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Combating sexual orientation discrimination in employment: legislation in fifteen EU member states

Report of the *European Group of Experts
on Combating Sexual Orientation Discrimination* ¹

about the implementation up to April 2004 of
*Directive 2000/78/EC establishing a general framework
for equal treatment in employment and occupation*

7 France

by Daniel Borrillo ²

translated from French ³

¹ The European Group of Experts on Combating Sexual Orientation Discrimination (www.emmeijers.nl/experts) was established and funded by the Commission of the European Communities under the framework of the Community Action Programme to combat discrimination 2001-2006 (http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm). The contents of the Group's report do not necessarily reflect the opinion or position of national authorities or of the European Commission. The report, submitted in November 2004, aims to represent the law as it was at the end of April 2004; only occasionally have later developments been taken into account. The full text of the report (including English versions of all 20 chapters and French versions of most chapters, plus summaries of all chapters both in English and French) will be published on the website just mentioned; links to it will be given on www.emmeijers.nl/experts.

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³ The original version of this chapter can be found in the *Version française* of this report, and also on the website mentioned in note 1.

7.1 General legal situation

France was the first country in the world to decriminalize sodomy. Like in all Western countries, before the French Revolution there were several laws that condemned homosexuality with the utmost severity. Inspired by the philosophy of the Enlightenment, the first revolutionary penal code of 1791 and the Napoleonic Code of 1810 ceased to criminalize 'unnatural morals'. The political liberalism and the secularization of the public order led the State to stop interfering in the private lives of consenting adults. The much-vaunted French liberalism, however, should be qualified. Indeed, as Jean Danet⁴ points out, the reticence of the penal codes at that time went hand in hand with a highly repressive case law towards homosexuals and extremely violent medical and psychiatric attitudes.

A century and a half later, on 6 August 1942, a few months after the enactment of the law on the status of Jews, France reintroduced into its criminal law a provision penalizing homosexuality. Marshal Philippe Pétain amended the penal code by introducing the crime of 'indecent and unnatural acts with young persons under 21 years of age and of the same sex as the perpetrator'⁵, whereas for heterosexual acts the majority was set at 13. Following the liberation in 1945, General De Gaulle maintained this criminalization by reintroducing it in the chapter on 'offences against public decency' (Art. 331 par. 2, Penal Code). Furthermore, in 1946 a provision, which would subsequently become part of the general statute of civil servants, stipulated, 'No person may be appointed to a public office if he is not of good morals', thus justifying discrimination. An article in the Employment Code established, 'The master must conduct himself towards his apprentice with proper care, supervise his conduct and morals, either in the house or outside, and notify his parents [...] of any licentious tendencies he might display', thus justifying dismissal for bad morals. On 1 February 1949, the Police Prefect of Paris issued the following regulation: 'It is prohibited for men to dance with each other at all dances'.

Later, as part of the fight against certain social scourges, an Act of 30 June 1960 put homosexuality on the same level as pimping and alcoholism. A decree of 25 November of the same year completed the repressive mechanism by adding to Article 331 indecent exposure as an aggravating circumstance where such an act is committed by individuals of the same sex. In 1968, France adopted the classification of the World Health Organisation (dating from 1965) of mental illnesses, which includes homosexuality alongside fetishism, exhibitionism, necrophilia, etc.

An act of 23 December 1980, amending the penal provisions regarding rape, maintains the offence based on the age difference according to whether the intercourse takes place between people of the same sex or the opposite sex.

⁴ Danet, 1977.

⁵ Art. 334 of the old Penal Code: 'Shall be punished by six months to three years' imprisonment and a fine of 2000F to 6000F: 1° Any person who, in order to satisfy the passions of another person, habitually arouses, favours or facilitates the debauchery or corruption of young people of either sex under the age of 21, or to satisfy his own passions, commits one or several indecent or unnatural acts with a person of his own sex under the age of 21.' (Act n° 742, Official Journal 27 August 1942, p. 2923).

The Constitutional Council considered that the Act was in keeping with the Constitution (Decision 80-125 of 19 December 1980)⁶.

Following the mobilization of the homosexual movement, the Ministry of the Interior on 11 June 1981 addressed a circular to the police hierarchy, prohibiting the 'filing of information on homosexuals, discrimination and especially anti-homosexual suspicions'. Subsequently, the Ministry of Health ceased to include homosexuality in the list of mental illnesses of the World Health Organisation. On 22 June 1982, the Quilliot Act (concerning housing) was promulgated, abolishing the obligation for homosexuals to use their flats 'with proper care'. On 4 August 1982, the Socialist majority at the time, together with the other left-wing parties, voted Act 82-683 which put an end to the age difference between heterosexual (15 years) and homosexual (18 years) relations. On 13 July 1983, a new Act repealed Article 40 of the Civil Service Code which stipulated that a public servant had to be 'of good morals'. Since those first measures, several legal provisions have been enacted to protect gays and lesbians against discrimination, both at the civil and penal level⁷.

7.1.1 Constitutional protection against discrimination

There is no French constitutional provision that explicitly prohibits discrimination on grounds of sexual orientation. The general terms and the non-exhaustive nature of the list of prohibited discriminatory situations⁸ established by Article 1 of the Constitution and the official reports which consider that 'the constitutional legislator did not intend to give an exhaustive enumeration of all possible kinds of discrimination'⁹ have never led the courts to apply these provisions in favour of sexual orientation (without however expressly rejecting it).

A general protection exists in the set of constitutional rules¹⁰. The *Declaration of the Rights of Man and of the Citizen of 1789* establishes in its first article, 'Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good', and in Article 10 it stipulates, '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'. The *Preamble to the Constitution of 1946* reads, 'The law guarantees women equal rights to those of men in all spheres'. 'Each person has the duty to work and the right to employment. No person may suffer prejudice in his work or employment by virtue of his origins, opinions or beliefs'. Furthermore, the *Constitution of the Fifth Republic* proclaims in its first article, 'France shall be an indivisible, secular, democratic and social Republic. It shall ensure the equality of all citizens before the law, without distinction of origin, race or religion. It shall respect all beliefs'.

⁶ 80-125, RJC I-88.

⁷ Borrillo, 1995.

⁸ In this sense, Mélin-Soucranian (1997, 92) considers, 'If we accept that the list of acts of discrimination is not closed, we are also obliged to acknowledge that the constitutional court, like any other court, may by virtue of its normal power of interpretation add new cases of discrimination to the enumeration given in the Constitution'.

⁹ 'The principle of equality in the case law of the constitutional courts sharing the use of the French language'. *Report of the French delegation*, Paris 10 April 1997, RFDA, 1997, p. 228.

¹⁰ Set of positive constitutional standards: Declaration of 1789; Preamble to the Constitution of 1946 and the Constitution of 1958.

7.1.2 *General principles and concepts of equality*

The constitutional principle of equality, referred to in the previous point, is complemented by an anti-discrimination principle established in Article 225-1 of the Penal Code¹¹. It should be pointed out that this general principle does not make it possible to punish all acts of discrimination, but only the situations enumerated in Article 225-2 of the said Code¹².

7.1.3 *Division of legislative powers relating to discrimination in employment*

According to Article 34 of the French Constitution, the rules governing employment law fall principally within the competence of the Legislative; the government has the power to make regulations, in other words, it issues decrees to complement and make more specific what has been laid down in a more general and abstract way by statutes.

France functions as a unitary State. Article 1 of the Constitution establishes that France is an 'indivisible Republic': the state-controlled community is conceived comprehensively without taking into account the diversity of local situations.

7.1.4 *Basic structure of employment law*

All the universal and binding rules (laws, regulations, decrees) governing employment law are codified in the Employment Code¹³. In principle, only the employment relations in the private sector are regulated by employment law. The collective labour agreements complement and improve the instruments of the Employment Code: they adapt the general provisions of the Code to specific situations of a branch of industry.

Public service jobs and the liberal professions are not regulated by the Employment Code, the former falling within the scope of civil service law and the latter being governed by common law.

