

France

Policies of anti-discrimination and integration in France: The HALDE – The French Equal Opportunities and Anti-Discrimination Commission

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Introduction

In the 20th century, the creation of new rights in the Declaration of Human Rights was accompanied by new concepts necessary for their comprehension and development. Freedom no longer belonged only to the moral domain of humanity, qua beings of dignity and respect, but also to the latter as citizens participating in the life of a state. Humankind no longer represented solely a universal concept of dignity to be respected; instead, it had a juridically constructed place in the world. The aim of the creation of new generations of rights (civil rights, social rights, rights of solidarity, bio-ethical rights, etc.) has been to equalize the material living conditions of everybody. The transition from formal citizenship to real citizenship expresses a concern to assure that citizens' rights really are exercised. In this sense, the state considers human beings as concrete entities, situated in accordance with a determinate social context and grasped in their singularity as workers, women, children, handicapped persons, etc. Faced with the deployment of the welfare state, the fight against discrimination is the result of a process of social and political mobilization. However, how can this exercise of rights be implemented in terms of public policy? It is in this context of evolving rights, in France, that the fight against discrimination emerged in the 1980s. Influenced by the *affirmative action* developed in the United States, France adopted positive discrimination as part of the fight against discrimination, which strived to bring about awareness of the deficit of Republican principles of equality and universality. Concerning the anti-racist policies

that are of greatest concern, France has adopted a policy of integration based on the principle of secularity and has refused recognition of racial or ethnic categorization. Public actions are *colour blind*, that is, are 'enacted by a logic of equality and not by a minority logic' (*Haut Conseil à l'Intégration*, report 1991) and are based on general and compensatory social rights (Schnapper, 1992)¹. As of 1997, the 'French invention of discrimination', mentioned by Didier Fassin, came to receive genuine recognition by the public authorities, little by little becoming part of its operations and apparatuses. The creation of the *Haute Autorité de Lutte contre les Discriminations et pour l'Égalité* (HALDE – High Authority for the Fight against Discrimination and for Equality), as an instrument of public action is one example of this.

If the creation of the HALDE forms part of the development of European policies for the promotion of equality, to what extent does it nevertheless meet the needs concerning the deficits of public policies and the failure of the judicial institution in this domain? Furthermore, to what extent has it been able to foster a jurisprudence against discrimination?

In this article, I will consider, on the one hand, the institution and its role in France in terms of the fight against discrimination. Then I will analyze the aspects (priorities and actions undertaken) of struggle against the discriminations presented in its 2009 annual report. I will then revisit the debate on ethnic statistics and the importance of research in the operation of the HALDE. Lastly, I will examine current debates over the stakes of the institution and its still uncertain future at the time of the writing of this report.

1. History and description of the institution

1.1. Historical outline of the fight against discrimination in France

In 1981, one of the first measures was the creation of **zones of priority education (ZEP)**, which consisted in giving more means concerning teaching positions to schools in areas where there were higher levels of students with specific social and learning difficulties. The implementation of ZEP occurred mainly in the suburbs and followed the observations made concerning social inequalities and success at school. The ZEP were presented as the first experiment in 'positive discrimination' within the National Education system.

¹ <http://www.reseau-terra.eu/article810.html>

This policy was born, on the one hand, from the conviction that our educative system has to meet the educational needs of all school-age children and, on the other hand, from the observation of inequalities at school due to the great diversity of social and cultural milieus. The concern of the education of students in difficulty led me to define a policy prioritizing underprivileged zones. **The democratization of the educative system and the fight against social inequalities has to be concretized by further means and above all by giving greater attention to those who are most in need** (Extract from the speech of the Minister of National Education, **Alain Savary**, from July 13, 1983).

Today, the balance-sheet of ZEP is divided. At the time, the stakes involved applying to national education the principles founding of the public service: to give means in accordance with needs according to the principle of solidarity. The fact is that school, even though it presents the possibility for social ascension, was unable to cure all the evils of society, especially as the promised means were not always obligatory. Following the crisis on the suburbs in 2005, the ZEP underwent reforms, including an end of compulsory schooling to 16 years of age. However, this has ultimately meant pursuing a two-tier school system, or what some call a 'policy of renunciation'.

Following this, a certain number of acts of law were adopted:

- The act of 1983 concerning professional equality between men and women based, in part, on contracts between states and companies designed to foster specific measures for women.
- The act of 10 July 1987, concerning the employment of handicapped workers, reserves the latter 6% of all positions in public organizations.
- The act of 14 November 1996 created free urban zones, zones for urban redynamizing, and sensitive urban zones that enjoy fiscal measures to enhance their development.
- The act of 8 July 1999 concerning equality between men and women, designed to foster parity in politics.

In the 1990s, in line with the ***affirmative action* policies in the United States and England**, more and more mechanisms of aid to victims were set up with information campaigns, mobilizations, special education for the agents of some public services, and the creation of a toll free number (114). The ***Haut Conseil à l'intégration (HCI)***, instituted in December 1989 by the government of Michel Rocard and affiliated with the Services of the Prime Minister's Office, was ascribed the mission of 'providing its opinion and making useful proposals, at the request of the Prime Minister, about the set of questions pertaining to the integration of foreign residents or residents of foreign

origin'.² Since 2004, it has been aided by the *Observatoire des statistiques de l'immigration et de l'intégration*.

