Strategic Litigation in the Right to Education. A Case Study of Discrimination in Mayotte.

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Abstract

Strategic litigation on Economic, Social and Cultural Rights (ESCR) claims has been studied at great length, including its impact on redistributive justice and social changes. However, a major factor of rights-denials is that hidden and diffuse practices of the administrations in charge of distributing social rights are happening far from the judiciary scrutiny. They often take the form of abusive requests of additional documents at the front desk. These widespread denials are often made orally and thus, constitute administrative decisions difficult to prove. The example of the French oversea-territory, Mayotte, is an evidence of it. Discriminations against foreign children take the form of denial to access schools because of abusive administrative requests during the enrollment process. The shortage of available public services and infrastructures opens the door to such abusive decisions, administrative arbitrary and discrimination. This unchanging situation may lead to consider that legal mobilizations before Courts are inefficient to address this type of inequalities indirectly impacting certain groups. However, quite the opposite, our approach is to research how courts could end efficiently diffuse administrative denials of those rights. This will be assessed through a particular case study. A new type of action recently introduced in France may find a real interest in this respect. Its collective dimension as well as its potential in bringing issues that are broadly shared within the society may make a difference in highlighting the need for public infrastructures and structural changes. Indeed, France recently introduced a procedure based on the pattern of the class action (‘*action de groupe’*). It was opened to very few legal matters, including discrimination. Not only its collective dimension but also the focus on discrimination may carry a strong potential in litigating ESCR. It is thus worth researching how this new type of action may support claims in access to education in Mayotte. Given that my assumption is that this new type of action could make a difference in contrast with usual procedures in terms of success in a material and social sense, in the following developments, I solely analyze the potential victory of the case study in Court. In order to assess so, I use a specific methodology drawn from strategic litigation assessments in the matter of equal pay legal mobilization in Europe, namely, the Legal Opportunity Structure (LOS). I then apply it to the example of the French department of Mayotte.

Table of Contents

List of Abbreviations

CESCR	Committee on Economic, Social and Cultural Rights
CJA	Code de Justice Administrative
CRC	Convention on the Rights of the Child
ECtHR	European Court of Human Rights
ESCR	Economic, Social and Cultural Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
LOS	Legal Opportunity Structures
UN	United Nations

In the following developments, all the foreign quotes are translated to English by me.

Introduction

Strategic litigation on Economic, Social and Cultural Rights (ESCR) claims has been studied at great length, including its impact on redistributive justice and social changes.[1] Indeed, "frequently, lawyers point out the boldness of the South-African judge when ordering distribution of retroviral treatments to seropositive mothers and young children (Case of TAC Campaign), of the South American judge to order the protection of street children (Case of Villagran Marales v. Guatemala), or of the French judge to invalidate the 'new job contract'."[2]

These legal mobilizations tend "to let us forget that the rights claims that come to courts are the ones that have not been satisfied by other institutions more commonly in charge of rights enforcement."[3] Indeed, rights denial is not only a matter of the judiciary. My experiences in supporting claims on economic and social rights in France brought me to a frustrating conclusion. I observed that a major factor of rights-denials is that hidden and diffuse practices of the administrations in charge of distributing social rights were happening far from the judiciary scrutiny. They take the form of abusive requests of additional documents at the front desk. These widespread denials are often made orally and thus, constitute administrative decisions difficult to prove. As summarized by Diane Roman, a 'bureaucratic management of poverty'[4]

[1] As for example, Brinks, D. M., & Gauri, V. (2014, June). The Law's Majestic Equality? The Distributive Impact of Litigating Social. *Perspectives on Politics, 12*(2), pp. 375-393. Retrieved from https://www.jstor.org/stable/43279912; Dallara, C., & Vauchez, A. (2012). Courts, Social Changes and Judicial Independence. *Global Governance Programme*(2012/2); Tushnet, M. V. (2006). The Role of Courts in Social Change: Looking Forward? *Drake Law Review, 54*, pp. 909-922

[2] Roman, Diane (Dir.). (2010, November). *« Droits des pauvres, pauvres droits ? ». Recherches sur la justiciabilité des droits sociaux.* p. 50. Retrieved from onpes.gouv.fr: https://onpes.gouv.fr/IMG/pdf/Justiciabilit_C3_A9_droits_sociaux_rapport_final.pdf. Original: « il est fréquent que le juriste relève l'audace du juge sud-africain pour exiger la distribution de rétroviraux aux mères et jeunes enfants séropositifs (aff. TAC Campaign), du juge sud américain pour ordonner la protection des enfants des rues (aff. Villagran Morales c. Guatemala), ou du juge français pour invalider le Contrat nouvel embauche. »

[3] Revillard, A. (2017). Social Movements and the Politics of Bureaucratic Rights Enforcement: Insights from the Allocation of Disability Rights in France. *Law & Social Inquiry, 42*(2), p. 458

[4] Phrase borrowed from Roman, D. (2017). Le juge et la justice sociale. *Délibérée, 2*(2), p. 8. doi:https://doi.org/10.3917/delib.002.0006

take place. It allows arbitrary and discriminatory decisions of the administration. The example of the French oversea-territory, Mayotte, is an evidence of it. According to the French Public Defender of Rights, "testimonies bring to light discriminations against foreign children who are denied access to education because of abusive administrative requests during the enrollment process or a lack of spaces in school establishments."[5] The shortage of available public services and educational infrastructures opens the door to such practices. The report of the Public Defender of Rights tends to support such a theory by showing that the majority of children who are denied the right to education are from the Comores. [6] This happens also as part of the management of insufficient resources allocated. According to a recent report published by the French parliament "Mayotte is two times less favored in terms of spending policies among the territories governed by Article 73 of the Constitution and sometimes less favored than other territories of comparable size benefiting from an autonomy under Article 74 of the Constitution".[7] The report provides a potential explanation. A non-genuine census of the population, which does not take into account the reality of the migratory situation, may take place. [8] As a result, the needs of the territory may be wrongly assessed. Only recently, the first case in which the administration refused to register a child to school was brought to court through an emergency procedure. The judge concluded to the absence of emergency and stated that the territory were suffering an immigration inflow, of a population showing little concern for public services