7.1.5 *Provisions on sexual orientation discrimination in employment or occupation*

As of 1985, the following acts of discrimination are penalized:

- Refusing to hire a person;

¹¹ Art. 225-1 of the Penal Code: 'Discrimination comprises any distinction applied between natural persons by reason of their origin, sex, family situation, physical appearance, descent, state of health, handicap, genetic characteristics, morals, sexual orientation, age, political opinions, union activities, or their membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion. Discrimination also comprises any distinction applied between legal persons by reason of the origin, sex, family situation, physical appearance, descent, state of health, handicap, genetic characteristics, morals, sexual orientation, age, political opinions, union activities, membership or non-membership, true or supposed, of a given ethnic group, nation, race or religion of one or more members of these legal persons'.

¹² Art. 225-2 of the Penal Code: 'Discrimination defined by article 225-1, committed against a natural or legal person, is punished by two years' imprisonment and a fine of €30,000 where it consists: 1° of the refusal to supply goods or services; 2° of obstructing the normal exercise of any given economic activity; 3° of refusing to hire, of sanctioning or dismissing a person; 4° of subjecting the supply of goods or services to a condition based on one of the factors referred to under article 225-1; 5° of subjecting an offer of employment, an application for a traineeship or a period of in-service training to a condition based on one of the factors referred to under article 225-1; 6° of refusing to admit a person to any of the training courses referred to under Article L 412-8, 2°, of the Social Security Code'.

¹³ www.legifrance.gouv.fr/WAspad/UnCode?code=CTRAVAID.rcv

- Sanctioning or dismissing a person;
- Subjecting an offer of employment to a condition based on one of the factors referred to under Article 225-1.¹⁴

Likewise, where the discriminating party is a public authority, the following acts of discrimination are penalized:

- Refusing the benefit of a right conferred by the law and/or;
- Hindering the normal exercise of any given economic activity.¹⁵

Besides the penal protection provided for cases of discrimination in employment and occupation (hiring, sanctioning, dismissal and subjecting an offer), there are numerous provisions that are specific to employment law (company rules, remuneration, qualification, transfer, career planning, etc)¹⁶.

For public sector employment, the applicable regulation is Article 6 of Act 83-634 of 13 July 1983 (amended by Act 2001-1066 of 16 November 2001 on combating discrimination¹⁷). Finally, the instrument is completed by Article 432-7 of the Penal Code¹⁸.

The protective instruments for combating discrimination apply not only to employees and temporary employment, but also to ordinary traineeships.

7.1.6 *Important case law precedents on sexual orientation discrimination in employment or occupation*

One decision has been delivered at the highest level of national jurisdiction¹⁹. In a ruling of 17 April 1991 – '*P... v. Association Fraternité Saint-Pie X*' – the Social Chamber of the Court of Cassation decided that the dismissal of a sexton on account of his homosexuality could constitute a wrongful breach of the

¹⁴ Art. 225-2 par. 3 and 5 of the Penal Code.

¹⁵ Art. 432-7 of the Penal Code.

¹⁶ Art. L. 122-35 of the Employment Code: 'The company rules (...) shall not contain provisions that prejudice employees in their employment or occupation by reason of their sex, morals, sexual orientation, ...'. Likewise, Article L. 122-45 of the Employment Code provides: 'No person shall be excluded from a recruitment procedure or from access to a traineeship or to a period of in-service training, no employee shall be sanctioned, dismissed or discriminated against, directly or indirectly, with respect to remuneration, training, placement, appointment, qualification, classification, professional advancement, transfer or contract renewal by reason of his origin, sex, morals, sexual orientation (...). No employee shall be sanctioned, dismissed or discriminated against in the manner referred to in the previous paragraph by reason of the normal exercise of the right to strike. No employee shall be sanctioned, dismissed or discriminated against for giving evidence of acts defined in the preceding paragraphs or for reporting such acts'.

¹⁷ Art. 6 of Act 83-634 of 13 July 1983 (amended by Act 2001-1066 of 16 November 2001): 'No distinction, direct or indirect, shall be made between civil servants by reason of their political, trade union, philosophical or religious views, their origin, sexual orientation, age, descent, state of health, physical appearance, handicap or their membership or non-membership, true or supposed, of a given ethnic group or race'.

¹⁸ Art. 432-7, Penal Code: 'Discrimination defined by Article 225-1, committed in respect of a natural or legal person, by a person holding public authority or discharging a public service mission, in the discharge or on the occasion of that office or mission, is punished by three years' imprisonment and a fine of €45,000 where it consists:

1° of refusing the benefit of a right conferred by the law;

2° of hindering the normal exercise of any given economic activity. 225-2 par. 3 and 5'.

¹⁹ There are several case law precedents in the area of homosexuality, but these are concerned mainly with the family (divorce for reasons of misconduct, child custody, visiting arrangements, maintenance, etc), respect for private life, and media law, and not with employment or occupation.

employment contract, and therefore an act of discrimination, if the employer fails to furnish proof that 'bearing in mind the nature of his duties and the purpose of the company (...) the employee's conduct' causes a 'clearly specified disruption' in the company. According to the Court of Cassation, it was unlawful to invoke the homosexuality of the employee as being contrary to Catholic tradition (as the Court of Appeal in Paris emphasized in the quashed judgment). However, if the 'morals' of the employee cause disruption in the company, such a dismissal would not be wrongful. The Court of Appeal, entrusted with re-examining the judgment quashed in cassation, did in fact take on board the objection by deciding in the case in question that 'the dismissal of this employee on the grounds of his homosexuality and the fact that he is HIV-positive ensues from a motive derived solely from his private life and cannot constitute a real and serious cause for terminating the employment contract, since the acts committed by the employee outside the company, which fall within the exercise of his freedoms, cannot justify a dismissal apart from the clearly specified disruption which such behaviour is liable to provoke within the organisation it constitutes, seeing that the unreserved adherence of the employee to the Catholic faith is beyond doubt.'²⁰

In other circumstances, the case law did consider the dismissal of a homosexual justified. In a judgment of 28 January 1993, the Court of Appeal in Montpellier ruled as such in a case where the employer accused the employee of having worked for a competing firm and of having committed provocative indecent acts, namely homosexual acts with a handicapped person, also an employee of the company'.

Moreover, most judgments of the tribunals and appeal courts refer to the professional advantages linked to the life of a couple. Before the Law on PACS (cohabitation contracts) was voted, the judgments were mostly unfavourable to extending such advantages to partners of the same sex²¹.

In a decision of 20 January 2003, the Industrial Tribunal of Martigues ordered a company to pay €130,000 in damages for discrimination on grounds of sexual orientation and moral harassment of a homosexual employee²².

7.1.7 Provisions on discrimination in employment or occupation that do not (yet) cover sexual orientation

All the general regulations make reference to sexual orientation. No such reference occurs in the specific provisions, such as all the articles of Chapter III (Title II) of the Employment Code relating to 'occupational equality between men and women' or the provisions relating to handicapped workers (quotas, timetable adjustments, etc).

The legal provisions concerning gender-based discrimination do not apply to discrimination on grounds of sexual orientation (and/or morals). In a decision of

²⁰ Court of Appeal, Paris, 4 November 1992, Dalloz, *Informations rapides du recueil Dalloz*, p. 125.

²¹ Refusal to recognize same-sex couples as cohabitants: Court of Cassation, Social Chamber, 11 July 1989, and Court of Cassation, Civil Chamber, 17 December 1997.

²² Industrial Tribunal, Martigues, hearing of 20 January 2003, '*Philippe Boutin v. TNT Jet Sud Est*', unpublished.

19 December 1980, the Constitutional Council refused to draw the analogy between sex and sexuality²³.

With regard to collective bargaining, the law requires the social partners to address the 'equality between employees, irrespective of their membership of an ethnic group, nation or race'²⁴. This requirement does not extend to sexual orientation.

