

Report

# Discrimination and Origins: the Urgent Need for Action

# Introduction

The unprecedented health crisis gripping France has laid bare the glaring social and territorial inequalities plaguing our society. It has also sparked particularly alarming cases of stigma against certain groups perceived as responsible for or carriers of the epidemic.

Since the adoption of the June and November 2000 European Directives, the law on non-discrimination has gone through considerable reform<sup>1</sup>. And yet, twenty years on and despite the high hopes at the time, origin-based discrimination is still widespread across France. People of foreign origin, or perceived as such, have to contend with discrimination in all areas of day-to-day life and at different times of life: from school to the workplace, in accessing housing or other goods and services, or in their dealings with the authorities and law enforcement agencies.

**The referrals to the Defender of Rights, its investigations and the testimonies gathered by its teams and delegates working nationwide show that discrimination based on origin or a related ground is becoming more commonplace.** It accounts for more than 1,840 referrals a year to the institution's head office, which is a third of all referrals bearing on discrimination<sup>2</sup>.

Official data and public reports corroborate the extent of such discrimination and its systemic dimension.

When job-hunting for example, individuals with Arabic-sounding surnames have to send out around three CVs to secure an interview, compared with just two for applicants with French-sounding surnames<sup>3</sup>. When applying for a private rental property, individuals with Arabic or African-sounding surnames are, respectively, 27% and 31% less likely to secure a first appointment with the owner<sup>4</sup>. The results of the statistical studies are indisputable: people of foreign origin, or perceived as such, are more exposed to unemployment, social insecurity, poor housing conditions and health problems<sup>5</sup>. Research highlights inequalities in schooling related to origin and territory, which jeopardise the professional integration of young people and their subsequent living conditions<sup>6</sup>. Finally, people of immigrant origin, or perceived as such, are overexposed to police checks and more strained relations with law enforcement agencies<sup>7</sup>.

As the Defender of Rights repeatedly points out, **discrimination is not an opinion, a feeling or a claim.** It has to do with a legal framework which lays down analytical guidelines for identifying unequal treatment, to ensure that a fundamental right is implemented: that of not being discriminated against.

<sup>1</sup> Council of the European Union, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ*, L. 180, 19 June 2000; Council of the European Union, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ*, L. 303, 2 December 2000.

<sup>2</sup> Defender of Rights, *Annual Activity Report 2019-2020*, 2020.

<sup>3</sup> DARES and ISM Corum, "Discrimination à l'embauche selon 'l'origine' : que nous apprend le testing auprès de grandes entreprises ?", *Dares Analyses*, no. 076, 2016, p. 2.

<sup>4</sup> Le Gallo J., L'Horty Y., du Parquet L., Petit P., *Les discriminations dans l'accès au logement en France : un testing de couverture nationale*, 2018, p. 30. To find out more, see Defender of Rights, *Letting without discriminating. A handbook for use by landlords*, 2017.

<sup>5</sup> See, in particular: France Stratégie, *Le coût économique des migrations*, 2016 ; Bruneau C., Dherbécourt C., Flamand J. & Christel G., "Marché du travail : un long chemin vers l'égalité", *La note d'analyse*, no. 42, France Stratégie, 2016; Baudet-Caille V. & Mony P., "Discriminations : quel impact sur la santé ?", *Plein droit*, no. 86, 2010/3.

<sup>6</sup> Brinbaum, Y., "Trajectoires scolaires des enfants d'immigrés jusqu'au Baccalauréat : rôle de l'origine et du genre", *Éducation et Formations*, no. 100, 2019.

<sup>7</sup> Defender of Rights, *Survey on access to rights. Vol.1: Police/population reports. The case of identity checks*, 2017; Jobard F. & Levy R., "Les contrôles d'identité à Paris", *Questions pénales*, CESDIP, 2010, 23 (1), pp. 1-4.

Specifically, **origin-based discrimination targets individuals not for what they do but for what they are or are presumed to be. It involves the projecting of stereotypes associated with individuals based on outward signs over which they have no control** (skin colour, facial features, hair texture, first name, surname, accent) or on socio-cultural characteristics (religion, place of residence), that suggest a foreign origin. The level of exposure to discrimination does not so much have to do with a person's current or past foreign nationality as it does with these different "signs", which fuel racial discrimination and stereotypes. Discrimination therefore concerns not only foreign nationals but also French citizens who are not fully recognised as such.

The question of origin is thus tied more largely in with a process of essentialisation of social groups: grounded in a symbolic distinction between "us" and "them", this translates into concrete and substantive effects (such as discrimination, harassment, segregation, assault or social inequalities).

In legal terms, origin-based discrimination may be acknowledged not only according to the origin ground but also other prohibited grounds of discrimination such as actual or presumed affiliation or otherwise with an ethnic group, nation or alleged race; physical appearance; name; actual or presumed affiliation or otherwise with a specific religion; place of residence; ability to communicate in a language other than French.

Origin-based discrimination is not exactly the same thing as racism. Racism has to do with an ideology or system of domination based on a division of groups with some considered superior to others, owing to their alleged origin or "race". It thus amounts to "an attitude of systematic hostility towards a category of individuals", fuelled by a certain number of prejudices about their behaviour, culture or lifestyle<sup>8</sup>.

The law distinguishes acts of racism from discrimination, and the courts do not consider these two notions in the same way. In law, the 29 July 1881 Act on freedom of the press makes provision for punishment of spoken or written words or images which stigmatise, humiliate or stoke racism. Racist violence constitutes an aggravating circumstance of crimes and offences under the French Criminal Code.

**Discrimination law, meanwhile, bears on everyday measures and practices which are often more subtle<sup>9</sup>.** Discrimination is thus legally characterised as unequal treatment on the basis of a prohibited ground in a certain number of contexts defined by law (including employment, housing or access to goods and services). For example, in terms of employment, it might entail an applicant being refused a job or promotion because of his or her origin. Pursuant to the Act of 27 May 2008, discrimination may be punished whether or not such unequal treatment was deliberate or conscious<sup>10</sup>.

**That said, origin-based discrimination and racism do form a continuum,** as illustrated by the first French anti-racism legislation which, in 1972, criminalised discrimination and hate speech on the basis of "an individual's *origin, or affiliation or otherwise with an ethnic group, nation, race or specific religion*"<sup>11</sup>.

<sup>8</sup> CNCDH, *2018 report on the fight against racism, anti-Semitism and xenophobia*, 2018, p. 24.

<sup>9</sup> See the platform and resource centre set up by the Defender of Rights: <http://egalitecontreracisme.fr/>.

<sup>10</sup> Act No. 2008-496 of 27 May 2008, which sets out various provisions for adaptation to EU legislation on combating discrimination.

<sup>11</sup> Act No. 72-546 of 1 July 1972 on combating racism, known as the "*Pleven Act*", introduced into the French Criminal Code the first sanctions against discrimination on the basis of the victim's affiliation or otherwise to a nation, ethnic group, race or specific religion in certain situations (refusal or conditional provision of a good or service, recruitment refusal or dismissal).

Similarly, repeated racist remarks characterise a situation of discriminatory harassment, which in law constitutes a form of discrimination.

Sociologists thus describe discrimination as “racism in action”, “in the sense that it is the expression of racist perceptions in the marginalisation [of victims] from economic resources”<sup>12</sup>. To gain a clearer idea of what origin-based discrimination is, it is therefore necessary to take these perceptions and their impact into consideration as part of a broader analysis of the collective perceptions, social relationships and socio-economic inequalities shaping our society; in other words, in terms of their systemic dimension.

**Such discrimination, which is often low-profile, has tangible and long-lasting adverse effects on the pathways of millions of people, challenging their most fundamental rights.**

Indeed, a significant proportion of the French population has experienced origin-based discrimination. Foreign-born citizens represent 9.7% of the French population, and more than half were born outside Europe. What is more, of the European Union countries with over a million inhabitants, France has the largest population of descendants of second-generation immigrants, both in absolute and relative terms. In 2014, the population of individuals born in France with at least one immigrant parent thus stood at 9.5 million, which is 14.3% of the total population. Foreign nationals or French nationals of foreign origin therefore account for nearly 21% of France’s population. If we add all of the people whose two parents are French but are victims of discrimination because they are assigned a foreign origin, we begin to grasp the scale of a widespread, yet hugely under-estimated phenomenon.

At a time when there has been encouraging progress in terms of gender equality and the fight against LGBT discrimination in recent

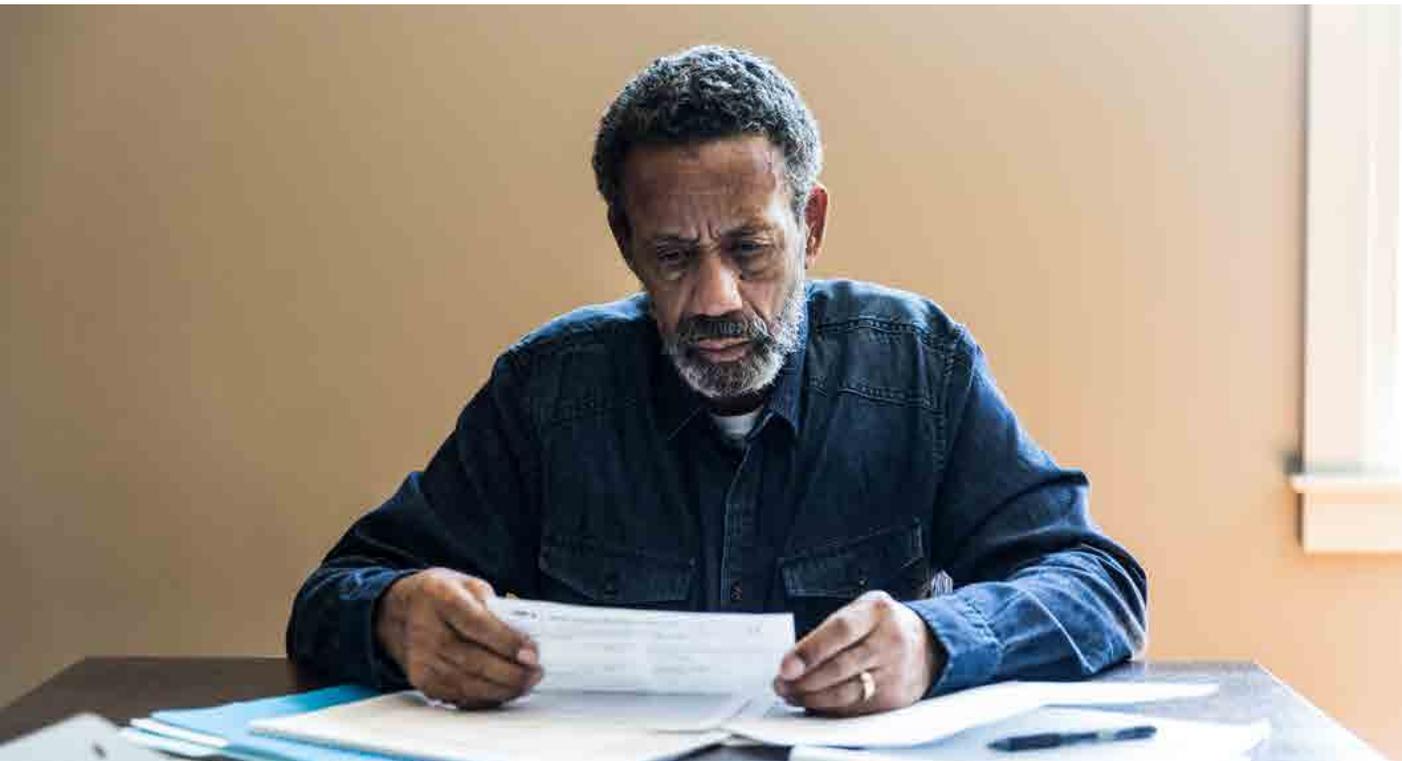
years, the public authorities have not afforded the same attention to origin – far from it. In the media and institutional speeches, the subject of racial discrimination gets buried in the approach to social or territorial inequalities, or amidst news in brief sections, preventing its recognition through other analyses.

How is it possible, when it is now fully identified thanks to existing research, that such discrimination has become so invisible in the public debate, and **that there is no longer a single meaningful public policy dedicated to combating racial discrimination?**

The lack of consideration of the data and studies that have built up over the past two decades shows a blindness on the part of the public authorities and of each of us to these issues and reflects a form of political denial which is part of the problem and partly to blame for its persistence; it is one of the reasons driving the perpetuation of such discrimination.

Although the most overtly discriminatory situations are sometimes reported and punished, other less visible or more indirect forms of origin-based discrimination so often go unrecognised and unpunished. Today, awareness of the most widespread forms of discrimination, in the employment and housing sectors, has, admittedly, improved, but a dedicated public policy where they are concerned does not seem to have been forthcoming. Other forms of discrimination or discriminatory harassment, which happen below the radar – such as online (via collaborative platforms for example) or when accessing certain types of goods or services (bank loans, help setting up a business, etc.) – also need to be identified and tackled. There is also an urgent need to acknowledge the often less known or visible discrimination against certain social groups, especially Roma and Asian communities, which is escalating further amid the current health crisis.

<sup>12</sup> Hamel C., Lesné M. & Primon J.-L., “La place du racisme dans l’étude des discriminations”, *Documents de travail*, no. 205, 2014, p. 3.



The framework for public action in this regard also encompasses a muddle of different concepts: fight against discrimination, promotion of diversity, inclusion, equality policy, secularism, racism or integration. This tends to lead to a trade-off between the policy issues to focus on, discriminatory situations being played down and inaction on the part of the public authorities. The question of identity seems to have been pushed aside in favour of equality.

The law on discrimination has made significant headway, but legal action is a daunting process for victims and seldom effective as a deterrent and solution to combating discrimination. The fight against origin-based discrimination must therefore be declared a political priority in all urgency, by drafting a national strategy and implementing comprehensive, structural and coordinated plans aimed at rooting out systemic discrimination.

This report sets out both to highlight the scale and consequences of this discrimination, based on the findings of the Defender of Rights and French public research (Part 1) and to draw attention to the limitations of legal action without a national policy for combating origin-based discrimination (Part 2). Finally, in light of the urgent need to act and defend the right of citizens of all origins to participate fully in French society, the Defender of Rights urges the public authorities to take action and recommends structural reforms (Part 3).

**Origin-based discrimination in France profoundly undermines attainment of the goals enshrined in the Republican pact. These issues have been overlooked by the public authorities for too long: they cause rifts across society and threaten the equal dignity of all.**



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# I. A recognised widespread phenomenon with harmful effects

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The Defender of Rights' findings on the discrimination to which individuals perceived as being of non-European origin are exposed, through its referrals, are corroborated by official data and research: differences in treatment on the basis of origin are a widespread phenomenon. Extending across all spheres of community life, these sometimes overtly discriminatory practices are a daily burden for immigrants, descendants of immigrants, or individuals perceived as such, with long-lasting and harmful consequences on the life courses and social relations of a significant section of France's population.

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## A. Routine discrimination that has become commonplace

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Although the term “discrimination” is steadily becoming more mainstream, the law provides precise definitions of the different forms of discrimination.

### **Discrimination: what are we talking about?**

Discrimination is defined as the unequal and unfavourable treatment of an individual or group of individuals on the basis of prohibited grounds and in a specific area defined by law such as employment, education, housing or healthcare.

Today, nearly 25 discrimination grounds are stipulated in Article 225-1 of the French Criminal Code and the Act of 27 May 2008, including origin, gender, physical appearance or the economic circumstances of an individual.

The “*origin*” ground forms a cornerstone of France's legislative package on non-discrimination. Other prohibited grounds may also be cited in recognition of origin-based discrimination: “*actual or presumed affiliation or otherwise with an ethnic group, nation or alleged race*”; “*surname*” as well as “*actual or presumed affiliation or otherwise with a specific religion*”; “*physical appearance*”; and “*place of residence*”.

*Discrimination by association* can occur when someone is unfavourably treated not because of one of his or her personal characteristics, but because s/he is closely associated with another person (such as in an interracial marriage)<sup>13</sup>.

<sup>13</sup> This form of discrimination has been defined by the Court of Justice of the European Union (ECJ, *S. Coleman vs Attridge Law & Steve Law*, Judgment of the Court, no. C-303/06, 17 July 2008).

## Various forms of discrimination are prohibited and defined in the Act of 27 May 2008<sup>14</sup>:

### Direct discrimination

This is a “*situation where one person is treated less favourably than another person is, has been or would have been treated in a comparable situation*”<sup>15</sup>. Direct discrimination may be deliberate, but can also arise without specifically wishing or intending to disadvantage or marginalise certain individuals. It stems from bias, value judgments or assumptions that we make – sometimes unconsciously – about a group of individuals.

**For example:** a line manager who asks or requires an employee to change his or her first name to a French-sounding one constitutes origin-based discrimination<sup>16</sup>. The same goes for a nightclub that bars entry to guests of North African origin because “*5 North Africans just won’t cut it*”<sup>17</sup>.

Another example of direct discrimination would be if one employee hasn’t seen any progress in terms of his or her career whereas his or her colleagues, who joined at the same time and have similar qualifications and experience, have had significantly more career opportunities.

A difference in treatment would also be discriminatory if a disciplinary sanction is applied for the same deeds for which only employees of North African origin are penalised<sup>18</sup>.

### Indirect discrimination

This occurs where “*an apparently neutral measure, criterion or practice*” would put persons at a particular disadvantage compared with others”, owing to their origin, “*unless that measure, criterion or practice is objectively justified by a legitimate aim, and the means for achieving that aim are appropriate and necessary*” (Art. 1 of the Act of 27 May 2008)<sup>19</sup>.

**For example:** reserving access to seasonable employment exclusively for the children of staff in the civil service is a form of indirect discrimination on the basis of origin: since the civil servants on-site are necessarily of French or European nationality, this measure particularly puts the children of immigrant parents at a disadvantage<sup>20</sup>.

With respect to hairstyles, the requirements and restrictions in line with euro-centric norms are likely to characterise direct discrimination on the basis of physical appearance as well as indirect discrimination on the basis of origin<sup>21</sup>.

<sup>14</sup> Act No. 2008-496 of 27 May 2008, which sets out various provisions for adaptation to EU legislation on combating discrimination.

<sup>15</sup> *Ibid.*

<sup>16</sup> Defender of Rights, Decision MLD-2016-064 of 23 February 2016 on a case of origin-based discrimination. A receptionist had been asked to change his electronic signature so as to use a different name from his foreign-sounding first name. This change was also made to the schedule for the hotel staff.

<sup>17</sup> Grenoble Appeal Court, Crim. Div., 30 May 2017, no. 16/00579.

<sup>18</sup> Defender of Rights, Decision 2017-128 of 30 March 2017 on the discriminatory dismissals and harassment of employees based on their origin (four employees of North African origin working at the same vehicle rental company who practised courtesy gestures). By two judgments dated 27 June 2019, Lyon Employment Tribunal followed the Defender of Rights’ analysis by cancelling all of the sanctions imposed against the sales representatives, citing the origin-based discrimination of which they were victim.

<sup>19</sup> Act No. 2008-496 of 27 May 2008, which sets out various provisions for adaptation to EU legislation on combating discrimination.

<sup>20</sup> Following repeated action on the part of the High Authority for Combating Discrimination and Promoting Equality (HALDE, now the Defender of Rights), this type of practice, observed both in the public sector and in large private corporations, has – if still a problem – at least become much less common. See, in particular: circular DHOS/P1 no. 2006-533 of 15 December 2006 on the fight against discrimination in terms of recruitment for seasonal employment in the hospital civil service branch, adopted following action on the part of the HALDE, as well as its deliberation nos 2009-355 of 26 October 2009 on seasonal employment reserved for staff’s children and no. 2011-03 of 31 January 2011 on the case of reserving seasonal employment in an insurance company for staff’s children.

<sup>21</sup> Defender of Rights, Framework Decision no. 2019-205 of 2 October 2019 on discrimination on the basis of physical appearance.

## Discriminatory harassment

Harassment is characterised by conduct towards a person “with the purpose or effect of offending the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment”<sup>22</sup>. Where such conduct is based on a prohibited ground, such as origin, it is considered to be discriminatory harassment. This form of discrimination may be established from a single fact if it is particularly serious<sup>23</sup>.

**For example:** racist “jokes”, stigmatising written or spoken comments against an employee or the enforcement of different working conditions from those laid down for others<sup>24</sup> may amount to discriminatory harassment: such behaviour expresses a certain hostility towards someone owing to their origin, who thus experiences a deterioration in their professional situation or health.

## Discriminatory instructions or orders to discriminate

Beyond the offence of subjecting a property or job offer to a discriminatory condition, for which there is already provision in Art. 225-2 of the French Criminal Code, the law also considers as a form of discrimination the act of ordering someone to adopt discriminatory behaviour (Art. 1-2° of the Act of 27 May 2008).

Anyone who exercises decisive influence over a recruitment policy or decision or a management practice is concerned.

**For example:** an ice skating coach announces in a TV programme that he will not recruit any skaters of a particular origin<sup>25</sup>; a lawyer who, in a radio interview, says she doesn’t wish to work with people of North African descent in her firm<sup>26</sup>.

## Retaliation following reports of discrimination

No one, whether the victim or witness, may suffer from retaliation after reporting a case of discrimination.

**For example:** an employee whose professional appraisals take a major turn for the worse after blowing the whistle about racist remarks<sup>27</sup>.

Regarding employment, companies have a safety obligation to meet, and must guarantee the protection of any staff blowing the whistle on cases of discrimination in good faith.

<sup>22</sup> Art. 1 of Act No. 2008-496 of 27 May 2008, which sets out various provisions for adaptation to EU legislation on combating discrimination.

<sup>23</sup> A carpenter-welder finds a photograph of a primate with his name written by hand on the communal notice board. This serious act alone allows for characterisation of discriminatory harassment (Defender of Rights, Decision MLD-2013-98 of 1 July 2013 on a case of discriminatory moral harassment; Saint Nazaire Employment Tribunal, Adjudication decision concerning a case of moral harassment and a case of origin-based discrimination, 16 December 2013, no. 12/00130).

<sup>24</sup> A manager denies a woman on an occupational training contract in a construction job access to the women’s cloakroom and toilets, stating that her gender, religion and origin are “a handicap” to succeeding, and alleging that her religion and origin are “worse” than her gender (Defender of Rights, Decision MLD-2016-073 of 10 March 2016 on a case of discriminatory harassment on the basis of gender and origin).

<sup>25</sup> This example is based on a judgment concerning a case of discrimination on sexual orientation grounds: ECJ, *Asociația Accep*, case C 81/12, 25 April 2013: In this case, a person perceived by public opinion as playing a leading role in a professional football club had particularly stated that, rather than hiring a footballer presented as being homosexual, he would have preferred to hire a player from the junior team. According to the applicant association, the journalists’ suppositions and the statements of this person prevented the conclusion of a contract of employment with a player presumed to be homosexual.

<sup>26</sup> This example is also based on a judgment concerning a case of discrimination on sexual orientation grounds: ECJ, *NH/Associazione Avvocatura per i diritti LGBTI-Rete Lenford*, case C-507/18, 23 April 2020.

<sup>27</sup> Defender of Rights, Decision 2019-115 of 22 May 2019 on the retaliation suffered by a civil servant following the report of a discriminatory situation he had made to the unit for collecting and processing these situations set up by his employer.

## 1. Strong perception of the scale of discrimination

In Europe, origin-based discrimination is perceived to be the most widespread form by far, compared with discrimination on the basis of sexual orientation, gender identity, religion or disability. France is even one of the European countries where perception of origin-based discrimination is strongest (82% of French citizens feel that such discrimination is widespread, compared with 64% of Europeans)<sup>28</sup>.

This conviction among the French population is confirmed by the extent of discrimination cases reported. All of the studies into the subject – whilst sometimes employing different research protocols and methodologies – conclude on the prevailing nature of origin-based discrimination in France.

According to the *Access to rights* survey that the Defender of Rights conducted in mainland France in 2016, **origin or skin colour comes across as the second discrimination ground after gender**: 11% of respondents claim to have experienced discrimination on the basis of origin or skin colour at least once over the five years running up to the survey<sup>29</sup>.

Despite progress in terms of knowledge and recognition on the part of the public authorities, origin-based discrimination is still an entrenched problem in French society – and has even got worse in some instances. By comparing the findings of the *Trajectories and Origins* (TeO) survey conducted by the French Institute for Demographic Studies (INED) in 2008 and those of the *Access to rights* survey conducted in 2016, a significant rise in reports of discrimination emerges<sup>30</sup>. This means that, in less than a decade, discrimination on the basis of origin and skin colour has almost doubled, with 11% of respondents claiming to

have suffered discrimination on such grounds in 2016 compared with 6% back in 2008. This overall rise in perceived discrimination reflects “two inextricably linked phenomena: growing awareness of unfavourable treatment in society and worsening discrimination”<sup>31</sup>.

### **A look back at the notion of “perceived” discrimination**

The prevalence rates calculated by the statistical surveys are partly grounded in respondents’ subjective evaluation of a situation and report levels of “perceived discrimination” or “feelings of discrimination”<sup>32</sup>. Research has revealed a strong correlation between reported discriminatory experiences and perceived experiences, with survey respondents tending to underestimate discriminatory situations<sup>33</sup>.

## 2. Discriminations in all fields of social life

**For those on the receiving end, origin-based discrimination is often a daily, commonplace and persistent experience.**

People who claim to have suffered from origin-based discrimination thus cite a wide variety of contexts (education, employment, housing, police checks, access to goods and services), unlike most other forms of discrimination which are overwhelmingly identified in the employment sphere<sup>34</sup>. Over and above its widespread nature, discrimination is also perceived as a repeated experience at individual level, as attested by the Second European Union Minorities and Discrimination Survey (EU-MIDIS II): respondents claiming to

<sup>28</sup> European Commission, Special Eurobarometer 437: Discrimination in the EU in 2015, 2015.

<sup>29</sup> McAvay H. & Simon P., “Perceptions et expériences de la discrimination en France”, in *Unequal access to rights and discrimination in France. Contributions of researchers to the Defender of Rights’ survey*, 2019, p. 109.

<sup>30</sup> McAvay H. & Simon P., “Perceptions et expériences de la discrimination en France”, *op. cit.*, p. 108.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*, p. 107.

<sup>33</sup> Lesné M. & Simon P., “La mesure des discriminations dans l’enquête TeO”, in Beauchemin C., Hamel C. & Simon P., *Trajectories and Origins: Survey on the Diversity of the French Population*, 2016, p. 383-412.

<sup>34</sup> *Ibid.*, p. 120.

have suffered discrimination state they have experienced it 4.6 times a year<sup>35</sup>.

**That said, the workplace remains the area of life where origin-based discrimination appears the most acute, whether in terms of finding work or career development.** Over half of the discrimination cases reported on the basis of origin or skin colour happen in the professional sphere<sup>36</sup>, which tallies with the referrals the Defender of Rights receives. Of all the referrals received in 2019 for origin-based discrimination, employment is the most common area cited, with 35.5% of referrals received concerning the private employment sector and 24.4% the public sector<sup>37</sup>.

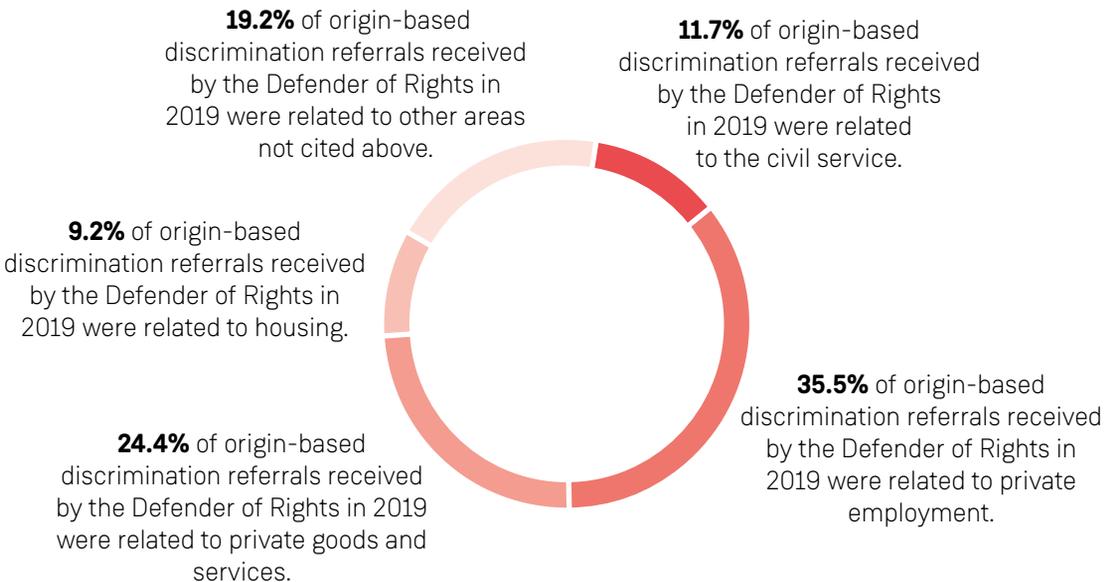
The annual *Barometer on the perception of workplace discrimination* conducted by the Defender of Rights and International Labour Organisation shows how ingrained origin-based discrimination has been over the past decade or so in the professional setting<sup>38</sup>.

### Testimony

“Graduating in 2015, I was top of my class with an average mark of 15 (out of 20), studious, conscientious and on good terms with others. During my placements, my old tutors all recommended me. Today, I am really struggling to find work while others from my class, less hard-working, who have had problems with their companies, often missed class and have scraped by with the average, have found a job. It is clear that neither my first and last names, which sound very foreign, nor my skin colour, help. When I see that I have barely landed 2 interviews in 7 months, even though I send out applications every day and call companies back, it’s not surprising you start asking yourself questions.”

Female jobseeker, 25 years old<sup>39</sup>

Distribution of origin-based discrimination referrals by area in 2019.



<sup>35</sup> European Union Agency for Fundamental Rights (FRA), *EU MIDIS II, Second European Union Minorities and discrimination Survey. Main results*, 2017, p. 14.

<sup>36</sup> McAvay H. & Simon P., “Perceptions et expériences de la discrimination en France”, *op. cit.*, p. 108.

<sup>37</sup> Defender of Rights, *Annual Activity Report 2019*, 2020.

<sup>38</sup> Defender of Rights and International Labour Organisation (ILO), *Barometer on the perception of workplace discrimination*, 2008-2019.

<sup>39</sup> Defender of Rights, *Access to employment and origin-based discrimination: results of the call for evidence*, 2016, p. 4.

At a time when the path to finding a job is already particularly hard-going amid the current economic climate, discrimination in accessing the workplace, and even at an earlier stage, in accessing internships, work-linked training or certifying training, is compromising the professional integration of a significant swathe of the population, especially youth. Jobseekers of foreign origin thus report more discrimination, particularly during a job interview (74%, +10 points compared with all jobseekers) or when accessing training (42%, +21 points)<sup>40</sup>.

### Testimony

“Several experiences: I’ve been compared to a terrorist in a job interview. At a job fair, they refused to take my CV, and after insisting that I be able to submit my CV and have a short interview like everyone else around me, I ended up having my interview in the stand’s broom cupboard. Doubts have been expressed over my professional experience because of my origins. I was offered a job in North Africa but only on a local contract; I asked if a native French citizen would have been put on a local contract and I didn’t get an answer.”

Male employee, 34 years old<sup>41</sup>

Research also lays bare how people of foreign origin (immigrants and descendants) are over-exposed to different degrading attitudes at work, which are characteristic of discriminatory harassment.

In the Parisian region, 7% of them have thus had to change their name in the professional sphere, 24% feel that their work is undervalued, 30% consider that their skills are under-estimated and 20% claim to have had to carry out menial or degrading tasks<sup>42</sup>.

No certifying course, activity sector or occupation seems to be free from these forms of discriminatory harassment. A 2018 study by the Defender of Rights thus reveals that nearly 20% of male and female lawyers perceived as being non-white have often or very often been the butt of racist jokes while on-duty<sup>43</sup>.

### Access to housing also entails selection processes that can give rise to origin-based discriminatory risks.

More than 80% of people who claim to have suffered discrimination while looking for housing cite their origin or skin colour as the reason<sup>44</sup>. People perceived as being black or Arab face a particularly steep uphill struggle, with respectively 39% and 38% of searches unsuccessful (compared with around 18% for all respondents having looked for a rental property)<sup>45</sup>. Perceived origin, particularly when it involves a non-European origin, thus constitutes a “marked differentiating characteristic in housing pathways”<sup>46</sup>.

