FRANCE

Contents

1. National court system

France has a unique organisation of its courts and tribunals which are divided into two orders: **the judiciary justice and the administrative justice**. This distinction between these two orders of jurisdiction was established by the Act of 16 and 24 August 1790, which prohibits judicial judges to handle disputes concerning the Administration or civil servants.[1] The administration is not thereby exempt from judicial review: specific tribunals have been created to handle disputes involving public persons. Originally highly dependent on the executive branch, these courts have gradually gained independence and impartiality equivalent to those characterizing the judicial justice. The existence of an independent administrative jurisdiction was recognised as a constitutional principle in 1987.[2]

Each order is composed of several tribunals which are organised into a hierarchy. The jurisdiction of each tribunal depends on the nature of the case and on the amount involved. The tribunals of common law *(de droit commun)* complement with some

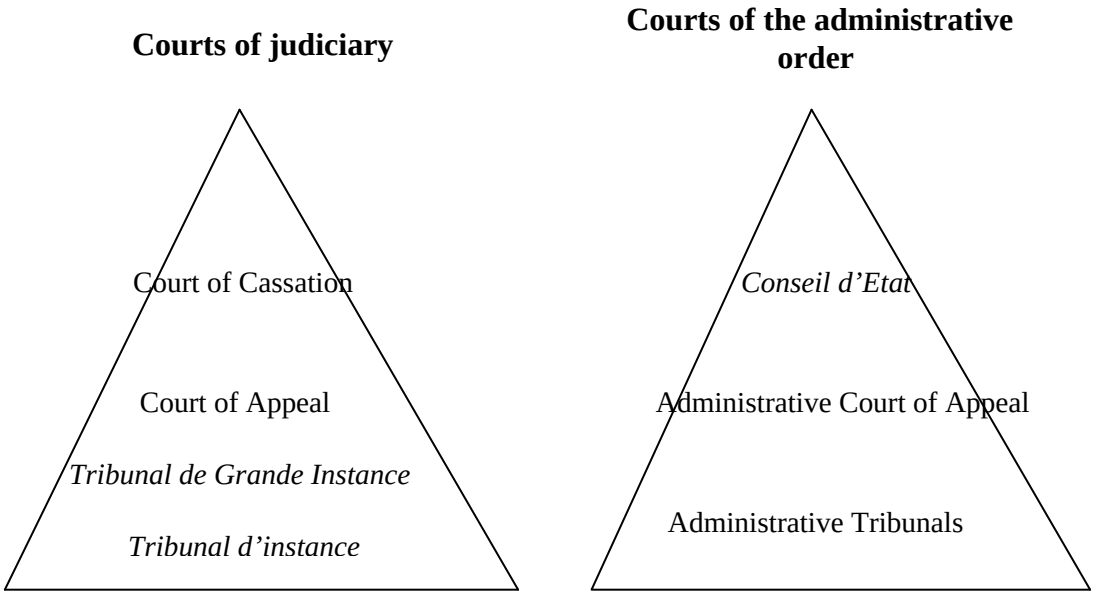
[1] http://www.viepublique.fr/decouverteinstitutions/justice/fonctionnement/tribunaux/comment-sont-organises-differents-tribunaux.html (1.9.2009).

[2] France/Act n° 87-1127 (31.12.1987).

specialised tribunals which are responsible to hear cases of a specific nature. The specialisation of these tribunals makes them more available. These tribunals have permitted to reduce the overload of the tribunals of common law and thus facilitate access to justice.

Within these orders, the various courts and tribunals are organized in a pyramidal structure (see Figure 1): (1) the courts called of first instance (or of first degree) form the basis of this organisation; (2) the appellate courts (or of second degree) are the courts that hear appeals against decisions delivered by the courts of first instance; (3) at the top of each order (judicial or administrative), a Court of 'cassation' is charged of monitoring and harmonizing the enforcement of law as it is implemented by the other judges (called the '*juges du fond*'). It is called the '*Cour de Cassation'* for the judiciary and the '*Conseil d'Etat'* for the administrative order.

Figure 1: Organization of judicial and administrative orders



As far as the **judicial order** is concerned, the Courts of first instance are of two categories (see Figure 2): on the one hand the courts of common law (*de droit commun)*, which are competent as a rule, and on the other hand the specialised tribunals whose jurisdiction has been recognised by special legislation. These specialised tribunals are mainly the Commercial Tribunal that hears trade disputes, and the Labour Tribunal which is a joint court, composed of representatives of employees and employers and which is responsible for settling disputes related to the drafting, the fulfilment and the breach of a contract of employment. The ordinary courts consist of "le *juge de proximité"*, "*le tribunal d'instance"* which is the equivalent to the Magistrates' Court, and "*le Tribunal de Grande Instance*" which corresponds to the High Court. The distribution of competence between these three courts depends on the nature of the case and on the amount at stake.[3]

In all cases, the re-examination of the case is possible by a higher Court. This is justified by the principle of the '*double degree of jurisdiction'*. However, it is necessary to distinguish the Court that can hear the case: when a case is ruled as the first and last resort by a court of first instance, it cannot be re-examined as a whole by a Court of Appeal: it can only go to the *Court of Cassation* if it raises a question of law. The cases that are subject to be held as the first and last resorts are those for which the financial interests are low (up to 4,000 Euros). In such a case, the appeal is not allowed. The person wishing to challenge the decision in question will have to file the case before the Court of Cassation. On the contrary, for cases involving monetary interests that are over 4,000 Euros, it is held as the first resort and thus the appeal before a Court of Appeal is possible, within the delay of one month since the notification of the judgment to the parties.[4] The Court of Appeal is also called a Court of Second Degree inasmuch as it re-examines the whole case, namely it examines both the facts and the points of law raised, either to confirm the decision of the tribunal of first instance, or to quash the first judgment.[5] That is the principle of the '*double degree of jurisdiction*': a case that presents a monetary interest (more than 4,000 €), can be examined in its entirety by a Court of Appeal which constitutes a higher Court. However, the Court of Appeal does not consist of the highest Court in the judicial system. The '*Court of Cassation'* is the Supreme Court, at the top of the hierarchy, and, as such, remains the last Court that can be seized on a particular case. In all cases, for the cases ruled as the first and last resorts or for cases ruled in appeal, the injured party is allowed to take the case to the *Court of Cassation*. Contrary to the Court of Appeal, the *Court of Cassation* does not examine the case in its entirety:

