European Monitoring Centre on Racism and Xenophobia
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EUMC

Anti-discrimination Legislation in EU Member States

A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the Council Directives

FRANCE

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under the guidance of

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on behalf of the

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The views expressed in the report do not necessarily reflect the opinions of the EUMC, the European Community and its Member States.

The information in the reports cover a period up to September 2001 and may not contain developments which have taken place since that date.

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PREFACE

The European Union (EU) is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to all Member States. The right to equality before the law and the protection of all persons from discrimination, together with the respect and promotion of the rights of minorities is essential to the proper functioning of democratic societies.

Strategies and activities to combat racism, xenophobia and anti-Semitism form an integral part of the European Union's work on equality, justice and social inclusion.

The Amsterdam Treaty which entered into force in May 1999, introduced a new article 13 into the EC Treaty. The European Commission proposed a package of measures to implement article 13 in November 1999 which led to the adoption in 2000 of a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and a Council Directive establishing a general framework for employment equality and a Council Decision establishing a Community action programme to combat discrimination.

The European Monitoring Centre on Racism and Xenophobia (EUMC) was established by the EU during 1997 as part of the EU's aim to combat racism, xenophobia and anti-Semitism more effectively at a European level. The EUMC has the task to provide the Community and its Member States with objective, reliable and comparable data at the European level on the phenomena of racism, xenophobia and anti-Semitism in order to help them when they take measures or formulate courses of action. It also undertakes studies and examines examples of good practice, formulates conclusions and opinions and publishes an Annual Report.

The EUMC as part of its work in the field of legislation commissioned a study to compare Member States' anti-discrimination legislation and the article 13 directives. Information from the study was used to produce a series of country reports. The reports aim:

- to provide an overview of existing anti-discrimination legislation on the grounds of race or ethnic origin, religion or belief in the Member States and draw a comparison with the anti-discrimination Directives;
- to support the implementation of the directives by the Member States by indicating to each Member State the developments in other Member States (with the view that by providing information on the variety of approaches adopted by Member States to deal with the same issues Member States could benefit from the experience of each other);
- to identify areas which may require further development;
- to support the European Commission in the framework of the Community Action Programme in particular under Strand 1 - Analysis and evaluation, and
- to support wider debate as the issue is of interest to a variety of sectors in society.

The EUMC takes the opportunity to thank Migration Policy Group for its work on this Study and hopes that this publication will be a useful contribution to overcoming discrimination.

Beate Winkler, Director EUMC

FRAMEWORK OF THE STUDY

Joint Project 1999-2000 "Research on national and European legislation combating racism"

In 1999, The European Monitoring Centre on Racism and Xenophobia (EUMC) undertook a joint project with Migration Policy Group on "Research on national and European legislation combating racism". The period covered in the project was from 1 May 1999 to 31 January 2000. The project carried out a comparative study on existing legislative provisions to combat discrimination on grounds of race or ethnicity and religion and belief and the proposal for a Directive concerning the elimination of racial and religious discrimination (known as Starting Line) and the proposal of the European Commission for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM (1999) 566 final, 1999/0253 (CNS).

EUMC Project 2001-2002 "Study on the comparison of the adopted Article 13 Council Directives with existing national legislation in the EU Member States"

By the end of 2000, with the adoption of Council Directives 2000/43/EC (Implementing the principle of equal treatment irrespective of racial or ethnic origin) and 2000/78/EC (Establishing a general framework for equal treatment in employment and occupation), there existed at the European Community level an actual framework for Member States on which to base, adapt or amend national legislation.

Terms of reference of the study

With the change in the legal situation at the European Community level, the EUMC decided to follow up the Joint Project of 1999 by commissioning a new study on legislation. The study would:

- produce a report on the comparison of the adopted Article 13 Council Directives with existing national legislation in the EU Member States. The grounds of discrimination to be examined in the Council Directives for the purposes of the comparative study and report would be limited to racial or ethnic origin and religion or belief; and

- update the country reports from the Joint project with Migration Policy Group (MPG): checking to see how the adopted Council Directives compare with existing legislation in all fifteen Member States; including information on any changes in legislation in the fifteen Member States that have occurred since the drafting of the Joint Project Reports.

Timeline of the study

The EUMC launched a call for tender process in May 2001 and selected Migration Policy Group to undertake the new study.

Information was collected up until September 2001. This enabled the draft reports from the study to be completed in time for submission to the meeting of the Legal Working Group to prepare the implementation of Directives 2000/43 and 2000/78 on non-discrimination into national law which was convened by the European Commission in November 2001. The Legal Working Group had an opportunity to examine the reports and make comments by 7 December 2001. Comments received by the EUMC were then examined and incorporated where relevant and as appropriate.

Format and scope

The format for the study is a list of questions, some optional for the purposes of the EUMC, related directly to the articles of the Council Directives. Optional questions where included in the reports provide information related to gender discrimination and the new Protocol 12 to the European Convention on Human Rights. Optional questions were not essential for the reports (and are therefore not included in every report) as they do not relate directly to the Council Directives, but may provide useful complementary information.

The information provided indicates provisions in the Constitutions, the Criminal law, Civil law and Administrative Law of the relevant EU Member State. Every care has been taken to ensure that the translations of titles of legislation from the original language are as accurate as possible, but they are for information purposes only and should not be regarded as the definitive or official translations by the European Union. The title of the piece of legislation in its original language has been included and should be referred to.

Final Caveat

The reports cover legal aspects as well as institutional mechanisms to promote equal treatment and combat discrimination as outlined by the Council Directives. In all reports there is a description of the legal and institutional situation and an indication of whether their compatibility with the Council Directives should be reviewed, some reports may indicate case law where it exists to complement the information on the legal provision, there is an element of evaluation in the reports, but the main emphasis has been to indicate what provisions exist without necessarily trying to evaluate them. As a result there may be some discrepancy between reality and the situation reflected by the law.

The final decision whether national legislation is compatible with the Council Directives rests with the European Court of Justice.

Introduction

Racial and ethnic discrimination, never totally eliminated in Europe, resurfaced when European societies became increasingly diverse as a result of continuous intra and extra European migration. Governments and civil society organisations responded by designing programmes to combat these forms of discrimination. In some countries these programmes included the adoption of comprehensive anti-discrimination legislation.

Policy responses at the level of the European Communities go back as far as the re-launch of the common market in the mid-eighties. This operation moved also social issues up on the European agenda, including equal treatment and anti-discrimination. In 1984, the European Parliament established the Parliamentary Committee of Inquiry into the Rise of Fascism and Racism, leading to the adoption of the Evrigenis Report in 1986. In the same year the European Parliament, the Council of Ministers and the European Commission adopted the Joint Declaration against Racism and Xenophobia. In 1991 a second report on the issue was published by the European Parliament (the Ford Report). From the early nineties non-governmental organisations started to call for European legislative measures and drafted their own legislative proposal, called the Starting Line, which received the support of the European Parliament, some governmental agencies and a great number of non-governmental organisations[1]. In 1994, the Consultative Commission on Racism and Xenophobia was established, which in its final report made a series of recommendations including the adoption of European legal measures against racism[2]. In the same year the final decision was taken by the Council of Ministers to designate 1997 as the European Year against Racism. The European Year offered tremendous opportunities to increase the support for a European strategy against racism, including for the adoption of legal measures against racism. At the same time the 1996/7 Intergovernmental Conference discussed proposals for Treaty changes, one of them being a proposal for the inclusion of an anti-discrimination clause in the EC-Treaty.

The actual inclusion of such a clause as Article 13 of the Treaty establishing the European Community (TEC) renews Europe's human rights commitments and strategically lays the foundation for policies that promote equality and value diversity. The European Commission started to draft anti-discrimination legislation as soon as the amended EC Treaty took effect (1 May 1999) and presented its first proposals in the same year. In one and half years two legislative measures and an action programme were adopted[3]. The Directive on racial and ethnic discrimination, the Racial Equality Directive[4], prohibits both direct and indirect discrimination, as well as harassment, victimisation and instruction to

[1] Isabelle Chopin, The Starting Line: A harmonised approach to the fight against racism and to promote equal treatment. In: European Journal of Migration and Law I (1): 1999; Jan Niessen, The Amsterdam Treaty and NGO responses. In: European Journal of Migration and Law II (2): 2000; Isabelle Chopin, Possible harmonisation of anti-discrimination legislation in the European Union. European and non-governmental proposals. In: European Journal of Migration and Law II (3 and 4): 2000.

[2] Final report from the Consultative Commission on Racism and Xenophobia to the General Affairs Council, Brussels, May 1996 (6871/1/96 RAXEN 18).

[3] Council Directive implementing the principle of equal treatment between persons irrespective of racial and ethnic origin (OJ L 180, 19/07/2000.b); Council Directive establishing a general framework for employment equality (OJ L 303, 02/12/2000); Council Decision establishing a Community action programme to combat discrimination (OJ L 303 02/12/2000).

