

## DIVERSITY AND LABOR LAW IN FRANCE

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### INTRODUCTION

International conventions and European directives on discrimination have an important impact on France. French courts have also complied with European principles raised by the European Court of Justice in that field.

As a matter of fact, despite the famous principle “*Liberté, égalité, fraternité*” proclaimed in the French Declaration of Human Rights and the French Constitution,<sup>1</sup> social and economic equality does not exist, and discrimination has become a serious subject. Almost every year, the French Parliament (Parliament) adopts new laws in order to enhance equality at work. European and international regulations, which are binding in France, influence these new laws.

A distinction should be made between what is called “negative discrimination” and “positive discrimination.” If one looks at the definition in a dictionary, discrimination stands for distinction.<sup>2</sup> In the common opinion, discrimination means detrimental difference in treatment, especially in a negative manner, with inequity. However, more recently, discrimination has also been used in France to describe what is called positive discrimination (or affirmative action)—special and beneficial legal actions meant to establish equality in favor of disfavored or disabled groups of persons. French regulations have been necessary for imposing and achieving equal treatment between individuals, either by prohibiting negative discrimination or by developing positive discrimination.

In France, negative discrimination has been challenged as a major violation of the republican principle of equality proclaimed in article 1 of the 1789 Declaration of Rights and the 1958 French Constitution.<sup>3</sup> Historically, the republican principle of equality has been a major pillar for citizenship and integration in France without any consideration of race, sex, or religion. The abstract and formal rule has major consequences in the French legal system. French citizenship has been deemed to absorb

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1. 1958 CONST. art. 2.

2. WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 403 (David B. Guralnik ed., 2d college ed. 1972).

3. 1958 CONST. art. 1; Declaration of the Rights of Man and of Citizen art. 1, Aug. 26, 1789, reprinted in THE FRENCH REVOLUTION AND HUMAN RIGHTS: A BRIEF DOCUMENTARY HISTORY 77, 78 (Lynn Hunt ed. & trans., 1996).

diversity and to give equal chances to every individual. As a consequence, the equality principle has been opposed to both positive and negative discrimination.

In fact, the equality principle also has had an impact on French society. French legislation has never been adopted on the basis of ethnic origins, even in the French colonies. Immigration has been encouraged as a means to develop economic activities in France. The equality principle is still fundamental in France. For example, French laws prohibit filing personal data based on individual religion or race.<sup>4</sup>

However, the situation was different in the 1960s and 1970s. Negative discrimination became more obvious after France lost its colonies and when the French economy encountered difficulties that raised social problems. In response, many specific laws and regulations have been adopted in order to achieve equal treatment for every individual and to help fight against discrimination. In the 1970s, the idealistic principle that France should provide equality to every citizen proved to be unsuccessful.

Many authors explained the crisis of the providential state.<sup>5</sup> These authors showed that after World War II political and economic intrusions improved the quality of life globally, because equality was an aspiration for the minimum general standard of living. But in the 1970s, society changed. Although equal rights, equal chances through education, and equal economic and social rights were still major pillars of French society, differentiation appeared in the economy because many disadvantaged or disabled workers were denied employment. Additionally, various immigrant and religious minorities challenged the cultural unit so that the universal and egalitarian vision was no longer accepted as a general rule.

In France in the 1980s, like in many other countries, equal treatment and protection of collective interests conflicted with individualism. Some people claimed that equal treatment was too expensive and should not be extended to every citizen; they alleged that favorable treatment should be granted only to the most disfavored people. Equitable and social justice was demanded with the idea that the principle of equality should be considered as a model to be accomplished with preferential treatment.

Consequently, positive discrimination in France adopted preferential treatment in education, access to work, and to civil services, etc. In 1981, the first French affirmative action was the creation of the Zone for Priority

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4. Law No. 78-17 of Jan. 6, 1978, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Jan. 7, 1978, p. 227.

5. See, e.g., PIERRE ROSANVALLON, *LA CRISE DE L'ÉTAT-PROVIDENCE* [THE CRISIS OF THE PROVINCIAL STATE] (1981) (outlining a three-tiered approach to relieve the state of the burden of welfare while maintaining the ideas of social justice).

in Education (ZEP) for children.<sup>6</sup> Subsequent affirmative action in France included the adoption of many labor laws intended to improve the situation of the disabled and the poor.

According to recent data, however, *de facto* negative discrimination still exists despite many efforts to the contrary. For example, unemployment is more prevalent among immigrants, even if they have a diploma.<sup>7</sup> Sixty-six percent of resumes with North African names do not receive any reply, let alone an interview.

Despite these facts, positive discrimination in France is not explicitly based on ethnic origins. Instead, preferential treatment tends to organize special rights in order to improve access to private or public activities for disfavored or disabled persons. Positive discrimination is viewed as a temporary device for obtaining equality and for struggling against negative discrimination.

Yet, the theoretical, idealistic equality principle still overrides and influences the validity of preferential treatment. The validity of positive discrimination is subject to the choice of objective criteria for determining the categories of recipients and to the implementation of reasonable and proportionate measures. As a consequence, positive discrimination is viewed as a complementary tool for equality.

Some may argue that there is some kind of a paradox. On one hand, the equality principle has been used for the protection of individuals against negative discrimination. On the other hand, positive discrimination promotes preferences for various and separate groups of people in many areas in order to reach an effective and collective equality. Labor laws give many illustrations of that evolution. This Essay therefore first considers the reactions against negative discrimination, summarized in Part I and then discusses the development of positive discrimination, summarized in Part II.

## I. NEGATIVE DISCRIMINATION AND EQUAL TREATMENT IN FRANCE

Legal and judicial reactions against negative discrimination at work, examples of which are set forth in Part I.A, have been adopted for imposing equal remuneration and equal treatment for working men and women based on equality and nondiscrimination. Exceptions to those rules are very

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6. SOPHIE RECHT, EUROPEAN MONITORING CENTRE ON RACISM AND XENOPHOBIA, ANTI-DISCRIMINATION LEGISLATION IN EU MEMBER STATES: France 25 (2002), available at <http://digbig.com/4qyaa>.

7. Victor Davis Hanson, *France's Immigrant Problem — And Ours*, CLAREMONT REVIEW OF BOOKS, Spring 2006, available at <http://digbig.com/4qyab>.

seldom. As a result, negative discrimination is subject to special treatment, as described in Part I.B.

### *A. Reactions to Negative Discrimination*

The principle of equality has led to legal and judicial reactions against discrimination at work. Differences of treatment may only be justified when they are based on objective grounds and applied on an equal basis.

#### 1. The Principle of Equality at Work

As a consequence of the principle of equality, nondiscrimination is mentioned in various provisions of the Labor Code and it is strictly applied by French courts.

##### a. The Legal Rules on Equality

Many French laws reflect international and European principles as well as the French principle of equality. Initially, French laws referred primarily to equality between men and women and later were extended to prohibit any discrimination based on sex, religion, origin, opinion, age, family, or disability. The major principle is expressed in article L. 122-45 of the Labor Code and article 225-1 of the Criminal Code. As of 2001, article L. 122-45 of the Labor Code prohibits and revokes any act or provision that is based on origin, sex, morals, sexual orientation, family situation, political or social opinions, religion, etc.<sup>8</sup> This article is based on the Law of November 16, 2001, which provided for a general principle of professional equality as an application of the directive dated November 27, 2000.<sup>9</sup>

Equality has been extended to various situations such as age, opinion, religion, national origin, family relations, sexual orientation, and name. The principle has been included in various other provisions. For example, article L. 120-2 of the Labor Code states that “nobody is entitled to restrict individual or collective liberties when there is no justification based on the nature of the work to accomplish or when there is no proportion with the purpose.”<sup>10</sup> Also, article L. 122-35 concerns the internal regulation in a company and provides that:

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8. C. TRAV. art. L. 122-45.

9. Council Directive 2000/78, 2000 O.J. (L 303) 16 (EU); Law No. 2001-1066 of Nov. 16, 2001, J.O., Nov. 17, 2001, p. 18311.

