French-American Foundation

French and American Approaches to Antidiscrimination Law

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The right to equality before the law is a primary value for both France and the United States, and the principle is written into the countries' respective constitutions. However, different historical experiences and legal structures have influenced the development of specific antidiscrimination measures. It remains to be seen whether these corrective legal measures can be adapted to confront new forms of racial discrimination.

Antidiscrimination law is one way in which democratic societies attempt to combat the social, economic, and political manifestations of racism. Although France and the United States share a commitment to the value of equality codified in their respective constitutions, the two countries' legal frameworks for combating discrimination reflect each country's particular history of racism. Today, racial prejudice manifests itself in increasingly complex ways, from intentional acts of defamation to structural barriers to economic well-being. The central challenge for antidiscrimination law in both France and the United States is adapting to the evolving and multifaceted nature of discrimination.

Legislation prohibiting racial discrimination in France and the United States is based on the fundamental constitutional principle of equality before the law. In France, the first article of the Declaration of the Rights of Man says that "Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good." Since 1946, the Preamble to the French Constitution has cast *racial* distinctions as contrary to constitutional rights: "[E]very human being, without distinction of race, religion, or belief, possesses inalienable and sacred rights." Similarly, the Fourteenth Amendment to the U.S. Constitution, adopted following the Civil War, guarantees "equal protection of the laws." While it does not explicitly ban racial distinctions, U.S. courts today interpret racial discrimination as contrary to constitutional equality, except under very limited circumstances.

This constitutional commitment to equality is also reflected in anti-discrimination laws adopted in the last half century. A 1972 French law criminalized racist speech and other forms of racist conduct, and in 1982 a provision outlawing discrimination in hiring, firing, and disciplining employees was added to the *Code du travail*, the French labor code. In the United States, the Civil Rights Act of 1964 prohibited discrimination in employment, education, and the provision of goods and services.

Criminal and Civil Enforcement: Divergent Frameworks

An important difference between French and American antidiscrimination law is the predominance of criminal sanctions for discrimination in France, whereas in the United States, remedies for discriminatory conduct are solely civil. While civil remedies are also available under French law, the norm against discrimination is enforced primarily in criminal proceedings pursuant to the Penal Code's prohibition of discrimination. This difference stems from the different historical circumstances in which antidiscrimination law emerged in the two countries. There are significant consequences for the definition and conceptualization of discrimination itself, as well as for the contrasting roles of antidiscrimination law.

The law against discrimination is classified in the French Penal Code as a crime against the dignity of persons. When the law prohibiting discrimination was first adopted in France, it was

part of a larger legislative package in 1972 that addressed many different manifestations of racism. The 1972 Pléven law built on existing laws that already imposed criminal penalties for racist conduct—namely, a 1939 law, known as the Marchandeau decree, which imposed criminal punishment for attacks in the press against racial and religious groups. The Marchandeau law was passed shortly before the collapse of the Third Republic to combat the rise of anti-Semitic propaganda. Prior to the ascent of the Vichy regime in 1940, anti-Semitism manifested itself in French society largely in the press and in political discourse, rather than through socio-economic forms of exclusion such as employment discrimination. Suspended by the Vichy regime, the law came back into force in 1946. During the 1972 legislative debates about a new antiracism law, some deputies invoked the 1939 law and the memory of the Holocaust to successfully strengthen the ban on racist speech. The 1972 law defined racism as consisting not only of discrimination but of racist expression.

Thus, in France, racial discrimination is largely framed as a symbolic and expressive act that attacks the victim's dignity and thereby expresses a lack of respect for the victim's equal status. For such a harm to occur, the perpetrator must *intend* to express contempt. By contrast, the U.S. Supreme Court has always understood American antidiscrimination law as an instrument to achieve equality of opportunity, so as to remove barriers that favor any particular racial groups, regardless of whether those barriers constitute an assault on human dignity.

