



Comparative study of standards and legislation relating to racial/ethnic discrimination, racism and xenophobia in Spain, France, Tunisia and Morocco

SUMMARY



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ACRONYMS

| | |
|----------------|---|
| CCPR | Human Rights Committee |
| CESCR | Committee on Economic, Social and Cultural Rights. |
| CDN | International Convention on the Rights of the Child |
| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| ECHR | European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) |
| COE | Council of Europe |
| CERD | Committee on the Elimination of Racial Discrimination |
| IACHR | Inter-American Commission on Human Rights |
| CIE | Immigration Detention Centre |
| CJEU | Court of Justice of the European Union |
| ECtHR | European Court of Human Rights |
| CNCDH | National Consultative Commission on Human Rights (French Republic) |
| CNDH | National Human Rights Council (Kingdom of Morocco) |
| CMW | International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families |
| CRMW | Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families |
| CRPD | Convention on the Rights of Persons with Disabilities |
| DILCRAH | Interministerial Delegation to Combat Racism, Antisemitism and Hatred (France) |
| UDHR | Universal Declaration of Human Rights |
| ECRI | European Commission against Racism and Intolerance |
| UPR | Universal periodic review |
| EQUINET | European Network of Equality Bodies |



- OHCHR** Office of the United Nations High Commissioner for Human Rights
- ICERD** The International Convention on the Elimination of All Forms of Racial Discrimination
- OAS** Organization of American States
- ODIHR** Office for Democratic Institutions and Human Rights (OSCE)
- IOM** International Organization for Migration
- ILO** International Labour Organization
- OSCE** Organization for Security and Co-operation in Europe
- ICCPR** International Covenant on Civil and Political Rights
- ICESCR** International Covenant on Economic, Social and Cultural Rights
- RGPH** General Population and Housing Census (Tunisia)
- NANHRI** Network of African National Human Rights Institutions
- ECHR** European Court of Human Rights
- CJEU** Court of Justice of the European Union
- AU** African Union
- UNESCO** United Nations Educational, Scientific and Cultural Organization
- UNHCR** United Nations High Commissioner for Refugees



1. INTRODUCTION

This document attempts to summarize the fundamental aspects of the comparative study of standards and legislation relating to racial/ethnic discrimination, racism and xenophobia in Spain, France, Tunisia and Morocco carried out within the framework of the project “Living together without discrimination: a human rights and gender-based approach”. The comparison aims to identify instruments, the analysis of which will provide avenues to explore and recommendations within the framework of the work in progress to strengthen national mechanisms - in particular those of the Kingdom of Morocco - in this field.

As a criterion for evaluating the guarantees against discrimination against the migrant population, racism and xenophobia that have been implemented in the four States, the international standard has been used, which has been defined on the basis of the results of the report on the analysis of standards and recommendations of international, regional and European Union organizations for combating discrimination against the migrant population, racism and xenophobia, which is also a product of the *Living Together* project.

In terms of structure, after the section in which the keys to understanding the international standard are highlighted, we have chosen to present the provisions of criminal law, due to the importance on the international scene of combating discrimination through criminal law.

It should be borne in mind that in international law, the most elaborate guarantees against racism, xenophobia and discrimination against the migrant population are those included in the field of the fight against racial discrimination. The European Union is no exception and, at this level, important and binding guarantees for the Member States have been developed, particularly in the area of employment. For this reason, a specific section in this study has been devoted to the regulation of employment law in the four countries. In addition to criminal law and employment regulations, it may be interesting to analyse the anti-discrimination mechanisms present in other areas of the law. For ease of presentation, in this report, the analysis of these mechanisms has been grouped into a single section.

Throughout the research, it has been demonstrated that the effectiveness of safeguards against discrimination requires interventions that facilitate access to justice for victims. Due to the importance of this aspect, a point is devoted to its presentation.

Next, and as comparative experience shows that regulatory reforms are not sufficient if they are not accompanied by coordinated public policies, the plans and strategies developed in this area in the states studied will be presented.

Finally, conclusions and ways to strengthen the legislative and regulatory framework of the comparative study have been included in this summary of the comparative study.



2. INTERNATIONAL STANDARDS OF PROTECTION TO COMBAT RACISM, DISCRIMINATION AND XENOPHOBIA AGAINST THE MIGRANT POPULATION

The prohibition of discrimination constitutes a fundamental element of the universal system of protection of human rights, in addition to being presented as key in the 2030 Agenda for Sustainable Development (goal 10.2)¹.

Although the protection afforded by the different treaties varies, international human rights law defines *discrimination* as “any distinction, exclusion, restriction or preference or any other differential treatment based directly or indirectly on the prohibited grounds for discrimination which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of the rights set out”². Under the standard of international human rights law, incitement to discriminate and harassment are included in the concept of discrimination³.

Discrimination can be direct or indirect. Direct discrimination involves less favourable treatment or acts or omissions that cause disadvantage when they are based on one of the prohibited grounds of discrimination (known as differential treatment). Indirect discrimination is used to refer to the disproportionate disadvantage of certain groups in relation to apparently neutral standards or practices (this is called “differential impact”). Intent to discriminate is in no way required for discrimination to exist under international law.

Differentiation does not constitute an attack on equality when it is based on reasonable and objective criteria and if the aim pursued is legitimate, but it must be justified, and the justification must be more rigorous when any of the prohibited grounds comes into play. If less favourable differential treatment or differential and disadvantageous impact for the protected groups is not justified by the need to achieve a legitimate and proportional objective, discrimination exists.

Another concept of discrimination that merits our attention is that of systemic discrimination. This is understood as a set of legal rules, policies, practices or cultural attitudes prevalent in the public sector or the private sector which create disadvantages for certain groups, and privileges for other groups” and exists in situations where discrimination is “strongly rooted in the behaviour and organization of society”⁴. We also talk about *structural discrimination*. In fact, structural discrimination does not always result in discriminatory behaviours that correspond to legal concepts, but their presence justifies the disadvantages of certain social groups and makes it difficult to identify discrimination. When a group is subjected to

1 United Nations General Assembly, Resolution of 25 September, 2015, *Transforming our world: the 2030 Agenda for Sustainable Development* (A/RES/70/1), https://unctad.org/system/files/official-document/ares70d1_en.pdf (Accessed 24-03-2020)

2 CCPR, General Comment No. 18 (1989) Non-discrimination, para. 7. Available in https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6622&Lang=en

3 CESCR, General Comment No. 20 (2009) on non-discrimination in the exercise of economic, social and cultural rights (E/C.12/GC/20), para. 7. Available in https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f20&Lang=en

4 CESCR, General Comment No. 20, cit., para. 12.



structural discrimination, the differential treatment or disadvantageous impact is assumed to be justified and control is circumvented.

To compensate for discrimination rooted in the social structure, states are empowered to take “affirmative action [for disadvantaged groups] in order to diminish or eliminate conditions which cause or help perpetuate the prohibited discrimination”⁵. This *specific action* will not constitute discrimination if it is based on reasonable and objective criteria and if the aim pursued is legitimate.

On the other hand, it must be taken into account that the migrant population does not constitute a homogeneous block, so that in order for the system of protection against discrimination not to be exclusive, it is necessary to consider the situations in which people may be victims of multiple discrimination and the more complicated issue of intersectional discrimination. *Multiple discrimination* refers to situations in which a person experiences two or more grounds of discrimination⁶. Sometimes the grounds interact in such a way that they are inseparable; these situations are called *intersectional* discrimination and there are particular difficulties fitting them into legally established concepts of discrimination, which normally consider a single ground of discrimination. Although the concept of intersectional discrimination has not always been included in the fight against discrimination, racism and xenophobia against the migrant population, it is a particularly interesting analytical tool for identifying power imbalances between group members and, in particular, those related to gender.

Racial discrimination, together with discrimination based on sex, is one of the most worrying aspects of international law; the prohibition of racial discrimination can even be understood as a norm of customary international law and consequently a peremptory norm.

