showed in all three cases the disappearance of discriminatory practices.

The work of justice or conciliation has therefore been structurally fruitful.

As situation testing is not formally prohibited by law, we have developed a tool called: *Comment prouver la discrimination raciale dans le logement ? (How to prove racial discrimination in housing)* This tool has been developed within the Belgian legal and regulatory framework to allow people and the associations supporting them to carry out situation testing themselves and use it, if necessary, as evidence in court.

In the case of a search for an apartment to rent, a situation of discrimination against a person due to his or her African origin was demonstrated. We suggested recording the apartment viewing requests⁶⁶: it turned out that if the person had a Belgian-sounding name, the apartment was available, but when Boubakar called, he was invited to be put on the waiting list, etc. This recording was considered valid and legitimate to prove discrimination.

The application of anti-discrimination legislation is difficult in Belgium, in particular on the question of proof. The country has about twenty different legislations, decrees, ordinances and federal anti-discrimination laws. The Brussels region, the most cosmopolitan region and the one most confronted with cultural and religious diversity, took the initiative in 2017 to adopt an order allowing the labour inspectorate to carry out situation testing. It may also impose administrative sanctions, without necessarily taking a procedure, if discrimination is recognised.

This order also provides for the possibility of an employer, recognised as discriminating, losing public benefits and subsidies. In this context, Unia signed a collaboration protocol with the labour inspectorate, leading to training on the legislative framework. It also specifies the procedures for carrying out and collaborating with the inspectorate, transferring files, etc.

Since this order was passed, the number of open files has not been high, as the conditions for application of the order are strict: serious evidence of discrimination and a complaint are needed. In many cases, candidates who are in recruitment procedures, for example, do not know that they are subject to discriminatory practices.

It is also useful to point out that we are faced with a lack of means (the labour inspectorate has not had any reinforcement of resources), which is sometimes added to a lack of conviction. Awareness-raising work needs to be done with these stakeholders.

Since 2017, further initiatives have been undertaken in terms of situation testing. For example, in Brussels there is a draft order to provide the housing inspectorate with the means to detect and rule on discrimination in access to housing and for the labour inspectorate to be able to make “mystery” calls without the risk of legal proceedings.

In conclusion, the challenge today is to use situation testing not only in individual cases but also in a collective approach. In this respect, Unia recommends reflection to allow the labour inspectorate to use data mining⁶⁷ and data matching⁶⁸. These techniques would allow administrative data to be used proactively. Thus, data could be used to highlight discriminatory bias.

Unia suggests that testing should be carried out in sectors in which reports are frequent, assuming that the high number of reports is an indication that could justify the implementation of situation testing. These tools could be used for self-regulation and self-inspection purposes.

Finally, Unia suggests relaxing the conditions for using situation testing, not limiting it to discrimination on the grounds of origin or gender, and proposing use of this tool in the fight against indirect discrimination, because situation testing is currently used more in the fight against direct discrimination.

LA TRADUCTION EN DROIT DE LA DISCRIMINATION : COMMENT FAIRE LA PREUVE DE LA DISCRIMINATION ?



Mathilde Zylberberg, head of the "Employment, Private Goods and Services" division, Defender of Rights

Maryline Poulain, CGT trade unionist, UD Paris

Sarah Benichou, Assistant to the Director, "Promotion of Equality and Access to Rights" Department, Defender of Rights

Patrick Charlier, Director, Interfederal Centre for Equal Opportunities (UNIA) in Belgium

PART III

HIGHLIGHTING SYSTEMIC DISCRIMINATION. THE LINK BETWEEN SOCIAL SCIENCES AND LAW

FOREWORD

MARIE MERCAT-BRUNS

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This round table entitled “*Highlighting systemic discrimination*” discusses the link between the law and social sciences. It is about showing how social sciences can be mobilised and dialogue established successfully with the law.

Even if discrimination occurs at individual level, within an organisation or professional sector, it may find its source or replicate within a more collective context, which therefore requires not only a quantitative study but also a qualitative study on the environment, the context in which the discriminatory situation that creates obstacles to inclusion emerges.

Even if discrimination is proven, studies show that the defence arguments seek to restrict litigation to strictly individual phenomena, linked to discriminatory behaviour of an individual who has acted in isolation. However, it is often the accumulation of situations that produce greater discrimination and the lack of response from the organisations that allow it to persist. It is sometimes linked to social constructs, prejudices or stereotypes.

A systemic perspective constituting a more global view of these phenomena is not so unfamiliar, particularly in employment law. The analysis of historical materialism formulated by Karl Marx is one example of this⁶⁹.

Classification of systemic discrimination is at the heart of the issue of social science mobilisation. Although not defined in French law, the concept of systemic discrimination was mentioned in a report on collective actions, which preceded the adoption of the law on class action of 2016⁷⁰ and was the subject of a court decision in 2019 where it was specifically named⁷¹.

According to the definition in the context of employment, “*systemic discrimination is discrimination that falls within a system, that is, within an established order, arising from practices, deliberate or otherwise, seemingly neutral, but giving rise to differences in remuneration. This systemic discrimination combines four factors:*

- *Stereotypes and social prejudices;*
- *Professional segregation in the distribution of jobs between categories;*
- *Under-assessment of certain jobs;*
- *And possibly, the search for short-term economic profitability.*

*The peculiarity of this discrimination lies in the fact that it is not necessarily conscious on the part of the one responsible for it*⁷².

It is recognised by the Supreme Court of Canada, which provides a more generic definition considering that systemic discrimination is a situation of cumulative and dynamic inequality resulting from the interaction of practices, decisions, behaviours, individual or institutional, which have harmful effects, whether or not they are intended, for members of the protected group⁷³. It is understood by this definition that systemic discrimination can be a combination in law of direct and indirect discrimination, discriminatory harassment and instructions to discriminate. This is sometimes counter-intuitive for a legal expert, lawyer or judge, because there is no single legal category: direct or indirect discrimination, which each responds to a specific regime even if indirect discrimination does not exclude a discriminatory intention of the person responsible for it. The social sciences can allow this reconciliation between qualification categories by stating, first and foremost, the discriminatory effect of practices, decisions or rules that combine the different figures of discrimination⁷⁴.

In particular, through social sciences, it is about highlighting the causes, the object and the effects of this systemic discrimination, which are characterised by the specific context in which they emerge. This approach is unfamiliar to lawyers, because in a civil law system, one starts from the statement of the rule and not from the facts according to the reasoning of syllogism.

What is the role of the social sciences? They help to identify discriminatory situations, as stipulated by the definition of direct discrimination⁷⁵ and the effects of discrimination as they result from the particular disadvantage for a group as set out in the definition of indirect discrimination⁷⁶. They shed light on the causes of systemic discrimination when they are informal,

not based on a rule (business culture, code of conduct, closed professional networks).

Finally, social sciences can show how this deconstruction of standards, of the voluntary or involuntary practices in place, can offer systemic solutions. Jurisdictions need to co-construct with the social sciences to find legal and social solutions, injunctions to do to change practices structurally, and thus, outside repair, also transform situations and environments that increase the risk of discrimination. The class action specifically provides for the possibility of requesting the cessation of the breach in the future⁷⁷.

The other important thing about systemic discrimination is that it is reproduced by the deliberate or involuntary inaction or ignorance of those with decision-making authority, the organisations and institutions. This is called *probatio diabolica* (devil's proof) because it is a question of proving the absence of action rather than a visible discriminatory act (promotion decision, rule in a collective agreement, racial profiling by a police officer). The glass ceiling, segregation of tasks, downgrading of gendered positions and environmental harassment⁷⁸ are difficult to prove. However, in law, the construction of negligence or liability without fault is familiar. Social sciences should also be used to understand historical phenomena related to immigration, for example (the Chibanis case⁷⁹), but also to mobilise the technique of individual interviews to identify the narratives of those who are discriminated against⁸⁰. At collective level, it would be necessary to look at the formal and informal collective practices of those involved in order to obtain visibility, traceability and specificity of the discrimination in a certain type of career, in an employment sector (services, industry) or outside of employment (housing, health, education)⁸¹.

THE CONTRIBUTION OF SOCIAL SCIENCES: THE CASE OF DISCRIMINATORY IDENTITY CHECKS.

SLIM BEN ACHOUR

Lawyer, Paris Court of Appeal

1- WHY MOBILISE SOCIAL SCIENCES AND HOW?

The file on racial profiling is the fruit of social sciences.

A study was conducted by René Lévy and Fabien Jobard of CNRS-CESDIP entitled *“Police et minorités visibles : les contrôles d’identité à Paris, 2009”*.

On the basis of this study, many associations fought against racial profiling.

Politically to start with, then legally.

Politically, because many activists considered that in France it was difficult to obtain legal progress on such a subject.

It is true that the results of the investigation conducted by the CNRS allowed the situation to be objectified: the “routine checks” as they were called by police officers are, in reality, almost exclusively “race-based identity checks”.

Equipped with these statistics, the associations, the activists questioned the government, which replied to them, at the time, that there were no discriminatory checks in France.

The political solution materialised during the 2012 presidential campaign, since the candidate of the socialist party, François Hollande, promised through commitment number 30 to put an end to racial profiling and to implement identity check receipts.

Racial discrimination took its place in the political debate, making many people aware that racial profiling said something very relevant about the fractures of French society and broken Republican promises after the revolts of 2005.

Fortunately, even before François Hollande was elected, the associations had

mandated us, Félix de Belloy and myself, to reflect on litigation exposing the State and condemning it for racial profiling (in the event that the candidate was elected and did not keep his promises).

The request was particularly relevant since the identity check receipt was one of the first commitments abandoned once the candidate had been elected.

As the activists said at the time, we were going to “do law”.

Specifically, this was an action for compensation for damages brought against the State and not against individual police officers.

Throughout the litigation that took place from 2011 to November 2016 before the national courts, a substantial amount of literature was produced and is still being produced today.

This literature includes, but is not limited to, the following reports: the 2014 and 2017 reports of the Defender of Rights⁸², the report of the National Human Rights Commission⁸³ of 8 November 2016, the ACAT report⁸⁴, the report of the Open Society Justice Initiative⁸⁵, the scientific article by René Lévy (CNRS Cesdip)⁸⁶, the Human Rights Watch report of 2012⁸⁷, then that of 2020^{88 89}, etc.

Noting the abundance of studies, national and international bodies regularly invited France to address the issue of racial profiling^{90 91 92}.

Of course, these studies featured prominently in the cases presented before the judges as evidence and contributed to the legal classification of the concept of discrimination.

The courts referred to them in their decisions, both in the decisions convicting the State by the Paris Court of Appeal on 24 June 2015 (RG: 13/24277), and in the Court of Cassation’s confirmation decisions of 9 November 2016 (15-25.873), for example.

The social sciences used in the racial profiling cases undoubtedly allowed judges

to understand what was going on in the context of what police officers call “routine checks”, the basis of which does not exist in the French Code of Criminal Procedure. In other words, the studies provided a clue to understanding the individual file presented by giving it a collective dimension.

The studies also made it possible, most likely, to overturn the beliefs that our institutions are neutral, that the State cannot discriminate, nor the police...

They also made it possible to move away from potential bias.

In terms of evidence, the social sciences could integrate the first movement of the “discrimination test” set out in the law according to which the applicant must present the elements suggesting discrimination in order to have a chance of success.

I would add that in other cases involving violence, the criminal case of the minors of the 12th arrondissement of Paris updated a procedure of police action motivated not by law, but by the notion of “undesirable”.

This concept had already been studied in sociology and had a strong link with the country’s colonial and post-colonial history.

A colonial history also mobilised for litigation on racial profiling⁹³.

Finally, perhaps the social sciences mobilised with the reminder of the absence of public policies on the subject of combating racial discrimination in France allowed judges to understand that much of the hope of fighting racial profiling rested on their shoulders.

2 SOCIAL SCIENCES, “INDICATIVE” OF SYSTEMIC DISCRIMINATION?

Lawyers are often contacted regarding an individual case, or even several individual cases with similar situations.

Their similarity is revealed to us or even confirmed by the studies carried out.

We talk more and more about systems, and with regard to discrimination, systemic discrimination.

In racial profiling, the definition used is based on General Comment No. 20 on the principles of non-discrimination of the United Nations Committee on Economic, Social and Cultural Rights⁹⁴: *“such systemic discrimination can be understood as legal rules, policies, practices or predominant cultural attitudes in either the public or private sector which create relative disadvantages for some groups, and privileges for other groups”*.

Clearly, if we go no further than the law, than the discrimination test, it would be difficult to win a case before the judges.

Before talking about social sciences as “indicative” of discrimination, I would highlight the social sciences (whether sociology, psychology, history, political sciences, etc.) as a means of understanding, personally, discriminatory processes, discriminatory behaviour, intentional or otherwise, biases, stereotypes, generalisations, etc.

Secondly, with regard to racial profiling, it is necessary to start from the existing situation: the authorities, the police do not produce information on the number of “routine” identity checks, their legal basis, the reasons, nor are they justified (no identity check receipt).

In other words, on the subject, the adversarial principle is not used by the State to justify itself, not even before the judge.

Hence the importance of studies relating to the causes and procedures of identity checks.

Thus, thanks to the statistical studies, judges

were able to recognise the disproportion of identity checks on “visible minorities” as they are called by the Court of Cassation⁹⁵. Judges can learn about how identity checks are carried out and the different types of checks (searches, frisking, etc.), the age of those checked, the frequency of checks, the locations, the impact on individuals, families, neighbours and close relatives.

The studies carried out make it possible to change scale, to change dimension: the individual cases usually presented are not isolated cases but are part of a history of collective and common experiences.

They reveal that individual cases are not individual cases and that many people find themselves in a similar situation.

Studies lead to the conclusion that cases of racial profiling are not exceptions, but rather a rule, not a legal one, a social rule, a persistent general practice, an expression of a discriminatory public policy firmly anchored in the work of the police forces.

This allows us to see that so-called “routine” checks constitute systemic racial discrimination.

This is what the Defender of Rights said in its observations before the Paris Court of Justice (in addition to saying that the children were subjected to discriminatory harassment) in the case of the minors of the 12th arrondissement of Paris.

Since then it can be noted that the term system is increasingly used⁹⁶.

Systemic discrimination is now a reading grid; we even talk about systemic thinking (“discipline that allows phenomena to be conceived in their entirety. It is a framework that allows you to see interrelations rather than individual elements”, Colleen Sheppard).

3· THE CONTRIBUTION OF THE SOCIAL SCIENCES TO THE QUALIFICATION OF SYSTEMIC DISCRIMINATION

First of all, let us return to the contribution of social sciences to discrimination in individual cases. The Court of Cassation, in the decisions on racial profiling of 9 November 2016⁹⁷, emphasises the importance of statistical studies in characterising the presumption of discrimination: “Whereas, first, the judgment finds that the statistical studies and information produced attest to the frequency of identity checks carried out on discriminatory grounds on the same category of population belonging to ‘visible minorities’, i.e. determined by physical characteristics resulting from actual or alleged ethnic origin; whereas, on the basis of a testimonial, it holds that the checks systematically and exclusively targeted, for an hour and a half, a type of population because of skin colour or origin; whereas the Court of Appeal has sovereignly inferred that Mr X provided elements to convey a difference in treatment that presumes discrimination”.

In other words, the reasoning of the Court of Cassation reveals an equation:

Research and statistical information

+ declaration that the check constitutes a difference in treatment related to the person’s origin

= presumption of discrimination.

This equation is found in the decision of the Paris Court of Appeal of 8 June 2021⁹⁸ on the checks carried out on three final-year students at the Gare du Nord in Paris.

In this case, the State made matters worse, since despite the plethora of information at its disposal, it only communicated very few elements, which does not exonerate it from its responsibility.

In collective cases, the social sciences are even more important, including with regard to systemic discrimination and particularly for the new legal action of class action.

Class action is designed and implemented to solve structural, institutional, collective and systemic problems.

Its objective is to put an end to discrimination through dissuasive remedies and, above all, by injunctions, obligations to do so.

It is therefore a question of finding systemic solutions to systemic problems via class action.

In the class action, individual cases are not analysed as in conventional individual litigation, but are considered as illustrations of a collective problem.

Depending on the data available, the statistics and qualitative and quantitative studies, the examination of individual files may be surplus to requirements.

With regard to racial profiling, the studies demonstrate a general system of control of persons perceived as coming from “minorities”.

The studies, moreover, have enabled the recognition by as many people as possible, including the State, of the reality of discriminatory checks, particularly in international fora, as well as by the current President of the Republic.

They highlight an inability for the State to reform, and characterise an institutional failure.

Indeed, inactivity, passivity, omission, silence, failure and shortcomings in procedures also involve the characterisation of systemic discrimination.

Recently, after formal notice was served on the Prime Minister, the Minister of the Interior and the Minister of Justice in January 2021, six associations contacted the Council of State in July 2021 as part of a class action to put an end to racial profiling.

In this case, it was an action for cessation of failures and not for compensation for damages. Its objective was to impose a reform on the State through the judge.

Reform in which the work of the experts again features prominently.

This work will also feature prominently in Strasbourg since the racial profiling files “lost” before the Court of Cassation on 9 November 2016 are now before the European Court of Human Rights.

The State is therefore caught in a vice. It will have to respond to the practice of racial profiling, both before the national judge and before the Strasbourg judge.

Finally, we should mention the situation of a desire to initiate litigation... without studies at its disposal.

In these conditions, it may be interesting to go... see elsewhere!

Are any studies carried out within the Council of Europe? The European Union? The United Nations? In countries where the concept of discrimination has developed considerably, particularly judicially (Canada, USA, United Kingdom, etc.)?