[5] République Française, Défenseur des droits. (2019, September). *Les outre-mer face aux défis de l'accès aux droits. Les enjeux de l'égalité devant les services publics et de la non-discrimination.* p.10. Retrieved from https://juridique.defenseurdesdroits.fr/doc_num.php?explnum_id=19235. Original : « Les témoignages recueillis mettent aussi au jour les discriminations subies par les enfants étrangers privés de scolarisation, du fait de demandes administratives abusives lors de l'inscription ou du manque de place dans les établissements scolaires. »
[6] *Ibid.*
[7] Kamardine, M. (2019). *Rapport N° 2029 relative à la programmation du rattrapage et au développement durable de Mayotte.* République Française. Assemblée Nationale, p. 28. Retrieved from https://www.assemblee-nationale.fr/dyn/15/rapports/cion_lois/l15b2029_rapport-fond.pdf. Original : « Mayotte, qui est par deux fois la moins bien dotée des collectivités régies par l'article 73 de la Constitution et qui est même parfois moins favorisée que des collectivités de taille comparable bénéficiant de l'autonomie garantie par l'article 74 de la Constitution. »
[8] *Ibid.*

functioning. [9] It may lead to consider that legal mobilizations before courts are inefficient to address this type of inequalities indirectly impacting certain groups. They are so, especially when considering how the ones living in poverty are placed in a situation of vulnerability in the face of the very first institutions supposed to satisfy social rights. However, quite the opposite, our approach is to research how courts could end efficiently widespread administrative denials of those rights.

This will be assessed through a particular case study. A new type of action recently introduced in France may find a real interest in this respect. Its collective dimension as well as its potential in ending systemic discriminations may make a difference in highlighting the need for public infrastructures and structural changes. Indeed, France recently introduced a procedure based on the pattern of the class action (‘*action de groupe’*). It was opened to very few legal matters, including discrimination. [10] Not only its collective dimension but also the focus on discrimination may carry a strong potential in litigating ESCR.[11] It is thus worth researching how this new type of action may support claims in access to education in Mayotte. According to Siri Gloppen, “[s]uccess in litigation can be evaluated from three different perspectives: success in court; success in the material sense; and success in the social sense.”[12] Given that my assumption is that this new type of action could make a difference in contrast with usual procedures in terms of success in a material and social sense, I will solely analyze the potential

[9] Tribunal Administratif de Mayotte, ord. 14 March 2018, n°1800229

[10] République Française. (2016, November 19). Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle. *JORF, 0269* (Texte n° 1, Chapter V). Retrieved from https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000033418805/

[11] Equal Rights Trust. (2014). *Economic and Social Rights in the Courtroom. A Litigator’s Guide to Using Equality and Non-Discrimination Strategies to Advance Economic and Social Rights.* London: The Equal Rights Trust. Retrieved from https://www.equalrightstrust.org/ertdocumentbank/ESR_Guide.pdf

[12] Gloppen, S. (2008, January). Litigation as a strategy to hold governments accountable for implementing the right to health. *Health and human rights, 10*(2), p. 24. doi:10.2307/20460101

victory in Court. In the following developments, I will explain the methodology used in assessing the opportunity of engaging in such a legal mobilization. I will then apply it to the example of the French department of Mayotte following those criteria.

Chapter I - Methodology

The theoretical action envisioned carries multiple specificities. First, it has barely ever been used in France since its creation. [13] Second, it relies on a potential shift of approach of the French judiciary which had developed the concept of discrimination solely on isolated and individual behavior and barely regarding systemic discriminations. [14] In addition, the latter matter is rarely litigated because it raises multiple difficulties, including regarding evidence. [15] Third, it touches upon the question of investment and creation of infrastructures to enable access to rights and thus redistribution, instead of the very content of a right. This particularity is also related to the reluctance of French judges to adjudicate upon economic and social rights when it affects public spending and public policies. [16] Last, it has regard to inequality between territories of the Republic, something remaining "taboo" in France given that the Republic is considered as being one and indivisible under the constitution. [17] Thus, there is a strong need for a methodology to disentangle those difficulties in a clear assessment of the opportunities offered by the action itself.

The impact of courts on social changes and judicial activism have been studied in "the United States and other common law countries, where the court system is core in both the production and the implementation of legal norms."[18] However, strategic litigation should not be approached the same way in countries "where courts attach much more importance to

[13] Peyronnet, M. (2021, January 11). L'action de groupe « discrimination » a déjà atteint ses limites. *Dalloz Actualité*. Retrieved from https://www.dalloz-actualite.fr/flash/l-action-de-groupe-discrimination-deja-atteint-ses-limites

[14] Fondimare, E. (2016, March 4). La difficile appréhension juridictionnelle des discriminations indirectes fondées sur le sexe. *La Revue des droits de l'homme, 2016*(9), p. 4. Retrieved from http://journals.openedition.org/revdh/2055

[15] See below

[16] Gay, L. (2020). Des droits part (entiere)? la justiciabilite inaboutie des droits sociaux en droit constitutionnel francais. *Cahiers de Droit, 61*(2), p. 422

[17] Conseil national d'évaluation du système sanitaire. (n.d.). *Inégalités territoriales*. Retrieved from cnesco.fr: http://www.cnesco.fr/fr/inegalites-territoriales/

[18] Revillard, A. (2017). Social Movements and the Politics of Bureaucratic Rights Enforcement: Insights from the Allocation of Disability Rights in France. *Law & Social Inquiry, 42*(2), p. 455

legislation than to case law"[19], such as France. Instead, inspiration will be drawn on legal opportunity assessment which has been used regarding discrimination in European civil law countries, sharing similar legal structures.