### Relations with law enforcement agencies, identity checks in particular, also lead to significant discriminatory practices on the basis of origin, implying racial and social targeting

of checks on young men, perceived as being black or Arab/North African<sup>47</sup>. Whereas 82.6% of men claim never to have had their identity checked by the police over the past five years, half of men perceived as being Arab/North African or black claim to

<sup>40</sup> Defender of Rights and ILO, 8<sup>th</sup> *Barometer on the perception of workplace discrimination*. Zoom “Jobseekers of foreign origin”, Studies and Findings, 2015, p. 2.

<sup>41</sup> Defender of Rights, *Access to employment and origin-based discrimination*, op. cit., p. 3.

<sup>42</sup> Eberhard M. & Simon P., *Expérience et perception des discriminations en Île-de-France*, Regional discrimination observatory in the Parisian region (ORDIS), 2016, p. 58.

<sup>43</sup> Defender of Rights, *Survey on working conditions and experiences of discrimination in the legal profession in France*, 2018, p. 20.

<sup>44</sup> Defender of Rights, *Unequal access to rights and discrimination in France. Analyses of the Defender of Rights*, 2019, p. 80.

<sup>45</sup> *Ibid.*, p. 71.

<sup>46</sup> Defender of Rights, *Survey on access to rights. Volume 5: Discrimination in access to housing*, 2017, p. 20.

<sup>47</sup> Defender of Rights, *Survey on access to rights. Vol.1: Police/population relations.*, op. cit.

had their identity checked at least once<sup>48</sup>. They also claim to be much more targeted by frequent checks (more than five times over the past five years) than men who are perceived as white: 6 times more for men perceived as being black, and 11 times more for men perceived as being Arab. 18-25 year olds perceived as being Arab/North African or black are particularly exposed, with 80% of them claiming to have had their identity checked over the five years leading up to the survey (versus 16% for the rest of the population).

**Education, from school through to university, is another sphere where perceived discrimination and inequality on the basis of origin runs high.** Most people reporting unfair treatment at school attribute it to racial discrimination: 58% of them cite their origin or nationality and 13% their skin colour<sup>49</sup>. Descendants of immigrants thus express a strong sense of injustice regarding the schooling system, particularly in terms of the guidance they are given (15% of them)<sup>50</sup>.

### Origin-based discrimination in access to housing

Real estate professionals have been implicated in several origin-based discrimination cases. To give one example, the Defender of Rights was referred a complaint about presumed discrimination on the basis of origin and/or nationality in connection with a house rental<sup>51</sup>. After sending a duly completed application to the agency, a couple, of foreign nationality, was asked by the latter for various additional documents even though they were high-earners (€6,300 net/month) and were looking for a property to rent for a modest budget of around €1,100/month. The Defender of Rights contacted the estate agency in question to try and find an out-of-court solution. The agency eventually approved the application. In a similar case, the complainant, despite having duly completed the application and sound financial guarantees, was not invited to view any apartments when there were clearly some available<sup>52</sup>. Following action on the part of the Defender of Rights, the estate agency contacted the complainant to offer her the property she was interested in and she was eventually allocated it.

<sup>48</sup> *Ibid.*, p. 16.

<sup>49</sup> Brinbaum, Y. & Primon J.-L., "Parcours scolaires et sentiment d'injustice et de discrimination chez les descendants d'immigrés", *Economie et Statistique*, no. 464-466, 2013, p. 215.

<sup>50</sup> *Ibid.*, p. 222.

<sup>51</sup> Defender of Rights, Amicable settlement RA-2018-181 of 5 December 2018 on presumed discrimination on the basis of origin and/or nationality.

<sup>52</sup> Defender of Rights, Amicable settlement RA-2018-126 of 1 August 2018 on presumed discrimination on the basis of surname and/or origin.



### 3. Discrimination corroborated by official data and research

#### **Testing (or comparison test)**

With this method, it is possible to analyse the effect of a specific characteristic in the allocation of a good or service (employment, housing, etc.), all other things being equal. Thanks to this method, the effect of characteristics that normally pass unnoticed in the data can be isolated and measured. For example, in the employment sphere, testing places individuals who are similar except for one characteristic in an experimental scenario where they are all applying for the same job vacancies, which match their common profile. The origin of individuals is usually indicated by the sound of the first and last name<sup>53</sup>.

If perceived differences in treatment do not always amount to discrimination in the eyes of the law, the discrimination cases reported and their scale are confirmed by scientific studies which have been able to objectively measure differences in treatment owing to origin across different areas.

The Ministry of Labour's testing studies, which are experimental methods for measuring discrimination, conducted in 2016 and 2018 in large businesses reveal significant discrimination towards applicants of North African origin. The latter have a 1-in-3 chance of securing an interview, compared with nearly 1-in-2 chance for applicants of French origin with a similar profile<sup>54</sup>. The two testing campaigns carried out on access to the civil service, particularly the local government and hospital branches, show that discrimination in the workplace extends beyond the private sector alone<sup>55</sup>.

<sup>53</sup> Du Parquet L. & Petit P., "Discrimination à l'embauche : retour sur deux décennies de testings en France", *Revue française d'économie* 2019/1 (Vol. XXXIV), pp. 91 to 132.

<sup>54</sup> DARES et ISM Corum, "Discrimination à l'embauche selon 'l'origine' : que nous apprend le testing auprès de grandes entreprises ?", *op. cit.*, p. 1.

<sup>55</sup> L'Horty Y., *Les discriminations dans l'accès à l'emploi public*, report to the Prime Minister, 2016.

Like the annual *Barometer on the perception of workplace discrimination* conducted by the Defender of Rights and the ILO<sup>56</sup>, **the findings of various testing campaigns run since the 2000s to measure discrimination during recruitment show that origin-based discrimination is deeply entrenched in the workplace<sup>57</sup>.**

### Testimony

“During an interview, the head of HR asked me if my parents spoke French and where my first name came from. She also asked me several questions about my town and neighbourhood and ended by explaining that her firm was ‘very old-fashioned, you understand?’”

Female employee, 29 years old<sup>58</sup>

**In terms of access to private housing, various testing campaigns conducted in estate agencies or among private landlords highlight strong indicators of origin-based discrimination.** In the Essonne *département* (Parisian region) or Villeurbanne (suburb of Lyon) for example, applicants for a property to let who are identified as being North African face discrimination in more than one in two cases, compared with an applicant perceived as French with a similar profile (with an equivalent income, financial guarantees and professional situation)<sup>59</sup>. Nationwide, someone with a North African-sounding name has around 27% less chance than someone with a French-sounding name of securing a first appointment with the property owner, and someone with an African-sounding name around 31% less chance<sup>60</sup>.

The testimonies gathered by the Defender of Rights have shed light on the sheer scale of discrimination suffered by people of overseas origin, especially young people who come to study in mainland France.

### Testimony

“What I would most like to talk about is the discrimination suffered as a Reunion Island national, when I arrived in mainland France. Discrimination in terms of housing; discrimination during a competitive entrance exam (yes, that’s right); discrimination in my training (I’m a graduate from the Institute of Political Studies); discrimination in relations with the police. I could share classic anecdotes with you like when the estate agent said after 20 minutes that the property was no longer available. Or at university, when the training officer said I wasn’t entitled to a grant as my surname was not French like “Martin”. Or how about when, during the oral of a competitive entrance exam for a Category A position, a State official with a foreign-sounding name dared to tell me that I didn’t belong in France.”

Male, native of Reunion Island<sup>61</sup>

Moreover, if someone with a North African-sounding surname clearly mentions they are a civil servant, they still have less chance than someone perceived as being “of French origin” who does not give any indication of their occupation<sup>62</sup>. This widely regarded sign of stability among private landlords only increases chances of success for someone with a “French-sounding” surname.

<sup>56</sup> Defender of Rights and International Labour Organisation (ILO), *Barometer on the perception of workplace discrimination*, 2008-2019.

<sup>57</sup> Testing by the French National Institute of Statistics and Economic Studies (INSEE) has, for example, revealed that discrimination practised during recruitment against applicants of immigrant origin was around 40% on average in 2013, irrespective of the job applicant’s foreign origin. See, in particular: Edo A. & Jacquemet N., “Discrimination à l’embauche selon l’origine et le genre : défiance indifférenciée ou ciblée sur certains groupes ?”, *Economie et statistique*, no. 464-465-466, INSEE, 2013.

<sup>58</sup> Defender of Rights, *Findings of the call for evidence*, *op. cit.*

<sup>59</sup> ISM-CORUM, *Testing sur le parc locatif privé du département de l’Essonne*, 2013, p. 11; ISM-CORUM, *Testing sur le parc locatif privé de Villeurbanne. Résultats*, 2011, p. 11.

<sup>60</sup> Le Gallo J., L’horty Y., du Parquet L., Petit P., *Les discriminations dans l’accès au logement en France : un testing de couverture nationale*, 2018, p. 30. To find out more, see Defender of Rights, *Letting without discriminating. A handbook for use by landlords*, 2017.

<sup>61</sup> Defender of Rights, *Overseas nationals and the challenges accessing their rights. Call for evidence among Overseas residents*, 2019, p. 11.

<sup>62</sup> Bunel, M., L’horty Y., Du Parquet L. & Petit P., *Les discriminations dans l’accès au logement à Paris : une expérience contrôlée*, TEPP research report, 2017, p. 2.

The same applies in New Caledonia for the indigenous Kanak people when looking for somewhere to live, which suggests intentional discrimination against certain groups<sup>63</sup>.

**Decision 2017-131 of 30 March 2017 on the refusals to change to a full-time contract faced by a part-time employee on the basis of origin**

Following the Defender of Rights' investigation, it appeared that, the second time the complainant was refused a full-time contract, an employee of European origin was awarded the contract instead, even though he had less seniority than the complainant. What is more, these refusals were not justified on objective grounds by the implicated car rental company, which should not be able to take advantage of its own wrongdoing.

The Defender of Rights concluded that "*what clearly comes across is that [one of the complainants] was treated in the professional setting less favourably than other employees and that the disciplinary sanctions imposed against him were discriminatory in nature (...) on account of his origin*".

**Origin-based discrimination also hampers people's access to other private services and goods.** One testing campaign run in 2016 in Villeurbanne, in partnership with the Defender of Rights, thus lifts the lid on the discrimination encountered by individuals perceived as being North African or African when accessing a bank loan or help with setting up a business<sup>64</sup>. The latter are thus proposed longer loans, with less attractive rates, than others of equivalent age and income. Origin-based discrimination is also experienced online, not least via collaborative platforms. On a car-sharing website, drivers with an "Arab- or

Muslim-sounding" first name are less likely to find passengers than those with a "French-sounding" first name, and therefore end up having to cut their prices by an average of 58.4%<sup>65</sup>. Discrimination has also been observed on seasonal rental websites<sup>66</sup>.

**Decision MLD-2016-006 of 24 February 2016 on denied healthcare on the basis of origin**

The Defender of Rights was referred a complaint about a dental practice refusing to grant an appointment owing to the female complainant's North-African origin or surname. The testing carried out by the Defender of Rights confirmed the discrimination practised by the dentist in terms of denying healthcare.

Such discrimination was reported to the National Dental Surgeons' Council which initiated disciplinary proceedings against the practice.

**Research also confirms that French citizens of immigrant origin, particularly North African or sub-Saharan origin, are over-exposed to police checks.** In 2009, a team from the French National Centre for Scientific Research (CNRS) thus observed police checks across five Parisian locations around Gare du Nord train station and Châtelet-les-Halles metro station and conducted a systematic comparison of the population stopped relative to the population at the locations during the same time slots<sup>67</sup>. The results show that people perceived as being black or Arab were checked to a disproportionate extent compared with people perceived as being white (depending on the location, between 3.3 and 11.5 times more for people perceived as being black, and between 1.8 and 14.8 times more for people perceived as being Arab)<sup>68</sup>.

<sup>63</sup> Kirszbaum T., *Capitalisation des connaissances sur les discriminations dans le parc privé et les instruments d'action publique pour les combattre*, op. cit., p. 13. In research, these forms are referred to as "taste-based discrimination".

<sup>64</sup> ISM-CORUM, *Testing sur l'accès au prêt immobilier et au prêt à la création d'entreprise réalisé par la ville de Villeurbanne*, 2017.

<sup>65</sup> Farajallah M., Hammond R. G. and Pénard T., "What drives pricing behavior in Peer-to-Peer markets? Evidence from the carsharing platform BlaBlaCar", *Information, Economics and Policy*, no. 48, 2019, p. 25.

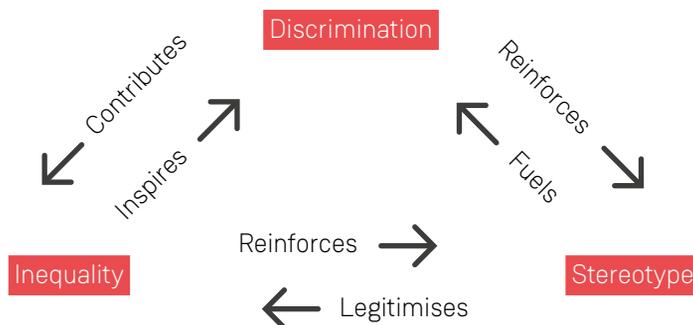
<sup>66</sup> Laouenan M. and Rathelot R., "Let's stay together? Combatting discrimination on Airbnb", *Global Perspective Series*, no. 9, 2016.

<sup>67</sup> Jobard F. & Levy R., "Les contrôles d'identité à Paris", *Questions pénales*, CESDIP, 2010, 23 (1), pp. 1-4.

<sup>68</sup> *Ibid.*, p. 3.

## B. Strong systemic discrimination

The scale and persistence of origin-based discrimination in France point to cumulative inequality stemming from the interaction of individual and structural practices, which may or may not be deliberate, and which disadvantage a particular group. This therefore means that it must be viewed in its "systemic" dimension, i.e. through the broader prism of collective perceptions, specific social relations, source of domination, and the structural socio-economic inequality running through society.



Stereotypes, discrimination and inequality feed off each other in a cycle that fuels inequality. Inequality reinforces the stereotypes and inspires discrimination, which in turn uses stereotypes to contribute to inequality.

*Defender of Rights, Acting against discrimination and harassment in the local government civil service branch. The HR kit: 9 factsheets, 2017<sup>69</sup>.*

Origin-based discrimination is an example of a larger set of stereotypes and prejudices held by society at large. Wired into our social and mental structures, these cognitive biases associate people with a disdained social identity which drives unfair practices.

Such identity-based prejudice and labels, channelled by certain political and media stances, end up holding the victims themselves accountable for the discrimination they suffer and are shaping new classes that are perceived as dangerous or incapable of adapting to the demands of our society (social inadequacy, lack of willingness to integrate, aggressiveness and violence, communitarianism, identitarian closure and religious fundamentalism, etc.).

### **Categorisation, stereotypes, prejudice: what does this all mean?**

We all draw on categories to group together the things making up the environment around us – humans, animals, objects, etc. – based on what they look like. These cognitive biases are grounded in an often unconscious categorisation essential for assimilating and understanding the flow of information that reaches us.

They are also behind multiple stereotypes shaped by shared beliefs, often acquired very early on, and applied to a whole group of individuals – without taking their individual differences into account. Characterised by exaggeration, simplification and generalisation, these stereotypes fuel prejudices that lead to a favourable or unfavourable attitude towards one or more individuals solely on account of their actual or presumed affiliation with a specific group.

<sup>69</sup> For examples on the sex and gender ground, see: Laboratoire de l'égalité, *Les stéréotypes, c'est pas moi, c'est les autres ! Lutter contre les stéréotypes pour construire une culture de l'égalité*, 2013.

Discrimination, to which a series of preconceived ideas and stereotypes lend legitimacy, also results from the general, unequal way the social system works – entailing interactions between all sorts of discriminatory practices and networks.

**The systemic approach therefore enables discrimination to be viewed no longer solely as individual acts, but as the product of enduring and collective inequality across different spheres of society life.** To take effective action, it is therefore necessary to fully recognise the systemic nature of this discrimination in France and to factor this notion into public policy analyses, since discriminatory practices inherent in organisations, in a particular social order, are often part of an internal culture, not clearly identified and seldom disclosed by victims.

## 1. The connection between collective inequality and origin-based discrimination in official data and research

Origin-based discrimination, both direct and indirect forms alike, produces enduring collective inequality and can be seen in segregation phenomena across different spheres of society life. Origin-based collective inequality combined with other forms of social inequality (to do with social position, economic resources, employment status, gender, religion, etc.) thus gives an insight into how certain social groups are formed and maintained at the bottom of the social hierarchy, where immigrants and descendants of immigrants are over-represented.

**From a systemic point of view, discrimination and inequality experienced in one area reinforce those experienced in other areas.**

For example, in a similar way to gender inequality, people of foreign origin (or perceived as such) who are steered from school towards undervalued sectors on the job market and live in deprived urban neighbourhoods subsequently risk being over-represented among jobseekers or individuals in precarious circumstances.

In generational terms, life courses of descendants of immigrants, although born and educated in France, are also likely to encounter the integration difficulties, greater precarity and strong inequality with which their immigrant parents had to contend since moving to France – owing to racial discrimination.

### Employment

Back in 2002, the French Economic, Social and Environmental Council (ESEC) noted that many young people of foreign origin were excluded from various spheres of social, economic and cultural integration<sup>70</sup>. Almost 15 years later, France Stratégie makes the same point: “All other things being equal, men with no direct immigrant ancestry always have a greater chance of finding work and earning more (...)”<sup>71</sup>.

Such inequality and discrimination are experienced from the internship and apprenticeship stage and, as such, narrow the prospects of integration in the workplace.

Origin-based discrimination in the workplace must be viewed in the broader context of the current socio-economic imbalance and history of post-colonial immigration in France. In the 1960s, use of foreign labour particularly from the former colonies contributed to a stratification of the labour market, where foreign workers were extensively clustered in low-skilled, unstable, low-paying jobs<sup>72</sup>.

<sup>70</sup> Opinion of the ESEC, *The integration of youth of foreign origin*, 2002.

<sup>71</sup> Bruneau C., Dherbécourt C., Flamand J. and Christel G., “Les inégalités sur le marché du travail”, *La note d'analyse*, no. 42, France Stratégie, 2016, p. 1.

<sup>72</sup> Réa A. & Tripier M., *Sociologie de l'immigration*, 2003.

Since then, these segregational practices have persisted amid exacerbated economic competition and widespread unemployment.

**Such discrimination leads to greater hurdles at different stages of working life**, with challenges finding work, low pay, often worse working conditions and fewer opportunities for accessing promotions and better-paid jobs<sup>73</sup>.

### Origin-based inequality in the workplace

According to France Stratégie, the employment rate of descendants of immigrants from North or sub-Saharan Africa is much lower (12 points less for men, 24 points less for women) than for men with no immigrant ancestry<sup>74</sup>. Male descendants of immigrants from North or sub-Saharan Africa between 25 and 59 years old have an average monthly wage that is 7% less than men with no immigrant ancestry, and those born in Overseas France – 23% less<sup>75</sup>. The pay gap is even more stark for women between 25 and 59 years old, from North or sub-Saharan Africa (-49%) or born in Overseas France (-38%), compared with men with no direct immigrant ancestry<sup>76</sup>.

Professional segregation may be vertical – with workers of foreign origin being assigned less stable or rewarding jobs or jobs with no contact with customers – or horizontal, by tending to recruit immigrants or descendants of immigrants in certain “targeted” industries (not least the youth work sector because of their presumed “ethnic-cultural affinity” with the group in question, or in the security sector, because of the specific physical characteristics associated with them<sup>77</sup>).

### Systemic discrimination in the construction sector

The Defender of Rights has recently taken a stance on the situation of 25 undocumented workers who were victims of discrimination on a building site, on the basis of their origin and nationality<sup>78</sup>. Following its investigation and in light of the sociological studies on the place of this group of undocumented Malian workers in the construction sector, the Defender of Rights exposed a system where each worker’s tasks on the worksite are organised and prioritised not on the basis of skills but of actual or presumed origin; the group of undocumented Malian workers was assigned and kept in the most strenuous and hazardous tasks.

Following the Defender of Rights’ observations, in its 17 December 2019 judgment Paris Employment Tribunal recognised the “*systemic racial discrimination*” these 25 Malian construction workers had suffered<sup>79</sup>.

<sup>73</sup> Brinbaum, Y., Primon, J.-L., & Meurs D., “Situation sur le marché du travail : statuts d’activité, accès à l’emploi et discrimination”, in Beauchemin, C., Hamel, C., & Simon, P. (eds.), *Trajectoires et origines*, op. cit.

<sup>74</sup> France Stratégie, *Le coût économique des migrations*, 2016, p. 39.

<sup>75</sup> *Ibid.*, p. 38.

<sup>76</sup> *Ibid.*, p. 37. By comparison, the difference is -33% for women with no direct immigrant ancestry.

<sup>77</sup> De Rudder V. & Vourc’h, F., “Les discriminations racistes dans le monde du travail”, in Fassin D. & Fassin E., *De la question sociale à la question raciale ? Représenter la société française*, 2006, pp. 175-194.

<sup>78</sup> Defender of Rights, Decision 2019-108 of 19 April 2019 on the situation of 25 undocumented workers claiming to have been the victim of discriminatory treatment on the part of their employer, a construction company, on the basis of their origin and nationality.

<sup>79</sup> Paris Employment Tribunal, Judgment on the systemic, racial discrimination suffered by undocumented Malian workers in the construction sector, 17 December 2019, no. 17/10051.

## **Housing**

Origin-based inequality is also a problem in access to private housing, whether in terms of renting or buying property. Repeated, persisting discrimination on the basis of origin paves the way to differentiated life courses and diverse forms of residential segregation, while exposing the victims to precarious, substandard forms of housing. The Defender of Rights' *Access to rights* study finds that **cumulative discrimination can result in major difficulties accessing housing, especially for people who consider they are perceived as Arab or black**<sup>80</sup>.

On the basis of the results of the INED-led TeO study, it has been possible to draw up a typology of residential spaces according to their social composition and to define the characteristics of segregated neighbourhoods in France<sup>81</sup>. Home to 10% of the French population, these neighbourhoods are characterised by an over-representation of immigrants and descendants of immigrants, high unemployment, a high concentration of council housing and virtual absence of individuals belonging to the higher socio-occupational categories. Nearly a third of the population in this type of neighbourhood is thus made up of people from sub-Saharan or North Africa and Turkey, in addition to a significant proportion of residents from Asia, Portugal or Overseas France<sup>82</sup>. **Segregation in housing is also measured in terms of the segregation practised in wealthy neighbourhoods, which are ethnically and socially uniform** – not least because of the high rents in practice there<sup>83</sup>.

If descendants of immigrants experience a limited form of “residential integration (...) over the generations”<sup>84</sup>, those of African or Turkish origin are nevertheless more likely to live in a context of “ethnic segregation” in turn<sup>85</sup>.

Immigrants, descendants of immigrants or people who are perceived as such must also put up with more precarious, often severely deprived housing conditions.

### **Precarious housing conditions in the MIDIS-II survey**

According to the MIDIS-II survey published in November 2019, only 15% of blacks in Europe own their dwelling (versus 70% of the general population), and nearly half of them (45%) say that they live in overcrowded housing (versus 17% of the general population)<sup>86</sup>. In France, 17% of respondents of African descent live in severely deprived housing (compared with 3% for the general population), i.e. in overcrowding housing with at least one of the following characteristics: a leaking roof, rot in the walls or windows, no bath/shower and no indoor toilet, considered too dark<sup>87</sup>.

<sup>80</sup> Defender of Rights, *Survey on access to rights. Volume 5: Discrimination in access to housing*, 2017.

<sup>81</sup> Pan Ké Shon J.-L., “Discrimination au logement et ségrégation ethno-raciale en France”, *Les après-midi*, no. 19, Profession Banlieue, 2011, p. 7.

<sup>82</sup> *Ibid.*, p. 8.

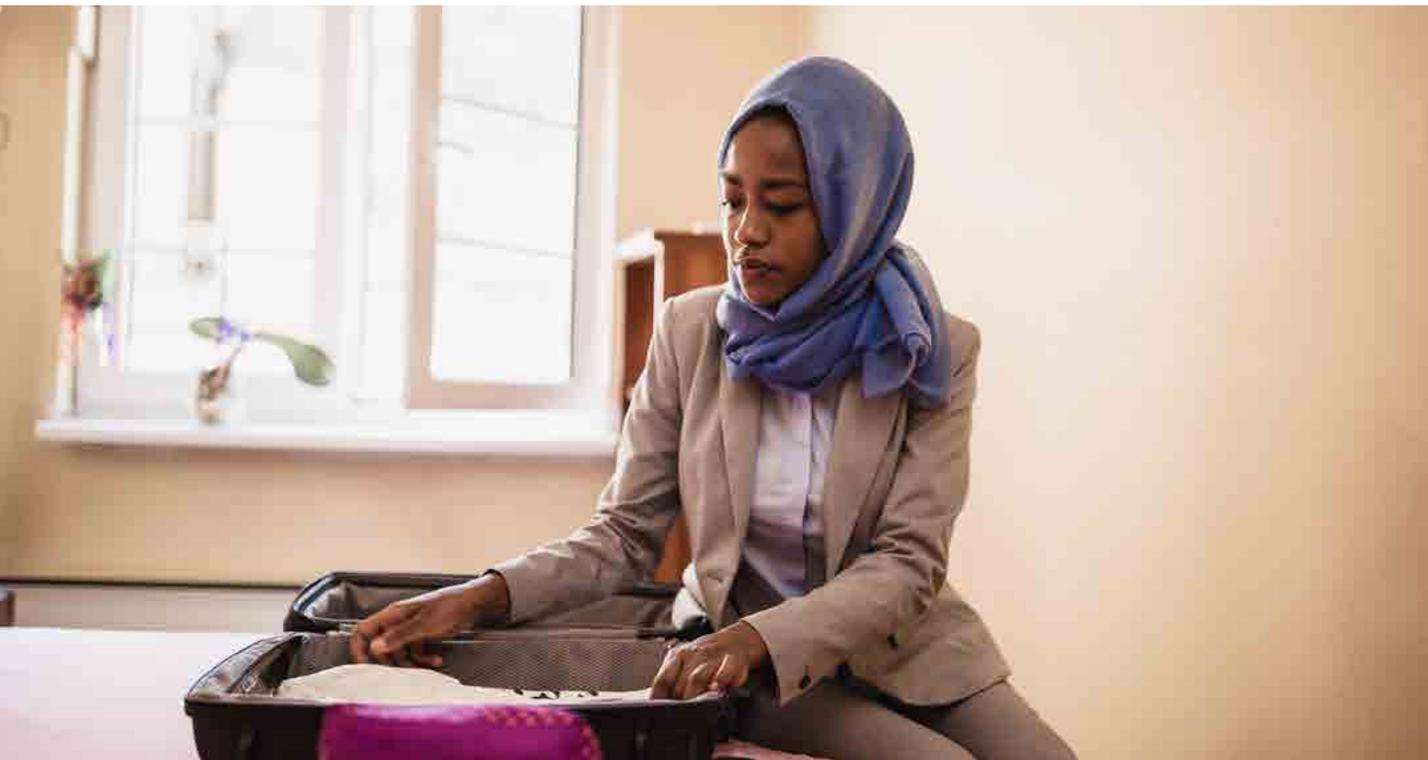
<sup>83</sup> <https://www.fondation-abbe-pierre.fr/nos-actions/comprendre-et-interpeller/en-finir-avec-la-segregation-sans-penaliser-les-mal-loges>

<sup>84</sup> Pan Ké Son J.-L., *op. cit.*, p. 10.

<sup>85</sup> McAvay H., *Immigrant's spatial incorporation in France: Patterns and determinants of Neighborhood and Housing Attainments*, Sociology thesis, Paris IEP, 2016.

<sup>86</sup> European Union Agency for Fundamental Rights (FRA), “Being black in the EU: Second European Union Minorities and Discrimination Survey: Summary”, 2019, p. 13. The survey bore on 12 Member States: Austria, Denmark, Finland, France, Germany, Ireland, Italy, Luxembourg, Malta, Portugal, Sweden and the UK.

<sup>87</sup> *Ibid.*, p. 14.



## 2. The role institutions play in producing systemic discrimination

Institutions play a part in producing systemic discrimination in France, as an employer but also as public services.

### Public employment

**Human resource practices in the public sector should be exemplary, and yet this is not always the case**, as illustrated by the complaints received by the Defender of Rights<sup>88</sup> and the findings of the various studies conducted on this subject.

The report *Public service schools and diversity*, produced at the request of the Prime Minister in February 2017, lays bare the

over-representation of civil servants' children in the civil service and a relative exclusion of descendants of immigrants<sup>89</sup>. The latter are thus 8% less likely to work in the public sector than as a private employee<sup>90</sup>. This **over-representation of descendants of immigrants in the civil service** cannot solely be attributed to schooling inequality or nationality<sup>91</sup>, but also to discrimination phenomena on the one hand and self-censorship on the other.

Testing carried out in 2016 has shown that, despite recruitment procedures based on competitive entrance exams, the civil service is not exempt from origin-based discrimination, which is more common in access to the local government and hospital civil service branches than in the central government branch<sup>92</sup>.

<sup>88</sup> In this regard, see the Defender of Rights' contribution to the *Report on combatting discrimination and recognising the diversity of French society in the civil service*. 2018 Edition, 2019, pp. 173-244.

<sup>89</sup> Rousselle, O. & Pannier P., *Public service schools and diversity: report to the Prime Minister*, 2017.

<sup>90</sup> *Ibid.*, p. 33.

<sup>91</sup> Pursuant to Article 5 of Act No. 83-634 of 13 July 1983 on the rights and duties of civil servants, no one may be a civil servant if they do not have French nationality. The law does provide for a number of exceptions, however.

<sup>92</sup> L'Horty Y., *Les discriminations dans l'accès à l'emploi public*, report to the Prime Minister, 2016.

## **Social housing**

**Residential segregation of immigrants or descendants of immigrants raises questions over the role of institutions, social landlords and public policy in the production of systemic discrimination.** The proportion of immigrants and descendants of immigrants benefiting from council housing rose steadily between 1982 and 2008. They have been particularly hard-hit by the industrial crises, the growth of mass unemployment and social precarity<sup>93</sup>.

However, the least attractive social housing sectors have tended to be allocated more to them. Individuals of North African, African and Turkish origin thus tend to be more clustered in neighbourhoods remote from urban centres and labour catchment areas, where public transport services are poor and there is a particularly high percentage of council housing (nine times higher in this type of neighbourhood where the majority population primarily lives)<sup>94</sup>. In 2008, over 70% of immigrants between 18 and 50 years old living in council housing said they lived in a neighbourhood where half or more of the residents were of immigrant origin<sup>95</sup>.

Segregation in council housing is reinforced by the strategies rolled out by municipalities with social housing shortages, aimed at avoiding the settlement of immigrants or individuals of immigrant origin in them. The social housing quota per municipality system, set up by Article 55 of the SRU Act (on solidarity and urban renewal) proves its limits in this way, since resistant mayors tend to allocate new social housing to locals who are unable to afford housing at the market price (so young people moving out of their parent's home, elderly people with diminishing independence, etc.)<sup>96</sup>.

The large number of applicants who are eligible for social housing means that the decision-makers have significant scope, which hinders residential mobility.

Furthermore, the urban renewal and social diversity policies pledged as part of the broader urban policy are having alarming repercussions on housing for individuals with a foreign and modest background, reflected in the gentrification of neighbourhoods that were traditionally home to immigrant or poor communities<sup>97</sup>. The housing policy and lack of rent regulation is contributing to "re-segregation phenomena"<sup>98</sup>, where the minority and precarious population is finding itself pushed out of the most affluent neighbourhoods towards diverse neighbourhoods and, ultimately, towards poor neighbourhoods<sup>99</sup>.

### **Discrimination against the Roma community, evictions and no re-housing**

Doubly discriminated against owing to their economic vulnerability and their origin, the Roma community is a deeply marginalised social group in France, and more widely across Europe, and the target of racism and violence on a daily basis. In 2015, the UN Committee on the Elimination of Racial Discrimination (CERD) sounded the alarm on the growing stigmatisation of Roma, "*occasioned by the use of racist hate speech by elected officials and others, the exclusion of Roma and an increase in the negative stereotyping of this group*"<sup>100</sup>. Their precarious housing and repeated evictions from slums with no re-housing leads to serious and multiple violations of their most fundamental rights: barriers to accessing employment and healthcare, their children are denied schooling and incessant police checks.

<sup>93</sup> Pan Ké Son J.-L., *op. cit.*, p. 6.

<sup>94</sup> *Ibid.*, p. 7.

<sup>95</sup> Pan Ke Shon J.-L. & Scodellaro C., "Discrimination au logement et ségrégation ethno-raciale en France", *Documents de travail, Ined*, no. 171, 2011, p. 13.

<sup>96</sup> Fauconnier G., "Logement social et application de la loi SRU : la lettre plutôt que l'esprit", *Métropolitiques*, 2019; Desage F., "Un peuplement de qualité. Mise en œuvre de la loi SRU dans le périurbain résidentiel aisé et discrimination discrète", *Gouvernement et action publique*, 2016/3, pp. 83-112.