In France, a victim is not necessary to bring a discrimination case. If a defendant is found guilty, punishment can be imposed, consisting of a fine of up to €45,000, or three years' imprisonment. The law emphasizes public harms occasioned by the perpetrator's transgression, rather than providing remedies directly to victims.

In the United States, by contrast, the legal framework for combating discrimination has emerged from attempts to eradicate racial status hierarchies that had obvious socio-economic manifestations. Thus, U.S. antidiscrimination law has not focused on racism or racist expression in relation to dignity, but rather, the practical consequences of racism for an individual's equal contract and property rights. After all, it was the legal incapacity to make and enforce contracts and to hold property that distinguished black slaves from citizens. Civil rights laws adopted after the Civil War guaranteed all persons the same right as white citizens to make and enforce contracts and to hold and sell property.

The antidiscrimination laws that emerged in the United States in the 1960s, such as Title VII, were adopted to eradicate racial segregation. Prior to this era, many states permitted, if not required, racial segregation in public schools. Many private employers openly discriminated against black employees by refusing to hire them or by segregating them into lower-status jobs. The Civil Rights Act of 1964 prohibited such conduct, under threat of civil lawsuits against the employer by the Justice Department on behalf of the aggrieved person. Under Title VII, a victim of discrimination can bring a private civil action against

The Complex Definition of Discrimination

What is discrimination? In U.S. law the legal concept of discrimination developed most significantly in cases interpreting Title VII of the Civil Rights Act of 1964, which bans discrimination in employment. Discrimination generally falls into one of two categories: disparate treatment or disparate impact. Disparate treatment occurs when the employer intentionally treats two persons differently on the basis of a prohibited characteristic, such as race. Disparate impact discrimination is a concept that emerged in the U.S. Supreme Court's 1971 decision in *Griggs v. Duke Power Company*, it occurs when an employer practice disproportionately disadvantages members of a protected group, and the practice cannot be justified by reference to business necessity. Disparate impact discrimination can occur unintentionally.

In France, discrimination is defined by Penal Code article 225-1 as "any distinction operated between persons on the basis of their origin" and other protected characteristics. Article 225-2 defines the types of decisions in which such distinctions would lead to criminal liability. The only form of discrimination, so defined, that is illegal under the Penal Code is intentional discrimination. Indeed, under the basic principles of the Penal Code, there can be no crime without the intent to commit it. Until 2001, French law did not prohibit unintentional forms of discrimination. A law adopted in 2001 prohibited "indirect" discrimination as well as "direct" discrimination under the Labor Code's prohibition of employment discrimination. The purpose of this legislation was to adhere to the European Union's Race Directive of 2000, which directs member states to prohibit "indirect" discrimination. "Indirect" discrimination is similar to the American concept of "disparate impact" discrimination. Although French law does not define "indirect" discrimination, the EU race directive defines as when an apparently neutral practice puts members of a particular racial or ethnic group at a disadvantage, when that provision, criterion, or practice cannot be justified as having a legitimate aim.

U.S. Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Préambule de la constitution de 1946, art. 1

Au lendemain de la victoire remportée par les peuples libres sur les régimes qui ont tenté d'asservir et de dégrader la personne humaine, le peuple français proclame à nouveau que tout être humain, sans distinction de race, de religion ni de croyance, possède des droits inaliénables et sacrés. Il réaffirme solennellement les droits et libertés de l'homme et du citoyen consacrés par la Déclaration des droits de 1789 et les principes fondamentaux reconnus par les lois de la République.

an employer. The plaintiff can demand an injunction – a court order requiring the employer to stop discriminating, or to reinstate or hire the plaintiff – or civil damages, including back pay and, since 1991, compensatory or punitive damages. Legislators explicitly rejected the option of imposing criminal penalties for violations of the Civil Rights Act. U.S. antidiscrimination law, which is designed around a civil liability regime, sees discrimination as a concrete injury to particular persons with economic consequences, such as a lost job or the inability to eat at the restaurant of one's choice. Discrimination thus requires an identifiable victim or concrete disadvantage.