1.1 Criteria of Assessment in European Civil Law Countries

In analyzing the success of claims for equal pay between men and women in European civil law countries, Gesine Fushs observed that "[t]he existing literature stresses two sets of factors that variably combine to determine LOS [legal opportunity structures]: legal access, and substantive and procedural law."[20] The Legal Opportunity Structures (LOS) is a set of criteria to assess the opportunity to bring a case before the court and the chances for potential legal mobilization in strategic litigation. Legal access refers to the potential barriers in prior access to courts such as costs and standing. Substantive and procedural law has regard to the very matter of the procedure. While the first refers to the legitimacy of the claim in terms of material provisions and enforceability, the second refers essentially to the burden of proof and the Court's obligation to investigate. In the second, the potential intervention of an independent institution plays an important role, something likely to happen since the French Public Defender of Rights published the above-mentioned report on the issue. The critical aspects are the existence of sufficient material provisions regarding the right to education and the burden of proof applied in the matter of discrimination. As the same author puts it, "[a] conducive opportunity structure would explicitly cite equal pay in the law, have a specific definition of what constitutes equal pay, as well as a clear definition of the judicial procedures available." Thus, in our case study, the same reasoning would involve an explicit citation of equal access to education in the law, a definition of what it means and a definition of the procedures available.

[19] Fuchs, G. (2013). Strategic Litigation for Gender Equality in the Workplace and Legal Opportunity Structures in Four European Countries. *Canadian Journal of Law and Society*, *28*(2), p. 190. doi:10.1017/cls.2013.21
[20] *Ibid*. p. 192

The developments will be following the line of this methodology. It will thus not examine the practical aspects and difficulties in preparing a legal mobilization of this size neither will I develop the ethical issues raised by the representation of those primarily affected in terms of empowerment. These issues are to be solved in separate works.

The above-presented structure of assessment may be enriched by other works in which analyses of successful legal mobilization regarding ESCR have been conducted.

1.2 Criteria of Assessment in Economic and Social Rights Experiences

Aside from the criteria above-mentioned, others have been developed with respect to ESCR. Taking into account the learnings from a legal mobilization in Bangladesh, authors analyzed the "enablers of successful legal mobilization". Two of them are of particular interest regarding mobilization before courts. First is a "progressive legal framework" and second is a "broadly sympathetic judiciary". [21] Drawing on this set of criteria, some features will help to analyze the presence of those two conditions. Namely, I will research the direct enforceability of international standards, the evolution of the courts' interpretation over time, whether the legal framework constitute an enabler, the existence of a similar ruling in regional jurisprudence, the familiarity of judges with the litigated matter, the existence of a rich national jurisprudence. In addition, the spirit in which was written the law is of utmost importance. This set of criteria will be used as a secondary source of assessment in order to identify the potential room for judicial activism.

[21] O'Neil, T., Valters, C., & Farid, C. (2015, March). *Doing legal empowerment differently.* p. 9. Retrieved from odi.org: https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9585.pdf

Chapter 2 - Application to the Case-study of the Right to Education in Mayotte

This section will be dedicated to discussing the three criteria developed in the methodology regarding the legal opportunity structure, namely, the legal access, the substantive law, and the procedural law. While the legal access criterium raises little difficulties, the focus will be placed on the available substantive laws applicable to this case and procedural laws, including the burden of evidence which is particularly critical in discrimination matters. [22]

2.1 The Legal Access

In respect of the *legal access* criterium, the French group action offers a strong LOS because "[s]trategic litigation is more likely when legal rules allow for, or facilitate, group action."[23] Indeed, the legal standing of an association alleviates the individual cost, either financial or emotional, of a procedure and requires a low level of mobilization from the affected people who cannot allocate much time and energy in such procedures.

The French group action may be brought when multiple individuals are victims of a similar violation caused by the same person or entity. It can seek to obtain the cessation of the breach, reparation for victims, or both. Only accredited associations, representing the victims, may bring it before Court. [24]

French administrative litigation requires as a pre-condition to any litigation, the existence of an administrative decision to be contested. It can be implicit as well as explicit. While this is a clear barrier to multiple possible actions, especially when there is no obligation of the administration to deliver a written answer to the request, the group action facilitates this burden. Indeed, a prior letter of notice demanding to cease the non-compliance to its obligation is to be

[22] Fondimare, *Ibid*., p. 6
[23] Fuchs, *Ibid*., p. 192
[24] Art. L. 77-10-1 et s. CJA

transmitted to the administration in charge. [25] The absence of response to this letter may logically constitute an implicit decision of the administration.

Another obstacle to address diffuse denials of rights is that the group action implies that multiple violations have been committed by a sole person or entity. Tackling widespread inequalities thus requires bringing into courts one sole entity or person creating a situation of discrimination. This has been tried very recently in a group action against the Prime Minister and multiple ministries tackling ethnic profiling. The results of such action will be critical in assessing this issue of legal access offered by the group action. [26] In order to attribute responsibility to one person or entity solely, it is necessary to step back to the event giving rise to the damage[27] while keeping a substantial link of causality between the event and the damage. [28] According to the above-mentioned report of the parliament, the event would be the flaws in the census of the need of the population regarding the right to education which refuses to take into account the population with migration background. In her submissions, Marjane Ghaem, the first attorney to bring cases of denial of the right to education in Mayotte, brought an element that may support this theory. She cited precedents of the Council of State expressly stating that the city hall, on behalf of the State, must set a list of children who fall under the obligation to enroll in school. Hence, an illegal decision in this context may engage solely the responsibility of the State. [29]

[25] Art. L. 77-10-1 et s. CJA
[26] Halissat, I. (2021, January 27). Contrôles au faciès : des ONG lancent une action de groupe contre l'Etat. *Libération*. Retrieved from https://www.liberation.fr/france/2021/01/27/controles-au-facies-des-ong-lancent-une-action-de-groupe-contre-l-etat_1818552/
[27] In French, it is called 'le fait générateur'
[28] Van Lang, A. (2020, July). *Droit de la responsabilité administrative.* Retrieved from univ-droit.fr: https://univ-droit.fr/unjf-cours/24311-droit-de-la-responsabilite-administrative
[29] Marjane Ghaem cites the jurisprudence of the Conseil d'Etat, 19 décembre 2018, N°408710

In light of these elements, applying the legal access criterium shows that the French new class-action offers a strong and coherent legal avenue to tackle efficiently the issue at stake. However, the substantial law criterium may offer a different perspective.