Are there any innovative legal analyses?

Indeed, as lawyers are also very important because of the difficulties in the implementation of the concept of discrimination in France, let us stress the importance of the work originating from the “Critical race theory”.

In conclusion, it should be stressed that the social sciences make an essential contribution to the proof of discrimination, qualification and now its solution.

The social sciences involved in discrimination disputes are used to reduce the distance between the social standard, discriminatory social practices and the legal standard. They make possible the promise of effectiveness of equal human dignity.

**THE CASE OF MALIAN CONSTRUCTION WORKERS:
A WORKPLACE SOCIOLOGIST CALLED AS A WITNESS.**

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The investigations conducted in the context of disputes relating to the identity checks, referred to by Slim Ben Achour, were statistical studies based on observation and measurement of differences in treatment, *“all other things being equal”*. This formula indicates a statistical operation, regression, which obviously does not allow all the roughness of the people and situations to be ironed out, but serves to neutralise certain aspects (for example, carrying a bag or not) to isolate something that is interpreted as the pure effect of discrimination.

These studies have suffered more or less contempt on the part of Slim Ben Achour’s opponents (the minimum criticism being that they may be valid but say nothing about the cases raised). At least, their quantitative aspect lies in the traditional legal concept of discrimination perceived as unfavourable treatment. This implies a comparison, and therefore a basis for comparison, a common starting point.

When I was asked to testify to the industrial tribunals in the context of the Ségur villa case already referred to by Marilyne Poulain⁹⁹, I had to propose only an investigation that was already ten years old and above all of a qualitative nature, that is to say based on long-term immersion on building sites¹⁰⁰. This type of investigation, through interviews and participating observation, lends itself to the capture of an overall configuration, but not to the reduction of some phenomena to causality distinguished by statistical equalisation of *“all other things”*.

In my thesis and in the book drawn from it, I described the relationship between the productive organisation of construction sites and racist discrimination, and more precisely

the correspondence between professional hierarchy and ethnic hierarchy. I described a discriminatory *“system”* – I intentionally did not say *“systemic discrimination”* – i.e. a set of phenomena whose sources and stakeholders are diverse and heterogeneous, but which combine to make a professional relegation of employees of certain origins. The components of this system are:

- The policy of the general building contractors (which manage the sites), whose widespread use of intermediary employers (in particular temping agencies) creates a hierarchy of staff related not only to their qualifications or experience, but to their employment status and the status of their employer, creating, around a stable core of employees, a halo of precariousness;
- Migratory policies that since the late 1960s have promoted the latest European immigration and hindered the installation and employment of others: thus the civic relegation of African immigration (through precarious residence permits or the absence of residence permits) predestines them to the most relegated jobs on building sites;
- Consolidation of the establishment of the most entrenched groups and the relegation of marginalised groups by the general practice of co-optation recruitment (through family and friend networks);
- And finally, the direct discrimination in the allocation of jobs maintained by employers at various levels, who share a racist ideology as to the place to be assigned to employees according to their origins. As always when a racist ideology is shared or promoted by people who have a little power, it works like a self-fulfilling prophecy since the assignment of certain people to certain jobs confirms in a circular way that they are *“good only for that”*.

On the one hand, the Ségur case corresponded to my analysis and did not surprise me. On the other hand, with regard to the litigation, what could my testimony bring?

Beyond the status of witness I was given (and which gave rise to criticism), could this not be detrimental to the cause?

- By showing the racist logics at work in construction well beyond the case of the offending employer, did I not risk trivialising the latter's practices?
- By highlighting the different aspects and sources of a discriminatory system, did I not risk diluting the responsibilities of this particular employer?

That is why, in order to prevent this dual risk of trivialisation of facts and dilution of responsibility, I concluded my testimony by saying that the notion of systemic discrimination must lead us, not to return to a disembodied "system", without anyone to account for it, but rather to question and challenge the actors and crucial places of production and perpetuation of discrimination, which contribute to maintaining certain categories of population in an inferior position.

But I think this does not remove all ambivalence, and in any case does not eliminate my own perplexity. In this case, how was the discrimination identified systemic, since, in this specific case, only one defendant was accused?

Is it because all the infringements of employment law were part of a racist conception of the employees who bore the brunt? Indeed, there is something unsatisfactory in merely sanctioning one by one all of the employer's breaches: obligation to provide training, obligation to ensure safety, payment for all hours worked (including social contributions), respect for rest, relating to termination of the employment contract, respect for the right to strike. Condemning each of these offences is necessary, but seems insufficient, because accumulation is in itself an indication of an unbearable conception by the employer of the workers who suffer them. It could be said that the total is greater than the sum of the parts, that the damage is greater than the sum of the

damages related to each of these offences. How can this extra, this additional soul that gives meaning to the whole, be named if not in the terms of discrimination?

Or, then, can we say that there is systemic discrimination because this degrading treatment concerned a group, in this case all the demolition workers, and because the law currently offers little control to grasp such a phenomenon? The usual legal and case law recognition of discrimination is not suitable for accommodating such a situation. The 25 Malian employees constitute the bulk of the company in question's workforce, they are the only ones on the site to perform the extremely arduous demolition work, which contradicts the comparison ("*all things being equal*") with employees who are not discriminated against. There is no personnel file common to the site – the organisational "system" on this work site (like many others) is outsourcing and the spreading of the work community between multiple employers. It is from the perspective of the difference in treatment that discrimination is mainly understood. In this case, the difference in treatment is both patent and intangible.

However, the law offers resources other than proof of difference in treatment: for example, by recognising as discrimination in the law "*any act linked*" to a prohibited ground "*the purpose or effect of which is to harm his dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment*" (which is consistent with the definition of harassment, while eliminating the obligation of proving as in the latter that these actions are "repeated"); or by dismissing (as the Court of Cassation did on 3 November 2011 for a domestic worker) the obligation to compare with existing employees, since the comparison with fictitious employees who would have benefited from application of the rules of law is sufficient, while the civil status of the employee (undocumented foreigner) makes it possible to link this unfavourable treatment to a prohibited ground (in this case origin).

How would the traditional legal prohibition on discrimination, which already provides for the classification of any degrading treatment linked to a prohibited ground as discrimination, have been insufficient? As I am not a lawyer, I am still mystified about what the idea of systemic discrimination allows or not.

However, as a sociologist, I see a decisive breach in what this notion, whether well or poorly defined, has allowed us to think.

An anecdote can illustrate this breach.

I remember a study day on discrimination organised some fifteen years ago by several CGT federations. The little films projected, the cases presented by the gallery showed children of post-colonial immigration who had done research and were subjected, for equal work and position, to discrimination. Cleaning trade unionists (whose federation did not take part in the event), with post-colonial migration backgrounds, showed up and were interrupted by the gallery as they described their working conditions (similar, with regard to the amount of offences and the extent of the degrading treatment, to those of the Ségur villa workers) by virtue of the fact that it was irrelevant. This happened at the CGT but I think it could have happened in many other places at the time.

What is changing, it seems to me, with the notion of systemic discrimination as applied to the Ségur villa, is the scope of the populations that we cover and that we intend to protect against discrimination. Until recently, the analysis of discrimination welcomed into its bosom the people most at the heart of the capitalist system, those most integrated into the institution of being a wage earner – and there was a narrow vision of the “equal pay for equal work” maxim. Such a perspective could only leave out the most relegated fringes of the employees – collectively relegated – where it is not possible to establish an “*all other things being equal*” reasoning in order to establish a residual inequality that only discrimination could explain. Finally, despite the established case law of the Constitutional Council justifying different and unequal treatment

for foreigners, the concept of discrimination is finally beginning to incorporate them, including those, the undocumented, for whom the State does not recognise the right to be there.

This enlargement calls for others, who will be sources of both progress and perplexity:

- Since the civic borders (nationality and even residence permit) are no longer a barrier to the analysis of discrimination, should the geographical boundaries continue to be so? I would not be surprised – or in any case I would not be disappointed – that the very beginnings of accountability of multinational companies located at the heart of the capitalist system vis-à-vis their far-flung employees (through the duty of care) led to the possibility of calling into question the (systemic?) discrimination experienced by Bangladeshi textile workers as it could be for the workers of the Ségur villa.
- The combination of stereotypes, professional segregation and the under-evaluation of jobs, present in the case of the Ségur villa and retained as being able to define systemic discrimination in Mrs Pécaut-Rivolier’s report, is likely to restart the consideration of gender-based discrimination. It has long been known that differences in remuneration are mainly attributable to professional segregation and the lower valuation of women’s professions (caregivers, home helps, etc.). It remains to be said against whom, against which institution, or in favour of which the concept of systemic discrimination could then be mobilised.

GARE DU NORD CLEANING STAFF: SYSTEMIC DISCRIMINATION BASED ON VULNERABILITY AND GENDER-BASED DOMINANCE.

SANDRA BOUCHON

Former lawyer of the Defender of Rights, Harassment/Discrimination Counsel

In 2013, the Defender of Rights was contacted by the European Association against Violence against Women at Work (AVFT) regarding the situation of five women who considered themselves to be victims of sexual harassment in a major cleaning company, and of reprisals for reporting these events¹⁰¹. At the same time, the institution was approached by a trade union representative from the same company, who said that he had been the victim of retaliation for supporting these women.

The victims were all women, cleaners for a subcontractor cleaning company working for SNCF. Their tasks consisted of cleaning the trains in transit at the Gare du Nord, in teams of 6 to 8 people.

They all complained about the sexual and sexist language of their superiors, mostly team leaders, and incidents of sexual harassment, some of which may be equated to sexual assault. They therefore worked in a degraded and degrading work environment.

In this case, it appeared quite quickly that the Defender of Rights had sufficient prima facie evidence of the existence of sexual harassment to carry out an adversarial investigation and thus mobilise a certain number of investigative powers.

In this case, the institution mobilised as many investigative powers as possible: around ten people on the Gare du Nord site were interviewed (claimants, defendants, witnesses, human resources, etc.) and an on-site inspection on the Gare du Nord site was organised for two days.

Following this extensive investigation, a legal analysis of the facts was conducted by the legal counsel of the Defender of Rights.

Very quickly, however, it appeared to be insufficient on its own.

Indeed, during the hearings, it emerged that there was a system of dominance between women and men, in the cleaning sector in general and on this site in particular. This dominance resided both in a prioritisation of functions and tasks based on gender, and in the situations of precariousness and economic vulnerability claimed by the claimants.

Faced with this observation, the contribution of social sciences appeared undeniable in this case. A sociologist, Nathalie Benneli, who has done a great deal of work on issues of gender and intersectionality, and published a book in 2011 entitled "*Nettoyeuse, comment tenir le coup dans un sale boulot*"¹⁰².

After contacting her, the Defender of Rights requested an expert report from her on the file. A certain number of elements, such as the hearing reports and on-site inspection reports, were communicated to it after being anonymised.

This expert report was widely covered in the decision that the Defender of Rights was able to return in this case¹⁰³, with a view to presenting its observations before the courts, the industrial tribunal and then the Court of Appeal.

This expert report highlighted two observations which the institution learnt on: on the one hand, the profile of these women characterised by significant vulnerability and, on the other hand, the existence of relations of dominance in the cleaning sector, revealed by a ranking of functions and a gendered division within the same profession.

The accumulation of these findings creates fertile soil for the occurrence of situations of sexual harassment. In this context, the investigation revealed that some men believed that they were allowed to abuse their position of authority to impose such actions on these women.

The vulnerable situation of these women is explained by the fact that these cleaning professions are considered secondary within an organisation, as they are not profit-making or productive activities. These are invisible jobs, mostly assigned to women, and in particular women of foreign origin, with few or no qualifications. The vulnerability of these women is accentuated by the increased use of subcontracting in these professions, which often involves insecurity of contracts (temporary, fixed-term contracts, etc.). These women therefore work in an extremely anxiety-provoking environment in which they are constantly reminded of their vulnerable situation and interchangeability: *“if it's not you, then it will be someone else”*.

The assignment of functions and tasks based on gender, in the cleaning professions, also emerges from the findings of the investigation conducted by the Defender of Rights. In the case of the Gare du Nord cleaners, all the claimants were women, at the lowest pay grade, and all the authors were men in managerial, team leader or site manager positions. This model highlights a form of professional segregation with men as principals and women performing the tasks.

Within the cleaning profession, there is a gendered division of tasks. Thus, among the crews cleaning the trains, men were assigned to hoovering, for example, while women were entrusted with cleaning the toilets. The hearings reveal in this regard that it was impossible to ask a man to clean toilets. Even the human resources manager explained: *“I can't ask a man to clean the toilets, everyone knows it's a woman's job”*.

The fact of assigning women to a particularly degrading task also constrains them to a particular posture when cleaning these small spaces, a spatial constraint. Several claimants also stated that men would take advantage of this bending down and rub against them.

This sociological work has revealed that gender-based dominance in the cleaning sector, coupled with situations of precariousness and economic vulnerability, has created a context conducive to sexual harassment. Even more so, this case highlighted generalised actions, such as a system of operation within this company.

The judgment of the employment tribunal handed down in this case acknowledged sexual harassment for the claimants and reiterated, in its judgment, in November 2017, this sociological analysis citing the contextual elements and the prioritisation of functions, on the basis of economic vulnerability, to establish sexual harassment. The company was ordered to pay the claimants considerable damages.

On appeal, the Court of Appeal was not so bold: it recognised sexual harassment, but did not retain the sociological context and reduced the damages. This results raises the question of compensation for victims of sexual harassment and discrimination.

This case, like that of the Malian construction workers, highlights the need to move away from the individual and highlight the systemic dimension of discrimination against a group on the basis of one or more criteria. In these cases of so-called invisible workers, the analyses of the Defender of Rights were both legal and sociological.

It is essential to use these cases today to show that our contemporary societies produce systems of dominance, which are racist or sexist depending on the sectors. Such discrimination must be understood as a system with regard to a group.

Let us use these cases to further evolve case law.

HIGHLIGHTING SYSTEMIC DISCRIMINATION BEFORE EUROPEAN COURTS AND UN COMMITTEES: THE ROLE OF SOCIAL SCIENCES.

ISABELLE RORIVE

Professor of law, Perelman Centre and Equality Law Clinic, Université Libre de Bruxelles

In order to discuss the role of the social sciences in highlighting systemic discrimination before European courts and UN committees, I will draw on the experience of the Equality Law Clinic, which, together with Emmanuelle Bribosia, now a judge of the Constitutional Court of Belgium, we created in 2014 in the Faculty of Law and Criminology of the Université Libre de Bruxelles¹⁰⁴.

Clinical law teaching aims, among other things, to ensure the transfer of legal knowledge that combines theory with practice by making students work on real cases. Well-known in North America, this teaching model, which comes in a variety of forms, spread in Europe in the 21st century¹⁰⁵.

The Equality Law Clinic is a legal clinic that works on structural causes of discrimination from a legal perspective with various partners with field experience, mainly equal treatment promotion bodies and civil society actors (whether they are well-established human rights NGOs or more informal groups, lawyers involved in social justice cases, other legal clinics, interdisciplinary academic networks, etc.). The law, and in particular international and European law on fundamental rights, which includes non-discrimination clauses, is seen here as a tool to be used to denounce and help to overcome certain forms of systemic discrimination. Our approach is not necessarily contentious, even though we are helping to develop the argumentative strategies for legal claims and have intervened as an *amicus curiae* in cases brought in particular before the European Court of Human Rights or the UN Committee on Economic, Social and



Isabelle Rorive, Professor of Law, Perelman Centre and Equality Law Clinic, Université Libre de Bruxelles

Cultural Rights. We are also involved in the drafting and implementation of situation testing protocols in collaboration with Unia, and in the drafting of research reports, memoranda or best practice guides with a view to improving the capacity of those involved, ensuring that relevant social science resources are integrated into our actions.

It is now well-established that non-discrimination law, as it has developed over the last twenty years, particularly under the impetus of European Union law, is not limited to a *formal* approach to equality, namely a procedural approach which would merely require similar treatment of similar cases or the different treatment of different situations. There are other aspects to a *substantial* approach to equality, as Professor Sandy Fredman showed in her model that combines four of them, namely *redistribution* (to break the cycle of disadvantage), *recognition* (to stop humiliation and restore dignity), *participation* (to facilitate inclusion) and *transformation* (to make a difference by changing structures)¹⁰⁶. These four dimensions are a kind of interpretive horizon that offers multiple anchoring in non-discrimination law.

When systemic forms of discrimination are at work, this substantial approach to equality requires more importance to be given to the facts of the case, to put them in a broader context to highlight the way in which inequalities of treatment operate. Here, social science tools, such as statistics, situation testing and surveys, are particularly valuable. They are used to *strengthen the link between fact and law* by going beyond the present case.

The European courts and UN committees have been receptive to this type of data. Thus, to take a well-known example, the concept of indirect discrimination to combat the gender pay gap was constructed in Europe by the Court of Justice of the European Communities on the basis of a statistical approach imported from the United States¹⁰⁷. This approach was then taken up by the European Court

of Human Rights, in the case *D.H. v. Czech Republic* on mechanisms of school segregation against Roma children, whereas until then this European court had been overcautious about accepting differences in treatment established on the basis of statistical data¹⁰⁸. A sociological analysis of the concept of stereotypes to characterise discrimination also begins to develop in the case law of the European Court of Human Rights, as illustrated in particular by the concurring views of Justices Yudkivska and Motoc in the case of *Carvalho Pinto de Sousa Morais v. Portugal*¹⁰⁹. The Court convicted Portugal of discrimination based on legal grounds that stated that “*on the date of the operation, the plaintiff was the mother of two children, was already 50 years old and that, at that age, a sex life [was] less important than it would have been if she were younger, as interest in it decreases with age*”. The Supreme Administrative Court of Portugal used this argument in particular to justify reducing the moral damages awarded to the applicant following a gynaecological operation that went wrong and had disastrous consequences for her sex life. Men older than the applicant had been granted much higher moral damages for medical misconduct that also deprived them of “normal” sexual relations, without reference to their age or status as a father. An intersectional approach, of which sociologists are very fond, is also particularly important here to characterise the difference in treatment based on a stereotypical vision of a 50-year-old married woman with children.