[4] This Directive was adopted first. For the negotiation process see, Adam Tyson, The negotiation of the European Community Directive on Racial Discrimination. In: European Journal of Migration and Law III (2): 2001.

discrimination. The material scope includes access to employment and working conditions, all kinds of vocational training, membership in professional organisations, social protection including health, social advantages, education and access to goods and services which are available to the public, including housing. The Directive allows positive action. The Directive obliges Member States to ensure judicial and/or administrative procedures for the enforcement of the obligations under the Directive and allows non-governmental actors to start legal action in cases of discrimination. The burden of proof is more equally divided between a victim of racism and the perpetrator. The Framework Directive for employment equality forbids discrimination on grounds of religion and belief in employment.

While the Commission drafted the proposals for the two Directives and the Council negotiated on the texts, the Migration Policy Group started in co-operation with the European Monitoring Centre on Racism and Xenophobia (EUMC) a research project. The research compared the requirements under the Starting Line and the proposal for a Racial Equality Directive with existing legislation in the fifteen Member States. The intention of the research was to clearly describe what the individual Member States would need to do in order to comply with the developing European standards[5]. After the adoption of the two Directives the research was updated[6], again in close co-operation with the European Monitoring Centre, by a group of independent experts who were part of the Europe-wide project *Implementing European Anti-Discrimination Law*, a joint initiative of the Migration Policy Group, the European Roma Rights Center and Interights[7].

The incorporation of the Directives into the national laws of the Member States in 2003 will keep the combat against discrimination on the national and European agendas. The transposition process requires the active involvement of national and European governmental and non-governmental institutions. The fifteen country reports and the synthesis report may contribute to a well-informed debate on the required adaptations of the laws in the Member States.

Jan Niessen, Director, Migration Policy Group

Isabelle Chopin, Migration Policy Group

[5] The fifteen country reports were made available at EUMC's web-site: Isabelle Chopin and Jan Niessen (eds), Research on national and European legislation combating racism. Joint project of the Migration Policy Group and the European Monitoring Centre on Racism and Xenophobia; Project period 1 May 1999 -31 January 2000.

[6] For this purpose religion and belief – grounds of discrimination in the Framework Directive - were included in the comparison.

[7] The group also prepared country reports for eleven accession states published in March 2002.

Introductory Remarks[8]

In spite of the fundamental nature of the values defended, the provisions of the French Penal Code which make discrimination illegal are relatively new. Moreover, they are constantly being added to; relating as they do to a subject which is highly sensitive socially and politically, they have formed the subject of numerous amendments in terms of legislation.

The first step in the prevention of discrimination was made by the legislative decree of 21 April 1939, known as the "Marchandeau Law", which modified the Law of 29 July 1881 on the freedom of the press. However, this text was difficult to implement and, in any case, it did not cover discriminatory conduct which was not accompanied by considerations of abuse or defamation.

It was only with Law 72-546 of 1 July 1972 that racial discrimination as such was made illegal for the first time. This Law introduced an Article 416 into the Penal Code, which penalised certain conduct (refusal or conditional offer to provide goods or services, refusal of employment and dismissal) if these were determined by the victim's membership or non-membership of a specific ethnic group, nation, race or religion.

Law 77-574 of 7 June 1977 supplemented the list of prohibited conduct by punishing interference in the exercise of an economic activity based on the same grounds of discrimination.

The introduction of Law 75-625 of 11 July 1975, meant that combating discrimination was no longer restricted to combating racism. Punishment was extended to discrimination based on sex and family situation. Then, a decade later, Law 85-772 of 25 July 1985 made illegal discrimination based on customs and this was followed by Law 89-18 of 13 January 1989 and Law 90-602 of 12 July 1990 which added disability and state of health to the list of grounds of discrimination.

The reform of the Penal Code effected by the Laws of 22 July 1992, which came into force on 1 March 1994, simplified and clarified the definitions of the offences. This also marked a new advance in anti-discrimination legislation: on the one hand by adding discrimination on the grounds of political opinions and union activities to the list of punishable types of discrimination and, on the other hand, by preventing any possibility of invoking a "legitimate motive" as justification for discrimination; and finally by increasing the established penalties.

In practice, it should be noted that the anti-discrimination legislation remains very modest. The difficulty of providing proof of discriminatory conduct is most often cited to explain the weakness of the legislation.

[8] This report was written by Sophie Recht under the direction of Migration Policy Group for the EUMC project on comparing existing national legislation in EU Member States with the Article 13 Directives (Council Directives 2000/43/EC (Implementing the principle of equal treatment irrespective of racial or ethnic origin) and 2000/78/EC (Establishing a general framework for equal treatment in employment and occupation)). It includes information from a previous report by Mr Azedine Lamamra which was part of a joint project of the Migration Policy Group and The European Monitoring Centre on Racism and Xenophobia entitled « Research on national and European legislation combating racism ».

However, it should also be pointed out that combating discrimination is not the prerogative of the criminal judge.

In fact, many types of discriminatory conduct do not fall within the scope of any penal text and, in any case, the criminal sanction does not exclude the intervention of the civil or administrative judge who may, if need be, declare the discriminatory act null and void and award compensation to the victim (basing the decision, depending on the case, on the provisions of the Labour Code or the Administrative Code).

Thus, while criminal judgements are rare, there is plenty of jurisprudence from the Social Chamber of the Court of Cassation in this area relating to discrimination in the field of employment.

The report examines some of these points in more detail below.

Article 1[9]

Is there any legal framework at national level that puts into effect the principle of equal treatment, or that is designed to combat discrimination on the basis of racial or ethnic origin and/or on the basis of nationality and/or on the basis of religion or belief? If so, what is the nature of this framework?

In French law there is no one provision which implements the principle of equal treatment or combats discrimination on the grounds of race, ethnic origin, nationality, religion or belief.

With regard to this matter, French law is constructed first and foremost on the basis of the principles of equality and freedom invoked in numerous fundamental, constitutional and international texts.

Constitutional provisions

The first article of the French Constitution of 4 October 1958 establishes that: "France ensures the equality before the law of all citizens, without distinction of origin, race or religion. It respects all beliefs."

The second reference to the concept of racial and religious discrimination is contained in the Preamble of the Constitution of 27 October 1946 which itself constitutes the Preamble of the Constitution of 1958.

[9] Discrimination on the grounds of race and ethnic origin are covered by the Council Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (further: **Racial Equality Directive)**; discrimination on the grounds of religion and belief (but only in employment and occupation) are covered by the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (further: **Employment Equality Directive**). Until Article 5 the provisions of the two Directives correspond in content and numbering; as of Article 5, the content of the articles corresponds, but the numbering differs; the report follows the numbering of the Race Directive; the numbers of the corresponding articles on religion and belief in the Employment Directive will be mentioned in a footnote.

This establishes that: " ... the people of France proclaim anew that each human being, without distinction of race, religion or belief, possesses sacred and inalienable rights. They solemnly reaffirm the human rights and freedoms of man and the citizen enshrined in the Declaration of Rights of 1789 and the fundamental principles acknowledged by the laws of the Republic...."

At this point it is also useful to recall the provisions of the Declaration of the Rights of Man and of the Citizen of 26 August 1789 which confirms the principles of freedom and equality, in particular in Articles 1 and 6.

Thus, Article 1 establishes that "Men are born and remain free and equal in rights." In addition, Article 10, in relation to the principle of freedom, refers to the prohibition of religious discrimination, stating: "No one shall be disquieted on account of his opinions, including his religious views, provided their manifestation does not disturb the public order established by Law."

Taking these constitutional principles as their basis, both the legal and administrative jurisdictions and the Constitutional Council penalise discriminatory practices, especially those based on nationality.

For example:

> [Constitutional Council, 22 January 1990] on the allocation of supplementary National Solidarity Funds (*Fonds National de Solidarité*) "The legislature may adopt specific provisions with regard to aliens provided they respect the international commitments subscribed to by France and the constitutional fundamental rights and freedoms acknowledged for all those who reside on the territory of the Republic.";
>
> [Constitutional Council 13 August 1993] pertaining to the Law on immigration control: "While the legislature may adopt specific provisions with regard to aliens, it must respect the constitutional fundamental rights and freedoms acknowledged for all those who reside on the territory of the Republic… aliens enjoy the right to social protection from the time they begin to reside stably and legally on French territory.";
>
> [Council of State 30 June 1989] penalises the Municipal Council of Paris which denied parental leave to persons on the grounds of their nationality;
>
> [Grenoble Court of Appeal 13 November 1991] upheld the conviction of a mayor who refused to enrol children of Maghreb (former French North African) origin in the town's schools and canteens on the basis of their nationality.
>
> [Court of Cassation Mixed Chamber, judgment of 10 April 1998] states with regard to the legality of the union, Front National de la Police (*National Police Front*), that a union may not act legitimately "contrary to the provisions of Article 122-45 of the Labour Code and to the principles of non-discrimination contained in the Constitution, the constitutional texts and the international commitments to which France is party.".