<sup>97</sup> Clerval A., *Paris sans le peuple. La gentrification de la capitale*, 2013.

<sup>98</sup> Kirszbaum T., *Rénovation urbaine, les leçons américaines*, 2008.

<sup>99</sup> High Committee for the Housing of Disadvantaged Persons (HCLPD), Opinion on the implementation of social diversity, 2015.

<sup>100</sup> UN Committee on the Elimination of Racial Discrimination (CERD), Concluding observations on the combined twentieth and twenty-first periodic reports of France, 2015.

## Education

Education, from school to university, is also a sphere where discrimination and inequality on the basis of origin are rife – particularly owing to the way institutions are run. **Schools may well be envisaged, in the Republican imagination, as a powerful tool in helping vulnerable communities or people from other countries to integrate, but they are not immune from the production of systemic discrimination and forms – at times updated – of segregation for all that.**

Nationwide, a number of academic indicators (school test results, retaking a year, academic orientation, dropping out, etc.) reveal significant differences between pupils depending on their origin, and greater difficulties for the children of immigrant parents from Africa and Turkey in particular. For example, overall the children of immigrants are less likely to get the baccalauréat (equivalent to A levels) under their belt<sup>101</sup>.

Such inequality, particularly experienced by male descendants of immigrants from North or sub-Saharan Africa and Turkey, is often associated with careers guidance running counter to their wishes, towards the technico-vocational streams, rather than the general ones. It also manifests in differentiated access, based on origin, to apprenticeships, which are viewed more positively than vocational college courses. A recent study by the National Institute of Youth and Community Education (INJEP) thus lays bare the under-representation of young immigrants or

descendants of immigrants in apprenticeships (53% compared with 65% of young people from the majority population), with the latter being guided more towards vocational colleges<sup>102</sup>.

Although it is difficult to determine the part played by each factor in this regard, several types – socio-economic, institutional and strategic – give an idea of ethno-racial inequality at school. Inequality in terms of success at school where the children of immigrants are concerned can largely be explained by socio-economic inequality and their parents' level of education, since the French school system tends to reproduce and exacerbate these situations. According to the OECD-led PISA survey in 2018, France is among the four countries with the most unequal schooling system. The struggles children of immigrants encounter at school in France are also compounded by the insufficient resources allocated to the schools where they cluster together<sup>103</sup>.

The educational system practises selection at a very early stage, thereby reinforcing the hierarchical segmentation of learning paths. Descendants of immigrants find themselves quickly pushed towards unpopular subjects and streams.

Such **academic segregation** is fuelled by families' avoidance strategies with respect to school catchment areas: disadvantaged schools thus end up being attended by pupils unable to choose, i.e. a high proportion of children of immigrants<sup>104</sup>: "Because of urban

<sup>101</sup> Birnbaum, Y., "Trajectoires scolaires des enfants d'immigrés jusqu'au baccalauréat", *op. cit.* That said, there are major disparities depending on pupils' social and immigrant background and gender. Both male and female pupils of Asian origin stand out for their high academic success (89% of those beginning secondary school in 2007 passed their baccalauréat (A levels) in 2016, while pupils of Portuguese origin achieve similar academic marks to native French pupils (78% and 80% passed their baccalauréat respectively). On the other hand, children from sub-Saharan Africa and Turkey, boys especially, do not do as well during the baccalauréat (73% and 69% respectively passed) and encounter stumbling blocks along their learning path from an early age (retaking a year in primary school, lower marks in secondary school, guidance towards vocational streams even though this is not what they want, and a higher number of school leavers without qualifications). For children of North African origin, there is a wide gap between the academic achievements of boys and girls, with 64% of the former but 80% of the latter passing the baccalauréat. In comparison with the 2008 TeO survey, it can be noted that Turkish girls are increasingly passing the baccalauréat, and overtaking boys in this respect (75% compared with 64%).

<sup>102</sup> INJEP, "Des jeunes discriminées au moment de leur insertion sociale. Résultats de deux études et de deux testings lancés par le Fonds d'expérimentation pour la jeunesse (FEJ)", *INJEP Notes et Rapports*, 2018, p. 50.

<sup>103</sup> As pointed out in the Bacqué-Mechmache mission report: "Studies conducted on school supervision in the Parisian region have thus shown that lower and upper secondary schools in the working-class suburbs cost the public authorities a lot less than those in town centres attended by middle- and upper-class children." (Bacqué M.-H. & Mechmache M., *Pour une réforme radicale de la politique de la ville*, report to the Minister for Urban Policy, 2013, p. 27).

<sup>104</sup> Van Zanten A., "Une discrimination banalisée ? L'évitement de la mixité sociale et raciale dans les établissements scolaires", in Fassin D. & Fassin E., *De la question sociale à la question raciale ? Représenter la société française*, 2006, pp. 195-210.

segregation, social inequalities, families' choices and methods for 'distributing' pupils across schools and streams depending on their performance, schools ultimately create marked social, sexual and ethnic uniformity: everyone is alike in the same class"<sup>105</sup>.

This competitive mindset regarding schools sometimes gives rise to strategies where certain categories of pupils deemed undesirable, such as Roma children, are excluded.

### Roma children denied schooling

The Defender of Rights has received several complaints concerning mayors' refusal to register Roma children, living in camps or hotels, at school. Following its investigations, the Defender of Rights concluded that this amounted to discrimination on the basis of origin, place of residence and the particular vulnerability resulting from their economic situation. It reminded the mayors in question of their obligations in terms of schooling children irrespective of their right of residence or housing arrangements within the municipality<sup>106</sup>.

To give an example, the Defender of Rights was referred a case where the mayor did not register for school three children from a family housed by an association<sup>107</sup>. Despite the parents' request, school registration was denied on the grounds that the electricity contract provided by the family was not valid – the mayoral team demanded a lease agreement. Since the family was housed by an association that did not own the accommodation, the mayoral team considered that the family was “*squatting*” and that the registration file was therefore incomplete. The Defender of Rights referred these situations

to the Prefect and Directorate of National Education Services, which administratively registered the children.

### Police

#### Individuals identified as being black or Arab are exposed to systemic discriminatory practices and bias in their relations with law enforcement agencies.

Statistical research shows a very high concentration of identity checks in France on young people (18-24 year olds) perceived as being black and Arab, living on high-rise or housing estates, as well as an excessive number of reports on their part of ethical breaches by law enforcement agencies during checks (disrespect in addressing them, insults, physical assaults, etc.)<sup>108</sup>. Such **racial and social profiling** appears to be an indicator of strained social situations and poor relations with law enforcement agencies<sup>109</sup>.

It should be understood in light of individual and collective professional practices likely to produce discrimination on the one hand, and the lack of a traceability system for checks on the other. Studies on police checks thus highlight that expectations in terms of the way people who are stopped for checks by law enforcement agencies should behave, their level of compliance and politeness for example, are much higher where minorities are concerned – especially those living in neighbourhoods that are regarded as difficult<sup>110</sup>. Territorial factors can thus combine with origin-based factors to trigger a police check, even when no objectively suspicious behaviour has been identified beforehand.

<sup>105</sup> Guyon R., “Entretien avec Dubet F. et Truong F., *De La galère aux Loyautés radicales*”, *Diversité*, no. 194, 2019, p. 10.

<sup>106</sup> See, in particular, the following decisions of the Defender of Rights: Decision no. 2018-005 of 25 January 2018; Decision no. 2018-232 of 12 October 2018; Decision no. 2017-134 of 7 November 2017; Decision no. 2017-195 of 28 July 2017.

<sup>107</sup> Defender of Rights, Decision no. 2018-011 of 30 March 2018 on a mayoral team's refusal to register for school the children of a family housed by an association.

<sup>108</sup> Defender of Rights, *Survey on access to rights. Vol.1: Police/population relations. The case of identity checks*, 2017.

<sup>109</sup> According to the European Union Agency for Fundamental Rights (FRA), profiling involves “categorising individuals according to their inferred characteristics”, such as presumed origin, skin colour, religion or nationality. For more information, see: European Union Agency for Fundamental Rights (FRA), *Preventing unlawful profiling today and in the future: a guide*, 2019.

<sup>110</sup> Jobard F., “Police, justice et discriminations raciales”, in Fassin D. & Fassin E., *De la question sociale à la question raciale ?*, *op. cit.*

### 3. The most exposed social groups: intersectional discrimination and stigma

#### **Racism and discrimination against communities of Asian origin**

Although the stereotypes associated with individuals of Asian origin sometimes appear positive, they can nevertheless play a part in their essentialisation and stigmatisation. Often buried or minimised, anti-Asian racism can take many forms in France: stigmatising remarks conveyed by the press and social media; bullying at school, discrimination in the workplace; racist insults and physical assault.

Racist remarks and acts against individuals of Asian origin (or perceived as such) have increased across many countries since the start of the COVID-19 health crisis – in some cases leading to serious physical assault. In France, the youth association Chinois de France (Chinese of France) has collected a large number of testimonies and videos posted on social media which reveal a resurgence in anti-Asian racism<sup>111</sup>. In January 2020, the hashtag #JeNeSuisPasUnVirus (#I'mNotAVirus) was launched over social media in an effort to counter the increasing stigmatisation of communities of Asian origin and gained global ground.

Certain social groups are more affected by systemic discrimination. So-called “visible” minorities are by far the most exposed to origin-based discrimination (42% of immigrants and 44% of descendants of immigrants claim to have been a victim over the five years leading up to the survey, compared with 19% of so-called “non-visible” immigrants and 6% of so-called “non-visible” descendants of immigrants)<sup>112</sup>.

Throughout the European Union, people of African descent must contend with persisting racial prejudice as well as forms of violence, harassment and discrimination of a racist nature. France stands out from other European countries through the very high rates of origin-based discrimination against certain groups: 29% of immigrants and descendants of immigrants from sub-Saharan Africa or the French overseas territories say they have suffered discrimination on account of their origin over the year leading up to the survey (9<sup>th</sup> place at European level), 31% for immigrants and descendants of immigrants with North African roots (3<sup>rd</sup> place)<sup>113</sup>.

**Certain individuals, situated at the point where various forms of discrimination intersect, are particularly exposed to the processes of stigmatisation and exclusion, owing to the interaction between their various socio-economic characteristics (gender, age, employment status, level of education, religion, place of residence, economic vulnerability).** By analysing the reporting rates for certain population categories, it is possible to factor in the effects of interaction with other grounds.

<sup>111</sup> <https://www.lajcf.fr/la-crise-du-covid-19-en-france-position-et-actions-de-lajcf/>

<sup>112</sup> McAvay H. & Simon P., “Perceptions et expériences de la discrimination en France”, *op.cit.*, p. 111. In this survey, visible minorities are understood as being immigrants (G1) or descendants (G2), for whom their own or their immigrant parent’s country of birth is in Asia, North Africa, the Middle East, sub-Saharan Africa or Overseas France. Invisible minorities include immigrants (G1) or descendants of immigrants (G2) for whom their own or their immigrant parent’s country of birth is in Europe, America, Australia or New Zealand.

<sup>113</sup> European Union Agency for Fundamental Rights (FRA), EU-MIDIS II, *Second European Union Minorities and Discrimination Survey*, 2009. Also see: European Union Agency for Fundamental Rights (FRA), “Being black in the EU: Second European Union Minorities and Discrimination Survey: Summary”, *op.cit.*

### Discrimination in Overseas France

The call for evidence launched by the Defender of Rights in 2018 in France Overseas threw light on the widespread discrimination suffered by residents of the French overseas territories<sup>114</sup>. 40% of the people questioned during the telephone survey think that people are often or very often treated unfavourably or discriminated against in their department, 35% sometimes and 21% rarely<sup>115</sup>.

The most commonly cited discrimination ground is origin and skin colour, well ahead of sexual orientation, state of health or disability. According to the respondents to the call for evidence, origin-based discrimination is for the most part experienced in relations with the authorities and public services (28.2%), in the workplace (26.6%), when job-hunting (11.5%) or during a police check (9.3%). It particularly affects residents of French Guiana and Mayotte, as well as the indigenous populations, among whom social precarity and the unemployment rate are both higher than the territorial average.

### Cleaning staff and sexual harassment

In a collective complaint on the practices of a cleaning company, the Defender of Rights submitted observations to the Employment Tribunal, acknowledging the instances of sexual harassment committed, in light of the situation of these foreign women who were in a deeply vulnerable situation economically speaking<sup>116</sup>.

The Defender of Rights presented studies showing that this occupation – strenuous, invisible and undervalued – could fuel exploitation and harassment against these female cleaners, who were very often foreign nationals. In a judgment dated 10 November 2017, the Employment Tribunal recognised the sexual harassment and context of economic dependence, sexism and vulnerability making such conduct more likely<sup>117</sup>. This ruling has been appealed.

### The scale of discrimination varies depending on gender and the associated stereotypes.

Women tend to report more discrimination (all grounds combined) than men (49% compared with 40%)<sup>118</sup>. That said, they report more discrimination on the basis of their gender and family situation and less discrimination on the basis of origin or skin colour than men (12% and 11% respectively for men versus 7% and 6% for women in 2016)<sup>119</sup>. There are several possible explanations for this finding, not least the combined exposure of women to gender-based discrimination which would mean that they under-report or downplay discrimination experienced owing to origin<sup>120</sup>.

The overall rate of discrimination in the professional sphere for women aged 18 to 44 perceived as black, Arab, or Asian (all grounds combined) is significantly higher than for women perceived as white (65% versus 42%)<sup>121</sup>. All other things being equal, they are 2.5 times more likely to experience discrimination in employment than women perceived as white.

<sup>114</sup> Defender of Rights, *Call for evidence among Overseas residents*, *op. cit.*

<sup>115</sup> *Ibid.*, p. 21.

<sup>116</sup> Defender of Rights, Decision MLD-2015-247 of 12 October 2015 on sexual harassment offences and retaliatory measures following a case of whistleblowing.

<sup>117</sup> Paris Employment Tribunal, Adjudication decision concerning the moral and sexual harassment and discrimination suffered by a female cleaner, No. 15/03130, 10 November 2017.

<sup>118</sup> McAvay H. & Simon P., "Perception et expériences de la discrimination en France", *op. cit.*, p. 108.

<sup>119</sup> *Ibid.*, p. 110.

<sup>120</sup> *Ibid.*, p. 112.

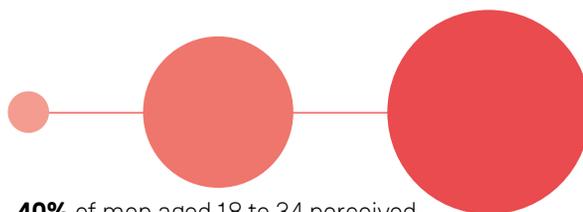
<sup>121</sup> Defender of Rights, *10<sup>th</sup> Barometer of perceived workplace discrimination*, 2017, p. 13.

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**Distribution of comments or conduct of a sexist, racist or homophobic nature, or related to religion, disability or state of health, experienced in the workplace by certain social groups**


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**11%** of men aged 35 to 44 perceived as white have experienced workplace behaviour of a sexist, racist or homophobic nature, or related to religion, disability or state of health.



**40%** of men aged 18 to 34 perceived as non-white have experienced workplace behaviour of a sexist, racist or homophobic nature, or related to religion, disability or state of health.

**54%** of women aged 18 to 44 perceived as non-white have experienced workplace behaviour of a sexist, racist or homophobic nature, or related to religion, disability or state of health.

Similarly, nearly half of working men perceived as black, Arab or Asian (48%) say they have been discriminated against (all grounds combined) in the workplace, compared with 24% of working men perceived as white<sup>122</sup>. Compared with working men aged 35 to 65 perceived as white and all other things being equal, working men of the same age perceived as being of non-European descent are three times more likely to report discrimination, and those aged 18-34 five times more likely.

Although the professional category has no influence on the discrimination rate reported by the respondents, the fact of being in employment does make it less likely – jobless and inactive individuals claim to be more exposed to discrimination<sup>123</sup>. This rate is also correlated with education level. Individuals with higher qualifications report more discrimination, perhaps because they are better informed and more motivated owing to their cultural capital.

This intersectional approach to discrimination yields clearer insight into these differentiated experiences of discrimination, and the emergence of new profiles: “Roma”, “young black or North African suburban male”, and “veiled female”.

**Emergence of the profile of the “young black or North African male from a deprived neighbourhood” is bringing with it prejudice and worsening racial discrimination against individuals perceived in this way.**

These youngsters are particular targets of symbolic violence, negative perceptions and discrimination: 40% of 18-34 year-old males perceived as being non-white have already experienced at least one stigmatising remark or act over the five years leading up to the survey<sup>124</sup>. The generation effect is particularly strong for 18-29 year-old males perceived as being Arab/North African, who report more discrimination (60% compared with 46% of 30 year olds and over)<sup>125</sup>.

In public, compared with the rest of the population, all other things being equal elsewhere, young men who are perceived as being Arab, North African or black are 20 times more likely to be stopped for checks by the police<sup>126</sup>. This specific population category also speaks of very strained relations with law enforcement agencies, claiming to have been disrespectfully addressed (40% compared with 16% overall), insulted (21% compared with 7% overall) or treated roughly (20% compared with 8% overall) during the last police check.

Because of the negative stereotypes prevailing about people living in France’s suburbs, the very fact of living on a high-rise

<sup>122</sup> *ibid.*, p. 15.

<sup>123</sup> McAvay H. & Simon P., “Perception et expériences de la discrimination en France”, *op. cit.*, p. 115.

<sup>124</sup> Defender of Rights, 11<sup>th</sup> Barometer of perceived workplace discrimination, 2018, p. 8.

<sup>125</sup> McAvay H. & Simon P., “Perception et expériences de la discrimination en France”, *op. cit.*, 2019, p. 113.

<sup>126</sup> Defender of Rights, *survey on access to rights. Vol.1: Police/population relations.*, *op. cit.*, p. 3.

or housing estate also greatly exacerbates exposure to origin-based discrimination, with some researchers describing a form of “spatialisation of ethno-racial discrimination”: 14% of housing estate residents claim to have suffered discrimination based on their neighbourhood and 17% for people who see themselves or are perceived as Arab<sup>127</sup>. In this case, the discrimination encountered is compounded by the inequality, systemic discrimination and the lack of resources plaguing such neighbourhoods – despite the “positive discrimination” policies pledged in their favour.

### Entrance to a nightclub denied on discriminatory grounds

The complainant, a former gendarme conscript, explained that he was in a group of 3 girls and 5 boys<sup>128</sup>. Despite having made a reservation, the nightclub manager did not let them enter.

The manager confirmed his decision and his words: “Yes, I remember telling that person that another five North Africans that evening would have been too much, as I didn’t want people saying that we were a nightclub only for the riff-raff. ‘Cos in people’s minds, when there are too many North Africans, we’re immediately catalogued as a nightclub for the riff-raff”<sup>129</sup>.

The victims lodged a complaint and the criminal judge, in an appeal court, sentenced the manager to a conditional six-month prison term and payment of damages on 30 May 2017 and the legal entity to a €10,000 fine for a legal offence<sup>130</sup>.

Furthermore, the testimonies and referrals that the Defender of Rights receives confirm the trend that the term “Muslim” is used to refer, de facto, to Arab immigrants or individuals perceived as such. This, in turn, confirms the need to factor the religious marker into analyses of origin-based discrimination, as demonstrated by the Defender of Rights’ call for evidence on origin-based discrimination in the workplace: “**the religious marker tends to exacerbate the racial marker**: people who are perceived as Arab overwhelmingly report also being viewed as Muslim (88% of women and 94% of men). This association between ethno-racial qualification and presumed Muslim faith is not as widespread in the population perceived as black”<sup>131</sup>.

### Testimony

“Straight after the November attacks, the boss told me he wanted to work with French citizens and I was laid off. For the record, I am a French citizen”<sup>132</sup>.

#### Male jobseeker, 41 years old

With politics and the media dominated by debates around counter-terrorism and secularism, discrimination on the basis of religious faith is climbing steadily: 5% of respondents reported religion-based discrimination in 2016, compared with 1% in 2008<sup>133</sup>. This considerable rise has mainly been felt by Muslims, reflecting growing stigmatisation where they are concerned<sup>134</sup>.

<sup>127</sup> McAvay H. & Simon P., “Perception et expériences de la discrimination en France”, *op. cit.*, p. 114.

<sup>128</sup> Decision 2017-044 of 30 January 2017 on denied entrance to a nightclub on the grounds of the North African origin of five individuals.

<sup>129</sup> *Ibid.*

<sup>130</sup> Grenoble Appeal Court, Judgment on the confirmed conviction for discrimination of a nightclub manager who denied access to a group of individuals on the grounds of their North-African origin, 30 May 2017, no. 16/00579.

<sup>131</sup> Defender of Rights, *Findings of the call for evidence. Access to employment*, *op. cit.*, p. 3.

<sup>132</sup> *Ibid.*, p. 6.

<sup>133</sup> McAvay H. & Simon P., “Perception et expériences de la discrimination en France”, *op. cit.* p. 109.

<sup>134</sup> Galonnier, J., “Comprendre la racialisation du religieux. Les convertis blancs à l’islam en France et aux États-Unis comme cas d’étude atypique.”, in Tersigni S. Vincent-Mory C. & Willems M.-C. (eds), *Appartenances in-désirables. Le religieux au prisme de l’ethnisation et de la racisation*, 2019, pp. 333–350.

A recent study by the Interministerial Delegation for the Fight against Racism, anti-Semitism and anti-LGBT Hatred (DILCRAH) among people who consider themselves Muslim confirms their **over-exposure to extensive discrimination based on their religion but also their perceived origin and skin colour**<sup>135</sup>. Following the focus of the public debate on the question of the veil or burkini, the prevalence of religious discrimination appears to be strongly correlated with wearing religious symbols or visible affiliation with a religion<sup>136</sup>.

### Testimony

“During my interviews, I was asked: ‘Where are you from? (...) ok we’ll call you’. ‘Are you going to follow Ramadan by the way?’. ‘Do you wear a veil?’”

Female jobseeker, 31 years old<sup>137</sup>

Testing carried out in 2016 also highlights the scale of discrimination based on religious affiliation, whether this concern the Catholic, Jewish or Muslim faith<sup>138</sup>. The findings of this study, where assumptions about a job applicant’s religion could be made from their CV – from their first name, attendance at a denominational school or membership of a religious association – show that Muslim men have to send out an average of 20 CVs before landing an interview, and Jewish men 7 (compared with 5 for Catholic men); Muslim women have to send out 6 and Jewish women 5 (compared with 4 for Catholic women), when their professional experience is identical for all of them.

### Removal of substitute menus from some school canteens

At its own initiative, the Defender of Rights took up the issue of the removal of substitute menus from municipal school canteen services<sup>139</sup>.

The terms used in the press by the mayoral team at issue implied that the removal of the substitute menus was an act whose scope went beyond the specific case of the municipality and its organisation, with the substitute meals described as being “*anti-Republican*”. Moreover, the exclusive service of a meal containing pork once a week at the school canteen deliberately excludes a category of children from among all those eating at the canteen – those of either the Muslim or Jewish faith.

Nîmes Administrative Court annulled the mayor’s decision to remove substitute menus in October 2018, but on grounds of lack of competence<sup>140</sup>.

<sup>135</sup> DILCRAH, *Racist behaviour and discrimination against French Muslims*, 2019.

<sup>136</sup> Defender of Rights, “Les discriminations fondées sur la religion en France”, *op. cit.*,

<sup>137</sup> Defender of Rights, *Findings of the call for evidence. Access to employment*, *op. cit.*, p. 8.

<sup>138</sup> Valfort M.-A., *Discriminations religieuses à l’embauche : une réalité*, Institut Montaigne, 2015.

<sup>139</sup> Defender of Rights, Own-initiative decision no. 2018-059 of 5 February 2018 on the removal of substitute menus to pork in a municipal school canteen service.

<sup>140</sup> Nîmes Administrative Court, Judgment on the annulment of the municipal decision having removed the substitute menus to pork in school canteens, no. 18/01601, 9 October 2018.

## C. Discrimination that is harmful for individuals and society

The repeated experience of discrimination – and its invisibilisation by the public authorities – as well as its systemic nature have long-lasting negative consequences on individual trajectories and the social groups affected.

It also ends up undermining social cohesion in French society as a whole.

### 1. How discrimination affects individuals and their life courses, and the roll-out of different strategies to address the issue

**Beyond the systemic effects, it is also important to note that differences in treatment have a concrete “cost” to individuals.** When looking for a job or an apartment for example, they have to send out and submit more applications, organise more viewings and attach more supporting documents in the hope of getting the job or apartment they want – all other things being equal. Young people of foreign descent living in the Parisian suburbs have to put in a lot more effort when job-hunting: an applicant for a server position with an Arabic-sounding name has to send out three times more CVs than another young person with a French name to land a job interview in this region<sup>141</sup>.

#### Consequences on individuals

**The long-term repercussions of forms of residential segregation and precarity, partly stemming from discrimination, have been studied: they entail the sweeping marginalisation of their inhabitants from the job market and adversely affect the schooling of their children.**

Apart from the extra applications that have to be sent out, discrimination on the housing market may lead to substantial loss of “well-being in the form of a mismatch between work supply and demand, longer commutes, potentially lower academic marks for immigrant children or more health problems”<sup>142</sup>. Studies lay bare the costs of segregation “in terms of failure at school, risk of unemployment, failure to integrate into society, intergenerational reproduction of poverty and narrower residential and social mobility prospects”<sup>143</sup>. They draw attention to the consequences of African immigrant communities being clustered within neighbourhoods with a poorer range of public services or more limited access to job opportunities, and underscore the importance of implementing public policies to address the social consequences of systemic discrimination<sup>144</sup>.

Discrimination also ends up wearing down the victims’ determination to find work or an internship: loss of motivation and self-confidence are two major consequences at a personal level<sup>145</sup>. In access to housing, such discrimination considerably lengthens the time it takes for victims to find somewhere to live: 55% of people perceived as Arab and 70% of people perceived as black say they have not

<sup>141</sup> Duguet E., Leandri N., L’Horty Y. & Petit P., *Discrimination à l’embauche. Un testing sur les jeunes des banlieues d’Île-de-France*, Centre d’étude des politiques économiques de l’université d’Évry-Val d’Essonne, 2007, p. 25; Jones E., “*Discrimination à l’embauche des jeunes en Île-de-France : un diplôme plus élevé compense-t-il une origine maghrébine ?*”, *Economie et Statistique*, n° 464-466, 2013, pp. 173-188.

<sup>142</sup> Acolin A., Bostic R. and Painter G., “A Field Study of Rental Market Discrimination across Origins in France”, *Journal of Urban Economics*, no. 95, 2016, p. 59.

<sup>143</sup> Kirszbaum T., “Capitalisation des connaissances sur les discriminations dans le parc privé et les instruments d’action publique pour les combattre”, *op. cit.*, p. 18.

<sup>144</sup> Combes P.-P., Decrease B., Schmutz B. and Trannoy A., “Neighbor discrimination theory and evidence from the French rental market”, *Journal of Urban Economics*, vol. 104, 2018, pp. 104-123.

<sup>145</sup> Defender of Rights, *Findings of the call for evidence. Access to employment, op. cit.*



managed to find a place after looking for a year – compared with just 21% of people perceived as white<sup>146</sup>.

Victims of discrimination or stigma have to reckon with a “subjective challenge of dissociation”, in other words a process which assigns them an identity to which they cannot relate<sup>147</sup>. Discrimination is experienced and acknowledged in many different, fragmented ways, which can vary depending on the significance of social resources (place in the social hierarchy, type of employment, family situation) or characteristics to do with origin (immigrant or descendant of immigrants, differentiated prejudices attached to national or ethnic, actual or presumed origin).

If a sense of propriety or weariness sometimes makes the suffering less visible or more difficult to put into words, **victims of discrimination are no less affected, for all that, by strong emotional reactions and personal injury, of varying severity, inflicted**

**by the experience of discrimination**, including anger and indignation, diminished self-esteem, fear of being paranoid, health problems, lower well-being, depression, etc. At the far end of the spectrum of experiences reported, especially for many young males from “deprived areas”, discrimination and stigma can be perceived as a “total experience” to quote François Dubet: “total, because their whole life seems marred by discrimination; instrumental, because it organises a definition of self and others. Henceforth, everything that happens is taken to be a manifestation of racism and discrimination and many types of behaviour which might seem ‘unjustifiable’ in principle become legitimate in a racist and uniform social world”<sup>148</sup>. Although discrimination does not actually shape their entire existence, it nevertheless remains “an uncertain threat”<sup>149</sup>.

People’s health is strongly correlated with socio-economic inequality, particularly working conditions and “the unequal distribution of

<sup>146</sup> Defender of Rights, *Unequal access to rights and discrimination in France*, op. cit., p. 80.

<sup>147</sup> Dubet F., Cousin O., Macé E. & Rui S., *Pourquoi moi ? L’expérience des discriminations*, 2013.

<sup>148</sup> Guyon R., “Entretien avec François Dubet et Fabien Truong. De *La galère aux Loyautés radicales*”, op. cit. p. 9.

<sup>149</sup> *Ibid.*

occupational risks depending on the place occupied in the social division of labour”<sup>150</sup>. Some social groups that suffer origin-based discrimination are more likely to do more insecure, strenuous jobs. Whatever the case, a situation of discriminatory harassment at work is hugely stressful in a way that impacts the motivation and professional performance of the victim<sup>151</sup>. **The complaints lodged with the Defender of Rights illustrate these adverse effects and the wider fallout – especially professional – of victims’ deterioration in health.**

### **Discriminatory harassment on the basis of origin and the impact on health**

An IT technician was laid off for physical unfitness for all positions in the company following a period of sick leave for severe depression. The repeated discriminatory harassment owing to his origin on the part of his colleagues, who made offensive comments towards him and “jokes” about his origins, ended up undermining his working conditions and his health. Contacted by the victim, the Defender of Rights presented its observations before the Employment Tribunal<sup>152</sup>. The latter recognised the existence of discriminatory harassment in connection with the employee’s origins which had repercussions on his mental health. The employer is accountable in this regard – whether or not there was malicious intent on the part of the perpetrators of the racist remarks and jokes<sup>153</sup>.

For the first time in France, researchers at the French Institute for Demographic Studies (INED) have analysed the mortality rates between 1999 and 2010 of adults born in France to two immigrant parents. They have found significant excess mortality among men of North-African descent: this is 1.7 times higher for men born in France to two North-African immigrant parents (276 per 1,000 compared to 162 per 1,000 for men in the reference population)<sup>154</sup>. These rates are lower, however, for second-generation south-European male immigrants (106 per 1,000) and for first-generation male immigrants, all origins combined. Published in June 2019, these findings suggest that this excess mortality cannot solely be explained by particular difficulties in accessing healthcare<sup>155</sup> or differences in education level, but also by a whole host of disadvantages, not least on the job market<sup>156</sup>.

### **Covid-19 and systemic discrimination**

Two projects launched in April 2020, led by the institute dedicated to biomedical research and human health (Inserm), the Directorate for Research, Studies, Assessment, and Statistics (DREES) and Ministry for Solidarity and Health, together with their partners (French National Institute of Statistics and Economic Studies/ INSEE, Santé publique France, French National Centre for Scientific Research/CNRS, INED and University of Paris-Saclay), are aimed at shedding light on the key epidemiological and social implications of the epidemic. The findings of these multidisciplinary studies will be instrumental in informing the most appropriate prevention and lockdown exit

<sup>150</sup> Baudet-Caille V. & Mony P., “Discriminations : quel impact sur la santé ?”, *Plein droit*, no. 86, 2010/3, p. 3.

<sup>151</sup> Salhi M., Thesis “Impact des discriminations sur le stress au travail: une mesure du rôle de la valorisation organisationnelle. Gestion et management”, University of Grenoble Alpes, 2016.

<sup>152</sup> Defender of Rights, Decision MLD-2016-328 of 20 December 2016 on a case of harassment and unfavourable career advancement amounting to a case of origin-based discrimination.

<sup>153</sup> Montpellier Employment Tribunal, Adjudication decision concerning cases of moral harassment on the basis of the employee’s origin, which led to health problems and unfitness for all of the positions in the company, no. 13/00529, 26 June 2015.

<sup>154</sup> Guillot M., Khlal M., Wallace M., “Adult mortality among second-generation immigrants in France: Results from a nationally representative record linkage study”, *Demographic Research*, v. 40, 2019, p. 1611.

<sup>155</sup> Berchet, C. and Jusot, F., “Immigrants’ Health Status and Use of Healthcare Services: A Review of French Research”, *Questions d’économie de la santé*, no. 172, 2012.