The use of social science studies or tools to highlight systemic discrimination therefore goes beyond the issue of evidence and the “*prima facie case*”. To ensure that they are taken into account, the constraints are essentially procedural, the right channel needs to be found to communicate them. Third-party intervention¹¹⁰ is one of them and sometimes complements the work of lawyers.

In several third-party interventions submitted by the Equality Law Clinic to the European Court of Human Rights, data from the social

sciences and medical sciences seemed crucial for anchoring the case in a more general context in order to identify systemic issues, but also to better measure the effects of a legislation or a practice on a vulnerable group when it comes to assessing proportionality. In particular, we have developed this approach in cases concerning intersex persons, both to support registration while respecting their gendered characteristics¹¹¹ and to denounce the so-called “normalisation” operations carried out on intersex children without proven medical need and in disregard of free and informed consent¹¹². In the same way, the effects of banning religious signs at school on the processes of emancipation of many Muslim students wearing the hijab could be drawn from university studies that measured both school drop-out and future professional insecurity. This data was submitted to the European Court of Human Rights to assess the proportionality of a measure prohibiting religious and philosophical signs in public establishments in the Flemish Community of Belgium¹¹³. We also embraced this approach in a case concerning the obstacles to effective access to rights and care for seriously ill foreigners in the Belgian legal system¹¹⁴.

The UN Committee on Economic, Social and Cultural Rights (CESCR)¹¹⁵ is less well known. That is why I chose to further develop the case *L.J.W. v. Belgium* submitted to this Committee in 2018, which returned its findings in October 2021¹¹⁶. This case was introduced from the point of view of the right to housing and in its third-party intervention¹¹⁷, the Equality Law Clinic strives to demonstrate that the violation of the right to housing is discriminatory, which the Committee will accept on the basis of the data we have provided. This third-party intervention is divided into three stages in order to denounce the particular structural dimension of the violation of the right to housing of low-income elderly people in Brussels. We first consider Mr L.J.W.’s individual context, before presenting the socio-economic context of Brussels, and then finally assessing the applicable legislation in the light

of this socio-economic context. It is important to note that, unlike the European Court of Human Rights, a third-party intervention before the UN Committee on Economic, Social and Cultural Rights can discuss the situation of the applicant, which makes it easier to place the case in its context.

Seventy-three years of age at the time, Mr L.J.W. had been living in the same apartment in Brussels for 24 years and received benefits of €1,185 per month¹¹⁸, an amount that pretty much corresponds to the poverty line in Belgium¹¹⁹. On the basis of a unilateral termination mechanism for the lease relating to the tenant’s main residence, without any reason needing to be given by the owner, he was forced to leave his apartment even though no suitable accommodation solution could be found. It is important to note that the end of the lease complies with the applicable civil legislation which allows, with six months’ notice and compensation of three months’ rent, to unilaterally terminate a lease held for more than nine years. Moreover, no breach of contract could be attributed to Mr L.J.W., who had neither damaged the property nor failed to pay rent. Although the legislation, which, with the guarantees of notice and compensation that it provides, does not seem to pose major difficulties, it is necessary, in order to assess the effects thereof, to place it in the context of Brussels, which is characterised by an exponential increase in rent in the last ten years.

In its third-party intervention, the Equality Law Clinic endeavoured to demonstrate the discriminatory effects of the applicable legislation, insofar as people with limited incomes occupying, as good tenants, a dwelling in Brussels for many years were unable to relocate because the compensation provided, calculated on the basis of the old rent, was insignificant following the growth of the rental market in Brussels and the sharp rise in rents. Thus, the apartment occupied by Mr L.J.W. had increased from a rent from €525 to €900 per month after his eviction. Moreover, we have drawn the Committee’s attention

to field studies, which establish that the option of termination without cause is, in the vast majority of cases, used to draw from the leased property an increased yield, i.e. a significant increase in rent¹²⁰.

If, as the *Bruxellois Rassemblement pour le Droit à l'Habitat* shows, “affordable housing is increasingly hard to come by or even non-existent for low-income families”¹²¹, the situation is even more critical for one-bedroom apartments. On the other hand, we were able to show the existence of a waiting list of almost 46,000 households for social housing, which has increased by 40% in 10 years and which is even more prevalent for single-person housing. This situation goes hand in hand with a worrying risk of poverty or social exclusion in Brussels, which is the highest in the country. This risk is even more prevalent for elderly people with modest incomes. For example, we have drawn the Committee's attention, backing it up with figures, to the fact that it is most often the elderly who are the subject of these forced evictions, with dramatic consequences on their mental and physical health, knowing that they depend for their independence on the links they have forged in their neighbourhood. This over-representation of the elderly in forced departures is due to “the combination of their fragilities and difficulties”¹²², which too often explains the impossibility of moving house to avoid eviction.

To assess the applicable legislation in Belgium, the existence of more protective legislative measures in civil law systems similar to Belgium (such as Switzerland, Germany or France) has also shown that it was possible to better reconcile the right to respect for property (or right of ownership) and the right to housing of people in vulnerable situations, such as low-income elderly.

Reading the Committee's findings shows that it is based on the various socio-economic data we submitted to it in order to assess the effects of the application of the legislation relating to the lease of the main residence

on the realisation of the right to housing without discrimination, not just of Mr L.J.W., but also of people over the age of 64 who, in the Brussels region, are most affected by the unilateral termination of their lease agreement. In addition to the actual compensation to which Mr L.J.W. is entitled, the Committee makes several important recommendations to the Belgian State which are likely to combat a situation of systemic discrimination following an “inflexible application” of the law “in the specific context of the increase in rents in the Brussels region”.

Thus, for the Committee, “the possibility of a disproportionate impact of this policy on the right to adequate housing for certain vulnerable populations entails a dual obligation for any State party that chooses such a normative framework. Firstly, the State must put in place a mechanism to monitor the impact of the application of the legal framework on the most vulnerable and marginalised populations in order to introduce the necessary adjustments to avoid a disproportionate impact that could involve a violation of the right to adequate housing for a specific group, such as elderly people in socio-economic difficulties. Secondly, the policy must include mechanisms and flexibilities to ensure that application of the legal framework does not have a disproportionate impact in some cases”¹²³.

The Equality Law Clinic will not fail to monitor the legislative changes that are necessary as a result of these findings of the UN Committee.

COMMENT SANCTIONNER ET CORRIGER LES DISCRIMINATIONS STRUCTURELLES L'ACTION COLLECTIVE DE DEMANDE



Défenseur des droits
RÉPUBLIQUE FRANÇAISE



Nicolas Jouin, lecturer in sociology, CRESPPA, University Paris-VIII-Saint-Denis

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PART IV

SANCTIONING AND CORRECTING STRUCTURAL DISCRIMINATION. THE COLLECTIVE ACTION OF THE FUTURE

FOREWORD

GWÉNAËLE CALVÈS

Professor of Public Law, University
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Good evening, ladies and gentlemen. We will now tackle the last round table of the day. It is a continuation of the previous one since it deals with the issue of structural or systemic discrimination, but it looks at it from three new angles.

The angle of collective action brought before the courts, first, with the presentation of Frédéric Guiomard, professor of social law at Toulouse 1 Capitole University.

Then, the angle of algorithmic discrimination, which is necessarily collective in nature. We will have the pleasure of hearing Bilel Benbouzid on this important subject.

Finally, the angle of international comparison, which will take us to the other side of the Atlantic, with an analysis by Mr Philippe-André Tessier of the Quebec experience of combating systemic discrimination.

CLASS ACTION: A FUTURE SOLUTION TO REPAIR HARM CAUSED BY DISCRIMINATION?

FRÉDÉRIC GUIOMARD

Professor of Social Law, University Toulouse
1 Capitole

As surprising as it may seem, class action can be regarded as an effective mechanism from a legal point of view. Effectiveness in law is indeed defined as the ability of a standard to produce the legal effects expected by the person applying a standard.

The preparatory work shows that the legislator's ambitions were modest when, in 2016, it decided to introduce this new path of legal action to combat discrimination. The impact study of the draft law on justice of the 21st century indicated that it is no longer clear that the text entails “*a change of mindset*”, but “*the legal impact itself will not be very important insofar as this draft has been designed for better integration into the French legal landscape*” (p. 161). Integration that will prove to be absolutely discreet: in six years, only two class actions seem to have been initiated.

Upon the adoption of the law of 18 November 2016, it could be perceived that the mechanism was designed not to serve or to make this action particularly difficult to carry out.

The obstacles to exercise of the action weigh both on the procedures and on the compensation.

The proceedings appear to be particularly restrictive for litigants. Without going into the details of the texts, the class action is enshrined in a mandatory procedure, which first requires the applicant (representative union or association) to serve notice on the employer. The latter must then inform the Social and Economic Committee (CSE), and a period of “discussion” with the CSE and the trade unions can begin on measures to stop the alleged discrimination. It is only the text of the French Labour Code that uses such a term, quite telling of the low level of requirement. Faced with an alleged collective discrimination situation, the legislator calls for a simple discussion, without regulating it in any way. This first step can take up to six months. Such a time limit imposed on an amicable procedure is not found anywhere else. The Decree of 11 December 2019, which generalised, in civil proceedings, the obligation to resort to amicable dispute resolution methods does not impose any mandatory time limit. Such a time limit, combined with the traditional slowness with which the courts deal with disputes, constitutes a real obstacle to taking action. The question could be asked about the compatibility of minimum time limits prior to the introduction of a legal action with the rules of fair trial.

Class actions are then problematic with regard to compensation for damages. Two rules result in a severe limitation of the damage covered. The assessment of harm is primarily a complicated approach. Since the action does not target the mere cessation of violations, it is up to the judge to determine the outline of the group of victims or the criteria for belonging to the group, to determine in advance “*the damages likely to be covered*”. There is no rule governing the judge’s power of assessment, which makes the outcome of these disputes uncertain. This uncertainty is combined with the subsequent phase

of collective settlement of damages leaving room for negotiation between the claimant and the employer on the determination of the individual damages compensated. In all cases, the law of 18 November 2016 indicates that victims may refer to the judge compensation for damages not accepted by the employer¹²⁴, the action being the jurisdiction of the judge of the court. Collective action therefore makes it essential to combine collective action with individual action to allow individualised settlement of damages, which influences the time, cost and effectiveness of the compensation.

Secondly, the French Labour Code imposes an unjustifiable limitation of the right to compensation. Article L.1134-8 provides that the compensable damages are only those born after the filing of the claim. The class action gives rise to the right to compensation only for a very limited part of the damage suffered. Compensation is only awarded for the damage of non-cessation of the breach, which then necessarily requires recourse to an additional individual action. Since the periods covered by the compensation are not the same, there is no guarantee that the judge before whom the individual dispute is brought considers himself bound by the judgements of the court in the class action.

This quick overview demonstrates that the legislator has put in place a slow, complex procedure that is limited in its scope.

It is not really surprising that the Paris Court of Justice, in its decision of 15 December 2020¹²⁵, made such a disappointing use of the class action by rejecting this action for damages for a delay in remuneration suffered by trade unionists.

Its very restrictive interpretation of the law for justice of the 21st century deprives class action of any procedural interest. It first considered that the obligation to discuss after the formal notice could be limited to a denial of the existence of discrimination, without regulating this stage with a minimum of loyalty which

should give meaning to this prior discussion. It then rejected the application of the rules on the burden of proof arrangement under European law, by reproaching the applicant trade union for failing to prove the existence of collective discrimination. Finally, in terms of damages, the court argued that it could not examine the disparities prior to 2016, on the grounds that this would give retroactive effect to the new provisions, which confuses the question of the exercise of the action and that of the rights that may be the subject of such action. The decision thus confirms the relatively limited potential of French class action in the fight against discrimination. These difficulties may cause litigants to prefer, traditionally, to maintain a collection of individual actions before the employment tribunals, which was done in the so-called SNCF Chibanis case.

Should we abandon all hope for class action on discrimination? Does it still have a place in French law?

There is no doubt that this type of action is of real use. The complexity of the proof operations in terms of collective discrimination in careers or remuneration requires seasoned actors and the compilation of cumbersome and expensive files. The individual exercise of action is particularly difficult in these areas. Furthermore, the collective nature of the action is a necessary means to protect victims from the risk of retaliation by the employer. The collective nature of the action should also not prevent an individual assessment of the damage.

The existing system would therefore need to be corrected in order to make group action a more effective tool in the fight against discrimination. Some improvements are already envisaged by an interpretation of the existing rules that is more favourable for the victims. The rules on the burden of proof arrangement taken from the European directives could of course be applied to these cases. The sensitivity shown by the Social Law Chamber of the Court of Cassation to European law could easily lead to such a correction. However, the very small volume of disputes poses an obstacle to the constitution of such case law.

Could we also not imagine an interpretation more favourable for victims with regard to compensation for damage? It seems possible, for example, to build bridges between class actions acknowledging the existence of discrimination and the awarding of compensation in employment tribunals. Above all, it must be hoped that the legislator will once again take possession of the issue in order to correct the aspects of the law, both in terms of procedure and redress.

Finally, it is necessary to learn from what makes French law special, resulting from the many courses of action that it offers to litigants in order to take action against discrimination, which numerous foreign rights do not do like North American law.

Class action could be retained as the preferred route to establish the existence of a breach and to request its termination, whereas compensation would be better understood by the individual industrial tribunal action, possibly through a preliminary class action. Questions of principle would be more easily addressed through action in the collective interest of the profession. It is also worth adding that victims have the valuable support of the Defender of Rights in these procedures in order to have access to evidence or expertise on the applicable rules.

Faced with the diversity of cases generated by collective discrimination, French law has an advantage in that it offers a variety of legal actions.

In conclusion, it therefore appears that the mechanism of class action for discrimination adopted in 2016 is far from perfect, and struggles to lend itself to litigation. The action has failed to find its place in the French procedural landscape. It can be hoped that the actions of experienced groups will provide an opportunity for construction of case law that makes room for these actions. Perhaps they will also have the effect of drawing the attention of the legislator to the need to reform them in such a way as to provide victims with access to an action that promotes complete, less complicated and rapid redress.

PREDICTIVE MACHINES AND SOCIAL JUSTICE IN THE US POLICE.

BILEL BENBOUZID

Lecturer in sociology, University Paris-Est Marne-la-Vallée

It is from studying the police and their use of predictive machines that I became interested in the challenges of social justice and discrimination.

Over the past 10 years, predictive policing techniques have developed considerably, particularly in the United States. These consist of preventing crimes or offences based on the analysis of existing data.

Based on the study of delinquency databases (burglary, theft, drug trafficking, sexual assault), the programs determine the geographical areas and the times when these events are most likely to occur, thus allowing police patrols to adjust and be “in the right place at the right time”.

In the United States, this technique is widely used. It is also used by the French *gendarmerie*.

The police seek to become more proactive than reactive. It wants to perform a real job of public security, which is why it has turned to these new techniques. Until now, it had no tools to be proactive, with the exception of patrols and identity checks. The latter, both in the United States and in France, have been the source of controversy, trials and even convictions. It should be recalled that police officers, in particular in the United States, are under pressure to achieve their quotas for identity checks, even if the use of quotas is prohibited. In the United States, it has been demonstrated that this quota policy led to checks that discriminated against minorities. Predictive policing therefore appeared to be a solution: by directing patrols according to the apparently neutral predictions of the machine, it is hoped to rectify the problem of discrimination in police stop activities.

The technique consists of dividing a neighbourhood into a grid by projecting

squares 500 metres by 500 metres onto a map, and sending the police to a square with a high probability of burglary, at a specific moment. As the police cannot stop everybody who passes through these areas, they patrol in a conspicuous way, for an optimal time calculated on the basis of past experience, so as to achieve a daily vigilance time – this is a product of security. We talk about optimised dosage of patrols in space and time.

It must be reiterated, at the outset, that the whole challenge of these technologies is to not produce discrimination. Except that associations have denounced these technologies, considering them to be racist.

These technologies are based on machine learning¹²⁶, which allows machines to become “smart” by learning the regularities (or irregularities) in datasets.

These methods are considered discriminatory as the data primarily reflects police activity and, as this activity is structurally discriminatory against minorities, the prediction of patrols tends to replicate these discriminations.

The machine has itself become racist.

But this assumption of a racist machine is up for debate. In fact, for facts to be recorded in the databases, a complaint needs to have been made. If certain people are not going to report a burglary, for example, to the police, patrols will be systematically directed to neighbourhoods where people have filed more complaints. The public security offer is therefore discriminatory. We can no longer talk about a racist police force, but about unequal access to the public good of security. It is another form of discrimination that is not sufficiently taken into account in the debate on the biases of predictive policing.