2.2 The Substantive Law Enforcement of the Right to Access Functioning Educational Institutions

The international standards on ESCR are sparsely enforced before courts in France. [30] It is thus necessary to research how the right to education is enforced in constitutional and non-constitutional laws in order to identify the potential existence of an obligation of the State to make educational institutions available in sufficient quantity and accessible for everyone.

2.2.1 Direct Enforceability of International Standards

Article 26 of the Universal Declaration of Human Rights provides that "[e]veryone has the right to education." Debates within the doctrine have been raised as to whether the right to education entails necessarily a right to access educational institutions beyond the mere freedom of the parents to provide education in accordance with their own culture and beliefs. [31] In this respect, the Committee on Economic, Social and Cultural Rights (CESCR) provided a clear answer. The right to education is protected by Article 13 and 14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). According to the General Comment N° 13 on the right to education, "functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party."[32] In addition, the right to education is enshrined in several other conventions ratified by France such as the Convention on the Rights of the Child (articles 28), and the Convention on the Elimination of Racial

[30] See below

[31] Valette, M. F. (2018). Le droit à l'éducation à l'épreuve des migrations en France. *Revue européenne des migrations internationales*, *34*(4), pp. 77-78. Retrieved from https://journals.openedition.org/remi/11712

[32] United Nations Committee on Economic, Social and Cultural Rights. (1999). *General Comment No. 13 (Twenty-first session, 1999). The right to education (article 13 of the Covenant).* §6. Retrieved from https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f1999%2f10&Lang=en

Discrimination (article 5). Finally, at the regional level, the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) mentions that "no person shall be denied the right to education" and uses indistinctively "right to education" and "right to instruction"[33]. According to the special rapporteur on the right to education, the right entails "free and compulsory primary education for all, the progressive realization of secondary and tertiary education, and the immediate non-discrimination in their application, are universally recognized."[34]

The nature of the State's obligation shifts when the non-discrimination principle is involved. The action focusing on discrimination may bring the benefit of replacing the usual progressively realizable obligation of the State in matters of ESCR to an immediate obligation to protect these rights. The Committee further develop on the States' obligation in specifying that "[t]he prohibition against discrimination enshrined in article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination."[35] Thus in matters of discrimination, the obligation is no more progressive or adapted to resources but immediate. It may also shift the focus away from ESCR upon which the judiciary is often reluctant to adjudicate. [36] Beyond the mere immediate obligation, it also provides to the judge an objective and easy criterion upon which to adjudicate this set of rights and which draws the attention away from the issue of resources by providing an element of comparison.

[33] Valette, *Ibid*., p. 78
[34] United Nations Human Rights Council. (2013). *Report of the Special Rapporteur on the right to education, Kishore Singh. Justiciability of the right to education*, §13. Retrieved from https://undocs.org/A/HRC/23/35
[35] United Nations Committee on Economic, Social and Cultural Rights, *Ibid*., §31
[36] See below

Although French judges accepted to control the validity of laws and administrative acts in accordance with international treaties[37], in general, ESCR have been hardly made directly enforceable before courts. Indeed, very few provisions of the ICESCR and the European Social Charter are considered as sufficiently clear and straight-forward by the judge to confer subjective rights to individuals. [38] The condition of having a broadly sympathetic judiciary appears to be missing when it comes to the Economic, Social and Cultural Rights (ESCR) as provided in international standards.

However, in a case of 2013, a court of the first instance, granted the request against a city hall decision to refuse the registration of a child in school because he did not reside permanently there. The Court based its decision on the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, on the Convention on the Rights of the Child and on the 1946 Preamble of the Constitution. [39] The ICESCR is not mentioned, which implies that its provisions are not considered as directly enforceable. However, the Convention on the Rights of the Child (CRC) is mentioned without specifying which provision. In 2007, the Council of State explicitly mentioned that Article 28 of the CRC was not directly enforceable. [40] In contrast, Article 3 on the best interest of the child was considered as being directly enforceable. [41] Interestingly, Article 2 on the principle of non-discrimination was considered as not directly enforceable by the administrative jurisdictions, while in contrast was considered as being directly enforceable by the judicial order. [42] Hence, it is likely that by

[37] Conseil d'Etat, 20 October 1989, N°108243
[38] Nivard, C. (2012). L'effet direct de la charte sociale européenne devant les juridictions suprêmes françaises. *Revue des droits et libertés fondamentaux*(28). Retrieved from http://www.revuedlf.com/cedh/leffet-direct-de-la-charte-sociale-europeenne-article/ ; Conseil d'Etat, 5 September 2005, N°248357, *Association collectif contre l'handiphobie*
[39] Tribunal Administratif de Cergy-Pontoise, 15 Novembre 2013, n°1101769. https://www.gisti.org/IMG/pdf/jur_ta_cergy_2013-11-15_ecole.pdf
[40] Conseil d'Etat, 9 July 2007, N°297871
[41] Conseil d'Etat, 9 January 2015, N°386865
[42] Cour de Cassation, 25 June 1996, N°94-14858, *Mazureck* ; Cour de Cassation, 16 June 1999, n°98-84538 ; Conseil d'Etat, 24 août 2011, N°320321

referring to the CRC, the Court's merely attempted to demonstrate that the best interest of the child was taken into account in its overall reasoning. The concept remains broad and does not explicitly entails a right to education.

Given the very weak enforceability of international standard in France, it is necessary to find support in the national legal framework.

2.2.2 Enforceability in the National Legal Framework

Since 1971, the Constitutional Council stated that the Preamble of a former 1946 Constitution acquired a constitutional value. [43] In this text, a number of social rights are mentioned and the right to instruction is referred to in Alinea 13. According to this provision, the Nation guarantees equal access to education and culture. An explicit mention of equal access to education exists inside the French legal framework, one of the conditions for a strong LOS. Still is missing however the explanation of what the right entails exactly.