10. C. TRAV. art. L. 120-2.

[The internal regulation] may not contain provisions which would prejudice the employees because of their sex, morals, sexual orientation, age, family situation, origins, opinions, religious beliefs, physical appearance, name, or disability, when they have equal professional capacity capability.<sup>11</sup>

In addition, the last paragraph of article L. 434-7 of the Labor Code provides that, in companies having at least two hundred employees, the joint production committee must create a commission on professional equality.<sup>12</sup> This commission is in charge of preparing a written report especially dedicated to a comparison of the employment and training situation between men and women in the company, as provided for by article L. 432-3-1, which provides that:

[T]his report contains an analysis based on pertinent data, especially on figures, defined by decree and eventually completed by data which take into consideration the specific situation of the company, which allow to appreciate, for each professional category in the company, the respective situation of males and females in hiring, training, promotion, qualification, classification, working conditions, effective remuneration. This report mentions the measures adopted during the year in order to establish professional equality, the aims, for the coming year, and the qualitative and quantitative definitions of future actions and their cost.<sup>13</sup>

Recent legislation, passed in 2005, requires the report to address female and male distributions of stock options. Many other laws have been included in the Labor Code in order to eliminate negative discrimination between workers without consideration of sex.

Besides those efforts, France is not in line with European and international laws. For instance, in France, the directive on proof of discrimination against pregnant women has not been transposed yet. Nor has France ratified the ILO Convention No. 183 on motherhood. Regularization should occur soon with the adoption of a draft law addressing equality of salaries between females and males, which is presently being discussed before the Parliament.<sup>14</sup>

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11. C. TRAV. art. L. 122-35.

12. *Id.* art. L. 434-7.

13. *Id.* art. L. 432-3-1.

14. The law was passed on March 23, 2006. Law No. 2006-340 of Mar. 23, 2006, J.O., Mar. 24, 2006, p. 4440.

### b. Caselaw on Negative Discrimination

French courts extensively apply antidiscrimination rules when the facts show evidence of a difference of treatment at work, even in civil service.

#### 1) Antidiscrimination Provisions Applied to Equal Remuneration

Equal treatment was first specified for remuneration and work conditions of males and females in a law dated July 13, 1983, called *loi Roudy* (equality between men and women), in Chapter III of the French Labor Code.<sup>15</sup> This law appears in the title dealing with employment contracts. Articles L. 140-2 to 140-9 of the Labor Code provide for equal remuneration of men and women.<sup>16</sup> *Loi Roudy* was completed by the law of May 9, 2001, which concerned equality between the sexes, when France complied with the directive concerning equal remuneration, dated February 10, 1975.<sup>17</sup> The rules on equal salary were modified later when the law of November 16, 2001 extended equality at work to every person, regardless of age, sex, religion, opinion, etc.<sup>18</sup>

As a consequence, any clause providing for a lower remuneration than the remuneration given to other persons in the same company in identical positions is void. According to article L. 140-4 of the Labor Code, the voided remuneration is then replaced by the maximum remuneration that may be given for that particular position.<sup>19</sup>

Many court decisions have affirmed equal remuneration. For example, courts have held that discrimination exists when an employee is deprived of a general allowance while the employee complies with the general conditions at work. The same rule may apply to part-time remunerations when they are not proportionate to full-time remuneration.<sup>20</sup> Every classification based on remuneration must be identical for men and women. The criteria for evaluating the work and its remuneration are based on professional knowledge demonstrated by a completed diploma, a professional practice, or capabilities arising from experience and responsibilities.

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15. Law No. 83-635 of July 13, 1983, J.O., July 14, 1983, p. 2176.

16. C. TRAV. arts. L. 140-2 to -9.

17. Council Directive 75/117, 1975 O.J. (L 45) 19 (EC); Law No. 2001-397 of May 9, 2001, J.O., May 10, 2001, p. 7320.

18. Law No. 2001-1066 of Nov. 16, 2001, J.O., Nov. 17, 2001, p. 18311.

19. C. TRAV. art. L. 140-4.

20. See C. TRAV. art. L. 122-35 (“[Internal rules] cannot bring the rights of the people and the personal freedoms and collective of restrictions which would not be justified by the nature of the task to achieve nor proportional with the required goal.”).

For the same reasons, any sexual discrimination in remuneration, even in collective agreements, is not allowed. For instance, an additional remuneration for childcare payments that would be granted only to women has been prohibited.<sup>21</sup> Also, any additional bonus may not be one-sided when it is based on sex (i.e., allowance for childbirth or for nursing a child).<sup>22</sup>

Nevertheless, even though equal remuneration for men and women was affirmed in 1983, differences in salaries still exist. Recent cases from 2005 show that French courts are obligated to raise the equality principle when examining claims of unequal remunerations. Facing those circumstances, the French government, in 2005, began drafting a new law concerning equal salaries between females and males. The new law provides that equality should be accelerated within the next five years by social dialogue and collective agreements.<sup>23</sup> A national and interprofessional agreement was also signed on March 1, 2004, for establishing equality between men and women.<sup>24</sup>

## 2) Antidiscrimination in Other Contexts: Motherhood, Trade Unions, and Sexual Harassment

In 1988, the European Court of Justice (ECJ) criticized France when France's collective agreements provided women with special rights for retirement and motherhood. The ECJ said the provisions should apply equally to men and women.<sup>25</sup>

French courts also applied the antidiscrimination rules to discrimination based on opinions, mostly trade union opinions.<sup>26</sup> Many claims have been filed by members of trade unions in France, and regularizations have been accepted by some big companies, like Peugeot

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21. Cour de Cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction], Feb. 19, 1992, Bull. civ. V, No. 98.

22. Cour de Cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction], Oct. 8, 1996, Bull. civ. V, No. 311; Cour de Cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction], Oct. 8, 1996, REVUE DE JURISPRUDENCE SOCIALE 11/96, No. 1149.

23. Law No. 2006-340 of Mar. 23, 2006, J.O., Mar. 24, 2006, p. 4440.

24. Accord National Interprofessionnel du 1er Mars 2004 Relatif à la Mixité et à l'égalité Professionnelle Entre les Hommes et les Femmes, Mar. 1, 2004, available at <http://digbig.com/4rggn>.

25. Case 312/86, Comm'n v. France, 1988 E.C.R. 6315, 6336-37, available at <http://digbig.com/4raaq>.

26. Cour de Cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction], Mar. 28, 2000, Bull. civ. V, No. 127; see also Marie-Thérèse Lanquetin, *Un tournant en matière de preuve des discriminations* [A Turning as Regards Proof of Discriminations], 2000 DROIT SOCIAL 589, 593 (reprinting Cass. soc. March 28, 2000, as part of the article); Cour de Cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction], July 4, 2000, DROIT SOCIAL 919, obs. Jean Mouly; REVUE DE JURISPRUDENCE SOCIALE [RJS] 6/02, No. 697 (2002).

and Régie Autonome des Transports Parisiens (RATP).

For instance, in the *Idex* case, although the salary of an employee had increased by 0.5% and the other employees had received an increase of 1%, the disfavored employee filed a claim alleging that the difference in the amount of salary increase was due to his position with the trade union.<sup>27</sup> The employer responded by arguing that he had full discretion to increase the salary on an optional and individual basis.<sup>28</sup> He added that, in his estimation and on the basis of the work performed by the employee, the increase in salary was worth only 0.5%.<sup>29</sup> The employee lost on appeal, but the French Supreme Court reversed, deciding that the employer committed discrimination based on the employee's trade union status.<sup>30</sup>

Moral and sexual harassment are also prohibited in article L. 122-46 of the Labor Code and in article 1112 of the Civil Code.<sup>31</sup> The Civil Code is still sometimes used by the Social Chamber of the French Supreme Court. An example may be found in a recent decision of November 30, 2004. The employer's conduct of asking for massages by his employee was qualified as violence because it created psychological perturbations and anxieties with the employees.<sup>32</sup>

### 3) Extensive Application of Antidiscrimination to All Employment Contracts

French courts tend to extend the application of labor laws against negative discrimination to every employment contract, even if the work is limited to a definite period of time or to training. Recently, in February, 2005, the French Supreme Court applied article L. 122-45 to the termination of a three-month test-period for an employee hired for an unspecified period of time.<sup>33</sup> In that case, the employee became sick prior

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27. Cour de Cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction], Sept. 28, 2004, Bull. civ. V, No. 227; Cour de Cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction], Sept. 28, 2004, DROIT SOCIAL 1147, 1147, obs. Christophe Radé.