If we focus on racism rather than other forms of discrimination, it is because of another controversy that has greatly contributed to the debate on algorithm systems: the COMPAS decision-making tool, used by judges in US courts¹²⁷, the objective of which is to determine

the risks of offenders reoffending. This software, at the end of a questionnaire, gives a ‘risk of reoffending’ score to each individual. This tool has been the subject of controversy because researchers have shown that the machine was getting it wrong, especially for people from ethnic minorities.

Faced with these findings, research is carried out to ensure that machine learning techniques take into account these discrimination issues. The challenge then is to try to integrate fairness constraints and not just efficiency constraints into the design of the machines.

In order to integrate these concepts of social justice (fairness) into the machine, it was necessary to identify fairness metrics, i.e. more or less different ways of saying: “*this is fair, this isn’t*”. The aim is to assess the impartiality of the systems and to mitigate their bias.

There are several methods for trying to meet this fairness requirement.

The question that then arises is that of the regulation of artificial intelligence and its framing by European law. It seems difficult today to be able to determine an official metric that allows predictive machines to be “labelled” as “fair” or “unbiased”.

It is likely that tools, kits and labels will be developed to certify the ability of predictive machines to produce “fair” results. IBM has developed a kit that indicates whether the machine is fair or not, according to a certain number of metrics.

The problem we are faced with is that it will be particularly difficult in the future for users to be aware of and to be able to prove the algorithm discrimination of which they are victims. This is a fundamental issue today.

Today, European law built around the Artificial Intelligence Act does not allow users to mobilise. This right is based on the law of bringing machinery into conformity relating to product security. It is mechanical and technical. It essentially covers security issues.

The Artificial Intelligence Act is therefore an instrument for building the European market that protects consumers and not citizens, guaranteeing fundamental rights with regard to the use and design of artificial intelligence systems.

TAKING ACTION AGAINST SYSTEMIC DISCRIMINATION: THE EXAMPLE OF QUEBEC.

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INTRODUCTION

Adopted in 1975 by the Quebec National Assembly¹²⁸, the Charter of Human Rights and Freedoms aims “*to solemnly declare the fundamental human rights and freedoms (...) so that they may be guaranteed by the collective will and better protected against any violation*”¹²⁹. Its text is based on international declarations and covenants that set out the rights and freedoms of all human beings, such as the Universal Declaration of Human Rights, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

The Charter is recognised as a fundamental, quasi-constitutional and supra-legislative law, meaning that all other Quebec laws must respect the rights it provides. At federal level, there is also a Charter of Rights, adopted in 1982, which has constitutional value. The Canadian Charter, however, refers only to the relationship of individuals with the State, while the scope of the Quebec Charter is broader. Indeed, the Government of Quebec and its institutions, as well as

private companies or bodies and all citizens, are required to comply with it in their social relations.

The Quebec Charter includes a chapter devoted to fundamental rights (which correspond more or less to the so-called first-generation rights in France), and then, in various chapters, it enshrines the right to equal recognition, political rights and judicial rights. It also has a chapter on economic and social rights. This section has no supra-legislative value.

In addition to enshrining a series of rights and freedoms, the Charter puts in place various mechanisms to encourage the exercise and respect thereof. In 1976, a Human Rights Commission was established¹³⁰ and, in 1989, a Human Rights Tribunal was set up. In particular, the latter has the power to hear and dismiss any claim relating to a situation of discrimination found after an investigation by the Commission¹³¹.

FUNCTIONS AND RESPONSIBILITIES OF THE HUMAN RIGHTS AND YOUTH RIGHTS COMMISSION

In order to fulfil its broad promotion mission and uphold the principles contained in the Charter, the Commission assumes different responsibilities¹³². In this presentation, we will focus more specifically on its role as an investigator into discrimination. Indeed, under the Charter¹³³, the Commission must investigate, on its own initiative or following receipt of a complaint, any situation which it considers to constitute a case of discrimination. This investigation is carried out in a non-adversarial manner. The Commission shall thus seek any evidence which facilitates an amicable settlement between the parties or possibly the referral of the dispute to a tribunal. If no settlement is possible, the Commission shall propose, taking into account the public interest and the interest of the victim, any measure of redress it deems appropriate¹³⁴. Such a measure may concern the admission of violation of a right,

cessation of the alleged act, completion of a particular action (reintegration into work for instance), or reparation for damage suffered by the payment of compensation, for example. If the party in question refuses to implement the Commission's proposals, the dispute may be brought before a court. In the majority of cases, this dispute will be brought before the Human Rights Tribunal (HRT).

It should be noted that in Quebec and Canada, the courts have for many years recognised that discrimination can be direct, indirect or systemic, the latter term probably being the closest to what is identified in France as the "structural discrimination" referred to in the title of this round table.

In case law, systemic discrimination has been defined in particular in the context of employment, but may apply in other sectors. In an employment context, it has been defined as:

"Discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of 'natural' forces, for example, that women 'just can't do the job'"¹³⁵.

This brings us to the heart of our presentation today. Through three examples of cases brought by the Commission before the courts, we will look at both the successes and the limitations of legal action as a way to counter systemic discrimination before the courts. We will then look at the prospects offered by collective action, since the Commission has recently for the first time started to tackle systemic discrimination through this particular legal process. It should be noted that, in addition to collective action and recourse before the HRT in connection with the complaints received, the Commission may

also intervene before the civil or administrative courts, in various disputes that threaten the protection of the right to equality, but also other rights or freedoms protected by the Charter. It is currently involved, for example, in a case where a regulatory measure is challenged that denies asylum seekers access to State-funded childcare spaces¹³⁶.

SUCCESSSES AND LIMITATIONS OF INDIVIDUAL ACTION AGAINST SYSTEMIC DISCRIMINATION IN QUEBEC

The majority of the Commission's investigations into alleged discrimination are based on individual complaints. In some cases, a group of victims makes a complaint, either directly or through an organisation. However, the civil liability logic that largely underlies appeals to the Human Rights Tribunal (HRT) requires that proof of damage be provided on an individual basis. The situation of each victim must therefore be exposed and the court must rule on a discrimination situation in each individual case in order to award the compensation sought¹³⁷.

Nevertheless, even when the complaints are individual, the Commission may, because it acts on behalf of the victim but also in the public interest¹³⁸, apply to the court it is addressing to issue orders of a scope that exceeds the individual case submitted to it¹³⁹. This possibility was also recognised by the Supreme Court in the *Bombardier* case¹⁴⁰.

Orders in the public interest can take different forms: obligation to attend training, introduction of a programme for access to equality in employment, changes to hiring procedures, etc. However, they have some limitations. In particular, they must relate to the dispute specifically submitted to the court, be supported by the relevant evidence and be appropriate given all the circumstances¹⁴¹. It may therefore prove complex for the Commission to gather sufficiently convincing and extensive evidence to support a broad-based conclusion, in the public interest, based on an individual situation. Moreover,

these orders do not always allow for control over the content of the training to be given or the anti-discrimination policy that a party to the dispute would be required to develop¹⁴².

THE GAZ MÉTROPOLITAIN DECISION: AN EXAMPLE DEMONSTRATING THE EXTENT OF SYSTEMIC MEASURES

Like Article 14 of the European Convention on Human Rights, the Charter does not in itself protect the right to equality. This right is protected only in the exercise of the other rights and freedoms guaranteed by the Charter. The right to absence of discrimination cannot therefore be based solely on the basis of a remedy and must be linked to another right or freedom of the person.

It should be noted that in order for there to be discrimination within the meaning of section 10 of the Charter, three elements must first be combined: a distinction, exclusion or preference; based on one of the fourteen protected grounds; and which affects the full and equal exercise of one of the rights or freedoms protected by the Charter. Once all three elements of a *prima facie* case of discrimination have been established, the defendant may present evidence that refutes the allegation of discrimination or a defence justifying the discrimination. If it succeeds in doing so, the court will find that there is no violation of the right to equality.

In the *Gaz Métropolitain* decision¹⁴³ on which we will first concentrate, the Commission was acting on behalf of eight women who alleged that they had been discriminated against in hiring, prohibited by section 16 of the Charter.

In this case, the HRT first found that women were significantly under-represented in the post that was to be filled, a "network officer" position, a role with poorly defined tasks not occupied by any women at that time. It also concluded that the employment prerequisites and the whole process included biases and practices that disproportionately excluded women from the position in question. In particular, it was demonstrated that during

the practical examinations, women had been given work gloves that were too big for them to properly perform the tasks required. It was also a requirement that candidates have a driver's licence reserved for certain types of heavy goods vehicles, when the evidence revealed that this licence could easily be obtained in the course of employment. Moreover, the interview questions revealed gender-based biases on the part of those responsible for hiring.

In its reasons, the HRT stated that systemic discrimination in employment against women is also maintained by a corporate culture that includes a variety of biases, prejudices and unconscious stereotypes that are favourable to those already present in the community and that guide the selection of candidates based on persons similar to those already in office. This has the effect of perpetuating the exclusion of categories of people who have not had the opportunity to enter this environment.

Individual remedies were granted to some candidates, but both the HRT and the Court of Appeal, which upheld the decision, also issued systemic orders. The systemic measures ordered include the company's obligation to develop, within a period of three months and in consultation with the Commission, an access to equality programme¹⁴⁴ in line with the requirements of the Charter, including measures aimed at prioritising the hiring of women with the essential qualities and skills required to carry out the work of a "network officer", or any equivalent position, at a preferential appointment rate of 40%. It was also ordered to cease requiring the specific type of driving licence prior to hiring and to adapt the selection tests, tools and working methods used respectively in the context of recruitment, the training programme and the job in question to the physical characteristics of women. The HRT had also ordered the establishment of a committee to counter sexual and gender-based harassment in the workplace, but the latter order was transformed into a simple

recommendation by the Court of Appeal. The Court of Appeal found that the order was insufficiently justified by the tribunal and that its relevance was too far from the evidence presented. Ten years later, many women hold this position within the company and the CEO of Gaz Métropolitain was until recently a woman, Sophie Brochu, who expressed her great pride in recognising the shift in gender equality in the recruitment processes of this large Quebec company.

THE BOMBARDIER DECISION: A PARTIAL DECISION IN THE FIGHT AGAINST SYSTEMIC DISCRIMINATION

The second example we will address is the *Bombardier* case, which illustrates the limits of individual action in proving systemic discrimination, but which also allows formal recognition, by the highest court in the country, of racial profiling.

In this case, a Canadian pilot of Pakistani origin was denied training to be given in Texas and Quebec by Bombardier, an aerospace company. The Commission's investigation revealed that, following the events of 11 September 2001, the pilot was placed – probably due to mistaken identity¹⁴⁵ – on a list of persons banned from entry into the United States by the US authorities, and Bombardier had been advised by the US Department of Justice that he posed a threat to aviation security. Bombardier thus refused to offer training to the pilot, saying that it was forced to comply with the US decision.

Following a referral by the Commission, in 2010 the HRT handed down a judgment¹⁴⁶ acknowledging that the company had infringed the complainant's right to receive services normally offered to the public and his right to the safeguard of his dignity and reputation without discrimination based on ethnic or national origin¹⁴⁷. The HRT ordered Bombardier to pay punitive, compensatory and moral damages, while ordering it to cease applying or considering the standards and decisions of the US national security authorities when processing applications for pilot training under a Canadian pilot licence.

However, the Quebec Court of Appeal reversed the decision and the case was finally decided, in 2015, by the Supreme Court, which believed that evidence had not been provided that ethnic or national origin had played any part in the unfavourable decision of the US authorities for the request for security screening. Consequently, the Court found that there was no discrimination.

However, this unfavourable decision allowed the Supreme Court, for the first time, to recognise racial profiling as a particular form of discrimination, taking into account the definition drawn up by the Commission in 2005 and which reads as follows:

“Racial profiling means any action taken by a person or persons in a position of authority with respect to a person or group of persons, for reasons of safety, security or protection of the public, which is based on factors of actual or alleged affiliation, such as race, colour, ethnic or national origin or religion, without a real reason or reasonable suspicion, and which exposes the individual to an examination or to different treatment.

Racial profiling also includes any action by persons in a position of authority who apply a measure disproportionately to segments of the population because, in particular, of their actual or alleged race, ethnicity, nationality or religious affiliation.”¹⁴⁸

This important recognition of the phenomenon

resulted in particular validation of the case law of the HRT in this area. Since then, the Commission has been successful in several cases where municipal police forces have been found to be responsible for profiling against racialised citizens.

Recently, in a decision involving the police of the City of Longueuil¹⁴⁹, for example, the Commission obtained various orders to bring the phenomenon to a halt within the police force in question. In this case, the complainant had been stopped without cause while driving a luxury car. In particular, during the trial, the Commission demonstrated its internal work and a social expert report setting out the negative prejudices concerning black men and their profiling by police officers, inter alia in relation to traffic offences (a prejudice often referred to as “driving while black”).

The HRT thus ordered, in addition to monetary compensation for the harm suffered by the complainant, that training be given to the police officers, but also to managerial staff in the police force. The content of this training is also determined by the order: it must include a review of case law, explain the phenomenon of profiling and how prejudices and stereotypes - conscious or otherwise - manifest themselves in police interventions, identify measures and practices to counteract the phenomenon, etc. This training must also be given within a certain period of time and be recurrent, and the knowledge acquired by those taking it must be assessed.

The judgment also orders the city involved to collect and publish annually, from 2021, statistical data on the perceived or suspected racial affiliation of individuals arrested in order to document the phenomenon of racial profiling. Indeed, the Tribunal considers that this collection is necessary in order to better document the extent of racial profiling within the force, to increase awareness amongst police officers and to better equip them to combat it. It also believes that *“the periodic communication of such data, with full*

transparency while respecting the right to privacy of those arrested, can help to keep the public better informed and maintain confidence in the police”.

COLLECTIVE ACTION: A NEW LEGAL PROCESS IN THE FIGHT AGAINST DISCRIMINATION?

The Commission regularly receives complaints about situations of discrimination experienced in the hiring process in various economic sectors. Some are related, for example, to section 18.1 of the Charter, which specifically prohibits a person from requiring a person, in an employment application form or employment interview, to give information regarding any ground mentioned in section 10 unless these questions relate to the skills or qualifications required for the job.

However, over time, the Commission found that many employers required, as part of their recruitment process, candidates to provide very detailed information on their state of health, information that is also covered by the “handicap” reason of section 10 of the Charter. Practices were developed where highly intrusive pre-employment questionnaires and medical examinations have the effect of violating the right to the integrity of the person and the right to private life¹⁵⁰ in a discriminatory manner. In this type of situation, individual action generally leads to reintegration of the person into the hiring process or financial compensation for the damage suffered, but the Commission found that despite the large volume of cases dealt with in this area, no lasting changes appeared to be introduced into the practices of employers.

In 2019, the Commission launched a collective action against a major employer in the Montreal area, the *Centre de services scolaires de Montréal* (CSSDM)¹⁵¹. This public body employs teachers, office staff, specialist educators, support staff, etc., who work in all the public schools in its territory. However, the investigation revealed that it used the same application form for all jobs, without taking into account the specific requirements

of each position or the skills required in relation to the positions held.

It should be noted that collective action¹⁵² is a type of procedure created in 1979 that has been used a lot in terms of consumption, for example in cases of misleading advertising in the food industry or against cigarette manufacturers by people who have developed cancer related to their tobacco consumption. This type of action is also used in environmental or personal information protection matters. This type of procedure allows a person or body to take legal action on behalf of a group of persons in a similar situation, allowing “members” of the collective action to obtain redress through one piece of evidence and a single legal debate. In this sense, collective action relies on the principle of strength in numbers in order to enforce the rights of each member of the group, favouring better access to justice by bringing together the remedies of the members (sometimes several thousand people), thus avoiding the multiplication of individual remedies.

The Commission therefore filed an application with the Court of Cassation¹⁵³ seeking authorisation to take collective action to declare as discriminatory the systematic and automatic use, by the CSSDM, of a single pre-employment medical questionnaire that is too broad for everybody applying for a job, in violation of the right, for any candidate, to a hiring process free from discrimination based on disability or the perception of disability. The Commission also wishes it to be recognised that these practices constitute a violation of the right to respect for private life and the right to the safeguard of dignity, protected by sections 4 and 5 of the Charter. The Commission asks to represent anyone who has applied for a job with the CSSDM since October 2016 and who had to fill in the form in question. The Commission’s objective is, above all, to recognise the systemic nature of the discrimination suffered and to obtain moral and punitive damages for the persons concerned. But it also seeks to have the questionnaire amended so that it complies with

the Charter, in particular so that it is limited to verifying the qualities and skills reasonably required for each of the jobs offered by the CSSDM and that it can only be required after a conditional offer of employment has been submitted to the candidate. In addition, personal information collected through non-compliant forms should be destroyed¹⁵⁴.

This is the first initiative of its kind for our organisation, and it obviously comes with its own challenges. The request to bring the class action has not yet been authorised, since the Court has to settle, on a preliminary basis, certain issues relating to the jurisdiction of the court before which it is brought. Indeed, the CSSDM states that since this is an employment dispute, it falls within the remit of the collective agreement, and that it is the courts competent in labour law that are therefore exclusively competent. Given the fact that the discrimination occurs prior to the actual recruitment of employees, the Commission considers itself fully competent to investigate and represent the injured parties, but the discussion remains to be held before the Court before it can consider proving the discriminatory nature of the hiring process. It should be noted, however, that although the appeal is still at the preliminary stage, the CSSDM has already announced its intention to review and amend the pre-employment medical form in question.