In accordance with the provisions of Article 55 of the Constitution, which states that the international treaties and agreements have an authority superior to that of French law, it should be mentioned that the provisions of those commitments, which deal with the issue of discrimination, form an integral part of the national legal system.

Examples of relevant treaties and agreements include:

- the Universal Declaration of Human Rights of 1948 (Preamble and Articles 1, 7 and 10),
- the International Labour Organisation Convention of 25 June 1958,
- the International Covenant on Civil and Political Rights
- the 1966 International Covenant on Economic, Social and Cultural Rights (Article 2),
- the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 14),
- the Maastricht Treaty (Article 6),
- the International Convention on the Elimination of all Forms of Racial Discrimination of 21 December 1965 (Articles 2 and 7),
- the International Convention on the Elimination of all Forms of Racial Discrimination Against Women of 18 December 1979.

However, French law allows that the constitutional standards, the primary source of French law, have more of the value of declaration and acknowledgement of principle and that it is sources below the level of the Constitution which have the role of translating these specifically into national law.

Legislative provisions

Articles 225-1 and subsequent articles of the Penal Code

Articles 225-1 and 225-2 of the New Penal Code appear to endorse, at least partially, the numerous fundamental, constitutional and international texts which proclaim the principle of equality.

Thus, after providing a general definition of discrimination (Art. 225-1), the Criminal Code specifies the cases in which it is punishable (Art. 225-2) and the designated penalties, thereby augmenting the legislation established by the old Penal Code.

Discrimination perpetrated by representatives of the public authorities is set out and made illegal by Article 432-7 of the New Penal Code, which refers to Article 225-1, which establishes the definition of discrimination.

The latter is worded as follows: “Any distinction perpetrated between natural persons on the grounds of origin, sex, family situation, state of health, disability, customs, political opinions, union activities, membership or non-membership, real or supposed, of a particular ethnic group, nation, race or religion constitutes discrimination.”

Thus it can be seen that French law extends the concept of discrimination to include distinctions based on membership or non-membership, real or supposed of a particular ethnic group, nation, race or religion.

Furthermore, the New Penal Code, which entered into force on 1 March 1994, created an individual criminal responsibility for legal entities and, in these circumstances, legal entities are also covered by the prohibition and punishment of discrimination (Art.121-2, 225-4, 226-24).

However, it should also be pointed out here that the Law of 10 January 1936, amended by the Law of 1 July 1972, had already made illegal, groups inciting discrimination or racial hatred.

It is in this context that the second paragraph of Article 225-1 of the New Penal Code establishes that:

> Any distinction perpetrated between legal entities because of the origin, sex, family situation, state of health, disability, customs, political opinions, union activities, membership or non-membership, real or supposed, of a particular ethnic group, nation, race or religion of members or certain members of these legal entities constitutes discrimination.

However, jurisprudence examples of prosecutions and penal sanctions for such acts of discrimination are currently very rare.

It is only in more specific areas, for instance in labour or press law, that some jurisprudence examples are to be found.

In addition to those provisions in the New Penal Code which are of a general nature, more specific provisions exist in a number of areas.

Other legislative texts: The Labour Code

Unfortunately, the Labour Code includes a number of texts the scope of which partially duplicates that of Articles 225-1 and subsequent articles of the Penal Code.

Thus, several articles in the Labour Code make provisions for (Art. L 123-1, L 140-2 to L 140-4) and render illegal (Art. L 152-1-1 to L 152-1-3, L 154-1 and R 154) discrimination in the sphere of employment on the grounds of sex or family situation.

Some types of behaviour prohibited by these texts are also included in Article 225-2 of the Penal Code (for example, refusal of employment), while others are not (for example, taking sex into account in relation to remuneration, training, assignation of duties etc.) and in all cases the penalties incurred are less severe.

Similarly, Articles L 412-2 and L 481-3 of the Labour Code make provision for and render illegal union discrimination on a broader basis than in the Penal Code.

It would therefore be desirable for the legislature to harmonise these different texts, at least by removing from the Labour Code the offences which are included in the Penal Code.

Article L 122-45 of the Labour Code stipulates that "No individual may be rejected from a recruitment process and no employee may be penalised or dismissed on the grounds of his or her origin, sex, customs, family situation, membership of an ethnic group, nation or race, political opinions, union activities or involvement in mutual benefit organisations or religious convictions."

Furthermore, Article L 122-35 makes it illegal for internal company regulations to include "provisions injurious to workers of equal professional ability in their work or employment on the grounds of their sex, customs, family situation, origins, opinions, faith or disability."

In addition, with regard to the prohibition of discrimination, it should be pointed out that Article L 133-5-10 of the Labour Code requires any industrial agreement concluded at national level to contain, with the potential to be extended, provisions on the equal treatment of French and foreign employees.

Other legislative texts: Other preventative provisions

There are also a number of texts which guarantee the prior prevention of discrimination.

Thus, Article 24, paragraph 6, of the Law of 29 July 1881 on the freedom of the press, also the subject of the above-mentioned law of 1 July 1972, makes illegal public incitement to discriminate, at least where the discrimination is perpetrated against a person or a group of persons because of their origin or their membership or non-membership of a particular ethnic group, nation, race or religion.

Article R 625-7 of the Penal Code punishes the same incitement, if it is not committed in public, with summary offence penalties. This offence was created at the time of the reform of the Penal Code.

A similar provision is made in the Law of 31 December 1987 on publications aimed at young people which prohibits offering, giving or selling to minors publications of any nature which present a danger to young people because of the space devoted to violence, discrimination or racial hatred.

The Law of 29 July 1881 also invokes defamation (Article 32, paragraph 2) and public – and even non-public – abuse (Article 33, paragraph 3) on the basis of origin or membership of a particular race or religion.

Some examples of cases can be cited, a number of which were examined by the highest court, the Court of Appeal:

> [Court of Appeal, Criminal Chamber, judgment of 21 May 1996]: the offence of incitement to racial discrimination was committed through the publication of an article entitled "Plural society" which contained several different statements which denigrated persons originating from North Africa, sub-Saharan Africa or belonging to the Roma/gypsy community, targeted because of their membership of a

> particular ethnic group, race or religion. Even without commentary, this tendentious presentation was considered to be likely to evoke in the readers reactions of rejection, on the basis of which the prosecution was deemed to be well founded.
>
> [Court of Appeal, Criminal Chamber, judgment of 13 April 1999] during a press conference which was organised to respond to defamatory remarks of which he had been the victim the previous day, a politician described his attacker as a "fat, crazy zebu".
>
> The Court considered that the choice of animal clearly demonstrated the intention of the politician to make reference to the origin of the victim and thus exhibited a racist motive. Furthermore, the Court judged that there was no excuse of provocation, since the lack of proportionality truly resulted from the racial nature of the insult.
>
> [Paris Court of Appeal, 11th Chamber, judgment of 11 January 2001]: considered that there was indeed an offence of incitement to racial hatred concerning an electoral leaflet. The leaflet placed a community of civilisation, language, customs and traditions which are a constituent part of the French Nation in opposition to, those persons understood under the word "immigration", that is those who come to and are present on the national territory, who are of foreign origin, particularly from North Africa, sub-Saharan Africa, and who do not wish to integrate.

Thus, advocating "prioritising French people for employment, social housing and social protection" appears to be incitement to apply discriminatory measures.

Moreover, as a preventative measure, Article 226-19 of the Penal Code prohibits the storing of personal data which denotes the race, political or religious opinions, membership of unions or customs of those concerned - information which constitutes potentially discriminatory criteria.

Thus the texts which make discrimination illegal form part of generally preventative body of legislation which, by various means, pursues similar, linked objectives.

Article 2.1 and Article 2.2(a) and 2.2(b)

Is there a definition of direct and indirect discrimination in your national legal system? Is there a need to introduce definitions of direct and indirect discrimination, as defined in Article 2.2(a) and 2.2(b) of the Directive, into national legislation?

Are there comparable definitions in national law in relation to gender discrimination?

There is no express definition in national law of direct or indirect discrimination similar to that contained in Article 2.2 (a) and 2.2 (b) of the Directives.

In French law, there is a definition of discrimination, which, without being specific, includes the concepts of direct and indirect discrimination. Because it is of a sufficiently

broad nature, this definition does not prevent the courts from recognising direct or indirect discrimination.