<sup>156</sup> Guillot M., Khlal M., Wallace M., “Adult mortality among second-generation immigrants in France”, *op. cit.*

strategies and enabling early detection of any second wave and, over the longer-term, monitoring of the effectiveness of the measures taken.

The EpiCOV project is a large-scale epidemiological study, associated with an extensive statistical survey<sup>157</sup>, on the basis of which it will be possible to quantify the proportion of people who have developed antibodies in response to the SARS-CoV-2 virus and to document the effects of this epidemic on the living conditions of our fellow citizens. This project will provide insight into the spatial, temporal, sociodemographic and family dimensions of the epidemic and the lockdown measures.

The SAPRIS project will study the prevalence of Covid-19 symptoms and other health problems, uptake and forgoing of healthcare for other disorders, perceived risk for oneself and in general, the effects of prevention measures on day-to-day life, social relations and work, as well as childcare.

These studies will yield an insight into the over-exposure and excess mortality of certain social groups to Covid-19, especially people living in working-class neighbourhoods and immigrant populations.

### **Circumvention strategies**

**To cope with racism and humiliation, people belonging to social groups who face discrimination have no other choice but to adopt a wide range of prevention and avoidance strategies**, “which go from avoiding conflict to confrontation to humour”, distancing, detachment, distrust or exile<sup>158</sup>. In this respect, the workplace is an interesting focus point, reflecting as it does both the

diversity and ambivalence of strategies adopted and the impact of discrimination on people’s career paths.

### **Testimony**

“However saturated the job market is, all of my old classmates have now managed to find a job; I, however, never land any interviews. The only difference I can see between them and me is my skin colour! My Jobcentre advisor even suggested that I stop putting a photo on my CV, which really shocked me at the time, but with hindsight this is what I’m considering doing now to at least have a chance of actually getting an interview.”

Female jobseeker, 26 years old<sup>159</sup>

Workplace discrimination also produces self-censorship where individuals may tend to limit their professional ambitions by anticipating the discrimination they are likely to be exposed to. It is also manifested in forms of social downgrading.

### **Testimony**

“I have done three masters via work-linked training, and for each of them, all of the Arab guys really struggled to find a company to take them on. At the end of each of them, the whole class had a job after 6 months, whereas the Arab guys are still without a job – and it’s been 10 years. We mostly do odd building jobs or temping as order pickers or seasonal fruit pickers in the spring and summer.”

Male jobseeker, 34 years old<sup>160</sup>

<sup>158</sup> Dubet F., Cousin O., Macé E. & Rui S., *Pourquoi moi ?*, op.cit., p. 6.

<sup>159</sup> Defender of Rights, *Findings of the call for evidence. Access to employment*, op. cit., p. 7.

<sup>160</sup> *Ibid.*, p. 6.

## Testimony

“After a long string of failures, I decided to take any old job. I don’t encourage anyone to work hard to get a diploma given the little help it’s been to me. I even regret having spent time and money on getting it. It’s changed my way of looking for work and especially with which companies.”

Female employee, 25 years old<sup>161</sup>

In order to get round the discrimination they are bound to face when looking for a job or during their career, individuals perceived as being of foreign origin may choose instead a profession with a self-employed or liberal status, or a job in industries where there is a high proportion of immigrants or descendants of immigrants<sup>162</sup>. These segmented markets can sometimes become a form of refuge, by increasing the chances of getting a job and thereby escaping potential stigma existing in other lines of business. That said, these strategies box in the careers of immigrants and descendants of immigrants and restrict their career choices.

Given the injustice of discrimination, immigrants and descendants of immigrants may attempt strategies to break away from discrimination (leave a job or city, move abroad or return to their country of origin), a decision which can have long-lasting, deeply scarring and sometimes destructive effects on their personal and professional lives<sup>163</sup>. To put an end to the spiralling failure once and for all, victims of discrimination on the basis of their origin sometimes consider moving abroad.

A study by the Paris-Parisian Region Chamber of Commerce and Industry (CCI) had thus revealed that “the recruitment discrimination that some minorities have to deal with also pushes some French youngsters to move to countries that are more open and tolerant of differences”, particularly those with the highest qualifications<sup>164</sup>.

## 2. Social cohesion is being weakened over the long-term

**The consequences of such discrimination can be felt at different levels. Over and above its economic and social cost, it undermines the trust that victims have in institutions and casts doubt over their place in society.** At local area level, spatial segregation, in return, steers the perspective that French society has of part of its population, as attested by the political and media debates.

Compared with their immigrant parents, second-generation “visible minorities” are more aware of the existence not only of this type of discrimination (71%) but also discrimination on the basis of religion, gender, state of health and disability<sup>165</sup>. This increased awareness of the risk of discrimination can partly be explained by higher expectations of equality in a country where they were born and have grown up. This higher perception of discriminatory risks among descendants of immigrants is specific to France and other European Union countries; unlike the other OECD countries where people of immigrant descent tend to feel less discriminated against than immigrants<sup>166</sup>. People born in France of non-European descent, as well as people born in Overseas France, “thus feel a lot more French” (sense of belonging), “than they feel perceived as French” (sense of acceptance)<sup>167</sup>.

<sup>161</sup> *Ibid.*, p. 14.

<sup>162</sup> De Rudder V. & Vourc’h F., “Les discriminations racistes dans le monde du travail”, *op. cit.*

<sup>163</sup> Dubet F., Cousin O., Macé E. & Rui S., *Pourquoi moi ?*, *op. cit.*

<sup>164</sup> Paris-Parisian Region Chamber of Commerce and Industry (CCI), *Les Français à l'étranger. L'expatriation des Français, quelle réalité ?*, 2014, p. 21.

<sup>165</sup> McAvay H. & Simon P., “Perception et expériences de la discrimination en France”, *op. cit.*, p. 102.

<sup>166</sup> OECD, *Indicators of Immigrant Integration*, 2015.

<sup>167</sup> Jayet C., “Se sentir français et se sentir vu comme un français. Les relations entre deux dimensions de l'appartenance nationale”, *Sociologie*, vol. 7, 2016, pp. 113-132.

### Testimony

“I hope that this study will raise awareness of the mental suffering of the third-generation of immigrants. You hear about integration, when we are already an integral part of France – when France is the only country we have ever known.”

Female employee, 28 years old<sup>168</sup>

### Testimony

“Even though I might have the same skills for the same job, I always have to show that I am the best or do more to land the job (compared with another applicant of French origin). These stances are highly detrimental to society as a whole and to community living. They create frustration, resentment, violence and always divide people more than they bring them together. They create ‘second-class’ citizens.”

Male jobseeker, 26 years old<sup>169</sup>

Though born French, descendants of immigrants are all too often regarded with a form of suspicion and treated differently when interacting with law enforcement agencies, school and the authorities, which undermines their trust and loyalty to French institutions. Whilst the vast majority of young people still have faith in the schooling system (87% of respondents), this trust appears to be weaker in victims of origin-based discrimination (76%)<sup>170</sup>.

From the point of view of pupils from deprived areas, the mechanisms that contribute to systemic discrimination are actually more than that: they “stem, in reality, from an intention to discriminate, from a racist school of thinking hidden behind its worthy principles”<sup>171</sup>. The violence that can accompany “this distrust is, essentially, commensurate with the often disproportionately high hopes for transformation placed in schools”<sup>172</sup>. In the same way, levels of trust in the police depend not only on the checks themselves, but also on whether or not they are perceived as racial profiling<sup>173</sup>.

### Discrimination thus undermines discriminated groups’ sense of loyalty to the Republic and fuels a certain distrust in institutions:

“not only do people have the feeling that the institutions are not protecting them, but they may think that they are there to keep them at a distance”<sup>174</sup>. For youngsters from deprived neighbourhoods in particular, as pointed out by François Dubet and Fabien Truong, the “certainty of belonging to the same group of dominated/stigmatised individuals, but without seeing any viable political prospects for glimpsing a possible improvement” acts as a form of collective consciousness<sup>175</sup>. Discrimination and poor representation in the public sphere fuel a painful search for identity and a sense of national disaffiliation.

Since 2015, suspicions regarding working-class neighbourhood communities, globally regarded as being “resistant to the ‘values of the Republic’” have grown and are feeding into public discourse<sup>176</sup>. This climate of distrust and, more generally, suspicions regarding Islam and the suburbs in particular – exacerbated since the terror attacks – are in turn driving identitarian closure and conflicts of loyalty.

<sup>168</sup> Defender of Rights, *Findings of the call for evidence. Access to employment*, *op. cit.*, p. 8.

<sup>169</sup> *Ibid.*, p. 10.

<sup>170</sup> Brinbaum, Y. & Primon J.-L., “Parcours scolaires et sentiment d’injustice et de discrimination chez les descendants d’immigrés”, *op. cit.*, p. 233.

<sup>171</sup> Guyon R., “Entretien avec François Dubet et Fabien Truong. De *La galère aux Loyautés radicales*”, *op. cit.*, p. 10.

<sup>172</sup> *Ibid.*

<sup>173</sup> European Union Agency for Fundamental Rights (FRA), “Being black in the EU: Second European Union Minorities and Discrimination Survey: Summary”, *op. cit.*

<sup>174</sup> Dubet F., Cousin O., Macé E. & Rui S., *Pourquoi moi ? L’expérience des discriminations*, 2013.

<sup>175</sup> Guyon R., “Entretien avec François Dubet et Fabien Truong. De *La galère aux Loyautés radicales*”, *op. cit.*, p. 8.

<sup>176</sup> Kirszbaum T., *Le stigmat territorial dans les discours politiques*, 2016, p. 2.

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## II. The limits and pitfalls of the current response

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The public authorities have been slow to recognise the scale of racial discrimination and its harmful effects for the Republican pact. “Recognition of the racial basis” of these inequalities and new political store set by origin-based discrimination marked a turning point in France<sup>177</sup>. Following the European Union’s lead, during the adoption of the discrimination directives at the end of the 1990s, the 1<sup>st</sup> anti-discrimination package<sup>178</sup> was launched, but was not developed as a priority or cross-cutting issue of specific public policies<sup>179</sup>.

In recent years, public policy to combat origin-based discrimination has only been an intermittent item on the public agenda. As such, this type of discrimination has not been supported by the positive and continuous momentum that has recently been observed for discrimination on the basis of gender or sexual orientation.

And yet, the scale of the stigmatisation on the one hand, and the economic situation on the other, call for priority to be given to the urgent deployment of strong policies supported by a clear discourse. For mass unemployment, pressure on the housing market, selective admission to university technology institutions or BTS courses (equivalent to vocational

HNDs) and more generally the significant mismatch between supply and demand are all factors fuelling – even unconsciously – stereotypes and discrimination: the large number of eligible applicants for a sought-after good (be it a job or housing for example) allows the decision-makers, recruiters and other managers scope for exercising preferences based on biases that play out negatively where origin is concerned<sup>180</sup>.

**Over the years, far from receding, origin-based discrimination persists and manifests itself in all areas of day-to-day life. Although recognised as such, it remains deprived of any proactive and ambitious policy for preventing and combatting it.**

<sup>177</sup> Benichou S., *Le droit à la non-discrimination ‘raciale’ : instruments juridiques et politiques publiques*, PhD thesis in public law, under the supervision of Danièle Lochak, 2011, p. 15.

<sup>178</sup> Creation in 1999 of the *Département*-level Committees for Accessing Citizenship (CODAC), Discrimination Study Group (GED) – which became the Discrimination Study and Prevention Group (GELD) in 2000; launch of a free telephone service for receiving reports of discrimination (114), etc.

<sup>179</sup> Fassin D., “L’invention française de la discrimination”, *Revue française de science politique*, vol. 52, 2002, p. 406.

<sup>180</sup> See, for example, in the social housing sphere, the research of the Lab’Urba team, *Analyse des facteurs et des pratiques de discriminations dans le traitement des demandes de logements sociaux à La Camy, Nevers, Paris, Plaine Commune et Rennes Métropole*, 2015.

## A. Public policies that are limited in scope

Following the European Union's efforts to make combatting ethno-racial discrimination a requirement<sup>181</sup>, the focus of anti-racism action came under the prism of law and public policy. After being put on the agenda in the late 1990s, state policy for fighting origin-based discrimination went through a number of reforms in France before quickly falling steadily out of favour. Origin-based discrimination policy in France has above all been the responsibility of local stakeholders and institutions, supported by urban policy.

By relying largely on legal recourse as a conceptual tool and means of taking action<sup>182</sup>, public policy to combat discrimination has not addressed the systemic dimension of origin-based discrimination and encounters difficulties in finding other registers for action. Competition from other paradigms, particularly the promotion of diversity, has impeded the emergence of a policy to combat origin-based discrimination, which was swiftly relegated to an urban policy issue. Political mobilisation on these issues then faded, replaced by an approach focusing on the values of the Republic and secularism.

### 1. Minimal policies with no great coherence and delegated to local government

Over and above the challenges of accessing rights and the role of the High Authority for Combating Discrimination and Promoting Equality (HALDE) created in 2004, whose remit became part of the Defender of Rights' purview in 2011, the fight against origin-based discrimination has gradually been reduced in terms of public policy to the sole framework of urban policy.

#### No ambitious national policy

Whereas the knowledge gained through research and public statistics now demonstrates the systemic nature of

discrimination, this does not seem to be sufficient to spur economic stakeholders and the public authorities into crafting an anti-discrimination strategy.

At national level, public prevention and correction policies tend to be limited to ad hoc measures, and perhaps even communication campaigns. Even in the employment sphere where efforts to combat discrimination have gained traction, shared discussions and narratives have sometimes gathered pace without enabling a meaningful equality policy to emerge.

The public authorities are continuing to encourage self-regulation of organisations by supporting the *Diversity Charter* and promote – particularly among central government – the *Diversity Label* set up in 2008 and attributed, to date, to 75 companies, including some forty SMEs/micro-businesses<sup>183</sup>.

Although the testing-based studies commissioned by the Government have lifted the lid on the reality of origin-based discrimination in recruitment, these remain isolated initiatives which have not been associated with any corrective action.

And yet the tests performed on the recruitment practices of some forty large corporations, between April and July 2016, had uncovered evidence of significant differences in treatment depending on the “origin” of the male and female applicants, for employee and manager positions alike<sup>184</sup>.

<sup>181</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ*, L. 180, 19 July 2000; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ*, L. 303, 2 December 2000.

<sup>182</sup> Act No. 72-546 of 1 July 1972 on combating racism, known as the “Pleven Act”; Act No. 82-689 of 4 August 1982 on the freedoms of workers in companies, known as the “Aurooux Act” (labour law provisions prohibiting discrimination in the workplace).

<sup>183</sup> See the website of the Diversity Label: <https://travail-emploi.gouv.fr/emploi/label-diversite>

<sup>184</sup> DARES and ISM Corum, “Discrimination à l'embauche selon l'origine” : que nous apprend le testing auprès de grandes entreprises ?”, *op. cit.*

Analysed by an external consultant, the action plans that the Ministry of Labour asked the companies identified as being highly discriminatory to draw up have turned out to be limited and lacking in details that would allow genuine assessment of their implementation. Only two companies from which no document was forthcoming have been named and shamed, a practice in English-speaking countries which involves publicly releasing the names of the offending companies in a bid to tarnish their reputation. At the start of 2017, a charter on origin-based discrimination in recruitment was drawn up between the Ministry of Labour and the companies on which the testing was carried out, and a good practice guide<sup>185</sup> has also been compiled, but these initiatives do not appear to have been followed up on.

In November 2017, during his speech in Tourcoing on urban policy, the President of the Republic had pledged to "punish discrimination in recruitment and publish the names of the worst-offending companies in this respect", in turn mentioning the use of name-and-shame practices<sup>186</sup>. In this mindset, a new testing-based study on origin-based discrimination in recruitment, carried out between October 2018 and January 2019, was submitted to the Ministry of Labour. Given the silence on the Government's part, despite being in possession of the testing results for 8 months, the researchers published their aggregate findings in January 2020<sup>187</sup>. The Government has published the official scores of the 40 large corporations of the SBF 120 stock market index<sup>188</sup>.

**National public policy thus seems to be limited to very occasional communication measures associated with a few analyses on recruitment, without any corrective measures then being demanded.**

The scale of discriminatory phenomena in the workplace goes beyond the recruitment stage and calls for a fully-fledged strategy to be set up, which is not just limited to the most visible forms of discrimination. Direct discrimination cannot solely be construed as intentional discrimination, but also enables punishment of the discriminatory effects of stereotypes. The notion of indirect discrimination encompasses rules that are apparently neutral but which produce discrimination, and paves the way to tangible corrective measures: this "system is aimed at providing a tool for detecting the effects of certain rules, whether or not they can be foreseen, by requiring a review of such rules, compensation for their effects and implementation of corrective action"<sup>189</sup>.

**Although well documented by social sciences, systemic discrimination has not given rise to a dedicated public policy.**

In the first decade of the new millennium, some local governments did rally to the cause of combatting discrimination in access to social housing, developing particularly awareness-raising and training actions that were sometimes on quite a large scale. But this momentum has since run out of steam.

More broadly, particularly in terms of systemic discrimination co-produced by the institutions, the public authorities still seem to be largely in denial and are clearly lagging behind as regards the approaches taken by their counterparts in Canada<sup>190</sup>, Great Britain and other countries.

At the moment, financing testing operations, communicating statistical results and giving a reminder of the legal framework prohibiting discrimination are standing in for proper public policy.

<sup>185</sup> ISM-CORUM, Good practice guide on steps taken to prevent discrimination risks in recruitment. Summary of talks with the 40 companies tested at the request of the Ministry of Labour, Employment, Vocational Training and Social Dialogue, 2017.

<sup>186</sup> <https://www.lci.fr/emploi/discrimination-a-l-emploi-les-entreprises-epinglees-echapperont-elles-au-name-and-shame-2142232.html>

<sup>187</sup> <https://www.franceinter.fr/economie/discrimination-a-l-emploi-les-resultats-de-la-campagne-de-testing-passee-sous-silence-par-le-gouvernement>

<sup>188</sup> Le Monde with AFP, "Air France, Renault, Accor et d'autres entreprises accusées de discrimination à l'embauche", *Le Monde*, 7 February 2020.

<sup>189</sup> Doytcheva M., "Tradition française et politique européenne de lutte contre les discriminations – à la lumière des trois directives européennes récentes", *French National Family Benefits Fund (CNAF) – Social Information*, 2005, no. 125, p. 99.

<sup>190</sup> Sheppard C., "Contester la discrimination systémique au Canada : Droit et changement organisationnel", *La Revue des droits de l'Homme*, 2018.

### **Limited action, delegated to local government level**

Efforts to combat discrimination in France were initially deployed in connection with the *EQUAL* Community initiative, pursuant to the 2000 European “Race Equality” and “Employment” directives. 43 French projects aimed at combatting ethno-racial discrimination in the workplace were funded in this context by the European Social Fund (ESF).

Regional projects also supported by the Action and Support Fund for Integration and Combatting Discrimination (FASILD)<sup>191</sup> helped to make initial progress in raising the profile of origin-based discrimination in access to employment at the territorial level (diagnostic studies, setup of networks of stakeholders), while national projects limited their ambition to developing training measures and tools primarily in the employment sphere<sup>192</sup>. With little political backing at national level, the *EQUAL* projects have played a part in France’s anti-discrimination action becoming a matter for local government and in a network emerging of stakeholders specialising in the promotion of equality within public organisations (associations, local authorities, businesses, trade unions, training providers, temporary employment agencies, etc.).

At local government level, efforts to combat discrimination have primarily formed part of urban policy, which implements the key aspects of integration policy and is primarily aimed at reducing social inequality between local areas and fostering the integration of residents of so-called priority neighbourhoods. State action in terms of combatting discrimination, carried out by a wide range of local stakeholders, comes in addition to this, and has thus ended up being delegated to the local level as part of a broader support policy for disadvantaged groups.

In the 2000–2006 urban contracts, the local authorities were asked to introduce a new section coordinating anti-discrimination efforts and integration policy. *Local plans for combatting racial discrimination in the workplace, subsequently renamed **Local Plans for Combatting Discrimination*** (PTLCD), were implemented as early as 2001<sup>193</sup>. **Initially geared towards racial discrimination in access to employment, their scope has gradually been extended** to encompass all discrimination grounds and all spheres of society.

The assessment performed in 2011 of the first generation of PTLCDs found that the overwhelming majority of plans (98%) continued to focus on employment, to the detriment of housing – even when this shift in focus was called for by Acsé (national agency tasked with overseeing them after the FASILD)<sup>194</sup>. Some confusion could also be observed between the fight against discrimination and other policy issues – integration in particular – as well as strong resistance on the part of stakeholders to address inequality through the prism of discrimination – especially on the basis of origin<sup>195</sup>.

Following the 19 February 2013 meeting of the Interministerial Committee on Urban Affairs (CIV)<sup>196</sup>, the Government vowed to recast urban policy by bolstering State action in terms of combatting discrimination: “*Reducing the inequalities with which neighbourhood communities must contend is the key purpose underpinning urban policy, and the fight against discrimination is its key tool*”<sup>197</sup>.

For the 2015–2020 urban contracts, the fight against discrimination is now a mandatory priority. By implementing a framework of reference, it must be possible for local areas – overseen by their Prefects – to “*mobilise,*

<sup>191</sup> The FASILD was incorporated into the new National Agency for Social Cohesion and Equal Opportunities (Acsé) in 2006, which was then replaced by the General Commission for Territorial Equality (CGET) in 2014.

<sup>192</sup> Cerrato Debenedetti M.-C., *La lutte contre les discriminations ethno-raciales en France. De l’annonce à l’esquive (1998–2016)*, 2018.

<sup>193</sup> Urban policy was initially overseen by the Interministerial Delegation for Urban Affairs (DIV), and then by Acsé from 2009, followed by the CGET from 2014.

<sup>194</sup> Cabinet Altidem, *Capitalisation et évaluation des PTLCD*, Report for Acsé, 2011. Also see Noël, O., “La lutte contre les discriminations à l’épreuve du temps et des territoires. Rôle des élu(e)s locaux, place des victimes et configurations d’actions locales”, In RECI, *Discriminations & territoires. La mobilisation des acteurs locaux*, 2009, pp. 27–37.

<sup>195</sup> Geste consultancy firm, *Évaluation de la prise en compte de l’intégration des populations immigrées et de la lutte contre les discriminations dans les contrats de ville*, Report for the DIV and FASILD, 2005.

<sup>196</sup> <https://www.anru.fr/fre/Espace-presse/Communiqués-Dossiers-de-presse/Comite-interministeriel-des-Villes-Relève-de-decisions-19-fevrier-2013>.

<sup>197</sup> CGET, *Nouveau cadre de référence de la lutte contre les discriminations au sein de la politique de la ville : les enjeux de la nouvelle contractualisation*, 2014, p. 3.

train and raise awareness of the local network and urban policy stakeholders in preventing discrimination through integrated approaches"<sup>198</sup>. The increasing number of Local Plans for Combatting Discrimination (PTLCD) reflects how "the fight against discrimination is becoming a municipal responsibility"<sup>199</sup>.

**The fact that action is being extended to cover all types of discrimination and incorporated into the urban policy portfolio is a sign that the political response to origin-based discrimination is weakening**, with the reference to area or place of residence replacing the reference to origin. The use of territorial categories thus contributes to the invisibility of origin-based discrimination to which residents of deprived neighbourhoods are still largely exposed<sup>200</sup>.

The assessment of the PTLCDs in terms of combatting origin-based discrimination (in the same way as the efforts by the operational committees for combatting racism and anti-Semitism/CORA and by prefects on equal opportunities) reveals decidedly mixed and disparate results<sup>201</sup>. The inclusion of the fight against discrimination as a cross-cutting priority of local contracts has "seldom progressed further, to date, than the statement of general intentions, masking the common lack of any action strategy combining a diagnostic study, action plan and assessment"<sup>202</sup>.

The General Commission for Territorial Equality (CGET), which took over from the Acsé, acknowledges that "most discrimination" suffered by residents of these neighbourhoods "is systemic"<sup>203</sup>.

But its framework of reference, which provides for "the improvement and assessment of decision-making processes in a bid to achieve genuine equality of treatment across all areas of life (housing, education, public services, etc.)"<sup>204</sup>, does not seem to have been put into practice through the new PTLCDs.

### **Action to combat discrimination and promote equality in access to social housing, led by the Isère Association of Social Landlords (ABSISE)**

Entrusted to Altidem, a service provider specialising in discrimination prevention, this action galvanised support from a wide range of social housing partners in the Isère department for five years (2011-2015). First and foremost it was an opportunity to train staff and draft a guide for professionals – particularly social workers who assist social housing applicants<sup>205</sup>. A *Charter to combat discrimination and promote equality in access to social housing*, signed in June 2015 with the Prefect of the Isère *département*, rounded off this action<sup>206</sup>.

Various trials have been set up ahead of certain actions in the allocation reform following the *Access to Housing and Urban Renewal/ALUR* and *Equal opportunities* Acts (rating applications, putting the range of available council housing and chosen rental online, etc.).

This action is being continued today through a survey among applicants aimed at assessing their level of satisfaction regarding the new procedure for applying for housing and how they are treated, as well as their perception of any discrimination in the allocation<sup>207</sup>.

<sup>198</sup> *Ibid.*

<sup>199</sup> Cerrato Debenedetti M.-C., *La lutte contre les discriminations ethno-raciales en France*, *op. cit.*

<sup>200</sup> Doytcheva M., *Une discrimination positive à la française. Ethnicité et territoire dans les politiques de la ville*, 2007.

<sup>201</sup> This assessment also draws on the Defender of Rights' contribution to drafting and implementing certain PTLCDs (Agreement between the Defender of Rights and General Commission for Territorial Equality (CGET), 17 November 2015).

<sup>202</sup> Kirsbaum T., "Capitalisation des connaissances sur les discriminations dans le parc privé et les instruments d'action publique pour les combattre", *op. cit.*, p. 28.

<sup>203</sup> CGET, *Nouveau cadre de référence de la lutte contre les discriminations*, *op. cit.*, p. 3.

<sup>204</sup> *Ibid.*, p. 7.

<sup>205</sup> [https://www.lemonde.fr/logement/article/2016/04/18/a-grenoble-et-en-isere-une-experience-reussie-d-attribution-equitable-de-logements-sociaux\\_4904107\\_1653445.html](https://www.lemonde.fr/logement/article/2016/04/18/a-grenoble-et-en-isere-une-experience-reussie-d-attribution-equitable-de-logements-sociaux_4904107_1653445.html)

<sup>206</sup> <http://www.isere.gouv.fr/content/download/4502/30363/file/Charte%20discriminations%20logement.pdf>

<sup>207</sup> ISM-CORUM, *Connaissance, satisfaction et ressenti de la discrimination dans le processus d'attribution*, Analysis of the findings of a survey for the Isère Association of Social Landlords (ABSISE), 2019.

Despite the innovative initiatives taken by some local stakeholders<sup>208</sup>, the **lack of capitalisation on successful trials and national political leadership** has hampered the emergence of a meaningful comprehensive policy to combat discrimination<sup>209</sup>.

Undermined by the cut in overall funding attributed to them, Local Plans for Combatting Discrimination (PTLCDs) largely rely on a motley array of non-binding, consensual tools and mechanisms (optional training schemes, local testing, identification of good practices), for the most part recycling those that came previously under the integration policy<sup>210</sup>. The most organised initiatives (service audits, specific measures for combatting discrimination in municipal recruitment) identified in the context of PTLCDs were able to be rolled out when they had the backing of the municipal team. Otherwise, urban policy professionals found themselves limited by technical constraints and a lack of resources and time, and steps taken to combat discrimination had to compete with other political priorities.

As such, at local and national level alike, other competing paradigms – or which were deemed to take precedence in the wake of the 2015 and 2016 terror attacks, such as combatting radicalisation or promoting secularism – have risen to the top of the urban policy agenda, with “ghetto” communities often initially being held accountable for these “problems”.

As Thomas Kirszbaum notes, we find ourselves in a paradoxical situation: France’s political leaders are expected to deliver a policy to combat discrimination and claim to want to include communities on the fringes of urban areas in the name of “Republican equality”, and yet, at the same time, they repeatedly remind these very communities that they are not exactly the same as the others and that they do not have this “something” to live up to the Republican requirements<sup>211</sup>. The same applies regarding the use of the terms “communitarianism” and “separatism” in official narratives about the organisation of Islam<sup>212</sup>.

More generally, **targeting the deprived neighbourhoods under urban policy leads to measures focusing on their residents and thus to an “insidious shift” and return to the “integration” agenda**: rather than examining discrimination as a “community problem”, it once again becomes a “problem of certain communities”, without any consideration of what produces discrimination and the more general mechanisms behind it, even though these play a part in the way in which communities are perceived<sup>213</sup>.

Although the limits of urban policy, as the sole recipient of public anti-discrimination policy, have been identified, the merger of the General Commission for Territorial Equality into the new National Agency for Territorial Cohesion (ANCT), set up on 1 January 2020<sup>214</sup> and afforded a broader mandate for supporting local government projects, does not augur well for significant changes in the terms and scope of local anti-discrimination policies.

<sup>208</sup> See, for example, the town of Villeurbanne which, particularly in the housing sphere, has developed an operational procedure against discrimination in the private and council sector, taking account of direct, indirect and systemic discrimination. See: Noël, O., *Note de capitalisation de la formation-action à la prévention et à la lutte contre les discriminations*, Association Villeurbanne Droit au Logement, Study for the town of Villeurbanne as part of the local plan against discrimination in housing, 2010. ([https://www.avdl.fr/doc\\_pdf/Note\\_ISCRA\\_demarche\\_AVDL\\_2010.pdf](https://www.avdl.fr/doc_pdf/Note_ISCRA_demarche_AVDL_2010.pdf)).

<sup>209</sup> See, in particular, CGET, *Methodological guide and case studies. Prevention and action against discrimination in urban contracts. The keys to implementing and assessing prevention and action against discrimination*, 2015.

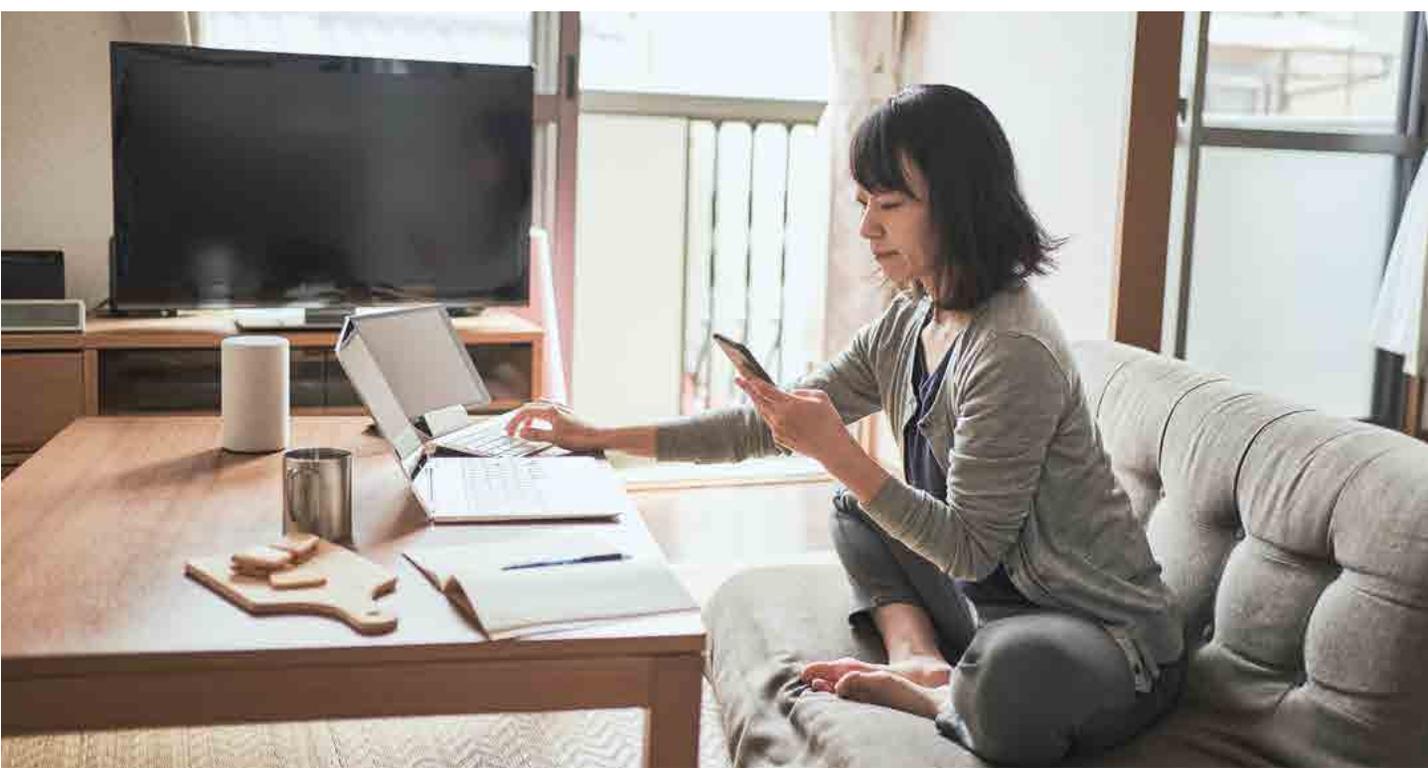
<sup>210</sup> Cerrato Debenedetti M.-C., *La lutte contre les discriminations ethno-raciales en France. De l'annonce à l'esquive (1998-2016)*, 2018. The author particularly notes that the budget allocated to PTLCDs was cut by a third between 2010 and 2014.