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[3] Competences of *Tribunal d'instance*: Articles L221-1 to L221-10 and Articles R221-3 to R221-37 of the Judicial Organisation Code, available only in French at http://www.legifrance.gouv.fr/affichCode.do?dateTexte=20090831&cidTexte=LEGITEXT000006071164&fastReqId=90314534&fastPos=1&oldAction=rechCodeArticle (1.9.2009). Article 2 of the Law n° 2005-47 of 26th January 2005 relating to the jurisdiction of the tribunal d'instance, of the juridiction de proximité and of the tribunal de grande instance, has amended the rate of resort or competence of the Tribunal d'Instance (up to 10,000 Euros to hear as last resort and up to 4,000 Euros to hear a case as first and last resort), available at http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000808829 (1.9.2009). Competences *of the Tribunal de Grande Instance*: Articles L211-1 to L221-14 of the Judicial Organisation Code, available only in French at http://www.legifrance.gouv.fr/affichCode.do?dateTexte=20090831&cidTexte=LEGITEXT000006071164&fastReqId=90314534&fastPos=1&oldAction=rechCodeArticle (1.9.2009).

[4] Article L311-1 to L311-14 of the Judicial Organisation Code, available only in French at http://www.legifrance.gouv.fr/affichCode.do?dateTexte=20090831&cidTexte=LEGITEXT000006071164&fastReqId=90314534&fastPos=1&oldAction=rechCodeArticle (1.9.2009).

[5] Article L311-1 of the Judicial Organisation Code, available only in French at http://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000006572170&cidTexte=LEGITEXT000006071164&dateTexte=20090831&fastPos=2&fastReqId=1225708867&oldAction=rechCodeArticle (1.9.2009).

it only examines the points of law that remain tricky.[6] It does not appreciate the facts of the case. As such, the Court of Cassation is not a Court of third degree. It rather checks if the other judges (‘*juges du fond’*) have correctly applied the law. It is often said that the Court of Cassation is a judge of the law, of its appropriate interpretation and proper implementation.[7] The Court of Cassation does not have the power to settle disputes on its own: in case of cassation, that is to say when the Court of Cassation considers that the former tribunal has not correctly interpreted the law, the Court of Cassation has to refer the case to another Court of the same nature than the tribunal that ruled the decision quashed.[8] The Court of Cassation thus guarantees to all citizens that French Law will be interpreted in the same way within the territory.

There are also Labor courts which are part of the civil courts, whose independence is guaranteed by article 64 of the French Constitution.[9] In addition, Labor Courts are composed in equal parts of representatives of the employees and of the employers, which ensures their impartiality.

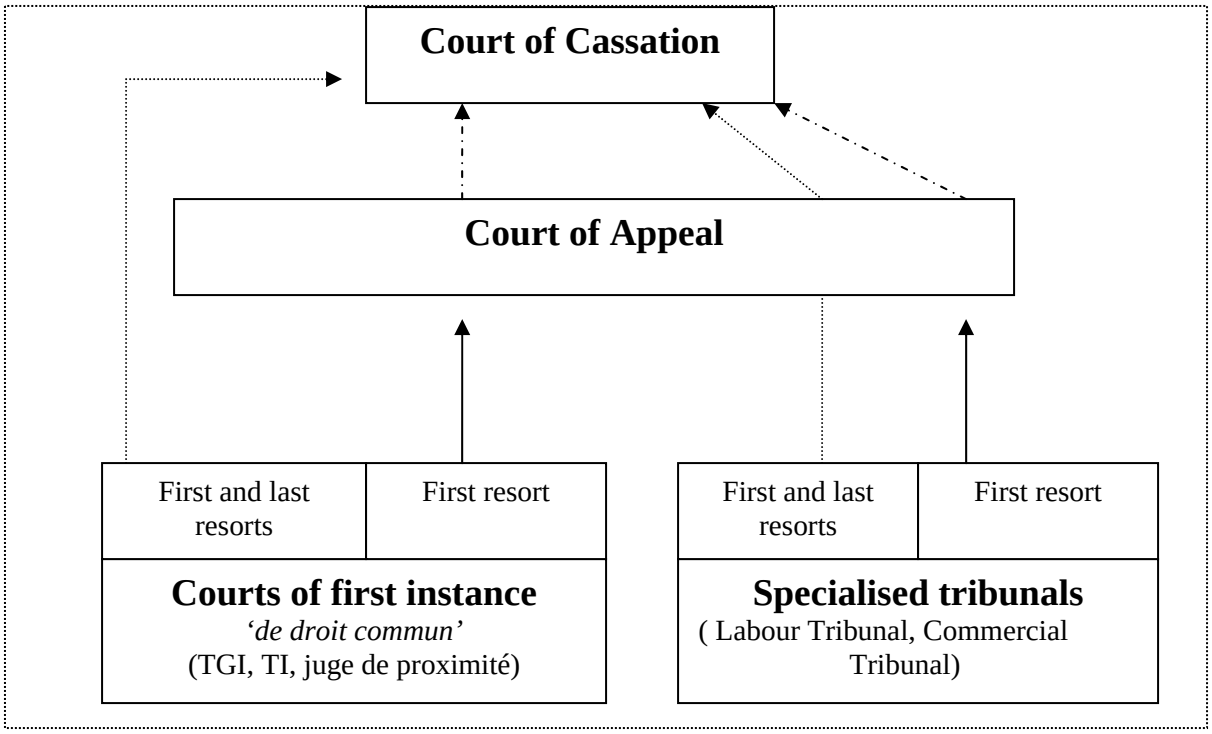
Figure 2: Overview of appeal process within the judicial order