Article 225-1 of the New Penal Code and the Law of 25 July 1881 on the freedom of the press provides a definition of discrimination: "Any distinction… on the grounds of origin… membership or non-membership, real or supposed, of a particular ethnic group, nation, race or religion constitutes discrimination."

Consequently, the expression "any distinction", even though it may not be sufficiently precise, allows French criminal law to recognise direct or indirect discrimination.

So it is not only direct discrimination, which is punishable under French law, but also indirect discrimination which is concealed behind an apparently neutral criterion.

The updating of the grounds for discrimination thus assumes that, at any stage of the proceedings, there has been prior demonstration that the requirement is not objectively justified.

For all that, in order to ensure legal effectiveness, it would be desirable to introduce a similar definition into national legislation.

There are several types of discrimination, direct and indirect, in France, which need to be curbed.

For instance, in the case of social security, the territoriality principle does not allow aliens, who return to their country before they reach the age of sixty and who no longer live in France when they reach retirement age, to draw on their French entitlements once they are in their country of origin.

Therefore, in certain situations, foreign workers have contributed in the same way as French nationals without benefiting from the same rights.

Furthermore, foreign workers who are not covered by international agreements, are excluded from so-called non-contributory benefits (i.e. those financed through taxes rather than contributions).

In addition to these examples of discrimination, there are several collective agreements which establish direct discrimination.

For example, in one case, negotiations established that a minimum number of French sailors must be employed on container ships which fly the flag of the Kerguelen Islands.

Similarly, Article 10 of the film technicians' collective agreement stipulates the percentage of foreign workers allowed in relation to French nationals.

In terms of indirect discrimination, the requirement to hold a French diploma excludes a large number of people from countries outside the European Union.

In the same way, to require candidates for a vacancy to have a particular level of physical strength or to produce a voting card may constitute a convenient way of excluding women or aliens. *Cf [Cass. Crim., 25 May 1983: the objective statement that the physical strength of men is superior to that of women does not authorise jobs which assume a certain level of strength to be reserved* a priori *for men]*.

Finally, there are new forms of discrimination in France today, such as those concerning "hereditary employment".

An increasing number of collective agreements establish a priority employment system for the children of workers. Where such agreements exist, they are in sectors where French nationality is already a condition of employment. For example, the collective agreement of 16 August 1996 establishes a monopoly for employing the children of dockers.

At this point, it is of interest to draw attention to some jurisprudence decisions.

A judgement of 8 April 1992 from the Social Law Chamber of the Court of Appeal, on the basis of the Preamble of the Constitution of 1958, censured criteria for dismissal which depended on whether the parties concerned were of European, Maghreb or Turkish origin.

Another example, which might be considered to constitute indirect discrimination on the grounds of racial or ethnic origin, would be an employer's refusal to take on young people from a particular geographical area, because this would actually be intended as a way of excluding a population of a different racial or ethnic origin in this geographical area.

Sex discrimination

As well as racial or religious discrimination, French law also prohibits all discrimination on the grounds of sex. This definition covers both direct and indirect discrimination, without providing a specific definition of indirect discrimination.

However, labour law recognises both "objective" and "positive" discrimination in the interest of the individuals concerned.

Direct objective discrimination is essentially (but not exclusively) that which concerns jobs which are not open to women.

Regarding positive discrimination, the labour law authorises measures taken solely to benefit women in the context of equal opportunities.

Finally, French labour law, under the influence of Community law, apprehends (through the rules of proof) the concept of indirect discrimination, although a specific definition is not provided.

As far as sex discrimination is concerned, the issue is approached from the angle of equal employment opportunities for men and women. Basically, it is principally as a result of European Union directives and jurisprudence that French law has established the equal treatment of men and women and acknowledges positive sex discrimination (Article L 123-1 ff).

Thus, Article L 123-3 of the Labour Code authorises temporary measures taken solely to benefit women in relation to re-establishing equal opportunities for men and women, especially by remedying the existing inequalities which affect women's opportunities.

Article 2.3

Is unlawful harassment an identifiable concept in national law? Is there a definition of harassment in the national law that corresponds to that in the Directive? Is it necessary to introduce such a definition into national legislation?

Are there comparable definitions in national law in relation to gender discrimination?

The concept of harassment, as defined by the Directives, does not exist in French law.

Such behaviour, even if it corresponds to a distinction made for reasons of origin, sex, family situation or a particular religion, does not feature in the context of the forms of discrimination penalised by the provisions of Articles 225-1 and subsequent articles of the Penal Code.

In fact, no act perpetrated on any of the grounds of discrimination set out in Article 225-1 of the Penal Code is subject to penal sanction.

This motive for discrimination must have been the inspiration for one of the actions listed in Article 225-2 of the Criminal Code, that is: refusal to provide goods or services, interference in the exercise of an economic activity, discriminatory refusal to hire or offer employment, discriminatory disciplinary sanctions and dismissal.

In addition, taking account of the limited nature of this list, it would seem to be desirable for the French legislature to introduce the concept of harassment as defined by the Directives into national law.

In pursuance of the principle of equality and principle of prohibition of unjustified discrimination, French law prohibits any direct discrimination that affects equal treatment.

However, there is no specific provision in French law except with regard to sexual harassment.

Apart from this particular case, there are no specific regulations.

Thus, harassment is referred to standard law (*droit commun*). Offences relating to intimidation, blackmail or abuse or regulations relating to protection regarding complaints would therefore be applicable.

Regarding sex discrimination, Article 222-33 of the Penal Code makes illegal "harassment of another through orders, intimidation or constraint, with the aim of obtaining favours of a sexual nature, by an individual abusing the authority derived from his or her office".

Nevertheless, the Criminal Chamber of the Court of Appeal, in a judgment of 31 May 2000, recalls the necessity of demonstrating the existence of pressure, which results from an abuse of authority.

Similarly, it is worth mentioning one specific provision: Article L 122-46 of the Labour Code, which protects those who are victims of or witnesses to incidents of "sexual harassment".

This article defines sexual harassment as follows: "actions… by an employer, his or her representative or any person who, abusing the authority derived from his or her office, gave orders, practised intimidation, imposed restrictions or exercised pressure of any nature on the employee, with the aim of obtaining favours of a sexual nature for his or her own gain or the gain of a third party."

Therefore, the concept of sexual harassment thus defined seems more restrictive than that contained in the Directives.

On the one hand, French law very specifically targets specific actions, while the Directive cites "unwanted conduct… with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.".

On the other hand, the actions penalised in French law must have been committed by an individual abusing the authority derived from his or her office.

Article 2.4

Is it unlawful under national law to give instruction to discriminate on the grounds of racial or ethnic origin or religion and belief? Is it deemed to be discrimination? Is there a need to introduce a similar principle in national law?

Are there comparable definitions in national law in relation to gender discrimination?

Instructing someone to practise discrimination on racial, ethnic or religious grounds is not expressly made illegal by the Penal Code.

However, Article 24 of the Law of 29 July 1881 on the freedom of the press, Article R 625-7 of the New Penal Code and the legislation on crimes against humanity are expressly directed at incitement to discriminate.

The Court of Cassation noted that incitement to racial or religious discrimination thus established implies incitement to commit the acts defined and rendered illegal by Articles 225-1 and 432-7 of the Penal Code *[cf Cass. Crim., 12 April 1976, Cass. Crim., 22 May 1989]*.

Nevertheless, it is important to distinguish two situations.

If the incitement did not result in concrete action, it goes without saying that, depending on the case, the only legislation which can be applied is Article 24 of the Law of 1881 (public

incitement to racial or religious discrimination) or Article R 625-7 of the Penal Code (non-public incitement to racial discrimination).

If the incitement did result in concrete action and if this action was perpetrated through one of the media listed in Article 23 of the Law of 1881, only this text, which punishes the perpetrator of the direct incitement as an accessory, can be applied.

On the other hand, if the incitement which resulted in the action, did not occur in public, its perpetrator can be prosecuted as an accessory of the principal perpetrator of the discrimination if the general conditions for complicity are fulfilled (Art. 121-6 and 121-7 of the Penal Code).

However, in all these cases, incitement to discrimination is not considered in itself to constitute discrimination, even though in the last case mentioned above, the accessory incurs the same penalty as the perpetrator of the discrimination.

In legal terms, the two offences effectively remain strictly distinct.

Consequently, although it might be possible to foresee an extension of the definition of discrimination contained in Article 225-1 of the Penal Code along the lines of "instructing someone to practise discrimination", this would not actually appear to be necessary, bearing in mind the preventative legislation which already exists.

As far as sex discrimination is concerned, there are no specific texts which make the act of instructing someone to practise discrimination of this nature illegal.

In addition, it is the standard law (*droit commun*) on complicity which is applicable in relation to the offence of discrimination as established and rendered illegal by Articles 225-1 and subsequent articles of the Penal Code.