It must be noted that, despite its promising aspects, collective action has obvious limits. In addition to jurisdictional issues, the burden of proof for discrimination in Quebec also raises questions, particularly in relation to disability, since the reasonable accommodation obligation that arises when there is *prima facie* discrimination (for instance because of a workstation not adapted to an employee's health condition) does not really lend itself to a collective dispute resolution process. Indeed, the accommodation must, by its very nature, be adapted to the person's situation¹⁵⁵. Finally, it may be thought that the unprecedented

nature of the Commission's application will probably lead the courts, if it were to be authorised, to clarify the specific rules for the application of this type of procedure to appeals in respect of human rights and freedoms.

CONCLUSION

These various examples have given us a brief overview of the Commission's main legal action in the face of systemic discrimination. However, as mentioned previously, the Charter entrusts the Commission with various responsibilities for the protection and promotion of all the rights enshrined therein¹⁵⁶, in addition to its investigative powers, which it also uses to combat all forms of discrimination. In conclusion, we would therefore like to draw your attention to some of the other courses of action available to the Commission to combat systemic discrimination.

Through its research mission, for example, the Commission conducted a broad public consultation in 2009 on racial profiling. Faced with the limitations of individual handling of complaints in this area for many years, the Commission has indeed considered that the solution to the systemic discrimination experienced by racialised minorities should also take on a systemic dimension. For this, it was first necessary to raise collective awareness of this problem and to identify the options for the solution to be implemented. A report containing more than 90 recommendations was thus published in 2011¹⁵⁷. These recommendations were addressed to the entire public administration, particularly the public security sector, the school sector and the child protection system. The Commission is continuing its work on this matter and an analysis of the implementation of the recommendations of this report was also published in October 2020¹⁵⁸.

The Commission has also conducted various studies, for example to measure discrimination in recruitment suffered by racialised minorities through CV testing in the Greater Montreal

Area¹⁵⁹. More recently, as a final example, it conducted a study that documented, among other things, the major consequences of xenophobic acts of hate on victims and the impact that this has on the exercise of their rights¹⁶⁰.

The Commission's mission also involves listening to individuals or groups who raise questions about human rights and freedoms, studying them and making recommendations to the government. It also analyses all draft laws of the National Assembly of Quebec to identify those provisions that may run contrary to the Charter, including the right to equality, and it makes appropriate recommendations to the government here too.

Finally, among the Commission's other means of action against systemic discrimination, it is important to note that the Commission monitors and supervises access to equality programmes in a large number of public bodies, pursuant to the *Law on access to equality in employment in public bodies*, and that it may also, if it finds a situation of systemic discrimination in employment, in the sectors of education or health or in any other service normally offered to the public, recommend the establishment of an access to equality programme¹⁶¹. Access to equality programmes, particularly in employment, are designed to ensure the equitable representation of individuals from groups who are victims of discrimination in all types of employment in an organisation or company and to identify and correct human resource management rules and practices that may potentially exclude or disadvantage individuals from such groups¹⁶².



Philippe-André Tessier, Président, Commission des droits de la personne et des droits de la jeunesse of Quebec

RECENT NEWS

OF THE HUMAN RIGHTS AND YOUTH RIGHTS COMMISSION

The Commission has produced a statement, published in *Le Devoir* on 7 October 2021, concerning the concept of systemic racism: <https://www.cdpdj.qc.ca/en/news/declaration-racisme-systemique>, as well as a discussion paper on this same concept: <https://www.cdpdj.qc.ca/fr/publications/document-reflexion-racisme-systemique>. In particular, it recalls its recommendation to the Quebec government to adopt a policy to combat racism and systemic discrimination.

The CDPDJ has also recently issued a statement on Draft Law No. 101 aimed at strengthening the fight against abuse against seniors and other vulnerable adults as well as monitoring the quality of health services and social services, stressing in particular the need to preserve the balance between protection and independence in the fight against abuse (<https://www.cdpdj.qc.ca/fr/actualites/presentation-loi-101-maltraitance-aines>).

The Commission has also adopted a stance on assisted dying, and expressed concern about the inaccessibility of assisted dying for certain persons, including minors and individuals unable to consent to treatment (<https://www.cdpdj.qc.ca/fr/actualites/commission-loi-soins-fin-de-vie>).

On 5 August 2021, the Commission also published a summary of its opinion on issues relating to the accommodation of children with disabilities in Quebec's municipal day camps (<https://www.cdpdj.qc.ca/fr/publications/camps-de-jour>).

In the area of disability, it has also produced its annual report on access to employment in public bodies for persons with disabilities, which contains commitments and recommendations (<https://www.cdpdj.qc.ca/fr/actualites/rapport-laee-personnes-handicapees>).

In general, the Commission regularly reacts to current developments concerning racial profiling and in the field of public security.

In this respect, the Commission has seen complaints related to racial profiling double in three years <https://www.journaldequebec.com/2021/10/25/les-plaintes-pour-profilage-ont-triple>.

Submission to the Advisory Committee on the Reality of Policing https://www.cdpdj.qc.ca/storage/app/media/publications/memoire_consultation-police_CCRP.pdf.

Submission to the Montréal Public Security Commission in the context of the consultation on the Montréal police force's policy on interrogations https://www.cdpdj.qc.ca/storage/app/media/publications/memoire_interpellations_police_montreal.pdf.

Analysis of the implementation of the recommendations of the Consultation Report of the Commission on Human Rights and Youth Rights on racial profiling and its consequences <https://www.cdpdj.qc.ca/storage/app/media/publications/bilan-profilage-racial.pdf>.



Journée d'étude
MERCREDI 24 NOVEMBRE 2021
 Défenseur des droits
Ministère de la Justice

Claudine Jacob, Director of Rights Protection, Legal Affairs, Defender of Rights

CONCLUSION

CLAUDINE JACOB

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This study day highlights the difficulties encountered in individual or collective action when it comes to the stages of legal proceedings and recognition of systemic discrimination, resulting finally in compensation for damages being obtained. The testimonies and conclusions of our various speakers highlight all the work that remains to be done in this area.

However, the incredible mobilisation of a certain number of stakeholders, and of the victims themselves, should be stressed. From this point of view, the feedback from the chambermaids of the Ibis Batignolles hotel is really remarkable and encouraging. They opened this study day by depicting extremely difficult, totally unacceptable working conditions, and demonstrated exemplary courage in mobilising themselves and others, and in identifying the support to achieve resolution of the situation after 18 months.

But the road is long and complex...

The challenge lies in “translating” these mobilisations so that they are legally qualified. How can we move from individual discrimination experienced by several victims to collective mobilisation? How can we ensure that victims play an active role in this mobilisation to obtain recognition of their status and restore their rights and dignity?

For this is the fight against discrimination and therefore a commitment against attacks on human dignity. One of the limits mentioned during the day is the lack of funding to allow these mobilisations.

Our law creating class action in the area of discrimination is recent and far behind North America, where Quebec, for example, has a fund to finance class actions. In 2015, the Defender of Rights, even before its opinion on the 2016 draft law, had recommended the creation of a fund¹⁶³. The institution should not give up on this.

With regard to the burden of proof, some speakers welcomed the fact that the concept of the shift of the burden of proof was acquired, in their view, as regards direct and individual discrimination, but unfortunately this is not entirely the case. Although this concept is effectively acquired by the Social Law Chamber of the Court of Cassation, it is not however retained in other chambers of the Court.

How can the indicators that allow for the shift of the burden of proof be qualified?

In this capacity, the Defender of Rights, with a number of lawyers and other legal professionals, has been fighting for several years to have different tools such as situation testing and clandestine recordings accepted before the courts. Cooperation between labour inspectorates, lawyers and social science researchers is more than ever necessary to contribute to bringing material to lawyers who can use it to constitute the body of evidence that allows the burden of proof of discrimination to be shifted. The links between the Defender of Rights and the labour inspectorate are very useful in this respect.

In the case of indirect discrimination, proof is more complicated to provide.

Indirect discrimination is an apparently neutral provision, criterion or practice, but it is likely to result in a particular disadvantage for persons by virtue of one of the criteria prohibited by law.

It is through indirect discrimination that, most of the time, we are able to qualify systemic discrimination. This kind of discrimination can only be understood through the work of legal professionals and social science experts, as this day has illustrated.

The social sciences provide elements that make it possible to classify discrimination as systemic, structural and functional, and to identify first-hand invisible phenomena in the various contexts discussed (organisation of work in a given company or sector). Once again, it is worth mentioning Mr Jounin's research on construction workers, or Mr Jobard's and Mr Levy's studies on identity checks.

In order to be successful in taking legal action, an organisation or company must be called into question and the discriminatory phenomena that exist within them needs to be described. It is after the joint work of the lawyer and the sociologist that it is possible to describe and then classify discrimination legally and prepare the litigation file.

History shows us that it has been very difficult for civil law judges and employment tribunal advisors to understand the rules on proof of discrimination. The concept of systemic discrimination is an additional step that will also take time. Recent setbacks must not stop us...

Today, two important and emblematic victories were explained in which the Defender of Rights made observations: the case concerning the undignified employment conditions of the Malian construction workers and the case of a police station on the issue of identity checks on young people in the neighbourhood.

The challenge today is to have the notion of systemic discrimination accepted by case law, beyond the employment tribunal, before a court of law, that is, before judges competent in class action, who are unfamiliar with discrimination law.

It seems that there is a great difficulty, both for the judicial judge and for the administrative judge, in articulating procedural law with discrimination law in the context of the class action. However, without this articulation, if the usual civil proof is applied, for example, the burden being borne by the applicant, it will always be extremely difficult to prove discrimination. There is a need for a great deal of education and training of judges.

Other difficulties await us, particularly in relation to the fact that the 2016 law provides that the events giving rise to discrimination must be subsequent to its "effective date". A restrictive interpretation of this provision leads to the effective entry into force of the law within ten or fifteen years. Here there is a risk of undermining the law.

Finally, the difficulties also concern the judge who has no tools to deal with class actions. He is faced with a new problem, without knowing his role which is not defined in the law. This is virgin territory for him. What happens to the process of establishing the group if he considers that there is a violation? And what about the redress phase? The Defender of Rights and lawyers have made recommendations in this area, in particular for our institution in its opinions in Parliament and in very comprehensive legal observations.

The last workshop showed that there are many challenges still to be overcome. Some, as the work on algorithms shows, have already been anticipated by the Defender of Rights in particular¹⁶⁴. And if, in the future, lawyers must also collaborate with mathematicians or statisticians, as well as sociologists, then so be it.

This day highlights to what extent the fight against systemic discrimination concerns us all: sociologists, legal experts, lawyers, trade unions, associations, labour inspectors... and of course victims of discrimination.

Thank you everyone.

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SLIM BEN ACHOUR

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Slim Ben Achour is a lawyer at the Paris Court of Appeal, specialising in equality and discrimination issues, and a member of the Paris Bar.

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BILEL BENBOUZID

BIOGRAPHY

After training as a State Public Works Engineer (ENTPE), Bilel Benbouzid defends a PhD thesis in sociology of science on anti-crime technologies.

Lecturer at Gustave Eiffel University since 2013, he has been conducting research into predictive policing, focusing on issues of discrimination and fairness in algorithmic decision systems. He is gradually steering his work towards computational social sciences, working in particular on YouTube data. He recently participated in research on the detection of hatred on YouTube as part of the CNCDH’s report on the fight against racism, anti-Semitism and xenophobia. He is currently a CNRS researcher at the Centre Internet et Société where he conducts research into the economics of the market of influence on YouTube on the one hand, and the regulation of artificial intelligence on the other.

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SARAH BENICHOU

BIOGRAPHY

Trained as a lawyer, Sarah Benichou held various positions in the trade union and associative world before becoming a specialist in discrimination. Author of a thesis in law, *Le droit à la non-discrimination “raciale” : instruments juridiques et politiques publiques*, she was in charge of teaching and in particular, from 2015 to 2020, the course on non-discrimination law in the framework of the “Migrations et relations interethniques” (Migration and interethnic relations) Master’s at the University Paris VII-Diderot. She has worked in the Promotion of Equality and Access to Rights department of the Defender of Rights since 2012, where she now holds the position of Assistant Director.

MAIN PUBLICATIONS

- Benichou S., *Le droit à la non-discrimination “raciale” : instruments juridiques et politiques publiques*, Thesis of the University Paris 10, 1 December 2011.

SAVINE BERNARD

BIOGRAPHY

Associate lawyer at the law firm 1948 AVOCATS, having taken an oath in 1997, working only alongside employees, employee unions and staff representatives.

MAIN PUBLICATIONS

- Regular legal columns in L'Humanité: *Alerter n'est pas dénigrer* (10 January 2022), *Sans juge le travailleur est sans droits* (15 November 2021), *Les Sourds s'emparent des prud'hommes* (27 September 2021) ;
- Bernard S., Code du télétravailleur, Éditions DALLOZ, 2021;
- Bernard S., “L'égalité des femmes dans la profession d'avocat”, *La Lettre du SAF*, October 2020;
- Bernard S., Roulet V., “Controverse : le CSE et le droit à la participation des travailleurs : des victimes collatérales de la covid-19 ?”, *Revue de Droit du Travail, Dalloz*, 2020, pp. 440-447.

SANDRA BOUCHON

BIOGRAPHY

Having trained as a lawyer, Sandra Bouchon practised in a law firm specialising in employment law in the defence of employees. In 2009, she joined HALDE as a lawyer in the private employment division, specialising in issues of discrimination in employment. She went on to refine her expertise on specific gender equality and sexual harassment issues. She then joined the Regional Directorate of the Defender of Rights to support and train delegates on this subject. At the end of 2021, she left the Defender of Rights to set up her own firm specialising in the conduct of internal investigations into discrimination and moral and sexual harassment. She also teaches at the University of Reims and provides training on these subjects.

GWÉNAËLE CALVÈS

BIOGRAPHY

Gwénaële Calvès is a professor of public law at the University of Cergy-Pontoise and a member of the “*Anti-Discrimination and Promotion of Equality*” college of the Defender of Rights. With Daniel Sabbagh, since 2001, she has co-directed the “*Anti-discrimination policies*” research group (CERI-Sciences Po).

MAIN PUBLICATIONS

- Calvès G., *Territoires disputés de la laïcité*, Paris, Presses Universitaires de France, 2018;
- Calvès G., *La discrimination positive*, Paris, Presses Universitaires de France, coll. “Que sais-je ?”, 4th ed., 2016;
- Calvès G., *Envoyer les racistes en prison ? Le procès des insulteurs* de Christiane Taubira, Paris, LGDJ, 2015.

VINCENT-ARNAUD CHAPPE

BIOGRAPHY

Vincent-Arnaud Chappe is a sociologist and research officer at CNRS, and a member of the *Centre d'étude des mouvements sociaux* (Industrial Action Study Centre) at the EHESS. His research focuses on various labour regulation practices, particularly concerning discrimination. For example, he is interested in how stakeholders in the professional relations system conduct investigations and process the information available in support of their claims.

MAIN PUBLICATIONS

- Chappe V.-A., Keyhani N., *La mobilisation collective des cheminots PS25 contre la SNCF*, Research report, 2021;
- Chappe V.-A., *L'égalité au travail. Justice et mobilisations contre les discriminations*, Paris, Presses des Mines, coll. “Sciences sociales”, 2019;
- Chappe V.-A., Denis J.-M., Guillaume C., Pochic S., *La fin des discriminations syndicales ? Luttés judiciaires et pratiques négociées*, Editions du Croquant, 2019, 255 p.

PATRICK CHARLIER

BIOGRAPHY

As a lawyer, Patrick Charlier has been Director of Unia – Interfederal Centre for Equal Opportunities and Combating Racism (Belgium) since 2016.

MAIN PUBLICATIONS

- Charlier P., *Dis, c'est quoi la discrimination ?*, Edition la Renaissance du livre, 2019, 90 p.;
- Charlier P., Lejeune J., “De l'État de transit à l'État de droit”, *Revue du droit des étrangers*, December 2004, pp. 374-397;
- Charlier P., Mary Ph., Nève M., Reynaert P., *Le Guide du prisonnier*, Editions LABOR, 2002, 333 p.;
- Charlier P., Lejeune J., “20 ans de loi contre le racisme – paysage, horizon et changement de perspective”, *Hémisphère Gauche*, 2001, 0, pp. 55-81;
- Charlier P., “Dire les droits de l'Homme, c'est bien, les respecter, c'est mieux”, in *Droits de l'Homme et démocratie - relativité ou universalité*, edited by Solidarité socialiste and Ligue des droits de l'Homme, 1998;
- Charlier P., “La protection de la vie privée”, in *Droits de l'Homme et démocratie - relativité ou universalité*, edited by Solidarité socialiste and Ligue des droits de l'Homme, 1998;
- Charlier P., 100 questions sur les polices, *Editions Jeunesse et droit*, 1998;
- Charlier P., “Que reste-t-il du droit d'asile ? Réfugiés et droits de l'Homme en Belgique”, in *Le front du refuge*, Editions De la démocratie, 1994.

CLARA GANDIN

BIOGRAPHY

An associate lawyer in the firm 1948 AVOCATS, Clara Gandin took an oath in 2018 and mainly practised in law relating to non-discrimination in the workplace, alongside employees and trade unions.

MAIN PUBLICATIONS

- Regular legal columns in L'Humanité: *Réintégré onze ans après le licenciement: la carrière doit être reconstituée* (24 January 2022), *Lanceur d'alerte et licenciement* (4 October 2021), *Camàieu rappelée à l'ordre pour discrimination* (19 April 2021), *Prouver la discrimination: l'employeur doit coopérer!* (4 January 2021);
- Gandin C., “Le congé parental ne doit pas aboutir à une réduction des droits”, *Semaine sociale Lamy*, 8 July 2019.