[6] Articles L411-1 to L411-4 of the Judicial Organisation Code, available only in French at http://www.legifrance.gouv.fr/affichCode.do?dateTexte=20090831&cidTexte=LEGITEXT000006071164&fastReqId=90314534&fastPos=1&oldAction=rechCodeArticle (19.2009).

[7] http://www.vie-publique.fr/decouverte institutions/justice/fonctionnement/tribunaux/quoi-sert-cour-cassation.html (1.9.2009).

[8] However, since 1979, the Court of Cassation has the power to quash a decision without referring it to a lower court and to settle the case, when the interpretation of the facts made by the former judges is sufficient to allow the appropriate application of the law.

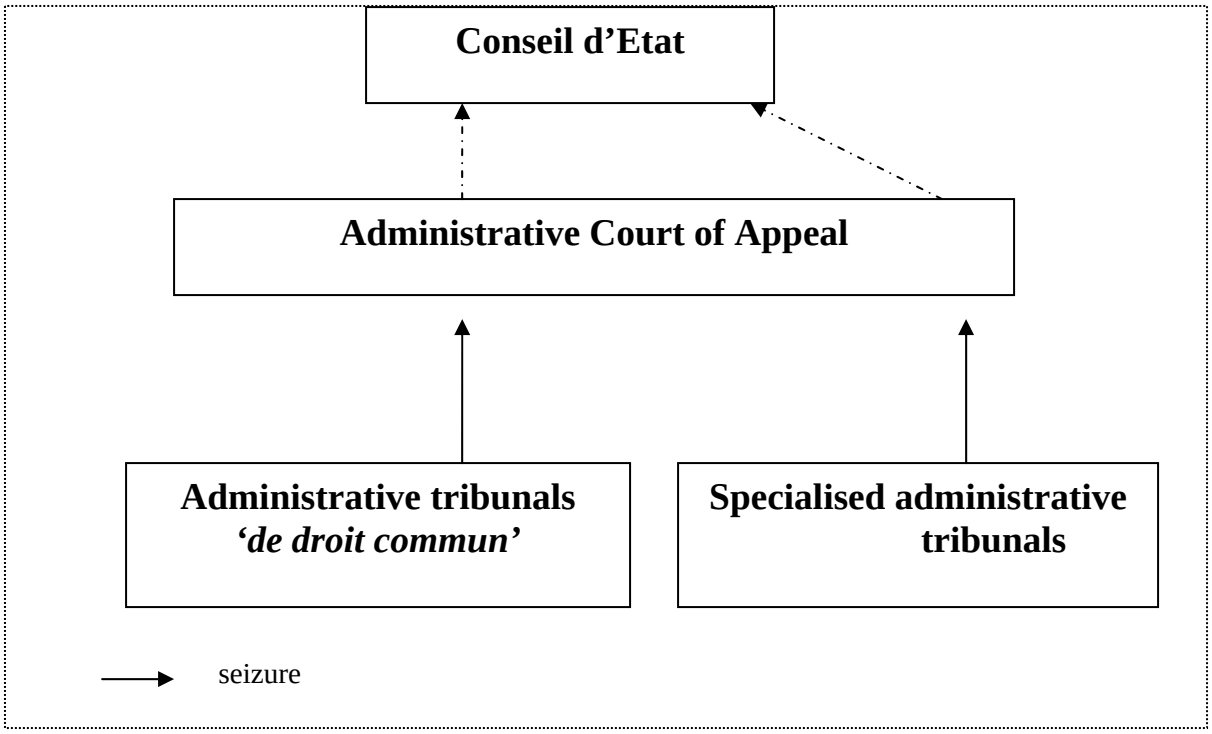
[9] Constitution of 4th October 1958, http://www.legifrance.gouv.fr/html/constitution/constitution.htm (1.9.2009).



The administrative order is organised in the same way as the judicial order but it is less complex (see Figure 3). The administrative tribunals[10] are the courts of first instance which hear the administrative disputes unless a particular law attributes the jurisdiction to a specialised administrative tribunal. The Administrative Courts of Appeal,[11] which were founded by the Act n° 87-1127 of 31 December 1987, are normally seized to re-examine the judgements ruled by administrative Courts (the appeal rate is about 16%). Finally, the *Conseil d'Etat* is the Supreme Court of the administrative order and as such it is the judge of cassation which quashes or confirms the decisions taken by the lower tribunals, only on the points of law. It checks if the application and interpretation of the law by the former jurisdictions were made correctly.

Figure 3: Overview of appeal process within the administrative order

[10] There are 36 Administrative tribunals in France.
[11] There are 18 Administrative Courts of Appeal.