Similarly, Article L 123-1 of the Labour Code prohibits any discrimination based on sex or family situation in employer/employee relationships.

Without prejudice to the enforcement of the Penal Code, breaches of these provisions are punished by a prison sentence of one year and/or a fine of 25,000 francs. In addition, the court may ordain that the judgement be made public and published in the press (Art. 152-1-1 of the Labour Code).

In addition, according to the rules of complicity and even though there are no judicial decisions in relation to this, it is possible to envisage the punishment of an individual who instructed the principal perpetrator to publish a job advertisement which stipulates the sex of the candidates.

Article 3.1[10]

Does the definition of 'racial and ethnic discrimination' and 'discrimination on the grounds of religion and belief' apply to all the fields of application listed in Article 3, both in the private and the public sectors?

To which other fields of application does the definition apply? (Compare with the fields of application listed in Protocol Nº 12)

Is gender discrimination covered in the same fields?

In relation to the concept of racial and religious discrimination, the essential aim of labour law in referring to the principle of prohibition of all discrimination is to establish equal opportunities and equal rights.

Thus, Article L 122-45 of the Labour Code stipulates that *"No person may be excluded from a recruitment procedure and no employee may be penalised or dismissed on the grounds of his or her origin, sex, customs, family situation, membership of an ethnic group, nation or race, political opinions, union activities or involvement in mutual benefit organisations or religious convictions…"*.

Furthermore, Article L 122-35 of the Labour Code prohibits internal company regulations from including "provisions injurious to employees of equal professional ability in their work or employment on the grounds of their sex, customs, family situation, origins, opinions, belief or disability.".

Article 6 of the Public Service Code constitutes the public sector counterpart to Article L 122-45 of the Labour Code in the private sector.

Thus, it stipulates that: "No distinction may be made between public servants on the grounds of their political, union, philosophical or religious opinions, sex, state of health, disability or ethnic origin.".

This Article continues by specifying that, "no measure relating to recruitment, appointment to a permanent post, training, assessment, promotion, assignation of duties and transfer may be taken against a public servant taking into consideration…" that this public servant has been the victim of sexual harassment or has witnessed such actions.

It should be noted that paragraph b of Article 3.1 contains a specific element regarding the scope of the Directive, which does not exist in French legislation, namely: "access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience".

It can simply be said that Article L 123-3-1 of the Labour Code, in relation to collective bargaining, imposes a requirement to negotiate, with a view to the professional equality of

[10] Article 3.1 of the Employment Equality Directive does not include the fields e) social protection, including social security and health care f) social advantages g) education h) access to goods and services, including housing, so the prohibition on religious discrimination of the Directive does not apply to these fields

men and women, especially concerning conditions of access to employment, training and professional promotion.

Equal treatment regarding membership of and involvement in an organisation of workers or employers or any professional organisation (d)

French law does not expressly make provision for this.

In fact, the courts have never been confronted by an issue of this nature. Nevertheless, the general principles and provisions relating to discrimination, be it of a constitutional, legal or administrative nature, mean that French law does provide the judge with the means of punishing a discrimination case of this type.

Social protection, healthcare benefits and social advantages (e, f)

It should be explained that French law has now succeeded in curbing practically all forms of discrimination on the grounds of nationality in the sphere of social protection. French law does not make specific provision for protection against racial and religious discrimination in these spheres.

Education (b, g)

It should be pointed out that the constitutional basis of the equality before the law of all citizens excludes racial, ethnic or religious discrimination in the sphere of education.

As far as education is concerned, one must refer principally to the circulars from the Minister of National Education, number 84-246, dated 16 July 1984, and number 86-120, dated 13 March 1986, regarding the right to education.

These two circulars specify that the enrolment obligation in educational establishments – under pain of charges of discrimination – applies in the same way to foreign and French children.

In these circumstances, and still under pain of charges of discrimination, the residence permits of the parents or guardians of a minor shall not be requested when the child is enrolled in an establishment.

Similarly, with regard to admission to nurseries, the rules in force for French infants must be applied without restriction to foreign children.

In this respect, the Grenoble Court of Appeal, in a judgment of 13 November 1991, upheld the conviction of a mayor who refused to enrol children of Maghreb origin in the town's schools and canteens on the basis of their nationality.

Equal treatment in the field of access to and supply of goods and services which are available to the public (h)

The private sector

To answer this question it is necessary to turn once more to criminal law.

Article 225-2 of the Penal Code penalises discriminatory behaviour (particularly on racial, ethnic, religious or sexual grounds), if it consists of refusing to provide goods or services (and if need be), if provision of these goods and services is subject to a discriminatory condition.

For example, in a judgment of 19 January 1998, Pau Criminal Court convicted a bus driver who had refused to take passengers because of their ethnic origin.

In addition, in a judgment of 12 November 1974, in a dispute concerning the refusal to rent an apartment to two Africans, the Paris Court of Appeal specified that the terms "goods and services" should cover "*all things which may be the subject of a right and which represent a pecuniary value or a benefit*".

It should be noted that French legislation is less restricted than the Directive, since it does not add the specification that goods and services must be "available to the public".

The public sector

Finally, regarding the public sector, reference must be made to the provisions of Article 432-7 of the Penal Code which states:

> Discrimination, as defined in Article 225-1, perpetrated against a natural person or legal entity by an individual who is a representative of the public authorities or responsible for a public services remit, in the exercise or during the exercise of his or her duties or remit, is punished by three years' imprisonment and a fine of 300,000 francs if the discrimination consists of:
>
> 1 refusing the exercise of a right accorded by law;
>
> 2 impeding the normal exercise of any economic activity.

While this text may be rather concise, its general terms do, nevertheless, cover the full scope of the Directive.

Considering its reference to Article 225-1, this provision also covers discrimination on the grounds of sex.

Article 3.2

To what extent, if any, does national legislation go beyond the Directive in prohibiting discrimination on the ground of nationality?

Paid professional activity

As stated above (Article 3.1, 1 (a) private sector) Article L 122-45 of the Labour Code stipulates that "No individual may be excluded from a recruitment process and no

employee may be penalised or dismissed on the grounds of his or her origin, sex, customs, family situation, membership of an ethnic group, nation etc".

It should be noted that jurisprudence (Criminal Chamber of the Court of Cassation, judgement of 14 October 1986) extended the scope of persons affected by discrimination in employment to include aliens.

An example is provided by the Toulouse Court of Appeal which, in a judgment of 24 September 1998, convicted two managers of a butcher's and delicatessen to a suspended sentence of one month in prison on a charge of racial discrimination consisting of having refused to employ a young woman of Maghreb origin as an apprentice sales assistant.

Furthermore, with regard to the prohibition of discrimination, it should also be pointed out that Article L 133-5-10 of the Labour Code requires all industrial agreements concluded at national level to contain, with the potential to be extended, provisions on the equal treatment of French and foreign employees.

Self-employed professional activity

In this sphere, French legislation more often than not includes a system of authorisations for aliens, especially those who are not European Union nationals. There are different provisions for the others, which depend on the existence or non-existence of international bilateral agreements.

As a general rule, aliens may not undertake private sector activities on their own initiative in the sphere of surveillance, security, transfer of funds, insurance brokering and general insurance (Articles R 511-4 of the Insurance Code), as bailiffs, notaries, auctioneers, receivers and liquidators, nor run gaming clubs or casinos (Decree of 14 August 1939) or manage a tobacconist's shop…

Furthermore, the sphere of self-employment is often subject to the double condition of French nationality and possession of a French diploma. This is essentially the case in the health sphere where aliens – apart from European Union nationals or beneficiaries of bilateral international agreements – are not entitled to exercise the professions of (Article L 356 of the Public Health Code) doctor, dental surgeon, midwife, pharmacist (Article 514 of the Public Health Code) or veterinary surgeon (Article 309-1 of the Rural Code).

Article 4

Do exemptions relating to genuine and determining occupational requirements exist at national level? Is it necessary to restrict any exemptions to those defined in Article 4?

In terms of labour law, French law recognises what it defines as "objective discrimination", even if this is connected to ethnic or religious criteria, provided this was the deciding employment criterion.

Thus, jurisprudence (Social Law Chamber of the Court of Appeal, judgement of 27 November 1986) justifies the termination of a contract of employment, where an

employee, who was employed to fulfil a remit, which implied that he or she shared the ethos of the employer, disregards the obligations arising from this appointment.

The provisions of the Labour Code to which Article 225-3-3 refers are contained in Article R 123-1 which authorises discrimination on the grounds of sex for the following posts: artists hired to interpret a male or female role and male or female models or mannequins.

Article 5[11]

Are there any specific measures that aim to ensure or promote full equality or to compensate for disadvantages linked with racial or ethnic origin and religion or belief? Is the government considering adopting such measures?

Are there are comparable measures in relation to gender discrimination?