Then policies for the fight against discriminations emerged following the adopting of the act of 16 November 2001 (act on the fight against discriminations)³ whose goal was to strengthen the possibilities for action of unions and associations, and to enable the victims to get out of their isolation. The creation of **GELD (Groupe d'études et de lutte contre les discriminations)**, the Group for the Study and Struggle against Discrimination) in the year **2000**, and then of **HALDE** in 2005, attests to a new policy phase that is more conducive to material equality. The creation of the HALDE with the act of 30 December 2004⁴, responded to a European request and is designed to compensate for the insufficiencies of the judicial system (reticence of victims to take legal action for fear of reprisals, difficulties of proving discriminatory deeds, public prosecutors with little inclination to invest in these dispute due to their complexity, and so on). It is one part of recent measures implemented by the Government, such as:

- The act of 17 January 2002 for social modernization;
- The act of 1 August 2003 for the orientation and programming for cities and urban renovation;
- The act of 4 March 2002 called the *Kouchner Law* pertaining to the rights of the ill.
- The act of 3 February **2003** called the **Lellouche Law aiming to increase penalties for infractions of a racist, anti-Semitic or xenophobic character**.
- The act of 30 June 2004 pertaining to solidarity for the autonomy of aged and handicapped persons;
- The act of 11 February 2005 concerning participation in citizenship by handicapped persons;
- The act of 23 March 2006 pertaining to salary equality between men and women;
- The act of 31 March 2006 for the equality of opportunities which notably made provision for the creation of an **Agence nationale pour la Cohésion Sociale**

² http://www.hci.gouv.fr/rubrique.php3?id_rubrique=8

³ This law pertaining to the fight against discrimination in the context of the workplace, transposes directive 2000/43/CE of the Council of 29/06/2000 relative to the implementation of the principle of equality of treatment between persons without distinguishing between race or ethnic origin, as well as the directive 2000/78/Ce of 27/11/2000 supporting the creation of a general framework in favour of the equality of treatment concerning issues of employment and workplace relations..
<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000588617&dateTexte>

⁴ <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000423967>

et l'Égalité des chances (ACSE),⁵ by founding 6 prefects for the equality of opportunity and endowing the HALDE with powers to sanction individuals or enterprises guilty of discrimination.

- The act of 27 May 2008, which contains diverse provisions for adapting the right of communities in the domain of the fight against discrimination.

The creation of the HALDE is today part of a rather complex institutional landscape and an increasingly abundant legislative production. The implementation of policies to fight discrimination involves the action of administrative services. These services fall under:

- various ministries (Social Affairs, Employment, Interior Ministry, etc.),
- interministerial structures (Interministerial Committee for Integration, Interministerial Delegate for the Handicapped, Interministerial Committee of Struggle against Racism and Anti-Semitism),
- public establishments such as the *Agence pour la Cohésion Sociale et l'Égalité des chances* (ACSE), heir of the *Fonds d'action sociale pour l'intégration et la lutte contre les discriminations* in charge of implementing governmental policy; and the *Commission pour la Promotion de l'Égalité des Chances et de la Citoyenneté* (COPEC), whose mission is to define measures for preventing and developing awareness of discriminations,
- associations in charge of public service missions such as the *Association de Gestion du Fonds pour l'Insertion Professionnelle des Handicapés* (AGEFIPH),
- or again various consultative bodies (*Haut Conseil à l'intégration*, *Observatoire de la parité entre les hommes et les femmes*, *Commission nationale consultative des gens du voyage*, etc.).

The ambition of the HALDE was to unify public policies in the fight against discrimination, but the large number of actors mobilized in the framework of the European programme EQUAL (2000-2008)⁶ has made it difficult to centralize the associations, public services and social partners.

The measures that bear on ethno-racial discriminations are those whose implementation in public action is most difficult. I will return to this issue in the chapter on ethnic statistics. The emergence of the question of racial discriminations arises through two types of device that have been set up by the public administration: local

⁵ <http://www.lacse.fr>

⁶ http://ec.europa.eu/employment_social/equal/index_fr.cfm

plans of struggle against racial discriminations in the work place, initiated by Interministerial Division for the City (DIV), and the *Programme d'Intervention Communautaire* (PIC) EQUAL in the context of theme B, relative to the 'fight against racism and xenophobia in the workplace'. From the outset, it can be observed that **racial discrimination is constructed like an unnamed problem**. Even though the problem raised in these programmes truly does concern racial discrimination, **qualifying discrimination as racial is difficult:**

Of the 42 EQUAL projects conducted from 2000 to 2008, only 5 among them bear the term racial or ethnic discrimination. Now, to constitute a specific public problem is tantamount to constituting a category which will differentiate it from other problems. Locally, the fight against racial discriminations is perceived as so many risks that serve as arguments for non-action (to increase racism, fuel tensions, the risk of victimization – that the action of struggling against discrimination would create more victims than discrimination itself; last, the spectre of positive discrimination which acts as a foil or as an alibi for non-action).⁷

Here, racial discrimination is considered, but without being stated clearly and without any successful resolution not only of the problem as such but also that of the nomination of the issue.

a. How can discrimination be defined?