Different instruments of International Human Rights Law are involved in determining guarantees against discrimination against the migrant population, racism and xenophobia. Of all of them, reference to the Convention on the Elimination of Racial Discrimination (ICERD) is unavoidable. The Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance of 2001 and the accompanying Programme of Action (Durban Declaration and Programme of Action) constitute a fundamental reference, as CERD introduced these instruments from 2002 as criteria for interpreting the obligations of member states (this is the case for Spain, France, Tunisia and Morocco). This is why, although Article 1 in sections 1.2 and 1.3 could be interpreted as excluding distinctions of nationality from the scope of the ICERD, CERD insists that the exclusions contained in paragraphs 2 and 3 of Article 1 cannot be interpreted as an exception to the prohibition of discrimination in the Universal Declaration and the two Covenants, so that “differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim and are not proportional to the achievement of this aim”⁷. In view of this interpretation, CERD recommends to States a series of general measures including the review of their legislation in order to detect possible discrimination against the non-national population; to pay attention to the issue of multiple discrimination these people face and to “refrain from applying different standards of treatment to female non-national spouses of citizens and to male non-national spouses of citizens”⁸.

5 CCPR, General Comment No. 18, cit., para. 10.

6 CEDAW, General Recommendation No. 25 (2004) on temporary special measures, para. 12 (CEDAW/C/GC/25). Available in http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/GEC/3733&Lang=

7 CERD, General Recommendation No. 30 (2005) on discrimination against non-nationals, para. 4. Available in [https://conf-dts1.unog.ch/1 %20SPA/Tradutek/Derechos_hum_Base/CERD/00_3_obs_grales_CERD.html#GEN30](https://conf-dts1.unog.ch/1%20SPA/Tradutek/Derechos_hum_Base/CERD/00_3_obs_grales_CERD.html#GEN30)

8 CERD, General Recommendation No. 30, cit., para. 8.



The Committee on the Elimination of Racial Discrimination also recommends taking action against discrimination in *the exercise of economic, social and cultural rights*, as regards *the expulsion of non-nationals*, in the administration of justice (including *the inclusion of aggravating circumstances for racist motives or purposes*), *access to citizenship* and *protection against verbal incitement to racial hatred and violence* (including measures to combat aggression towards and stereotyping of the non-national population by “politicians, officials, educators and the media, on the Internet and other electronic communications networks and in society at large”)⁹.

More specifically, the *prevention of racial discrimination in the administration and functioning of the criminal justice system* is the subject of General Recommendation 31; in this text, among other things, it is recommended that States take action to “prevent questioning, arrests and searches based solely on the physical appearance of a person, that person’s colour or features or membership of a racial or ethnic group, or any profiling which exposes him or her to greater suspicion”¹⁰. These practices that the Committee intends to combat are called *racial profiling*.

The fight against racial discrimination, in accordance with international standards, must include criminal law (we are talking about hate crimes); this is the case of the inclusion of aggravating circumstances, aggravated criminal offences if they are committed for motives of discrimination and hate speech¹¹, but we must also activate prevention tools. States must thus “adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, to combat the prejudices which lead to racial discrimination and to promote understanding, tolerance and friendship among nations and racial or ethnic groups” (Article 7, ICERD).

The Durban Declaration emphasizes the risk of racial discrimination for migrants, refugees and asylum seekers. However, protection regimes against racial discrimination and standards relating to non-nationals are often differentiated. In addition, some of the discrimination suffered by migrants does not yet constitute discrimination based on racial or ethnic origin within the framework of the ICERD. For this reason, it is necessary to take into account the guarantees against discrimination contained in the standards on international protection and on migrant workers.

The *status of refugees* is governed by the 1951 Convention and the 1967 Protocol, of which the four states analysed are participants. The Convention defines as a refugee any person who has obtained this status under international standards and who “is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail him- or herself of the protection of that country, for fear of persecution” (Article 1). Thus, the Convention prohibits the expulsion or forced return of all refugees or asylum seekers under the principle of non-refoulement.

Regarding migrant workers, the instrument that offers the most extensive protection is the *International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, to which Morocco is a party, but which has not been ratified by Spain, France or Tunisia. There are also several relevant International Labour Organization (ILO) conventions. *Convention No. 111* (1958), concerning discrimination (employment and occupation), includes the grounds of “race, colour, sex, religion, political

9 CERD, General Recommendation No. 30, cit., para. 12.

10 CERD, General Recommendation No. 31 (2005), Racial Discrimination in the Administration and Functioning of the Criminal Justice System. Available in <https://www.acnur.org/fileadmin/Documentos/BDL/2012/8463.pdf>

11 Article 4(b) ICERD, CERD General Recommendation No. 29 (2002) concerning discrimination based on descent. Available in https://conf-dts1.unog.ch/1%20SPA/Tradutek/Derechos_hum_Base/CERD/00_3_obs_grales_CERD.html#GEN29



opinion, national extraction or social origin” and it is in force in the four countries¹². They are also committed to *Convention No. 100* (1951) on equal remuneration, relating to men and women workers. However, *Convention No. 97* (1949) on migrant workers *has not been ratified by Tunisia* (takes effect for Morocco on 14 June 2020) and *none of the four countries studied has ratified Convention No. 143* (1975) on migrant workers (supplementary provisions).

The shortcomings of the international community’s response to the current massive population displacements led to the High-Level Summit for Refugees and Migrant Women, which unanimously adopted the *New York Declaration for Refugees and Migrants* (AG/RES/71/1). Although not legally binding, the New York Declaration for Refugees and Migrants is a landmark on the issue in that it expresses political will in favour of the protection of displaced persons and the support of host communities. These commitments led to the adoption, at the Intergovernmental Conference in Marrakech, of the *Global Compact for Safe, Orderly and Regular Migration*¹³ and the *Global Compact on Refugees*, which was adopted on 17 December 2018 by General Assembly resolution 73/151¹⁴. The need to deal separately with the response to migration and the response to situations of refuge has been justified by the fact that the consensus on a common framework from which to deal with questions of asylum and refuge is higher than that concerning safe, orderly and regular migration. The objectives of the Compact that are relevant to the elimination of discrimination against the migrant population are: to facilitate *fair* and ethical recruitment and to safeguard *decent work conditions*, to use *immigration detention* only as a last resort and to seek alternatives, provide migrants *with access to basic services*, and to empower migrants and societies to *achieve full inclusion and social cohesion*.

People at risk of being victims of racism, xenophobia and discrimination against the migrant population may also belong to other disadvantaged groups and therefore may experience multiple and aggravated forms of discrimination that are often difficult to detect. Among migrant people there are women, children and girls, people with disabilities, etc.; however, when data on migration are collected, these dimensions are not always reflected and safeguards against discrimination do not always take into account the diversity of migrants.

This is often the case for *migrant women*, about whom CEDAW and CERD emphasize that they suffer more than men from racial discrimination and that they are victims of *sexual violence* (especially in situations of deprivation of liberty), *forced sterilizations*, abuse of *domestic workers* and the worse employment situation of these same workers.

With regard to the situation of domestic workers, let us recall that ILO Convention No. 189 on domestic workers stipulates that “domestic work continues to be undervalued and invisible and that it is carried out mainly by women and young girls, many of whom are migrants or belong to disadvantaged communities and are particularly vulnerable to discrimination in terms of employment and working conditions and other human rights violations” (Preamble). Unfortunately, this convention has not been ratified by any of the four countries studied.

International human rights law also requires taking into account the situation of *migrant children and adolescents*, as well as that of *people with disabilities*, and *sexual minorities*. It is also essential to

12 https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312256 (Accessed 12/04/2020)

13 <https://undocs.org/en/A/CONF.231/3>

14 <https://undocs.org/en/A/RES/73/151>



remember that racism, xenophobia and discrimination against the migrant population very often go hand in hand with *discrimination based on religion or beliefs*.

Within the otherwise broad and indeterminate framework of international human rights law, regional systems and the European Union provide more concrete examples of some of the guarantees required. At this level, and in particular with regard to “European anti-discrimination law” (Council of Europe and European Union) where racial discrimination has a prominent place, it is appropriate to highlight four aspects: the progressive development of the *intersectional approach*, the interest in the *instruments of criminal law*, the development of guarantees of access to justice and the use of other instruments beyond the Law in the fight against stereotyping and prejudices.