Discrimination based on racial or ethnic origin

Only in a limited number of spheres does French law contain measures benefiting certain groups with the aim of eliminating existing inequalities or promoting real equal opportunities.

Essentially, the spheres covered are education and housing.

Education

Mention should be made here of the creation of Education Priority Zones (*Zones d'Enseignement Prioritaire*) and educational success contracts (Minister of Education circular, 10 July 1998), since they are situated in areas with high immigrant populations or French populations of immigrant origin.

In addition, there are the Centres for Training and Information on the Schooling of Children of Migrants (*Centres de formation et d'information sur la scolarisation des enfants de migrants - CEFISEM*).

Housing

Here it is worth mentioning the existence of the specific assistance policy for housing for migrants, characterised essentially by a policy of assistance and maintenance of the housing stock.

This is currently principally governed by the circulars of 9 June 1988 and 15 February 1998 and the agreement of 14 May 1997 between the Minister for Housing and the Social Economy for Housing Union (*Union d'économie sociale pour le logement*).

This specific assistance policy for housing is led principally by the Interministerial Committee for Housing Immigrant Populations (*Commission interministérielle pour le*

[11] Article 7 in the Employment Equality Directive

logement des populations immigrées) (created by the decree of 9 June 1998) and the Social Action Fund for Immigrant Workers and their Families (*Fonds d'action sociale des travailleurs immigrés et de leurs familles*).

Comparison with discrimination based on sex

With regard to what is described as positive discrimination, the labour law authorises measures taken for the sole benefit of women in the context of equal opportunities.

Thus Article L 123-3 of the Labour Code authorises temporary measures taken solely to benefit women in relation to establishing equal opportunities for men and women, especially by remedying existing inequalities which affect opportunities for women.

It is useful here to cite a judgment made by the Council of State, dated 4 February 2000, where it ruled that the fact that it was easier for female public servants to retire, than it was for their male counterparts, did not constitute illegal discrimination.

Similarly, the Versailles Court of Appeal, in a judgment of 3 June 1999, ruled that the aim of paying a bonus "at the beginning of maternity leave", which was established by a company agreement, was to implement the principle of equal treatment of male and female employees by compensating for an inherent professional prejudice which represented an existing inequality. A bonus of this kind is a positive discrimination measure.

Article 6[12]

Are there any measures that protect the principle of equal treatment at national level that go beyond the minimum requirements of the Directive?

Please refer to earlier developments, in particular to those concerning Article 5.

Article 7.1[13]

Are legal procedures available for the enforcement of the obligations under the Directive for those who consider themselves wronged?

Legal recourse – appropriate and effective?

French law offers specific legal routes with regard to unequal treatment. They are appropriate in that they also pertain to the prohibition, cessation and compensation of inequality.

Discrimination based on race or ethnic origin is, without doubt, that for which prevention has been most constantly advocated by the public authorities. Several circulars from the Minister of Justice (*Garde des Sceaux*) have dealt with combating racism presented as a

[12] Article 8 in the Employment Equality Directive
[13] Article 9.1 in the Employment Equality Directive

priority (see, for example, circular 92-21 of 22 June 1992 and circular 98-6 of 16 July 1998).

However, because of the regulations governing proof, and more precisely the non-existence of the principle of the reversal of the burden of proof, the legal routes are usually ineffective and very rarely lead to trials and convictions.

In this respect, mention should be made of the very short time limit for the institution of criminal proceedings in cases of racial and religious discrimination by the press (three months).

Thus, in 1993, eight convictions were pronounced for charges of racial discrimination by an individual. Figures for other years were 13 in 1994, eight in 1995, ten in 1996 and four in 1997.

The overwhelming majority of these convictions led to fines, with some incurring short suspended prison sentences.

Taking into account the undoubted reality of discrimination, especially in the world of work, the legal response does not seem very effective and should certainly be improved.

Adequate compensation?

In French law, the principle is that there must be full compensation for all wrongs. Discrimination does not escape this principle and the victims have the right to full compensation for their pecuniary or moral wrong and there is, in principle, no legal limitation.

However, again there is still too little jurisprudence on this subject.

It should be pointed out here that regulations exist in labour law – for all employees – which lead to a system of ceilings for compensation depending on the age of the company. In addition, the termination of an employment contract on grounds of racial or religious discrimination might lead in practice to a regime of limited compensation in any case.

Effective possibility of protecting one's rights?

The main regulation which should be mentioned here is that relating to legal aid.

In effect, this allows the costs of a legal action, including the lawyer's or bailiff's fees, to be paid partially or in full by the State. This applies both to civil and criminal trials.

The Law of 10 July 1991, reorganising legal aid, has led to a rise in the number of aliens requesting legal aid. To such an extent that, in certain circumstances, an alien who does not usually reside on French territory may also benefit from legal aid.

Appropriate structures in terms of legal action against discrimination?

Such structures do not exist in French law.

However, structures do exist in relation to combating racial discrimination but not at the level of legal action.

A circular of 1 March 1993 created a departmental section, under the presidency of the prefects, for the co-ordination of work to combat racism, xenophobia and antisemitism.

In addition, a decree of 31 August 1993 instituted Departmental Security Programmes (*Plans départementaux de sécurité*).

Furthermore, the Departmental Commissions on Access to Citizenship (*Commissions départementales d'accès à la citoyenneté*) can alert the prosecutors to incidents of discrimination, mainly racial.

These provisions, to which are added the Local Security Contracts (*Contrats locaux de sécurité*), constitute the only appropriate structures in relation to combating racial and religious discrimination.

Consequently, the framework for legal action is set by the standard law (*droit commun*) on prosecutions, more specifically:

- a complaint addressed to the Public Prosecutor or lodged with the police or the *gendarmerie*, which may lead to a withdrawal of proceedings (the public prosecutor retains the discretionary right to prosecute),
- a complaint filed by a civil claimant to the senior examining magistrate which automatically leads to a judicial investigation
- a direct citation which, if the facts are sufficiently well established and the perpetrator of the discrimination has been identified, allows the perpetrator to be brought before the court immediately.

Since these procedures are not legally subject to the regulations on information destined for the public, there would be grounds for making such provision.

Appropriate conciliation procedures?

There is no appropriate conciliation procedure in this respect.

The only possible forms of conciliation are those which are legally established in the context of criminal proceedings through mediation and, in the context of social proceedings through conciliation.

This system of conciliation does not exclude recourse to legal action.

Article 7.2[14]

Is it possible for national associations or other legal entities to engage in legal proceedings for the enforcement of rights under the Directive?

French law allows associations and unions to act in law and to constitute themselves as civil claimants.

But it is important, first and foremost, to consider the case of legal entities who are victims.

The victim, legal entity

Discriminatory acts are punishable when perpetrated to the detriment of, either a natural person or a legal entity (Art. 225-1, paragraph 2).

However, a legal entity can only be affected through natural persons. Article 225-1, paragraph 2, of the Penal Code stipulates that: "Any distinction perpetrated between legal entities because of the origin… of members or certain members of these legal entities constitutes discrimination."

Nevertheless, it might be imagined that the law would make provision for specific discrimination criteria.

Thus, in French law, boycotting particular companies because of their nationality, independently of the nationality of their members, does not come directly within the provisions of the law.

Action by unions

The Labour Code stipulates that, provided it has the agreement or request of those concerned in writing, the union may take any legal action on behalf of a worker from the company regarding discrimination on the grounds of sex or family situation (Article L 123-6).

If requested by a worker, the union may also assist and represent him or her before an industrial tribunal (Art. R 516-5) or a social security tribunal (Art. 142-20 of the Social Security Code).

Finally, "unions may exercise any of the rights of the civil claimant, before any competent body, relating to acts causing direct or indirect injury to the collective party concerned of the profession they represent (Art. L 411-11 of the Labour Code).

Thus, the Criminal Chamber of the Court of Appeal, in a judgment of 29 October 1996, ruled that the fact of dismissing a worker because of his membership of a union or union activity did, itself, generate a wrong suffered by the profession to which the person concerned belongs and for which the unions representing this profession might demand compensation.

[14] Article 9.2 in the Employment Equality Directive

Action by non-profit-making associations

For non-profit-making associations which, in accordance with their statutes, offer to assist victims of discrimination based on racial or ethnic origin or religion, as well as discrimination on the grounds of sex or customs, and which have been legally established for five years at the time of the incident, French law acknowledges the possibility of their taking legal action and constitute themselves as a civil claimant (Articles 2-1 to 2-14 of the Code of Criminal Procedure, Article 48 of the Law of 29 July 1881).

In practice, it will be noted that the only cases where, on the one hand, associations and, on the other, unions, may take legal action are for discrimination in the spheres, respectively, of the press and labour law.