The idea that instruction and social assistance may translate into subjective rights that may be claimed by individuals and may constitute obligations upon the State was widely rejected within legal doctrines and the jurisprudence of the Constitutional Council for long.[44] Two explanations may be given to this. First, the right to education and more broadly social rights are completely absent from the French Bill of Rights. But also, Alineas of the 1946 Preamble are broad and declaratory. However, in a recent decision of the Constitutional Council, an obligation of education free of charges at every stage, even in higher education, was declared in light of the Alinea 13. [45]

Through the procedure of "référé liberté", the Council of State, higher jurisdiction competent in this matter, also recognized multiples social rights as being fundamental rights

[43] Conseil Constitutionnel, 16 July 1971, N°71-44 DC
[44] Gay, *Ibid*., p. 408
[45] Conseil Constitutionnel, 11 October 2019, N°2019-809 QPC

and accepted to control the validity of administrative decisions to these rights. [46] As a consequence, some of the rights enshrined in the 1946 Preamble are recognized through this procedure as being directly enforceable. It did so regarding the above-mentioned Alinea 13 in a matter of equal access to education of people with disabilities. In this case, the authorities refused to allocate a school aid to a child with disabilities. The Council of States considered that equal access to instruction was a fundamental right guaranteed by the 1946 Preamble. However, it did not hold to a serious and manifest violation because the child was yet enrolled in school despite the absence of the school aid. [47] According to Laurence Gay, since 2010 the Council of State is more willing to recognize the direct enforceability of social rights enshrined in the 1946 Preamble. However, she argues that a common feature of the decisions recognizing the direct enforceability is that it is also enshrined in the laws voted by parliament. According to the author, this is probably because the judiciary is reluctant to involve in resource settings issues, historically considered as a competence of the parliament. In any way, this would confirm her position that the provisions of the preamble are not considered to be directly enforceable autonomously. [48]

Regarding the right to education, the advantage is that a principle of equal access is also guaranteed in Article L. 111-1 of the education code. In addition, the law also defines what entails such equal access, namely it specifies that public services ensure the inclusion of all children without distinction and the need to reinforce education in poor areas. However, the law itself does not explain as such that equal access would entail an obligation of the State to provide "functioning educational institutions and programmes […] in sufficient quantity"[49] in contrast to the general comment of the CESCR above-mentioned. Neither is clearly requested

[46] Gay, *Ibid.*
[47] Conseil d'Etat, 15 December 2010, N°344729
[48] Gay, *Ibid.*, p. 419
[49] See above

a prior and sufficient census of the needs in each territory. Hence, the national legal framework does not offer a strong LOS.

The jurisprudence of the Council of State provides some limited descriptions of the State's obligation under the right to education. In a case of 2009, the Council of State granted a request to condemn the French State on the ground of its failure to provide education to a child with disabilities. The Council of State held that the public authorities' obligation in the matter of education was an obligation of result, as opposed to an obligation of means. The decision thus, clearly affirmed that the lack of infrastructure was not a justifiable reason for the State to escape its obligation. [50] However, the decision is grounded on Article L.111-1 of the education code solely. The absence of any mention of the principle of equality or non-discrimination shows a reluctance of judges to use the later concept.

Remaining the fact that most of these decisions involve children with disabilities. It is doubtful that such a solution is adaptable to all types of failure to register children to school. Indeed, a law of 2005 has defined clear obligations of the State in terms of accessibility to public institutions such that rooms for judiciary activism toward inclusivity in this matter were widely open by the spirit of the law itself. [51] Such law does not exist regarding the equal access of the people with a migration background. Besides, *de facto*, similar decisions involving this group do not exist. Although a decision of 1996 held that the administration was not legitimately entitled to request a resident permit to grant the enrollment in secondary education, the decision does not reject by itself the denial of the right to education on the ground of the administrative status. [52] Two cases regarding nationality discrimination are, however, of significant importance. A tribunal of the first instance has invalidated a decision of the city hall

[50] Conseil d'Etat, 8 April 2009, N°311434, *M. et Mme A*
[51] Loi N° 2005-102 du 11 février 2005 pour l'égalité des droits et des chances, la participation et la citoyenneté des personnes handicapées
[52] Conseil d'Etat, 24 January 1996, N°153746, *Lusilavana*

of Casseneuil to deny the enrollment of two Morrocan children in order to limit the inflow of immigration in the city. [53] In addition, the highest administrative jurisdiction also invalidated such denials in enrolling a kinder garden. It specified that although there was not any obligation upon the State to register children at this level of education, denial cannot be based on discriminatory grounds. [54] Although it shows clear benefits of raising the principle of non-discrimination, especially when the obligation of the State is unclear regarding the right at stake, both decisions are old and isolated.

One element may be of substantial importance in identifying an obligation of public authorities to provide educational infrastructures in sufficient quantity. A law of 2008 created a right of enrolled children to be received within the premises of kinder garden and primary schools all along the school time. [55] The Constitutional Council deduced that it entails an obligation of the State to provide sufficient resources to territorial authorities to support the creation of sufficient public services to complete this right. [56] As Virginie Donier puts it "the correlation between the recognition of a right and the creation of public services is expressly displayed."[57] Still, this obligation remains fragile. According to Virginie Donier the jurisprudence usually uses the concept of *general interest* to hide behind the power of appreciation of public authorities and to justify choices entailing social inequalities. [58]

In this respect, the use of the concept of discrimination may play a role in shifting such reasoning.

[53] Tribunal Administratif de Bordeaux, 14 June 1986, *El Aouni c/ maire de Casseneuil*
[54] Conseil d'Etat, 27 February 1981, N°21987
[55] Loi N°2008-790 du 20 août 2008 instituant un droit d'accueil pour les élèves des écoles maternelles et élémentaires pendant le temps scolaire (1)
[56] Conseil Constitutionnel, 7 August 2008, N°2008-569 DC
[57] Donier, V. (2010). Le droit d'accès aux services publics dans la jurisprudence : une consécration en demi-teinte. *Revue de droit sanitaire et social*. p. 800. Original: « La corrélation entre la reconnaissance d'un droit et la création d'un service public est alors expressément affichée »
[58] Donier, *Ibid*., p. 804

2.3 The Substantive Law enforcement of the principle of non-discrimination

While using the principle of non-discrimination in respect to human rights enforcement carries the many advantages mentioned above, it also carries the challenge of fitting the narrow definition of discrimination and a general reluctance to apply the provisions regarding discrimination. In order to assess the potential room for bold reasonings of national judges, it is necessary to observe whether the legal framework offers a strong opportunity by analyzing the enforcement of the principle of non-discrimination.