Mention has already been made of the recommendation to adopt an intersectional approach to racism, xenophobia and discrimination against the migrant population as part of the international standard. Furthermore, the obligation of States to *designate as an offence certain attitudes of discrimination on grounds of race*, certain manifestations of *hate speech*, and to include *aggravated criminal offences* and *aggravating circumstances* on grounds of discrimination has also been introduced into the universal protection system¹⁵. The presentation of other aspects (access to justice and the use of non-legal instruments) from regional systems and European Union Law can be useful in establishing models of guarantees against racism, xenophobia and discrimination against the migrant population in the context of international law.

An important part of the efforts made in the regional systems, in particular in the Council of Europe and in the European Union, aims to establish *guarantees of access to justice* in cases of racial discrimination. In this scenario, it is for States to make effective the obligations arising from human rights (to respect, protect and establish) and therefore, in addition to requiring guarantees of non-discrimination by public authorities, mechanisms to strengthen protection against discrimination in relations between private persons are proposed.

On the one hand, it is important to develop *mechanisms for sharing the burden of proof*¹⁶. In most cases, it is difficult to prove discrimination because the defendant is in possession of the evidence. For this reason, some instruments provide for the application to be accepted if the applicant simply demonstrates enough discrimination indices.

Once the case has been accepted by the court, to “dismantle” the presumption that justified the admission of the case, it is up to the defendant to demonstrate that there was no differential treatment or impact or that the difference is justified. Before international tribunals and human rights treaty bodies, the respondent is the state and, sometimes, the evidence to build the presumption on which the admission of the case depends may be provided by the intervention of other agents apart from the person likely to have been discriminated against.

¹⁵ The concretization of these measures by the European Union can be seen in Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. Official Journal of the European Union, 6 December 2008. Available in <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l33178&from=EN>

¹⁶ In the European Union, this guarantee was introduced by Council Directive 2000/43/EC of 29 June 2000 on the implementation of the principle of equal treatment between persons irrespective of race or ethnic origin. Official Journal of the European Communities, 29 June 2000. Available in <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0043&from=en> (it is also the subject of Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex. Official Journal of the European Communities, 20 January 1998. Available in <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997L0080&>. In the regional systems, it presents, inter alia, in ECHR, *Case of BS c. Spain*, available in <https://www.derechoshumanos.net/jurisprudencia/TEDH/Sentencia-Asunto-BS-Vs-Spain-MalosTratos-Racismo.htm>, and in the decision of the Inter-American Court of Human Rights (2012) *Nadege Dorzema and others vs. República Dominicana*, https://www.corteidh.or.cr/docs/casos/articulos/seriec_251_esp.pdf



Although this mechanism is difficult to transfer to the criminal field, it is of interest for employment issues and can also be of interest with regard to the denial of access to goods and services in the civil and commercial code. Precisely in these areas, the *definition of administrative offences and sanctions* which also affect the performance of the administration itself, is a useful tool.

As a supplementary guarantee of the judicial process, in the international systems, it is proposed to create *bodies for equality and non-discrimination* competent to investigate and even determine the commission of an offence and apply the corresponding sanction.

Similarly, within the framework of the regional and European Union systems, there is a call for the media and education, both informal and formal, to be activated in order to overturn the stereotypes which underlie systemic and institutional racism, xenophobia and discrimination against the migrant population.

Finally, in the section on mechanisms that are not specifically legal, the development of plans and strategies to coordinate action, establish goals and measure results, is presented as an important resource.

So far, the international standards for the protection of the migrant population against discrimination, racism and xenophobia have been presented in a general way. The situation in Spain, France, Tunisia and Morocco in relation to these standards will be presented below.



3. CONSTITUTIONAL FRAMEWORK

The proclamation of the principle of equality and the prohibition of discrimination are contained in the constitutions of Spain, France, Tunisia and Morocco, but the definition of prohibited acts of discrimination and criteria for discrimination in accordance with the international standards did not receive the same consideration in the four states.

Although the history of the constitutional recognition of rights has particular features which mean that the instrument for combating discrimination in France is the law, article 2.1 of the 1958 Constitution affirms “the equality before the law of all citizens without distinction of origin, race or religion” in addition to incorporating the Declaration of 1789 and the Preamble of the Constitution of 1946. It should also be added that the conception of equality in the French Republic does not fit well with the consideration of the particular situations of groups with diverse identities and sometimes this makes material equality difficult. On the contrary, the legislative development of the constitutional principle of equality seeks to guarantee equal protection of rights for each person regardless of their cultural specificities.

In the case of the Spanish Constitution of 1978, it is article 14 which introduces the principle of equality and the prohibition of discrimination “Spaniards are equal before the law without any discrimination on the grounds of place of birth, race, sex, religion, opinion or any other personal or social condition or circumstance”. Article 9.2 establishes the State’s commitment to material equality, affirming “that it is the responsibility of the public authorities to promote the conditions for freedom and equality of the individual and of the groups to which (s)he belongs to be real and effective”. With regard to the rights of foreign persons, article 13 affirms that “foreigners shall enjoy public freedoms...in the terms established by treaties and the law”; although this article seems to deconstitutionalize the rights of non-nationals, the decision of the Constitutional Court 115/1987 interpreted the text to indicate that the rights derived from human dignity belong to foreigners on an equal footing with nationals and the regulation cannot stand for the law and are guaranteed by the Constitution. It is an interpretation consistent with the international standard as well as decision of the Constitutional Court 236/2007 which declared unconstitutional the articles of the Organic Law of Freedoms and Rights of Foreigners which, after the reform by Organic Law 8/2000, deprived irregular migrants of the rights to assembly, association and non-compulsory education, free justice and union rights.

Tunisia is bound by the international standard, but the Tunisian Constitution of 2014 does not refer to foreign persons in the proclamation of the principle of equality before the law referred to citizens who “are equal before the law without discrimination” (art. 21), persons with disabilities (Article 48) and the non-discriminatory protection of children in accordance with the paramount interests of the child (Article 47). Consequently, the rights of migrants in Tunisia depend on bilateral agreements. The bilateral conventions concluded by Tunisia with the Maghreb States generally grant nationals of Maghreb countries the same rights as those enjoyed by Tunisian nationals: right to ownership of movable and immovable property, equal treatment with nationals in matters of expropriation, equal treatment with nationals, equal treatment with nationals as regards the right of access to justice and to a fair trial.

In the preamble to the Moroccan Constitution of 2011, the Kingdom of Morocco undertakes to “banish and combat all discrimination against anyone on grounds of sex, colour, beliefs, culture, social or regional origin, language, disability or any personal circumstance whatsoever”. In Morocco, “foreigners enjoy the fundamental freedoms recognized for Moroccan citizens, in accordance with the law” – according to article 30 of the 2011 Constitution, which also provides that foreign nationals residing in Morocco “can



participate in elections by virtue of the law, the application of international conventions, or the practice of reciprocity” – and the nationality and condition of foreign persons are within the domain of the law (Article 71). Despite the literal meaning of these standards, the effect of international law must lead us to understand that differences between nationals and foreigners in the regulation of the exercise of rights will constitute discrimination *unless they are justified by the need to achieve a legitimate objective and are proportional*. A special mention must be made of Article 23, which considers “any incitement to racism, hatred and violence prohibited”.

Thus, despite the fact that France and Spain prohibit discrimination on the basis of nationality, there is in all four States a temptation to deconstitutionalize the recognition of the rights of non-nationals which would be incompatible with international human rights law, as national human rights institutions such as the Spanish Constitutional Court and the Defender of Rights in France have already observed.

Morocco and Tunisia do not expressly prohibit discrimination based on nationality, and the text of the Tunisian constitution does not mention the prohibition of racial discrimination, but both are signed up to the ICERD. Similarly, the clause on the recognition of the rights of foreigners in Morocco must be interpreted as an equal rights clause, because the law can introduce only justified, appropriate and proportional differences.