Example: [Court of Appeal, Criminal Chamber, judgement of 8 March 2001]: the organisation, General Alliance against Racism and for the Respect of French and Christian Identity (*Alliance générale contre le racisme et pour le respect de l'identité française et chrétienne*) constituted itself as a civil claimant regarding satirical drawings deriding the Catholic faith which were considered not to constitute incitement racial hatred.

Article 7.3[15]

What time limits apply to the bringing of an action?

It will be recalled that the time limit laid down for criminal proceedings in cases of racial and religious discrimination by the press is three months.

Articles 225-1 and subsequent articles of the Penal Code and those of the Labour Code render the types of discrimination, which they define and penalise, illegal. The time limit for criminal proceedings is therefore five years (Article 133-3 of the Penal Code).

It is interesting to point out that the types of discrimination made illegal by Article 225-2 of the Labour Code are excluded from the benefit of amnesty by the latest amnesty laws.

On the other hand, it should also be noted that, in the context of a dismissal made on discriminatory grounds, the time limit for bringing it before the industrial tribunal may be shorter. It is two months from the signed receipt for full settlement.

Article 8[16]

Does the principle of the reversal or easing of the burden of proof in cases of racial and religious discrimination exist in national law?

Are there comparable provisions in national law in relation to gender discrimination?

[15] Article 9.3 in the Employment Equality Directive
[16] Article 10 in the Employment Equality Directive

Currently there is no legislation in French law (except for that on racial defamation) relating to the principle of the reversal of the burden of proof in relation to discrimination. This being the case, there would be grounds for legislating to introduce this into national legislation.

In French law, the burden of proof basically always falls on the plaintiff, that is, as far as this report is concerned, on the victim of discrimination.

It should be pointed out here that Directive 97/81/CE of 15 December 1997 on the burden of proof in cases of discrimination on the grounds of sex constitutes the first legal exception to the principle of French law as regards the burden of proof.

It should be explained that, in the context of sexual equality at work, rules of simple presumption of discrimination were overruled, under the influence of the European Court of Justice, which are enforceable by the French courts and which constitute a reversal of the burden of proof.

It is useful to draw attention here to the decisions by the European Court of Justice which were made in the cases of Bilka, 13 May 1986, and Enderby, 27 October 1993, which amended the national regulations in this regard.

Even before its integration into French law, the Social Law Chamber of the Court of Cassation took up the provisional regime laid down by the Directive of 15 December 1997.

The following judgements are of interest here:

- [Judgement of 10 October 2000] this is the case of a person employed as a highly skilled worker who was promoted from Grade 175 to Grade 190 as of 1 January 1994 but whose basic salary was not altered at all.

The Court of Appeal decided that the employer, if he disputed the discriminatory nature of the treatment of the worker who submitted evidence to the judge of a breach of the principle of equal pay, must establish that the disparity was justified for objective reasons which had nothing to do with discrimination.

- [Judgement of 28 November 2000] through a bold reading of Article L 123-5 of the Labour Code, the Court of Appeal establishes a presumption of discrimination against the employer who wrongly dismissed an employee, even though she had previously brought legal action on the basis of the professional equality of men and women.
- -[Judgement of 19 December 2000] this case was about a request to adjust the pay of female laboratory workers. The first stage was to confirm the existence of a difference in treatment of male and female workers in the company. Then, it fell to the employer to justify the difference thus confirmed, on the basis of objective reasons, which was not possible in this case.

There is also a bill pertaining to the introduction of a presumption of discrimination against employers, making them responsible for demonstrating, through the choices they make in

terms of appointments and promotions, pay rises, penalties and dismissals, that they are not guided by any discriminatory consideration.

Nevertheless, it should be noted that French law, - having failed to take cognisance of precise regulations on the reversal of the burden of proof – allows compromises to be made to the principle of the burden of proof being incumbent on the plaintiff.

In the civil sphere, Article 11 of the New Civil Procedure Code allows the judge to request either the plaintiff or the defendant, if need be on pain of a coercive fine, to produce evidence.

In terms of labour law, Articles L 122-14-3, L 122-40-3 and L 140-8 establish that, in the event of dispute, the judge forms his or her conviction in view of the evidence provided by the parties and, if necessary, after any measure of instruction he or she considers to be of use. If doubts still persist, the benefit of the doubt falls to the wage earner.

In criminal matters such compromises are found essentially in the sphere of the press.

The Criminal Chamber of the Court of Cassation ruled that the principle of presumption of intent to cause harm applied in charges of defamation, is legal in the sense that it is not contrary to Articles 6 and 10 of the European Convention on Human Rights whereby it is possible, in the context of this presumption, to provide contrary proof, and that the rights of the defence are assured.

Article 9[17]

Is the Directive's definition of victimisation to be found in national law?

Are there comparable definitions in national law in relation to gender discrimination?

The concept of victimisation does not exist as such in French law.

Consequently, cases of victimisation must be referred to standard law (*droit commun*).

It would thus be offences relating to intimidation, blackmail or abuse or regulations pertaining to protection regarding complaints or to wrongful dismissal, which would be applicable.

However, mention should be made of a specific provision, which protects victims of, or witnesses to, incidents of sexual harassment.

Thus, Article L 123-1, last paragraph, of the Labour Code establishes that: "No-one may take into consideration the fact that the person concerned has suffered or refused to suffer the actions defined in Article L 122-46 or has witnessed or reported such actions, in making decisions about hiring, remuneration, training, assignation of duties, qualification,

[17] Article 11 in the Employment Equality Directive

classification, professional promotion, transfer, termination or renewal of contracts of employment or disciplinary measures."

The penalty is a prison sentence of one year and/or a fine of 25,000 French francs.

Similarly, Article L 122-46, paragraphs 2 and 3, of the same Code stipulates: "No worker may be punished or dismissed for having witnessed or reported the actions defined in the previous paragraph. Any contrary provision or Law is null and void."

Article 10[18]

Which steps are necessary to ensure sufficient public awareness of existing laws? What arrangements currently exist to ensure that anti-discrimination legislation has been or will be brought to the attention of the public?

Does the government need to act to ensure that by means of information and training, and where necessary by effective sanctions, all officials and other representatives of the public authorities at every level abstain from any racially or religiously discriminatory speech or behaviour in the exercise of their functions?

Steps necessary to raise awareness

It would appear to be necessary to establish the sustained provision of information and training to all citizens to raise awareness and give them the means to respond to racial and religious discrimination in all spheres – political, professional, educational, cultural and in sport. In this respect, particular attention should be given to school children.

One example is that unions are now undertaking several discrimination awareness and training initiatives for employees.

Another solution would be to disseminate, free of charge, the numerous sources of information which exist on the subject, in particular the annual reports of the National Consultative Commission on Human Rights (*Commission Nationale Consultative des Droits de l'Homme*) and the High Council on Integration (*Haut Conseil à l'Intégration*).

In addition, the public authorities should produce and disseminate free of charge a Discrimination Code, essentially covering racial and religious discrimination, which would reproduce in full texts and relevant jurisprudence, as well as a guide to the procedures. An appendix to the Code could be included with a list of all the institutional, cultural, organisational and union players concerned with this subject.

Finally, it is interesting to note the proposal made by Jean-Michel Belorgey in his report, "Combating discrimination" ("*Lutter contre les discriminations*"), produced for the Minister of Employment and Solidarity and published in April 1999. Borgey recommends the establishment of an independent body with responsibility for investigating complaints

[18] Article 12 in the Employment Equality Directive, which has the following phrase in addition to article 10 "for example at the workplace".

from victims of racial discrimination in employment, as well as the creation of an Integration Agency which would unite all the services of the State, which currently have responsibility for integration.

Existing publicity measures

Apart from the activities of antiracist organisations and unions, the main source of information dissemination are the annual reports of the High Council on Integration and the National Consultative Commission for Human Rights.

The High Council on Integration (set up through the Prime Minister by decree 89-912 of 19 December 1989 and completed by decree 96-622 of 11 July 1996) provides advice and proposals at the request of the Prime Minister or the Interministerial Council on Integration (*Conseil interministériel à l'intégration*) on all issues relating to the integration of foreign residents and residents of foreign origin.

The role of National Consultative Commission for Human Rights (set up through the Prime Minister by a decree of 30 January 1984) is to provide advice to the Prime Minister on all national and international issues relating to human rights. Like the High Council on Integration, it provides an important service in terms of the broad dissemination of information.

Finally, it should be noted that, in 1994, the Ministry of Justice distributed 50,000 free copies of a guide to rights in relation to racial discrimination.

More recently, a poster campaign was launched concerning the setting up of a special phone line to provide information to victims of discrimination about their rights.

In response to the second question, reference should first be made to Article 432-7 of the New Penal Code which penalises discrimination relating to the refusal to grant the benefit of a right accorded by law or the interference in the normal exercise of any economic activity, perpetrated by a representative of the public authorities acting outside the directives of the government.

