

With 40 years of experience in antidiscrimination law and affirmative action, the United States constitutes a major point of reference for French policy-makers. Whether perceived positively or negatively, the American example can certainly make a significant contribution to the French debate on how to best foster equal opportunity. Moreover, examining the American antidiscrimination framework is particularly timely as France has just adopted European-level directives that require developing tools for identifying and combating all forms of discrimination, especially indirect discrimination. More generally, the French government is exploring means for promoting equality that might be compatible with its constitutional framework, which doesn't allow for the collection or use of ethno-racial data. This issue has become a priority: in December 2008, President Nicolas Sarkozy appointed Yazid Sabeg as Commissioner for Diversity and Equal Opportunity, a first-of-its-kind position in the government. Commissioner Sabeg created a "Committee on the Measurement and Assessment of Diversity and Discrimination," and submitted to President Sarkozy an action plan to promote diversity and equal opportunity in May 2009.

Convinced that the lessons drawn from the American model can help enhance the French debate on equality of opportunity, the French-American Foundation initiated a study on the American antidiscrimination framework in late 2008 under the supervision of Daniel Sabbagh, Senior Research Fellow at CERI-Sciences Po.

Focusing on employment, this study has a twofold objective:

- to describe the general architecture and internal logic of the system to fight employment discrimination in the United States, beyond the ethno-racial categories on which it is based;
- to examine how certain instruments developed in the United States, which have proven effective in fighting discrimination and promoting equal opportunity, could be adapted to the French system by using categories other than ethno-racial ones.

American Antidiscrimination Study Tour to Washington, D.C., and New York City (October 2008)

This project started with a study tour to Washington, D.C., and New York City in October 2008, during which key French antidiscrimination experts met with their American counterparts.

List of French participants: Guillaume Ayné, Executive Director, *SOS Racisme*; Sarah Bénichou, Researcher, University of Paris X – Nanterre; Catherine Chouard, Director of Human Resources, Elior Group; Sophie Latraverse, Deputy Legal Director, HALDE — *Haute Autorité de Lutte contre les Discriminations et pour l'Égalité* (High Authority to Fight Discrimination and to Promote Equality); Claude-Valentin Marie, Senior Research Fellow at INED – *Institut National des Etudes Démographiques* (National Institute of Demographic Studies), Vice-President, HALDE; Marie Mercat-Bruns, Law Professor, Director of the Center for the Americas at Sciences-Po; Marie-France Picart, Associate Director, Prodiovisuel International; Stephanie Seydoux, Director, Promotion of Equality department, HALDE; Carole Da Silva, Director and Founder of the AFIP – *Association pour Favoriser l'Intégration Professionnelle* (Association to Promote Professional Integration); Malik Salemkour, Vice-President – *La ligue des Droits de l'Homme* (The Human Rights League); Dominique Sopo, President, *SOS Racisme*; Sophie Vulliet-Tavernier, Director of Legal and International Affairs, CNIL — *Commission Nationale Informatique et Libertés* (Data Protection National Agency); Néphéli Yatropoulos, Advisor – European and International Affairs, HALDE.

During this study tour, the French delegates met with Associate Supreme Court Justice Stephen G. Breyer; senior officers from the Equal Employment Opportunity Commission (EEOC), the Federal Contract Compliance Programs (OFCCP) at the Department of Labor, the U.S. Census Bureau; civil rights organizations such as the NAACP-LDF and the ACLU; top experts in equal opportunity-related fields, such as William Bowen, economist and former president of Princeton University; Jeffrey Rosen, professor of Law at George Washington University; Harry Holzer, professor of public policy at the Georgetown Public Policy Institute and member of the Urban Institute, and Devah Pager, associate professor of sociology at Princeton, among others.

Study Tour Findings

Three major lessons can be drawn from 40 years of American experience in fighting discrimination.

- The American antidiscrimination system was organized in the early 1960s through a monitoring system put into place by the EEOC and the OFCCP. This monitoring system collects information on the racial breakdown of a company's workforce and tracks its changes over time. This helps identify racial imbalances and gauge the impact of measures taken by employers to correct the lack of diversity that may have resulted from discriminatory practices.
- From a legal standpoint, the fight against discrimination can only be effective if a balance is struck between cracking down on discriminatory behaviors/processes and preventing them with incentives. Negotiated measures or mediation, which came to the fore as a primary means of legal settlement in the 1990s, was only possible after a long series of class action precedents in the 1970s.
- Given the persistent inequality affecting some communities in the United States – especially the African-American community – it is obvious that fighting exclusively employment-based discrimination is insufficient to foster social equality. Combating employment discrimination must be part of an umbrella antidiscrimination policy that takes into account regional discrepancies as well as inequality in housing and education. This broad-based approach is essential to preventing structural discrimination prior to discrimination in hiring.