2.3.1 The Enforcement of the principle

Formally the legal definition may be found in Article 1 of the law adapting the European Union directives into the French system. Constitute direct discrimination, the situation in which, on the ground of one of the prohibited criteria, an individual is treated in a less favorable way than another one in a comparable situation. Constitute indirect discrimination, a provision, a criterium or a practice that is apparently neutral but entails, because of one of the prohibited criteria, a particular disadvantage to one in comparison to another. [59] Although the abusive requests of the administrations excluding *de facto* children from the Comores from schools, could be interpreted as direct discrimination, it would be likely considered by courts as being indirect. Indeed, the practices of the administration requesting additional documents may be seen as neutral. In addition, in comparable cases, the European Court of Human Rights (ECtHR) has concluded to indirect discrimination regarding segregation of Roma children in school. In the case *of D.H. and Others v. Czech Republic*, special classes for children with mental disabilities were organized and the decision to place a child in such class was based on a psychology test. The probability of Roma children being placed in these classes was twenty-seven times more likely than other children. The Court considered that there was indirect

[59] Article 1, Loi N°2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations (1)

discrimination. This development may resonate with the present case study in that the requests of administrations for additional documents and the lack of space at school are apparently neutral but affect disproportionately Comorans statistically. However, analyzing indirect discrimination, the ECtHR gave the possibility to justify an unfavorable treatment by an objective and reasonable justification. To prove the existence of indirect discrimination, is needed that the difference of treatment was not objectively and reasonably justified and that someone in a comparable situation would not suffer the same treatment. [60] Thus, the legal outcome of the proposed group action become more uncertain when such component enters into consideration. Indeed, it brings the additional condition that the judge does not consider as a reasonable justification the insufficiency of education infrastructure to exclude children from the Comores.

In addition, discrimination is not a well-known principle in the French jurisprudence of the Council of State either. Indeed, "a prior analysis of the jurisprudence allowed to enlighten some tendencies linked to the specific attachment of the administrative judge to the principle of equality and to the secondary place accorded, in parallel to the principle of non-discrimination".[61] It is also largely favored by the Constitutional Council which recognized in 1986 a constitutional principle of equality between the territories of the Republic. The principle of non-discrimination is completely absent from the decision. [62] This can be explained by the fact that the concept is also not contained in the Constitution[63], while the principle of equality is in Article 6 of the French bill of rights. Regarding the latter, indeed, the administrative judge

[60] ECtHR, 13 November 2007, N°57325/00, *D.H. and Others v. Czech Republic*
[61] Andolfatto, D., Bugnon, C., Dechâtre, L., Docaj, D., Donier, V., Droin, N., . . . Granero, A. (2016). *Le principe de non-discrimination : l'analyse des discours.* Rapport de recherche. Mission de recherche Droit et Justice. p. 5. Retrieved from https://halshs.archives-ouvertes.fr/halshs-01480678/document. Original: « Une analyse préalable de la jurisprudence nous a permis de mettre en lumière certaines tendances liées à l'attachement particulier du juge administratif au principe d'égalité, et à la place secondaire accordée, parallèlement, au principe de non-discrimination. »
[62] Conseil Constitutionnel, 3 July 1986, N°86-209 DC
[63] Andolfatto, et al., *Ibid*., p. 44

is used to the concept. According to Cécile Barrois de Sarigny, Master of petitions in the Council of State, the control is operated in a way that guarantees that the judge will not substitute to public authorities. For these reasons, unequal treatments may be justified by the purpose of the litigated rule as long as the choice is coherent, justified by the public interest and not manifestly disproportionate. [64] According to UN Committee on Rights of the Child "[d]espite the large public investment in children, the Committee is concerned by the inequity in the allocation of some resources in the State party, particularly for children in situations of marginalization and for the overseas departments and territories, especially in Mayotte. It remains concerned by the absence of progress in carrying out consistent budgetary analysis."[65] Thus, the defender may fail in proving that the choice is coherent. In addition, "requiring a birth registration certificate for school enrollment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates"[66] without any reasonable justification. Although this shows that discrimination can be found by judges, the judiciary is not in a position of being sympathetic.

An additional difficulty may be found in the enforcement of the prohibited discriminatory criteria themselves.

2.3.2 The Enforcement of the Prohibited Discriminatory Criteria

The LOS can also significantly differ under the influence of the criteria of discrimination alleged. Two arguments can work in favor of claiming racial discrimination as opposed to discrimination on the ground of nationality. First, the ECtHR specified in the case of *D.H. and*

[64] Barrois de Sarigny, C. (2020). Le principe d'égalité dans la jurisprudence du Conseil constitutionnel et du Conseil d'État. *Les cahiers du Conseil constitutionnel, TITRE VII*(4), pp. 20-22. Retrieved from https://www.cairn.info/revue-titre-vii-2020-1-page-18.htm

[65] United Nations Committee on the Rights of the Child. (2016). *Concluding observations on the fifth periodic report.* §13. Retrieved from https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fFRA%2fCO%2f5&Lang=fr

[66] United Nations Committee on Economic, Social and Cultural Rights. (2009, July 2). *GENERAL COMMENT No. 20. Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights).* §10.

Others v. Czech Republic, that in a matter of racial discrimination there cannot be any reasonable justification. [67] Second, because a specific EU Directive may be raised in the submission, namely the Directive 2000/43/EC above mentioned, while discriminations on the ground of nationality are not prohibited regarding third-country nationals within the EU framework. [68] However, the Public Defender of Rights, in the case brought by Marjane Ghaem concluded to the existence of discrimination on the ground of place of residence, on the ground of vulnerability resulting from the economic situation of the victim and on the ground of nationality.[69] Racial discrimination would thus hardly apply to this case.