28. Cour de Cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction], Sept. 28, 2004, DROIT SOCIAL at 1147.

29. *Id.*

30. *Id.* at 1148.

31. C. TRAV. art. L. 122-46; C. CIV. art. 1112.

32. Cour de Cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction], Nov. 30, 2004, Bull. Civ. V, No. 303. The conduct is also prohibited by CODE PÉNAL C. PÉN. art. 222-33 (sexual harassment) and by C. PÉN. arts. 225-13 to -14 (which forbid labor conditions that are contrary to human dignity such as economic slavery), which all are punishable by five years in prison and a fine of €150,000.

33. Cour de Cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction], Feb. 16, 2005, Bull. civ. V, No. 52, p.46.



to the end of the test period.<sup>34</sup> When he returned, the employer terminated the contract.<sup>35</sup> The employee claimed damages and argued that the employer had terminated the contract for sickness.<sup>36</sup> The judges accepted the claim and cancelled the termination, awarding damages of €46,000.<sup>37</sup>

## 2. Exceptions to Equality

Contrary to the general rule of equality, some differences of treatment are permitted when based on objective grounds. For instance, differences in family situations or unique duties associated with particular jobs may provide good reason to remunerate employees differently. Discrimination claims may also be denied when the employer has special requirements for clothes or outfits at work, if the clothes are necessary for job performance.

Issues of health, sanitation, and security or image of a company may be good reasons for French courts to intervene. The courts consider the activities and the contacts with clients. Clothes that may disturb other employees may be prohibited. Hairstyle may also be considered by the employer. Recently, a commercial engineer was fired because he suddenly dyed his hair red. His claim for discrimination was rejected by the judges. However, a court's appreciation may change depending on the fashion evolution (e.g., piercings, beards, earrings).

Written dress codes may be permitted, but unjustified or disproportionate requirements may be struck down by the courts. French courts decided that the "Disney look," which prohibited beards, moustaches, makeup, long nails, etc., was not justified. On the other hand, prohibition of short pants was accepted by a court because it is not a proper outfit to wear in front of customers.<sup>38</sup>

Prohibition of the Islamic scarf at work has also been a question of discrimination, depending on various circumstances. For instance, in 2003, the Court of Appeals of Paris refused to uphold the decision of an employer who terminated a contract with an employee on the ground that she wore an Islamic scarf.<sup>39</sup> The employer argued that, because he had relocated the employee to a place where the company had its main activities and where the employee would be in contact with customers, he was justified in

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34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*; JCP 2005 II 10098, note Joël Colonna. For French readers, please note that Edition Général is presumed in J.C.P. citations unless otherwise indicated.

38. Cour de Cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction], May 28, 2003, Bull. civ. V, No. 178.

39. REVUE DE JURISPRUDENCE SOCIALE 10/03, No. 1116.

terminating the employee's contract.<sup>40</sup> However, the court declared that termination of the contract was not justified by objective elements since the employee had been in contact with customers at her previous location.<sup>41</sup> As a consequence, the contract termination was struck down on the basis of religious discrimination.<sup>42</sup> It remains to be seen, however, whether the prohibition of the Islamic scarf might not be deemed to be discrimination when objective and technical necessities for work are not compatible with a scarf, e.g., answering phone calls.

### *B. Specific Treatment of Negative Discrimination in France*

As described in Part I.B.1, *infra*, special rules of evidence have made it easier to prohibit negative discrimination at work. French courts tend to be severe against the employers. Even before French laws had adopted a general prohibition of discrimination, difference of treatment was criticized and barred when it was based on various grounds such as sex, religion, origin, opinion, behavior, family situation, disability, and age. As discussed in Part I.B.2, *infra*, French courts evaluate claims on a case-by-case basis. Penalties have been reinforced, as noted in Part I.B.3, and recently a special authority was created to aid in the fight against negative discrimination, as noted in Part I.B.4.

#### 1. The Burden of Proof of Discrimination

Many labor laws alleviate the victim's burden of proof by adopting a presumption when the relevant facts demonstrate differential treatment. The rules relating to the proof of discrimination at work have been modified in article L. 122-45, paragraph 4 of the Labor Code in order to improve the situation of the victim—they reverse the burden of proof and put it on the defendant-employer.<sup>43</sup>

Other provisions of the Labor Code have also been changed to account for the 2001 extension of the prohibition against discrimination and for when the European directives were transposed into French laws.<sup>44</sup> The victim may now benefit from a presumption of discrimination while the defendant-employer has the burden of proving that the decision was based

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40. *Id.*

41. *Id.*

42. *Id.*

43. C. TRAV. art. L. 122-45.

44. C. TRAV. art. L. 140-8. Article L. 123-1, paragraph 4 is identical to article L. 122-45 on proof of discrimination in general. Compare C. TRAV. art. L. 123-1 para. 4, with C. TRAV. art. L. 122-45 para. 4.

on objective elements. According to article L. 122-45, the employee must “present the facts which lead to presume the existence of a direct or indirect discrimination”;<sup>45</sup> evidence of other employees’ salaries is admissible. Thereafter, the defendant–employer “must give evidence that his decision is based on objective grounds and is not based on discrimination.”<sup>46</sup> This evidentiary burden puts the employer in a difficult situation. The employer must offer positive evidence of objective grounds for the decision and negative evidence demonstrating the absence of discrimination.<sup>47</sup>

Similar rules of evidence apply to harassment since the law Fillon of January 3, 2003, changed the burden of proof as it relates to presumptions.<sup>48</sup> Article L. 122-52 now provides that the employee must present evidence of facts that lead to the presumption of sexual or moral harassment.<sup>49</sup> In response, the employer must present evidence that the decision was based on “objective criteria.”<sup>50</sup> However, the definition of “objective criteria” is not clear, and case law is interesting in its application. For instance, an evaluation of the employee’s performance may not be considered as an objective criterion for deciding an increase in salary. On November 9, 2004, the Criminal Chamber of the French Supreme Court allowed claims of discrimination based on trade union membership due to the fact that the affected employees were barred from progression in their remuneration.<sup>51</sup> The French Supreme Court admitted the proof of discrimination by comparing the salaries and the classifications of the employees’ representatives with the salaries of other employees who had identical diplomas and seniority.<sup>52</sup>

Proof of discrimination may also appear as the alleged grounds for a dismissal. Courts have refused subjective explanations when they were based only on lack of confidence, irritability, or incompatibility.

Taking the lessons from those cases, employers should prepare evidence that their decisions are not based on discrimination. The employer must determine some employment criteria to be disclosed to the employees. The employer may also prepare files on employees, including information

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45. C. TRAV. art. L. 122-45.

46. *Id.*

47. The burden of proof for sexual discrimination has also been alleviated by article L. 140-8, which refers to the last paragraph in article L. 123-1, modified in 2001 by the law generalizing the application of the equality principle. C. TRAV. art. L. 140-8.

48. Law No. 2003-6 of Jan. 3, 2003, J.O., Jan. 4, 2003, p. 255.

49. C. TRAV. art. L. 122-52.

50. *Id.*

51. Cour de Cassation, Chambre criminelle [Cass. crim.] [highest court of ordinary jurisdiction], Nov. 9, 2004, Bull. Crim., No. 279.

52. *Id.*

about their activities, so that the employer may have good reasons for the absence of an increase in salary. In addition, the criteria must not qualify as indirect discrimination, e.g., based on absences due to health problems or on trade union activities.

Despite the difficulties of reversing the presumption of discrimination, employers are sometimes successful in meeting their burden of proof. As recently as June 21, 2005, the Social Chamber of the French Supreme Court held that an employer could apply a different remuneration to the director of a day kindergarten when he was compelled to hire a director on an emergency basis due to sickness of the previous director.<sup>53</sup>

## 2. Judicial Evaluation of Discrimination

Even though discrimination is determined on a case-by-case basis, French courts give interesting descriptions of some criteria that may be used for qualification.