FRÉDÉRIC GUIOMARD

BIOGRAPHY

Frédéric Guiomard is a professor of private law, specialising in labour law and social protection law, at Toulouse Capitole University, E.A. 1920, head of the Department of Labour and Occupational Activity Law. He is responsible for the “Contentieux, procédure et juridictions” column in the labour law review. His research focuses on social litigation, social protection law and discrimination law.

MAIN PUBLICATIONS

- Guiomard F., “L'action de groupe-discrimination en quête de sens. (À propos du jugement du tribunal judiciaire de Paris, 15 décembre 2020, FTM-CGT c/ SA Safran Aircraft Engines)”, *Le Droit ouvrier*, 2021, 336, pp. 321-336;
- Guiomard F., Jad A., “Les principes d'universalité et d'égalité dans la réforme du système de retraite”, *Droit social*, Dalloz, 2021, p. 294;
- Guiomard F., “Un sociologue aux prud'hommes”, *Revue de droit du travail*, Dalloz, 2020, p. 137;
- Guiomard F., “La preuve des discriminations syndicales dans l'action de groupe”, *Revue de droit du Travail*, Dalloz, 2018, p. 866;
- Guiomard F., “L'extension des règles de preuve des discriminations aux procédures de référé”, *Revue de droit du travail*, Dalloz, 2017, p. 742.

LIORA ISRAËL

BIOGRAPHY

Liora Israël is a law sociologist, Director of Studies at the School for Advanced Studies in the Social Sciences (EHESS), Member of the Maurice Halbwachs Centre (UMR 8097 CNRS/ENS/EHESS). She has worked in particular on political mobilisation of the law, on the legal training of elites, and also on the judicial treatment of discrimination. Within the EHESS, she takes care of the Potential Social Sciences Workroom (OuSciPo) whose purpose is to build partnerships between research and civil society.

MAIN PUBLICATIONS

- Israël L., “Détournement de procès ? L’affaire des ‘Quatre de Fleury-Merogis’”, *Histoire Politique*, 2021, 45;
- Israël L., *À la gauche du droit. Mobilisations politiques du droit et de la justice (1968-1981)*, Editions EHESS, 2020;
- Israël L., *L’arme du droit*, 2nd edition, Editions Presses de Sciences Po, Paris, 2020.

CLAUDINE JACOB

BIOGRAPHY

From 1983 to 1999 and from 2011 to 2014, Claudine Jacob held positions as a children’s judge and trial judge and President of Chambers in various courts. In 1999, she became a task officer for European and international criminal matters for the Director of Legal Affairs of the Ministry of Foreign Affairs, from 2002 to 2007, liaison magistrate in Canada and from 2008 to 2011 civil justice advisor at the Permanent Representation of France to the European Union in Brussels. From 2014 to 2016, Claudine Jacob was appointed a national expert seconded to the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs.

Since 2016, she has been head of the Protection of Rights - Legal Affairs department at the Defender of Rights.

NICOLAS JOUNIN

BIOGRAPHY

Sociologist Nicolas Jounin is the author of a thesis on labour relations and discrimination in the construction sector, and co-author of a book on strikes of undocumented workers. A senior lecturer on leave of absence at the Paris 8 University, he carries out appraisals on working conditions for staff representatives within the framework of the firm Cedaet.

MAIN PUBLICATIONS

- Jounin N., Tourette L., *Marchands de travail, Edition Seuil*, 2014;
- Barron P., Bory A., Chauvin S., Jounin N., Tourette L., *On bosse ici ! On reste ici !, Edition La Découverte*, 2011;
- Jounin N., *Chantier interdit au public. Enquête parmi les travailleurs du bâtiment, Edition La Découverte*, 2008;
- Jounin N., Palomares É., Rabaud A., “Ethnicisations ordinaires, voix minoritaires”, *Sociétés contemporaines*, 2008, 70, pp. 7-23.

RACHEL KÉKÉ

BIOGRAPHY

Rachel Kéké Raïssa took up her position in 2003 at the Hotel Ibis Batignolles as a chambermaid and then as housekeeper from 2019. She is one of the spokeswomen for the strike action by the chambermaids at the Ibis Batignolles hotel, which started in 2019 against the company STN, a subcontractor of the Accor Group, and ended in May 2021.

Since this action ended, Rachel Kéké has more generally denounced in the media the injustice suffered by women of foreign origin in French society, focusing on the consequences that the insecure jobs they tend to have on their physical and mental health (workplace accidents, moral and sexual harassment, scorn, etc.).

NARGUESSE KEYHANI

BIOGRAPHY

Narguesse Keyhani is a lecturer at the University of Lyon 2, a member of the TRIANGLE laboratory and a member of the Convergence Migrations Institute. Together with Vincent-Arnaud Chappe, she investigated the collective action of Moroccan railway workers against discrimination at SNCF. She also participated in a collective investigation into the judicial treatment of racist offences, coordinated by Abdellali Hajjat and Audrey Célestine.

MAIN PUBLICATIONS

- Chappe V.-A., Keyhani N., *La mobilisation collective des cheminots PS25 contre la SNCF*, Research report, 2021;
- François C., Gilbert P., Keyhani N., Masclet C., “Espaces non mixtes : l’entre-soi contre les inégalités ?”, *Métropolitiques*, 2021;
- Keyhani N., Hajjat A., Rodrigues C., “Saisir le racisme à travers sa pénalisation”, *Genèses*, 2019, 116/39.

OMER MAS CAPITOLIN

BIOGRAPHY

Omer Mas Capitolin is a social, community and local development officer, member of the “*Pour en finir avec les contrôles au faciès*” platform, a coalition of NGOs working to promote reforms aimed at reducing the practice of race-based identity checks. He is also co-founder of the *Maison Communautaire pour un Développement Solidaire* (MCDS), an NGO that fights discrimination and promotes the improvement of relations between the police and citizens in France.

SYLVIE KIMISSA

BIOGRAPHY

Sylvie Kimissa has been working as a chambermaid at the Ibis Batignolles hotel since 2013. She is one of the spokeswomen for the strike action by the chambermaids at the Ibis Batignolles hotel, which started in 2019 against the company STN, a subcontractor of the Accor Group, and ended in May 2021.

MARIE MERCAT-BRUNS

BIOGRAPHY

Marie Mercat-Bruns is an Affiliated Professor at the École de droit de Sciences Po and a member of the Scientific Committee of the *Presage sur le Genre* Programme. Since 2019, she has been appointed Expert for France on Gender Equality with the European Commission. A lecturer in private law, research supervisor at CNAM and member of the CNRS LISE laboratory (Co-pilot for Gender, Law and Discrimination), she also leads the “Discrimination and Fundamental Rights” division in the Trans Europe Experts network. She has recently drafted a global report on racism for UNESCO (2021) and participated in several working groups for the executive, including one on the evolution of the protection of vulnerable individuals for the Ministry of Justice, Health and Disabled People (2018 Caron-Déglièse Report).

MAIN PUBLICATIONS

- Mercat-Bruns M., “Les inégalités à l’épreuve de la crise sanitaire : télétravail et discrimination indirecte fondée sur le sexe”, *JCP*, 2021, p. 461;
- Mercat-Bruns M., “La discrimination intersectionnelle : une notion émergente en droit du travail ?”, *Bulletin Joly*, 2021, p. 52;
- Mercat-Bruns M., Nouveaux modes de détection et de prévention de la discrimination et accès au droit : action de groupe et discrimination systémique ;

algorithmes et préjugés ; réseaux sociaux et harcèlement sexuel, *Société de législation comparée*, 2020;

- Mercat-Bruns M., “Le droit français est-il suffisamment équipé en matière de lutte contre la discrimination systémique”, *Revue de Droit du Travail*, 2020, p. 373;
- Mercat-Bruns M., “Les figures de la discrimination au travail : quelle cohérence ?”, *Revue Droit du Travail*, 2020, p. 25;
- Mercat-Bruns M., “La discrimination systémique : peut-on repenser les outils de la non-discrimination en Europe ?” *REDH*, 2018, 14;
- Mercat-Bruns M., Oppenheimer D. B., Cady S., “Comparative Perspectives on the Enforcement and Effectiveness of Antidiscrimination Law: challenges and innovative tools”, *Springer International Publishing*, 2018;
- Mercat-Bruns M., “Racisme au travail : les nouveaux modes de détection et les outils de prévention”, *Droit social*, 2017, p. 361;
- Mercat-Bruns M., “Discrimination at Work: Comparing European, French, and American Law”, *Oakland: University of California Press*, 2016;
- Mercat-Bruns M., “L’identification de la discrimination systémique”, *Revue de Droit du Travail*, Nov. 2015, p. 672;
- Mercat-Bruns M., *Discriminations en droit du travail : dialogue avec la doctrine américaine*, Paris, Dalloz, 2013.

MARILYNE POULAIN

BIOGRAPHY

Secretary of the CGT Departmental Union of Paris, Member of the CGT confederal department, Leader of the CGT Immigration Collective, Director of the journal “*Droit ouvrier*”.

MAIN PUBLICATIONS

- Poulain M., Carayon L., “Fin de chantier pour le racisme des patrons”, *Délibérée*, 2021, 12, pp. 70-77;

- Poulain M., “Travailleurs étrangers sans-papiers, et s’il était temps d’appliquer notre Constitution et de garantir l’égalité de traitement et la cohésion sociale !”, *Annales des Mines - Réalités industrielles*, 2021, 2, pp. 48-51;
- Poulain M., “Les actions collectives animées par la CGT ont permis la condamnation prud’homale de la discrimination raciale systémique”, *Chronique Ouvrière*, February 2020;
- Poulain M., “À propos de l’Affaire du Chantier de Breteuil – Récit d’un combat syndical et juridique”, *Droit ouvrier*, April 2020;
- Poulain M., “Le procès de la traite”, *Plein droit*, 2018, 4, p. 119;
- Poulain M., “Mafia et traite bd de Strasbourg”, *Plein droit*, 2017, 2, p. 113.

ISABELLE RORIVE

BIOGRAPHY

Isabelle Rorive is a professor in the Faculty of Law and Criminology at the Université Libre de Bruxelles (ULB), where she is also President of the Perelman Centre. An advisor to the Rector and the President of the ULB for the diversity policy, a member of the committee of senior experts of the European Equality Law Network and a founding member of the scientific committee of the Berkeley Centre on Comparative Equality and Anti-Discriminations Law, Isabelle Rorive continues her research in European and international projects using an interdisciplinary approach. Together with Emmanuelle Bribosia, she set up the Equality Law Clinic in October 2014, which she now manages.

MAIN PUBLICATIONS

- Rorive I., “Le droit à la santé sans discrimination des résidents des maisons de repos laissé pour compte” (with C. Derave), in F. Tulkens, S. Parsa (ed.), *État de droit, état d’exception et libertés publiques*, *Anthemis*, 2022, pp. 205-253;
- Rorive I., “Digital Profiling: Challenges for Equal Opportunities in Online Targeted Employment Advertising” (with A.M. Corrêa

- Harcus), *European Journal of Human Rights*, 2021, pp. 221-241;
- Rorive I., “Discrimination intersectionnelle : mode d’emploi” (with E. Bribosia & R. Medard Inghilterra), *Revue trimestrielle des droits de l’homme*, 2021, pp. 241-274;
 - Rorive I., “Religious Conscientious Objection: A Troubled Path” (with A.M. Corrêa Harcus), in S. Mancini (ed.), *Handbook on Constitutions and Religions*, Edward Elgar Publishers, 2020, pp. 370-382;
 - Rorive I., “Convention sur l’élimination des discriminations à l’égard des femmes et Pactes onusiens : quel potentiel pour les droits des femmes ?” (with E. Bribosia), in D. Bernard & C. Harmel (eds.), *Commented code – Women’s rights*, Brussels, Larcier, 2020, pp. 23-34;
 - Rorive I., “Article 20 – Égalité en droit” and “Article 21 – Non-discrimination” (with E. Bribosia & J. Hislaire), in F. Picod, C. Rizcallah & S. Van Drooghenbroeck (ed.), *Charte des droits fondamentaux de l’Union européenne. Commentaire article par article*, Brussels, De Boeck, 2019, 2nd ed., pp. 533-557 and pp. 559-592;
 - Rorive I., *Human Rights Tectonics. Global Dynamics on Integration and Fragmentation* (ed. with E. Bribosia), Cambridge, Intersentia, 2018 (with a contribution entitled “Why a global approach to non-discrimination law matters: Struggling with the ‘conscience’ of companies””, pp. 111-140);
 - Rorive I., *Governing Plural Societies. Migrants integration and multiculturalism in North America and in Europe* (ed. with A. Rea, E. Bribosia and D. Sredanovic), Brussels, PUB, coll. *Études européennes*, 2018;
 - Rorive I., “Human rights integration in action: making equality law work for trans people in Belgium” (with E. Bribosia), in *Fragmentation and Integration in Human Rights Law: Users’ Perspectives*, in E. Brems & S. Ouald-Chaib (eds), Cheltenham, Edward Elgar Publishers, 2018, pp. 111-138;
 - Rorive I., “Lutter contre les discriminations”, in C. Bricteux and B. Frydman (dir.), *Les défis du droit global*, Brussels, Bruylant, coll. *Penser le droit*, 2018, pp. 41-61;

- Rorive I., *Droit de la non-discrimination : avancées et enjeux* (ed. with E. Bribosia & S. Van Drooghenbroeck), Brussels, Bruylant, 2016;
- Rorive I., “Column - Equality and Non-Discrimination Law” (with E. Bribosia), *European Journal of Human Rights*, 2013, pp. 297-329; 2014, pp. 205-237; 2015, 2, pp. 223-243; 2016, 2, pp. 254-268; 2017, 2, pp. 191-213; 2018, 2, pp. 126-145; 2019, 2, pp. 120-140.

GENEVIÈVE ST-LAURENT

BIOGRAPHY

Geneviève St-Laurent is a lawyer and holder of a PhD under co-supervision from Laval University (Quebec) and Aix-Marseille University (France). Her thesis was awarded the Aix-Marseille Legislative Editions Award, the Quebec Association of Comparative Law Award and the ABC-Quebec Michel-Robert Award. From 2016 to 2018, Ms St-Laurent was a postdoctoral researcher and lecturer in the Faculty of Law at the University of Montreal. Since 2018, she has been a legal advisor to the Human Rights and Youth Rights Commission (CDPDJ).

MAIN PUBLICATIONS

- Saint-Laurent G., *La condamnation pénale comme limite au droit de vote ou la quête de l’équilibre entre un droit fonctionnel et un droit individuel*, *Legal and Political Science Thesis*, 29 September 2015.

MATHILDE ZYLBERBERG

BIOGRAPHY

Mathilde Zylberberg sat the entrance examination for the *École nationale de la magistrature* in December 1998 and was offered the position of investigating judge at the District Court of Laon in September 2001. From September 2001 until 31 March 2021, she held various magistrate positions.

Since 1 April 2021, she has held the position of head of the “Employment – private goods and services” division within the Defender of Rights.

PHILIPPE-ANDRÉ TESSIER

BIOGRAPHY

Philippe-André Tessier was appointed Vice-President responsible for the Charter mission in December 2017 and served as the interim Chairman in March 2018, before being appointed President of the CDPDJ by the National Assembly on 28 February 2019. Prior to his appointment to the Commission, he was a partner and head of the Labour Law Group at Robinson Sheppard Shapiro and his practice focused on labour and employment law and administrative law.

A graduate of the University of Montreal in law, industrial relations and communication, Philippe-André Tessier is a member of the Quebec Bar and the Order of Certified Human Resources Advisors (CRIA). He also holds the designation of Chartered Administrator (ASC).

Philippe-André Tessier was very active in his professional order, having served as President of the Young Bar Association of Montreal (AJBM), Secretary and Treasurer of the *Conseil du Barreau de Montréal*, as well as a member of the Executive Committee and the *Conseil général du Barreau* of Quebec. He was also a member and Secretary of the Board of Directors of Éducaloi and, until his appointment to the Commission, was a member and Chairman of the *Société québécoise d'information juridique* (SOQUIJ). Philippe-André Tessier was also very involved during his studies in the college and university student movement and chaired the accreditation committee set up under the Act on the accreditation and financing of associations of pupils or students.



AGENDA

FOR THE STUDY DAY ON 24 NOVEMBER 2021

08:30

WELCOME

09:00

OPENING

Claire Hédon, Defender of Rights

09:15

I- TIME FOR MOBILISATION: RECOGNISING COLLECTIVE DISCRIMINATION

This round table will address, based on specific cases, the conditions for forming collectives. How do we become aware that we have been, individually and collectively, the victims of discriminatory differential treatment? How can we make the shift from the individual case to the collective? How can the group take advantage of the law? Who is involved and what support is available?

The “ordeals of the collective” also need mentioning: under what conditions and with which resources a collective of plaintiffs is constructed and manages to keep itself going, despite the length of the procedure, the difficulties, the conflicting interests, etc.

PRESENTER

Liora Israël, Sociologist of Law and Justice, Director of Studies, EHESS.

SPEAKERS

- **Rachel Kéké** and **Sylvie Kimissa**, representatives of the chambermaids at the Ibis Batignolles hotel;
- **Omer Mas Capitolin**, community agent, *Maison communautaire pour un développement solidaire* (MCDS);
- **Vincent Arnaud Chappe**, sociologist, CNRS, EHESS and **Narguesse Keyhani**, lecturer in political science, University Lyon II, Triangle, IC Migrations;
- **Savine Bernard** and **Clara Gandin**, lawyers, Paris Bar, 1948 Avocats.