7.1.8 *Provisions on sexual orientation discrimination in other fields than employment and occupation*

Besides in employment and occupation, French law affords protection against sexual orientation discrimination in the following areas:

- Refusal to supply goods or services (Art. 225-2, Penal Code);
- Obstructing the normal exercise of any given economic activity (Art. 225-2, Penal Code);
- Subjecting the supply of goods or services (Art. 225-2, Penal Code);
- Refusal to admit a person to any of the training courses referred to in Article L. 412-8, 2°, of the Social Security Code (for example students performing a traineeship) (Art. 225-2, Penal Code);
- Refusal to let living accommodation.²⁵

7.2 **The prohibition of discrimination required by the Directive**

Although France has provided for protection against discrimination towards homosexuals since 1985, the contribution of the Directive appears to be crucial in several respects. First of all, there is the addition of sexual orientation alongside the more ambiguous concept of 'morals'. Nevertheless, the latter concept complements the instruments in the sense that it allows the courts to punish other types of discrimination such as those based on sexual practices: sadomasochism, group sex, free sex, etc.

At the penal level, however, the Directive has had little impact. Apart from the terminological issue, it has simply made it possible to introduce a penalty for discrimination perpetrated during traineeships and/or vocational training.

It is in the area of employment law in particular that the Directive has had most impact on French law. Thanks to the Directive, domestic law introduced the concept of indirect discrimination (without however defining this) and reversed the burden of proof. Furthermore, moral harassment is now penalized in France, while associations are able to act on behalf of the victims in legal actions.

²³ 80-125, RJC I-88.

²⁴ Act of 6 November 2001 (chapter devoted to the National Commission for Collective Bargaining).

²⁵ Art. 158 of Act 2002-73 of 17 January 2002 amending and complementing Article 1, par. 2, of Act 89-462 of 6 July 1989 'aimed at improving tenancy relations'.

7.2.1 *Instrument(s) used to implement the Directive*

The Directive complements the French legal mechanism. The main measures required by the Directive were adopted by Act 2001-1066 of 16 November 2001 on combating discrimination, as well as by Act 2002-73 of 17 January 2002 introducing the prohibition of moral harassment. These two Acts are incorporated in the Penal Code (Art. 225-1, 225-2 and 432-7) and the Employment Code (Art. L122-35, L122-45, L122-46, L122-49, L122-52 and L122-54), as well as in Articles 6 and 6 quinquies of Act 83-634 of 13 July 1983 governing the rights and obligations of civil servants.

7.2.2 *Concept of sexual orientation (art. 1 Directive)*

Protection has existed in France since 1985 against sexual orientation discrimination at the penal level (Act 85-772 of 25 July 1985) and at the level of employment (Act 86-76 of 17 January 1986 and Act 92-1446 of 31 December 1992), but the designation chosen by the Legislative was that of 'morals'. Before the promulgation of Act 2001-1066 of 16 November 2001 on combating discrimination, French law did not know the term 'sexual orientation'. The adoption of this Act, however, did not displace the term 'morals', which continues to exist alongside the new term. The concept of 'morals' was interpreted in the case law as synonymous with homosexuality. The term 'sexual orientation' is not defined by the law or in the case law.

'Gender-based discrimination' existed as a category well before the introduction of the term 'morals'. Nevertheless, this category has never been used in the case law to protect homosexuals against discrimination.

In my view, the concept of sexual orientation does not protect transsexuals or transvestites against discrimination. While the former found protection in the category of 'gender', the latter found protection in the category of 'morals' or, more particularly, in the category of 'physical appearance'.

7.2.3 *Direct discrimination (art. 2(2)(a) Directive)*

In employment law, direct discrimination on grounds of morals has been covered since 1986 with respect to company rules and since 1992 for recruitment, career and dismissal procedures. Direct discrimination is punished most severely, ranging from civil to administrative and penal sanctions.

7.2.4 *Indirect discrimination (art. 2(2)(b) Directive)*

The concept of indirect discrimination was introduced into the Employment Code by the Act of 16 November 2001 without however being defined. What remains to be seen is whether the case law will refer to the definition given by the Directive, which seems logical. It should also be noted that indirect discrimination does not apply in penal law, since this always requires a subjective intention²⁶.

²⁶ Art. 121-3 of the Penal Code: 'There is no felony or misdemeanour in the absence of an intent to commit it'.

7.2.5 Prohibition and concept of harassment (art. 2(3) Directive)

In the Penal Code, the harassment of another person for the purpose of obtaining favours of a sexual nature is punished by one year's imprisonment and a fine of €15,000²⁷. In French law, harassment is not regarded as discrimination but as an act of causing damage to the person's physical or mental health.

Sexual harassment has been punished by employment law since 1992²⁸. Act 2002-73 of 17 January 2002 completes the instrument by introducing the concept of moral harassment²⁹. In French law as it stands now, moral harassment, like sexual harassment, is punished by the Penal Code³⁰ as well as by the Employment Code³¹, but also by regulations governing civil servants (Art. 6, Act 83-634 of 13 July 1983, as amended by recent acts). The law applies to the public sector as well as to the private sector, among managers as well as among colleagues. The law requires that the employee who claims to be the victim of sexual or moral harassment establishes 'the facts that allow the presumption of harassment'³². In terms of civil law, once the victim furnishes proof, it is up to the employer to prove that he has not committed harassment.

The law also complemented the texts relating to the 'harassment arbitrator', in Article L122-54 of the Employment Code. A new Act of 3 January 2003 amended the instrument which in its present version provides, 'An arbitration procedure may be initiated by any person involved. The choice of arbitrator shall be agreed between the parties'.

Finally, the definition 'repeated harassment' established by the law implies that an isolated act cannot be considered as harassment³³. This situation, as well as the fact that it is not considered as a form of discrimination, the concept of harassment in French law falls short of Community requirements in this area.

²⁷ Art. 222-33 of the Penal Code.

²⁸ Art. L 122-46 of the Employment Code: 'No employee or applicant for a job, traineeship or period of in-service training shall be punished, dismissed or discriminated against, directly or indirectly, with respect to remuneration, training, placement, appointment, qualification, classification, professional advancement, transfer or contract renewal by reason of having undergone or refusing to undergo harassment by any other person for the purpose of obtaining favours of a sexual nature for his own benefit or for the benefit of a third party.

No employee shall be sanctioned, dismissed or discriminated against for giving evidence of acts defined in the preceding paragraph or for reporting such acts.

Any provision or act to the contrary shall be legally null and void'.

²⁹ Art. L 122-49 : 'No employee shall be obliged to undergo repeated acts of moral harassment which are designed to or which lead to a deterioration of his working conditions liable to harm his rights and his dignity, to damage his physical or mental health or to compromise his career prospects.

No employee shall be sanctioned, dismissed or discriminated against, directly or indirectly, with respect to remuneration, training, placement, appointment, qualification, classification, professional advancement, transfer or contract renewal by reason of having undergone or refusing to undergo such acts as defined in the preceding paragraph or for giving evidence of such acts or for reporting them.

Any breach of the employment contract as a result thereof, any provision or act to the contrary shall be legally null and void'.

³⁰ Art. 222-33-2 of the Penal Code: 'Harassing another person by repeated conduct which is designed to or which leads to a deterioration of his conditions of work liable to harm his rights and his dignity, to damage his physical or mental health or compromise his career prospects is punished by a fine of €15,000.

³¹ Art. L 122-49 of the Employment Code.

³² Art. L 122-52.

³³ Art. L122-49.

7.2.6 *Instruction to discriminate (art. 2(4) Directive)*

In my view, the concept in French law of the instruction to discriminate should be seen as a form of discrimination. There is no express prohibition of the instruction to discriminate.