<sup>211</sup> Kirszbaum T., “Le stigmatisme territorial dans les discours politiques”, *op. cit.*, p. 1.

<sup>212</sup> Le Monde with AFP, “Macron veut lutter contre le ‘séparatisme islamiste’, sans stigmatiser les musulmans”, 18 February 2020. ([https://www.lemonde.fr/politique/article/2020/02/18/emmanuel-macron-en-deplacement-a-mulhouse-veut-lutter-contre-le-separatisme-islamiste\\_6029978\\_823448.html](https://www.lemonde.fr/politique/article/2020/02/18/emmanuel-macron-en-deplacement-a-mulhouse-veut-lutter-contre-le-separatisme-islamiste_6029978_823448.html)).

<sup>213</sup> Noël O., “Injonction institutionnelle paradoxale et souffrance professionnelle”, *VEI-Diversité*, no.137, 2004.

<sup>214</sup> Act 2019-753 of 22 July 2019 founding the National Agency for Territorial Cohesion (ANCT). This agency is formed by a merger of three bodies: the General Commission for Territorial Equality (CGET), National Public Establishment for the Planning and Redevelopment of Commercial Spaces (Epareca) and the Digital Agency (for its portfolios: deploying high-speed broadband through the “France Très Haut Débit” plan, and mobile cover and digital uses through the “Société numérique” mission).



Efforts to combat discrimination should not solely be restricted to deprived neighbourhoods. This targeting ignores the vast majority of communities exposed to origin-based discrimination who do not live in such neighbourhoods. It prompts ordinary law policies and stakeholders to perpetuate a stereotypical vision of the associated issues. By delegating its "management" to local government specialists, such targeting deprives the fight against discrimination of its necessary cross-cutting and nationwide dimension<sup>215</sup>.

## 2. The fight against discrimination eclipsed by competing paradigms

Right from the outset, public policy to tackle racial discrimination<sup>216</sup> seemed to be swiftly overshadowed by competing paradigms and other political priorities.

### Promotion of diversity and consequences on the fight against discrimination

Back in 2004, right when the High Authority for Combating Discrimination and Promoting Equality (HALDE) was about to be set up, a new paradigm emerged in France for addressing the question of origin-based discrimination: that of promoting diversity<sup>217</sup>.

<sup>215</sup> Kirszbaum T., "Capitalisation des connaissances sur les discriminations dans le parc privé et les instruments d'action publique pour les combattre", *op. cit.*

<sup>216</sup> i.e. the narratives and policies accompanying the authorities' new stance and aimed at putting the non-discrimination principle into practice (prohibition of origin-based discrimination in the French Criminal Code, dating from 1972).

<sup>217</sup> The paradigm of diversity in the workplace brings to mind the goal of social diversity – the substitute for ethno-racial diversity as pointed out by the Discrimination Study and Prevention Group (GELD) as early as 1999, used in the social housing sector to guide settlement policies according to the belief that a "balanced" distribution of populations fosters social promotion of underprivileged communities. Deschamps V. E., "Approche critique et juridique des normes relatives à la mixité sociale", *Informations sociales*, 2005, no. 125, p. 58. On stances justifying diversity in housing, see Kirszbaum T., *Mixité sociale dans l'habitat, Revue de la littérature dans une perspective comparative*, Études et recherches, 2008 ; Kirszbaum T. & Simon P., *Les discriminations raciales et ethniques dans l'accès au logement social*, 2001.

But following this swift success, and as pointed out by Olivier Noël as early as 2006, “has the fight against ethnic and racial discrimination been nothing but a passing episode in France’s public policy?”<sup>218</sup>

On the back of the signature of a *Diversity Charter* in 2004, following the initiative of some forty large French companies, and the official creation of the *Diversity Label* in 2008, the paradigm of diversity was initially harnessed to address the issues of non-discrimination in companies. Aimed at encouraging private and public employers alike to reflect France’s “cultural and ethnic diversity” within their organisation, it extols the importance and merit of varied backgrounds and perspectives as assets enabling a company to “mirror society”, not least in order to break new ground and capture new markets<sup>219</sup>.

Proposed by France’s National Association of Human Rights Directors (ANDRH), the *Diversity Label* is awarded by Afnor Certification to companies meeting specifications based on the corporate consensus regarding diversity on the good practices to adopt, all criteria combined. Backed by the State, the label is grounded in a positive and proactive approach that makes a refreshing change from the prohibitions and requirements laid down by the law.

In the beginning, promotion of diversity enabled greater attention to be paid to the representativeness of “visible” minorities in politics and the media<sup>220</sup>. The Act of 31 March 2006 for equal opportunities particularly recommends that television programmes “reflect the diversity of French society” (article 47)<sup>221</sup>.

Whilst it is increasingly in evidence across the professional, political, scientific and non-profit spheres, **the paradigm of diversity nevertheless plays a part in eclipsing that of the fight against origin-based discrimination and the associated legal prohibitions.**

Unlike the notion of discrimination, that of diversity – the spread of which has also been encouraged by the European institutions – is not based on an enforceable legal definition. It does not entail any obligations for employers or give any rights to potentially targeted civil servants or employees. This lack of conceptual convergence is illustrated by the many extendable definitions given to it, the characteristics likely to define it (origin, gender, disability, age, sexual orientation, etc.), as well as the policies conducted with a view to promoting it, which depend to a large extent on the organisation’s activity sector, its environment, size, strategy and culture.

### Testimony

“Rather than talking about “diversity”, which does not lead to any practical recommendation in recruitment terms, we preferred to look at the subject through the lens of equal treatment, which resonates a lot more with recruiters. But people had to be given training first, so that they understood the difference between these two notions.”

### Companies<sup>222</sup>

Unlike the law on non-discrimination, which is more demanding, the extendable paradigm of diversity has contributed to an overly flexible reconfiguration of companies’ and authorities’ efforts, with the signature of charters, agreements, pacts, dedicated conventions and, for some, application for certification. The rise of soft law and voluntary commitments has led to progress, but it has not been translated into agreements and precise objectives with the social partners.

This approach also tends to make respect for fundamental rights conditional upon the economic efficiency objectives which would be expected of a non-discrimination and equality policy.

<sup>218</sup> Noël, O., “Entre le modèle républicain de l’intégration et le modèle libéral de promotion de la diversité : la lutte contre les discriminations ethniques et raciales n’aura-t-elle été qu’une parenthèse dans la politique publique en France ?”, *Contribution at the CASADIS symposium*, CGT, 2006, p. 1.

<sup>219</sup> Even if, for the Defender of Rights, diversity in terms of perspective and backgrounds should not be confused with skin colour and the presumed origin of individuals.

<sup>220</sup> Bereni L. & Jaunait A., “Usages de la diversité”, *Raisons politiques*, 2009/3, no. 35, pp. 5-9.

<sup>221</sup> Act No. 2006-396 of 31 March 2006 for equal opportunities.

<sup>222</sup> ISM-CORUM, *Good practice guide on steps taken to prevent discrimination risks in recruitment.*, op. cit., p. 4.

While the *Diversity Charter*, introduced in 2004, focused on origin-based discrimination, research conducted since show that the employers who have signed it and/or been awarded the Label on account of their efforts to promote diversity tend to focus their prevention initiatives on disability, age and gender equality, since such proactive measures are usually in response to key legal obligations. Furthermore, the paradigm of diversity is chiefly directed towards senior executives in the private sector and government departments: the steps taken in this regard above all focus on the representativeness of “elites”, thus overshadowing the scale of racial and sexual discrimination across the businessfield, especially in low-skilled employment<sup>223</sup>.

Such promotion of diversity asked of organisations thus risks becoming “the substitute for a more structural public policy promoting equal opportunities, i.e. a policy that would be aimed at overhauling the conditions in which individuals prepare to enter the job market”<sup>224</sup>. However, decisive action against systemic discrimination (and the tendency to consider the underlying stereotypes as natural) requires the public authorities to become more involved in convergent strategies.

### **Emergence of competing paradigms**

Beyond official stances taken on diversity, the public authorities have focused their efforts on tackling racism and anti-Semitism, embodied by the Interministerial Delegation for the Fight against Racism, anti-Semitism and anti-LGBT Hatred (DILCRAH), set up in February 2012 and, since November 2014, attached to the Prime Minister’s departments (rather than solely the Minister of the Interior).

After an initial interministerial plan entitled *Mobilized against Racism and Anti-Semitism* (*Mobilisés contre le racisme et l’antisémitisme*)

(2015-2017), the *National Plan Against Racism and Anti-Semitism* (2018-2020) presented by Prime Minister Édouard Philippe in March 2018, and led by the DILCRAH team, musters together all of the ministries in four battles<sup>225</sup>: combatting online hatred; educating against prejudice and stereotypes; better assisting victims and investing in new areas of action. This has mainly been put into practice through communication and awareness campaigns and *Département*-level plans within the context of the operational committees for combatting racism and anti-Semitism (CORAs), which replace the former Equal Opportunities Commissions (COPEC, formerly CODAC). The outcome in this regard has been modest and is not widely known.

In order to prepare the ministries for applying for the **Diversity Label**, the DILCRAH has also, since 2015 and in conjunction with the General Directorate for Administration and the Civil Service, been coordinating a compulsory awareness-raising module for all new civil servants, which sets significant store by the fight against racist and anti-Semitic prejudices and stereotypes<sup>226</sup>.

Across myriad sectors, including schools and higher education<sup>227</sup>, efforts to tackle racism and anti-Semitism are mainly focused on cruel behaviour amounting to criminal offences. That said, “the fight against racial discrimination is distinct from efforts to counter racism, in that its target is not ideological prejudices but the ensuing tangible inequalities”<sup>228</sup>.

Reviving a narrative that primarily addresses racism through the lens of hate speech<sup>229</sup>, as worthwhile as this fight and the tools for leading it are, cannot alone tackle the complexity of everyday, systemic situations encompassed by the principles of direct and indirect discrimination. As the French National Consultative Commission on Human Rights (CNCDH) has underscored, and along

<sup>223</sup> G. Calvès explains that this search for representativeness, in the civil service in particular, means that members of ethno-racial groups are subjected to “highly differentiated forms of initial socialisation”, that such experiences bring about the “formation of different systems of attitudes and values” and that “such cultural differences influence the behaviour of officials and the contents of their decisions”. As she points out, empirically this theory does not hold well as it does not include the phenomenon of acquiring a professional culture common to all officials. In DGAFF, *Renouvellement démographique de la Fonction publique de l’État : vers une intégration prioritaire des Français issus de l’immigration ?*, public report, 2005.

<sup>224</sup> Benichou S., *Le droit à la non-discrimination ‘raciale’*, op. cit.

<sup>225</sup> <https://www.gouvernement.fr/plan-national-de-lutte-contre-le-racisme-et-l-antisemitisme-2018-2020>

<sup>226</sup> <https://www.fonction-publique.gouv.fr/formation-contre-discriminations>

<sup>227</sup> See Ministry of National Education, *Agir contre le racisme et l’antisémitisme. Vademecum*, 2020.

<sup>228</sup> Doytcheva M. & Caradec V., “Inégalités, discriminations, reconnaissance. Une recherche sur les usages sociaux des catégories de la discrimination”, *De la lutte contre les discriminations ethno-raciales à la « promotion de la diversité »*. Une enquête sur le monde de l’entreprise, 2008, p. 141.

the same lines as what is being done on LGBT matters, the need for transversality and decompartmentalisation calls for a comprehensive, coordinated and effective policy<sup>230</sup>.

What is more, in the wake of the 2015 terror attacks and the measures taken in the context of the State of emergency, the Defender of Rights warned the public authorities about the effects of policies against radicalisation<sup>231</sup>. The security rationale pursued in the name of the fight against terrorism and "radical Islamism" has come hand-in-hand with a policy line calling for a "vigilant society". This has been partly responsible for creating a climate of distrust towards suspicious individuals on the basis of their religious beliefs and origin, in which conflation and prejudice fuel discriminatory behaviour and undermine rights and freedoms on a daily basis, while calling into question the very foundations of the principle of secularism<sup>232</sup>.

The recent and perpetually renewed controversy around the principle of secularism – at times given extensive interpretation – has **further exacerbated the stigma towards Muslims or people simply perceived as such.**

With no political backing, the fight against discrimination is inevitably hampered by relative inertia.

### **Decision concerning discriminatory harassment on the basis of origin and/or religious beliefs<sup>233</sup>**

The complainant, of North African descent, had endured an oppressive working environment for years, marred by behaviour with racist, Islamophobic and anti-Semitic connotations. Against this backdrop, on 20 January 2016, in his locker he found a burned prayer book on which the words "FN 2017" had been affixed. Following this serious incident, the occupational health & safety committee (CHSCT) requested an investigation which would never be carried out – the employer simply sending a memo to staff and erasing the graffiti with racist connotations. Deeply shaken by this working environment, the complainant was signed off on sick leave and reached out to the Employment Tribunal for compensation for the harassment and discrimination in his career advancement that he believed he had suffered.

Following the investigation, the Defender of Rights found that the complainant had been a victim of behaviour characteristic of discriminatory harassment on the basis of his origin and religious beliefs and noted that the employer had failed in its safety obligation by allowing a climate to take root conducive to such acts occurring and by failing to conduct an internal investigation for punishing them. The Defender of Rights thus presented its observations to Paris Appeal Court, which followed up on its conclusions<sup>234</sup>.

<sup>229</sup> Note that this is not so much the case for LGBT or gender issues. Accordingly, the State has undertaken a "Mobilisation plan against anti-LGBT discrimination and hatred" (<https://www.gouvernement.fr/plan-de-mobilisation-contre-la-haine-et-les-discriminations-anti-lgbt>)

<sup>230</sup> CNCDH, *Interministerial plan against racism and anti-Semitism: assessment and way forward*, 2017.

<sup>231</sup> Defender of Rights, Opinion 16-06 of 26 February 2016 relating to monitoring of the state of emergency.

<sup>232</sup> CREDOF, *Ce qui reste(ra) toujours de l'urgence*, research carried out with support from the Defender of Rights, 2018.

<sup>233</sup> Defender of Rights, Decision 2019-041 of 8 March 2019 on a case of discriminatory harassment on the basis of origin and/or religious beliefs and an employer's failure to comply with its safety obligation.

<sup>234</sup> Paris Appeal Court, Judgment on moral harassment and discrimination on the basis of an employee's religion and origin; the employer did not respond appropriately to the behaviour with racist and Islamophobic connotations of which the employee was victim, 5 December 2019, no. 17/10760.

## B. Legal action has limited effect

Influenced by European law, French law has undergone many changes over the last two decades to incorporate a broader definition of discrimination and ensure that victims are supported.

In France, this involved the legislative transposition of the 2000 European directives, significant support, for a few years, for anti-discrimination associations and the setup of the public interest group GELD and helpline 114, followed by the founding of an independent administrative authority, the High Authority for Combating Discrimination and Promoting Equality (HALDE), which subsequently became the Defender of Rights

But although discrimination law has been afforded attention and **victim support tools have been developed, taking legal action nevertheless remains a painful and daunting process** for victims, who cannot bear the burden of combating discrimination on their own.

### 1. Progress in terms of non-discrimination law to facilitate legal redress and sanctions

Social science research and the major headway made in European law have changed the perception that French stakeholders, long focused on the goal of the symbolic condemnation of racist behaviour, had of the compensatory role of legal action.

To ensure that discrimination victims' right of remedy is more effective in practice, definition of the forms of discrimination punished by law has moved away from the search for intent and closer to the reality described by the social sciences, with the adoption of the concepts of direct and indirect discrimination.

The French legal framework has thus broadened the scope of the situations it covers beyond the repression of intentional individual deeds. It now punishes forms of direct discrimination stemming from the mobilisation – sometimes unconscious – of stereotypes and clamps down on discriminatory harassment, i.e. moral harassment associated with a discrimination ground.

#### **Recognition of discriminatory harassment: an example**

The Defender of Rights frequently observes inertia on the part of employers when confronted with situations of discriminatory harassment. It has, for example, received a complaint from a female employee concerning remarks and conduct based on her origin, confirmed by several pieces of evidence, the purpose or effect of which has been to offend her dignity and to create an intimidating, hostile, degrading, humiliating or offending environment<sup>235</sup>. Following the inquiry, the employer's failure to comply with its output-based safety obligation was characterised, pursuant to Articles L. 4121-1 et seq. of the Labour Code, despite the wrongdoing having been disclosed. This situation led to her permanent unfitness for her position as well as any other position in the company, and to her dismissal.

At first instance, the complainant's case had been rejected, but, in its judgment dated 27 October 2017, the Appeal Court before which the Defender presented its observations overturned the initial ruling, finding the existence of *“moral harassment partly based on discriminatory motives which led to her declaration of unfitness and her*

<sup>235</sup> Decision MLD-2016-327 of 19 December 2016 on discriminatory deeds on the basis of a female employee's origin.

*dismissal on the grounds that redeployment was impossible*<sup>236</sup>. The Court declared that the dismissal was invalid and sentenced the company to pay €11,000 in damages for the job loss following the declaration of the complainant's unfitness and to pay €15,000 for the harm resulting from the moral harassment and discrimination suffered. The Court maintained that the company “*had seriously failed to comply with its safety obligation (...) since not only had it abstained from responding to bring an end to the behaviour endured, but it had also issued a warning to the complainant after she had come forward to report the discrimination and moral harassment (...)*”<sup>237</sup>. The Appeal Court thereby upheld all of the observations presented by the Defender of Rights.

The law also seeks to analyse and identify the potentially discriminatory impact of apparently neutral measures (practices, rules, policies) on protected groups (risk of indirect discrimination). It considers all of the ways in which discrimination may be expressed in day-to-day life.

**The law's approach no longer focuses solely on suppressing wrongdoing, but also correcting a measure which is leading to unequal treatment.** The collective and systemic dimension of the right to non-discrimination has assumed new importance following the sanctions for indirect discrimination<sup>238</sup>.

Over the past two decades, other major legal breakthroughs have strengthened the scope of the law on combatting discrimination: proof has been made easier and support for victims is given precedence.

**In light of how difficult it is for victims to provide proof of discrimination, in the wake of the 2000 European directives the law provides for modification of the burden of proof before the civil and administrative courts**<sup>239</sup>. Victims must gather together the facts, in the form of a body of evidence, establishing a presumption of discrimination. In this case, it is up to the person implicated to establish that the challenged decision “*is grounded in objective facts unrelated to any discrimination*”<sup>240</sup>. Moreover, the law facilitates access to proof by allowing the judge to supplement the debate “*by ordering any relevant measure of inquiry*”<sup>241</sup>.

Other improvements have been made to French law: recognition of the ability of trade unions and associations to initiate legal proceedings in cases of discrimination on behalf of victims, extension of the aggravating circumstance to all crimes and offences, acceptance of testing as proof before the civil and criminal courts and protection of employees in the event of retaliation after reporting a discrimination situation<sup>242</sup>.

The lawmaker has steadily increased the legal arsenal to include more than 25 discrimination grounds prohibited under the law. Several of these now enable indirect or related origin-based discrimination to be acknowledged, such as actual or presumed affiliation with an alleged race or nation, surname, physical appearance, nationality, place of residence, bank address or ability to communicate in a language other than French.

<sup>236</sup> Douai Appeal Court, Judgment on discriminatory moral harassment against a female retail assistant which led to her being dismissed for unfitness, 27 October 2017, No. 15/03684.

<sup>237</sup> *Ibid.*

<sup>238</sup> Tulkens F., Former judge and Vice-President of the European Court of Human Rights, “Les évolutions récentes de la jurisprudence de la Cour européenne des droits de l'homme. Ses moments forts, ses ressorts, ses dynamiques”, in Defender of Rights, *Proceedings of the Symposium 10 years of non-discrimination law*, “Droit et Justice” Research Mission, with the Court of Cassation, Conseil d'État (the supreme administrative jurisdiction in France) and Conseil national des barreaux (national institution that represents all practicing lawyers in France), p. 23.

<sup>239</sup> Pursuant to Articles L. 1154-1 of the Labour Code and 4 of Act No. 2008-496 of 27 May 2008.

<sup>240</sup> *Ibid.*

<sup>241</sup> CE, Ass., 30 October 2019, Ms Perreux, no. 298348.

<sup>242</sup> Act No. 2001-1066 of 16 November 2001 on the fight against discrimination (in the workplace); Act No. 2002-73 of 17 January 2002 on social modernisation; Act No. 2004-1486 of 30 December 2004 founding the High Authority for Combating Discrimination and Promoting Equality (which became the Defender of Rights in 2011); Act No. 2006-396 of 31 March 2006 for equal opportunities, etc. Today, Act No. 2008-496 of 27 May 2008, which sets out various provisions for adaptation to EU legislation on combating discrimination, is the main reference text.

Although the number of criminal convictions remains low, **civil litigation for origin-based discrimination cases rose sharply from 2005**, under the impetus of European law, transposition legislation since the Act of 16 November 2001, and the HALDE<sup>243</sup>. Unlike for criminal sanctions, there are no public statistics for social and civil sanctions of discrimination.

It is, however, possible to extrapolate this progress by comparing the few thousand cases now presented each year before the social division of the Court of Cassation with the twenty or so prior to 2005 and by using the study by Evelyne Serverin and Frédéric Guiomard covering the period from 2007 to 2010<sup>244</sup>. The increase in the number of decisions issued by the Court of Cassation's social division the past few years<sup>245</sup> has even led to a "discrimination" sub-section being created within it. More broadly, the findings of the research project led jointly by the "Droit et Justice" (Law and Justice) research mission and Defender of Rights on the impact of the transposition of European discrimination law show how judges' practice has changed at all levels of court<sup>246</sup>.

Institutionally speaking, several organisations and systems have also been set up to advance the development and effectiveness of legal action.

Under European impetus and following the 2002 presidential elections, the High Authority for Combating Discrimination and Promoting Equality (HALDE), founded in 2004<sup>247</sup>, was an independent institution tasked particularly with the legal processing of complaints alleging discrimination and was expected, among other things, to improve access to proof and to sanctions for such discrimination<sup>248</sup>. Since 2011, the Defender of Rights, formed from the merger of the HALDE, the Children's Defender, the Mediator of the French Republic and the National Commission for Security Ethics, has assumed these duties. Through its investigation capacities and observations before courts, it promotes an innovative legal approach through the individual processing of the cases it receives. Its promotion efforts are aimed at raising the awareness of the public authorities, professionals and general public of the challenges of equality and non-discrimination.

Regarding the inquiry and investigation process, it has been empowered with various means for gathering proof (request for evidence and, where this is refused, access to the judge, on-site verifications, hearings). Implicated persons are legally required to respond to the institution. **The observations that the Defender of Rights can present before the courts which are referred the victims' cases help to provide the judges with keys to understanding European discrimination law and to drive forward case law**, whether this has to do, for example, with proof of origin-based discrimination, punishment of discriminatory harassment or systemic discrimination<sup>249</sup>.

<sup>243</sup> Doytcheva M., "20 ans de non-discrimination en France : du droit aux pratiques", Les cahiers de la LCD, no. 6, 2018/1, pp. 121-137. For use of panels as evidence of discrimination in the workplace, see: Bousard-Verrecchia E., "Multiplication des critères de discrimination : de l'écoute de la personne à la qualification des faits et à la stratégie judiciaire", in Defender of Rights, *Proceedings of the symposium Multiplication of discrimination grounds. Issues, effects and way forward*, 2015, p.130 et seq.

<sup>244</sup> *Ibid.*; Serverin, E. & Guiomard, F., *Des revendications des salariés en matière de discrimination et d'égalité. Les enseignements d'un échantillon d'arrêts extrait de la base Jurica (2007-2010)*, "Droit et Justice" Research Mission, 2013.

<sup>245</sup> Although the number of civil cases and decisions by the social division of the Court of Cassation on discrimination is growing steadily, the rejection rate is still much too high in other areas (in 2006, 15% of the Court of Cassation's discrimination-related decisions led to a reversal, versus 43% on average) and the discrimination grounds above all appears to be secondary rather than primary. See Doytcheva M., "Diversité et lutte contre les discriminations au travail. Catégorisations et usages du droit", *Les Cahiers de la LCD*, no. 6, 2018/1.

<sup>246</sup> Defender of Rights, *Proceedings of the Symposium 10 years of non-discrimination law*, *op. cit.*

<sup>247</sup> Act No. 2004-1486 of 30 December 2004 founding the High Authority for Combating Discrimination and Promoting Equality.

<sup>248</sup> Borrillo D. & Chappe V.-A., "La haute autorité de lutte contre les discriminations et pour l'égalité : un laboratoire juridique éphémère ?", *Revue française d'administration publique* no. 139, 2011/3, pp. 369-380.

<sup>249</sup> Saint-Nazaire Employment Tribunal, Judgment on a case of moral harassment and discrimination based on origin, no. 12/00130, 16 December 2013; Paris Employment Tribunal, Judgment on the racial and systemic discrimination suffered by the undocumented Malian workers in the construction sector, no. 17/10051, 17 December 2019.

Following the observations of the HALDE and then the Defender of Rights in the context of several years' litigation, the Court of Cassation thus recognised the possibility of furnishing quantitative evidence of discrimination in recruitment by the presumption that could be made from the analysis and comparison of the last names of job applicants and those who were eventually recruited on fixed-term or permanent contracts<sup>250</sup>.

**Accordingly, the improvement in the judicial response to discrimination can largely be put down to the integration of the modification in burden of proof in civil, administrative and social case law and the contribution of first the HALDE and then the Defender of Rights** to the investigations and development of legal arguments. Access to evidence supporting unequal treatment in the possession of the person who committed the discrimination, i.e. the possibility for the Defender of Rights or victim's lawyer to ask the defendant for access to comparators in the latter's possession, has enabled decisive progress to be made in the effectiveness of the remedy for discrimination.

To a certain extent, over the past ten years, social law has improved the judicial processing of discrimination cases concerning the workplace. **In access to goods and services however, whether in terms of recreation, access to housing or education, civil remedies are seldom harnessed and the criminal justice route is still not very effective.**

## 2. An uphill struggle for victims

The public measures and actions taken in France in terms of information and access to rights for discrimination victims do partly seem to be having a positive effect. In Europe, the majority of people (79%) seem to be familiar with the anti-discrimination legislation in their country of residence, with the UK (87%) and France (81%) demonstrating the

highest levels of familiarity<sup>251</sup>. That said, there are still various hurdles to accessing justice against origin-based discrimination, and victims find the whole process to be an uphill struggle.

### Legal action is not taken in many cases

Despite the prevalence of origin-based discrimination, the percentage of individuals who opt not to take legal action remains very high: of those who reported having suffered discrimination at work based on their origins, only around 12% actually took legal action<sup>252</sup>. Victims of other forms of discrimination are even more likely not to take legal action: **88% of victims of professional discrimination based on their origin or skin colour do not take any**, compared with 75% of victims of discrimination based on disability or health<sup>253</sup>.

The first point to make is that victims sometimes have difficulty identifying themselves as such, owing to the subtle nature of the discrimination, absence of proof or fear that people will think they are being paranoid – or even because they believe reporting it would not be justified (this is particularly the case for immigrants who do not have French nationality)<sup>254</sup>. Second, **direct reports made to employers, schools or landlords do not seem to be given much consideration** and do not lead to meaningful investigations and potential sanctions often enough.

The Defender of Rights or the court very often seems to be the only solution. But victims of origin-based discrimination speak of a number of hurdles which deter them from seeking legal redress.

In the workplace, legal action usually adversely affects victims' career paths. Regarding goods and services, the effort far exceeds the compensation which might reasonably be expected before the civil courts or the sanction before the criminal courts.

<sup>250</sup> Cass. Civ., Judgment on a case of discrimination in recruitment based on the applicant's origin, no. 10-15873, 15 December 2011; Toulouse Appeal Court, Judgment on the refusal to recruit an applicant owing to his North African roots, no. 08/06630, 19 February 2010.

<sup>251</sup> European Union Agency for Fundamental Rights (FRA), "Being black in the EU", *op. cit.*, p. 8. Malta (18%) and Italy (27%) have the lowest response rates.

<sup>252</sup> Defender of Rights, *Survey on access to rights*, own data, 2016.

<sup>253</sup> *Ibid.*

<sup>254</sup> Gründler T. & Thouvenin J.-M., *La lutte contre les discriminations à l'épreuve de son effectivité*, 2016.

What is more, few trade union organisations and associations rally behind origin-based discrimination cases before the courts. In criminal cases, despite the powerful symbolic implications of suppressing origin-based discrimination, victims typically see their complaints being dismissed.

Even though victims of discrimination in private housing, for example, can directly sue the owner or his/her intermediary, the estate agency, in a civil or criminal court, judicial proceedings are virtually non-existent. Like in the employment sector where legal action is mainly taken by employees, implementation of non-discrimination law is less effective in access to goods, such as housing, as it is in maintaining a right. This is because the selection procedures are more opaque, proof of the discriminatory denial of access more difficult to establish and victims are less engaged and equipped than those who face losing their housing, for example<sup>255</sup>.

It should also be noted that **civil redress for origin-based discrimination in the workplace or in other areas is rarely successful** and can be met with a certain reluctance on the part of judges. There has been marked progress in administrative case law since the modification of the burden of proof came into effect, as this enables more effective sanctions for discrimination<sup>256</sup>. But the principle of non-discrimination is struggling to take hold in administrative judges' narratives, not least because its application would reduce the discretionary scope of the public authorities<sup>257</sup>.

The conditions for practising identity checks entrusted by law to the police authorities are very broad.

The Constitutional Council has nevertheless repeatedly pointed out that such checks must be carried out solely on the basis of criteria that do not include any sort of discrimination between people whatsoever<sup>258</sup>.

### **Decision on the discriminatory service indications and instructions issued by a Parisian police station bearing on systematic evictions of Roma and the homeless**

One case in which the Defender of Rights got involved highlights the existence of racial and social profiling. The Defender of Rights was referred orders, instructions and service indications issued by the public security police station of a Paris arrondissement, between 2012 and 2018, which give rise to a presumption of discriminatory practices in this constituency by the emergency police squad (Brigade de Police Secours et de Protection)<sup>259</sup>.

Indeed, within a given sector, they are ordered to conduct identity checks of “gangs of blacks and North Africans” (instruction in 2012) and, across the whole arrondissement, “systematically evict the homeless and Roma” (practice from 2012 to 2018). Following an investigation, the Defender of Rights called for all of the Parisian police stations to be inspected to assess the scale of discriminatory eviction practices and their impact on homeless people.