The HALDE defines the term *to discriminate* as follows:

The prohibition or limitation of access of a person to an employment, a lodging, to good and to services or to any training on grounds of criteria prohibited by law. (source site)

In addition, 'discrimination, such as it is defined by the law, is an intrinsically comparative concept. (...) there can be no discrimination unless there are two groups and it is possible to show that one of the two groups is 'disadvantaged' with respect to the other group relative to a prohibited motive, with respect to a rule, a practice, a measure or some sort of examination.'⁸

In France, the question of discrimination has been interpreted as a euphemized way of designating and grasping 'racist' acts. Having become almost synonymous, 'discrimination' and 'racism' are conceived as functioning on the same mode. Now, the main contribution by works on discrimination is to have shown that, more than proceeding from a racist ideology, it is above all 'systemic', that is to say, it results from the functioning of a system whose rules and conventions are neutral in appearance, but whose methods of functioning end up disadvantaging, in a significant way, persons on grounds of their belonging, real or supposed, to stigmatized groups (Banton, 1994). One of the consequences of the notion of systemic discrimination is that properly racist intentionality is no longer determining in the analysis of discriminatory phenomena (De Schutter, 2001).⁹

⁷ 'Mieux connaître pour mieux combattre. Les discriminations à l'épreuve des savoirs et des pratiques' Colloquium of 2 December 2009, BNF, Paris, p.43. <http://www.halde.fr/Mieux-connaître-pour-mieux.html>

⁸ Ibid, p.54.

⁹ SIMON Patrick et STAVO-DEBAUGE Joan, 'Les politiques anti-discrimination et les statistiques: paramètres d'une incohérence', *Sociétés contemporaines*, 1/2004 (n° 53), pp. 57-84.

In France, article 225-1 of the Penal Code¹⁰ defines a list of criteria which enter into the constitution of an act of discrimination:

Constituting a discrimination is any distinction made between physical persons on grounds of their origin, their familial situation, pregnancy, their physical appearance, their family name, state of health, handicap, genetic characteristics, mores, sexual orientation, age, political opinions, union activities, belonging or non-belonging—real or supposed—to an ethnicity, a nation, a race or a determinate religion.

b. What is the HALDE?

The HALDE is an independent administrative authority (AAI), that is to say, an administrative body which acts in the name of the state and possesses real power, without for all that falling under the authority of the government (*source: Conseil d'Etat*). The act of 30 December 2004 that gave rise to the creation of the HALDE resulted notably from a **transposition of the European directive 2000/43 of 29 June 2000** relative to the implementation of the principle of equality of treatment between persons without distinction of race or ethnic origin.¹¹ It assists any and all individuals who turn to it in identifying discriminatory practices and countering them. It considers that the fight against discrimination is also centered on the promotion of diversity. The HALDE's mission is to fight against discrimination (direct and indirect) prohibited by the law, to supply any required information, to accompany victims, and to identify and foster good practices in order that the principle of equality may become part of reality (source site). Its creation is based on the observation that it is not enough to follow the legal route, in spite of the reinforcements made to the repressive apparatus. It is rather necessary to implement a body endowed with diversified means of action, able at once to intervene upstream and to provide support to victims.

The HALDE provides advice on legal options and helps establish proof of discrimination. It has the power to refer cases to the court system itself on any discriminatory practice brought to its knowledge. It holds investigative powers to enquire into cases. It may demand documents and proof which the victim was unable to obtain, ascertain facts on site and take evidence from witnesses. It helps identify the procedure best-suited to the situation:

- A mediation session can be arranged in order to reach an agreement, or when discrimination has been ascertained, the national prosecutor may be called upon for a decision,
- It may secure compensation, suggest payment of damages to the party

¹⁰http://www.legifrance.gouv.fr/affichCode.do;jsessionid=965D709A3ECC6A296CD328669B454CE2.tpdjo09v_3?idSectionTA=LEGISCTA000006165298&cidTexte=LEGITEXT000006070719&dateTexte=20100828

¹¹http://www.halde.fr/Directive-2000-43-CE-du-Conseil-du.html?page=article_domaine&id_mot=3

discriminated against and trigger proceedings if damages are refused (settlement with compensation),

- Speak before the judge if the victim decides to go to court,
- Publicly disclose a discriminatory practice.

The HALDE issues opinions and recommendations to the Government, the Parliament and the public authorities to counter discrimination, improve legal texts, and bring French law forward in this field. Article 15 of the 30 December 2004 Law instituting the HALDE provides that the HALDE must be consulted on all legal bills on fighting discrimination and promoting equality. It can also be consulted by the government on all issues relating to discrimination. The opinions are adopted by the Council, and sent by the President to the relevant authorities.