7.2.7 *Material scope of applicability of the prohibition (art. 3 Directive)*

The situations where protection is afforded are defined by Article 225-2 of the Penal Code and by other articles (see 7.1.5):

- Company rules;
- Hiring of workers;
- Access to traineeship;
- Training;
- System of sanctions;
- Dismissal;
- Remuneration;
- Placement;
- Appointment, qualification, classification, promotion, transfer, contract renewal (Art. L122-45 of the Employment Code);
- Civil service and comparable employment (Art. 6 quinquies of the Act governing the rights and obligations of civil servants);
- Obstruction of an economic activity by a public authority (Art. 432-7 of the Penal Code);
- Refusal by a public authority of a benefit conferred by the law (Art. 432-7 of the Penal Code);
- Sexual and/or moral harassment in public and private sector employment (see 7.2.6).

French law does not afford protection against discrimination in unpaid employment (except for unpaid traineeships in the company).

7.2.8 *Personal scope of applicability: natural and legal persons whose actions are the object of the prohibition*

Natural and legal persons, both public and private.³⁴ The designation of a legal person makes it possible to go beyond the responsibility of an isolated individual and to confront an organisational, economic or social structure as the perpetrator of discrimination (Art. 121-2 of the Penal Code).

As regards persons holding public authority or discharging a public service mission, Article 432-7 of the Penal Code punishes refusal of the benefit of a

³⁴ Colleagues who perpetrate acts of harassment are punishable exclusively under the Penal Code. The Employment Code is only applicable where an employee is harassed by a supervisor.

right conferred by the law and obstruction of the normal exercise of a given economic activity.

7.3 What forms of conduct in the field of employment are prohibited as sexual orientation discrimination?

The law gives no definition of sexual orientation or of morals. The latter term was added to the list of grounds prohibited by penal law by an amendment tabled by a Socialist MP. According to the author of the amendment, his proposal at the time was 'of course aimed at homosexuals, but not only them. It also concerns those who by their behaviour, way of life, dress, haircut and whatever else may be refused certain goods or services'³⁵. In order to avoid an essentialization of the category 'sexual orientation', the legislator had to follow the solution chosen in the drafting of the laws on racial discrimination in which, after the designation of membership of an ethnic or racial group, the specification 'true or supposed' race was included, so that discrimination is not based on a material reality of membership of the category, but simply on the basis of the mental picture formed by the person who discriminates³⁶.

7.3.1 *Discrimination on grounds of a person's actual or assumed heterosexual, homosexual or bisexual preference or behaviour*

Since the law does not define the term 'sexual orientation' and the case law contains no rulings yet on this terminological question, we can only formulate the hypothesis that the courts might universally apply the category 'sexual orientation' covering homosexuality, heterosexuality and bisexuality.

7.3.2 *Discrimination on grounds of a person's coming out with, or not hiding, his or her sexual orientation*

Employees are free to come out with or hide their sexual orientation. In any case employees are protected against all forms of discrimination.

7.3.3 *Discrimination between same-sex partners and different-sex partners*

The Court of Cassation on two occasions defined the concept of cohabitation as a de facto union between a man and a woman. In 1989, the Court of Cassation ruled that the sickness benefit funds could refuse to confer the title of claimant on a same-sex cohabitant of the insured.³⁷ To confirm this interpretation, an identical solution was adopted in connection with the refusal by Air France to confer on the same-sex cohabitant of an employee the benefits that are granted to staff living in a 'free union'.³⁸ In 1997, the same Court allowed a refusal to transfer a lease to the surviving homosexual partner of a man who had died of

³⁵ Jean-Pierre Michel, Official Journal of the French National Assembly, 24 May 1985, p.1103.

³⁶ It is only in Article 132-77 of the Penal Code concerning aggravating circumstances in the case of homophobic crimes that the Legislator chose the formula 'true or supposed sexual orientation' (introduced into the Penal Code by Article 47 of Act 2003-239 of 18 March 2003).

³⁷ Judgment of 11 July 1980, *Bulletin Civil des arrêts de la Cour de Cassation*, 1989, V, No. 515, 312.

³⁸ Judgment of 11 July 1980, *Bulletin Civil des arrêts de la Cour de Cassation*, 1989, V, No. 514, 311.

AIDS. It needed the Cohabitation Contracts Act of 1999 to come into force to put an end to such rulings.

Since the Act of 15 November 1999 came into force, (and except for access to assisted procreation techniques and adoption), there is no discrimination in the law between same-sex cohabitants and different-sex cohabitants³⁹. Cohabiting unmarried couples (homosexuals or heterosexuals) find themselves in a less favourable legal situation than married couples. Discrimination exists against homosexual couples due to the fact that they cannot marry. This situation might constitute a case of indirect discrimination in the area of employment, but no court has ruled on this yet.

Apart from the issue of access to marriage for same-sex couples, indirect discrimination exists between couples when it comes to benefiting from a reduction of the two-year period of conjugal life in order to claim a life annuity following the death of an employee in cases where the couple has one or several children. Since homosexual couples have no right to filiation, they are on no account entitled to such a reduction.

In my view, all these situations constitute a case of indirect discrimination on grounds of sexual orientation, and are therefore contrary to Article 16 of the Directive.

7.3.4 *Discrimination on grounds of a person's association with gay/lesbian/bisexual individuals, events or organisations*

No specific provision exists. Therefore the principle of freedom of association applies, and no person may be discriminated against on grounds of such association (except for what is laid down in point 7.4.4)

7.3.5 *Discrimination against groups, organisations, events or information off/for/on lesbians, gays, bisexuals*

In the absence of a specific provision, it is the principle of freedom of expression that applies. I know of no case of discrimination against a homosexual organisation in the area of employment.

Groups (with legal personality) and associations are protected against discrimination based on sexual orientation, as provided by the Penal Code.⁴⁰

In an entirely different field, the APGL (Association of Gay and Lesbian Parents and Future Parents) has been removed from the *Conseil supérieur de l'information sexuelle* (CSIS – Sexual Information High Council), an advisory body in the field of sex education, contraception and abortion⁴¹.

³⁹ Art. 515-8 of the Civil Code: 'Cohabitation is a de facto union, characterized by conjugal life of a stable and continuous nature, between two persons of different sexes or of the same sex, living as a couple'.

⁴⁰ See the second sentence of art. 225-1 of the Penal Code, quoted in para. 7.1.2.

⁴¹ Ministerial Decree of 29 July 2002 (Official Journal 6/8/02). The Association of Gay and Lesbian Parents and Future Parents and the CADAC (Coordination of Associations for the Right to Abortion and Contraception) were removed in favour of two Catholic and family associations (National Confederation of Catholic Family Associations and Families of France).

7.3.6 *Discrimination on grounds of a person's refusal to answer, or answering inaccurately, a question about his or her sexual orientation*

Article 9 of the Civil Code establishes that 'everyone has the right to respect for his private life'. Furthermore, Article L.121-6 of the Employment Code stipulates, 'The information requested, in whatever form, from a job applicant shall be used solely for the purpose of evaluating his ability to hold the position offered or his professional skills. This information shall be directly and necessarily connected with the position offered or with the evaluation of the applicant's professional skills'. The investigation framework is therefore established by this text. The information requested must be directly connected with the position offered or with the applicant's professional skills. Consequently, the employee is not obliged to supply information on his sexual orientation.

7.3.7 *Discrimination on grounds of a person's previous criminal record due to a conviction for a homosexual offence without heterosexual equivalent*

Homosexuals convicted before 10 May 1981 under the former Article 331-2 have been granted the right to Presidential amnesty by a decision of August 1981.

7.3.8 *Harassment*

The concept of sexual harassment traditionally referred to advances by men to women. In 1993, however, the Court of Appeal in Paris for the first time punished an act of homosexual sexual harassment⁴².

Since harassment is not considered a form of discrimination but an attack on a person's integrity, it matters little whether the sexual advances are of a homosexual or heterosexual nature.

It is prohibited to disclose another person's homosexuality (*outing*). Such a disclosure constitutes an infringement of a person's privacy. Article 9 of the Civil Code provides, 'Everyone has the right to respect for his private life. Without prejudice to compensation for injury suffered, the court may prescribe any measures, such as sequestration, seizure and others, appropriate to prevent or put an end to an invasion of personal privacy'. In a judgment of 10 March 2003, the High Court in Paris decided in favour of MP Jean-Luc Romero in a case he had brought against a gay magazine, which had revealed his homosexuality two years before in an article on the campaign for the local elections in Paris. The Court recalled that 'a person's sexual orientation comes within the sphere of private life'.