For the first time in 2016, the Court of Cassation confirmed the civil liability of the State, considering that “an identity check based on physical characteristics associated with an actual or presumed origin, with no prior objective justification, is discriminatory: this amounts to gross negligence”<sup>260</sup>. Despite this major progress in French law and European case law and recommendations

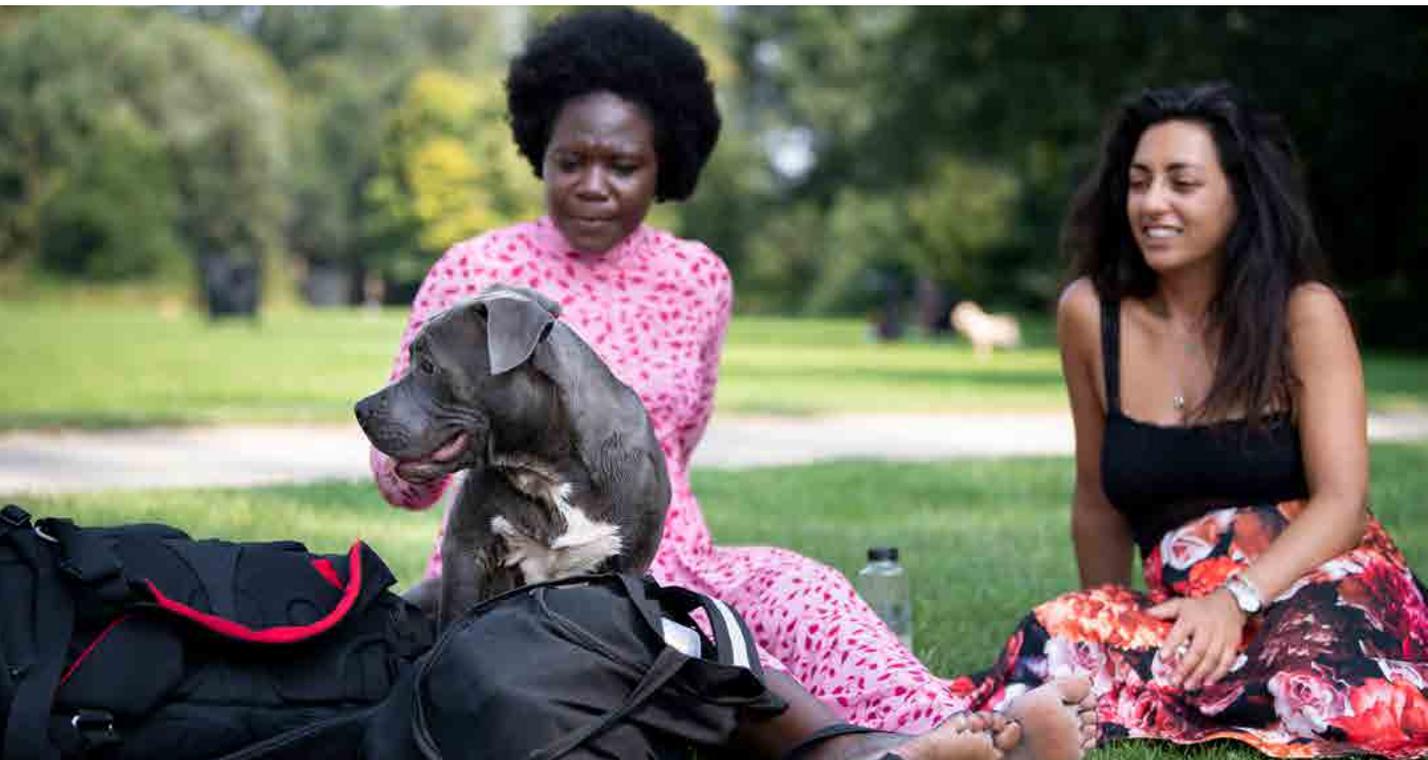
<sup>255</sup> Menduina-Gordon E., “La discrimination dans le logement privé”, in T. Gründler & J.-M. Thouvenin. *La lutte contre les discriminations à l'épreuve de son effectivité*, op. cit., pp. 408-426.

<sup>256</sup> CE, Ass., 30 October 2009, Ms Perreux, no. 298348 and CE, 10 January 2011, Ms Levêque, no. 325268.

<sup>257</sup> Icard P. & Laidie Y., *Le principe de non-discrimination : l'analyse des discours*, CREDESPO, University of Burgundy, Research conducted with the support of the Defender of Rights and “Droit et Justice” Research Mission, 2016.

<sup>258</sup> See, for example, CC, 24 January 2017, no. 2016-606/607 Preliminary ruling on the issue of constitutionality (QPC). Article R. 434-16 of the French Internal Security Code of 4 December 2013 prohibited such discrimination: “When an identity check is authorised by law, police and gendarmerie personnel do not use any physical feature or distinctive mark [as grounds] to choose whose identity is to be checked unless there is a specific alert justifying this. The identity check shall be carried out without offending the dignity of the subject.”

<sup>259</sup> Decision 2019-090 of 2 April 2019 on the discriminatory service indications and instructions issued by a Parisian police station bearing on systematic evictions of Roma and the homeless.



challenging the legality of “racial profiling”<sup>261</sup>, **it still remains extremely difficult to obtain judicial recognition of such “looks-based checks” as discriminatory practices** given how hard it is to bring proof when up against the discretionary scope of the police and the legitimate goal of law enforcement<sup>262</sup>.

More generally and substantively speaking, there are myriad hurdles that impede victims' access to remedies: the complexity of gathering evidence to characterise the discrimination (which is often concealed behind apparently legitimate motives), despite the modifications provided for by the law; the technicity of this subject with

which the prosecutor’s offices and judges are not very familiar; the lengthiness and high costs of judicial proceedings (lawyer, expert assessment); the psychological toll on the victim of taking action; the modest amount of the compensation where discrimination is recognised or the fear of retaliation, especially in the employment sphere.

Furthermore, despite training and heightened awareness of discrimination law, **judges still often rely on finding wrongdoing during trials** and on a French legal culture of equality which tends to address the “breach of equality” rather than non-discrimination law<sup>263</sup>.

<sup>260</sup> Cass. Civ., Judgment on the non-discriminatory nature of an identity check carried out following a gang robbery, 9 November 2016, no. 15-24207. The other 12 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. See also: Defender of Rights, Decision MDS-2016-132 of 29 April 2016 on discriminatory identity checks.

<sup>261</sup> ECHR, Judgment *Lingurar v. Romania*, 16 April 2019, application no. 48474/14. In this judgment, the ECHR concluded on violations of Article 14 (prohibition of discrimination) of the European Convention on Human Rights (the Convention) in conjunction with Article 3 (prohibition of inhuman or degrading treatment) in a case bearing on a police raid carried out in 2011 at the home of a Roma family in Romania. In this judgment, the Court uses the term “*ethnic profiling*” for the first time to describe the police activities and finds that the authorities have established a direct link between ethnic origin and criminal behaviour, which made their action discriminatory.

<sup>262</sup> Defender of Rights, Decision 2018-257 of 18 October 2018 on proceedings concerning State liability for discriminatory identity checks; Paris Regional Court, Judgment on the non-discriminatory nature of the identity check of three high school students descending from a train from abroad on their return from a school trip, 17 December 2018, no. 17/06216. The Court considers that, in this particular case, in light of the description of the class, contrary to what the three individuals claim, discrimination cannot be based on its actual or presumed racial or ethnic affiliation, where all of the students in the class are described by the female teacher as being of foreign origin and were not all subject to a check. The appeal is in progress.

<sup>263</sup> Doytcheva, M., “20 ans de non-discrimination en France : du droit aux pratiques”, *op. cit.*

### **A criminal policy of little practical effect**

Although the French Criminal Code was the first to provide for the express prohibition of origin-based discrimination in 1972<sup>264</sup>, criminal law is not always the most favourable way for punishing it.

The opportunity of taking the criminal justice route will depend on whether the deeds come under the Criminal Code, which has a more limited scope than the Act of 27 May 2008 and only bears on intentional discrimination<sup>265</sup>. Such a choice will also depend on the evidence available, as the rule of evidence in criminal cases can in some cases allow for the production of recordings or evidence that cannot be presented in civil cases. Finally, the ability to prove the intentional nature of the discrimination will have to be taken into account in the choice of remedies.

As such, some areas, such as work relations, do not come under the Criminal Code. Others, on the other hand, will go unpunished if the prosecutor's office does not take responsibility for investigating promptly and for prosecuting, especially for situations concerning access to goods and services. This is because, where entry to a restaurant or hotel, or a rental, is denied, the volatile proof is only accessible via a criminal investigation, and the financial aspect of damages remains inadequate to justify investment in civil proceedings. With no criminal proceedings, these discrimination situations, which are very common, go unpunished.

### **Despite the creation of anti-discrimination units within prosecutor's offices more than ten years ago, few cases are successfully investigated,**

reach trial and lead to a conviction, especially those related to origin. In its 2018 annual report on the fight against racism, anti-Semitism and xenophobia, the French National Consultative Commission on Human Rights (CNCDH) raised concerns about the recent fall in the criminal response rate for complaints for racist discrimination, from 81% in 2016 to 70% in 2017 (with charges brought against 724 people in 2017)<sup>266</sup>.

After various texts, the publication of a new circular by the Minister of Justice on 4 April 2019, urging greater mobilisation of criminal judges, underscores the need to continue efforts<sup>267</sup>.

### **3. Collective action and sanctions are not ushering in real change**

Although recognition of discriminatory situations through legal action has paved the way for principles and respect for standards, each case remains an individual success and does not signal the end of a discriminatory practice within a company or resolution of a problem for all those in the same situation. For whilst the law is sometimes effective, its wins remain symbolic, with no real change or collective impact ensuing.

#### **The individual impact of legal action**

In 2010, the Court of Cassation sentenced a large French bank to pay €350,000 in compensation to one female complainant after recognising a management practice where women's careers were concerned that amounted to gender-based discrimination<sup>268</sup>.

<sup>264</sup> Act No. 72-546 of 1 July 1972 on combating racism, known as the "Pleven Act", introduced into the French Criminal Code the first sanctions against discrimination on the basis of the victim's affiliation or otherwise to a nation, ethnic group, race or specific religion in certain situations (refusal or conditional provision of a good or service, recruitment refusal or dismissal).

<sup>265</sup> i.e. discrimination involving a refusal or subordination in connection with recruitment, sanction and dismissal, access to goods and services and to vocational training, hindering a right or economic activity – see Articles 225-1 et seq. and 432-7 of the French Criminal Code.

<sup>266</sup> CNCDH, *2017 report on the fight against racism, anti-Semitism and xenophobia*, 2018.

<sup>267</sup> Ministry of Justice, Circular of 4 April 2019 on the fight against discrimination, hate speech and hateful conduct, CRIM-BPPG no. 2019/0015/A4. See previously: the 11 July 2007 dispatch on combatting discrimination, which encourages prosecutor's offices to set up an anti-discrimination branch in each regional court (TGI) to help victims to access justice and improve the quality of the criminal justice response; the 5 March 2009 dispatch on extending the competence of anti-discrimination branches; Ministry of Justice, Circular No. 2006-16 of 26/06/2006 on the presentation of the provisions of Act No. 2006-396 of 31 March 2006 for equal opportunities with regard to combatting discrimination.

<sup>268</sup> Court of Cassation, Soc. Div., Decision on the refusal to allow the appeal to proceed of a company convicted for discrimination, 22 September 2011, No. 10-20415.

However, the impact of this sanction has remained very limited for the bank: only the female employee in question received compensation for her material harm; the systematic and structural discrimination existing in the company, concerning all women, laid bare by the investigation, has not been corrected and the other female employees affected have not seen any improvement in their situation.

### **A limited impact on the discriminatory recruitment policy of a large firm**

A specialist temporary agency worker of North African origin had been employed by a large aeronautics firm over several periods totalling 28 months, yet had his application for a permanent contract turned down; a temporary agency worker with less experience and a weaker track record was chosen over him.

As evidence, the HALDE presented the findings of the comparative study of the permanent contract recruitments made by the firm between 2000 and 2006 and for the year 2005-2006 against the available pool of fixed-term workers and applicants with the requisite skills for the job in question within the employment catchment area<sup>269</sup>.

The investigation showed that, on the site at issue, only two out of 288 permanent contract recruitments made over the 2000-2006 period and none of the 43 skilled worker recruitments made in 2006 concerned someone whose surname was of North African origin.

The judgment of Toulouse Appeal Court dated 19 February 2010, confirmed by the Court of Cassation, sentenced the firm to pay €18,000 in moral damages for recruitment discrimination on the basis of origin to the applicant, but the revelation of the systematic discrimination practised in recruitment did not lead to any corrective measures within the firm<sup>270</sup>.

A judgment which recognises a discrimination practice in the workplace amounts to an isolated conviction, with minimal financial impact for the firm, and no impact on social relations and practices at organisational level.

The introduction into procedural law of a collective redress mechanism by Act No. 2016-1547 of 18 November 2016 modernising justice in the 21<sup>st</sup> century **makes it possible to go beyond the individual approach to strict compensation for a victim's benefit, by allowing a collective approach to legal action** which encompasses all victims in a similar situation.

However, as the Defender of Rights highlighted in its opinion to Parliament No. 20-01 of 20 February 2020, **a large number of uncertainties complicates the deployment of collective action**<sup>271</sup>. The complex procedure firstly requires 6 months of preliminary negotiations before any referral to the judge, the aim being that the employer makes the necessary corrections within this time-limit. Furthermore, the purpose of class action in the event of discrimination, as introduced in France, remains limited to the elimination of the discrimination; the question of compensation for the harm suffered must be addressed through subsequent individual lawsuits.

Finally, with no specific procedural framework defining the management of this new form of litigation, which is both burdensome and complex, leaves judges to cope on their own with the new tasks incumbent upon them. Amid inadequate procedural indications, the effectiveness of legal action remains contingent upon courts' abilities to get to grips with this complex procedure, which is still at the experimental stage.

Two other key aspects of the current procedure for collective action could limit access thereto at the outset: the type of stakeholders likely to go down this route and the question of financing for class action.

<sup>269</sup> HALDE, Deliberation No. 2010-129 of 31 May 2010 on a complaint bearing on a case of origin-based discrimination in recruitment.

<sup>270</sup> Toulouse Appeal Court, Judgment on a recruitment refusal owing to the applicant's North African origin, 19 February 2010, No. 08/08630; Cass. Soc., Judgment on a case of discrimination in recruitment based on the applicant's origin, 15 December 2011, No. 10-15873.

<sup>271</sup> Defender of Rights, Opinion 20-01 of 5 February 2020 on the assessment and outlook concerning class actions.

The law stipulated that only trade unions and associations could initiate a class action, bearing in mind that, in terms of employment, they could only do so for recruitment and traineeship refusals. These remedies are very expensive and require significant mobilisation. To date, trade unions have only opted for this new legal remedy to defend their structural interests in terms of trade union discrimination<sup>272</sup>. Although a case on gender equality would seem to be in preparation, class action for trade unions does not currently represent a tool for accessing rights in terms of origin-based discrimination in the workplace.

### **The case of Moroccan workers at the SNCF**

More than 800 Moroccan workers, hired between 1970 and 1983 at the French National Railway Company (SNCF), were unable to benefit from railwayman status and the associated advantages, which were reserved for European employees, subject to age. They took action against the SNCF.

Following a lengthy litigation, almost all of them were eventually successful on the grounds of nationality-based discrimination, before the Employment Tribunal in 2015, and then Paris Appeal Court in January 2018, after countless referrals and more than twelve years of judicial proceedings<sup>273</sup>. Not once did they benefit from any trade union or association support, and by the time the judgments were handed down, most of them had already retired.

This case represents a complex litigious series which could have been considerably shortened and streamlined in the context of a class action.

Access to collective action for groups suffering from origin-based discrimination seems to be non-existent, for want of proximity with trade unions and because their interests are hardly represented within them. This is what happened in the case of the Moroccan SNCF workers, in which the trade union organisations did not get involved to address the systemic discrimination at issue.

In another case brought by female cleaners on a subcontractor's trains, who were victims of widespread sexual harassment, the victims were able to obtain damages, but no decision could be issued as the law stood at the time concerning the implementation of mandatory corrective measures by the employer<sup>274</sup>.

Overly costly and difficult to make sense of, class actions remain few and far between – or absent altogether from some spheres, such as access to goods and services. Associations tend not to have the necessary financial resources to initiate class actions or pay the associated fees (for lawyers and experts).

And yet the concurrent emergence in French law of the notion of systemic discrimination and class action should set the stage for acknowledgment of structural, collective and commonplace discrimination and a challenging of the practices driving it.

### **Sanctions do not go far enough**

The low impact of legal proceedings as a deterrent and tool for preventing discrimination can also be explained by the paltry amount of penalties handed down.

In recital 26 and Article 15, Council Directive 2000/43 states that “*Member States should provide for effective, proportionate and dissuasive sanctions*” of racial discrimination<sup>275</sup>. Grounded in the principle of effective judicial protection, this requirement

<sup>272</sup> Whether in private employment with the action of the French trade union confederation, CGT, against the firm SAFRAN Aircraft Engines, or in public employment, with the action of the trade union, Alternative Police CFDT, against the Ministry of the Interior to speak out against the presumed trade union discrimination within the national police force.

<sup>273</sup> Paris Employment Tribunal, Adjudication decisions concerning the discriminatory difference in treatment owing to the foreign nationality of employees, 21 September 2015, No. 11/01666; Paris Appeal court, Judgment on the discriminatory treatment of foreign railwaymen, called “chibanis”, in terms of career advancement, 31 January 2018, No. 15/11389.

<sup>274</sup> Paris Employment Tribunal, Adjudication decision concerning the moral and sexual harassment and discrimination suffered by a female cleaner, 10 November 2017, No. 15/11389 (and others).

<sup>275</sup> Council of the European Union, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ, L. 180, 19 July 2000.

had already been laid down by European Court of Justice case law on gender-based discrimination<sup>276</sup>.

In terms of goods and services, criminal and civil convictions are rare and symbolic, amounting to a few hundred euros.

Regarding employment, compensation that offending companies are ordered to pay by the courts only covers damages based primarily on compensation of lost pay, or symbolic moral damages, which never costs the offending organisation much and does not have any dissuasive effect on others. Indeed, **discriminators can get away with paying very little since, at worst, they will be sentenced to pay what was owed**, and legal action is a high-risk and burdensome process for employees.

The Court of Cassation recently began extending the scope of the financial penalty beyond the principle of compensation in the event of violation of the non-discrimination principle, as a constitutionally protected right leading to invalidation<sup>277</sup>. However, this case law only bears on employment and not on goods and services; the resulting excess costs remain marginal and the moral damages declared to compensate for the devastating impact discrimination has had on the victims' lives are paltry (€18,000 in the aeronautics industry case, when the victim's career as a specialist worker had been halted).

Irrespective of any implications in terms of image, in France it makes more sense economically for a company to maintain collective inequalities, the correction of which would have a substantial economic cost, and to take the risk of a possible lawsuit.

More than 15 years after the European anti-discrimination directives were transposed, 15 years after the founding of the HALDE and 9 years after that of the Defender of Rights, the results obtained in terms of judicial sanctions for discrimination show that no prevailing and significant change can be achieved by litigation alone. This is why, although improving access to the law and the effectiveness of sanctions to reinstate victims' rights and encourage more victims to take legal action is essential, it is clear that this route alone is not enough to bring about lasting, structural change where discriminatory conduct, practices and rules are concerned.

<sup>276</sup> Muir E., "L'action juridique de l'Union européenne dans la lutte contre les discriminations", *Migrations Société*, 2010/5, No. 131, pp. 87-104

<sup>277</sup> Cassation Soc., Judgment on the fact that a dismissal on the grounds of the female employee's pregnancy characterises a violation of the principle of equal gender rights, 29 January 2020, No. 18-21862: "Grounds: Pursuant to the provisions of Articles L. 1132-1 and L. 1132-4 of the French Labour Code, any dismissal delivered with regard to a female employee on the grounds of her pregnancy is invalid; where such a dismissal characterises a violation of the principle of equal gender rights, guaranteed by Paragraph 3 of the Preamble of the 27 October 1946 Constitution, the employee requesting her reintegration is entitled the payment of compensation equal to the amount of the pay she should have received between her eviction from the company and her reintegration, with no deduction of any alternative income from which she may have benefited during this period".

# III. The urgent need for action and levers available

Origin-based discrimination represents a fundamental violation of the equal dignity of all people, undermining Republican values and threatening social cohesion.

**The Defender of Rights considers that vigilance over the trivialisation of stereotypes and prevention of discrimination is necessary at the earliest possible stage.**

Two initiatives led by the institution help to raise young people's awareness of the importance of combatting stereotypes and promoting the culture of rights and equality: the Young Ambassadors of Rights programme, known as JADE<sup>278</sup>, and the educational platform Educadroit<sup>279</sup>.

Beyond the moral, educational and political issues, the renewed definition of origin-based discrimination is no longer tied in with intent and focuses instead on the specific discriminatory effects. This must lead to positive obligations on the part of all potential perpetrators of discrimination. It is both necessary and urgent to deliver proactive policies for ending the prejudice underlying direct discrimination and to analyse the procedures and decision criteria which can amount to indirect discrimination. Such a process requires discrimination to be analysed (diagnostic study) and instruments to be set up aimed at preventing it (indicators for monitoring and assessing equality policies)<sup>280</sup>.

Today, ambivalence and “disparities in the implementation of non-discrimination law seem to point to an absence of any real anti-discrimination policy which would take this ‘law seriously’”<sup>281</sup>.

**The fight against origin-based discrimination must be removed from the realm of urban policy to become a political priority, as has been the case in recent years with regard to gender equality.** There are effective levers for taking action and they must be harnessed to bring about structural change and provide a credible, over-arching solution to this major problem plaguing French society.

It must bring all organisations, administrations and stakeholders on board, together with the State, which must be exemplary in this regard. It is high time that a strategy be unveiled and rolled out across the board to tackle the systemic dimension of discrimination.

In addition to public policies to counter poverty, unemployment or substandard housing, measures combatting racial (and territorial) discrimination must be taken as such, with dedicated targets, alongside measures seeking to address more strictly economic barriers<sup>282</sup>.

<sup>278</sup> Between the ages of 16 and 25, young ambassadors of rights (JADE) are young people engaged in civic service for 9 months, trained and supervised by the Defender of Rights, working to raise the awareness of children and other young people about the rights of the child and non-discrimination.

<sup>279</sup> The “Educadroit” programme to educate children and young people in the law and their rights is a resource centre dedicated to raising awareness of the Law and rights, which organises initiatives from a network of partners. Its 10 key points include the issues of equality and discrimination (“*All equal before the law?*”).

<sup>280</sup> Benichou S., *Le droit à la non-discrimination « raciale »*, op. cit., p. 27.

<sup>281</sup> Mercat-Bruns M. & Perelman J. (sup.), *Les juridictions et les instances publiques dans la mise en œuvre de la non-discrimination: perspectives pluridisciplinaires et comparées*, Sciences Po Law School, Research carried out with the support of the “Droit et Justice” Research Mission and Defender of Rights, 2016, p. 179.

<sup>282</sup> Argant S. & Cédéy E., *Testing dans le parc locatif privé français sur l'existence de discriminations envers les jeunes et selon diverses combinaisons de critères*, ISM-CORUM, Report for the National Institute of Youth and Community Education (Injep) and Experimental Fund for Youth (FEJ), 2017.

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## A. Improving knowledge to fight more effectively

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Defining the reality and diversity of origin-based discrimination, raising awareness and gaining recognition of it among the general public, media and various stakeholders involved in society, while ensuring better access to research findings and public statistics analysis, is an essential first step to removing the current veil of invisibility. This shared knowledge must guide action and enable stakeholders and public authorities to rally to the cause. A necessary diagnostic tool for determining the national anti-discrimination strategy, it must also contribute to this strategy's monitoring and assessment.

Once almost entirely absent in France, research in social science and law has developed considerably over the past two decades, yielding clearer insight into the mechanisms behind racial discrimination and enabling its prevalence to be measured and its systemic dimension to be analysed. Discrimination research and measurement merit being continued however, beyond solely the employment sphere, so as to assess the discriminatory effects of existing policies and procedures. The deployment of coherent anti-discrimination actions is also conditional upon such measurement, which must be drawn upon to determine how effective they are and thus enable necessary adjustments to be made. This is applicable at national and local level, regarding the public authorities and organisations themselves.

### 1. Developing public research and statistics

**The Defender of Rights recommends developing public statistics on origin-based discrimination and using these as genuine tools for coordination and action to promote equality policies.** This data must, on the one hand, allow for an understanding of the specific difficulties faced by individuals discriminated against on the basis of their origin and, on the other, provide information on the progress of public policy implementation throughout French society.

Public statistics typically conduct surveys on large samples, for general knowledge purposes and anonymously, so as to obtain sociodemographic data on foreign nationals, immigrants and descendants of immigrants, such as in the “Trajectoire et Origines” (Trajectories and Origins) survey by the Institute for Demographic Studies (Ined) and National Institute of Statistics and Economic Studies (Insee)<sup>283</sup>. This has improved knowledge of ethno-racial discrimination by using data correlated with the origin of individuals, such as their nationality and place of birth, their parents' nationality, the language passed on in childhood, etc. These surveys may collect sensitive personal data and are governed by the French National Council for Statistical Information (Cnis) and, where applicable, the French Data Protection Authority (Cnil).

In order to bring origin-based discrimination into the open, **the Defender of Rights recommends that national campaigns of discrimination tests (“testings”), in the spheres of access to employment, housing or other goods and services, be run not only at regular intervals but also over the long-term, in order to support the entities tested and enable them to correct the discrimination detected within their organisation.**

Public statistics do provide a certain number of data for gaining a clearer idea of the situation of individuals exposed to discrimination on account of their origin, but little research

<sup>283</sup> Beauchemin C., Hamel C. & Simon P. (sup.), *Trajectoires et origines*, *op. cit.* The survey has been updated and the second wave is in progress.

has been carried out into the consequences of such discrimination, especially those associated with phenomena of professional segregation and de-skilling in employment, as has partly been studied already in housing (effects of spatial segregation). There are also other areas requiring much further exploration – or new attention – such as public services, education, higher education, functioning of social services, and access to community goods and services.

More in-depth surveys could also be conducted for a clearer understanding of the consequences of discrimination on individuals and their life courses, by adopting an intersectional perspective so as to grasp the specific disadvantages suffered by some social groups. What is more, some populations, on which few surveys have been conducted, could be paid specific attention, not least individuals of Asian or Overseas descent.

Apart from the spheres concerned, there is the more general question of available data for knowing the actual or presumed origin of individuals exposed to discrimination.

Although the variables for identifying second generations of immigrants are now processed more systematically, public statistics (with the exception of a dedicated “Trajectories and origins” survey) are still struggling to capture the persistence of origin-based discrimination within their various survey tools<sup>284</sup>.

Over and above ad hoc research, **the Defender of Rights recommends equipping anti-discrimination policy with a statistical monitoring system. In this respect, it recommends:**

- Identifying and financing a “discrimination watchdog”, to use the expression in the February 2010 report by the Comedd (Committee for measuring and assessing diversity and discrimination)<sup>285</sup>, so as to **ensure continuous statistical monitoring**

**of the subject at national level** and raise its profile. This would be tasked with submitting an annual report on the current situation regarding discrimination in France, on the basis of statistical data on origin collected directly by the watchdog and on the compilation of existing data, and would have powers and means for continuous monitoring. All types of discrimination, beyond the origin ground, could come into the equation, to factor in phenomena of accumulation and intersectionality. The Defender of Rights produces and distributes studies at regular intervals on the fight against discrimination, but its statistical capacity and resources are much more limited. It could be worthwhile strengthening the Defender of Rights’ powers and organising its collaboration with public statistics institutions (along the lines of what is done at the National Observatory on Urban Policy/ONPV on neighbourhoods coming under urban policy);

- **Re-considering the introduction of census questions bearing on parents’ nationality and country of births;**

- **Organising, by the Government, of a taskforce on the overall policy for collecting data on actual or presumed affiliation with a racial group by public statistics stakeholders** for the purposes, where necessary, of proposing legislative changes in this respect (governing the collection purpose). This brainstorming could be led with such public institutes as Insee or Ined, in conjunction with the Defender of Rights and the Cnil. The conclusions of this taskforce could be discussed at the Cnis, which ensures coordination between the producers and users of public statistics.

<sup>284</sup> *Ibid.*

<sup>285</sup> COMEDD, *Inégalités et discriminations. Pour un usage critique et responsable de l’outil statistique : rapport du comité pour la mesure de la diversité et l’évaluation des discriminations*, 2010, p. 195.

## 2. Setting up measuring tools within organisations

In the same way as issues relating to gender equality, the question of measuring origin-based discrimination within organisations themselves must not only bring it out into the open but also lead to a groundswell of action that forms part of assessable action plans.

### Analysis of discrimination and practices that carry a risk

Within an organisation, conducting a diagnostic study and analysis of situational differences between staff (according to whether or not they are affiliated with a group exposed to a risk of discrimination: women, people with disabilities, individuals perceived as being of non-European descent) by occupational category provides a first building block for developing an action plan. This review, which may also be carried out among users, is an opportunity for the company, social landlord, temporary employment agency, school or public service in question to exercise vigilance and develop appropriate measures.

Many cite the strict rules laid down concerning the collection and processing of data related to the origin or skin colour of individuals to justify the subject's low profile and their inaction within their organisations. And yet, **under current law there is provision for deploying a range of measuring tools**, as set out in the CNIL/Defender of Rights guide *Measuring as the key to achieving equal opportunities*<sup>286</sup>. The process of collating best practices, initiated by the HALDE and continued by the Defender of Rights, particularly in the guide

Acting in favour of workplace equality<sup>287</sup>, has identified methods and criteria that can be harnessed to produce company diagnostic studies where origin-based discrimination is concerned, in line with the framework laid down by the French *Data Protection Act*<sup>288</sup>.

These guides provide scope for analysing human resource files and/or outsourcing the processing of company data to a trusted third party. Objective information bearing on surname, nationality or place of birth is thus used and sometimes combined with anonymous surveys on perceived discrimination among staff, to produce a diagnostic study and provide indicators<sup>289</sup>. These are benchmarks that are already widely used by some employers, researchers and consultants in human resources.

Although, on an ad hoc basis, some diagnostic studies and the distribution of their findings have enabled some organisations to communicate on the question, the measures carried out are limited, too isolated and seldom form part of an actual, appropriate prevention plan.

New State-funded studies should be run at regular intervals and provide valuable indicators for assessing the effectiveness of measures taken.

The recent testing campaigns and steps to combat discrimination in access to the three civil service branches thus seem to show that such measures have led to less origin-based discrimination<sup>290</sup>. If run at regular intervals, over time these initiatives have the potential to provide indicators for assessing the effectiveness of measures taken.

<sup>286</sup> CNIL and Defender of Rights, *Measuring as the key to achieving equal opportunities: methodological user's guide for employment stakeholders*, 2012.

<sup>287</sup> Defender of Rights, *Acting in favour of workplace equality: the Defender of Rights' recommendations for large companies*, 2015.

<sup>288</sup> Act No. 78-17 of 6 January 1978 on information technology, data files and civil liberties.

<sup>289</sup> The Constitutional Council (Conseil Constitutionnel) explained that although in theory the definition of an ethno-racial standard would be at odds with the Constitution, the "processing required for conducting studies on the measurement of the diversity of people's origins, discrimination and integration [...] can bear on objective data" which may "for example, be based on name, geographic origin or nationality prior to French nationality. For all that, the Council did not rule that only objective data could be subject to processing: the same applies for subjective data, such as that based on perceived affiliation" (Comment Decision No. 2007-557 DC of 15 November 2007, Act on controlling immigration, integration and asylum, *Les cahiers du conseil constitutionnel*, n° 24, p. 6).

<sup>290</sup> See, in this regard, the Circular of 3 April 2017 on implementation of the policy bearing on equality, the fight against discrimination and promotion of diversity in the civil service; and the new Government-commissioned testing-based study, conducted in 2018, on discrimination within the three civil service branches (L'Horty, *Les discriminations dans l'accès à l'emploi public*, report to the Prime Minister, 2016. See also: Challe L., l'Horty Y., Petit P. & Wolff F.-C., *Les discriminations dans l'accès à l'emploi privé et public : les effets de l'origine, de l'adresse, du sexe et de l'orientation sexuelle*, 2018).

### **MICADO survey: assessing the effectiveness of an anti-discriminatory measure among estate agencies**

In light of the scale and persistence of discrimination in housing, the Defender of Rights developed practical tools that were widely distributed in 2018 among real estate professionals. It then sought to assess the impact of this awareness-raising action on agency practices by funding the MICADO research (*Measuring the impact of an alert letter from the Defender of Rights to estate agencies*) conducted by the ERUDITE and TEPP laboratories of the Paris-Est Marne-la-Vallée and Paris-Est Créteil Universities<sup>291</sup>.

An initial testing campaign was conducted to identify origin-based discriminatory practices within 343 agencies (located in the 50 largest urban areas in France). Half of the agencies with practices identified as being discriminatory received a personal letter from the Defender of Rights reminding them of the legal framework and the handbook *Letting without discriminating. A handbook for raising the professional standards of practices*<sup>292</sup>. The other half of discriminatory agencies was not contacted, to form a control group. Other testing campaigns were then conducted with these agencies to assess progress in terms of their practices.

The results, published in October 2019, reveal that discrimination between people of French origin and people of North African origin applying for housing is clearly decreasing in the agencies that have been made aware in this respect. But the positive effects of the Defender of Rights' approach subside after fifteen months.

Use of a correspondence testing protocol repeated for the purposes of assessing public policy constitutes a methodological innovation in research on discrimination. It opens up new perspectives in an area where assessment of the impact of public and private action remains embryonic.

**Statistical measurement of discrimination is just as necessary to enable its identification as it is, where applicable, to correct and punish direct and indirect discrimination, particularly in court.** These data and analyses can also be usefully mobilised by the defendant organisation in its defence.

For a presumption of indirect discrimination, the disproportionate impact of an apparently neutral measure or practice on a protected group is considered. This impact can be assessed using statistics characterising the effects of a difference in treatment. This quantitative approach involves a “statistical comparison between the makeup of two groups – a ‘baseline’ (initial) group and an ‘end group’, comprising all of the individuals having endured the test whose impact is being measured”<sup>293</sup>. The European judge thus indicates in its Enderby ruling that statistical comparison enables a presumption of indirect discrimination to be established<sup>294</sup>.