Objective of the Report

The goal of the French-American Foundation report is to inform the French public debate by providing private and institutional actors, as well as policymakers and associations, further avenues to be explored in fighting discrimination. The report addresses some of the following issues:

- How can France move away from *ad-hoc* policies and provide greater coherence to its antidiscrimination framework?
- What lessons can be drawn from the American model and the EEOC's systematic monitoring of companies?
- What types of investigations aimed at measuring discrimination in companies can now be carried out in France? What data can be collected within the limits of the framework set forth by the CNIL (the French data protection agency)?

The French-American Foundation decided to focus this study on fighting national origin-based discrimination as France does not have complete statistical data on this criterion, unlike that of gender or age discrimination.

This report consists of two parts:

- First, a summary description of the American antidiscrimination system, which is not well-known and sometimes caricatured in France (1);
- Second, an analysis of the policies implemented in the United States with a view to possibly adapting some of their tools within the French framework (2).

Some of these tools are also valid for types of discrimination other than those strictly based on origins.

The report entitled “*Equal Treatment in Employment: Learning from American Antidiscrimination Policies*” is by Sarah Benichou, Researcher, University of Paris X-Nanterre; Ioanna Kohler, Director at the French-American Foundation, and Daniel Sabbagh, Senior Research Fellow at CERI-Sciences Po.

The ideas and suggestions for action stated in this report were inspired by observations made during the study tour organized by the French-American Foundation in October 2008, and in no way engage the liability of its participants.

"Equal Treatment in Employment: Learning from American Antidiscrimination Policies"

Executive summary

(Download full French version at: <http://www.frenchamerican.org/cms/rapport-egalite-emploi>.)

1. Description of the American antidiscrimination framework

In the United States, federal antidiscrimination policies go beyond the framework of intentional or individual discrimination and take into account the structural and/or institutional character of discrimination. Unlike the French antidiscrimination system, the U.S. system can measure the collective impact of discrimination.

Data on the makeup of company workforces is central to this system. This data is compiled in the EEO-1 form and administered through the Equal Employment Opportunity Commission (EEOC), a federal agency founded in 1964. The EEO-1 form must be filled out every year by companies contracting with the federal government with more than 50 employees, and by all companies with more than 100 employees; however, completing this form does not entail setting quotas or proportional representation objectives.

On this form, employers anonymously report the breakdown of their workforce into nine professional categories, five pre-established ethno-racial categories, and by gender. Albeit in a simplified format, these categories are the same as those used in the census. Since 2003, employee self-declaration has been in effect.

The data from the EEO-1 form is used to monitor and analyze the entire selection process (hiring, career path, access to training, etc.), and can be used to prevent, correct, and fine non-compliant companies. It represents a tool with which both government and private employers can evaluate themselves to see which groups are under-represented, and to measure the effectiveness of the efforts undertaken. This data can also serve as objective proof in direct individual or indirect discrimination litigation. It is generally cross-referenced with data on the breakdown of the qualified active population of the same employment pool. Other innovative methods do not entail developing census-related statistics.

The American antidiscrimination system has a major proactive component. In addition to complying with anti-discrimination law, federal agencies issue directives such as the "Uniform Guidelines on Employee Selection Procedures," which assist employers in changing their selection procedures so as to avoid all forms of discrimination. Furthermore, the EEOC provides fee-based training programs to raise awareness of company staff, particularly those working in human resource departments, about certain unconscious discriminatory behavior. The goal is to limit the subjective bias in the decision-making process and to promote transparent hiring criteria to make recruitment procedures more objective.

Lastly, one of the most innovative facets of the American system is to require private contractors of the federal government not only to comply with antidiscrimination measures, but also to employ a significant proportion of under-represented minority groups. Government contractors must identify obstacles to equal treatment in their workplaces and develop an affirmative action program to identify actions to correct the racial imbalances detected.

Regarding discrimination litigation, the system has evolved significantly since the 1960s. Mandated since 1972 to take legal action, the EEOC initially focused on high-profile class action suits with heavy financial penalties. This strategy paved the way for establishing precedents and informing stakeholders about the purview of antidiscrimination law. After 1991, highly dissuasive punitive damages were often the outcome of individual court cases.

As a consequence of cutbacks in the 1980s, the EEOC continued to focus its efforts on class action or structural discrimination likely to have the greatest impact. Furthermore, as a consequence of a greater number of discrimination judicial precedents and a swelling backlog of claims, reconciliation and mediation progressively became one of the primary methods for settling discrimination cases. These informal voluntary proceedings are now systematically recommended to parties to a dispute. When parties settle disputes under the aegis of the EEOC, proceedings tend to be swift and comparatively inexpensive.