Negative remarks towards homosexuals would now fall within the scope of penal law as a form of moral harassment. Not so long ago, however, they were still tolerated. In an appeal lodged with the Court of Cassation against a judgment of the Court of Appeal in Paris, which had considered that the

⁴² Court of Appeal, Paris, 18th Ch., Section C, 8 October 1992, *Sté Euro Disney v. Vallinas*, Juris Data n° 023467.

dismissal for serious misconduct of an employee who had made homophobic remarks to one of his subordinates was wrongful since the serious misconduct had not been established⁴³, the Social Chamber of the Court of Cassation (in a decision of 8 October 1992) upheld this judgment and considered that the repeated jokes about homosexuality constituted 'facile jokes', and was proper to 'tradition and custom' in the occupational environment.

7.4 Exceptions to the prohibition of discrimination

Unlike prohibited situations connected with age, health, genetic characteristics⁴⁴, sex or family situation, French law makes no exception to the prohibition of sexual orientation discrimination.

7.4.1 Objectively justified indirect disadvantages (art. 2 (2)(b)(i) Directive)

No exceptions in the law.

7.4.2 Measures necessary for public security, for the protection of rights of others, etc. (art. 2(5) Directive)

No exceptions in the law.

7.4.3 Social security and similar payments (art. 3(3) Directive)

All homosexual and heterosexual individuals enjoy the same social rights. Nevertheless in my opinion, there exists a form of indirect discrimination in the fact that gays and lesbians cannot marry. Individuals linked by a cohabitation contract are not entitled to widow's pension or survivor's pension, nor to rights devolved to spouses in collective labour agreements, nor to parental rights following the death of the spouse who was vested with parental authority, etc⁴⁵.

7.4.4 Occupational requirements (art. 4(1) Directive)

The exception of denominational corporations alone does not suffice to justify discrimination on grounds of sexual orientation. Proof is also needed of the objective reason as clearly specified disruption within the company. In the judgment of 17 April 1991 cited above, which was delivered in connection with the dismissal of an employee on the grounds of his homosexuality, the Court of Cassation certainly considered that 'it is prohibited for an employer to dismiss an employee for the sole reason drawn from his morals or his religious beliefs', but then went on to point out that there could be no discrimination since 'dismissal is allowed for objective reasons based on the behaviour of the

⁴³ 21 ch. sect. 16 of 16 May 1991.

⁴⁴ The latter exception has just been incorporated in the Penal Code: 'However, such discrimination is punishable by the penalties provided for in the preceding article where such discrimination is based on predictive genetic tests for an illness that has not been notified yet or a genetic predisposition to a certain illness'.

⁴⁵ See Borrillo and Fassin, 2003. The right-wing majority in Parliament recently opposed an amendment tabled by the Communist group to extend widow's pension and survivor's pension benefits to cohabitants.

employee who, bearing in mind the nature of his duties and the purpose of the company, caused a clearly specified disruption within this company'.⁴⁶

7.4.5 *Loyalty to the organisation's ethos based on religion or belief (art. 4(2) Directive)*

An employer cannot invoke the homosexuality of an employee in a religious organisation. The Court of Cassation, in the so-called sexton judgment, quashed the decision of the Court of Appeal precisely because it invoked the incompatibility of the Catholic ethic with the homosexuality of the employee. However, dismissal may be justified if disruption of relations at work is proved. In other words, the exception of denominational corporations must always be accompanied by proof of a clearly specified disruption.

7.4.6 *Positive action (art. 7(1) Directive)*

No measures of affirmative action exist as yet for sexual orientation. French-style positive discrimination as conceived by the Council of State is based on criteria of neutral or general distinctions such as gender, race, handicap, economic or social situation, territory, etc.

An employer cannot positively discriminate in favour of a homosexual candidate, since such a situation would be considered plain discrimination.

7.5 Remedies and enforcement

7.5.1 *Basic structure of enforcement of employment law*

French law provides for judicial and non-judicial remedies. The latter are exercised by the *employer* from the moment he is requested to do so by the victim or simply as soon as he suspects a situation of discrimination, in which case he must make sure that it ceases. They may also be exercised by the *employees' representatives, the human resources manager or the works council*⁴⁷, as well as by the *trade unions* (which have extensive powers to take legal action in the name of the collective interest of the profession⁴⁸) and organisations for combating discrimination (which may exercise the rights that are granted to a party bringing a civil action⁴⁹). These non-judicial remedies may also be exercised by the *Labour Inspectorate*⁵⁰, which also has the powers of

⁴⁶ Court of Cassation, Social Chamber, 17 April 1991, *Droit Social* 1991, 485.

⁴⁷ Art. L 422-1 of the Employment Code: 'The duties of the employees' representatives shall be to submit to the employer all individual and collective complaints concerning wages, the application of the Employment Code and other laws and regulations concerning social security, hygiene and safety, as well as collective labour agreements applicable in the company; to refer to the Labour Inspectorate all complaints and observations concerning the application of the laws and regulations of which it is responsible for ensuring the enforcement'.

⁴⁸ Art. L 141-11 of the Employment Code.

⁴⁹ Art. 2-6 of the Code of Criminal Procedure.

⁵⁰ Art. L 611-1 et seq.: 'The labour inspectors may request all documents or information, in whatever form, that may be useful for establishing facts that are likely to allow them to establish the existence or absence of an infringement of Articles L122-45 of the Employment Code and Article 225-2 of the Penal Code'.

judicial police. It can report to the *Commission d'Infractions* and notify the Public Prosecutor.

Judicial remedies are exercised before the Industrial Tribunal.

7.5.2 Specific and/or general enforcement bodies

The *Industrial Tribunal* is the court that is charged with enforcing the law and settling disputes arising from employment contracts. An institution unique in Europe, this court of law is composed of elected judges (from among candidates who are not magistrates) who exercise their jurisdiction in employment law. Where a case of discrimination is concerned that is provided for by the Penal Code, the victim may also refer his case to the Magistrates' Court. The administrative court may be appealed to for challenging individual measures affecting professional life in the public sector.

Although there exist organisations that specialize in promoting equality and combating racial discrimination (Research Group for Combating Discrimination⁵¹; Departmental Commission for Access to Citizenship⁵²; the Foundation for Action and Support for Integration and Combating Discrimination (FASILD)⁵³; the High Council for Integration), special programmes also exist for combating sex discrimination and for the integration of handicapped persons. On the other hand, there are no agencies or programmes that are officially concerned with sexual orientation discrimination.

On 16 February 2004, the French Ombudsman submitted a report to the Prime Minister proposing the establishment of a High Authority for combating discrimination, which would be empowered to act in all cases of discrimination. Its primary task would be to handle individual complaints and to offer support to victims of discrimination who would be able to put their case directly to this body. Although the High Authority cannot take the place of the courts, it would have access to means of investigation with respect to public services and to private individuals. It would be able to refer cases to the courts, and it may issue warnings. It would have a mediatory and advisory function. The Authority would also encourage the drawing up of codes for promoting equality designed to establish good practices, and would encourage public services and industry to become involved in this process voluntarily.

The bill which was presented by the government on 15 July 2004 and should be discussed this autumn⁵⁴, is insufficient on a number of points. An independent authority promoting equality and against all forms of discrimination is mostly favoured. The *Commission nationale consultative des Droits de l'Homme* formulated the recommendations so that the independence and the means of the institution, as well as a central role for the victims are ensured in the bill⁵⁵.

⁵¹ www.le114.com.

⁵² www.tarn.pref.gouv.fr/pages/dispositifs_d_aide/default.htm.

⁵³ www.social.gouv.fr/htm/pointsur/accueil/fasild.htm.