4. LEGISLATIVE FRAMEWORK

The analysis of safeguards against discrimination established at the level of the law is essential for understanding the framework of protection. In general, protection against discrimination based on nationality is weak, as seen in international human rights law. Furthermore, it has been pointed out that of the four States, only Morocco is a member of the CRMW, Tunisia is not signed up to ILO Convention No. 97, and none of the four has ratified Convention No. 143. Despite the above, the migrant population is protected against discrimination through the measures against racial discrimination that have been implemented in all four systems.

On the other hand, in particular, France and Spain are bound by European Union law. Within the framework of the Union, the citizens of the Member States are protected against discrimination based on nationality. The regular migrant population finds more elaborate mechanisms to protect their rights under conditions of equality in the workplace. This is not the case for the irregular migrant population, for whom no effective safeguards against discrimination have been developed. However, the European Union has developed a solid system of legal safeguards against discrimination based on racial or ethnic origin, which has been transferred to the Member States and from which the migrant population benefits.

Spain and France have had to incorporate into their respective regulations the instruments on discrimination of the European Union, particularly Directive 2000/43/CE of the Council of 29 June 2000 on the adoption of the principle of equal treatment of persons irrespective of their racial or ethnic origin, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, and Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. There are therefore multiple coincidences in the field of application of these (goods and services in relation to racial or ethnic discrimination, employment, penal intervention and protection of victims of crime). In the fields considered by the European Union, the concepts of direct and indirect discrimination and harassment are considered as discrimination. Development is varied outside areas and criteria not provided for by European law, so that the level of safeguards against discrimination depends on the context and the criterion.

Regarding the specifics, it should be noted that in addition to the prohibition of discrimination based on racial or ethnic origin, France has a long list of criteria introduced in civil, social and criminal matters through which the migrant population can be protected against discrimination. It is important to bear in mind that in French law, the concept of race is avoided and that the criteria of race and origin are often replaced (or supplemented) by other categories which do not contradict the universalist concept which underlies the French system of human rights protection (even the term most used is “rights of man”), insofar as they respond to questions deemed far from questions of identity. This role is played by criteria such as place of residence (introduced by Article 15 of law No. 2014-173 of 21 February 2014 on town planning and urban cohesion) or physical appearance. Thus, certain criteria which, in other contexts, would justify a case of indirect discrimination become, in French law, direct discrimination. The strategy is useful because it makes it possible to avoid the difficulty, sometimes the impossibility, of proving the different impacts that certain measures can have for foreigners.



4.1. CRIMINAL LAW

As already said, the Spanish and French criminal provisions are the result of the transposition of European Union law. In this context, States are obliged to combat certain manifestations of racism and xenophobia through criminal law¹⁷; these are hate crimes and hate speech. In the case of France, the instrument for the criminalization of hate speech has been Press Law.

In accordance with the obligations within the framework of the Union, the following are punishable both in Spain and in France:

- a) public incitement to violence or hatred directed against a group of persons or a member of such a group, defined by reference to race, colour, religion, descent, or national or ethnic origin;
- b) the commission of an act referred to in point (a) by public dissemination or distribution of writings, images or other materials;
- c) publicly condoning, denying or grossly trivializing the crimes of genocide, crimes against humanity and war crimes, as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, targeting a group of persons or a person belonging to such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the behaviour is carried out in a manner likely to incite violence or hatred towards a group of people or a person who is a member of such a group;
- d) publicly condoning, denying or grossly trivializing the crimes defined in Article 6 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945, targeting a group of persons or a person belonging to such a group defined by reference to race, colour, religion, descent, or national or ethnic origin, when the behaviour is carried out in a manner likely to incite violence or hatred towards a group of persons or a person who is a member of such a group (Article 1 of Framework Decision 2008/913/JHA).

Racist or xenophobic motivation must be considered as an aggravating circumstance (Article 4 of Framework Decision 2008/913/JHA).

In the European Commission's 2014 report on the implementation of the aforementioned Framework Decision¹⁸, the organization of police units specializing in hate crimes and special prosecution services for this type of crime, as well as the development of specific training for the police service, prosecutors and judges and the recompilation of reliable, comparable and systematically collected data on this type of crime were suggested to improve the application of the stipulated criminal regulations. Initiatives in this regard have been carried out in France and Spain.

By transposition of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, the criminal procedure standards of Spain and France recognize a set of victims' rights in the area of criminal procedures, including the right to protection and compensation. The scope of these standards is independent of the nationality and legal residence status of the victim (Article 1) and "victims of crime should be recognized and treated in a

¹⁷ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32008F0913> (Accessed 24-03-20)

¹⁸ Report SWD (2014) 27 final of 27 January 2014 from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia through criminal law. European Commission. Retrieved [9 June 2019] from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0027>



respectful, sensitive and professional manner without discrimination of any kind based on any ground such as race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age, gender, gender expression, gender identity, sexual orientation, residence status or health” (para. 56). Among the criteria which will be particularly assessed when adopting measures to protect victims is the fact that the offences are based on prejudice or discriminatory motives, such as hate crimes (Article 22. 3). In Spain, racist, antisemitic or other reasons related to ideology, religion or beliefs, family situation, ethnicity, race or nationality of its members, national origin, gender, sexual orientation or identity, their illness or disability are included. In France, the personalized assessment to determine whether specific protective measures must be implemented during criminal proceedings is carried out in view of the “circumstances of the commission of the offence resulting in particular from a discriminatory, racist, ethnic, religious motive, or existing links between the victim and the accused person” (Article 10.5 and D.1-3 Code of Criminal Procedure).

Regarding the protection of victims, it is worth mentioning the extension of protection to foreign women, even in an irregular situation, who are victims of gender-based violence and trafficking provided for by Spanish law. All victims of trafficking also have protection in the other three states.

The Spanish and French Penal Codes criminalize discriminatory acts of refusal of services and benefits by public service officers and persons who carry out professional or commercial activities, respectively. Serious discrimination in public and private employment is also punishable. The grounds prohibited in Spain are ideology, religion or beliefs, ethnicity, race or nation, gender, sexual orientation, family situation, illness or disability. In France, where the regulation is broader, the grounds are origin, gender, family situation, pregnancy, physical appearance, particular vulnerability resulting from their economic situation – apparent or known to its perpetrator –, surname, place of residence, state of health., loss of independence, disability, genetic features, customs, sexual orientation, gender identity, age, political opinions, union activities, ability to express oneself in a language other than French, and actual or supposed membership or non-membership of an ethnic group, a nation, an alleged race or a determined religion. But there are a few cases where the difference is admissible on grounds of protection of the person or, in the case of employment, “unsuitability”. One of these exceptions appears in reference to refusal to hire based on nationality when it results from the application of the statutory provisions relating to the public service.

The Tunisian Penal Code in no way refers to racial discrimination and offensive and xenophobic behaviour to which migrant populations are exposed. Organic Law No. 2018-50 of 23 October 2018 on the elimination of all forms of racial discrimination aims to fill this void. Article 2 of this law considers racial discrimination “any distinction, exclusion, restriction or preference made on the basis of race, colour, descent, national or ethnic origin or any other form of racial discrimination within the meaning of ratified international conventions which is capable of preventing, hindering or denying the enjoyment or exercise, on the basis of equality, of rights and freedoms, or entailing additional duties and burdens”, but in Tunisia, “any distinction, exclusion, restriction or preference established between Tunisians and foreigners does not constitute racial discrimination provided that no nationality is targeted to the detriment of others, while taking into account the international commitments of the Republic of Tunisia”. It is the case that this part of article 2 is contrary to the international commitments of the Republic of Tunisia derived from the ICERD.

Imprisonment and fines are provided for anyone who commits an act or makes a statement containing racial discrimination. And these sentences are aggravated by the vulnerability of the victim. Article 9 provides for hate crimes (incitement; dissemination of ideas based on racial discrimination, racial supremacy



or racial hatred; praising racially discriminatory practices; forming, joining or participating in racist organizations; support or funding of racist activities, associations or organizations).