2. Restrictions regarding access to justice

The most important restriction on access to an effective remedy in relation to discrimination concerns the statute of limitations to facts. The common law provides a prescription in 30 years whereas it is limited to only 5 years in the field of discriminations. Indeed, by the Act of June 17 2008 relating to the reform of the prescription in civil matters,[12] the legislature has simplified the rules of civil prescription by establishing the principle that "*personal or movable actions are lapsed by 5 years from the day the holder of a right knew or should have known the facts enabling him/her to exercise it* ".[13]

In parallel to this rule, the legislature has also discreetly introduced a significant change in the Labour Code by including a new Article L. 1134-5 which provides that "*an action for damages resulting from discrimination is prescribed by five years after the disclosure of the acts of discrimination*".[14]

[12] France/Act n° 2008-561 (17.06.2008) relating to the reform of the prescription in civil matters: http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019013696&fastPos=1&fastReqId=426182837&categorieLien=cid&oldAction=rechTexte (1.9.2009).

[13] Article 2224 of the Civil Code.

[14] http://larevue.hammonds.fr/Prescription-en-matiere-de-discrimination,-le-legislateur-enfin-raisonnable_a683.html (1.9.2009).

3. Length of judicial proceedings

In general, in non-discrimination cases, the average length of proceedings of cassation is approximately 20 months. The appeal proceedings before the Court of Appeal of Paris are much longer than the average (around 38 months). Before trial courts, the average length of proceedings is approximately 17 months. The time of the resolution of procedures is slightly lengthened in the field of labour law (i.e. before the Labour Courts) because of the conciliation period which leads up to the litigation stage. There are not enough cases before labour courts to establish statistics on the delays though. The two cases studied were judged by a Court of Appeal[15] after 2 years and 6 months and by the Court of Cassation after a further delay of, respectively, two years and ten months, and one year and nine months.

4. Are procedures concluded within a reasonable time?

The figures concerning the length of the proceedings reveal that many cases are not heard within a reasonable time. This is a problem of a huge importance concerning access to justice: the length of the procedure might deter individuals from suing a case, particularly because of the costs involved. This problem has been worsened by the increase in the number of pending cases.

5. Does provision exist for speedy resolution of particular cases?

Emergency proceedings exist. However, they do not concern the merits of the case but only requests for suspension of the execution of certain measures.

In civil cases, the emergency proceedings are provided for in Articles 484 to 492 of the Code of Civil Procedure. The presiding judge may prescribe protective measures that are necessary to prevent from imminent damages or to stop a manifestly illegal trouble. The judge in charge with emergency interim proceeding is seized on summons. Concerning the emergency interim proceedings, decisions are settled in a much shorter time not exceeding 1 month. However, they do not concern the merits of the case but only requests for suspension of the execution of certain measures.

There is a procedure of summary judgment before Labour courts as well (articles R1455-1 to R1455-4 of the Labour Code). The litigation must fall within the jurisdiction of the court, but the claimant does not need to have already brought a request on the main case in order for the request of summary judgment to be admissible. There is also a condition of emergency. If there are no serious doubts about the issue of the case, the summary judgment office is competent to order any measure made necessary by the emergency, to order a deposit, or order the execution of an obligation. Even if there are doubts on the issue of the case, the summary judgment office may

[15] There are no information in the decisions to establish the dates of the first instance decisions

order protective measures to prevent an imminent damage or make a situation clearly illegal cease. The decision of the summary judgment office does not have a binding authority. A procedure of summary judgment is available before the administrative tribunal[16]. It may suspend the contested decision until it examines the facts. The request has to be justified by emergency and a serious doubt on the legality of the measure. It was only used in one of the cases studied, in which the Conseil d'Etat refused the request for summary judgment and reminded that a request for annulment of the decision concerned must be filed for the summary judgment to be granted.

Before the Equal Opportunities and Anti-Discrimination Commission (*Haute Autorité de Lutte contre les Discriminations et pour l'Egalité*, HALDE)[17], an independent administrative authority with powers of sanction to fight against discrimination) no emergency procedure is explicitly provided for. In practice, HALDE primarily deals with the urgent cases. According to the President of HALDE, the time to deal with the applications is on average 180 days, which is a relatively short time.[18]

6. Is it possible to waive the right of access to a judicial body?

It is not possible to waive the right of access to a judge in labour procedures.

7. Access to non-judicial procedures

Judicial proceedings are not the only means existing in French law to punish discriminatory behaviours. Before the labour court, the procedure always starts with a conciliation attempt, but it is led by counsellors of the court, and if the conciliation is not possible, the matter is transferred to the judgment office. More importantly, the Act of 30 December 2004 establishing the Equal Opportunities and Anti-Discrimination Commission *Haute Autorité de Lutte contre les Discriminations et pour l'Egalité* (HALDE)[19], an independent administrative authority with powers of sanction to fight against discrimination) gives the latter the opportunity to be seized and to self-refer cases of discrimination to its knowledge as well as to issue resolutions containing recommendations to public authorities. That law has granted the HALDE a broad mission: "*the High Authority is competent to deal with every kind of discrimination, direct or indirect, prohibited by law or by international obligations to which France is bound*". It has received four major powers: an investigative power, a mission of assistance to victims and a mission of mediation, the power to enact recommendations and the power to promote equality.

The status of HALDE is a guarantee of independence and of impartiality of its 11 members appointed by the President of the French Republic, the Prime Minister, the Presidents of the

[16] Article L512-1 of the Code de Justice Administrative

[17] http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000423967&fastPos=1&fastReqId=1733776284&categorieLien=id&oldAction=rechTexte (1.9.2009).

[18] C. Lacourcelle (2008), 'Quand les entreprises jugent la Halde', in : *Entreprises et carrières, n°929/930*, (04-17.11.2008), pp.14-16.

[19] http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000423967&fastPos=1&fastReqId=1733776284&categorieLien=id&oldAction=rechTexte (1.9.2009).