11:00

II- THE TRANSLATION INTO LAW OF DISCRIMINATION: PROVING DISCRIMINATION

This round table will address the issues of proof of discriminatory disadvantages and inequalities, particularly with regard to the burden of proof arrangement that applies in non-discrimination law.

How can the collective difference in treatment be updated and characterised?

What kind of indicators are needed to establish discrimination in law?

What are the uses and roles of comparison, situation testing and statistics?

PRESENTER

Sarah Benichou, Assistant to the Director, “Promotion of Equality and Access to Rights” Department, Defender of Rights.

SPEAKERS

- **Mathilde Zylberberg**, head of the “Employment, Private Goods and Services” division, Defender of Rights;
- **Maryline Poulain**, CGT trade unionist, UD Paris;
- **Patrick Charlier**, Director, Interfederal Centre for Equal Opportunities (UNIA) in Belgium.

14:00

**III - HIGHLIGHTING SYSTEMIC DISCRIMINATION.
THE LINK BETWEEN SOCIAL SCIENCES AND LAW**

The inequalities of treatment highlighted in some cases reflect structured discrimination within the organisations involved and reflect systemic discrimination. This session will look at how the social sciences, and primarily sociology, are now effectively used in appeals for discrimination. It will discuss the use of the concept of systemic discrimination arising from the social sciences.

How can the social sciences provide major support for putting individual cases into context?

How can we use studies to demonstrate the systemic dimension of discrimination and characterise discrimination before the judge?

What is the attitude of French and European judges towards collective discrimination?

PRESENTER

Marie Mercat Bruns, lecturer in private law, research supervisor, affiliate professor at the Ecole de droit de Sciences Po, CNAM.

SPEAKERS

- **Slim Ben Achour**, lawyer, Paris Court of Appeal;
- **Nicolas Jounin**, lecturer in sociology, CRESPPA, Université Paris-VIII-Saint-Denis;
- **Sandra Bouchon**, former lawyer for the Defender of Rights, harassment/discrimination counsel;
- **Isabelle Rorive**, professor of law, Centre Perelman and Equality Law Clinic, Université Libre de Bruxelles.

15:30

IV - SANCTIONING AND CORRECTING STRUCTURAL DISCRIMINATION. THE COLLECTIVE ACTION OF THE FUTURE

The reparations and sanctions obtained in the event of discrimination remain completely insufficient with regard to standards, particularly European standards, of proportionality and dissuasive and strictly individual effects.

This session will address the strengths and limitations of the class action procedure and the prospects of the law for sanctioning and correcting structural discrimination through the lens of the Quebec example and the new challenges posed by discrimination and algorithmic bias.

PRESENTER

Gwénaële Calvès, Professor of Public Law at the University of Cergy-Pontoise.

SPEAKERS

- **Frédéric Guiomard**, professor of social law, University Toulouse 1 Capitole;
- **Bilel Benbouzid**, lecturer in sociology, University Paris Est Marne-la-Vallée;
- **Philippe-André Tessier**, President, *Commission des droits de la personne et des droits de la jeunesse* in Quebec.

17:00

CONCLUSION

Claudine Jacob, Director of Rights Protection, Legal Affairs, Defender of Rights.

NOTES

- ¹ Defender of Rights, Law and Justice research mission, *Multiplication des critères de discrimination. Enjeux et perspectives*. Proceedings of the conference, 18 & 19 January 2018, Paris, 2019, 218 p.
- ² Law No. 2001-1066 of 16 November 2001 on the fight against discrimination (in the field of labour); Law No. 2002-73 of 17 January 2002 on social modernisation; Law No. 2004-1486 of 30 December 2004 establishing the High Authority for the Fight against Discrimination and for Equality (now the Defender of Rights in 2011); law No. 2006-396 of 31 March 2006 on equal opportunities; Law No. 2008-496 of 27 May 2008 issuing various provisions adapting the national legislation to Community law in the field of combating discrimination, is the main reference text.
- ³ Defender of Rights, International Labour Organisation, *14e baromètre de la perception des discriminations dans l'emploi, consacré à la jeunesse*, Paris, 2021, 36 p.
- ⁴ Orléans Court of Appeal, 7 February 2017, No. RG 15/02566.
- ⁵ Rennes Court of Appeal, 10 December 2014, No. RG 14/00134.
- ⁶ Defender of Rights, *Enquête sur l'accès aux droits - volume 1 : relations police / population : le cas des contrôles d'identité*, Report, 2017, 44 p.
- ⁷ Defender of Rights, Opinion 15-25 of 1 December 2015 on security at stations in the face of the terrorist threat; Opinion 15-27 of 11 December 2015 on the prevention and combating of incivility, violations of public security and terrorist acts on public passenger transport; Opinion 16-12 of 10 May 2016 on the fight against abusive identity checks.
- ⁸ Defender of Rights, Decision MDS-2016-132 of 29 April 2016 on discriminatory identity checks.
- ⁹ Court of Cassation, 1st civ., Judgment relating to the non-discriminatory nature of an identity check carried out following a gang robbery, 9 November 2016, No. 15-24207. The twelve other judgments of the Court of Cassation: No. 15-24214; 15-24213; 15-24211; 15-24209; 15-24208; 15-25873; 15-25877; 15-25876; 15-24210; 15-24207; 15-25875; 15-25872.
- ¹⁰ Defender of Rights, Decision 2018-257 of 18 October 2018 on proceedings for State liability for discriminatory identity checks / Defender of Rights; Decision 2021-054 of 9 March 2021 relating to observations before a Court of Appeal within the context of proceedings for State liability for discriminatory identity checks / Defender of Rights.
- ¹¹ Paris Court of Appeal, 8 June 2021, No. RG 19/00872.
- ¹² Defender of Rights, Opinion 20-11 of 11 December 2020 relating to the hearing of the Defender of Rights by the information mission of the National Assembly on the emergence and evolution of the various forms of racism and the responses to it.
- ¹³ Defender of Rights, *La mise en œuvre de la Convention relative aux droits des personnes handicapées (CIDPH)*, Report, 2020, 108 p.
- ¹⁴ Defender of Rights, *Discriminations et origines : l'urgence d'agir*, Report, 2020, 80 p.
- ¹⁵ Defender of Rights, *"Gens du voyage": lever les entraves aux droits"*, Report, 2021, 23 p.
- ¹⁶ Defender of Rights, *Algorithmes : prévenir l'automatisation des discriminations*, Joint declaration with the CNIL, 2020, 11 p.
- ¹⁷ Defender of Rights, Decision 2019-108 of 19 April 2019 on the situation of 25 workers in an irregular situation finding themselves victims of discriminatory treatment by their employer, a company in the building sector, due to their origin and nationality.
- ¹⁸ Defender of Rights, *La mobilisation collective des cheminots PS25 contre la SNCF : dynamique et tensions d'une action judiciaire groupée*, Research & results, 2021, 13 p.
- ¹⁹ The MCDS is an NGO that fights discrimination and promotes the improvement of relations between the police and citizens in France. The organisation works on four fundamental issues: ethnic profiling in police stops, abusive police stops, police brutality and the improvement of relations between the police and citizens, and in particular relations between police and youth.
The community approach of the MCDS aims to strengthen the capacity of citizens to collectively develop solutions to their problems within their local communities.

The MCDS provides young people with the advice and tools they need to collectively reflect on their problems and identify solutions, and then assist them in formulating the operational aspects of their projects and in securing institutional support for the realisation of their vision of social transformation. The MCDS also develops and co-constructs an open network of local stakeholders capable of using their different positions, interests and skills to collectively bring about change. The experiences and knowledge gained in a neighbourhood are then used to organise other neighbourhoods. This approach is aimed at constructing collectives, creating a sense of belonging and empowering people to become agents of change.

²⁰ Defender of Rights, Decision 2020-102 of 12 May 2020 relating to observations before the judicial tribunal of X in the context of proceedings for State liability for discriminatory identity checks.

²¹ La Brigade des mamans contre les amendes abusives de leurs enfants - Bondy Blog.

²² Legal action at the end of the 1990s against PSA Peugeot Citroën on grounds of trade union discrimination. Chappe V.-A., *Les discriminations syndicales saisies par le droit à PSA, La nouvelle revue du travail*, 7, 2015.

²³ Action by 17 miners dismissed for having gone on strike in 1948 or 1952 and/or beneficiaries who, following a class action brought before an employment tribunal in 2008, obtained a pardon under Law No. 2014-1654 of 29 December 2014 on finance for 2015 from all miners who had been dismissed for having participated in these strikes.

²⁴ CGT class action against Safran Aircraft Engines (formerly Snecma) for trade union discrimination against 34 union delegates, initiated in 2017.

²⁵ CGT class action against the *Caisse d'Épargne d'Ile-de-France* for gender discrimination.

²⁶ Documentary *L'honneur des gueules noires* by Jean-Luc Raynaud.

²⁷ Impact study Law No. 2016-1547 of 18 November 2016 on the modernisation of 21st century justice, p. 168.

²⁸ See Chappe V.-A., Keyhani N., *La mobilisation collective des cheminots PS25 contre la SNCF*, Research report, 2021; Defender of Rights, *La mobilisation collective des cheminots PS25 contre la SNCF : dynamique et tensions d'une action judiciaire groupée*, Research & results, 2021, 13 p.

²⁹ When the class action seeks cessation of the violation, the judge, if he finds that it exists, orders the defendant to cease and to take, within a period to be specified, all the necessary measures for this purpose, if necessary with the help of a third party designated by him.

³⁰ On the subject of discrimination, given the difficulties for the victim to provide proof of the discrimination, the law mitigates the principle of the burden of proof before the civil and administrative courts pursuant to Articles L.1154-1 of the French Labour Code and 4 of Law No. 2008-496 of 27 May 2008. This principle facilitates the establishment of proof for victims who have to gather evidence establishing a presumption of discrimination. It is for the respondent to demonstrate, secondly, that his actions are not discriminatory.

³¹ See the brochure of the Defender of Rights which presents this method of testing discrimination for all those who wish to use it.

³² Circular INTK1229185C of 28 November 2012 on the conditions for examining applications for residence permits lodged by foreign nationals in an irregular situation. It specifies, among other things, the conditions for residency through an "employee" card.

³³ Fight led in 2014 by stylists, manicurists and employees of hairdressers on Boulevard de Strasbourg to assert their rights with the bosses exploiting them. For more details see: Poulain M., *"Mafia et traite boulevard de Strasbourg"*, *Gisti - Revue Plein droit*, 2017, 113.

³⁴ The labour inspectorate, accompanied by the foreign labour manager of DIRECCTE, will make an initial observation and will note various offences in terms of health and safety, payment of salaries and salary levels, failure to declare to social bodies, etc. The inspection report, drawn up retrospectively after several observations, will list no fewer than 14 offences.

³⁵ https://www.liberation.fr/france/2021/01/26/travail-dissimule-des-femmes-de-menage-ukrainiennes-exploitees-et-sous-emprise_1818491/.
<https://www.nouvelobs.com/justice/20210127.OBS39424/onze-femmes-de-menage-ukrainiennes-exploitees-par-une-entreprise-liee-a-airbnb-portent-plainte.html>.

³⁶ <https://www.humanite.fr/social-eco/esclavage-moderne/vies-de-paris-la-traite-detres-humains-derriere-une-association-daide>.
<https://www.leparisien.fr/faits-divers/lassociation-daide-aux-migrants-qui-exploite-des-sans-papiers-devant-le-tribunal-de-paris-21-01-2022-PAOFV5LH7ZHEZMJKT04A6AL6MA.php>.
<https://www.franceinter.fr/justice/censee-aider-les-sans-papiers-l-association-vies-de-paris-devant-la-justice-pour-traite-des-etres-humains>.

³⁷ For more details, see: Poulain M., *"Mafia et traite boulevard de Strasbourg"*, *Gisti - Revue Plein droit*, 2017, 113.

- ³⁸ Defender of Rights, Decision 2019-108 of 19 April 2019 on the situation of 25 workers in an irregular situation finding themselves victims of discriminatory treatment by their employer, a company in the building sector, due to their origin and nationality.
- ³⁹ https://www.lemonde.fr/societe/article/2021/12/21/travailleurs-sans-papiers-une-enquete-vise-une-entreprise-de-collecte-de-dechets_6106879_3224.html.
- ⁴⁰ See Article 4 of Law No. 2008-496 of 27 May 2008 issuing various provisions adapting the national legislation to Community law in the field of combating discrimination.
- ⁴¹ Court of Cassation, Social Law Chamber, 3 April 2020 No. 00-42.583.
- ⁴² Court of Cassation, Social Law Chamber, 12 February 2014, No. 12-27.420 unpublished judgment.
- ⁴³ Court of Cassation, Social Law Chamber, 29 June 2011, No. 10-15.792.
- ⁴⁴ Court of Cassation, Social Law Chamber, 14 June 2007, No 05-45.219.
- ⁴⁵ Court of Cassation, Social Law Chamber, 8 July 2020, No. 19-13.637.
- ⁴⁶ *Ibid.*
- ⁴⁷ CJEC, 26 June 2001, case C-381/99, *Susanna Brunnhofner v. Bank der österreichischen Postsparkasse AG*, points 51 to 62.
- ⁴⁸ Court of Cassation, Social Law Chamber, 8 December 2009, No. 08-44.003.
- ⁴⁹ Court of Cassation, Social Law Chamber, 4 July 2000, No. 98-43285; Social Law Chamber, 28 June 2006, No. 04-46419; Social Law Chamber, 7 November 2018, No. 16-20759.
- ⁵⁰ Court of Cassation, Social Law Chamber, 2 July 2014, No. 12-24175 et al.
- ⁵¹ Court of Cassation, Social Law Chamber, 29 June 2011, No. 10-15.792. Bulletin 2011, V, No. 166.
- ⁵² CJEU, 19 April 2012, case C-415/10, *Galina Meister cl Speech Design Carrier Systems GmbH*, spec. §§ 32 and 47 and availability.
- ⁵³ Defender of Rights, Decision 2020-101 of 4 May 2020 on a refusal to hire under a permanent employment contract an employee already working at the company for 8 months on a temporary basis due to pregnancy and gender, for example.
- ⁵⁴ Court of Cassation, Social Law Chamber, 24 April 2013, No. 11-15.204.
- ⁵⁵ Court of Cassation, Social Law Chamber, 1 July 2009, No. 08-40.988.
- ⁵⁶ Court of Cassation, Social Law Chamber, 29 June 2011, No. 10 14.067.
- ⁵⁷ Court of Cassation, Social Law Chamber, 20 September 2017, No. 16-20.238.
- ⁵⁸ Article 119 of the Treaty on European Union
- ⁵⁹ CJEC, 27 October 1993, case C-127/92, *Enderby, C-127/92, Rec. p. I-5535*, point 17.
- ⁶⁰ CJEC, 9 February 1999, case C-167/97, *Seymour-Smith and Perez*.
- ⁶¹ HALDE, Deliberation No. 2010-129 of 31 May 2010 on a claim relating to discrimination in employment on the grounds of origin.
- ⁶² Court of Cassation, Social Law Chamber, 15 December 2011, No. 10-15.873.
- ⁶³ Note that the sound of the surnames and/or first names is used here as a support for stereotyped perceptions and not as a reliable indicator of a given origin.
- ⁶⁴ Court of Cassation, Social Law Chamber, 15 December 2011, No. 10-15.873.
- ⁶⁵ CJEU, 3 October 2019, case C-274/18, *Schuch-Ghannadan*.
- ⁶⁶ Les tests de situation sont nécessaires contre la discrimination | Unia.
- ⁶⁷ Data Mining means “data exploration” or “the extraction of knowledge from data”. Data Mining consists of a family of automatic or semi-automatic tools allowing a large amount of data contained in a database to be analysed.
- ⁶⁸ Data matching or coupling is the process of linking data from different sources.
- ⁶⁹ Historical materialism is a philosophy formulated in the middle of the nineteenth century by Karl Marx and Friedrich Engels, according to which historical events are determined not by ideas but by social relations (particularly the links between social classes) and by the impact of changes to modes of production on ways of thinking.
- ⁷⁰ Law No. 2016-1547 of 18 November 2016 on the modernisation of justice of the twenty-first century (Article 60).