Last, it issues a report of its activities in an annual report, addressed to the President of the Republic, to the Prime Minister and to the Parliament. However, the HALDE does not have any vocation to conceive, lead, coordinate or finance public policies for fighting against discrimination. Contrary to other independent administrative authorities, it has no decision-making powers, nor any power of sanction. But the act of 31 March 2006, called the equal opportunity act, endows the agents of HALDE with a power of perquisition even in case of disagreement of the person in charge of the premises, as well as with the power to write up statements of offense for proven acts of discrimination. In civil matters, under the impetus of the European Communities Court of Justice (the present day Court of Justice of the European Union), the French Court of Cassation has adapted the regime of evidence; and in penal matters, proof by test of discrimination (method of the testing) is legalized by article 225-3-1 of the Penal Code.¹² In this way, the administration of evidence is made easier for the victims.

c. How is the HALDE organized?

The HALDE is a collegial body composed of 11 members, appointed by: the President of the French Republic, the Prime Minister, the Presidents of the National Assembly, the Senate and the Economic, Social and Environmental Council, as well as by the Vice-President of the Conseil d'Etat and the First President of the Court of Cassation. Its Chairman is appointed by the President of the French Republic. The Council deliberates over all matters relating to the exercise of the HALDE's powers and

¹²http://www.legifrance.gouv.fr/affichCodeArticle.do;jsessionid=C01B26C1D2CC0EF702D1309BD09CCC81.tpdjo15v_3?idArticle=LEGIARTI000006417838&cidTexte=LEGITEXT000006070719&dateTexte=20100905

responsibilities and, in particular, in relation to: legal action, observations presented by the HALDE before the courts pursuant to Article 13 of the Law of 30 December 2004, its opinions and recommendations. Presided by Marie-Thérèse Lanquetin (jurist and researcher), the Advisory Committee comprises 18 members chosen from among figures recognized for their involvement in the domain of the fight against discrimination. This make-up assures that the HALDE has an opening onto civil society. The College can ask for advice from the Advisory Committee in order to help clarify its reflection (source site). Endowed with a budget of 11.9 million euros, it employs close to 90 persons.

2. Analysis of a document: the 2009 annual report

2.1. *A will to communicate and to shape*

The HALDE undertakes actions to foster a real – to use its terms – **equality of opportunity**.¹³ It undertakes to promote awareness and to educate in order to help develop practices and attitudes. It aims to identify and foster good practice concerning the fight against discrimination.

Above all, the HALDE makes available prevention tools and distance training modules such as *e-learning*, designed for the general public and for professionals. The aim is to spread the concrete measures that render the fight against discriminations effective. *E-learning* is accessible through the Internet and requires enrolment.¹⁴ It involves pedagogical sessions in the form of creating situations, knowledge evaluation, exercises, attention to stereotyping, and information on the promotion of equality in companies and in everyday life as well as in the domain of education.

It also undertakes communicational activities including mainly the distribution of brochures as well as information campaigns aimed at all audiences to engender greater awareness of the remedies that it proposes. The information campaigns for the general public involve the distribution of fold-out pages, episodes from a televised series *Flagrants délits* (“**Caught Red Handed**”) that retraces the “situations and places of our daily lives using real facts extracted from files of complaints, designed to make each of us **feel the shock of discrimination**”¹⁵ as well as information stands, poster campaigns, publications and the development of its internet site. Downloadable

¹³ 2009 Annual Report, p.4.

¹⁴ <http://www.halde.fr/-E-learning-.html>

¹⁵ 2009 Annual Report, p.34.

brochures are available online ('Responding to questions about discrimination', 'The good conduct code', 'The practical guide', etc.).¹⁶ The HALDE relies on its reputation which it describes as growing and on Media interest. The site also permits the consultation of a **repertory of good practices** and of initiatives to adopt.¹⁷

Lastly, the HALDE conducts research works and associates its approach with the analyses produced by researchers in order to bring out certain phenomena of discrimination and to identify paths of action. In addition, it has created a collection '*Etudes & Recherches*' with the aim of making 'research works known, as well as the studies and practices concerning the laws surrounding discrimination and the promotion of equality'.¹⁸

2.2. What does the fight for the equality of opportunity consist in?

The struggle for the equality of opportunity is in some sense the positive aspect of the fight against discriminations. For the HALDE, it consists in providing advice that aims to foster conditions to further good practices. Thus, the HALDE proposes tools that are destined to aid public and private employers, private and social landlords, key figures from the Department of National Education, etc. in order to help prevent discrimination. These tools are the ones mentioned above. The guides and studies consulted and downloaded on the site in 2009 correspond in large part to the sectors of employment, of housing and of education. Since 2006, the HALDE has established contact with companies through an annual questionnaire annual titled *Cadre pour agir et rendre compte* (**Frame for acting and rendering account**). This promotion of equality is based, as said above, on supports that serve the purposes of communication, but also on monitoring work via the analysis of jurisprudence in relation to jurists, economists and sociologists.

2.3. The categories of discrimination

The types of discrimination prohibited by law bear on the following: origin (the Halde's main criteria for entitlement to jurisdiction in 2009), sex, family situation, pregnancy, physical appearance, family name, state of health, handicap, genetic characteristics, mores, sexual orientation, age, political opinions, union activities, belonging or non-belonging—real or supposed—to an ethnicity, a nation, a race, or a determinate religion. (source: 2009 Report). The distribution of **complaints** is made according to

¹⁶ <http://www.halde.fr/-Brochures-.html>

¹⁷ <http://www.halde.fr/-Le-repertoire-.html>

¹⁸ <http://www.halde.fr/-Etudes-.html>

the following domains: **employment; regulations; functioning of the public services, goods and private services; lodging, education; and others.** The three priorities remain employment (which is the object of close to half of all complaints), education and lodging. However, in comparison to the number of files received, 10,734 in 2009, few are prepared for trial (1752 files), and the time required to do so is often very long (about one year per proceedings). The files can sometimes be complex to deal with because they come under discrimination involving multiple criteria.