Assemblies and Senate and the Economic and Social Council, as well as by the Vice-President of the State Council and the First President of the Court of Cassation[20]. The independence of HALDE is to be guaranteed through the collegiate character of its Council, by the attendance of at least one member of the higher administrative or judicial courts, by its Advisory Committee and by its autonomous management. The collegiate composition of the Council guarantees both the inter-disciplinarity of its members and the impartiality of its deliberations. Its members are mandated for a period of five years. This mandate is neither removable nor renewable. The Advisory Committee is composed of qualified individuals, representatives of specialised NGOs, of representative trade unions, of the CNCDH (National Consultative Commission on Human Rights) and of other national institutions, as well as competent individuals active in domains concerning the remit of HALDE. In regard to autonomous management, HALDE receives its own financial resources, which are linked to the budget of the Prime Minister.

Anyone who considers that he/she is a victim of discrimination can lodge a complaint with HALDE by letter (or e-mail), either directly, or through an intermediary. Complaints can also be lodged with HALDE jointly by the victim and an association which has been in existence for at least five years as at the date of the alleged discrimination, and whose purpose is to combat discrimination and/or to help its victims. HALDE is required to respond in writing to any written representation addressed to it.

Except when dealing with individual cases which are brought to HALDE (submission of a case by written inquiry by a natural person or submission by an authorised association), HALDE can recognise all cases of discrimination and intervene on its own initiative, on condition that the victim is informed and is not opposed to these actions.[21] Its power to raise self-initiated complaints appears fundamental to HALDE, which is not a judicial organ, to enable it to ensure the effectiveness of continuing and independent action.

In the case of a criminal offence, HALDE may refer the claim to the criminal courts, or proceed with a penal transaction. Although HALDE can initiate an action in the same way as the Public prosecutor, the action itself, after it has been raised by HALDE, must be taken over and pursued by the Public Prosecutor. In such cases, the status of HALDE is 'closer to the status of a civil party than that of a prosecutor'.[22] HALDE has also been conceived as an 'auxiliary of Justice': the law makes it possible for the criminal, civil and administrative courts to seek its observations on cases under adjudication. In addition, HALDE has the power to seek permission to submit its observations in criminal matters. Following the Act of 2006, this power is no longer subject to authorisation but is implemented *ipso jure*.

With regard to its investigative powers, when an inquiry is in progress HALDE can only exercise its powers of investigation after first obtaining permission from the Public Prosecutor concerned. HALDE can also recruit sworn agents specifically authorised by the Public Prosecutor to record statements on crimes of discrimination. Once HALDE has consulted the individuals concerned and has obtained their consent, and provided agreement is obtained from the Public Prosecutor, it can authorise its agents to carry out interrogations and evidence verification procedures on the ground. In the event of a refusal of access to premises by the owner, the chairman of HALDE may apply to a judge to obtain authorisation to carry out a search (*perquisition*) in a specific location. In accordance with Article 12 of the Law of 30.12.2004, HALDE informs the Public Prosecutor when it appears that facts brought to its attention can be construed as constituting a

[20] For more details, see the report: Thematic Legal Study on assessment of data protection measures and relevant institutions, France.
[21] France/Loi 2004-1486 (30.12.2004), Article 4.
[22] F. Desportes, 'Discriminations', in : Jurisclasseur pénal, fasc.20, para.109.

crime or an offence.[23] The referral of a case to HALDE does not affect the ordinary legal procedure.[24] Finally, the Act of 31 March 2006 on equal opportunity recognises the authority of investigators working on behalf of HALDE to issue a statement asserting discrimination, which can only be reversed if substantial evidence to the contrary is brought before the courts (Article 2). Its powers of inquiry are limited by the fact that it can not hold the powers of a criminal police section entrusted with judicial activities.

By virtue of Articles 11-1, 11-2 and 11-3 of Act 2004-1486, as amended by Act 2006-396 on Equal Opportunities, and Article D.1-1 of the Criminal Procedure Code as amended by Decree 2006-641 of 1 June 2006, a new power was conferred upon HALDE, that of proposing a so-called 'penal transaction' to perpetrators of direct discrimination. Following an investigation of a complaint resulting in a finding of direct intentional discrimination by the person or entity investigated, this entails HALDE proposing a specific criminal sanction to the perpetrator, which he/she can either accept or reject. This could be a fine or publication (for instance in a press release) of the fact that discrimination has taken place, and if relevant, an award of compensation to the victim. It empowers HALDE to propose fines to the amount of €3,000 for a natural person and €15,000 for a legal entity, together with compensation to the victim (Articles 11-1 and 11-2 Law on HALDE).[25]

These transactions, once accepted by both parties, must be officially approved by the Public Prosecutor. The proposal of the transaction must clarify, on the one hand, the nature of the litigious facts as well as their legal classification, and on the other hand, the nature and amount of the measures proposed, as well as the time within which they must be executed, and finally the amount of damages awarded to the victims. The person to whom a transaction is proposed must be informed that, prior to giving his/her consent within 15 days to the proposal made by the HALDE, he/she can be assisted by a lawyer. The victims of discrimination can always deliver a direct summons before the minor offences court. 'The penal transaction procedure was instituted in order to ensure efficiency and rapidity, all the while remaining consistent with criminal policy (…) The decision is unilateral and administrative, unlike the rest of the procedure.'[26] In cases of rejection of the proposed negotiated criminal sanction, or a subsequent failure to comply with it, HALDE can initiate a criminal prosecution, in place of the Public Prosecutor, before the criminal court.