**Statistical measurement must be mobilised in the context of audits that make it possible to question and then revise the procedures and criteria for selection and career advancement within organisations.**

<sup>291</sup> Defender of Rights, *Discrimination test in access to housing according to origin: Measuring the impact of an alert letter from the Defender of Rights to estate agencies*, Études et Résultats, 2019.

<sup>292</sup> Defender of Rights, *Letting without discriminating. A handbook for raising the professional standards of practices*, 2017.

<sup>293</sup> De Schutter O., *Discriminations et marché du travail. Liberté et égalité dans les rapports d'emploi*, 2001, p. 97.

<sup>294</sup> EJC, Judgment of 27 October 1993, *Enderby v Frenchay Health Authority*, case C 127/92, Rec., p. I-5535, points 14, 16 & 22. This judgment concerns the lower pay of speech therapists compared with pharmacists, the former being almost exclusively women while the latter are predominantly men, it being noted that, in Great Britain, collective bargaining processes came under the same parties (the same employer for both occupations at issue and the same trade union). The pay gap stemmed from a form of discrimination that could be described as systemic (if only to explain the prevalence of women speech therapists and the few women pharmacists). What is important here is to look at the outcome, i.e. the pay gap, which the ECJ found amounted to “*prima facie*” discrimination.

### **The implications of statistical and non-financial indicators in organisations**

In addition to the analysis prior to mobilisation and targeted action, the establishment of quantitative indicators must enable the action taken to be monitored and its effectiveness to be assessed. **If integrated into corporate social responsibility scorecards**, these indicators would enduringly raise the profile of the fight against discrimination.

The question of origin-based discrimination in France carries altogether decisive implications for social cohesion and equal rights, and yet the law has still not addressed the promotion of rights and prevention of such discrimination in terms of corporate social responsibility and obligations. However, assessment and measurement of situations of discrimination cannot be limited, in spite of their interest, to carrying out social climate surveys that are sometimes conducted among employees or managers.

**The Defender of Rights recommends that a legal obligation be created whereby companies must publish statistical and non-financial indicators** and harness these fully in tackling origin-based discrimination, in a bid, on the one hand, to measure the discriminatory risks within the organisation and, on the other, to assess the effectiveness of measures taken to counter these<sup>295</sup>.

Corporate social responsibility is a driver for structural action on discrimination. The example of actions in favour of the professional

integration of people with disabilities, gender equality and job retention among senior citizens, demonstrates not only that it is possible to change collective situations with regard to discrimination, but also that, to ensure such action succeeds, it is necessary to ground it in legally regulated obligations and mechanisms.

The lawmaker has decided to promote gender equality and the professional integration of people with disabilities using data that should appear in the new economic and social database (Articles L. 2312-18 to L. 2312-36 of the French Labour Code)<sup>296</sup>. However, this no longer contains data on the distribution of employees between French and foreign nationals, and only companies with fewer than 300 employees are concerned by this obligation.

Today, these non-financial indicators and reports are one of the best tools for advancing and negotiating on gender equality in the workplace (similar to the compulsory Equality index since 2019<sup>297</sup>) and on integrating people with disabilities. They are often a key argument making the economic case for a policy for managing diversity, combatting discrimination and corporate social responsibility (CSR).

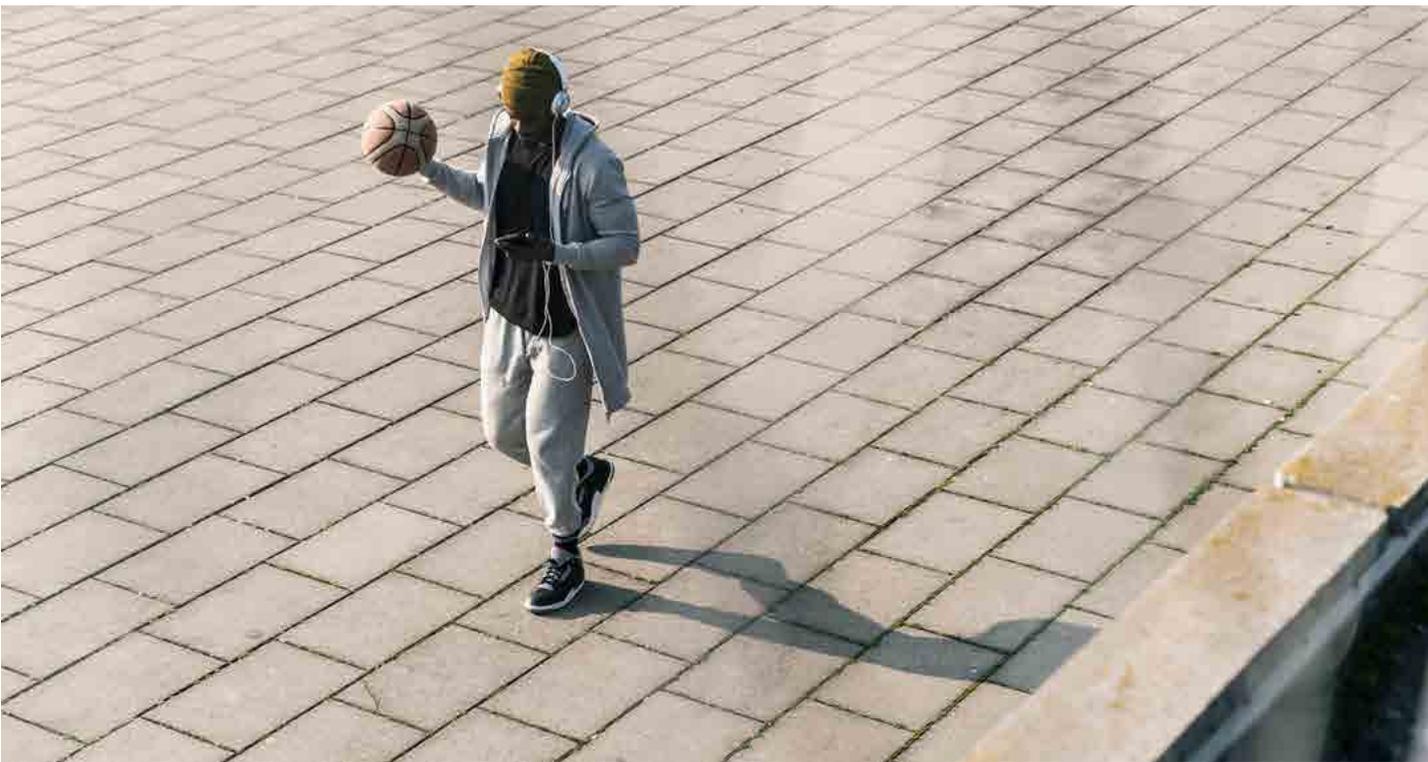
**For the Defender of Rights, it is both necessary and urgent to make full use of the non-financial indicators in terms of combatting origin-based discrimination.**

It is recommended that this question be included in corporate social responsibility strategies by laying down this obligation.

<sup>295</sup> To find out more, see: Defender of Rights, Opinion 18-20 of 30 August 2018 on Bill No. 1088 on business reform and growth, 2018.

<sup>296</sup> Decree No. 2017-1819 of 29 December 2017 on the social and economic committee, which has repealed the previous provisions of the French Labour Code on the social audit, clarifies which data must now be included in this audit and in the economic and social database. Included is data on gender equality in the workplace, data concerning the workforce in terms of age, prevention and training actions for the benefit of older employees and people with disabilities and measures taken to develop them.

<sup>297</sup> All companies with at least 50 employees must calculate and publish their Gender Equality in the Workplace Index, every year, on 1 March. They must also forward it, along with the detail of the 4/5 key indicators, to their social and economic committee (CSE) as well as the labour inspectorate (Direccte). Where a company's index falls short of 75 points, it must take corrective measures to attain at least 75 points within 3 years. These annual or multiannual measures must be defined in the context of the compulsory negotiations on workplace equality or, failing an agreement, by unilateral decision of the employer and after consulting the CSE. Should a company not publish its index, implement corrective measures or in the event these measures are ineffective, it risks incurring a financial penalty of up to 1% of its annual wage bill. See the [factsheet published by the Ministry of Labour on the index](#): Ministry of Labour, *The equality index, advancing gender equality in the workplace*, 2020.



In its Opinion 18-20 of 30 August 2018 on Bill No. 1088 on business reform and growth (PACTE Act), the Defender had suggested:

- Amending Articles L. 2312-18, L. 2312-26, L. 2312-27 and L. 2312-36 of the Labour Code to make explicit provision (in the same vein as reports supporting gender equality) for the inclusion of data on combatting origin-based discrimination in the economic and social database and in the social audit, in accordance with the terms to be set by Conseil d'État decree;
- Amending Article L. 225-100-2 of the French Code of Commerce to clarify which consolidated annual report must present an analysis containing indicators "in terms of combatting discrimination" in accordance with the terms to be set by Conseil d'État decree.

The tools necessary for implementing such a measure have already been discussed and worked on by the social partners, companies and government departments. The national CSR platform set up by the Prime Minister at France Stratégie since 2013 has pointed out that CSR could be a "factor contributing to social cohesion and non-discrimination"<sup>298</sup>. In its findings, the inter-partner dialogue group on workplace discrimination, meeting under the auspices of the Ministries of Labour and Urban Affairs<sup>299</sup>, had highlighted the opportunity of using CSR indicators to extend the comparative situation report (RSC) and create indicator-based obligations<sup>300</sup>.

<sup>298</sup> France Stratégie, *La RSE, démarche de dialogue et levier de transformation*, Opinion, 2019, p. 11.

<sup>299</sup> Sciberas J.-C. & Barbezieu P., *Rapport de synthèse des travaux du groupe de dialogue inter-partenaires sur la lutte contre les discriminations en entreprises*, Ministry of Labour, Employment and Social Dialogue and Ministry of Urban Affairs, Youth and Sport, 2015.

<sup>300</sup> Sciberas J.-C., *Rapport sur le suivi de la mise en œuvre des propositions du groupe de dialogue sur la lutte contre les discriminations en entreprise*, Ministry of Labour, Employment and Social Dialogue and Ministry of Urban Affairs, Youth and Sport, 2016. See, in particular, proposal no. 8 of this report: "On the basis of the work carried out by the dialogue group, draft the necessary texts for applying the proposal on indicators for monitoring developments in terms of careers and pay and the proposal on creating an 'equal opportunities correspondent' position in companies with over 300 employees".

Transposition of the European Directive on the disclosure of non-financial information<sup>301</sup> led, in 2017, to the publication of an ordinance and its implementing decree<sup>302</sup> replacing the current CSR reporting system, known as “Grenelle II”<sup>303</sup>.

In large companies, the primary obligation involves reporting their CSR practices<sup>304</sup> through the disclosure of data. With the Non-Financial Performance Statement (DPEF), companies can now present specific social, societal and environmental information *depending on its relevance* in light of the company’s policies and main priorities<sup>305</sup>. On the social front, this means that companies are still encouraged to disclose information concerning their “*action aimed at combatting discrimination and promoting diversity*” but this statement will only be made on the basis of their priorities<sup>306</sup>.

With no shared reference framework<sup>307</sup> and in order to bring all economic stakeholders on board (including micro-businesses), convergence is necessary regarding the different regulatory requirements on the production of CSR data, as is greater consistency in terms of information.

With respect to the challenges associated with equality of treatment and the fight against discrimination, **the public authorities could set up a new working group bringing together the Defender of Rights and the national CSR platform with a view to coordinating this thought process and identifying the indicators that could be adopted.**

The reports published by companies (depending on their size and activity sectors) on CSR would include comparable information on equality of treatment, prevention of discrimination, progress in the employment of groups protected by non-discrimination law and the measures taken in this regard.

The goals that would result from the available indicators or analyses performed must be set out in established agreements or plans.

**Measuring discrimination is not enough in itself: it must provide a springboard for root-and-branch reform.** Similarly, where a report has been drawn up of action taken, this must be drawn on to revise the organisation’s anti-discrimination strategy.

In order to assess the effectiveness of policies conducted and any improvements that could be made, through Act No. 2017-86 of 27 January 2017 on equality and citizenship, the lawmaker has stipulated that “*the Government shall publish a two-yearly report on the fight against discrimination and consideration of the diversity of French society in the central and local government and hospital civil service branches*”<sup>308</sup>. The first edition of this report, which includes the Defender of Rights’ independent contribution, was published in June 2019<sup>309</sup>. This new obligation will allow for general monitoring of anti-discrimination progress in the civil service and provides an opportunity that the authorities must seize to consolidate and take their assessments further.

<sup>301</sup> Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (Text with EEA relevance).

<sup>302</sup> Through Ordinance No. 2017-1180 of 19 July 2017 on the disclosure of non-financial information by certain large undertakings and corporate groups, and its implementing decree (Decree No. 2017-1265 of 9 August 2017 implementing Ordinance No. 2017-1180 of 19 July 2017 on the disclosure of non-financial information by certain large undertakings and corporate groups), by amending Articles R. 225-104 to R. 225-105 of the French Code of Commerce in particular.

<sup>303</sup> Act No. 2010-788 of 12 July 2010 concerning the national commitment for the environment, known as “Grenelle II”, defined a standardised regulatory framework with a list of 42 themes bearing on the social, societal and environmental aspects. Themes F (Equality of treatment) and G (Promotion of and compliance with the stipulations of the International Labour Organisation’s Fundamental Conventions), general though they may be, allow for provision of reporting on the non-discrimination issues within CSR reports.

<sup>304</sup> This is only compulsory for listed companies with more than 500 employees and revenues exceeding €40m as well as for unlisted companies with more than 500 employees and revenues exceeding €100m.

<sup>305</sup> Ordinance No. 2017-1180 of 19 July 2017 on the disclosure of non-financial information by certain large undertakings and corporate groups.

<sup>306</sup> *Ibid.*

<sup>307</sup> The reference frameworks do not go into the social aspects in as much detail as the climate and environment questions. On this point, see: De Cambourg P., *Garantir la pertinence et la qualité de l’information extra-financière des entreprises : une ambition et un atout pour une Europe durable*, report submitted to the Minister of Economy and Finance, 2019.

<sup>308</sup> Act No. 2017-86 of 27 January 2017 on equality and citizenship, Art. 158.

<sup>309</sup> Ministry for Public Accounts and Action, *Report on the fight against discrimination and consideration of the diversity of French society in the civil service. 2018 Edition*, with the contribution of the Defender of Rights, 2019.

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## B. Strengthening companies' duties to act

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The lack of expertise and structuring of civil society in the field of the fight against discrimination based on origin **presupposes that greater support should be given by the public authorities to the associative sector**. Along with supporting those already involved, it is a question of encouraging ordinary stakeholders to invest in this issue and creating new networks capable of listening to and guiding victims, conducting investigations, and challenging the various organisations and institutions concerned.

Beyond that, the public authorities should **require organisations, both public and private alike, to engage fully in the fight against discrimination through structured action plans**. Audits could also shed light on the discrimination risks and prompt revision of the procedures at issue.

### 1. Developing an action plan and training staff

**Leaders of organisations must adopt a stance that supports the fight against origin-based discrimination and commit to this stance through meaningful action plans.**

The action plan conducted by the company or authorities against origin-based discrimination should draw up a timeline, clear targets, specific methods of action and the people within the organisation who will be responsible for managing this policy.

### Drafting official multiannual anti-discrimination plans

This commitment will only be possible with a decision at the highest level of the organisation's management structure. The staff representative bodies must be consulted beforehand, owing to their duties and the role they play in assisting employees in the event of discrimination and in signing company-level agreements on the subject.

Setting up focus groups involving all staff could also be a way of identifying specific situations or issues which might not have been taken into account.

**These multiannual plans, which will be assessed at periodic intervals, must be put together as follows:**

- **Formalise the commitment of the company's management;**
- **Carry out a diagnosis or review the risks of discrimination in the company and set up appropriate indicators to that end;**
- **Raise awareness and train staff (management, human resources, staff representative bodies and teams);**
- **Promote the principles of objectivity, transparency and traceability of the procedures and criteria applied;**
- **Prevent discrimination and deal with any reports of it.**

Without going back over the key issues relating to measurement within organisations, mentioned earlier, the importance of including all of the prohibited grounds of discrimination – origin in particular – in the steps taken by companies and of conducting cross-cutting equality policies should be underscored.

**Such strategies should not be drawn up solely with respect to the field of employment and human resources.** Action plans in which all of the parties concerned are involved should be developed to probe the discrimination produced by the organisation in the service it provides: this, of course, entails, for the employer (who might be the National Education authorities for example) developing a strategy to ensure that the principle of non-discrimination is effective in the management of its staff, but examining and endeavouring to correct any direct and indirect discrimination

that a school may show towards children or parents also matter, as does an analysis of its academic guidance, allocation and selection procedures.

### **Raising awareness and training of staff**

#### **Training of security staff**

Alongside its systematic contribution to the initial training of police officers, since 2017 the Defender of Rights has conducted continuing professional development measures for training leaders and ethics correspondents of the national police force. These training sessions provide knowledge about: direct and indirect discrimination prohibited under the law; how the Defender of Rights intervenes concerning security officers' compliance with ethical rules, with a particular focus on identity checks; management of discrimination or harassment situations to which such officers may be exposed as supervisors. Since February 2017, the Defender of Rights has delivered the same type of training to staff as well as safety, supervision and training managers at the SNCF, tailored to the circumstances the latter work in.

**The Defender of Rights recommends that organisations run in-house training and awareness campaigns on racism, origin-based discrimination and employer obligations, in line with the current practice as regards sexual harassment.**

The training and awareness policy helps to change mentalities and to reconsider staff practices, including in the way they interact with users or customers (rather than solely in terms of human resources).

Since the Act of 27 January 2017 on equality and citizenship (Article L. 1131-2 of the French Labour Code), training in non-discrimination is now compulsory for companies with at least 300 employees and for any specialist

recruitment agency<sup>310</sup>. This provision now requires recruitment staff to take training in non-discrimination in recruitment at least once every five years. To ensure this requirement is put effectively into practice, three years after its promulgation, **the Defender of Rights recommends that the Ministry of Labour adopt a circular aimed at informing the stakeholders of the specific arrangements for implementing this requirement**, such as the minimum time the training should last, its contents and the occupations concerned.

Apart from recruitment staff, all organisation staff should be made aware of the risk of origin-based discrimination, which is a difficult phenomenon to grasp, but can be connected with many different grounds (including skin colour, culture, religion, nationality or place of residence for example).

In senior management instructions and training, **employees' and supervisors' attention must particularly be drawn to the different forms of origin-based harassment, such as racist insults, remarks and jokes, and to the procedures that should be followed to respect equality**. Finally, staff must be trained in the methods for managing users or customers and handling the discriminatory and racist requests some customers may make<sup>311</sup>. Senior management, teams and trade unions must also be warned about the risk of conflation and stigma associated with religious affiliation and discrimination they could engage in while at work.

The Defender of Rights makes an active contribution to training measures by distributing dedicated tools and leading training on discrimination, particularly for the attention of the police and legal professionals.

**The Defender of Rights recommends heightening the awareness of civil servants and the security forces regarding the stereotypes liable to lead to discriminatory practices, and what the best practices are.**

<sup>310</sup> Act No. 2017-86 of 27 January 2017 on equality and citizenship.

<sup>311</sup> See in this regard: Defender of Rights, *Factsheet. 8 steps for letting without discriminating*, factsheet for the attention of real estate professionals, 2017.

## 2. Performing audits within organisations to analyse procedures

**The Defender of Rights recommends implementing a public policy aimed at revealing and correcting origin-based discrimination through sectoral audits and audits within companies and authorities.**

### Auditing structural risks

Performing an audit of the discriminatory risks in an organisation involves analysing the procedures and practices so that any that risk producing discrimination are identified and corrective actions are taken where necessary (revising procedures, setting up best practices, training and raising the awareness of the individuals concerned)<sup>312</sup>.

For employment and human resources, this process involves:

- Assessing the discriminatory risks, outlining goals and corrective actions and planning for periodic assessments;
- Clarifying the HR procedures of the establishment in question on the basis of a documentary analysis (HR tools, online communication or reporting tools);
- Comparing these procedures with existing practices, observing what the HR departments do in specific situations and questioning the individuals concerned.

The guide *Discrimination-free recruitment*, published by the Defender of Rights in 2019, particularly gives a reminder of the procedure that Human Resources should follow to ensure a non-discriminatory recruitment process, by identifying what is prohibited or allowed, during the different stages of searching for and selecting applicants, from the definition of the company's need right through to the

actual recruitment<sup>313</sup>. Analysing an employer's recruitment practices for example will lead to closer attention being paid to the way in which a job vacancy is written and disseminated ("sourcing"), CVs are managed or applicants are selected. This analysis may also bear on other HR aspects: allocation and integration of new recruits, staff appraisal procedure, management of mobilities and promotions, access to training and so on. In that respect, the Defender of Rights recommends calling on an external service provider with the requisite expertise so as to guarantee the neutrality of the assessment.

Quantitative assessments based on the statistical processing of HR data or the perception of individuals involved (staff, users) may be carried out for a mapping of the company by target group and an identification of the potential or actual discriminatory risks according to staff origin. A qualitative analysis of practices is also necessary, as we have already pointed out, prior to the diagnostic study.

**The Defender of Rights thus recommends strengthening the policy combatting origin-based discrimination in the workplace by introducing a statutory auditing and monitoring obligation, beginning with certain flagship public service companies, chosen in light of their duty to set an example.** These would be high-profile companies with a high number of employees or officials. They could establish a pilot scheme, requiring reporting and monitoring with the Defender of Rights, under similar terms to those governing the audit of France Télévisions, which would send out a meaningful message on the part of the Government. Such procedures have shaped the policy for equal access to the public sector in Quebec.

<sup>312</sup> CNIL and Defender of Rights, *Measuring as the key to achieving equal opportunities*, op. cit.

<sup>313</sup> Defender of Rights, *Guide. Discrimination-free recruitment*, 2019.

## The example of equal access programmes in Quebec

In Quebec, the mission of the national human rights commission (CDPDJ) includes implementing equal access programmes that help to combat workplace discrimination.

The *Charter of Human Rights and Freedoms* regulates the application of these programmes which, for nearly 20 years, have been designed to ensure an equal representation of people from groups that suffer discrimination across all types of position in an organisation and to identify and correct human resource management practices and rules liable to have discriminatory effects<sup>314</sup>.

The groups at risk of discrimination covered by the programmes are as follows: women; aboriginal communities, i.e. the First Nations, Inuits and Métis of Canada; visible minorities, i.e. communities other than aboriginal people, who are not white; ethnic minorities, i.e. communities other **than aboriginals and people belonging to a visible minority**, whose native language is neither French nor English; people with disabilities identified under the law ensuring the exercise of such people's rights for the purposes of their school, professional and social integration.

These programmes are designed for public bodies (municipal bodies, education networks, healthcare as well as social services and Crown corporations), certain private undertakings as well as certain governmental bodies. The CDPDJ manages the analysis of audits provided for by the law to define the catch-up objectives set on a company-by-company basis and to oversee their monitoring<sup>315</sup>.

A comparable approach had been trialled by the HALDE as part of a mission auditing the national broadcasting companies (SNPs) of France Télévisions it had been tasked by the Act of 5 March 2009 on the public television

service<sup>316</sup>. Through this audit, the authority was able to test an original methodology entailing both an examination of human resource management procedures and a survey among staff on career paths according to origin<sup>317</sup>. This audit is only partly complete, however, as a properly qualitative assessment of career paths and pay could not be carried out. Beyond the diagnostic stage, the lawmaker had not made provision for any correction obligation, mechanism for setting targets or monitoring system.

There would be merit in such audits being performed to test the procedures of certain public services and authorities and their discriminatory impacts where applicable (at national level or within a more specific organisation), whether this entails auditing the selection methods of a graduate school or the procedure for allocating low-income housing in a given social housing office.

### For example: Decision 2017-160 of 17 July 2017 on a discriminatory refusal to hire on the basis of origin

The complainant applying for the job of sales management assistant was not hired. The executive assistant who interviewed her explained that her profile was a perfect fit for the job, but told her over the telephone that: *“my boss asked me not to recruit Africans on the pretext that they don't know how to work. Or West Indians either, who he reckons are too slow. There was even a folder of CVs called ‘African CVs’ which contained all of the CVs from people of African, West Indian or Island origin”*<sup>318</sup>.

Following its investigation, the Defender of Rights recommended that the company at fault offer the complainant fair compensation for her loss, and amend its recruitment methods to avoid any discrimination in the future.

<sup>314</sup> Charter of Human Rights and Freedoms, 1975.

<sup>315</sup> See the website of the [Commission des droits de la personne et des droits de la jeunesse](#) of Quebec.

<sup>316</sup> Article 2 of Act No. 2009-258 of 5 March 2009 on audiovisual communication and the new public television service had thus amended Act No. 2004-1486 of 30 December 2004 founding the High Authority for Combating Discrimination and Promoting Equality, by adding to Article 15 the following provision: *“By 31 December 2009, the High Authority shall submit to Parliament a report assessing the human resource management policy conducted by the national broadcasting companies referred to in Article 44 of Act No. 86-1067 of 30 September 1986 on the freedom of communication so as to combat discrimination and better reflect the diversity of French society.”*

<sup>317</sup> This report does not address the representation of diversity in programmes, a mission that Act No. 2009-258 of 5 March 2009 on audiovisual communication and the new public television service entrusted to France's broadcasting regulator, the Conseil supérieur de l'audiovisuel (CSA).

<sup>318</sup> Defender of Rights, Decision 2017-160 of 17 July 2017 on a discriminatory refusal to hire on the basis of origin, p. 3.

In this regard, it would be worth the Defender of Rights being empowered to initiate structural investigations within organisations: during referrals on individual deeds, some of its investigations already uncover evidence of systematic discrimination which would justify the performance of full audits of the companies and organisations concerned and monitoring of the recommendations issued in these cases. To that end, the Defender could call on experts and/or existing inspection services. This would, for example, enable it to refer to the General Inspectorate for Social Affairs (IGAS) or National Social Housing Regulator (ANCOLS), in the same way as it is able to refer to the Conseil d'État for any report or legal question today<sup>319</sup>.

### **Promoting the principles of objectivity, transparency and traceability**

**The audits must prompt employers to set up selection procedures that are grounded in the principles of objectivity, transparency and traceability.**

Although discrimination may sometimes be the manifestation of an assumed or conscious intention to place one or more individuals at a disadvantage, most of the time discriminatory treatment results from unintentional processes and reflexes. Opaque and subjective selection procedures that have not been properly

defined, as well as choices based on feelings, can resemble discriminatory practices.

While private employers can freely determine the procedures used as long as they are not discriminatory, public employers were quick to set up procedures to respect the principle of equal access to the civil service. But for all that, the rule of anonymous competitive entrance tests and jury supervision, which foster objective selection and more equal treatment, are not enough to guarantee a complete absence of discriminatory bias<sup>320</sup>.

### **The challenges of transparency and traceability**

At the same time, the development of digital tools, including algorithms, which select applicants on the basis of criteria that are difficult to identify, may unintentionally increase the phenomenon of discrimination. In a 2018 report, the Royal United Services Institute for Defence and Security Studies (RUSI), a British-based defence and security think tank, thus acknowledged that machine learning systems, which constitute black boxes in a way<sup>321</sup> “will inevitably reproduce the inherent biases present in the data they are provided with”, hence a heightened risk of disproportionate targeting of ethnic and religious minorities<sup>322</sup>.

<sup>319</sup> Article 19 of Organic Act No. 2011-333 of 29 March 2011 on the Defender of Rights stipulates that “*The Defender of Rights may ask the Vice-President of the Conseil d'État or First President of the Cour des comptes to have any studies carried out*” and Article 31 indicates: “*Where the Defender of Rights is referred a complaint, not submitted to a judicial authority, which raises an issue to do with the interpretation or scope of a legislative or regulatory provision, it may consult the Conseil d'État. The Defender of Rights may make said opinion public*”.

<sup>320</sup> Versini D., *Rapport sur la diversité dans la fonction publique*, report presented to the Minister for State Reform and the Civil Service, 2004, p. 45: “*Written tests usually of an academic nature favour applicants with the most qualifications, who have received significant training in this type of selection and applicants from the most advantaged socio-occupational categories who benefit from a favourable social and cultural environment. The same applies for oral tests*”.

<sup>321</sup> Royal United Services Institute for Defence and Security Studies, *Annual Report 2017/2018*, 2019. See also: Villani C., *Donner un sens à l'intelligence artificielle*, 2018, pp. 143-148.

<sup>322</sup> Babuta A., “*Innocent Until Predicted Guilty? Artificial Intelligence and Police Decision-Making*”, *RUSI Newsbrief*, vol. 38, no. 2, 2018.

In the context of the adjustment of the burden of proof in civil cases, under the 27 May 2008 Act, if facts suggesting the existence of discriminatory selection have been established, the implicated person must prove the absence of discrimination through elements that objectively justify the choices made. The *Danfoss* judgment and settled case law of the ECJ on gender-based discrimination indicate that the opacity of a remuneration system is sufficient to lead to a presumption of discrimination which requires the company to prove that its practice is not discriminatory<sup>323</sup>. In a similar approach, the European Court of Human Rights considers that the lack of prescribed practices and *lack of transparency* regarding procedures play a part in the establishment of origin-based discrimination<sup>324</sup>.

In law, **the lack of transparency and traceability regarding the procedure leading up to the decision implies presumption of discrimination** in order to guarantee the right to legal remedy. Such issues concern all activity spheres, beyond merely the employment sector.

Victims of racial profiling<sup>325</sup> speak of their difficulty in furnishing evidence<sup>326</sup>, particularly owing to a very vague regulation of checks<sup>327</sup> and the fact that there is no traceability system in place during them. At the moment, and as noted by the Court of Cassation in 2016,

checks “*are not subject to any recording*”<sup>328</sup>: where there is no bringing in for questioning, an immigrant stopped several times a day for an identity check will have no avenue of appeal against such a discriminatory “racial profiling” practice.

In its judgment, Paris Appeal Court had considered that the absence of any traceability of the identity check carried out amounts to an obstacle to judicial control, which could, in itself, prevent the person subject to the check from meaningfully challenging the measure at issue and its potentially discriminatory nature, at odds with ECHR case law on the right to an effective remedy<sup>329</sup>.

Traceability of checks is important in terms of safety and of preventing ethno-racial profiling<sup>330</sup>: ultimately, it would enable their effectiveness to be assessed and, perhaps, to readjust their number and the locations and people targeted, similar to the assessment policies set up abroad.

**Ensuring the traceability of identity checks is a recommendation the Defender of Rights has made since 2012, to guarantee that individuals subjected to discriminatory or abusive checks are able to take legal action**<sup>331</sup>.

One pilot scheme, launched in 2017 and applicable until 1 March 2018, planned for the systematic recording of identity checks carried out pursuant to Article 78-2 of the

<sup>323</sup> ECJ, *Danfoss*, 17 October 1989, no. 109/88, p. 3225. The Court maintains: “*where an undertaking applies a system of pay which is totally lacking in transparency, it is for the employer to prove that his practice in the matter of wages is not discriminatory, if a female worker establishes, in relation to a relatively large number of employees, that the average pay for women is less than that for men*”. Also see ECJ, Judgment of 27 October 1993, *Enderby v Frenchay Health Authority*, case C 127/92; ECJ, Judgment of 26 June 2001, *Susanna Brunnhofer*, case C-381/99; ECJ, Judgment of 3 October 2006, *Cadman*, case C-17/05.

<sup>324</sup> ECHR, GC, Judgment of 16 March 2010, *Oršuš and others v Croatia*, application no. 15766/03.

<sup>325</sup> For more information, see European Union Agency for Fundamental Rights (FRA), *Preventing unlawful profiling today and in the future: a guide*, *op. cit.*

<sup>326</sup> Cass. crim., 13 January 1986, no. 89-90041, Bull. crim. No. 19. A court-led substantive assessment of the legality of operations is only possible where the individual whose identity is being checked does not wish to or is unable to justify his/her identity and is therefore detained for verification, or in the event the identity check comes immediately before a police custody measure or placement in immigration detention.

<sup>327</sup> They can be carried out in the event of individuals caught committing a crime, a risk of public disorder or at the State Prosecutor’s formal request.

<sup>328</sup> Cass. Civ., Judgment on the non-discriminatory nature of an identity check carried out following a gang robbery, 9 November 2016, no. 15-24207. The other 12 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.

<sup>329</sup> Paris Appeal Court, Two judgments concerning the State’s conviction for identity checks on discriminatory grounds, 24 June 2015, no. 13/24261 and no. 13/24262.

<sup>330</sup> ECHR, ch. 4<sup>th</sup> sec., *Lingurar v Romania*, application no. 48474/14 (discriminatory behaviour of the police regarding a Roma family, using “ethnic profiling” to justify a raid at their home).