### a. The Place for Recognition of Discrimination at Work

On June 1, 2005, in a decision concerning a group of companies that included Plastic Services, the Social Chamber of the French Supreme Court had its first opportunity to define the scope of a social and economic unit that may be referenced in determining equality or discrimination in remuneration of employees.<sup>54</sup> A group of employees claimed discrimination and requested the benefits (thirteenth-month allowance and luncheon voucher checks) granted by another company that belonged to the same group of companies.<sup>55</sup> The employees argued that they were members of the same social and economic unit.<sup>56</sup>

The employees based their claims on article L. 140-2 of the Labor Code, even though that provision applied only to equality between men and women.<sup>57</sup> Under said article, discrimination in remuneration in various subsidiaries of a company is forbidden when the employees have the same activities.<sup>58</sup> The French Supreme Court stated that the principle of “identical salary for identical work” applied when the employer was the

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53. Cour de Cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction], June 21, 2005, Bull. Civ. V, No. 206.

54. Cour de Cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction], June 1, 2005, Bull. civ. V, No. 185, p. 163.

55. *Id.*

56. *Id.*

57. *Id.*

58. C. TRAV. art. L. 140-2.

sole contractor.<sup>59</sup> However, the court gave an interesting obiter dictum:

[W]ithin a social and economic unit, which is composed with distinct legal persons, determination of the employee's right to remuneration may only be compared with the remuneration of other employees of the same unit when the remuneration is determined by law or a collective convention or agreement, and when the activity of the employees takes place in the same subsidiary.<sup>60</sup>

Hence, the French Supreme Court did not uphold the decision of the court of appeals, which held that the social and economic unit should not be considered as a single company, but rather that it should be considered only for organizing the representation of employees from various companies pertaining to the same group.

French commentators have pointed out that the obiter dictum in the June, 2005, decision seems to admit an additional element for a comparison of remunerations and the determination of discrimination in remuneration. The dictum requires that before a comparison between two employees' remuneration benefits can be made, two conditions must be met: (1) the business place must be a social and economic unit; and (2) the business must be an ongoing business where the employees exercise their activity under a single direction.

That decision conflicts with the position adopted by the ECJ, which refers to a single employer, an identical status, or a distinctive place of business or activity as circumstances and facts to be considered for comparing the remuneration between employees and deciding on discrimination in remuneration.<sup>61</sup>

#### b. Statute of Limitations for Discrimination

It is also interesting to note that French courts decided not to apply the five-year statute of limitations to damages awarded as compensation for discrimination based on their conclusion that damages do not qualify as salaries.<sup>62</sup> A joint decision, dated March 15, 2005, from the French

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59. Cour de Cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction], June 1, 2005, Bull. civ. V, No. 185, p. 163.

60. *Id.*

61. Case C-320/00, *Lawrence v. Regent Office Care Ltd.*, 2002 E.C.R. I-7325, I-7353-54, available at <http://digbig.com/4rarh>.

62. See C. CIV. art. 2277 (setting forth a five-year statute of limitations for salary payment claims); C. TRAV. art. L. 143-14 (same).

Supreme Court, applied this kind of reasoning.<sup>63</sup> Therefore, the statute of limitations for damages based on discrimination is thirty years.<sup>64</sup>

### 3. Penalties for Discrimination

In addition to compensation of harm to the victims, discrimination at work is punished with various other penalties.

#### a. Labor Consequences

Article L. 122-45 of the Labor Code, introduced by Law No. 2001-1066 of November 16, 2001, prohibits differential treatment.<sup>65</sup> Consequently, a victim of differential treatment is entitled to equal treatment with the other employees as a remedy, which is usually the difference in salaries. Specifically, article L. 123-2 of the Labor Code voids any clause in collective agreements providing for direct or indirect negative discrimination.<sup>66</sup> Under article L. 122-45-2 of the Labor Code, the victim may also be officially reinstated as of the date when the employer terminated the contract on the basis of discrimination.<sup>67</sup> Finally, claims for damages may also be filed by associations or trade unions on behalf of the employees.<sup>68</sup>

#### b. Penalties in the Criminal Code

Article L. 122-45 of the Labor Code lists the types of discrimination punishable under articles 225-1 through 225-4 of the Criminal Code.<sup>69</sup> Discrimination is considered an offense to the dignity of the person. According to article 225-1 of the Criminal Code:

Discrimination comprises any distinction applied between natural persons by reason of their origin, sex, family situation, physical appearance or patronymic, state of health, handicap, genetic characteristics, sexual morals or orientation, age, political opinions, union activities, or their membership or non-

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63. Cour de Cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction], Mar. 15, 2005, Bull. civ. V, No. 86, p. 75.

64. See C. CIV. art. 2262 (prescribing a thirty-year statute of limitations as a default for all in rem and in personam actions).

65. C. TRAV. art. L. 122-45.

66. *Id.* art. L. 123-2.

67. *Id.* art. L. 122-45-2.

68. *Id.* art. L. 122-45-1.

69. *Id.* art. L. 122-45.

membership, true or supposed, of a given ethnic group, nation, race or religion.

Discrimination also comprises any distinction applied between legal persons by reason of the origin, sex, family situation, physical appearance or patronymic, state of health, handicap, genetic characteristics, sexual morals or orientation, age, political opinions, union activities, membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion of one or more members of these legal persons.<sup>70</sup>

Article 225-2 of the Criminal Code provides that:

Discrimination defined by article 225-1, committed against a natural or legal person, is punished by three years' imprisonment and a fine of €45,000 where it consists:

- 1° of the refusal to supply goods or services;
- 2° of obstructing the normal exercise of any given economic activity;
- 3° of the refusal to hire, to sanction or to dismiss a person;
- 4° of subjecting the supply of goods or services to a condition based on one of the factors referred to under article 225-1;
- 5° of subjecting an offer of employment, an application for a course or a training period to a condition based on one of the factors referred to under article 225-1 . . . .<sup>71</sup>

Some exceptions are mentioned in article 225-3 of the Criminal Code:

The provisions of the previous article do not apply to:

- 1° discrimination based on state of health, when it consists of operations aimed at the prevention and coverage of the risk of death, of risks for the physical integrity of the person, or the risk of incapacity to work or invalidity. . . .
- 2° discrimination based on state of health or handicap, if it consists of a refusal to hire or dismiss based on a medically established incapacity, according to either the provisions of title IV of book II of the Labour Code, or of the laws defining the statutory framework of the public service;
- 3° recruitment discrimination based on gender when the fact of being male or female constitutes the determining factor in the exercise of an employment or professional activity, in accordance

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70. C. PÉN. art. 225-1.

71. *Id.* art. 225-2.

with the provisions of the Labour Code or of the laws defining the statutory framework of the public service.<sup>72</sup>

But it is worth noting that legal persons may incur criminal liability for discrimination as provided in article 225-4 of the Criminal Code:

Legal persons may incur criminal liability for the offence defined under article 225-2, pursuant to the conditions set out under article 121-2. The penalties incurred by legal persons are:

1° a fine, pursuant to the conditions set out under article 131-38;

2° the penalties enumerated under 2°, 3°, 4°, 5°, 8° and 9° of article 131-39.

The prohibition referred to in 2° of article 131-39 applies to the activity in the exercise of which or on the occasion of the exercise of which the offence was committed.<sup>73</sup>

Thus, the same facts may be punished in various manners depending on the provisions of the labor or criminal laws to be applied. However, criminal court decisions are rare even though companies may be sued for criminal liability whenever they benefit from discrimination. The reason may be that discrimination is a private harm, and the victim is looking mostly for reintegration and for compensation that are addressed by social courts.

#### 4. The HALDE

Recent efforts to strengthen the fight against discrimination have resulted in the creation of a new administrative authority to assist victims: the Haute Autorité de Lutte contre les Discriminations et pour l'Égalité (HALDE) was created by Law No. 2004-1486 dated December 30, 2004,<sup>74</sup> and completed by Decree No. 2005-215, dated March 4, 2005.<sup>75</sup> This administrative and independent authority is concerned with direct or indirect discrimination forbidden by French laws or by international rules applicable in France and is supported by the Ministry of Social Affairs.