2.4. The HALDE's three priorities (employment, education and lodging)

For each of these sectors, it is possible to find the responses and treatment of the complaints according to the characteristics of origin, of handicap/state of health, of sex/pregnancy/familial situation, of union activities/political opinions, of age, of religious convictions and of sexual orientation. In some cases, HALDE is also constrained to consult the right to work and the right to lodging. For each of the priorities, I will provide one of the examples that the HALDE reported dealing with in its 2009 Annual Report.

- The question of employment corresponds to half the complaints addressed to the HALDE. For each type of discrimination, there are examples with recommendations and proposal for methodological supports, penal transactions, observations made to the conciliation board or the administrative tribunal, cases of mediations in order to create dialogue. Discrimination in the workplace comprises problems of the non-consideration of diplomas, recruitment, position creation, career development, salary equality, equality of work contracts, and harassment. Confronted with the measures of the HALDE, employers are thus constrained to develop their practices, which is sometimes a hassle for companies.

Example: 'A viticulture farmer submitted an employment offer addressed to "pôle emploi" to a condition based on the origin of the applicants. He did not want travelling people, nor persons of Maghreb origin. The reasons given by the farmer, which concerned the constraints of his farm operation, were unable to constitute an admissible justification permitting the waiving of his penal responsibility. The offense of discrimination appeared to be appropriate, so the HALDE proposed penal action. Deliberation n° 2009-337 of 28 September 2009'.

- Next is the issue of education and principally the demand for the schooling of children, recognized as a fundamental right. Here we also find problems concerning conditions of enrollment in higher education and arbitrariness of conditions for attaining financing (stipend, etc.).

Example: 'The HALDE was referred to a complaint relative to a refusal to have access to a professional training on grounds of the state of health. After having successfully passed the selection tests, the complainant received notification of a decision to reject his application on grounds of 'medical restrictions', presumed by the training facility. Now, the inquiry conducted by the HALDE revealed that no doctor had the occasion to make a declaration on his aptitude for this employment. The complainant and the joinder of the party gave their agreement for the establishment of a mediation process. Deliberation n° 2009-28 of 2 February 2009'.

- Lastly, there is the issue of lodging, which essentially concerns problems in the procedures of attribution of rental contract. In this case, the HALDE can intervene with the certified agents who carry out a *testing* (or test of discrimination). In matching several pieces of information, the results of such a test make it possible to indicate a risk of discrimination, however without confirming an offense.

Example: 'the HALDE carried out a test of discrimination on access to private lodging. The criterion of discrimination studied was that of origin (black African) as revealed by family name. The requests, the content of conversations, and the personal information made available to the knowledge of the operators (private landlords and real estate agents) were comparable. If a slight disadvantage appeared in the value of the applications, it was systematically to the detriment of the applicant of reference. Each call was made in the presence of a HALDE certified agent. The certified agents were guarantors of the methodological seriousness and of the veracity of the observed results during the test. Their statements constitute the proof of the elements gathered throughout the test. 77 operators were tested across 3 distinct territories (Paris, Essonne and the Lille agglomeration). It involved 43 real estate agencies and 34 individual private landlords. The results of a test of discrimination indicate a risk of discrimination, but are not sufficient to characterize, in and of themselves, the offense of discrimination. The HALDE inquired into 15 situations that appeared to show a manifest difference in treatment. 20 auditions were carried out. Following the results of this test, the HALDE addressed a reminder of the law and transmitted 9 files to the competent prosecutors of the Republic. To be noted is the fact that 5 files concerned real estate agencies. These 9 files are now the object of a complementary inquiry carried out by the prosecution that was referred to. Deliberations n° 2009-5 to 17 of 5 January 2009'.

3. Analysis of a scientific debate: the question of 'race' and ethnic statistics – the French ambiguity

At the start of the 1990s, the *Institut National d'Etudes Démographiques* (INED) and the *Institut National de la Statistique et des Etudes Economiques* (INSEE) raised the issue of taking 'ethnicity' into account in statistics and provoked a debate on the concept of ethnicity. According to Max Weber,

we will call ethnic groups, insofar as they do not represent 'kinship groups', those human groups which nourish a subjective belief in a community of origin based on similarities in external habitus or mores, or both, or on memories of colonization or of migration, in such a way that this belief becomes important for the spreading of communalization – little matter whether a community of blood exists or not.¹⁹

¹⁹ WEBER, Max, *Économie et Société* (t. 2), Plon, Paris, 1995 [1922].