- ⁷¹ Employment Tribunal (CPH) of Paris, 17 December 2019, No. 17/10051.
- ⁷² Pecaut-Rivolier L., *Lutter contre les discriminations au travail : un défi collectif en entreprise*, Report, 2013, p. 27.
- ⁷³ *Action Travail des Femmes v. Canadian National Railway Company* (1987) 1 S.C.R. 1114. 1139 (1987) 8CHRR D/4210 (SCC); Mercat-Bruns M., “La discrimination systémique : un concept venu d’ailleurs mais un défi commun”, RDT, 2020, p. 423.
- ⁷⁴ Mercat-Bruns M., “*Les figures de la discrimination au travail : quelle cohérence ?*”, RDT, 2020, p. 25.
- ⁷⁵ “Constitutes direct discrimination the situation in which, on the grounds of origin...”, Art. 1 Law No. 2008-496 of 27 May 2008 issuing various provisions adapting the national legislation to Community law in the field of combating discrimination.
- ⁷⁶ “Constitutes indirect discrimination a provision, criterion or practice that is apparently neutral but is likely to cause, for one of the reasons mentioned in the first paragraph, a *particular disadvantage* for individuals...”, Art. 1, Law No. 2008-496 of 27 May 2008.
- ⁷⁷ See above note², Law of 2016.
- ⁷⁸ Paris Criminal Court, 20 December 2019, handed down in the context of the proceedings against France Telecom, <https://urlz.fr/bAtL>.
- ⁷⁹ Séréno S., “Épilogue de la bataille judiciaire des Chibanis contre la SNCF (Paris, 31 janv. 2018)”, *Gaz. Pal.*, 2018, No. 20, p. 70; Jounin N., *Chantier interdit au public*, La Découverte, 2009.
- ⁸⁰ Dubet F., Cousin O., Macé E., Rui S., *Pourquoi moi ? L’expérience de la discrimination*, Le Seuil, 2013.
- ⁸¹ Hart M., Secunda P., “A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions”, *Fordham Law Review*, 2009, 78, p. 37.
- ⁸² Defender of Rights, *Rapport relatif aux relations Police/Citoyens et aux contrôles d’identité*, 2014; Defender of Rights, *Enquête sur l’accès aux droits (volume 1). Relations police/population : le cas des contrôles d’identité*, 2017, 44 p.
- ⁸³ CNCDH, *Prévention des pratiques de contrôles d’identité discriminatoires et/ou abusives*, Report, 2016.
- ⁸⁴ ACAT, *L’Ordre et la force : enquête sur l’usage de la force par les représentants de la loi en France*, 2016.
- ⁸⁵ Open Society Justice Initiative, *Equality Betrayed: The Impact of Ethnic Profiling in France*, 2013.
- ⁸⁶ Lévy R., “La police française à la lumière de la théorie de la justice procédurale”, *Déviante et Société*, 2016, 40, pp. 139-164.
- ⁸⁷ Human Rights Watch, *The root of humiliation. Abusive identity checks in France*, Report, 2012, 62 p.
- ^{88, 89} Human Rights Watch, “*They talk to us like we’re dogs*”: *abusive police stops in France*, Report, 2020, 50 p.
- ⁹⁰ ECRI, “ECRI Report on France (fourth monitoring cycle)”, Adopted on 29 April 2010.
- ⁹¹ European Union Agency for Fundamental Rights (FRA), *Data in Focus Report - Police stops and minorities*, 2008.
- ⁹² Council of Europe, Report by Nils Muizniek following his visit to France from 22 to 26 September 2014. Published on 17 February 2015.
- ⁹³ See Piazza P., *Histoire de la carte nationale d’identité*, Edition Odile Jacob, 2004.
- ⁹⁴ UN, Committee on Economic, Social and Cultural Rights General Comment 20 - *Non-discrimination in economic, social and cultural rights*.
- ⁹⁵ Court of Cassation, 1st civ., 9 November 2016, No. 15-25.876.
- ⁹⁶ See Report of the Independent Commission on Sexual Abuse in the Church (2021) (Sauvé report); Council of State, Decision No. 456924 of 22 November 2021, ordering the improvement of hygiene conditions in custody.
- ⁹⁷ Court of Cassation, 1st civ., 9 November 2016, No. 15-25.873.
- ⁹⁸ Paris Court of Appeal, 8 June 2021, No. RG 19/00873.
- ⁹⁹ See: Chanu A., Berlan C., “*Reconnaissance de discrimination raciale systémique envers des travailleurs maliens sans-papiers*”, *Droit social / Discriminations*, 2020, pp 18-19.
- ¹⁰⁰ Jounin N., *Chantier interdit au public. Enquête parmi les travailleurs du bâtiment*, Edition La découverte, poche, 2009.
- ¹⁰¹ AVFT (2017). “*Condamnation de la société H. REINIER pour harcèlement sexuel.*”
- ¹⁰² Benelli N., *Nettoyeuse, comment tenir le coup dans un sale boulot*, Edition Seismo, coll. “Questions de genre”, 2011.
- ¹⁰³ Defender of Rights, *Decision MLD-2015-247* of 12 October 2015 on acts of sexual harassment and reprisals for reporting such events.

- ¹⁰⁴ The Equality Law Clinic (ELC) is attached to the Perelman Centre and the Centre for European Law of the Faculty of Law and Criminology at the Université Libre de Bruxelles (ULB). <https://equalitylawclinic.ulb.be>.
- ¹⁰⁵ See, for example, Poillot E. (dir.), *L'enseignement clinique du droit. Expériences croisées et perspectives pratiques*, Larcier, 2014.
- ¹⁰⁶ Fredman S., "Substantive Equality Revisited", I-CON (2016), 14, 712–738 (*Oxford Legal Studies Research Paper No. 70/2014*).
- ¹⁰⁷ On the circulation of the notion of disproportionate impact, see Rorive I., "Lutter contre les discriminations", in C. Bricteux and B. Frydman (dir.), *Les défis du droit global*, Brussels, Bruylant, coll. Penser le droit, 2018, pp. 30-45.
- ¹⁰⁸ Judgment of the Grand Chamber of the ECHR, 13 November 2007 (request No. 57325/00).
- ¹⁰⁹ Judgment handed down by the 4th Section of the ECHR, 25 July 2017 (request No. 17484/15).
- ¹¹⁰ The third-party intervention procedure allows "a person or body not party to legal proceedings to provide information to the court on matters of fact or law" [Salmon 2001]. Its terms vary depending on the jurisdiction or quasi-jurisdiction concerned.
- ¹¹¹ Third-party intervention of the Equality Law Clinic in collaboration with the Human Rights Centre of the UGent, in case Y v. France (request no. 76888/17) submitted on 23 November 2020 to the ECHR.
- ¹¹² Third-party intervention of the Equality Law Clinic in collaboration with the Human Rights Centre of the UGent, in case M. v. France (request no. 42821/18) submitted on 24 February 2021 to the ECHR.
- ¹¹³ Third-party intervention of the Equality Law Clinic in collaboration with the Human Rights Centre of the UGent, in case Mykias v. Belgium (request no. 50681/20) submitted on 25 May 2021 to the ECHR.
- ¹¹⁴ Third-party intervention of the Equality Law Clinic in collaboration with the Refugee Law Clinic, in case N.R. V. Belgium (request no. 63620/19) submitted on 18 May 2021 to the ECHR.
- ¹¹⁵ The Committee on Economic, Social and Cultural Rights (CESCR) is the body of 18 independent experts who oversee the implementation of the International Covenant on Economic, Social and Cultural Rights by its States parties. The Committee was established pursuant to ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the supervisory functions entrusted to the United Nations Economic and Social Council (ECOSOC) in Part IV of the Covenant. Approved on 10 December 2008 and entered into force on 3 May 2013, the Optional Protocol provides for the implementation of the right to appeal proceedings. As at 31 December 2021, 24 States had ratified it, including Belgium and France.
- ¹¹⁶ Findings communicated to the Belgian State on 12 October 2021 following communication no. 61/2018.
- ¹¹⁷ Third-party intervention of the Equality Law Clinic submitted to the CESCR on 25 March 2020.
- ¹¹⁸ Income guarantee for the elderly (GRAPA).
- ¹¹⁹ For 2018, the poverty line for a single person was set at €1,185 per month: STATBEL (Belgian Office of Statistics), "SILC Indicators 2004 2018", June 2019, available online: <https://statbel.fgov.be/fr/themes/menages/pauvrete-et-conditions-de-vie/risque-de-pauvrete-ou-dexclusion-sociale#figures>.
- ¹²⁰ Among the cyclical factors, related to the owner, leading to forced eviction, a Brussels study lists five grounds, three of which are linked to a unilateral termination without cause (emphasis added): (i) increase in rent; (ii) desire to occupy the property; (iii) change of owner due to succession or sale; (iv) desire to change tenant; (v) major renovation work (Brussels-Capital Health and Social Observatory, "Précarités, mal-logement et expulsions domiciliaires en Région bruxelloise", *Brussels Report on the state of poverty, 2018*, p. 62).
- ¹²¹ Rassemblement Bruxellois pour le Droit à l'Habitat (RBDH), "Crise du logement : le logement social", 10 October 2019, available online: <http://www.rbdh-bbrow.be/spip.php?article1958>; see also Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context (Leilani Farha), Report UN/Doc A/HRC/34/51, 18 January 2017, §34.
- ¹²² Brussels-Capital Health and Social Observatory, "Précarités, mal-logement et expulsions domiciliaires en Région bruxelloise", *op. cit.*, p. 100.
- ¹²³ Point 12.3 of the findings of the CESCR in the case *L.J.W.*
- ¹²⁴ Law No. 2016-1547 of 18 November 2016 on the modernisation of justice of the twenty-first century, Art. L.1134-10 C. Trav.
- ¹²⁵ Judicial Court of Paris, 15 December 2020, No. RG 18/04058.
- ¹²⁶ Machine learning is a field of study of artificial intelligence that relies on mathematical and statistical approaches to give computers the ability to "learn" from data, i.e. improve their performance to solve tasks without being explicitly programmed for each one.
- ¹²⁷ Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) is software that is used by the courts to determine the risk of reoffending.

- ¹²⁸ Quebec is one of the ten provinces that, together with three territories, make up Canada. The division of powers between state and federal government is provided for in the Canadian Constitution, sections 91 et seq. of the Constitution Act, 1867. It should be reiterated that because of this federal context and the history of Quebec, Quebec law has both a civil law tradition with respect to private law and a *common law* tradition for public law.
- ¹²⁹ *Charter of Human Rights and Freedoms*, CQLR, c. C -12 (hereinafter referred to as the “Charter”).
- ¹³⁰ The current name and responsibilities of the Commission result from the merging in 1995 of the mandates of the Commission des droits de la personne (Human Rights Commission) and the Commission de protection des droits de la jeunesse (Youth Rights Commission). *Law on the Commission des droits de la personne et des droits de la jeunesse (CDPDJ – Human Rights and Youth Rights Commission)*, L.Q. 1995, c. 27, Art. 2.
- ¹³¹ Charter, section 111.
- ¹³² Charter, section 71.
- ¹³³ Charter, sections 71 and 74 to 85.
- ¹³⁴ Charter, section 80.
- ¹³⁵ *CN (the Canadian National Railway Company) v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114.
- ¹³⁶ *Bijou Cibuabua Kanyinda v. Attorney General of Quebec*, 500-17-108083-190. This application for judicial review was initiated by a mother seeking asylum, on a personal basis, but the Commission will have the opportunity to support the latter’s arguments at trial, in order to inform the court on the issues of indirect discrimination on the basis of gender, social status and national origin, among others. This type of intervention allows the Commission to implement its unique expertise on various rights issues, in matters that do not necessarily go through its complaint and investigation mechanism.
- ¹³⁷ See, for example, the case concerning the wage freeze imposed on young teachers in the public network, where the unequal treatment resulting from a remuneration policy that has the effect of disadvantaging teachers at the beginning of their careers was considered discriminatory by the HRT. The original complaint, brought by some sixty people, affected almost 13,000 other complainants then added to the recourse to challenge the changes made to the collective labour agreement. This large number of complainants raised several difficulties in the HRT recognising the settlement between the Commission, the union and the government. See: *Morin v. Quebec (Attorney General)*, 2009 QCTDP 8, and more broadly, to put this case into context: Normand Morin, *Le gel de l’avancement de l’échelon salarial chez les jeunes enseignants du Québec (1997-2009)*, submission to the Faculty of Graduate Studies of Laval University, 2010, [Online]. <https://www.collectionscanada.gc.ca/obj/thesescanada/vol2/QQLA/TC-QQLA-27184.pdf>.
- ¹³⁸ Charter, sections 79 and 80.
- ¹³⁹ See, for a recent example that led to individual monetary compensation for complainants, but also included a systemic order to amend the collective agreement for all employees: *Aluminerie de Bécancour Inc. v. CDPDJ (Beaudry et al.)*, 2021 QCCA 989.
- ¹⁴⁰ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2015 SCC 39.
- ¹⁴¹ *Id.*, par. 103.
- ¹⁴² Note that in the event of failure to comply with orders issued by the court, whether they are individual in scope or returned in the public interest, the ordinary rules for the enforcement of judgments in civil matters are applicable. For example, the parties convicted in default of execution could be found guilty of contempt of the court and may be given a criminal fine, or even community service work or a prison sentence.
- ¹⁴³ *Commission des droits de la personne et des droits de la jeunesse (Beaudoin et al.) v. Gaz Métropolitain Inc.*, 2008 QCTDP 24; *Gaz Métropolitain Inc. v. Commission des droits de la personne et des droits de la jeunesse*, 2011 QCCA 1201. It should be noted that the complaint was initially brought by an organisation that defends women’s rights, Action Travail des Femmes.
- ¹⁴⁴ The Charter provides, in sections 86 et seq., for the possibility of setting up equal access employment programmes, which, in particular, promote, subject to equivalent competence, the hiring of persons belonging to certain historically discriminated groups. A specific law also regulates this type of programme in some public bodies: *Act respecting equal access to employment in public bodies*, CQLR, c. A-2.01.
- ¹⁴⁵ Bombardier stated at the trial that the US authorities had confirmed this error in an oral exchange, but formal evidence could not be provided in the course of the proceedings.
- ¹⁴⁶ *Commission des droits de la personne et des droits de la jeunesse (Human Rights and Youth Rights Commission) (Latif) v. Bombardier Inc. (Bombardier Aerospace Training Centre)*, 2010 QCTDP 16.
- ¹⁴⁷ In accordance with sections 4, 10 and 12 of the Charter.
- ¹⁴⁸ *Commission des droits de la personne et des droits de la jeunesse, Racial profiling: Context and definition*, Michèle Turenne, 2005.

¹⁴⁹ *Commission des droits de la personne et des droits de la jeunesse (De Bellefeuille) v. City of Longueuil*, 2020 QCTDP 21.

¹⁵⁰ Protected by sections 1 and 5 of the Charter respectively.

¹⁵¹ At the time the application was submitted, this organisation was known as the “Commission scolaire de Montréal” (Montreal School Board). School service centres are intermediate public organisations between the Ministry of Education and schools. Their mandate is to organise educational services in pre-school, primary and secondary establishments, in specialist schools for students with disabilities or learning difficulties and in vocational training and adult education centres.

¹⁵² See, on this type of recourse: Éducaloi, “Qu’est-ce qu’une action collective ?”, [Online] <https://educaloi.qc.ca/capsules/quest-ce-quune-action-collective/> See also, on this collective action in particular, the FAQ posted by the Commission <https://www.cdpcj.qc.ca/fr/foire-aux-questions/action-collective>.

¹⁵³ Note that the Charter does not oblige the Commission to bring its claims for discrimination before the HRT (see in particular section 80 of the Charter). In this case, the HRT does not have jurisdiction in matters of collective action, an area reserved for the Superior Court.

¹⁵⁴ Please note that the disputed form includes 14 questions relating to the physical and psychological health of candidates. Most are open, i.e. they are formulated very broadly and are not targeted in time. If the applicant answers in the affirmative to any of the questions, the applicant must provide additional details on his or her state of health and the employer reserves the right to request a medical examination to which the candidate is obliged to consent. If the candidate refuses, his or her application will not be considered. For more details, see the Commission’s request for authorisation, available on the Quebec Registry of Class Actions, [Online] <https://www.registredesactionscollectives.quebec/fr/Consulter/ApercuDemande?NoDossier=500-06-001021-191>.

¹⁵⁵ See, for example, on the practical application of a request for accommodation: COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, *Guide d’accompagnement - Traitement d’une demande d’accommodement*, Jean-Sébastien Imbeault et al., 2012 (updated in 2018), [Online] https://cdpcj.qc.ca/storage/app/media/blocs-informations/pour-en-savoir-plus-accommodement-raisonnable/Guide_virtuel_accommodement.pdf.

¹⁵⁶ Charter, section 71.

¹⁵⁷ *Commission des droits de la personne et des droits de la jeunesse, Racial profiling and systemic discrimination of racialized youth, Report on the consultation on racial profiling and its consequences*, Paul Eid, Johanne Magloire and Michèle Turenne, 2011.

¹⁵⁸ *Commission des droits de la personne et des droits de la jeunesse, Bilan de la mise en œuvre des recommandations du rapport de la consultation de la Commission des droits de la personne et des droits de la jeunesse sur le profilage racial et ses conséquences*, Evelyne Pedneault, Amina Triki-Yamani et al., 2020.

¹⁵⁹ *Commission des droits de la personne et des droits de la jeunesse, Mesurer la discrimination à l’embauche subie par les minorités racisées : résultats d’un « testing » mené dans le grand Montréal*, Paul Eid et al., 2012.

¹⁶⁰ *Commission des droits de la personne et des droits de la jeunesse, Xenophobic and notably islamophobic acts of hate: Research carried out across Quebec*, Houda Asal, Jean-Sébastien Imbeault and Karina Montminy, 2019.

¹⁶¹ See sections 86 et seq. of the Charter. If this recommendation were not followed, then the Commission could contact the HRT.

¹⁶² The law that applies to public bodies more specifically identifies five groups: women, native people, “visible minorities” (i.e. people who are not white and who are not native people), “ethnic minorities” (persons whose mother tongue is not French or English, who are neither native people nor from a visible minority) and persons with disabilities (according to a precise legislative definition). For more information on the objectives and functioning of these programmes, see <https://www.cdpcj.qc.ca/fr/nos-services/activites-et-services/en-savoir-plus-sur-les-programmes-dacces-legalite-en-emploi>.

¹⁶³ *Defender of Rights, Opinion 15-13 of 2 June 2015 on the proposal for a law introducing a class action for discrimination and the fight against inequalities*.

¹⁶⁴ See the Declaration of the Defender of Rights (2020), “*Algorithmes : prévenir l’automatisation des discriminations*”, in partnership with the CNIL, May 2020.



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