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72. *Id.* art. 225-3.

73. *Id.* art. 225-4.

74. Law No. 2004-1486 of Dec. 30, 2004, J.O., Dec. 31, 2004, p. 22567.

75. Decree No. 2005-215 of Mar. 4, 2005, J.O., Mar. 6, 2005, p. 3862.



The creation of the HALDE is a sign that discrimination has become an important question in France.

- The HALDE has specific power to control, review, and prohibit discrimination. As a consequence, the HALDE may issue injunctions against the discriminators and it may file requests for investigation with the judge of emergencies.
- The HALDE may be informed by the victims and by associations.
- The HALDE may also bring a claim against the discriminators, provided that the victim consents. When a victim files a claim, the HALDE may also present observations to the courts (civil, criminal, and administrative).
- The HALDE may assist victims with the presentation of evidence of discrimination in court and/or in reaching an amicable settlement.
- The HALDE may publish recommended changes to the laws and regulations to promote equality.
- The HALDE may also represent France, and it may prepare projects for fighting against discrimination in international meetings and organizations.<sup>76</sup>

As a consequence, in the near future, fighting against discrimination should be more active in France. President Jacques Chirac offered new incentives for France to comply with European programs in the battle against discrimination.

In addition to labor laws designed to apply the European directives, equality was recently reaffirmed and recognized as a general rule by the Law of December 30, 2004 (the law that created the HALDE), which was adopted with a complete consensus in Parliament as a late transposition of the Directive of June 20, 2000.<sup>77</sup> As a result, paragraph 1 of article 19 of that law provides for the application of the principle of equality for individuals in various matters: social protection, education, access to goods and services, membership in a trade union or professional organization, and

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76. Law No. 2004-1486 of Dec. 30, 2004, J.O., Dec. 31, 2004, p. 22567.

77. *Id.* As a result, that law was not submitted for approval to the Council. Some commentators concluded that the Council would have criticized the various references to groups in the 2004 law because the French Constitution recognizes only individual rights.

access to employment—irrespective of nationality, ethnicity, or race.<sup>78</sup>

As provided in preceding labor laws, paragraph 2 of article 19 of the Law of December 30, 2004, shifts the burden of proof when the victim offers indisputable facts evidencing discrimination.<sup>79</sup> In response, the defendant must prove that a decision was justified by objective elements and, thus, does not qualify as prohibited discrimination.<sup>80</sup> Articles 20–22 of the Law of December 30, 2004, modify the law of the press and penalize provocation of discrimination against an individual or a group of individuals based on gender, sexual orientation, or disability.<sup>81</sup>

It is too early to consider the impact of the Law of December 30, 2004. The law's justification comes from a report by Maître Bernard Stasi, who concluded that France was far behind many countries in the struggle against discrimination.<sup>82</sup> Maître Stasi referred to the Anglo-Saxon countries that had adopted nondiscrimination policies early in the 1960s and that had created specific entities for investigating and condemning discrimination.<sup>83</sup> The report also emphasized the difficulties of denouncing discrimination in France because victims could not provide factual evidence of discrimination.<sup>84</sup>

Strangely enough, in France, a general policy against discrimination was not initiated until 1997 under Prime Minister Jospin. In the meantime, before the creation of the HALDE, France had many administrative entities in various ministries in charge of social affairs. The main entity was Groupe d'études et de lutte contre les discriminations (GELD) (the Group for the Study and the Struggle Against Discrimination), which was created in 1999. These entities had no real power and failed in the fight against discrimination. They lacked financial and personal resources; police investigations were unsuccessful. Their procedures did not help victims of discrimination. In addition, French lawyers ignored European rules and European court decisions. Consequently, criminal penalties for discrimination were unusual. Civil claims dealt mostly with discrimination at work, and administrative courts were concerned only with discrimination in civil service.

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78. *Id.* art. 19.

79. *Id.*

80. *Id.*

81. *Id.* arts. 20–22.

82. BERNARD STASI, COMMISSION DE REFLEXION SUR L'APPLICATION DU PRINCIPE DE LAÏCITE DANS LA REPUBLIQUE, RAPPORT AU PRESIDENT DE LA REPUBLIQUE (2003), <http://digbig.com/4rbbc>.

83. *Id.* at 33–35.

84. *Id.* at 31.

However, changes in law occurred progressively, especially in labor law, addressing equality between men and women at first and thereafter addressing equality as a general rule in favor of all employees. Some consumer associations attempted to prove discrimination between applicants based on race in renting houses or apartments; they partly succeeded by sending substantively equal applicants of different races out to apply for housing and then proving in court that the ethnic-minority candidates were refused on the basis of race.

Recent investigations show that discrimination still exists, primarily in the workplace. According to statistics published in May, 2004, disabled individuals are more affected by discrimination than others.<sup>85</sup> Discrimination based on ethnicity, age above fifty years old, physical appearance, place of residence, and gender is manifest. The facts show that individual protection against negative discrimination is difficult, and that France has not developed the same efforts as other countries, despite pressures from the international and European communities.

The creation of the HALDE indicates that France is ready to develop and extend its policy of equality and equal treatment, even at work. Developments in 2004 and 2005 show that new methods have been adopted in France in order to obtain equal treatment for all individuals without consideration of their gender, religion, race, opinion, etc. Under various influences from the United States and from the European Union, France has realized that specific treatment for a social justice—better integration of the differences between people—is to be considered as positive discrimination.

## II. POSITIVE DISCRIMINATION IN FRANCE

Even though some methods for positive discrimination, such as quotas, have been ruled unconstitutional in the United States as contrary to the rule of equal protection,<sup>86</sup> France has used public and legal actions, as described in Part II.A, to improve the situation of those who suffer from discrimination based on disability or lack of education.

More recently, public efforts have been combined with specific private measures from major French companies, as discussed in Part II.B.

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85. The results of the study are discussed in the following article. Laurent Lejard, *Tartufes*, LE PREMIER HEBDOMADAIRE FRANCOPHONE DU HANDICAP, May 2004, <http://digbig.com/4rbqn>.

86. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978).

### A. Public and Legal Actions

Various laws have been adopted in France to give special protection to some categories of employees, primarily based on disability, gender, and age. Influenced by the new philosophy that equal treatment is a goal and that equality is based on social justice, legal measures provide for assistance and particular rights to counterbalance the disadvantages of some groups of people.

Measures have been adopted, and these are described in Part II.A.1. Although these measures were initially contested as a violation of the principle of equal treatment, they have been accepted, provided that they comply with the requirements of the principle of equality and with European and international requirements that are discussed in Part II.A.2.

#### 1. The Variety of Affirmative Action

##### a. The Rationale

Various affirmative action programs have been introduced in France since the 1980s, especially in labor laws. The terminology has been criticized, and some authors have suggested alternative terminology such as “positive mobilization,” “effective equality,” “promotion of diversity,” or “republican reequilibrium.”

The measures have been inspired by the U.S. experiences in the 1960s and 1970s characterized by Justice Blackmun when he declared that “in order to treat some persons equally, we must treat them differently.”<sup>87</sup> However, French affirmative action laws differ from U.S. affirmative action laws in that they do not refer to ethnic criteria because such criteria are forbidden by article 1 of the French Constitution, which states that “France . . . insures equality before the law of all citizens without distinction of origin, race or religion.”<sup>88</sup> In addition, the French republican political and cultural tradition is opposed to any preference based on ethnic criteria. As a consequence, when a representative of the Ministry of Education was appointed as a “préfet” in part because he had Algerian origins, the expression “préfet musulman,” coined by French journalists,

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87. *Id.* at 407 (Blackmun, J., dissenting in part); see also Gwénaële Calvès, *La discrimination positive* (Presses Universitaires de France, Que Sais-Je? No. 3712, 2004); DANIEL SABBAGH, *L'ÉGALITÉ PAR LE DROIT: LES PARADOXES DE LA DISCRIMINATION POSITIVE AUX ÉTATS-UNIS* (2003); Daniel Sabbagh, *La tentation de l'opacité: le juge américain et l'affirmative action dans l'enseignement supérieur*, in *DISCRIMINATION POSITIVE*, at 5 (Pouvoirs No. 111, 2004).