Article 7 of the Law of 30 December 2004, establishing the HALDE, expressly states that the Council of HALDE has the power to bring the parties, or have the parties brought, to an out-of-court settlement through mediation. However, this mediation is not carried out by HALDE, as the mediators are third parties. The mediation instituted by HALDE is neither bargaining nor a settlement, but a process governed by law. It can occur either in the public or private sector.[27] In this context, HALDE may propose a third party, the mediator, who will listen to the arguments of the parties and address their points of view. Since 2005, in order to guarantee the expertise of the mediator, HALDE has usually given proxy to a member of the National Federation of Mediation Centres, which operates under the aegis of the National Council of Lawyers.[28] Specific mediation

[23] See for instance, Deliberation 2007-186 (02.07.2007).
[24] France/Loi 2004-1486 (30.12.2004), Titre 1er, Article 4 para. 5.
[25] Sophie Latraverse, Report on measures to combat discrimination Directives 2000/43/EC and 2000/78/EC country report 2008 France, p. 110, available at http://www.migpolgroup.com/public/docs/169.2008_Countryreportonmeasurestocombatdiscrimination_France_EN.pdf .
[26] HALDE/Annual Report/2007, p.39. See, for instance, Decision 2007-107 (02.04.2007).
[27] HALDE/Annual Report/2007, p.27.
[28] See the partnership agreement signed by HALDE and the National Council of Lawyers in 2005.

training modules for mediators working for HALDE across the country were also organised, with the assistance of training centres. In addition, a decision was made to launch a call for tenders in order to create a network of mediators across all of France.[29] The HALDE mediation procedure is free of charge for the parties.

Mediation is entirely confidential. The arguments of parties and the documents they put forward are not transmitted to a court to which the matter could later be referred. The Act of 30 December 2004 stipulates in Article 7 that conclusions and declarations gathered throughout the mediation procedure cannot be invoked or produced before a civil or administrative court without the consent of interested parties. There is an exception in criminal cases, as HALDE is obligated to inform the Public Prosecutor about facts which could represent elements of a crime or a felony.[30] Two other features of the mediation process are worth mentioning: preliminary work before mediation is carried out, consisting of a personal interview with each party individually, during which HALDE explains the steps of the mediation procedure and discusses the challenges that mediation presents and the issues at stake. Secondly, it makes sure that the terms of any agreement do not breach non-discrimination requirements.[31]

The procedures implemented before the HALDE are, as the case may be, either exclusive or supplementary to legal proceedings. The complementary nature of the actions of the HALDE with those of the judiciary has been highlighted by the Act of 31 March 2006 relating to equal opportunities. It is embodied in the power of the HALDE, in case of failure of the proposed transactions, to set in motion public action. This possibility is not only reserved for the prosecution but may be granted to other authorities, as provided for in Article 1 of the Code of Criminal Procedure.[32] The criminal transactions may be proposed without the agreement of the Public Prosecutor in cases where the victim has brought the discrimination only to the knowledge of the HALDE, or when the HALDE has self-referred the case (the facts being unknown to the judiciary). On the contrary, when the judicial authority has been seized of the facts, the HALDE can only offer a penal transaction under the condition the Public Prosecutor has supported such a transaction.[33] This transaction will be refused in practice only when the Prosecutor is of the opinion that the facts do not constitute an offence, or, on the contrary, when the seriousness of the case requires the prosecution before a court.[34] If the prosecution is already set in motion, a transaction is not possible. The fundamental role of the Public Prosecutor in the settlement procedure is to approve or to refuse the transaction proposed by the HALDE, this agreement being supported by the perpetrator of the discrimination and by the victim. The approval of the transaction puts an end to the prosecution.

The cooperation between the judiciary and the HALDE is also reflected in the role of the judge in charge of emergency interim proceedings (*juge des référés*). This latter judge may be of a great

[29] HALDE/Annual Report/2007, p.26.
[30] (http://www.paris-avocat.eu/discrimination-halde.html#2c).

[31] Elise Blanc 'Mediation and Discrimination – The example of HALDE', 27 March 2008 -Auditorium de la Maison du Barreau de Paris,
[32] http://www.legifrance.gouv.fr/affichCode.do;jsessionid=29585BF7F02C39A5F44CBF0D64C465BF.tpdjo17v_1?idSectionTA=LEGISCTA000006121320&cidTexte=LEGITEXT000006071154&dateTexte=20090626 (1.9.2009).
[33] Article 12 of the Act of 30.12.2004.
[34], 'La lutte contre les discriminations et transactions proposées par la HALDE', in : *La semaine juridique sociale*, n°42 (17.10.2006).

support for the HALDE in the search for evidence by ordering, for example, that it shall be permitted for the HALDE to visit premises. Furthermore, the HALDE is allowed to submit comments during proceedings. However, in some cases, proceedings before the HALDE occur independently from the judiciary, especially when the HALDE acts through individual recommendations addressed to an employer or through mediation. This independence would be enhanced in the case where the High Authority would be seized of matters which are not of the jurisdiction of ordinary courts, for example, a referral to the HALDE beyond the limitation period of 5 years.

The measures taken by the HALDE are not subject to the judicial control of the judiciary. This situation leads some authors to consider that this could be a source of legal uncertainty insofar as the two authorities in charge of discrimination may rule differently on similar questions, without the obligation to respect the decisions of the other.[35] For instance, the judicial judge and the HALDE have expressed an opposite view on the issue of the payment of premiums exclusively to foreign employees on the sole ground of their nationality. The Court of Cassation ruled that these measures were legal under the condition that they contribute towards the creation of an international scientific centre.[36] HALDE ruled the contrary.[37] These possibilities of discrepancies between these two bodies are also justified by the fact that the judicial authorities and the HALDE follow different lines in their handling of cases. The HALDE only focuses on the texts prohibiting discrimination whereas the judicial courts have a wider approach taking into account other principles of law.