<sup>331</sup> Defender of Rights, *Report on police/citizens relations and identity checks*, 2012; Defender of Rights, Opinion 16-19 of 21 July 2016 on Bill No. 773 on equality and citizenship; Defender of Rights, Opinion 16-12 of 10 May 2016 on combatting abusive identity checks; Defender of Rights, Opinion 15-25 of 1 December 2015 on security in stations amid the terror threat; Defender of Rights, Opinion 15-27 of 11 December 2015 on preventing and combatting antisocial behaviour, public safety breaches and terror acts on public transport..

French Code of Criminal Procedure by national gendarmerie and police officers, equipped with a mobile camera in some locations<sup>332</sup>. To our knowledge, no publication has followed the assessment of this pilot scheme provided for by decree.

### **Analysing criteria and procedures**

#### **Public inquiries within the police force ... and reforms in Great Britain and Quebec:**

In light of the lack of any investigation into the death, in 1993, of a black youth, Stephen Lawrence, a sweeping public inquiry was opened into allegations of racism within the police force<sup>333</sup>. In February 1999, the judge, Sir William Macpherson, submitted his report concerning the investigation into this murder. The famous Lawrence report recognised the systemic nature of racism within Britain's police forces<sup>334</sup>. On the basis of this finding, the judge called for the prerogatives of the *Race Relations Act*, the anti-racism and anti-discrimination legislation adopted in 1965, to be extended: after initially focusing on discrimination in employment and housing, this legislation was extended to cover the police and justice services, as well as public health, education and the Armed Forces<sup>335</sup>.

Similarly, in Quebec, a number of public reports have been submitted following various incidents and widespread signs of tension between the police and the "visible minorities"<sup>336</sup>. These reports all found that the police was systematically biased towards minorities, and laid bare the latter's total

mistrust of the former. Recommendations were issued particularly concerning the training, oversight mechanisms and recruitment of police officers.

Such an approach strikes as crucial in stamping out discrimination. An objective analytical process is aimed at ending, or at the very least reducing, the use of subjective criteria in the way individuals are managed.

In its 13 August 1993 decision, the Constitutional Council thus clarified that checks to ensure foreign nationals are carrying residence documents "*must be carried out solely on the basis of objective criteria and excluding (...) any discrimination*", which refers to "*racial profiling*"<sup>337</sup>. And yet, these practices persist.

#### **The Defender recommends amending Article 78-2 of the French Code of Criminal Procedure to explicitly indicate therein that identity checks cannot be based on grounds that, by law, constitute discrimination.**

Extending the policing powers attributed to transport security officers carries the same risks of racial profiling, as can be seen in the Defender of Rights' decision on the terms "*migrants, Syrians, Roma, rough sleepers, collectors, street vendors, dealers and drug addicts*" used by officers of the Parisian Transport Operator RATP to describe their mission concerning people unduly taking up position in spaces<sup>338</sup>.

An objectively analysed decision is also sought in housing, with the law clarifying the list of supporting documents that a landlord may ask of an applicant for a property to let or of their guarantor<sup>339</sup>. Some reforms have

<sup>332</sup> Ministry of the Interior, Decree No. 2017-636 of 25 April 2017 on the conditions for trialling the recording of identity checks by national gendarmerie and police officers, equipped with a mobile camera (application of Article 211 of Act No. 2017-86 of 27 January 2017 on equality and citizenship)

<sup>333</sup> <https://www.humanite.fr/node/151815>

<sup>334</sup> MacPherson W., *The Stephen Lawrence Inquiry*, 1999.

<sup>335</sup> McLaughlin E. and Murji, K., "After the Stephen Lawrence Report", *Critical Social Policy*, 19(3), 1999, pp. 371-385.

<sup>336</sup> Commission des droits de la personne du Québec, *Enquête sur les relations entre les corps policiers et les minorités visibles et ethniques : rapport final du Comité d'enquête à la Commission des droits de la personne du Québec*, Montreal, 1988.

<sup>337</sup> CC, Decision No. 93-325 D.C of 13 August 1993 on controlling immigration and the conditions governing the admission, reception and residence of foreign nationals in France, recital 16. Along the same lines, see CC, Decision No. 93-323 of 5 August 1993 on identity checks (recital 9: "*whilst the lawmaker may provide for the possibility of an individual's identity check not being associated with his or her behaviour, it is up to the authority in question to justify, in all cases, the special circumstances establishing the risk of public unrest on which the check is grounded*").

<sup>338</sup> Defender of Rights, Decision 2018-077 of 21 February 2018 on the terms "migrants, Syrians, Roma, rough sleepers, collectors, street vendors, dealers and drug addicts" used by officers of the Parisian Transport Operator RATP to describe their mission concerning people unduly taking up position in their spaces.

<sup>339</sup> Art. 22 of Act No. 89-462 of 6 July 1989 aimed at improving tenant/landlord relations and amending Act No. 86-1290 of 23 December 1986.

also been made in social housing to improve the transparency, traceability and objective analysis of applicant selection procedures. Applicants' right to information, right from the moment they submit their application to the allocation of the housing, has been introduced by the Access to Housing and Urban Renewal (ALUR) Act<sup>340</sup>. Online access to the choice of housing available must be underpinned by the same objectives. Systems for rating applications have been made systematic by Act No. 2018-1021 of 23 November 2018 in the intermunicipal authorities targeted by the council housing allocation reform. And yet, systems for qualifying the choice, which seek to map the social housing occupants so as to steer allocations by limiting access to certain applicants, carry risks of discrimination<sup>341</sup>.

For the scope allowed by the legal framework has fostered an interpretation of the general allocation principles to establish a set of tacit rules around the central objective of "social diversity". This is thus defined as the search for a "settlement balance" in terms of social housing, to avoid the clustering of poor households in struggling neighbourhoods, which sometimes means that, at local level, ethno-racial criteria are used and the waiting times for immigrant populations become longer. This objective thus tends to prevail, in reality, over the guarantee and respect for the right to housing.

**The Defender of Rights recommends explicitly stating, in law, the priority that the right to housing takes over the objective of social diversity, pointing out that the right to housing must be implemented without**

**discrimination.** These clarifications should be made to Article L. 441 of the French Construction and Housing Code which defines the allocation policy guidelines<sup>342</sup>.

Amid the general roll-out of application rating systems in the intermunicipal authorities concerned by the allocation reform, pursuant to the ALUR and Equality and Citizenship pieces of legislation, **the "link to the municipality" criterion**, associated with place of residence, introduced into the law in 2014, must be given fresh consideration<sup>343</sup>.

These sectoral examples show the importance of fully taking these issues on board – particularly across all public services.

### **The lack of transparency and discriminatory bias of algorithms: the example of Parcoursup**

Since 2018, Parcoursup has been collecting the preferences of all students, at national level, in the form of non-ranked options and cover letters. Applications, selected on the basis of a national algorithm, are then forwarded to universities which use local algorithms to analyse the quality of each application according to the institution's requirements.

The transparency requirements for the national algorithm have been strengthened: in addition to the source code, specifications, outlined in summary format, must also be published<sup>344</sup>. The French Data Protection Authority (CNIL), having authorised the

<sup>340</sup> Act No. 2014-366 of 24 March 2014 for access to housing and urban renewal, known as the ALUR Act, and Act No. 2017-86 of 27 January 2017 on equality and citizenship. The legislation defines the core guidelines of the new framework for allocating social housing: coordinating the policy for allocating social housing by the intermunicipal authority in a bid to crack down on practices of avoiding applicants deemed "undesirable" by municipalities; obligation of at least 25% of social housing, outside of urban policy priority neighbourhoods, to the poorest applicants registered an intermunicipal level; obligation of at least 25% allocation to priority applicants, first and foremost under the enforceable right to housing (DALO), on the reserved housing quotas of municipalities and Action Logement (formerly 1% Logement) bodies and social landlords for the non-reserved housing part. The obligation to rehouse priority applicants under the DALO is no longer solely incumbent upon the State, through the prefectural quota. The Act of 23 November 2018 to reform housing, planning and digital technology, known as the ELAN Act, confirmed the obligation to allocate 25% of housing to the poorest applicants outside of urban policy priority neighbourhoods, which must be applied strictly.

<sup>341</sup> Act No. 2018-1021 of 23 November 2018 to reform housing, planning and digital technology.

<sup>342</sup> Art. L. 441-1 of the French Construction and Housing Code (CCH).

<sup>343</sup> Act No. 2014-173 of 21 February 2014 on programming for towns and cities and urban cohesion. Article L. 441 of the CCH currently indicates that "the absence of link with the municipality where the housing is located alone provides sufficient grounds for not allocating housing that meets the needs and capacities of the applicant". On the other hand, it therefore authorises its consideration among other criteria defined for allocation, not least as part of a rating system, poised to become compulsory under a Decree of 17 December 2019 implementing the ELAN Act in order to define the terms according to which these rating systems should be set up from 2020 where they do not yet exist and from 2021 for compliance with said Decree in the local areas that already have such a system.

<sup>344</sup> Act No. 2018-166 of 8 March 2018 on the guidance and academic success of students; Art. L. 312-1-3 of the French Code of Relations between the Public and the Authorities; Art. L. 612-3 II of the French Education Code..

processing of data by Parcoursup, explains that this measure makes it possible to “*provide all citizens with information about the algorithmic processing that is more accessible and easier to understand than the source code alone*”<sup>345</sup>.

However, it had allowed local algorithms to derogate from the principle of transparency of algorithms used by the authorities “in order to guarantee the necessary protection of the confidentiality of the educational teams’ deliberations” (Article L. 612-3 I of the French Education Code)<sup>346</sup>.

This made it impossible to challenge the resulting selection and even to identify any discriminatory bias. Accordingly, in January 2019 the Defender of Rights had recommended to the Minister of Higher Education that the criteria taken into account by the algorithms used by the local commissions of higher education institutions for processing and assessing applications be made public ahead of their allocation to undergraduate courses<sup>347</sup>.

Referred a Preliminary ruling on the issue of constitutionality (QPC), the Constitutional Council ruled on the transparency requirement concerning the selection criteria used. In its 3 April 2020 decision, it indicated that each higher education institution must specify if it used “*algorithmic processing*” and inform the students who ask about the criteria on the basis of which applications are examined by Parcoursup<sup>348</sup>. That said, restricting third-party access to these criteria is justified, according to the Constitutional Council, on general interest grounds, in proportion with this objective.

Pursuant to the Decree of 26 March 2019<sup>349</sup>, following a dispute, higher education

institutions must now disclose the general criteria used in their selection procedure, but an assessment of the risks of direct discrimination on the basis of place of residence and indirect discrimination on the basis of origin or gender remains a challenge<sup>350</sup>.

In a report published on 27 February 2020, the Cour des comptes (supreme body for auditing the use of public funds in France) drew attention to the lack of transparency of the Parcoursup system, which is the only means of guaranteeing fairness<sup>351</sup>. On the one hand, it calls for local algorithms to be made public in a bid to ensure diverse working methods across local commissions, caution against increasingly automated categorisation and underline the at times disputable parameters of local algorithms – especially those bearing on high school of origin. On the other hand, the Cour des comptes would like the high school of origin to be anonymised, and the difference between baccalaureate (A level) grades and coursework to be measured, so as to ensure fairness between high school students.

**The Defender of Rights would argue that any policy to combat origin-based discrimination must ensure that companies and administrations adopt transparent procedures in employment, as well as access to housing, education and access to private and public goods and services. They must identify potential situations where discrimination could occur, along with the processes leading up to them, in order to prevent them as far as possible, by setting up objective procedures.**

<sup>345</sup> CNIL, Deliberation No. 2018-119 of 22 March 2018 providing an opinion on a draft order authorising the implementation of personal data processing named Parcoursup

<sup>346</sup> Art. L. 612-3 I of the French Education Code.

<sup>347</sup> Defender of Rights, Decision 2019-021 of 18 January 2019 on the functioning of the national platform for pre-enrolment in the first year of higher education (Parcoursup). Although a judgment of Guadeloupe Administrative Court had authorised the UNEF, the requesting student trade union, to access the source code of a local algorithm (TA Guadeloupe, 4 February 2019, UNEF, no. 1801094), the Conseil d’État annulled said decision on 12 June 2019, contending that “*only applicants may be communicated information concerning the criteria and terms for the consideration of their applications as well as the educational grounds*” (CE, 12 June 2019, Université des Antilles, no. 427916).

<sup>348</sup> CC, Decision No. 2020-834 Preliminary ruling on the issue of constitutionality (QPC) of 3 April 2020 on the communicability and publicity of algorithms implemented by higher education institutions in the consideration of applications to enrol in undergraduate degrees.

<sup>349</sup> Decree No. 2019-231 of 26 March 2019 on the national pre-enrolment procedure for access to undergraduate higher education courses and amending the French Education Code.

<sup>350</sup> Defender of Rights, Decision 2019-099 of 8 April 2019 on the functioning of the national platform for pre-enrolment in the first year of higher education (Parcoursup), particularly the lack of transparency of the allocation procedure.

<sup>351</sup> Cour des comptes, *Un premier bilan de l’accès à l’enseignement supérieur dans le cadre de la loi orientation et réussite des étudiants*, Communication to the French National Assembly’s Public Policy Assessment and Oversight Committee (CEC), 2020.



### 3. Ensuring effective sanctions for origin-based discrimination

In light of the minimal impact that sanctions handed down by the courts have and the inertia of certain employers in tackling even the most serious cases of discrimination, effective and dissuasive punishment of origin-based discrimination is necessary.

Whether at organisation or court level, the perpetrator of discrimination must incur a disciplinary sanction from his or her employer (if the offence took place in the workplace) and civil or criminal sanctions must progress commensurate with the severity of the deeds and their impact on the work organisation and victim.

### Processing and punishment of reports within organisations

Amid the denial and lack of suitable response from organisations to the reports they receive, victims are left with a sense of fatalism and only one choice when their work situation has become unbearable: refer their case to the Defender of Rights or the courts, and await their rulings.

According to the law, public and private employers alike are duty-bound to take all necessary measures to protect the physical and mental health and safety of employees or public officials<sup>352</sup>. **The Defender of Rights also reminds companies and administrations that they must put the necessary mechanisms in place to easily collect and swiftly process reports of discrimination or harassment and to punish the perpetrator when the allegations are founded.**

<sup>352</sup> Art. L. 1152-4 and L. 4121-1 of the Labour Code; Art. 23 of Act No. 83-634 of 13 July 1983 on the rights and duties of civil servants; Cass. Soc., Judgment of 21 June 2006, no. 05-43914.

### **Decision: discriminatory moral harassment on the basis of origin**

The Defender of Rights was referred a complaint about the problems encountered by a civil servant who said he suffered discriminatory moral harassment because of his African origin on the part of his direct line manager<sup>353</sup>. This situation allegedly involved mainly remarks of a racist nature which offended his dignity, as well as unfavourable professional appraisals for 2013 and 2014. The investigation conducted by the Defender of Rights found that the complainant could indeed be considered a victim of discriminatory moral harassment on the basis of his origin, which considerably impaired both his working conditions and his health.

The Defender of Rights recommended that the administration intervene, remind the perpetrator of what the law says, correct the situation and ensure recognition of accountability for the complainant's state of health with respect to the conduct observed.

On the one hand, this involves informing employees and public officials of their rights and duties, by displaying the legal provisions and including those bearing on discriminatory harassment in the rules of procedure, especially the disciplinary sanctions incurred by the perpetrators. On the other, it calls for anticipation of problems by training supervisors and the organisation of an official procedure for collecting and processing reports of discrimination and harassment. The more serious the situations reported, the swifter the response must be.

Careful attention must be paid to working environments where there is little diversity (gender, age, origin, etc.), as the risk of harassment may be higher towards minority staff<sup>354</sup>.

In the civil service, such arrangements have been compulsory since May 2020. The texts clarify the contents of the procedure for reporting acts of violence, discrimination, moral or sexual harassment and gender-based behaviour<sup>355</sup>.

The Defender of Rights gives a reminder that when a discriminatory situation is reported, the appropriate professionals must be contacted internally (the occupational physician or therapist, staff representative bodies, etc.) and any necessary protection for the individual claiming to be a victim provided. Note that, for the public sector, functional protection must be systematically granted when the requesting party provides evidence<sup>356</sup>. Senior management must ensure that an internal inquiry is conducted in order to establish the facts. **If the inquiry confirms the allegations, senior management must immediately take disciplinary measures against the perpetrators, without awaiting a decision from the courts**, and conduct a sanctions policy aimed at cracking down on impunity.

An employer can be held civilly or administratively liable for failing to comply with the safety obligation, and must prove that it took all necessary measures to prevent and, where applicable, punish the discriminatory harassment<sup>357</sup>. Since discriminatory harassment is a form of discrimination in the eyes of the law, the victim can have the discriminatory acts recognised as invalid and obtain full compensation for the harm suffered.

<sup>353</sup> Defender of Rights, Decision 2017-156 of 1 December 2017 on discriminatory moral harassment on the basis of origin and health, particularly expressed through remarks of a racist nature and which considerably impaired both the working conditions and health of the victim.

<sup>354</sup> To find out more, see: Defender of Rights, *Discriminatory harassment in the workplace. Factsheet for the attention of employers*, 2018.

<sup>355</sup> Act No. 2019-828 of 6 August 2019 on reforming the civil service; Decree No. 2020-256 of 13 March 2020 on the system for reporting acts of violence, discrimination, harassment and gender-based behaviour in the civil service, which clarified that the system should have been set up by 1 May 2020 at the latest.

<sup>356</sup> Art. 11 of Act No. 83-634 of 13 July 1983 on the rights and duties of civil servants. The granting of functional protection is not subject to a complaint being lodged.

<sup>357</sup> Cass. Civ., Judgment of 1 June 2016, no. 14-19702; CE, Ass., 30 October 2009, Ms Perreux, no. 298348; CE, 10 January 2011, Ms Levêque, no. 325268.

**The Defender of Rights draws attention to the fact that punishment of discriminatory behaviour is also the responsibility of the inspection and disciplinary bodies of the different occupational sectors, which may be the sector-specific councils (in health or sport for example).**

### **Decision on origin-based discriminatory harassment and the lack of protection for the public hospital worker**

The Defender of Rights was thus referred a case by a public hospital worker claiming to have suffered from remarks and behaviour with racist connotations on the part of his colleagues over several years<sup>358</sup>. He maintained that his employer had been informed of the situation but had not protected him. Quite the reverse in fact: his employer allegedly took unfavourable measures that undermined his career advancement.

Following its investigation, the Defender of Rights considered that the hospital, having been informed by the complainant of facts likely to constitute discriminatory harassment, had not taken appropriate measures to put a stop to these. It recommended that the hospital grant the complainant the benefit of the functional protection provided by the civil service status and asked it to compensate the harm suffered by the complainant. In its decision, the Defender of Rights also outlined several general recommendations for the attention of the hospital, bearing particularly on the organisation of training and setup of a procedure for collecting and processing reports of discriminatory harassment.

### **Decision on the discriminatory remarks a doctor made to his female patient during an appointment**

The patient was pregnant and went to see a doctor. During the appointment, the latter asked how many children the patient had. When she said that this was her fourth, he apparently said: “*So when’s the ninth due, then?*”<sup>359</sup>. The patient reported that he then asked if she was of Malian origin, to which she replied that she was born in the Ardennes (in France), but was of Senegalese descent. The doctor then allegedly continued his remarks about how “*crazy*” it was that people of African origin had “*so many children*”, that there should be some thought for the children’s future, that schooling was expensive<sup>360</sup>. The patient immediately left the surgery in a state of shock.

After its investigation, the Defender of Rights concluded, for the first time, that a situation of discriminatory harassment in terms of goods and services had taken place. The institution considers that the doctor’s behaviour, which he describes as tactless, did amount to harassment based on the patient’s origin.

After steps taken by the patient with the clinic and the French Medical Council, the patient and the doctor (who did not deny the remarks reported) have managed to reach an agreement before the Council: the doctor apologised to the patient. Noting the agreement reached between the parties, the Defender of Rights recommended that a civil settlement be reached to compensate the harm resulting from the discrimination.

<sup>358</sup> Decision 2019-085 of 23 April 2019 on the discriminatory harassment on the basis of origin suffered by a public hospital worker.

<sup>359</sup> Defender of Rights, Decision 2018-239 of 26 September 2018 on the discriminatory remarks that a doctor made to his female patient during an appointment.

<sup>360</sup> *Ibid.*

### **Improve the processing of discriminations by the criminal courts**

There are a number of factors common to the civil and criminal justice channels that explain why legal remedy for victims is limited: sanctions have little impact, compensation is low and the financial and psychological cost for victims can be significant – all of which impede the effectiveness of legal action.

Some requirements specific to the criminal justice route and the drafting of the constituent elements of the discrimination offence make it almost impossible to obtain legal remedy. Presumption of innocence means that the burden of proof lies with the prosecuting party, which must gather the evidence together to establish all of the aspects making up the offence.

In terms of discrimination, the requirements of the criminal courts where evidence is concerned are particularly steep. Although proof is “*discretionary*”, which means it can be provided by a broad range of means (recordings, “*unlawfully*” obtained evidence), adjustment of the burden of proof does not exist in criminal law as it does in civil law, and the special proof of the discriminatory intent required currently prevents use of presumptions of fact.

In reality, discrimination is perceived in relationship with others, and represents something “unspoken” which is seldom explicit. Criminal justice requires explicit proof of the characterised intent to commit discrimination and of its discriminatory basis; proof alone of the act and the outcome or a body of evidence is not enough to justify a presumption of fact. This means that only some forms of direct discrimination leaving material evidence of the discriminatory basis of the perpetrator’s decision can succeed in obtaining a criminal conviction. **This requirement is compounded by the fact that the police and the prosecutor’s office have a relatively inactive investigations policy and very limited experience in this regard.**

Accordingly, the testing conducted outside the judicial framework by associations or the public authorities never seems to lead to additional investigations or prosecutions, even though its findings lift the lid on routine discriminatory practices whose perpetrators are identifiable<sup>361</sup>. Ultimately, cases are commonly dismissed with no further action, including complaints that the Defender of Rights forwards to the State prosecutor where it considered that there was proof of the materiality of the intent.

After more than 15 years of criminal justice policy on discrimination, few cases come to trial and convictions are almost unheard of. Even the judges themselves recognise their powerlessness in the face of the challenges in terms of proof. These challenges give rise to undeniable impunity in spheres where criminal justice is the most appropriate route, not least because the burden of legal action does not lie solely with the victim.

This is the only remedy open to discrimination victims capable of leading to significant sanctions for perpetrators in terms of recruitment, access to internships or vocational training or barriers to economic activity or to the exercise of a right and in terms of access to public and private goods and services.

In Article 1349, the French Civil Code defines presumptions as “*conclusions by which the law or the court infers an unknown fact from a known fact*”<sup>362</sup>. In a judgment *Salabiaku v France*, delivered on 7 October 1988, the European Court of Human Rights states that “*presumptions of fact or of law operate in every legal system*”, and must be set out by the States within reasonable limits in light of the severity of the issue and safeguarding of the right of defence<sup>363</sup>.

<sup>361</sup> Kirszbaum T., “Capitalisation des connaissances sur les discriminations dans le parc privé et les instruments d’action publique pour les combattre”, *op. cit.*, p. 39.

<sup>362</sup> Art. 1349 of the French Civil Code.

<sup>363</sup> ECHR, *Salabiaku v France*, 7 October 1988, no. 10519/83, 1988, p. 167.

**The Defender of Rights thus recommends amending Articles 225-1 et seq. of the French Criminal Code in order to make it more effective by providing for a mechanism to adjust the burden of proof with regard to the grounds for discrimination between natural or legal persons, enabling certain presumptions of fact to be used<sup>364</sup>.**

This partial easing in the burden of proof, practised by the criminal courts in other spheres, would make it easier for the victim to collect the necessary evidence for characterising the offence and strengthen the impact of criminal justice in combatting discrimination, without overly calling into question the presumption of innocence<sup>365</sup>. The Defender of Rights believes that such an amendment would enhance the effectiveness of the legal framework set up to protect discrimination victims whilst complying with this principle.

**The potential for class action: a procedure that must evolve**

Group action, like the American class-action, is a tool with major potential, both curative and preventive, which could give rise to legal action of unprecedented form and scope.

In light of its powers in terms of combatting discrimination, the Defender of Rights has been consulted throughout the discussions which led to a group action process for discrimination being created before the civil and administrative courts under Act No. 2016-1547 of 18 November 2016 modernising justice in the 21<sup>st</sup> century<sup>366</sup>. In its opinions for the lawmaker's attention, it underscored **the importance of these legal proceedings for acknowledging systemic and collective discrimination, too few cases of which have to date been brought before the courts**, and the procedural challenges of the effectiveness of legal action for victims<sup>367</sup>.

In its collective dimension, class action calls for a different approach to the way judicial processing of discrimination is considered. Over and above the qualification of individual situations, it prompts us to consider the possibility of their accumulation and multiplication where the analysis bears on the situation of a specific group within a work collective, subject to a series of diverse differences in treatment on the basis of one or more prohibited grounds.

The law has yet to precisely define the necessary terms to enable this new approach to legal disputes to fully achieve its potential for judicial effectiveness regarding victims' access to the law and the equality principle.

The Act modernising justice in the 21<sup>st</sup> century only very briefly specifies the role of the judge referred a class action for discrimination, with no details on their duties at the first phase of class action, consisting of ruling on the materiality of the collective breach with which the defendant employer is being charged. When the collective dimensions of discrimination become the focus, the issues in terms of presenting evidence and the facts before the regional court (TGI) – a court which has handled this matter very little to date – gain new prominence.

Highlighted by the Defender of Rights in its opinions to Parliament, the Act's shortcomings raise considerable uncertainties that make any legal action very complicated. Once a discriminatory situation has been found, the judge must clarify the practices behind it, so as to identify what corrective action needs taking. These measures will thus give rise to a debate between the parties and a court decision which must ensure they are monitored. The court shall have to decide on matters that come under a range of new areas of action and expertise where it is concerned.

<sup>364</sup> M. Toullier, in Thouvenin, J.-M. et al., *La lutte contre les discriminations à l'épreuve de son effectivité*, CEDIN, June 2016, "Droit & Justice" Mission, December 2013, Appendix, pages 263 et seq.

<sup>365</sup> Gründler T. & Thouvenin J.-M. (dir.), *La lutte contre les discriminations à l'épreuve de son effectivité*, op. cit.

<sup>366</sup> Act No. 2016-1547 of 18 November 2016 modernising justice in the 21<sup>st</sup> century.

<sup>367</sup> Defender of Rights Opinion to Parliament: Opinion 13-10 of 31 October 2013; Opinion 15-13 of 2 June 2015; Opinion 15-23 of 28 October 2015; Opinion 16-10 of 7 April 2016; Opinion 16-11 of 10 May 2016.

It would be to the texts' advantage to organise this procedure and the contribution of experts, notably with regard to corrective human resources measures, which should provide support enabling judges to perform the new role assigned to them.

The Defender of Rights also reiterates that it would be appropriate to re-examine the possibility of substantially opening up class action with regard to discrimination<sup>368</sup>. For example, to a group which forms specifically for the purposes of the cause. The criteria for joining this group would be similar to those defining a victim of discrimination: suffering the same unfavourable treatment, in connection with a prohibited discrimination ground. For example, a group of employees of foreign origin, on fixed-term contracts, notice that permanent contracts are only awarded to their colleagues of French origin. The judge seems able to dismiss manifestly abusive claims. It should be noted that, insofar as the regional court is the only competent court to recognise civil class actions, the parties will have to be represented by a lawyer. The same applies before administrative courts for full-jurisdiction appeals. This obligation is a guarantee of the seriousness of the actions that will be brought before the judge.

Over and above the proceedings themselves, there is also the question of how they are to be financed – not only in terms of the fees charged by the lawyer but also any specialists called on to contribute evidence or develop corrective measures. It appears highly unusual for associations to mobilise the technical and financial resources required to take legal action.

Creation of a financing fund for class actions, which could potentially be provisioned through civil fines imposed by courts or specific legal fees, could be envisaged<sup>369</sup>, particularly to encourage this form of action to emerge for routine questions of access to goods and services.

As part of the adoption of the Bill on Equality and Citizenship in 2016, the National Assembly had taken up the Defender of Rights' proposal by establishing a fund to participate in the funding of class actions, provisioned by a fine increase imposed by the criminal court referred the class action. This measure had been criticised by the Constitutional Council for only bearing on class actions brought before criminal courts – a procedure for which there is no provision in the texts incidentally – but the Council's members did not cast doubt over the opportunity of creating such a fund in the context of collective action before the civil or administrative courts<sup>370</sup>.

A single class action that is easy to access for all of the victims in the same situation would likely lead to significant remedies and, correlatively, to a questioning of discriminatory practices, with the financial aspect demanding they be brought to an end.

In this way, effective class action for discrimination could renew the financial impact of such disputes, with the economic risks incurred providing an incentive for a solution to be found to a collective situation of discrimination.

**To ensure that group action can provide an effective remedy for origin-based discrimination, the Defender of Rights recommends:**

- **Specifying the court's duties and clarifying how group action procedures should be organised, drawing upon the possibilities offered by the judge's powers as defined in Articles 10 and 11 of the French Code of Civil Procedure;**
- **Expanding group actions to include associations involved in employment and access to goods and services; and exploring the scope for groups to be set up specifically for the purpose of taking such action;**
- **Creating a fund to finance collective action for discrimination.**

<sup>368</sup> Defender of Rights, Opinion 20-01 of 5 February 2020 on the assessment and outlook concerning class actions.

<sup>369</sup> In this regard, the model of Quebec's Fonds d'aide au recours collectif (Class Action Assistance Fund), created in 1979 by the Act respecting the class action (L.R.Q., chapter R-2.1), appears to provide constructive food for thought. See the Defender of Rights opinions 20-01; 16-10; 15-23 and 15-13 on class action.

<sup>370</sup> CC., Decision no. 2016-745 DC of 26 January 2017; Act No. 2017-86 of 27 January 2017 on equality and citizenship, Art. 127.

### **Proportionate and genuinely dissuasive legal sanctions**

Financial penalties imposed following court action on origin-based discrimination are not sufficiently dissuasive and much lower than those observed in English-speaking countries, which are particularly active in combatting racial discrimination – the UK or US for example<sup>371</sup>.

Sentences and remedies delivered by the French courts are still very insubstantial and fall far short of the cost of a truly game-changing action that would end origin-based discrimination in the workplace, or punishment of discrimination in terms of access to goods and services that would be commensurate with the scale of the practice at issue.

As we have seen, **a judicial decision which recognises a discriminatory practice in the workplace thus amounts to an ad hoc conviction, with minimal financial impact for the company and no impact on the wider social relations or practices within the organisation.** Although individual lawsuits have developed, the set of stakeholders, with the exception of a few companies, does not concern itself with discriminated groups, and the mechanisms are not in place to oblige institutions and economic operators to deal with collective discrimination. Unlike other States, the judge can only order and monitor an action plan and structural reforms<sup>372</sup> in the context of class action, and the recommendations that the Defender of Rights can issue rely on the willingness of the addressees.

**In civil matters, the Defender of Rights recommends amending Act No. 2008-496 of 27 May 2008, which sets out various provisions for adaptation to EU legislation on combating discrimination:**

- **To enable the judge to order diagnostic studies and issue corrective measures, subject to penalties, against defendants in individual lawsuits;**
- **To provide for the possibility of granting punitive civil damages in cases of direct discrimination or discriminatory harassment.**

The concurrent emergence in French law of the notion of systemic discrimination and class action should set the stage for acknowledgment of structural, collective and commonplace discrimination and a challenging of the practices driving it.

But as long as criminal, administrative and civil convictions continue to cost the implicated party less than the act of undertaking reform to end direct and indirect discrimination, court sanctions will not be able to be considered dissuasive in the meaning of Directive 2000/43 or pave the way for meaningful policies combatting discrimination within organisations.

<sup>371</sup> In this regard, see the reports by the European Network of Legal Experts in non-Discrimination. In the UK, employees who suffer racial discrimination can be awarded compensation running into the hundreds of thousands of pounds by the Employment Tribunals (equivalent to *Conseils de Prud'hommes* in France). The average amount of compensation awarded in 2004 in this sphere was £13,720 (approx. €20,373), which is a record for such compensation in Europe (in Connolly M., *Townsend-Smith on Discrimination Law: Text, Cases and Materials*, 2004). In 2005, the US-based subsidiary of the French group Sodhexo chose to pay a settlement of nearly USD 80m to some 3,000 “black” employees to avoid “class action” for racial discrimination in terms of career advancement.

<sup>372</sup> Suk J. C.-H., “Antidiscrimination law in the administrative state”, *Illinois Law Review*, 2006-2, pp. 405-473.