88. 1958 CONST. art. 1.

was highly criticized. That appointment was regarded as a sign of integration for immigrants, and no reference to any religious or foreign origin should have been used by the journalists. Rather, French affirmative action measures are designed to promote access to employment for underprivileged categories of persons.

b. The Beneficiaries and the Methods

1) Measures Directed to Support Women, the Disabled, Sick People, and Young or Elderly People

Specific measures must comply with the French Constitutional Council (Council) requirements. Although the equality principle is considered fundamental, the Council permits some positive discriminations when the discriminations intend to promote equality, provided that the measures are objective, reasonably justified by a legitimate purpose (especially for employment policies), and appropriate and necessary to the stated purpose.

Article L. 122-45-3 of the Labor Code, Law No. 2001-1066 of November 16, 2001, article 3, allows specific treatment based on age.<sup>89</sup> As a consequence, article L. 122-45-3 states that specific treatment based on age is permitted when it provides for:

[T]he prohibition of access to employment or the installation of special working conditions as a means to ensure the protection of young and old workers; [or]  
the fixing of a maximum age for recruitment, based on the training necessary for the position concerned or based on the reasonable period of employment before retirement.<sup>90</sup>

Article L. 122-45-4, enacted as part of article 24-II of Law No. 2005-102, February 11, 2005, was added to the Labor Code in 1987 and allows for some differences in favor of disabled people.<sup>91</sup> Differences should not be treated as discrimination provided that the disability is noticed by a doctor for the employee, the discrimination is due to bad health or handicap, and the measures are objective, necessary, and appropriate.<sup>92</sup> Paragraph 2 specifies that “appropriate measures for disabled persons are not discrimination when they intend to promote equality of treatment as

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89. C. TRAV. art. L. 122-45-3.

90. *Id.*

91. *Id.* art. L. 122-45-4.

92. *Id.*

provided in article L. 323-9-1.”<sup>93</sup>

In addition, articles L. 323-9 through 329-11 confirm the French policy in favor of helping disabled people with various measures, like orientation, reeducation, professional training, and placement.<sup>94</sup> Government financial assistance is provided to employers and institutions in order to make possible adaptations at work for disabled persons.<sup>95</sup> A range of targets for this financial assistance are provided, like adaptation of machines, places for work, and individual equipment for disabled workers.<sup>96</sup>

Since 1987, article L. 323-1 has imposed an obligation on employers having at least twenty employees that six percent of their employees be disabled persons.<sup>97</sup> However, that obligation has not been complied with because the employers can simply replace that obligation by calculating the salaries that would be paid to disabled employees and making an equivalent financial contribution to a special fund dedicated to developing professional opportunities for the disabled.<sup>98</sup> The employers are fined if they do not comply with either obligation.<sup>99</sup>

Articles L. 123-3 through 123-7 provide for the promotion of equality between men and women.<sup>100</sup> Temporary measures designed to promote equal opportunities for women have been permitted since 1983 and these measures state expressly that de facto inequality should be corrected.

Article L. 123-4 imposes plans on each company to achieve professional equality.<sup>101</sup> Financial assistance may be negotiated by the employers with the government, but the financial assistance covers studies of the situation in the company and proposals for measures to be adopted in order to reach equal treatment.<sup>102</sup>

Article L. 900-1 mandates professional training.<sup>103</sup> It is a national obligation enacted in 2004 and presented as a social promotion for professional insertion or reinsertion of employees.<sup>104</sup> Employers with at least ten employees must contribute financially to training.<sup>105</sup>

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93. *Id.*

94. *Id.* arts. L. 323-9 to -11.

95. *Id.* art. L. 323-9

96. *Id.*

97. *Id.* art. L. 323-1.

98. *Id.* art. L. 323-8-2 as modified by Law No. 2005-102 of Feb. 11, 2005, J.O., Feb. 12, 2005, p. 2353.

99. C. TRAV. art. L. 323-8-6-1.

100. *Id.* arts. L. 123-3 to -7.

101. *Id.* art. L. 123-4.

102. *Id.* art. L. 123-4-1.

103. *Id.* art. L. 900-1.

104. Law No. 2004-391 of May 4, 2004, J.O., May 5, 2004, p. 7983.

105. C. TRAV. art. L. 951-1.

A national and interprofessional agreement was signed on September 20, 2003, for professional training, and it provides that “in order to reduce inequalities of access . . . young people, seniors, women, and employees of TPE-TME are priority public.”<sup>106</sup>

Three exceptions to equality are provided for in the Labor Code: age in article L. 122-45-3, and disability in article L. 122-45-4 with recent changes regarding health and handicap.<sup>107</sup>

## 2) Methods Included in Laws and Regulations in Private and Public Sectors

A special ministry of parity and professional equality has been created in France. Priority and positive actions have been adopted in order to make corrections to de facto inequalities. They mostly attempt to enhance access to work, although some actions deal with special treatment at work (e.g., remuneration and conditions of work). These positive actions are “color-blind” and do not refer to ethnicity. Ministère Délégué à la cohésion et à la parité

Very recently, Order No. 2005-893 and Decree No. 2005-894, dated August 2, 2005, introduced new employment contracts as a means to improve employment in small companies (TPE) having a maximum of twenty employees.<sup>108</sup> Although each contract is signed for an unlimited period of time, the company may terminate the agreement during a two-year period, and the termination of the agreement will not be subject to the usual labor rules.<sup>109</sup> Indemnification of the employee is far less important, but the special treatment is supposed to improve employment in France by reducing the use of contracts for limited periods of time.

### a) Quotas

Quotas have been used in France, despite the fact that they are considered contrary to the equality principle. Parity between men and women has only been used in political elections for assemblies and is distinguishable from quotas that run contrary to the equality principle. As a result, the Law of June 6, 2000, which was compulsory in towns of more

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106. ACCORD NATIONAL INTERPROFESSIONNEL DU 20 SEPTEMBRE 2003 RELATIF A L'ACCES DES SALAIRES A LA FORMATION TOUT AU LONG DE LA VIE PROFESSIONNELLE 2 (2003), *available at* <http://digbig.com/4rcbc>.

107. C. TRAV. art. L. 122-45-3; Law No. 2005-102, Feb. 11, 2005, J.O. Feb. 12, 2005, p. 2353.

108. Order No. 2005-893 of Aug. 2, 2005, J.O. Aug. 3, 2005; Decree No. 2005-894 of Aug. 2, 2005, J.O. Aug. 3, 2005.

109. Order No. 2005-893 of Aug. 2, 2005, J.O. Aug. 3, 2005.

than 3500 inhabitants, increased the percentage of elected women to 47.5% of the elected persons as compared to only 25.7% in 1995.<sup>110</sup> In contrast, at the national level, where the law provides that state financial assistance should be reimbursed by political parties, the percentage of women in the National Assembly was only 12.3% in 2000, not much of an improvement from 10.9% in 1997.<sup>111</sup>

Quotas are now provided in labor laws for:

- disabled workers (companies with more than twenty employees must hire disabled persons for six percent of the positions);<sup>112</sup>
- victims of car accidents;
- army veterans with an invalidity pension;
- widows by war;
- orphans from war; and
- disabled women with mental disease due to war.<sup>113</sup>

Of course quotas do not solve all problems. On one hand, disability quotas have diminished the number of claims of denied access to public services under article 6 of the Declaration of Rights, which requires equal access to public services. On the other hand, companies rarely comply with the six percent quota and prefer to pay or return financial assistance to the government when it is provided.

Employment in the civil service based on ethnicity is not allowed, but some measures may benefit local people indirectly. In two decisions from 1960, the Council recognized the validity of legal measures providing that ten percent of judges in Algeria must have Muslim origins, like much of the local citizenry.

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110. Law No. 2000-493 of June 6, 2000, J.O. June 7, 2000, p. 8560; Mercedes Mateo-Diaz, *Searching for the Panacea of Long-Term Equality: On the Art of Combining Quick-Fix Solutions and Structural Measures to Increase the Presence of Women in Parliament* 22 & n.38 (European University Institute, Robert Schuman Centre for Advanced Studies No. 2004/07, 2004), available at <http://digbig.com/4rcex>.