Since 2003, the Moroccan penal code has introduced discrimination as an offence, which it defines, just like the French penal code, as preventing access to certain goods and services. Anyone who incites discrimination or hatred between people also commits an offence. Anyone who incites discrimination or hatred at sporting events also commits a crime. However, there is no specific criminalization of the dissemination of racist ideas, despite what is recommended in the definition of the international standard.

4.2. EMPLOYMENT LAW

Through the impact of international law and the European Union, employment law is an area in which the legislation on equality and non-discrimination is more developed, particularly in the area of racial discrimination. However, migrants in an irregular situation are not legally protected, especially in the field of domestic employment. This is also the case for non-national workers in Morocco.

While Tunisia's Employment Code refers only to discrimination between men and women, racial discrimination in employment, both direct and indirect, is prohibited in Spain, France and Morocco in recruitment, promotion, training, salary and contract finalization. However, the employment laws of the four countries studied specify different requirements for hiring migrant workers. These requirements generally involve the duty of employers who want to recruit them to obtain an authorization issued by the competent authority. In Morocco, the employment code provides that the government authority responsible for employment can also withdraw the authorization. In addition, the employment relationships of non-nationals are subject to particular requirements, such as a model set by the employment authority (Article 517), the commitment of the employer to bear the costs of return in the case of refusal of authorization. Finally, case law considers that the employment contract of the foreign person is always for a fixed term (Court of Appeal, Decree of 21 Oct. 2003, No. 1074); there is, therefore, an exception to the rule of Article 17 of the Employment Code which provides that "the contract concluded for a maximum duration of one year becomes a contract of indefinite duration when it is maintained beyond its duration". Since the Decree of 24 July 2018, No. 5400, the dismissal of a foreign employee whose employer had not requested the renewal of the work permit is considered abusive according to an interpretation of the Employment Code based on the international obligations of Morocco.

In Tunisia, the rights of migrant workers depend on bilateral agreements (Article 258 Employment Code). The conclusion of an employment contract with a foreign person specifies a residence permit in Tunisia bearing the mention "authorized to perform salaried work in Tunisia", and its duration may not exceed one year, renewable only once" (Article 258.2 of the Employment Code).

Through the influence of Council Directive 2000/43/EC of 29 June 2000 on the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin¹⁹, in Spain and France, the reversal of the burden of proof is introduced in relation to disputes where there is a presumption of discrimination based on race or ethnic origin in access to employment, promotion, vocational guidance and training, working conditions, trade union and professional association rights, and social protection (including social security and health). The European standard also mentions social benefits, education

¹⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0043>



and also access to goods and services, including housing; but, as we will see later, the implementation of the safeguards introduced by the Directive in these other areas has been different in the two countries.

The mechanisms are available, but they still need to be made more effective. On the one hand, there is the problem of proof, which is always difficult to access, but also the problem of raising the awareness of people in the world of work, companies, employment intermediaries and in particular workers' organizations.

On the other hand, it should be mentioned that discrimination in employment involves inequality in the enjoyment of social rights, because access to social benefits in social security systems depends on the regularity of work and its quality (duration, remuneration, etc.). This implies inequality in the enjoyment of the guarantees of social rights. This situation generally affects migrant workers, but particularly migrant women.

In France and Spain, social protection, which does not depend on social security, is conditional on the place of residence, but sometimes difficulties in regularizing or proving residence are also a discriminatory obstacle in access to social services.

4.3. OTHER REGULATORY INSTRUMENTS

One of the areas where the proclamation of the prohibition of discrimination is found more in Spain, France and Morocco is *education*; in addition, equality and non-discrimination are part of the curriculum. The concept of equality – and secularism – dominating the French educational environment has often led to conflicts about the prohibition of religious symbols in public educational centres.

Framework law No. 2002-80 of 23 July 2002 on education and teaching in Tunisia considers education as a basic right guaranteed to all *Tunisians* without discrimination based on sex, social origin, colour or religion". This implies that the right to education, which is compulsory from the age of six to sixteen, is not officially guaranteed for migrants.

Another sensitive area is sport. Paradoxically, *sporting events* have proven to be favourable scenarios for expressing racial hatred. This issue has prompted the criminalization of the most serious behaviours by Tunisia, Morocco and France. In addition to the criminalization of the expressions of hatred already mentioned, Spain has established a framework of administrative offences and has developed policies to raise awareness of discrimination among sports federations. In France, the fight against discrimination and violence in sport is part of the national strategy for ecological transition towards sustainable development (2015-2020).

The growing concern in the international arena about the role of the *media* in disseminating discriminatory messages and images has been projected onto the states. In addition to the crimes defined, Spain has adopted standards for audiovisual communication and advertising. As for France, it has implemented provisions on the protection of minors, girls and boys, against certain materials in the audiovisual field that are discriminatory in nature or incite racial hatred. Law No. 88-13 on the press and publishing²⁰ provides for the prohibition or blocking of publications (press, websites, advertising) inciting discrimination

²⁰ Dahir No. 1-16-122 of 6 kaada 1437 (10-8-2016) promulgating law No. 88-13 on the press and publishing. Official Bulletin No. 6522, 1-12-2016



or racial hatred; fines are also imposed on those responsible for the publication, dissemination or transmission of discriminatory messages. The National Press Council applies the ethical charter of the press (in force from 3 August 2019) which prohibits practices of racial discrimination, among others.

In addition to the above, the report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance following her mission to the Kingdom of Morocco²¹, cited as good practice the work developed by the High Authority for Audiovisual Communication and in particular the guide developed with the High Authorities of Côte d'Ivoire and Tunisia, *Combating hate speech in the audiovisual media. Standards, case law, good practice, and case studies*²².

There are other sensitive areas in relation to which there are still no specific provisions. We must cite as good examples the guarantees provided by French law on *housing and town planning*. The refusal of housing to a person because of "their origin, surname, physical appearance, gender, family situation, state of health, disability, customs, sexual orientation, political opinions, union activities or his or her true or supposed membership or non-membership of a given ethnic group, nation, race or religion" is a civil offence (in addition to being a possible criminal offence). Article 1 of law No. 2014-173 of 21 February 2014 on town planning and urban cohesion stipulates that council policy must contribute to combating discrimination "of which the inhabitants of disadvantaged neighbourhoods are victims, particularly discrimination related to their place of residence and their real or supposed origin". Although this article does not talk about discrimination against the migrant population, it is included in the reference to place of residence and real or supposed origin.

Another of the scenarios in which the migrant population is exposed to discrimination is that related to *international protection*. All four States are parties to the 1951 Convention relating to the Status of Refugees, but large contemporary displacements test the adequacy of this instrument and pose a challenge for States to implement adequate measures to prevent discrimination on the basis of nationality in access and in the protection provided so that people in vulnerable situations do not encounter obstacles in the procedure which deprive them of the protection to which they are entitled. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection contains provisions in this regard, whose transposition by the Spanish State is pending. Among the migrants in a vulnerable situation are those who additionally belong to other groups exposed to discrimination (sometimes women -always when they have been victims of sexual violence; children, especially girls and adolescent girls and boys; disabled people, etc.).

Legal guarantees are necessary to combat racism, xenophobia and discrimination against the migrant population, but the law is not a sufficient instrument to combat these situations which are sometimes rooted in the social structure. For this reason, intervention against discrimination that does not take into account, in addition to legislative reforms, intervention at other levels, is insufficient. Thus, the reforms of substantive law must be supplemented by guarantees of access to justice and by the development of public policies at different levels which tend to coordinate action and which focus on awareness-raising, training and the empowerment of people and groups exposed to discrimination.

21 <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/41/54/Add.1&Lang=F>

22 In cooperation between the High Authority for Audiovisual Communication of Côte d'Ivoire, the High Authority for Audiovisual Communication of Morocco and the Independent High Authority for Audiovisual Communication of Tunisia, *Combating hate speech in the audiovisual media. Standards, case law, good practice, and case studies*, International Organization of La Francophonie, 2017. Available in <https://www.refram.org/Media/Files/Etudes-et-presentations/Guide-contre-les-discours-de-haine> (Accessed 16 Oct. 2019)



5. ACCESS TO JUSTICE

Sometimes, despite the prohibition of discrimination, victims encounter difficulties in accessing justice as a result of a lack of information or resources, but also the existence of rigid procedures and attitudes or gaps in the training of legal operators.