⁵⁴ Bill for the establishment of a High Authority for anti-discrimination and equality [*Project de loi portant création de la Haute autorité de lutte contre les discriminations et pour l'égalité*], 15 July 2004, 1732/2004 www.assemblee-nat.fr/12/projets/pl1732.asp.

⁵⁵ Bill for an independent anti-discrimination administrative authority [*Projet d'une autorité administrative indépendante de lutte contre les discriminations*], 3 November 2003, *Commission Nationale Consultative des Droits de l'Homme* www.commission-droits-homme.fr/bin/InfoGeneFr/affichageDepeche.cfm?IdDepeche=105.

The main anti-discrimination associations are expected to emphasise the inadequacies of this bill⁵⁶. They propose that the range of prohibited grounds is enlarged and that gender identity is added. They demand that the *Haute Autorité* engages with civil society to a greater extent, suggesting that the members of these associations can participate directly within the authority. According to the associations, article 4 should be modified so that public authorities are equally required to give explanations about their actions in cases before the authority. The regional branches should also be equally placed, and finally the burden of proof should be the same as before other administrative courts (contrary to what was established in article 17 of the bill).

7.5.3 Civil, penal, administrative, advisory and/or conciliatory procedures (art. 9(1) Directive)

Civil procedure before the Industrial Tribunal: may be instituted by private sector employees or non-incumbent agents employed in an industrial or commercial public service. The trade unions may bring a civil action solely within the framework set out in Article L 411-11 of the Employment Code. Associations may also bring a civil action.

Criminal procedure: before the magistrates' court of the place where the discriminatory act was perpetrated. Only direct discrimination is covered by criminal law. The public prosecutor's office acts on the information supplied by the judicial police (Art. 15-3 of the Code of Criminal Procedure), who receive complaints from victims, or by any public official (for example counsellors of the National Employment Agency). Associations may refer cases directly to the public prosecutor's office. In criminal procedure, it is the Public Prosecutor who decides whether prosecution is appropriate.

Administrative procedure: administrative court in whose jurisdiction the author of the challenged decision is domiciled⁵⁷.

7.5.4 Civil, penal and/or administrative sanctions (art. 17 Directive)

The principle in French law is that discriminatory acts are null and void. In the case of dismissal, an employee will therefore be reinstated as of right⁵⁸.

Furthermore, in civil law, the Industrial Tribunal may award damages and/or order the annulment of the challenged measure (Art. L122-45 of the Employment Code).

In penal law, where a natural person is involved, the magistrates' court may impose a maximum sentence of two years' imprisonment and a fine of €30,000 as well as any of the additional penalties of Article 225-19 of the Penal Code (posting up or dissemination of the judgment, closure for five years at the most

⁵⁶ Collective for a national independent anti-discrimination authority [*Collectif pour une autorité indépendante universelle de lutte contre les discriminations*], Impression AIDES

⁵⁷ www.aides.org/sites/aides/?arbo_parent=1057/&cmd=dossier&id=1057&tyoe+F&niveau=1&type_menu=1. Administrative law does not provide for a right to summon the other party directly. The complainant must first apply to the public service; only if he is faced with a total or partial refusal can he bring his case before the court.

⁵⁸ The employee, however, may refuse to be reinstated in the company and instead request the cancellation of the employment contract by the court.

or definitive closure of one, several or all of the establishments of the business owned by the convicted person, definitive exclusion from procurement contracts or for a period of five years at the most, confiscation of the business, etc)⁵⁹.

Where a natural person holding public authority or discharging a public service mission is involved, such person may incur a maximum sentence of three years' imprisonment and a fine of €45,000 as well as any of the other penalties of Article 432-17 of the Penal Code: forfeiture of civil, civic and family rights, in accordance with the conditions set out in Article 131-26; prohibition, in accordance with the conditions set out in Article 131-27, of holding a public office or of carrying on the professional or social activity during the exercise or as a result of the exercise of which the offence was committed; confiscation, in accordance with the conditions set out in Article 131-21, of money and items unlawfully received by the perpetrator of the offence, with the exception of items that may be returned. In the case provided for in Article 432-7, the posting up or dissemination of the judgment, in accordance with the conditions set out in Article 131-35.

Where a legal person is involved, such person may be declared criminally liable for the offences committed on its behalf by its bodies or representatives. This liability does not exclude that of the natural persons. The penalties include a fine of €150,000, posting up of the judgment, placing under court supervision for a period of five years, prohibition for a period of five years of carrying on a professional activity during the exercise of which the offence was committed, closure of the establishment, exclusion from procurement contracts, confiscation of the item that was used to commit the offence.

At the administrative level, the competent administrative court is in principle that in whose jurisdiction the author of the challenged decision is domiciled. Two types of remedies may be referred to it, namely remedies for abuse of power or remedies of full jurisdiction. The former is aimed at the annulment of the discriminatory administrative act or individual decision. The remedy of full jurisdiction, also called remedy of full litigation, is aimed not only at obtaining the annulment of a decision, but also at demanding compensation.

7.5.5 *Natural and legal persons to whom sanctions may be applied*

Natural persons, persons holding public authority or discharging a public service mission, and legal persons⁶⁰.

⁵⁹ See also article 225-1, as well as article 132-77, cited above. Also see the new wording of Articles 221-4, 222-3, 222-8, 222-10, 222-12, 222-13, 222-18-1, 222-24, 222-30, 311-4 and 312-2, as modified by the Law 2004-204 of 9 March 2004 which compliments the Law of 18 March 2003 (Law 2003-239). These articles expand the crimes based on the sexual orientation of the victim. Finally, see the new wording of article 226-19 of the Penal Code, which was introduced by the Law of 6 August 2004.

⁶⁰ Since the new Penal Code came into force in 1994, legal persons (with the exception of the State) may be held criminally liable for offences committed on their behalf by their bodies or representatives in the cases expressly provided for by law. The criminal liability of legal persons does not exclude that of the natural persons who are perpetrators of or accomplices to the same acts (Articles 121-2 and 225-4 of the Penal Code).

7.5.6 Awareness among law enforcers of sexual orientation issues

There is very little or no awareness among law enforcers of sexual orientation discrimination, starting with the judges of the highest judicial authorities⁶¹. In an appeal lodged with the Court of Cassation against a judgment of the Court of Appeal in Paris⁶² (which considered that the dismissal for serious misconduct of an employee who made homophobic remarks to one of his subordinates was wrongful because the serious misconduct had not been constituted), the Social Chamber of the Court of Cassation (in a decision of 8 October 1992) upheld this judgment and considered that the repeated jokes about homosexuality constituted 'facile jokes', and was proper to 'tradition and custom' in the occupational environment.

Although the associations receive numerous reports of discrimination at work, only one decision in favour of a homosexual employee who was the victim of discrimination has been recorded in France (the Cassation case cited under 7.1.6). This discrepancy between the law and reality clearly shows how civil society has failed to appropriate this legal tool.

The judicial police sometimes refuse to consider complaints of discrimination⁶³.

The limited number of labour inspectors makes the work of monitoring fairly ineffective (it would appear that the inspectors are poorly informed about sexual orientation discrimination)⁶⁴.

Public officials and civil servants must notify the Public Prosecutor of any violations they report during the exercise of their duties. However, there seems to be an institutional resistance to the judicialization of disputes.

The trade unions do not seem really active in bringing cases of sexual orientation discrimination before the courts (although there are many complaints of trade union discrimination).

This low level of litigation activity can also be observed among gay and lesbian associations.

7.5.7 Standing for interest groups (art. 9(2) Directive)

Article 2-6 of the Code of Criminal Procedure allows associations to take legal action. It should be noted, however, that the concept of sexual orientation does not feature alongside that of 'morals' in the text of that Article, as is the case with all the other provisions. This oversight on the part of the legislator is, in my view, contrary to the requirements of the Directive.

The trade unions cannot bring a civil action in penal law. Their right to intervene is limited by Article L411-11 of the Employment Code⁶⁵.