111. Mateo-Diaz, *supra* note 112, at 22.

112. C. TRAV. art. L. 323-1; *see supra* Part II.A.1.b.1 (discussing the six percent quota for disabled persons).

113. *Id.* art. L. 323-3.



## b) Granting of Diplomas

Diminished and expanded access to civil service employment in New Caledonia was provided in 1984 by a French law that limited recruitment for the positions of agents A and B only to those who had obtained a bachelor's degree and removed the condition of eligibility for the positions of agents C and D.<sup>114</sup> The laws did not refer to ethnicity since it would have been contrary to article 1 of the French Constitution. The Council did not void that law. In fact, President Mitterrand mentioned ethnicity by declaring that civil service would still be considered colonial as long as 2800 French agents and ninety New Caledonian agents would be active in the French territory.

## c) Special Access to Public Service Employment Based on Social Criteria

In 1982, the Parliament adopted a special competition for acceding to the Ecole Nationale d'Administration in favor of specific categories of persons who had spent eight years devoting their activities to public entities, like associations, trade union organizations, towns, or villages.<sup>115</sup> The idea was to improve de facto equality and to promote access to high functions in civil services for directors of political, trade union, and associative organizations.

The Council decided on January 14, 1983 that

[A]rticle 6 of the Declaration of Rights is not opposed to different rules for recruitment when they allow appreciation of capabilities and qualities of candidates for entering in a school or acceding to a class of private service agents and they take into consideration the merits and the necessities of the civil service.<sup>116</sup>

That decision showed that the Council was not opposed to affirmative action even though the Council wanted to control compliance with affirmative action based only on objective requirements.<sup>117</sup>

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114. Law No. 84-53 of Jan. 26, 1984, J.O. Jan. 27, 1984, p. 441.

115. Law No. 82-380 of May 7, 1982, J.O. May 8, 1982, p. 1315.

116. CC decision no. 82-153DC, Jan. 14, 1983, Rec. 35. The Council also denied a provision that gave preference to seniority, but calculated seniority based on previous training in the Ecole Nationale d'Administration as opposed to previous experience in the civil service generally. *Id.*

117. Privileged promotion in civil services has sometimes been granted to civil agents who agree to work in difficult social and security areas (e.g., ZEP).

## d) Equalization of Salaries Between Men and Women

A measure regarding compensation for equalization of salaries between men and women was considered recently in a new law prepared in 2005. Although equal remuneration for men and women has been affirmed since 1983, de facto differences are still apparent. For example, 31.6% of women and 5.7% of men have a part-time job.<sup>118</sup> One woman out of ten is a manager in French companies.<sup>119</sup> Also, for percentages where the numerator is the amount of women working in a given field and the denominator is the amount of men working in that same field, women comprise 76.4% in the arts but only 27.8% in the sciences.<sup>120</sup>

New affirmative action programs were considered in 2004 and 2005. A national and interprofessional agreement was signed on March 1, 2004, for parity and equality between men and women.<sup>121</sup> The agreement provides for temporary and specific actions in order to fill in the gaps.

In 2005, the French government prepared a new law equalizing salaries between men and women, which provides for acceleration of equality within the next five years by social dialogue and collective agreements.<sup>122</sup> As an incentive, the law provides that, in the absence of social dialogue, the government may consider making a financial contribution to the employers based on the salaries in their companies.<sup>123</sup>

The measures are still quite timid since the financial contribution will require a new law. Moreover, experience has proven that such affirmative action is not usually very efficient, even in politics, for example:

- equalization plans for access to work and equal remuneration have already been organized for women in the “Roudy law” of July 13, 1983, and these measures failed;<sup>124</sup>
- state financial assistance of employers for hiring and promoting

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118. Ute Klammer, *Working Women in the Age of Flexibility: New Diversities, New Needs for Social Protection* app. at 17, tbl.1(2000)

119. Dominique Méda, *Women and Work*, <http://digbig.com/4rdcg> (last visited Feb. 1, 2007).

120. See Claudine Hermann & Françoise Cyrot-Lackmann, *Women in Science in France*, 15 SCI. CONTEXT 529, 539–40 (2002) (comparing the number of women that are university professors in certain fields to the number of men).

121. Accord National Interprofessionnel du 1er Mars 2004 Relatif à la Mixité et à l'égalité Professionnelle Entre les Hommes et les Femmes, *supra* note 25.

122. Law No. 2006-340 of Mar. 23, 2006, J.O., Mar. 24, 2006, p. 4440.

123. *Id.*

124. Law No. 83-635 of July 13, 1983, J.O., July 14, 1983, p. 2176, art. 18 as modified by Law No. 2001-397 of May 9, 2001, J.O., May 10, 2001, p. 7320, art. 10. For agreements between France and employers or professional or interprofessional organizations for professional equality, see C. TRAV. art. L. 121-1 to -5; C. TRAV. art. L. 123-4.

women has already been provided as assistance for replacement of women on maternity leave;<sup>125</sup> and

- state financial assistance for women employees has already been provided such as the allowing of formation as provided by the national and interprofessional agreement of 2004.<sup>126</sup>

Specific treatment at work for women, such as leave of absence and allowance for maternity, was recognized by European directives 76/207, article 2, section 3; 79/7 article 4, section 2; 86/378 article 5, section 2—all of which take into consideration the specific biological status of women.<sup>127</sup> Directive 92/85 of October 19, 1992, provides special measures for improving the security and health of women who are pregnant, just gave birth, or are breastfeeding.<sup>128</sup> Member states should have changed accordingly before October 19, 1994.<sup>129</sup> The directive provides for:

- interdiction of work at night;
- maternity leave of at least fourteen weeks;
- leave of absence with remuneration for medical control before birth; and
- prohibition of the unilateral termination of employment until the end of the maternity period, except for grounds not related to maternity.<sup>130</sup>

Women get the benefit of those measures as long as they inform the employer of maternity.<sup>131</sup>

#### e) Equality Labels for Companies

Equality labels are a new form of affirmative action. A special commission delivers the labels to companies that prove that they promote equality between men and women.<sup>132</sup> PSA-Peugeot-Citroën was the first

125. C. TRAV. art. L. 322-9.

126. Accord National Interprofessionnel du 1er Mars 2004 Relatif a la Mixite et a L'egalite Professionnelle Entre les Hommes et les Femmes, *supra* note 25, arts. 7–8.

127. Council Directive 86/378, art. 5, § 2, 1986 O.J. (L 225) 40, 41 (EC); Council Directive 79/7, art. 4, § 2, 1979 O.J. (L 6) 24, 25 (EC); Council Directive 76/207, art. 2, § 3, 1976 O.J. (L 39) 40, 40 (EC).

128. Council Directive 92/85, art. 1, 1992 O.J. (L 348) 1, 2 (EC).

129. *Id.* art. 14.

130. *Id.* arts. 7–10.

131. *See id.* art. 2 (including in the definition of a pregnant worker only those that inform her employer of her condition).

132. NICOLE AMELINE, MINISTRE DE LA PARITÉ DE LA L'ÉGALITÉ PROFESSIONNELLE, LABEL

beneficiary.<sup>133</sup>

## 2. The Validity of Positive Discriminations

Criticism is now omitted when affirmative action programs comply with some legal and judicial requirements.

### a. Criticisms

At first, affirmative action programs were criticized because they were contrary to the equality principle. In addition, preferential treatment for a group of people was not considered to be in harmony with the goal of integration because such treatment might lead to an affirmation of a separate identity. Preferential treatment was then considered to be a negative discrimination because it created specific treatment for groups of women, elderly, disabled persons, etc. Opponents to affirmative action compared the French situation and the U.S. system where affirmative action reinforced ethnic minorities and diluted the link to citizenship.

On November 18, 1983, the Council contested political quotas in municipal elections for women and a change in the French Constitution was necessary to enable parity in political elections.<sup>134</sup>

The ECJ and the Council limited positive discrimination and requested that specific preferences be justified by objective criteria for enhancing and improving the situation of disfavored categories of people. They also required that privileges be temporary since they were designed to achieve *de facto* equality. When the requirements were not complied with, discrimination was not permitted.