To resolve this situation, it is necessary to adopt awareness-raising and educational measures, but in Comparative Law, the States have also tried procedural and organizational formulas to make rules on the merits more effective in the fight against discrimination. The mechanisms of *reversal of the burden of proof* already mentioned are an example of this and they must be introduced in the social and civil codes and the code for administration and litigation. Integration into the penal code is difficult because of the difficulties in making this case scenario conform to the principle of the presumption of innocence.

The *specialization* of police units and public prosecution systems and the judiciary referred to in the 2014 Report of the European Commission on the application of the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law is another such measure.

Of all the initiatives, the establishment of specialized anti-discrimination bodies has proven to be one of the most effective. In Spain, the institution dedicated to combating racial discrimination is the Council for the Elimination of Racial or Ethnic Discrimination (in addition to the Defender of the People); in France, the Defender of Rights has assumed the functions of combating discrimination first attributed to a High Authority.

The Council for the Elimination of Racial or Ethnic Discrimination is competent in the areas covered by Directive 2000/43/EC which requires its creation. It receives support from the Institute for Women and for Equal Opportunity (which is the organization in charge of combating discrimination against women). In its composition the attempt has been made to guarantee the representation of the collectives which are most often victims of racial discrimination, but it is an institution dependent on the government and it has an advisory character, although it can decide independently on the drafting and dissemination of analyses and reports as well as promoting measures that contribute to the elimination of discrimination. In addition, the Spanish Observatory on Racism and Xenophobia (OBERAXE) - now attached to the State Office for Migration of the Spanish Ministry of Inclusion, Social Security and Migration - has as its main function the collection and analysis of information and the promotion of work to combat racism, racial discrimination, xenophobia and other forms of intolerance, as well as hate incidents and hate crimes²³.

The Defender of Rights in France has a power of arbitration and can activate public action if the arbitration is not successful. In arbitration proceedings, the institution for the fight against discrimination in France has, in certain cases (offences provided for in the Penal and Employment Codes), a power that can be said to be sanctioning, and not only advisory, insofar as the person who has been denounced for discrimination can accept the proposed sanction.

The Constitution of Morocco provides for the creation of an authority responsible for parity and the fight against all forms of discrimination (Articles 19 and 164), but despite the promulgation of the organic law

²³ <http://www.mitramiss.gob.es/oberaxe/es/index.htm>



relating to this authority, it has not yet been established. On the other hand, the competences attributed by the text of the organic law seem to refer to discrimination between men and women.

The competence of the French anti-discrimination institution to activate public action can be a tool to compensate for the difficulties encountered by victims of discrimination in accessing justice. Other instruments of interest concern the possibility of intervention by associations representing the interests of groups that are victims of discrimination. In Spain as in France, there is a reluctance to give associations procedural legitimacy, but there are already examples of trade unions and consumer associations. On certain occasions, associations can intervene on behalf of the victim, for example, in Spain, with regard to people with disabilities.

It would be interesting, on the one hand, to try similar formulas in terms of discrimination, but also for trade unions and consumer associations to use the rights of action they already have in the fight against discrimination, because migrants are also workers and consumers. Along these lines, the law of modernization of justice of the 21st century of 18 November 2016 created a system of collective redress in matters of discrimination²⁴; the group action can be initiated by a trade union or an association for the fight against discrimination that has been in existence for at least five years, in cases of discrimination suffered by at least two people in salary, access or promotion in public or private employment.

²⁴ Law No. 2016-1547 of 18 November 2016 on the modernization of justice in the 21st century. Available in <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033418805&categorieLien=id>



6. PUBLIC POLICIES AND COORDINATION MEASURES

Various documents produced at the international level show that discrimination is a complex phenomenon with cultural roots that must be addressed through coordinated interventions in different areas. In the States that have been the subject of this study, plans and strategies have been developed and have had great relevance in the fight against racism, xenophobia and discrimination against the migrant population.

In Spain, plans and strategies have been implemented which have had some good results, but due to the political situation of the Spanish State, two of the most important, the Human Rights Plan and the National Strategy for the Fight against Racism, Xenophobia and related Intolerance, are awaiting renewal.

The development of coordination measures between the national institutions involved in the fields of discrimination is also desirable. An example is the Interministerial Agreement for institutional cooperation in the fight against racism, xenophobia, LGBTphobia and other forms of intolerance signed in Spain between the General Council of the Judiciary, the Attorney General, the Ministry of Justice, the Ministry of the Interior, the Ministry of Education and Vocational Training, the Ministry of Labour, Migration and Social Security, the Ministry of the Presidency, Relations with Parliament and of Equality, the Ministry of Culture and Sport and the Centre for Legal Studies²⁵ and which is oriented towards the organization of training and awareness-raising activities for professionals involved in the effectiveness of regulations against discrimination, the strengthening of the collection of data and statistics on hate crimes and the fight against hate speech.

In France, the national plan to combat racism and antisemitism, the current period of validity of which is from 2018 to 2020²⁶, mobilizes all ministries to fight against hate on the Internet, educate against prejudice and stereotyping, better support victims, and invest in new areas of mobilization. Some of the planned measures are: the overhaul of local anti-racism policies and the establishment of local plans, an associative and participatory communication campaign to mobilize society, the creation, within the Pharos reporting platform, of a national unit responsible for combating hate speech on the Internet, the development of alternative penalties with educational value, in particular citizenship courses, education in the values of tolerance and respect for others, at school and beyond, by developing schemes such as citizen sponsorship, civic service and the citizen reserve. Measures to promote access to justice for victims of racism, antisemitism and hatred have been included in the plan.

As part of this plan, the Interministerial Delegation to Combat Racism, Antisemitism and Hatred (DIL-CRAH) steers the plan which mobilizes all the Ministries, with a very important role for the Ministry of Education.

25 The ministries have been named according to the nomenclature in force on the date of the agreement, 19 September 2018. Available in <http://www.mitramiss.gob.es/oberaxe/es/ejes/coordinacion/interinstitucional/index.htm>

26 <https://www.gouvernement.fr/plan-national-de-lutte-contre-le-racisme-et-l-antisemitisme-2018-2020>



In Morocco, the National Immigration and Asylum Strategy²⁷ aims to achieve better integration of immigrants and better management through the establishment of a mechanism that brings together all people working in the field of migration. Several major areas have been defined, which relate in particular to the challenges of integration, good governance, respect for human rights and then the fight against discrimination and the fight against human trafficking. Other instruments express Morocco's commitment to equality and the prohibition of discrimination – National Action Plan for Democracy and Human Rights (2018-2021)²⁸ and the Government Plan for Equality (2017-2021)²⁹ – but they do not expressly mention the elimination of racism, xenophobia and discrimination against the migrant population.

Coordination of plans and strategies makes it possible to introduce the coordinated measures necessary for the effectiveness of legal reforms. It is also important to bear in mind that the participation of groups that are victims of discrimination in the definition of strategies and measures as well as in the composition of coordination and monitoring mechanisms is a necessary condition for interventions to adopt a rights-based approach.