As a result of the previous statement, the European Union law cannot offer a strong legal framework as it does in the matter of equal pay. Under European Union laws, the principle of non-discrimination has known rich developments, including in respect of social rights, through the competence of the Union in matters of labour. [70] Five directives are to be mentioned. The Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; the Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; the Directives 2002/73/EC,2004/113/EC and the Directive 2006/54/EC on equal treatment between men and women in diverse areas. It is not surprising that equal treatment between men and women found significant developments in national jurisprudence because a significant set of standards enhanced such possibility by paving the way to judges. The "principle equal pay for equal work" carries a clear element of comparison, "without national

[67] ECtHR, 13 November 2007, N°57325/00, *D.H. and Others v. Czech Republic*
[68] Doukas, I. (2008). Non-Discrimination on Grounds of Nationality: The Position of Third Country Nationals' within the EU. *Cambridge Student Law Review*, *4*(1), pp. 1-10.
[69] Décision du Défenseur des droits n° 2019-294
[70] Example, CJEU [GC], 1 March 2011, C- 236/09, *Association belge des Consommateurs Test-Achats ASBL v. Conseil des ministres*

or community measures being required"[71]. In the case of the right to education, the national legal framework expressed a clear idea of universality but does not provide guidelines on how to interpret what constitute a discrimination in access to education, in contrast with the matter of equal pay.

Moreover, not all inequalities qualify for discrimination. The qualification of discrimination, in most of the cases, contains a necessary element of comparison, an identified actor and a prohibited act. [72] The comparator is ambiguous in matter of access to rights, including access to education. The situation is still encompassed within the legal framework. The French law contains a broad list of prohibited criteria of discrimination capable to cover comprehensively many situations. Moreover, the law adapting the five directives of the European Union reaches a broader scope of application than the directives encompassing other prohibited grounds of discrimination and other matters in which discrimination is forbidden such as education. Under Article 2(3), discrimination either direct or indirect, in access to education is prohibited. [73]

According to Diane Roman, the "group actions rendered possible by the J21 act may happen to be interesting provided that it is combined with another recent provision: the criminalization of discriminations based on the particular vulnerability resulting from the socio-economic situation of the victim."[74] According to the author "it would be wrong to

[71] Bamforth, N., Malik, M., & O'Cinneide, C. (2008). *Discrimination Law: Theory and Context, Text and Materials.* p. 252. London: Sweet & Maxwell

[72] Lochak, D. (2004). La Notion de Discrimination. *Confluences Méditerranée, 48*(1), pp. 13-14. Retrieved from https://www.cairn.info/revue-confluences-mediterranee-2004-1-page-13.htm

[73] Loi n°2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations (1)

[74] Roman, D. (2017). Le juge et la justice sociale. *Délibérée, 2*(2), p. 11. doi:https://doi.org/10.3917/delib.002.0006. Original: « Cela étant, les actions de groupe rendues possibles par la loi J21 pourraient s'avérer intéressantes pour peu qu'elles soient combinées avec une autre disposition récente : la pénalisation des discriminations fondées sur la particulière vulnérabilité résultant de la situation socio-économique de la victime.»

believe that such provision will remain a dead letter."[75] Moreover, besides disability, precarity characterizes victims of State's breaches to its obligations in the matter of education. [76] This shows that aspects of rights denials may also be multifactorial and intersectional, poverty being a cause and a consequence of discriminations. [77] In the United States, the concept of intersectionality has known great development even in courtrooms, something which might be less likely in France. [78]

While some of these criteria were not even meant to be litigated in court, in the spirit of the law drafters, the group action was explicitly created in order to end systemic discriminations, including the ones regarding the place of residence. [79] Discrimination in employment remained, however, the focus of the preparatory documents. [80] In addition, this ground of discrimination has also been chosen by the French Public Defender of Rights in a similar case brought by the mayor of a city. He alleged "the failure of the National Education authorities to provide sufficient teaching staff and preschool classes for the 2015/2016 school year in the underprivileged suburb of St-Denis. It was found that the insufficient resources allocated to the area resulted in direct and indirect discrimination on the ground of residence and origin."[81] Although the legal structure does not pave the way to judges' interpretation, the French Public

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[75] Roman, *Ibid*., Original : « Certes, la loi n° 2016-832 du 24 juin 2016 visant à lutter contre la discrimination à raison de la précarité sociale a divisé la doctrine, certains auteurs soulignant son inutilité, voire son caractère contre-productif. Mais il serait erroné de croire que cette disposition restera lettre morte. »

[76] Valette, *Ibid*., p. 74. Original: « À l'exception du handicap, ce serait la précarité des familles, ou l'isolement, la fragilité des statuts et le sentiment d'exclusion qui caractériseraient l'ensemble des victimes des manquements de la France à ses obligations en matière d'éducation. »

[77] Equal Rights Trust. (2014). *Economic and Social Rights in the Courtroom. A Litigator's Guide to Using Equality and Non-Discrimination Strategies to Advance Economic and Social Rights.* p. 17. London: The Equal Rights Trust. Retrieved from https://www.equalrightstrust.org/ertdocumentbank/ESR_Guide.pdf

[78] Möschel, M. (2014). L'intersectionnalité dans le contentieux de la non-discrimination relatif au domaine de l'emploi en France. In REGINE (eds.), *Le droit français au prisme du genre*. pp. 702 - 706. Paris: Editions du CNRS

[79] République Française. (2015). *Etude d'Impact. Projet de loi portant application des mesures relatives à la justice du XXIème siècle.* p. 172. Retrieved from https://www.senat.fr/leg/etudes-impact/pjl14-661-ei/pjl14-661-ei.html

[80] République Française, *Ibid*., p. 168

[81] Farkas, L., & Gergely, D. (2020). *Racial discrimination in education and EU equality law.* p. 91. Brussels: European Commission. Retrieved from https://www.equalitylaw.eu/downloads/5104-racial-discrimination-in-education-and-eu-equality-law-pdf-949-kb

Defender of Rights bear this role and add an additional opportunity. Yet, Courts shows a clear reluctance to widen the reach of the principle of non-discrimination.