In France, by passing from 'race' to 'ethnicity' there is a seeming attempt to **displace the problem without 'resolving' it. Census concerning social class, sex, religion etc., are accepted, but a census on skin colour still creates problems.** The question of skin colour still refers too much to the pseudo-scientific studies of the 19th century on 'races'. The stakes of this question, in France, involve the attempt to find a common and conventional terminology and denomination that is accepted in the political, scientific, juridical and public fields.

The reference to ethnicity or to the 'race' is the one most often rejected to the advantage of more established (and less embarrassing) characterizations, ones which contribute to blurring, and even to invalidating, the analysis of social situations, and particularly those pertaining to the space of discriminations. Since the affirmation of a 'race', even in order to denounce the uses of it, could work to give credence to its existence, the statistical apparatus makes use of descriptors which, without directly evoking it, serve as an unavowed 'racial' or 'ethnic' proxy (equivalent). This is similar for the decision to speak of 'foreigners', when any evidence of nationality plays but a marginal role or none at all, or to speak of 'immigrants' apropos of persons born in France who have never had the experience of 'migration'. This strategy of diversion echoes the euphemization practiced in public debate.²⁰

For researchers (sociologists, historians, demographers...), at issue is above all to raise the question of the tools by which to measure social inequalities and 'diversity'. They recognize that it is a delicate subject and they remind us that it is a 'complex social reality' and that the 'effects of public policy are ambiguous'. Statistics are held to be an instrument of social life that they also contribute to constructing.

In effect, it is not known whether discriminations are rising in France or not, but in any case the perception of them is. Might it not also be the case that the discourse of struggle against discrimination fosters the accruing perception, sometimes even excessive, of the feeling of being discriminated against? In one of the conclusions of the colloquium, Louis Schweitzer, former president of the HALDE, indicated that 'European studies show that it is in those countries which have the most active policies in matters of discrimination that public opinion perceives the presence of discrimination the most intensely'. The fight against discrimination certainly does make real discrimination appear, but does it not also participate in the construction of other types of discrimination? In France, the issue of the reconstruction of reality weighs heavily, and works to facilitate neither action nor debate.

the data elaborated by the statisticians, similar to every policy and all knowledge, becomes a part of the reality itself. It is quite true that policy and research contribute to the awareness of ethnic categories. Besides, this is the reason why some anti-racist activists have considered eliminating the word 'race' from official texts, since by declaring a fight against prejudices linked to 'race', the drafters of constitutions and of laws implicitly

²⁰ SIMON Patrick et STAVO-DEBAUGE Joan, 'Les politiques anti-discrimination et les statistiques: paramètres d'une incohérence', *Sociétés contemporaines*, 1/2004 (n° 53), pp. 57-84.

recognize, and therefore consecrate, the very existence of 'races'.²¹

From the outset, the debate is heavily influenced by the question of 'race' that remains 'unresolved' in France.

In France, race is treated (...) in a way that must remain informal and that it is forbidden to deal with overtly. Declarations on skin colour, in contrast with declarations on sex, not only are not allowed, but are explicitly prohibited. This enables France to eradicate the question at the fundament: there are no races, therefore there are no racial problems. But race, which is unconcerned with French sophisms, though it does not exist either biologically or officially, exists as a marker of social status and also concerns people who are neither white, nor black, nor 'mixed' (Delphy, 2008: 29).

The point is to employ "the term of race to designate not a reality pertaining to genetics or more generally from nature, but to a social construction using, as does gender in relation to sex, certain morphological characteristics of individuals to constitute hierarchical groups" (Ibid).

The question that would arise is then the following: how is it possible to avoid the perverse effects (registration, ghettoization, etc.) of ethnic categorization of society, the aim of which is to broaden the process of social democratization and to achieve equality?

The perverse effects are well known. The policy of fighting against discrimination inevitably contributes to the social existence of categories of population; it effectively sanctions the reality of these categories. It is in fact necessary to qualify, by categorizing them, the victims of discrimination in order to be able to compensate them. Policy works to sanction the existence of these criteria. It contributes to 'ethnicizing' collective life'.²²

Opposition to ethnic statistics reflects the fear that a negative use of them might enhance already existing categorization and discrimination. On the other hand, for other researchers, to reject these type of statistics represents a form of voluntary blindness or of hypocrisy in the face of ethnic inequalities. The main argument in favour of ethnic statistics consists in arguing that 'forms of inequality which are not 'known' have no social existence, and thereby do not accede to the rank of the inequalities against which it is legitimate to fight'.²³ In fact, the opponents to ethnic statistics fear that they will be employed badly, as well as to fuel false representations. By constructing categories to define origin, there is a notion that this could congeal the category immanent and specific to the individual, from which s/he would not be able to get out, in contrast with social categories that express a social and economic system and whose borders are more permeable relative to status. The problem encountered

²¹ Colloquium of 19 October 2006, Paris, 'Statistiques "ethniques"', p.6, <http://www.halde.fr/Colloque-statistiques-ethniques.html>

²² Colloquium of 19 October 2006, Paris, 'Statistiques "ethniques"', p.8, <http://www.halde.fr/Colloque-statistiques-ethniques.html>

²³ *Ibid*, p.11.

by these statistics is that of pre-established categories. For some, the categories of ethnicity are too simplistic and differ according to the representations of each. In fact, the construction of categories sometimes leads only to caricature without illustrating the complexity of the phenomenon. The more reticent prefer to stress the complexity of the debate in order to avoid simplifying the categories through congealing representations, which ultimately do not provide a reflection of society. Will establishing an ethno-racial categorization in public statistics not lead to imposing a type of identification on people that the latter have not chosen? And are these statistics really necessary to fight against racial discriminations? Would it not be better to leave these borders imprecise, given the arbitrariness in the definition of the criterion of ethnicity and the identity assignation that it contains?