Then, Article 7 of the Police Code of Ethics stipulates that: "The officer of the national police…must ensure absolute respect for all persons, irrespective of their nationality, origin, social status or political, religious or philosophical convictions.".

In addition, the National Centre for Study and Training of the National Police (*Centre national d'études et de formation de la police nationale*) organises training session specifically aimed at raising awareness among police officers of cultural differences and the situation of young immigrants.

In the context of education it is also worth mentioning the existence and work of the Centres for Training and Information on the Schooling of Children of Migrants (CEFISEM).

Article 11[19]

Are there any measures to promote the social dialogue on the issues of the Directives at national level?

The French legislature instituted the possibility for employees to benefit from measures taken by their companies, negotiated in the context of a scheme for the professional equality of men and women (Article L 123-4 of the Labour Code). This scheme was negotiated in the form of a company agreement.

A ministerial circular of 2 May 1984 lists the actions which may be included in these agreements. For example, reserving appointment to certain posts for women, training offered solely to women etc.

The training, promotion and work organisation actions thus established may benefit from State aid, in accordance with the conditions laid down by a decree of 30 January 1984.

At the same time, Article L 123-4-1 of the Labour Code allows companies to conclude agreements with the State which guarantee them financial aid to conduct a study into their situation in relation to professional equality and potential positive discrimination measures.

A decree of 1 April 1992 determines the conditions on the basis of which an agreement of this type may be concluded.

In addition, the employer has an obligation to submit an annual report to the company board on the comparative situation of the general conditions of employment and the training of men and women in the company (Article L 432-3-1 of the Labour Code).

Finally, on the basis of a Law of 9 May 2001, the legislature has reinforced the existing texts in several ways:

- to ensure that no company may slip through the net, the professional equality of men and women was added to the list of subjects for compulsory annual review (Article L 132-27, paragraphs 4 and 5);
- all the subjects for negotiation should take into account the requirement of equality (Article L 132-27-1),
- industries are obliged to renegotiate every three years and should take care to guarantee the principle of equality (Articles L 132-12, L 132-12-1 and L 933-2-1).

However, apart from these provisions on sex discrimination, there are no other specific regulations relating to discrimination.

[19] Article 13 in the Employment Equality Directive.

Article 12[20]

Are there any measures to promote the dialogue with non-governmental organisations at national level?

No measures of this type currently exist in national law.

However, at a less formal level, it is evident that such dialogue does indeed exist.

Thus, it is likely that before finalising any draft law or bill, preparatory work and reports would take into account consultation with the relevant non-governmental organisations.

Article 13[21]

Is there a specialised body to promote equal treatment, irrespective of race or ethnic origin at national level? If so, what are its powers and duties? Is such a body effective?

If not, would the government need to act in order to give this body such specific powers? What would be the procedure?

There are currently three national administrative institutions in France which are involved, to different degrees, in dealing with the issues linked to discrimination, especially discrimination on the grounds of race or ethnic origin.

They are the High Council on Integration, the National Consultative Commission for Human Rights and the Commissions on Access to Citizenship (*Commissions d'accès à la Citoyenneté*).

The main responsibilities of these bodies are as follows:

High Council on Integration

The High Council on Integration (set up through the Prime Minister by decree 89-912 of 19 December 1989 and completed by decree 96-622 of 11 July 1996) provides advice and proposals at the request of the Prime Minister or the Interministerial Commission on Integration on all issues relating to the integration of foreign residents and residents of foreign origin.

National Consultative Commission for Human Rights

The role of this body (set up through the Prime Minister by decree of 30 January 1984) is to provide advice and information to the Prime Minister.

[20] Article 14 in the Employment Equality Directive

[21] There is **no** article in the Employment Equality Directive corresponding with Article 13 of the Racial Equality Directive on specialised bodies

Every year it produces a very important public report which basically records its findings and recommendations.

Commission on Access to Citizenship

This commission, created by a circular of 18 January 1999 and set up at departmental level is the State's instrument for action to promote equal access to citizenship. Its work is based on positive action aimed at opening up real possibilities for integration, promotion and development for those who feel they are unfairly excluded.

The main role of the Commission on Access to Citizenship is:

- to disseminate widely recruitment possibilities by competition open to all in the civil and public services which should represent the population of the country
- to ensure that employers appreciate the national interest which is attached to employment without discrimination, to integration through employment and to the validation through success at work of young people who encounter specific difficulties.
- to work with state officials, especially those who are in regular contact with young people from sensitive areas, and with their local partners to evaluate discriminatory situations or behaviour of which they are aware.
- to ensure that all citizens are treated equally and with consideration by all public service officials and by the public services.
- to receive, through its permanent secretary, any observations from citizens who are victims of vexatious or discriminatory practices in their dealings with the authorities in the allocation of housing, access to leisure services or provision of services.
- to pass on to the relevant authorities, including the legal service, facts of which they are aware and which appear to constitute offences.

These bodies have powers to provide advice, recommendations and proposals and to produce studies and publications.

Nevertheless, only the Commission on Access to Citizenship is expressly empowered to pass on information about incidents of discrimination to the legal authorities for investigation or prosecution.

Moreover, none of these bodies is explicitly authorised to receive complaints (in the criminal sense) and to press for prosecutions.

It should be recalled here that Jean-Michel Belorgey (President of the High Council in Integration, in his report, "Combating discrimination" ("*Lutter contre les discriminations"*), produced for the Minister of Employment and Solidarity and published in April 1999, recommends the establishment of an independent body with responsibility for investigating complaints from victims of racial discrimination in employment.

This independent body has not yet been set up.

Article 14[22]

Is action needed to ensure that national law guaranteeing equal treatment between individuals, irrespective of racial or ethnic origin and religion or belief, takes priority over other laws, regulations or administrative provisions?

Do national legislative or administrative procedures provide for declaring null and void those provisions in agreements, contracts or rules that relate to professional activity, workers and employers that are contrary to the principle of equal treatment?

There is no need to introduce new provisions into French law guaranteeing that the equal treatment of individuals takes priority over other laws.

As has already been indicated at the beginning of this report, the equal treatment of individuals is a constitutional principle, that is, it forms an integral part of the highest legal standard.

In response to the second question, reference must be made to standard law (*droit commun*), more specifically to Article 6 of the Civil Code which establishes: "Specific agreements shall not depart from laws which are in the interest of law and order".

So, equal treatment is expressly considered as a rule of law and order, directly by the Labour Code and indirectly by the Penal Code by means of provisions relating to discrimination.

In these circumstances, equal treatment conceived as a consequence of non-discrimination is connected to the principle of law and order in French law which prohibits any agreement, contract or regulation of a professional nature which establishes any inequality of treatment on the grounds of race, ethnic origin or sex and that on pain of sanction, specifically of termination as null and void.

In addition, numerous legal texts, which originate either from international agreements or from national regulation, already prohibit any provision contrary to equal treatment (especially Article L 123-2 of the Labour Code mentioned above)

Article 15[23]

Is there a need for further effective and proportionate sanctions, penalties and remedies?

Do equivalent provisions already exist on the national level in other areas?

In principle, French law includes effective, proportionate and dissuasive sanctions.

It had already been mentioned that for discrimination on the grounds of origin, sex, ethnic group, race, nation, religion etc provision is made for a penalty of two years' imprisonment

[22] Article 16 in the Employment Equality Directive
[23] Article 17 in the employment Equality Directive

and a fine of 200,000 francs. Moreover, the legal provisions containing such discrimination would be purely and simply considered null and void.

Nevertheless it should be noted, on the issue of the dissuasive character of the sanctions, that the publication of decisions (posting of the conviction in the press or in the workplace) is not compulsory and that in order to make these sanctions dissuasive this would need to be made compulsory.

Professional equality between men and women and sexual harassment provide examples for comparison:

the non-respect for equality may be punishable in accordance with the nature of the infringement:

- either a prison sentence of one year and/or a fine of 25,000 francs, with the option of posting and publication in the newspapers (Article L 152-1-1 of the Labour Code);
- or a prison sentence of two years and a fine of 100,000 francs (Article 225-2 of the Penal Code)

sexual harassment is punishable by a prison sentence on one year and a fine of 100,000 francs and is aimed at any person who has committed or profited from such actions (Article 222-33 of the Penal Code).

Article 16

What action (if any) has already been taken in order to comply with the Directives?

No measures have yet been taken to comply with the Directive.

Protocol N°12

a) Has your government signed Protocol N°12?
b) Does your government intend to ratify Protocol N°12?
c) What are the obstacles to the ratification of Protocol N°12 by your country? Are these obstacles political or legal? In the case of obstacles in national legislation, what are these?

At time of writing France has not yet ratified Protocol N° 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Therefore, no measures have yet been taken to implement it into national law.