2.3.3 The Limited Reach of the Principle of Non-discrimination

The ECtHR takes into account the vulnerability of minority groups. In the case of *Winterstein and Others v. France,* the Court balanced the right to private life, safeguarded by Article 8 of the Convention, with the violation of the right to property. This assessment must take into consideration the vulnerability of Roma as a minority group in Europe. [82] However, the court rejected the arguments based on Article 14 related to the principle of non-discrimination. This shows a certain reluctance of the judge to recognize the existence of discrimination.

Moreover, the jurisprudence of the ECtHR has developed the concept of reasonable accommodation, especially in the context of access to education to people with disabilities. Although the context in which the jurisprudence has been developed as well as the legal reasoning are substantially different, some similarities may be underlined. First, by requesting accommodation the jurisprudence holds a positive obligation that may involve resource setting. The same situation applies to the obligation to register all children to school since it requires the creation of sufficient infrastructures. Second, because one of the milestone cases regarding reasonable accommodation has regard to education. Indeed, in the case of Çam v. Turkey, an academy of music dismissed a young woman's application after the medical visit because she was blind, although she passed all competence requirements. [83] The Court held that "[a]lthough Article 2 of Protocol No. 1 cannot be interpreted as requiring the Contracting States to set up or subsidize special education establishments, any State which does have such establishments has an obligation to provide effective access to them"[84]. The discriminatory component is thus

[82] ECtHR, 17 October 2013, n°27013/07, *Winterstein and Others v. France*
[83] ECtHR, 23 February 2016, n°51500/08, *Çam v. Turkey*
[84] *Ibid*. § 43

essential in defining the extent to which Courts can interfere with resource settings. This is summarized in the concept according to which, it cannot impose "a disproportionate or undue burden" on States.[85] However, it is hardly applicable to the present case of Mayotte because the resources needed are not related to rendering accessible existing infrastructures but to create them in sufficient number for all. Thus, the jurisprudential developments regarding the principle of discrimination have a limited reach. As a result, it is unlikely that national judges engage in bold rulings in this respect.

One among the main factors of the judge's reluctance to engage with the principle of discrimination is also contained in the rules of the procedural laws.

2.4 The Procedural Law

The criterium of procedural law is also essential because discrimination is often hard to prove given the informal forms it can embody and given the need for a comparator. The procedure used has a significant influence on the level of proof and, thus the outcome of the case.

Mathias Möschel observed that in France, the criminal proceedings have been favored in matter of discrimination while in the United States claimants have resorted to the civil one in order to benefit from a *discovery* mechanism. [86] In contrast, "in French laws, […] the criminal proceeding with investigatory powers of the judge of instruction happened to be the most efficient"[87].

This might change, however, in light of two elements. In matters of discrimination, Article 4 of the law adapting European laws shifts the burden of proof. Indeed, the victim should bring

[85] *Ibid*. § 65
[86] Möschel, M. (2014). L'intersectionnalité dans le contentieux de la non-discrimination relatif au domaine de l'emploi en France. In REGINE (eds.), *Le droit français au prisme du genre*, p.703
[87] *Ibid*. Original: «Julie Suk explique cette différence par le fait que le droit civil américain dispose du mécanisme de la *discovery* qui donne d'amples pouvoirs aux juges, en particulier celui d'exiger les documents des parties. Ceci n'est pas le cas en droit français, où le procès pénal avec les pouvoirs d'enquête du juge de l'instruction s'est avéré l'instrument le plus efficace pour mener une action de non-discrimination. »

elements in support of a presumption of discrimination. It is to the defender to prove that the measure was justified by an objective reason distinct from any discrimination. If needed, the judge can order measures of instruction. [88] Thus, this particular legal framework brought a strong advantage in terms of procedural law to address discriminations in the Courtroom. In addition, the group action may discuss issues related to indirect discrimination. This brings the possibility to invoke a larger panel of evidence. Indeed, public reports can support efficiently such claims.

In addition, the use of criminal proceedings entails the need to prove that there was an intention of discrimination, which is not needed in civil law or administrative law cases. This has also been confirmed by the European Court of Justice in the case of *Enderby v Frenchay Health Authority*. However, it means that the French administrative and civil courts are not familiar with the probatory regime in non-discrimination matters. According to Marie Peyronnet, this may explain why the very first group action regarding Union-affiliation discriminations recently failed. [89] This may also lead judges to research instinctively an intentional component to retain the existence of a discrimination. This adds to the uncertainty of the legal outcome of the proposed scenario developed in this case-study.

[88] Article 4, Loi n°2008-496 du 27 mai 2008 portant diverses dispositions d'adaptation au droit communautaire dans le domaine de la lutte contre les discriminations (1)
[89] Peyronnet, *Ibid*.

Conclusion

The French group action in non-discrimination may end widespread and systemic discrimination resulting from inequalities in access to public services. The example of the right to education in Mayotte is useful to assess the potential success in the Court of such legal mobilization. In order to conduct such an assessment, the LOS provides a powerful analytical framework.

It results from the application of its criteria that the group action provides a strong legal opportunity structure in terms of legal access. However, the substantial laws constitute the weaknesses of the scenario proposed. The enforcement of the right to education is patchy. Although the higher administrative jurisdiction recognized the existence of State's obligation to guarantee an adapted access to education to people with disabilities, it did so in favor of a specific law aiming to foster inclusion of this group. The right to equal access to education is not explicitly interpreted by the jurisprudence as creating an obligation of the State to provide public services infrastructures in sufficient quantity. In addition, the French administrative courts are not familiar with the principle of non-discrimination and the regional legal structure does not offer sufficient opportunity to foster a shift in approach.

The procedural law criterium offers a fertile area to litigate. However, the criminal proceeding has been historically favored by claimants. As a result, civil judges are also less familiar with the concept of discrismination. Such setting does not offer a sympathetic judiciary that could trigger bold jurisprudences.

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