For instance, France was condemned by the ECJ on October 25, 1988, because it gave automatic and unconditional prior access to employment to women but not men.<sup>135</sup> A special age limit for women was considered

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ÉGALITÉ 3 (2004), available at <http://digbig.com/4rgga>.

133. Press Release, AFAQ, Label Egalité Professionnelle: AFAQ AFNOR Certification délivre les premiers labels (Jan. 26, 2005). In 2005, two “sociétés d’économie mixte” received the label: “Eau de Paris” and “Services Funéraires.” AFAQ, Label Egalité Professionnelle: liste des labellisés, <http://digbig.com/4rggd> (Jan. 2007).

134. YAËL ATTAL-GALY, DROITS DE L’HOMME ET CATÉGORIES D’INDIVIDUS (2004).

135. Case 312/86, Comm’n v. France, 1988 E.C.R. 6315, 6334–36. See generally Case C-407/98, Abrahamsson v. Fogelqvist, 2000 E.C.R. I-5539, available at <http://digbig.com/4rdek>; Petrovic v. Austria, 1998-II Eur. Ct. H.R. 579, 587–88 (declaring that Austria does not have to extend the parental-leave allowance to fathers as well as mothers); Marie-Thérèse Lanquetin & Hélène Masse-Dessen, *Les droits particuliers pour les femmes dans les conventions collectives* (Cour de justice des Communautés européennes 25 octobre 1988), 1989 DROIT SOCIAL 551; Pierre Rodière, *Droit social: famille et égalité de traitement*, 25 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 297 (1989).

illegal even though it could also apply to men.<sup>136</sup> Prohibition of night work for women was not permitted because the protection was specific to women.<sup>137</sup> France was also criticized because provisions in collective agreements regarding age for retirement and night-work hours maintained special provisions for women when they should also have concerned men.<sup>138</sup>

#### b. Approval of Affirmative Action Programs

The ECJ and French courts finally upheld positive discrimination with some limits.<sup>139</sup>

According to the ECJ, special treatment may be permitted when it is objectively necessary for social and economic reasons, when the measures are in proportion to the promotion of equality, and when the measures are temporary. As a consequence, differences in treatment based on maternity have been permitted when they are justified by biological reasons. The French law of July 13, 1998, considered temporary measures in favor of female workers to establish equal opportunities in the face of de facto inequality.<sup>140</sup>

In civil services, French administrative courts also permit distinctions for the protection and promotion of equal opportunities between males and females.<sup>141</sup>

However, the Council did not permit the principle of parity as a general rule. In a decision of June 19, 2001, regarding the status of judges, the Council decided that a provision for parity between men and women on a list of candidates for elections of the Conseil Supérieur de la Magistrature was a violation of article 6 of the Declaration of Rights.<sup>142</sup> As a result, the Council held that parity should only be applied in the areas specified by article 3, paragraph 5 of the 1958 Constitution.<sup>143</sup>

136. Conseil d'Etat [CE] [highest administrative court], Feb. 6, 1981, D. 1981 inf. rap. 289.

137. Case C-158/91, Criminal proceedings against Jean-Claude Levy, 1993 E.C.R. I-4287, reprinted in August 2, 1993, D. 1993 577, note C. Pettiti; Case C-345/89, Criminal proceedings against Alfred Stoeckel, 1991 E.C.R. I-4047, I-4067; Marie-Ange Moreau, *Travail de nuit des femmes, observations sur l'arrêt de la CJCE du 25 juillet 1991*, 1992 DROIT SOCIAL 174.

138. Case 312/86, Comm'n v. France, 1988 E.C.R. 6315, 6336.

139. Case C-158/97, Badeck, 2000 E.C.R. I-1875, available at <http://digbig.com/4rdcj>; Cour de Cassation, Chambre sociale [Cass. soc.] [highest court of ordinary jurisdiction], Nov. 23, 1999, Bull. civ. V, No. 447; Katell Berthou, *Sur les discriminations positives*, 2000 DROIT SOCIAL 901, 901; Lanquetin, *supra* note 27, at 591.

140. Law No. 83-635 of July 13, 1983, J.O., July 14, 1983, p. 2176.

141. CE, June 26, 1989, D.P. III 152.

142. CC decision no. 2001-445DC, June 19, 2001, Rec. 63, J.O., June 26, 2001, p. 10125.

143. *Id.* at 65.

*B. Private Affirmative Action*

In 2005, French companies started considering positive discrimination and active reactions in order to contribute to social justice.

- Forty-five big companies developed a diversity chart to promote the employment of students with diplomas who originate from immigrant families.
- The French government improved its discussions with companies regarding racial discrimination with negotiations on racial discrimination in a National Conference for Equal Chances held on February 3, 2005.<sup>144</sup> The major trade unions, CFDT, CGT, CFTC, and UNSA, signed a trade union chart for equal treatment, nondiscrimination, and diversity.<sup>145</sup>
- The Group PSA-Peugeot-Citroën and trade unions signed an agreement on diversity and social cohesion in the companies.<sup>146</sup> That agreement provides for the recruitment of one hundred employees with diplomas originating from remote geographical areas.<sup>147</sup>
- Some companies recruit with anonymous curriculum vitae (CV) (AXA). However, the amendment about anonymous CV was rejected in the law of January 18, 2005, on social cohesion, and most companies prefer to contact and interview applicants for jobs. Companies view this as a reaction to diversity equivalent to denying diversity.
- The law on social cohesion of January 18, 2005, requires that interim companies and placement agencies review their advertisements to comply with articles L. 122-45 and L. 311-4 of the Labor Code and to ensure that offers do not contain any discrimination.<sup>148</sup>
- Interim companies fight against discrimination. Michael Page France signed an agreement with associations like SOS Racisme against discrimination.<sup>149</sup> Adecco created a poll against

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144. ÉGALITÉ/DIVERSITÉ: CONFÉRENCE NATIONALE POUR L'ÉGALITÉ DES CHANCES (2005), available at <http://digbig.com/4rghy>.

145. Miren Larre, Égalité des chances: Après la conférence nationale, tout reste à faire (Feb. 9, 2005), <http://digbig.com/4rgja>.

146. Accord sur la diversité et la cohésion sociale dans l'entreprise, Sept. 2004, available at <http://digbig.com/4rgjc>.

147. *Id.* art. 1.2.

148. Law No. 2005-32 of Jan. 18, 2005, J.O., Jan. 19, 2005, p. 864.

149. Frédéric Saliba, *Pour en finir avec le délit de faciès*, STRATÉGIES, Oct. 7, 2004, at 42,

discrimination and harassment.

All these measures indicate that equality must be combined with diversity. They show that the famous equality principle in the preamble of the French Constitution and in the Civil Code has not been effective in the workplace. Specific legislation and regulations with precise punishments is necessary in the struggle against negative discrimination at work.

#### CONCLUSION

Again and again, new laws repeat the equality principle for access to employment and treatment at work, not only between men and women but also for every employee without distinction of age, family situation, religion, national origin, opinion, disability, etc.

Equality is extended to every condition or situation at work, including remuneration. All employees must benefit from the same advantages when they are placed in the same conditions for work.

Preference has been given to fighting against negative discrimination mostly in accordance with international and European rules against discrimination. Yet France has not ratified protocol number 12 relating to the general interdiction of discrimination.

The law creating the HALDE extends the principle of nondiscrimination for social protection, health, social advantages, education, access to services and goods, membership in trade unions, and access to employment. As a consequence, it will be interesting to examine the results of the action directed by the HALDE against discrimination in France.

All the existing provisions demonstrate that now, more than ever, application of the equality principle is difficult in labor laws. There is a great paradox between the formal and abstract principle for equality that prohibits any negative discrimination in individual treatment for employment, and the “positive discrimination,” which aims to realize a concrete equality with differential and temporary treatment based on objective inequality.

Both measures may prove to be a difficult balance for an idealistic equality while the formula “vive la difference” is in every mouth.