⁶¹ For example, with regard to gender-based discrimination, despite the existence of a sophisticated legal instrument, there have only been two decisions by the Court of Cassation in civil law. See: Serverin, 1994, 654 et seq.

⁶² 21 ch. sect. 16 of 16 May 1991.

⁶³ Note n° 2 of the Advisory Committee of the Research Group for Combating Discrimination, page 60.

⁶⁴ There are also problems connected with the discretion of the inspectors and their choice of the reported cases to be dealt with.

Despite the number of gay and lesbian associations connected with the sphere of work and despite their legal capacity to take action, they have so far displayed little activity in the legal domain. This is probably due to the French tradition of showing little inclination to judicialize disputes.

7.5.8 *Burden of proof of discrimination (art. 10 Directive)*

A distinction should be made between proof in penal law and proof in employment law. In penal law, it is up to the victim or the Public Prosecutor to furnish proof of the facts constituting the discrimination (material element) as well as of the employer's intention to discriminate (moral element). The principle is that of the freedom of proof (eyewitness accounts, bailiff's report, memos, internal documents, *testing*⁶⁶, etc). Penal law is only concerned with cases of direct discrimination.

In civil cases, the law does not require the victim to furnish proof, but simply the 'factual elements that allow the presumption of direct or indirect discrimination'. It is then up to the respondent party to prove that its decision was justified by 'objective elements that have nothing to do with discrimination'⁶⁷. The Industrial Tribunal will base its decision on a consideration of all these elements.

French law does not extend this new system of proof to public sector employees. This means that civil servants cannot benefit from sharing the burden of proof as is already the case for private sector employees. This situation is contrary to the Directive.

7.5.9 *Burden of proof of sexual orientation*

In the area of employment, it suffices for the victim to supply evidence, 'factual elements that allow the presumption of direct or indirect discrimination'. It is then up to the respondent to prove that its decision was justified by objective elements that have nothing to do with discrimination. The victim is under no obligation to prove his sexual orientation.

7.5.10 *Victimisation (art. 11 Directive)*

Since 1983, victimisation has been punished solely in connection with gender-based discrimination⁶⁸. In order to bring French law into line with the Directive,

⁶⁵ Art. L411-11 of the Employment Code: 'They have the right to go to court. They may exercise before all courts all the rights reserved for the party bringing a civil action in connection with all acts that cause direct or indirect prejudice to the collective interest of the profession which they represent'.

⁶⁶ *Testing* is a report of an act of discrimination drawn up by a bailiff. This form of proof was ratified by the Criminal Chamber of the Court of Cassation in a decision of 11 June 2002 (judgment n° W 01-85-560 F-D).

⁶⁷ The last paragraph of Article L122-45 of the Employment Code stipulates, 'In case of dispute concerning the application of the preceding paragraphs, the employee concerned or the applicant for a job, traineeship or in-service training shall submit factual elements that allow the presumption of direct or indirect discrimination. In the light of these elements, it is up to the respondent party to prove that its decision was justified by objective elements that have nothing to do with discrimination. The court shall pass judgment after having ordered, where necessary, any and all investigative measures it deems useful. Any provision or act to the contrary taken with regard to an employee shall be legally null and void'.

⁶⁸ Art. L 123-5 of the Employment Code: 'Shall be null and void, any dismissal of an employee following a lawsuit brought by this employee or on his behalf on the basis of the provisions of the present Code regarding equality between men and women in employment, where it has been established that there was no real and serious reason for the dismissal and this dismissal in reality constitutes a measure taken by the employer on account of the lawsuit. In this case, the employee shall be reinstated as of right and shall

Article L122-45-2 of the Employment Code has been amended as follows: *'Shall be null and void, any dismissal of an employee following a lawsuit brought by this employee or on his behalf on the basis of the provisions of the present Code regarding discrimination, where it has been established that there was no real and serious reason for the dismissal and this dismissal in reality constitutes a measure taken by the employer on account of the lawsuit. In this case, the employee shall be reinstated as of right and shall be considered never to have ceased to hold his job.'*

It should be noted that measures of reprisal other than dismissal are not punished in French law which, in this area, has only partly implemented the Directive (as the law does not provide for the nullity of such measures).

As far as the public sector is concerned, victimisation is penalized by Article 6 quinquies (introduced by Act 2002-73 2002-01-17 art. 178 JORF 18 January 2002)⁶⁹.

Pressurizing witnesses and other parties to the proceedings is prohibited by the general provisions of the Penal Code (Art. 434-5): 'Any threat or any other intimidation made against any person with a view to persuading the victim of a felony or a misdemeanour not to file a complaint or to retract is punished by three years' imprisonment and a fine of € 45,000'. And Article 434-15: 'The use of promises, offers, presents, pressures, threats, acts of violence, manoeuvres or tricks in the course of proceedings or in respect of a claim or defence in court to persuade others to make or deliver a false statement, declaration or affidavit, or to abstain from making a statement, declaration or affidavit, is punished by three years' imprisonment and a fine of € 45,000, even where the subornation of perjury was ineffective'.

Protection also exists with respect to eyewitness accounts of harassment (Art. L122-49 of the Employment Code)⁷⁰.

Similarly, Article L122-45, par. 3, of the Employment Code stipulates, 'No employee shall be sanctioned, dismissed or discriminated against for giving evidence of acts defined in the preceding paragraphs or for reporting such acts'.

be considered never to have ceased to hold his job.

If the employee refuses to continue the performance of the employment contract, the Industrial Tribunal shall award him compensation which shall not be less than the salary for the last six months. Furthermore, the employee shall also be entitled to compensation corresponding to the severance payment provided for by Article L. 122-9 or by the applicable collective labour agreement or the employment contract. The second paragraph of Article L 122-14-4 of the present Code shall also apply'.

⁶⁹ Art. 6 quinquies of Act 2002-73 2002-01-17: 'No public servant shall be obliged to undergo repeated acts of moral harassment which are designed to or which lead to a deterioration of his working conditions liable to harm his rights and his dignity, to damage his physical or mental health or to compromise his career prospects. No measure connected with recruitment, appointment, training, assessment, discipline, promotion, posting and transfer shall be taken with regard to a public servant by taking into consideration: 1° The fact that he has undergone, or refused to undergo, acts of moral harassment as referred to in the first paragraph; 2° The fact that he appealed to a hierarchical superior or took legal action with a view to putting an end to these acts; 3° Or the fact that he gave evidence of such acts or reported them. Any official having committed the acts defined above shall be liable to disciplinary sanctions. The provisions of the present article shall apply to non-incumbent public law officials'.

⁷⁰ Art. L122-49 of the Employment Code: '...No employee shall be sanctioned, dismissed or discriminated against, directly or indirectly, with respect to remuneration, training, placement, appointment, qualification, classification, professional advancement, transfer or contract renewal by reason of having undergone or refusing to undergo such acts as defined in the preceding paragraph or for giving evidence of such acts or for reporting them. Any breach of the employment contract as a result thereof, any provision or act to the contrary shall be legally null and void'.

7.5.11 *Other aspects of remedies and enforcement*

Testing as a method of proof intended to establish discrimination may be used in penal law⁷¹ as well as in civil law. In the area of access to employment, the Court of Appeal in a decision of 18 April 2001 convicted an employer of discrimination on grounds of ethnic origin on the basis of *testing* by telephone.

7.6 **Reform of existing discriminatory laws and provisions**

7.6.1 *Abolition of discriminatory laws*

According to the principle of *lex posterior derogat priori*, discriminatory provisions are automatically repealed as soon as new laws become effective.

7.6.2 *Abolition of discriminatory administrative provisions*

Discriminatory administrative provisions are automatically repealed as soon as new laws become effective.

7.6.3 *Measures to ensure amendment or nullity of discriminatory provisions included in contracts, collective agreements, internal rules of undertakings, rules governing the independent occupations and professions, and rules governing workers' and employers' organisations*

If no specific measure is adopted, according to the general principle of *lex posteriori derogat priori*, all discriminatory provisions will automatically be null and void.