In addition to paying damages and possible heavy fines, corrective measures can be ordered in negotiated settlements between the parties, whether mediated by the EEOC (or ruled on by a judge, if the case goes to trial). Serving the public interest, these positive obligations generally consist of manager awareness training programs as well as a review of selection procedures.

2. What lessons can be drawn for France?

As the law dated May 27, 2008 completed EU discrimination directives to French law, France is now encouraged to devise instruments to identify collective and structural discrimination that go beyond individual cases of intentional discrimination. From this perspective, the availability of relevant statistics is crucial to inform all stakeholders about discrimination and seems essential in ensuring the effectiveness of the law. In employment, this data could be collected by monitoring public and private organizations. This data would enable stakeholders to adjust their strategy, to better spot structural discrimination and to concentrate their efforts on the most problematic organizations and business sectors. It would also facilitate assessing the outcomes of voluntary actions put forward by companies most deeply committed to this issue.

Since collecting ethno-racial statistics is still banned under French law, substitute categories would have to be developed for monitoring. At present, a relative consensus could be reached about collecting objective data like the place of birth and nationality of the persons

surveyed as well as the nationality and place of birth of their parents. This would require that the relevant authorities draw up and implement a standardized monitoring form. In addition to this new nomenclature, employment discrimination field experiments – called “testing” in France – should be encouraged.

The proactive feature of promoting equal treatment should also be enhanced. To achieve this, it is essential to inform human resource departments about the complexity of the discrimination issue to limit the impact of stereotypes in the decision-making process. Following the example of the EEOC guidelines, a standard for quality training that is suited to different business sectors could be developed. This training might be helpful in challenging certain recruitment practices (informal/word of mouth notification about job offers) and in questioning the objective and meritocratic nature of the way that companies assign jobs, provide training, or give promotions. To counter possible unconscious biases in decision-making, it would be advisable to conceal the identities of applicants from recruiters. The provision relating to anonymous résumés stipulated under Art. 24 of the Law of March 31, 2006 represents a step in this direction.

Perhaps a parallel can be drawn to road safety in France. Strict enforcement of the rules of the road (and fear of high fines) has led to a significant decrease in road accidents over the past ten years. Similarly, the American example shows that the stages of legal action and negotiations occurred at very specific times on the antidiscrimination timeline. An effective strategy would require following the order of these stages. An initial phase of judicial handling appears to be essential as French antidiscrimination law is a very recent development, and as only a small number of

discrimination cases have gone to trial until now. Therefore, it would be desirable to institute formal legal remedies so as to legitimize and inform about antidiscrimination judicial precedents.

Moreover, for court action to prompt a dynamic comparable to the one in the United States, truly dissuasive sanctions that instill violators with fear of legal action should be implemented. From this standpoint, class action suits and large fines (higher than the ones currently imposed by French courts, which are negligible compared to the maximum fines stipulated by law) might be an avenue to explore.

Conclusion

The wide array of tools of the American system, which mobilizes both government agencies and non-government organizations, is a key asset for fighting racial discrimination. Its relative effectiveness demonstrates the need to rationalize the French antidiscrimination system in order to combine incentives with more standard regulatory instruments. Closely following the timeline specific to antidiscrimination action would be advisable: it seems that using constraints should precede stressing incentives and proceedings alternative to legal sanctions since the EEOC has only focused on mediation as a legal remedy since the 1990s. In addition, this multi-faceted strategy was only made possible because there was a strong political will from the onset, as exemplified by the empowerment of specialized agencies. To implement such a coherent and proactive policy in France, all stakeholders – the HALDE, judicial institutions, the French government and civil society – should work together and coordinate their actions whenever possible. From this standpoint, the HALDE would be perfectly positioned to play a central role in ensuring the unity and effectiveness of government action.

About the French-American Foundation

Founded in 1976, the French-American Foundation is committed to advancing the dialogue between France and the United States. The foundation brings together key policymakers, academics, business leaders and other prominent individuals from both countries so that they may exchange their ideas and create productive bonds likely to have a lasting effect on policies in France and in the United States. To reach these objectives, the French-American Foundation creates multi-year thematic programs, holds conferences, organizes exchanges and produces publications meant to foster and share best practices between the two countries.

The French-American Foundation policy program on “Equality of Opportunity” examines French and American strategies to fight discrimination and to promote greater integration to foster dialogue and exchange best practices between key stakeholders in both countries. It focuses on education and employment, critical means of social integration for minority and immigrant populations. This program has received major funding from the Ford Foundation.

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