The option of invoking an action for abuse of power ('Recours en Excès de Pouvoir') against the decisions of the HALDE is rather a complex issue. The case law of the Conseil d'Etat on the subject provides for some clarification. By a decision of 13th July 2007, the Conseil d'Etat ruled that the recommendations of the HALDE are not in themselves administrative decisions that may be subject to a REP. The Conseil d'Etat ruled in the same direction about the deliberations by which the HALDE takes position on a case and decides to be heard by a court. However, the administrative judge asserted that a general recommendation drafted in a mandatory manner could be challenged before it. The responsibility of the State might be approved for damage resulting from the action of the HALDE during controversial "testing" for example. Thus, the decisions of the HALDE can be controlled only very exceptionally.[38]

8. Legal aid

According to the Act of 10 July 1991[39], legal aid is awarded on the basis of the person's financial means; the maximum resources to benefit from legal aid is 1367€ per month. In this case, the aid covers 15% of the expenses. The aid gradually increases as the resources decrease; persons earning less than 911€ per month are awarded full coverage of their legal expenses.[40] This system

[35] G. Loiseau, 'La Halde: quelle autorité?', in : *Droit social* n°2 February 2009, p. 142.

[36] France/Cour de Cass. Soc,/Synchrotron acte II/n°0645270 (17.04.2008). See also, France, Cour de Cassation/n°269198/(9.11.2005), J.C.P. S. 2006, n°14, p.22.

[37] France/HALDE/Deliberation n° 2007-282 (22.10.2007). http://www.halde.fr/IMG/alexandrie/3592.PDF (30.08.2009).

[38] http://www.egaltraitement.net/modules/xfsection/article.php?articleid=72&category=40 (29.08.2009).

[39] http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006077779&dateTexte=vig (1.9.2009).

[40] These amounts are for single persons; they are increased by 159€ for each dependent person for the first two persons, and by 101€ for each dependent after that.

allows people without any means or with low incomes to obtain from the State the payment of all or part of the costs of a trial.[41] It must be requested through the "legal aid office" which sits within each *Tribunal de Grande Instance*. If it is granted, the government pays all or part of all legal expenses (including lawyers' fees). For instance, in 2007, the allowance of full legal aid was subject to a threshold of a monthly income of 874 Euros for a single person.[42] In 2009, the ceiling of income has been moved to 911 Euros for benefiting of the total financial aid and to 1.367 Euros for the partial payment.[43] However, it appears that the cost of a trial remains a hurdle to the access to justice for many persons.[44]

In France, victims of discrimination have several ways to obtain information or assistance at various stages. They obtain assistance from the Equal Opportunities and Anti-Discrimination Commission (*Haute Autorité de Lutte contre les Discriminations et pour l'Egalité* (HALDE)) and many associations (NGOs).[45]

The HALDE gives assistance to victims of discrimination, specifically by helping them to identify procedures to implement, to collect evidence, to complete their file, to resort to mediation or to Justice. Concerning the action of the HALDE, cases that were analysed show that the HALDE is really involved in helping victims. It presents almost in all cases submissions to the courts, either at the request of victims or on his/ her own initiative.

As far as the NGOs assistance is concerned, as soon as cases of discrimination are recognised, such associations place lawyers at the disposal of victims and help them to complete documentation to file their complaints. Associations active in the field of discrimination can even, in certain cases, sue for civil injury before an ordinary Court or refer to the Public Prosecutor. Finally, associations can draw the attention of the general public to suspect practices used by administrative bodies or private companies, and alert them to such practices. The associations concerned lead campaigns to raise public awareness of discrimination, as well as information campaigns to make the public aware of their existence and to help potential victims. Victims of discrimination are relatively well informed and assisted in all their actions by French associations, as the feeling of being discriminated against has become more widespread in society. However, it is impossible to evaluate the degree of satisfaction of the victims in regard to these measures, as there are no polls or statistics on this subject. It must be noted that lawyers work on a *pro bono* basis for the associations involved, as there is no funding available for their work. The trade unions are lagging behind on this issue. Nowadays it is easy for all victims of discrimination on the grounds of race or ethnic origin to find and obtain assistance from NGOs. Indeed these NGOs offer legal advice to victims and where discriminatory practices appear to have occurred, undertake their legal representation in court proceedings. Much information is also available on their websites. It is impossible to compile a complete list of the associations that fight against racial discrimination. What is certain is that there are increasing numbers of associations dealing with these matters. Most of these associations fight against all kinds of discrimination, that is to say that they cover all types of discrimination without distinguishing between any specific racial

[41] Article 2 of the Act n° 91-647, 10.07.1991.
[42] Article 4 of the Decree n° 2007-1738 of 11th December 2007.
[43] Circular SADJPV, 30 December 2008, Official Bulletin of Justice n° 2009/1.
[44] George de Leval (sous la dir.) L'accès à la Justice, Coll. Commission Université-Palais, Université de Liège, Vol. 98, 2007, summary available only in French at http://www.anthemis.be/index.php?id=152&tx_ttproducts_pi1%5BbackPID%5D=152&tx_ttproducts_pi1%5Bproduct%5D=99&tx_ttproducts_pi1%5Bcat%5D=31&cHash=6c95ee49d2 (1.9.2009).