7.6.4 *Discriminatory laws and provisions still in force*

None to my knowledge.

7.7 **Concluding remarks**

France falls short of the requirements of the Directive on the following points:

- The law does not define indirect discrimination (7.2.4).
- Even though harassment in the field of employment is not considered in France as a form of discrimination, the same protection as provided under anti-discrimination provisions applies (7.2.5).
- At work and in employment, harassment must be repetitive for it to be punished by the law (7.2.5).
- Reversal of burden of proof is not mentioned for public service jobs (7.5.8).

⁷¹ Judgment n° 99-87.251 of 12 September 2000 of the Criminal Chamber of the Court of Cassation.

- In the area of employment, reprisal measures other than dismissal are not punished (7.5.10).
- The legal instruments in private law do not protect the liberal professions or jobs in the armed forces (7.2.7).
- The code of criminal procedure does not mention sexual orientation as a situation allowing an association to bring a civil action (7.5.7).

Despite the existence of judicial tools capable of protecting the victims of discrimination, the case law in reality is not in keeping with the actual workplace experience of lesbians, gays, bisexuals and/or heterosexuals.

Although the social indicators prove the existence of a discriminatory reality in the area of employment, the cases that are eventually brought before the courts are quite rare⁷². The reports of the associations for combating AIDS, the information communicated by the Gay and Lesbian Centre in Paris and the testimonies of associations in the provinces reveal how widespread the problem is of discrimination in employment and occupation.

In 2000, the association *SOS Homophobie* recorded 108 calls connected with problems of discrimination, threats and insults in the workplace, both in the public and the private sector⁷³. In 2002, the same association recorded 81 calls in connection with discrimination in employment. The decrease may be accounted for by a dual effect produced by the new legal instruments and by the setting up of numerous gay associations within companies⁷⁴.

A recent survey on homophobia in the workplace among 322 persons⁷⁵ shows that nearly 57% of the respondents experienced homophobia in their workplace, not only from a hierarchical superior (25%), but especially from colleagues (45.3%). Despite the strategies for concealing their homosexuality adopted by lesbians and gays, many of them report 'rumours, unspoken comments, talking behind their backs, etc'. For 44.5% of the respondents, homophobia led to anxiety, stress, loss of confidence, loss of motivation, sometimes even depression and a feeling of guilt.

Moreover, several employees (gays and lesbians) are afraid to say that they have a relationship (cohabitants) for fear of their superiors and colleagues.

Unfortunately, no sociological studies exist in France on how the associations make use of the law to protect the users and to promote their cause. Given the small number of complaints and the absence of lawsuits in this area, it seems that the array of legal tools is not sufficiently deployed yet⁷⁶.

Unlike the fight against racism, xenophobia and the exclusion of women, no official campaigns have been organized yet in the fight against homophobia and

⁷² Only one case was brought before Cassation since there exists in France an instrument for combating discrimination in employment.

⁷³ Report 2001, SOS Homophobie: www.france.grd.org/assocs/sos/

⁷⁴ Chiefly in public corporations. There is an umbrella association that groups all associations. See: www.homoboulot.org/.

⁷⁵ Christophe Falcoz, Crepa-Université de Paris Dauphine, 2003.

⁷⁶ Several LGB associations connected with employment (Air France, Canal +, Paris City Council, SNCF, RATP) have set up an umbrella association, called '*Homoboulot*', which is aimed at combating discrimination in employment. Such a structure undoubtedly allows a more effective deployment of the legal machinery in egalitarian action.

discrimination against LGB persons. On the contrary, the French public authorities, as well as a majority of intellectuals, have expressed overtly heterosexist opinions⁷⁷. Similarly, organisations that are entrusted with asserting equality are concerned exclusively with racial issues. Only the situation of the handicapped and of women are addressed by a ministry or a State secretariat concerned with discrimination against women or the handicapped. Nevertheless, despite the existence of all these tools, the situation remains precarious for ethnic minorities, women and handicapped persons⁷⁸.

No awareness campaigns on sexual orientation discrimination (posters, canvassing, etc) have ever been staged in France. Despite meetings between LGB associations and the political authorities, there has been no dialogue in France leading to concrete proposals aimed at allowing better information and a deployment of the legal machinery. Very recently, a number of LGB associations, among others, met in order to propose the setting up of an independent administrative authority for combating discrimination⁷⁹.

With a legal system that has trouble discerning discrimination (particularly indirect discrimination), a civil society that fails to appropriate protective laws and a government which, in my opinion, combats discrimination based on sexual orientation only in a very limited way, but also numbers among its ranks politicians who are overtly hostile to equal rights for lesbians and gays, the penalties instituted by the law seem far from representing a threat to employers. If it is a question of combating a discriminatory system rather than a subjective discriminatory attitude, the task is even more difficult because we are confronted with a culture in which there is little room for a multiplicity of sexual orientations.

Advertising, television, children's books or schoolbooks at best ignore homosexuality, or at worst continue to treat it as a perversion. It is clear that within the French population, homosexuals are far from being represented in all social areas. It is not a question of putting in place a policy of affirmative action (which would involve requiring individuals to come out as homosexuals) but to take into account the reality of homosexuality, and to adequately question sexuality (art, advertising, cinema, various parts of the city, tourist offices, seminars....).

⁷⁷ See Borrillo and Fassin (dir) 2001.

D. Borrillo and P. Lascoumes, 2002 (see especially the chapter '*Best of Homophobe*')

⁷⁸ In 2000, there were only 15 convictions for racial discrimination. Unemployment is higher among women and their salaries are lower than those of men. Although since 1987 French law requires industry to employ 6% handicapped workers, the employment rate in this group has stagnated at around 4%.

⁷⁹ Bernard Stasi, the French Ombudsman, on 16 February 2004 submitted a report to the President and the Prime Minister suggesting the establishment of an independent authority for combating discrimination. See: www.vie-publique.fr/actualite/alaune/2004/breve_discriminations_rapport_stasi.htm.

List of literature used in footnotes

- Borrillo D., E. Fassin, 'L'aventure ambiguë du pacs', *Regards sur l'actualité*, La documentation française n° 286, 2003, pp.47-53.
- Borrillo, D. et Lascoumes, P. - *Amours égales? Le Pacs, les homosexuels et la gauche*, La Découverte, 2002.
- Borrillo, D., 'L'orientation sexuelle en Europe: esquisse d'une politique publique anti-discriminatoire', *Les Temps Modernes* n°609 June-August 2000.
- Borrillo, D., 'Les instruments juridiques français et européens dans la mise en place du principe d'égalité et de non-discrimination', *Revue Française des Affaires Sociales*, N° 1, Vol. 56, January-March 2002, pp. 113-129.
- Borrillo, D., 'Statut juridique de l'homosexualité et droits de l'homme', in Rommel Mendes-leite (dir), *Un sujet inclassable? Approches sociologiques, littéraires et juridiques des homosexualités*, Cahiers gai kitsch camp, n°28, Lille, February 1995, pp.99-115.
- Borrillo, D. and Fassin, E. (dir) *Au-delà du PaCS, l'expertise familiale à l'épreuve de l'homosexualité*, Paris, PUF, 2nd edition, 2001.
- Danet, J., 'Discours juridique et perversions sexuelles', Centre de Recherche Politique, vol. 6, Université de Nantes 1977.
- Groupe d'Etude et de Lutte contre les Discriminations (GELD), 'Le recours au droit dans la lutte contre les discriminations: la question de la preuve' Note n° 2.
www.le114.com/contenu.php?dossier=0&id_rubrique=4&cns_mode=read&id_note=1b.
- Mélin-Soucramanian, F., *Le principe d'égalité dans la jurisprudence du conseil constitutionnel*. Economica, Paris 1997.
- Rapport 2001 SOS Homophobie: www.france.ard.org/assocs/sos/.
- Serverin, E, 'L'application des sanctions pénales en droit social: un traitement juridictionnel marginal' 1994, *Droit Social*, p. 654 et seq.