The debate surrounding 'ethnic' statistics or statistics of diversity remain problematic in France because **the term ethnic is ambiguous, depending on whether it denotes geographical origin, cultural aspects, diverse practices, or genetic traits. It can be understood differently depending upon the interlocutor and can fuel ambiguities.** And it also highlights the contradictions between the defence of republican values, which rejects any apparatus that could become a tool of fixed categorization and therefore feed into new forms of discrimination, and the requirement to construct a more reliable tool for those who precisely wish to enable the measuring of discrimination under the control of the ***Commission Nationale de l'Informatique et des Libertés (CNIL)*** and of the ***Conseil National de la Statistique (CNIS)***. The CNIL provides a legal framework for statistical activity and the CNIS considers the deontological and scientific aspects. Following the law on "Informatics and Freedoms", the CNIL set up a working group and pronounced a first opinion on this question in July 2005. A new working group was formed at the end of 2006, giving rise to ten recommendations, which were made public in May 2007. Even if today there are exceptions to the rule, in its article 8-I, the law prohibits the collection of 'data of a personal character that show, directly or indirectly, the racial or ethnic origins, the political, philosophical or religious opinions, **or the union membership of persons, or that are relative to the health or the sexual life of these latter**'.

Created in March 2009 at the request of the *Commissaire à la Diversité et à l'Égalité des chances*, Yazid Sabeg, the *Comité pour la Mesure et l'Évaluation de la Diversité et des Discriminations* (Comedd) submitted, in February 2010, a report titled *Inégalités et discriminations - Pour un usage critique et responsable de l'outil statistique* (Inequalities and discriminations – for a critical and responsible use of

statistical tools) concerning the highly controversial question of ethnic statistics, at a moment when the debate on national identity was in full swing. In the 30 recommendations proposed, statistics seem to be considered as indispensable for measuring discriminations but only under certain conditions. Since it is necessary to avoid recourse to ethno-racial criteria, the Committee therefore recommends basing them on the nationalities and countries of birth of the parents. Attempting to resolve the polemic, the main conclusions of the report advise:

- The provision of a regular system of statistical information on discrimination and diversity.
- The authorization, subject to consent and strict anonymity, of surveys about perceptions of belonging and discrimination, in the framework of research or experimental observation.
- Facilitating researchers' access to the data of INSEE.
- Establishing a yearly distribution in firms of a 'comparative situation report' (*rapport de situation comparée*, or RSC), based on the model established in the framework of negotiations on professional equality between men and women. These 'RSC-Diversity' reports would be carried out using a standard questionnaire to be filled in by the salaried employees of companies of at least less than 250 salaried employees. Origins would be described in it uniquely via countries of birth and the nationality of the persons surveyed and their parents. The collection of questionnaires and the exploitation of the responses would be carried out by specialist outside operators.
- The construction of a discrimination watchdog within the HALDE, since it would have to maintain control over this process.²⁴

What the researchers give us to understand about such collaboration work between institutions, is the same as what Didier Fassin is ultimately so right in telling us: we will be able to share in common space on the condition of **accepting "differences in the perception of reality"**, in the intelligent understanding of our social world.

²⁴ <http://www.cnil.fr/la-cnil/actu-cnil/article/article/91/le-rapport-du-comedd-sur-les-statistiques-de-la-diversite-sinscrit-dans-la-suite-des-recommandatio-1/>

4. The future and the reforms to come

4.1. Balance-sheet of the HALDE: 2005-2009

According to the 2009 annual report, the HALDE reports that in five years it has received more than 30,000 complaints, giving rise to the deliberation by the 'College' of 1,148 of them. Its recommendations were followed in 64% of cases and 78% of the observations that it was led to present to the courts were followed. Today it is present in 81 French metropolitan departments and overseas territories.²⁵ It regards that it has made progress in the matter of equality of treatment and has succeeded in obtaining legal decisions to compensate for prejudice suffered in a bid to change attitudes and practices. By making its decisions public, the HALDE considers that feelings of resignation have faded and persons are encouraged persons to address themselves to it. In addition to its legal actions, the HALDE claims that its implementation of a framework of reference has been effective, as has its setting up of apparatuses, formulation of recommendations, and developing of measures for training and prevention.

But the departure of Louis Schweitzer, who headed the HALDE for nearly 6 years, provoked a polemic over the way he had managed the institution (bad management, financial opacity, bloated budget, exorbitant rent²⁶, conflicts of interest, lack of independence, etc...), bequeathing his successor with a series of problems to solve. Following the denunciation of the French *Cour des comptes* (Court of Audit of France), the UMP (Union for a Popular Movement, a French right-wing political party) asked Louis Schweitzer to explain himself on the above points. According to a report revealed by the weekly newspaper *Marianne*, Louis Schweitzer was reproached for an 'absence of control', for being involved in 'markets at the limit of legality' and for the 'opacity surrounding financial operations', particularly in the sector of communications.