27 Ministry in Charge of Moroccans Living Abroad and Migration Affairs, *National Immigration and Asylum Strategy*. Available in [https://marocainsdumonde.gov.ma/wp-content/uploads/2018/02/Strate %CC % 81gie-Nationale-dimmigration-et-dAsile-llovepdf-compressed.pdf](https://marocainsdumonde.gov.ma/wp-content/uploads/2018/02/Strate%CC%81gie-Nationale-dimmigration-et-dAsile-llovepdf-compressed.pdf)

28 https://didh.gov.ma/fr/planification-et-suivi/politiques_publiques/le-plan-daction-national-en-matiere-de-democratie-et-des-droits-de-lhomme-2018-2021/

29 [http://www.social.gov.ma/sites/default/files/icram %202 %20fr.pdf](http://www.social.gov.ma/sites/default/files/icram%202%20fr.pdf)



7. CONCLUSIONS

7.1. THE INTERNATIONAL FRAMEWORK

Spain, France, Tunisia and Morocco are committed to respecting the standards of the universal system of protection against racism, xenophobia and discrimination against the migrant population. In this context, the prohibition of racial discrimination set out in the International Charter of Human Rights is therefore considered a peremptory norm. In addition, the ICERD defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and basic freedoms in the political, economic, social, cultural or any other field of public life” (Article 1 ICERD), and, although “distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens”, were first excluded by ICERD Article 1.2, an interpretation aligned with commitments made in Durban recognizes that “xenophobia against non-nationals, particularly migrants, refugees and asylum seekers, is one of the main sources of contemporary racism, and that rights abuses committed against members of these groups occur largely in the context of discriminatory, xenophobic and racist practices”³⁰. The exclusions contained in paragraphs 2 and 3 of Article 1 cannot therefore be interpreted as an exception to the prohibition of discrimination of the Universal Declaration and the two covenants, so that a difference in treatment based on citizenship or immigration status constitutes discrimination unless it is justified by the need to achieve a legitimate aim and is proportional.

One of the measures specified by the ICERD is the prohibition of hate speech. Article 4 of the ICERD, condemns “all propaganda and all organizations which are motivated by ideas or theories based on the superiority of a race or a group of people of a certain colour or a certain ethnic origin, or who claim to justify or encourage any form of hatred and racial discrimination”. CERD believes that states should criminalize all acts of racism as stated in Article 4 of the International Convention, including the dissemination of ideas based on racial superiority or hatred, incitement to racial hatred, violence or incitement to racial violence, but also racist propaganda activities and racist organisations. Member States, moreover, are encouraged to introduce into their criminal legislation a general aggravating circumstance relating to the racial motivation of the offences”³¹.

In addition, migrants, refugees and asylum seekers are expressly mentioned in the Durban Declaration and Programme of Action as victims of racism, xenophobia and related intolerance. The Convention relating to the Status of Refugees defines as a refugee anyone who has obtained this status under international standards and who “is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail him- or herself of the protection of that country, for fear of persecution” (Article 1); the Convention prohibits the expulsion or forced return of all refugees or asylum seekers under the principle of non-refoulement.

30 CERD, General Recommendation 30, cit.

31 CERD, General Recommendation 30, cit., para. 4a).



The Global Compact for Safe, Orderly and Regular Migration aims to define a common approach to international migration. The principles that guide the Compact are people, international cooperation, national sovereignty, rule of law and procedural guarantees, sustainable development, human rights, gender perspective, child's perspective, the pan-governmental approach, and the pan-social approach. Although it is not a binding document, the Migration Compact constitutes a crucial step forward in this respect, both in terms of placing migration in a complex perspective, and in recognizing it as a phenomenon with enriching potential for society as a whole. In this light, starting from Objective 17, one of the commitments made by the signatory countries is to encourage a change of opinion: "an open and evidence-based public discourse on migration and migrants [...] that generates a more realistic, human and constructive perception in this regard" in order to reduce all "manifestations of racism, racial discrimination, violence, xenophobia and related intolerance". Other objectives relevant to the elimination of discrimination against migrants are to facilitate fair and ethical recruitment and to safeguard decent working conditions, to resort to the detention of migrants only as a last resort and to seek alternative solutions, to provide migrants with access to basic services, to empower migrants and societies to achieve full inclusion and social cohesion.

Of the four countries analysed, only Morocco is a party to the CRMW, which is the most comprehensive instrument for the protection of the rights of migrant workers and has established a series of definitions for the different categories of migrant workers, as well as an official link with its content in order to hold party States accountable for the rights of migrant workers and their families. Thus, the CRMW commits States to cooperate in mobility programmes that facilitate migration, movement of labour, migration integration programmes, to promote family reunification and to cooperate in return and readmission. A reporting cycle is also put in place to monitor the rights arising from the international obligations of signatory States.

7.2. THE CONSTITUTIONAL FRAMEWORK

All four states have incorporated a commitment to equality and the fight against discrimination into their constitutions. Although differences in the recognition of the rights of non-nationals are admitted, it is necessary to interpret the constitutional and legal provisions (for example, Article 13 of the Spanish Constitution and article 2 of the Tunisian Law on racial discrimination) in accordance with the binding international standard so that these differences respond to the need to achieve a legitimate aim and are proportional. Thus, the law on the rights and freedoms of foreigners in Spain and their social integration, since 2009, defines discrimination as "any act that, directly or indirectly, results in a distinction, exclusion, restriction or preference against an alien based on race, colour, descent, national or ethnic origin, or religious beliefs and practices, and which has the purpose or effect of nullifying or limiting the recognition or exercise, on an equal footing, of human rights and basic freedoms in the political, economic, social or cultural field".

7.3. THE LEGISLATIVE FRAMEWORK

1. Spain and France are bound by Council Directive 2000/43/EC of 29 June 2000 against racial discrimination, and Council Directive 2000/78/EC of 27 November 2000 on equality in employment, as well as by Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law. This circumstance leads to coincidences regarding the concepts of discrimination and prohibited grounds, as well as in respect of certain areas of particular interest and with certain responses.



2. French criminal law punishes discrimination based on “membership or non-membership, real or supposed, of a given ethnic group, nation, race or religion” when it prevents the person from accessing certain goods and activities; for example when it consists in refusing the supply of a good or a service, in hindering the normal exercise of any economic activity; in refusing to hire, sanctioning or dismissing a person; in making the supply of a good or service subject to a condition based on one of the elements defined as discriminatory; in making a job offer, an internship request or a period of in-house training subject to a condition based on any of these elements; in refusing to accept a person on certain training courses covered by the social security code. And the offences are aggravated by the circumstance of discrimination.

In Spain there are also cases of discrimination constituting offences when it occurs in public or private employment or is committed by a public official. Discrimination based on ethnicity, race or nation is also an aggravating circumstance in the Spanish Penal Code.

Both French criminal law and Spanish criminal law sanction public defamation of a racial nature, public insult of a racial nature, public provocation to racial hatred, condoning of war crimes or crimes against humanity, disputing of crimes against humanity, non-public racial insult, non-public racial defamation, non-public incitement to racial hatred, and racial discrimination.

Tunisia is today the first Arab country to have passed a law which provides for prison sentences and heavy fines for any person or group who engages in incitement to hatred, racist threats, or the dissemination and the condoning of racism.

Since 2003, the Moroccan criminal code has introduced discrimination as an offence, like the French code, when it comes to preventing access to certain goods and services. Anyone who incites discrimination or hatred between people also commits an offence. Anyone who incites discrimination or hatred at sporting events also commits a crime. Protection against the dissemination of racist ideas is introduced by the press standards.

3. Employment legislation in France and Spain provides for sanctions in the event of direct or indirect discrimination or harassment on grounds of membership or non-membership of an ethnic group, nation or race. In these cases, if there are indications of discrimination, it is up to the other party to justify the differential treatment. Also, due to the impact of European law, rigorous control is used.

With regard to the applicable law for the protection of the rights of migrants and the policy on migration in Tunisia, the Tunisian administration generally has discretionary power, no recourse being granted to foreign persons in the event of refusal to grant, for example, a residence permit. Nor is there any guarantee against arbitrary expulsion. The vague concept of public order is often written into the texts. These discriminatory situations are mitigated by the bilateral agreements signed with other Maghreb countries. Nationals of Maghreb states enjoy the right to work and to exercise all industrial, commercial and agricultural trades and any other regulated activity.

Discrimination based on race is prohibited by the Moroccan Employment Code, but there are particular features in the hiring of non-nationals that could be discriminatory. In addition, immigration regulations are being reviewed. The national immigration and asylum strategy includes the prohibition of discrimination in its objectives with regard to the integration of legal immigrants.