Social Norms and Equal Opportunity

In both countries, antidiscrimination law is limited in its capacity to bring about equality of opportunity, but for different reasons. Antidiscrimination law plays a very marginal role in French society. Compared with the volume of litigation in the United States, very few cases are brought in France. Convictions are rare, largely because, in accordance with general principles of the French Penal Code, there can be no conviction without proof of discriminatory intent. This intent is difficult to prove in criminal proceedings where the defendant benefits from a strong presumption of innocence. Thus, criminal convictions tend to occur only in cases where evidence of discriminatory intent is overwhelmingly clear. Without an explicit admission from the employer that he rejected a job applicant expressly to exclude blacks or North Africans, a conviction is highly unlikely.

Civil cases challenging discrimination under the *Code du travail's* antidiscrimination provision are rare because French civil procedure makes it difficult for plaintiffs to obtain access to evidence to prove constituting discrimination. Even if the defendant's intent to discriminate need not be proven in civil cases, the plaintiff must still provide evidence of the basic facts – for instance, the fact that he was treated differently because of his race. Usually, evidence of such treatment would be in the hands of the defendant – for example, in personnel records, in an employment case. French civil procedure does not permit parties, including plaintiffs, to be witnesses in their own cases, so the plaintiff's own testimony with regard to discrimination would not constitute proof of fact in a civil case.

Responding to the limits of both criminal and civil enforcement regimes, a 2004 law created the *Haute autorité de lutte contre les discriminations et pour l'égalité* (HALDE) (High Authority to Fight Discrimination and to Promote Equality) an agency devoted to combating discrimination and promoting equality. Although the HALDE does not have the power to impose sanctions or compel employers to change their conduct, it plays an important role in aiding victims of discrimination obtain information and evidence that can be used in civil or criminal proceedings. Furthermore, the agency mediates disputes and trains lawyers and judges to raise awareness about issues of discrimination. Whether this will enlarge the role of antidiscrimination law in French society remains to be seen.

In the United States, antidiscrimination law had a transformative effect on American society in the 1970s. Successful lawsuits in the decade following the passage of the Civil Rights Act of 1964 forced employers to abandon overtly discriminatory hiring and promotion policies. By contrast with the French system, the American system of civil litigation makes it relatively easy for plaintiffs to obtain evidence that is in the hands of the adversary. Civil procedure rules entitle parties to obtain any matter that is relevant to a claim or defense from the other side.

However, the social practices that cause racial

inequality in American society have evolved. Now, institutional practices and subtle stereotypes tend to entrench and reinforce the exclusion and disadvantage of racial minorities in employment. Many scholars of employment discrimination law in the United States observe that it is difficult for civil litigation under existing law to root out these more subtle practices that tend to disadvantage minorities. Although there is a large volume of employment discrimination litigation in U.S. courts, many recent studies show that plaintiffs' rate of recovery in these cases is low compared to other types of legal action. Furthermore, despite the availability of the disparate impact theory of liability, disparate impact cases make up a very small percentage of employment discrimination cases, and the success rates for such claims are even lower than the success rate for employment discrimination cases in general.

Future Challenges

French and U.S. antidiscrimination law face similar impending challenges: Can this body of law continue to counteract the evolving practices that undermine equality of opportunity? Because of the difficulties of proving discrimination and the costs of litigation, many of the social practices that cumulatively tend to disadvantage racial minorities are not diminished by antidiscrimination law. If antidiscrimination law is truly an instrument to achieve genuine equality of opportunity, lawyers and policy-makers will need to move beyond the criminal and civil enforcement models that have developed in the two countries.

Useful Links

A Chronology of French Antidiscrimination Law

http://www.ladocumentationfrancaise.fr/dossiers/conference-racisme/chronologie-france.shtml

The High Authority to Fight Discrimination and to Promote Equality (HALDE)

http://www.halde.fr/

EU Council Directive on Race

http://www.eacih.org/fileadmin/DADV/documents/2000-43_en.pdf

U.S. Equal Employment Opportunity Commission

http://www.eeoc.gov/

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