4.2. A new president: what does the future hold in store for the HALDE?

On 16 April 2010, by a decree of the Presidency of the Republic, Jeannette Bougrab (jurist, lecturer in public law and placed in secondment by the *Conseil d'Etat*) was appointed president of the HALDE to succeed Louis Schweitzer. Apropos of the polemic over its expenditure from 2005 to 2010, Jeannette Bougrab has remained cautious and limited her commentaries until the *Cour des comptes* hands down its

²⁵ 2009 Annual Report, p.54.

²⁶ The annual rent for the headquarters of 11 rue Saint-Georges (IXe) for 2,304 m² is 1,831,952 euros, which is 795 euros per m² as compared with 308 in the neighbouring street.

decisions. Since taking office, she has had to confront a certain desire for change. However, last month, she pressed charges against the newspaper *Le Canard enchaîné*, which accused her of having set up a vote in early May in order to double her monthly pay. The accusation gave rise to death threats against her, for which she pressed charges against X. Whether or not the accusations against Louis Schweitzer and Jeannette Bougrab prove true, it nevertheless seems clear that the government has the HALDE in its sights.

The HALDE aims to be an independent institution, however the first modification to it, which is to be decided soon, will result in the HALDE's absorption within the Office of the Mediator of the Republic, which would take on the function of Defender of Rights (the position of Mediator is appointed by the Council of Ministers at the suggestion of the President of the Republic). Jeannette Bougrab moved immediately to counter this proposal, offended by the dilution of several entities into one and the same body, as well as by the question of their independence, since she is cognizant of the fact that its president would be appointed by Nicolas Sarkozy. But was the new president of the HALDE not also appointed by President Sarkozy? The HALDE's absorption, as well as that of the *Défenseur des enfants et de la Commission Nationale de déontologie de la Sécurité* (CNDS), is therefore perceived as a genuine regression in matters of the defense of fundamental liberties. It is held to mark a retreat in the implementation of public policy in favour of the promotion of equality and of monitoring of the constitutional obligation of non-discrimination.

In actual fact, however, opinions are much divided concerning the **effectiveness of the HALDE**. Some think that the institution has passed its tests and proven indispensable in the fight against discrimination. Others think that it is instrumentalized by the government. Today the question that has to be asked bears on the consequences of such an absorption, as well as on the future of the HALDE, and of its specificity in the wake of that decision. Is the question not ultimately one of the effectiveness of the public policies concerning the fight against discrimination? The actors involved seem quite pessimistic as regards this new measure.

4.3. European commitment

While present stakes concern the suppression of the HALDE—itsself created upon European Union request in order to fight against discrimination and to foster equality of treatment within each member state²⁷—the European Commission Against Racism and

²⁷ Directives 2000/43/CE of 29 June 2000 and 2002/73/CE of 23 September 2002

Intolerance (ECRI)²⁸ has reaffirmed the institution's essential role in its fourth report on France.

Concerning its involvement outside of French borders, the HALDE appears to be engaged in trying to have its actions instituted in European policies. To this end, it is pursuing cooperation with homologous institutions in the states of the European Union, but also in Canada and in the United States.

Conclusion

Legal professionals have moved to verify the effectiveness of the HALDE, which is nonetheless ripe for further improvement. They are in favour in increasing its legal means, and of the strengthening of its capacities of action and not of their dilution. Does France not ultimately require real reforms that would make it possible to intensify the fight against discrimination? Does it not need to continue conducting research in this domain?

The desire to promote diversity, equality of opportunity, as well as to counter discrimination is perceived as the fight of a society that is confronting its own demons. This is because, despite all these measures, the 'hatred of others' persists. Eric Fottorino, in an article published in *Le Monde* (18 August 2010) and entitled "L'amour de soi et la haine des autres" (Self-love and Hatred of Others), neatly sums up in a few lines France's paradoxical situation as concerns racism and xenophobia and its ongoing inability, on both the left and the right, to make the situation better. Indeed, even the UN has denounced the rise of xenophobia in France. According to it, by creating the Minister of Immigration and National Identity, in May 2007, and by pursuing new policies of security, Nicolas Sarkozy is building

prejudices, stereotypes, and internal enemies, (...) of distrust between an US and a THEM, between the France of the 'true' French and the sufferance of those who do not steal or kill but bear the stigmata of the foreigners. (...) The result is this: words are chosen as so many weapons to create polemics and anesthetize thought, (...) the authorities are closing the door on all intelligent reflection. At a time when it is necessary to make proposals, the only recourse left is protest. There is a refusal to go back to the sources of the evils. (...) This policy of humiliation gives off a degrading vision of public action.²⁹

This, effectively, is enough to provide the HALDE with even more work.

²⁸ The body of the Council of Europe comprises independent experts whose mission is to fight against racism, xenophobia, anti-Semitism and intolerance. http://www.coe.int/t/dghl/monitoring/ecri/default_fr.asp

²⁹ <http://www.ldh-toulon.net/spip.php?article4029>

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