[45] Association websites: www.sos-racisme.org, www.ldh-france.org, www.licra.org, www.mrap.asso.fr, www.gisti.org (23.02.2008).

groups. There are five main associations working in the field: SOS Racism (*SOS Racisme*), the League of Human Rights (*la Ligue des Droits de l'Homme*), the International League Against Racism and Anti-Semitism (*la Ligue Internationale contre le racisme et l'antisémitisme, LICRA*), the Movement Against Racism and for Friendship amongst Peoples (*le Mouvement Contre la Racisme et pour l'Amitié entre les Peuples, MRAP*) and GISTI, the Group providing Information and Support to Immigrants (*Groupe d'Information et de soutien des Immigrés*).[46] Some other associations defend a particular category of victims.[47] Moreover, some specialised associations fight against discrimination in particular domains (work, housing, leisure) or for specific groups.[48] Every group of victims of discrimination on the grounds of race or ethnic origin is covered by NGOs in France, as the most important NGOs involved in this field cover all communities. It is also important to mention the existence of the Departmental Commissions for Access to Citizenship (*les Commissions départementales d'accès à la citoyenneté, CODACs*), created in 1999, and the Basic Services of the Houses of Justice and Law (*les permanences à la Maison de justice et du droit MJD*). In the prefectures, the Commissions for Equal Opportunity and Citizenship (*Commissions pour l'Egalité des Chances et la Citoyenneté, COPEC*) may also receive allegations of discriminatory acts from the alleged victims and help them to pursue their complaints. These COPECs took the place of the CODACs in 2005. The function of these bodies is to facilitate the dissemination of information to victims and cooperation between the various players at local level. They should also facilitate cooperation between the associations themselves.

9. Forms of satisfaction available to a vindicated party

With regard to non-discrimination cases, under Article L1134-5 of the Labour Code, "*the monetary reparation compensates for all the damage resulting from the discrimination*".

Labour Courts, whose jurisdiction concerns all litigations related to the execution of the work contract, may order measures like the payment of salaries that were miscalculated or not paid, or award damages. Compensation in French law is typically not viewed as a deterrent measure for the losing party; it is calculated on the basis of the damage undergone by the employee.

The legislator has made provision in the Labour Code for the possibility of requesting annulment of a discriminatory measure, allowing for reintegration in case of dismissal, retroactive indemnity (financial compensation for the loss in earnings for the entire period of discrimination) and legal modification of an employee's status in his/her working environment (Articles L122-45, L122-49, L123-1 LC). The Court of Cassation has on many occasions ordered the reconstitution of the career of an employee with retroactive indemnification, the ensuing cost to the employer being substantial. However, recourse in other areas, in matters of housing or in respect of non-salaried employees (article 19 of the Act on Equal Opportunities and Anti-Discrimination Commission (*Haute Autorité de Lutte contre les Discriminations et pour l'Egalité* (HALDE)) does not benefit from such provisions, and the remedy is limited to the award of damages. Similarly, in regard to hiring practices, an applicant for employment with a company for which she/he has not yet

[46] *Ibid*

[28] For example : the Association of Support and Aid to Nomadic Peoples.

[48] For example: Association for the Mediation of Anti-Racial Discriminatory Hiring Practices and Agir pour les Harkis

worked cannot request reinstatement in that company. In such cases, the applicant can only request compensation for loss or damages.

In non-criminal matters involving the public service, recourse must be sought through the administrative court. Two forms of recourse are available: one against the abuse of power, to annul a contentious decision, or full jurisdictional recourse, in order to obtain not only annulment of the decision but to award damages as well.

It is also important to add that following the Act adopted on 17 June 2008, the prescription period for remedial action for damages related to discriminatory acts has been reduced from 30 to 5 years.[49]

10. Adequacy of compensation

Compensation in French law is not viewed as a punitive measure, but as a reparation which takes into account the accurate damage the person went through.

The sanctions imposed by the courts in discrimination cases (in contradiction to the sanctions applicable in French law) are often neither proportionate nor sufficiently dissuasive.

11. Rules relating to the payment of legal costs

In civil cases, the losing party is ordered to pay costs under section 696 of the Code of Civil Procedure, unless the judge decides otherwise. Costs include lawyers' fees. This rule also applies to Labour Courts.[50]

12. Rules on burden of proof

With reference to the European directives, Act n°2001-1066 of 16 November 2001 modified the burden of proof in matters of work and employment, in that it shall be incumbent upon the respondent to prove that there has been no breach of the principle of equal treatment.[51] In the case of housing litigation, the burden of proof was amended in the same way in 2002.[52] Thus the claimant must demonstrate, from the beginning, that incidences of unequal treatment exist. With regard to these elements, the defendant must then prove that his/her refusal to rent housing to the claimant was justified by elements unrelated to racial considerations. With regard to Act n° 2004-1486 of 30 December 2004, the Equal Opportunities and Anti-Discrimination Commission (*Haute Autorité de Lutte contre les Discriminations et pour l'Egalité*, HALDE) has the right to

[49] France/Loi 2008-561 (17.06.2008).
[50] Article 696 of Code of Civil Procedure.
[51] Article of the Labour Code L.1134-1 in its recent version: '(…) it is incumbent upon the respondent to prove that his/her decision is justified by objective elements unrelated to discrimination '(…)il incombe à la partie défenderesse de prouver que sa décision est justifiée par des éléments objectifs étrangers à toute discrimination. (…)'.
[52] Article 1 Act n°89-462, 6 July 1989 as amended by Act n°2002-73, 17.1.2002.

assess explanations given by the Minister of Justice, and generally by any public or private person indicted. This shift in the burden of proof has been extended by Article 4 of Act n° 2008-496 of 27 May 2008 to all non-criminal fields.

In order to avoid infringing the principle of the presumption of innocence, there is no reversal of the burden of proof in criminal matters.[53]

[53] National Assembly, Report by Isabelle Vasseur, n°695, p.42.