4. As the international framework shows, education is a transcendent area in the fight against discrimination. Educational standards in Spain and France include both the prohibition of discrimination as educational content and as a principle of the organization of teaching. In France, it is worth noting the action of the Ministry of Education, since the CNCDH called its attention to the matter, in connection with the training of educators and the development of mechanisms such as peer mediation. As part of Morocco’s immigration and asylum strategy, content-related measures in this area are progressing.
5. A particularly important area is the audiovisual sector. Both in France and in Spain, there are audiovisual regulations aimed at avoiding racist and xenophobic content. In Morocco, the press



law contains provisions on the prohibition of such content and the punishment of those responsible.

6. In France, moreover, there are provisions on housing which prohibit discrimination. Similarly, the French provision on town planning (Article 1 of law No. 2014-173) is of particular interest; this stipulates that the town policy must contribute to combating discrimination “of which the inhabitants of disadvantaged neighbourhoods are victims, particularly discrimination related to their place of residence and their real or supposed origin”.
7. In any case, there is no structured response framework against discrimination at administrative level. The areas of intervention vary according to the states and the responses depend on the authorities involved in the area concerned (employment, audiovisual, etc.).

7.4. COORDINATION OF THE RESPONSE TO RACISM, XENOPHOBIA AND DISCRIMINATION AGAINST THE MIGRANT POPULATION

1. None of the States has a general regulatory mechanism on equality and non-discrimination which would, in addition to allowing coordination between the various competent authorities, make it possible to treat discrimination as a general phenomenon by avoiding the current fragmentation of the grounds and sectors.
2. France has a comprehensive system of protection against racial discrimination, articulated in the National Plan to Combat Racism and Antisemitism and Hate Speech on the Internet, and there is an Interministerial Delegation in charge. Coordination of the fight against racial discrimination is not as visible in the other states. In Spain, there are notable sectoral initiatives with excellent results, but neither the human rights plan nor even the Spanish national strategy to combat racism, racial discrimination, xenophobia and intolerance has had continuity which made it possible to generate a list of objectives with clear and assessable measures, and to develop effective and general coordination mechanisms. With regard to the Moroccan immigration and asylum strategy, the objective of the fight against discrimination is part of more general objectives, which can cause it to lose its intensity.
3. As far as the authorities are concerned, in France, the Defender of Rights is now responsible for dealing with discrimination for whatever reason; this organization has the power to negotiate compensation and, in the event of failure of this arbitration, to initiate public action. In Spain, there is an authority with specific competence to combat racial discrimination, which is the Council for the Elimination of Racial and Ethnic Discrimination, but it is a supportive and consultative body and does not have the capacity to sanction or to take legal action.

7.5. THE PERSISTENCE OF RACISM, XENOPHOBIA AND DISCRIMINATION AGAINST THE MIGRANT POPULATION

1. Despite the measures put in place in France and Spain to deal with racism, xenophobia and discrimination against the migrant population, it is still present. In these States, as in Europe in general, the presence of xenophobic political discourse and the proliferation of messages with this content on social networks are particularly worrying. In addition, profiling practices are still documented by certain security agencies.
2. Both in the two European States and in the two African States studied, there is a lack of adequate mechanisms for collecting data on discriminatory episodes that reflect how racism and xenophobia affect the migrant population and make it possible to identify the causes and to plan



responses, as well as to show the various grounds for discrimination that could interact in the case of the migrant population.

7.6. THE CULTURAL AND EDUCATIONAL RESPONSE

1. Neither in Spain, nor in Tunisia, nor in Morocco, is there an articulated prevention programme that attempts to systematically influence the stereotypes on which discrimination is built.
2. One of the obstacles to effective protection is the victims' ignorance of their rights and of the means of enforcing them. Sometimes people who discriminate do not know they are engaging in behaviour that is prohibited by law. The sanction and the penal response do not seem sufficient in relation to this obstacle, which requires interventions at the cultural and educational level.



8. AVENUES TO EXPLORE FOR STRENGTHENING THE LEGISLATIVE FRAMEWORK AIMING TO PREVENT AND COMBAT RACIAL DISCRIMINATION, RACISM AND XENOPHOBIA

This section aims to highlight some lines of action that can serve as a starting point for discussion of the appropriate paths to follow to improve mechanisms against racism, xenophobia and discrimination against the migrant population in Morocco. The guidelines described take as a starting point international standards and action carried out in the European Union. They are also based on lessons learned from the experience of the four states that were analysed.

To organize the proposals, we have chosen to group them according to whether they correspond to action at regulatory level, to the development of public policies and coordination instruments, or to interventions linked to cultural perceptions, training and empowerment. For these purposes, the chapter is divided into three sections: regulation, plans, strategies and public policies, and promotion, training and participation.

The recommendations presented are intended to be the starting point for an in-depth discussion in which the CNDH, the government and the sector of civil society involved will take part, and on the basis of which a proposal for implementation can be drawn up, indicating the roles and responsibilities of each party.

8.1. REGULATION

1. Proof of willingness to commit to the human rights of migrants would be the ratification of the CRMW by States that have not yet done so.
2. The fight against racism, xenophobia and discrimination against the migrant population in the States studied could benefit from the approval of a general legislative instrument that addresses the building of equality and prohibits all discrimination
 - 2.1. Faced with the current fragmentation, a general law would make it possible to cover all the causes of discrimination, as well as the interactions between them, and would be appropriate in order to influence the different areas in a coordinated manner.
 - 2.2. The regulation's approach must be integral, so that prevention, identification and response measures are planned which, in addition to sanctions, offer adequate compensation to the victim and guarantees of non-repetition that affect the person who committed the offence, but also the sectors in which discrimination may be embedded.
 - 2.3. The integral law should ensure that access to justice in cases of discrimination (specifically racial discrimination) is guaranteed regardless of the administrative situation of foreigners with regard to residence.
 - 2.4. The new regulation should pay sufficient attention to the collection of data on aspects related to discrimination.



- 2.5. Similarly, in the drafting of the law, the representative bodies of the different groups that are generally victims of discrimination should be given the opportunity to participate.
- 2.6. Circulars, orders and instructions to authorities could help give effect to the regulation.
3. The debate on the most appropriate technique for criminalizing the most serious forms of discrimination should be addressed. In this regard, the inclusion of offences related to hate speech in the penal code could achieve greater effectiveness compared with that achieved through the use of special penal regulations, as happens in France and Morocco and seems to be the tendency in Tunisia.
4. Morocco should revise the sectoral laws and regulations in force to detect and eliminate aspects likely to cause discrimination and to strengthen the guarantees against the same. This is the case for:
 - 4.1. The regulation of the employment contract for the non-national employee should be amended to ensure that any differentiation serves a legitimate goal and is appropriate and proportional to the achievement of this goal, according to international standards.
 - 4.2. The reform of the law on the status of foreign persons, where Morocco should include the principles of respect for human rights and non-discrimination present in the national strategy for immigration and asylum.
 - 4.3. Adoption of the asylum bill. Clarification of the situation of people seeking international protection in Morocco (as well as in Tunisia) would be desirable.
 - 4.4. The revision of the regulations on employment, education, housing, town planning and audiovisual communication in order to improve the instruments for combating discrimination. In this respect, the distribution of the burden of proof by the insertion of mechanisms for reversing the burden of proof works as an appropriate instrument.

8.2. PLANS, STRATEGIES AND PUBLIC POLICIES

1. Where they do not exist, it would be desirable to implement plans and strategies to combat racial discrimination which take migrants into account. The plans should define clear objectives, as well as indicators to regularly measure the degree of achievement of the objectives.
2. Human rights plans, anti-discrimination strategies in different sectors and migration strategies must pay particular attention to racism, xenophobia and discrimination against the migrant population, which cannot be overlooked in the measures to be implemented, in the collection of data and in the reports that States submit to international human rights organisations.
3. Public policies developed with regard to the migrant population must include a focus on prevention of discrimination in the sectors in which they are involved.

8.3. PROMOTION, TRAINING AND PARTICIPATION

1. Prevention of discrimination must target stereotyping. In this regard, we must continue the work that has already begun to be developed in Morocco on the construction of a positive image of the migrant population. In the four States studied, it is necessary to replace the discourse on migration as a key to security with a discourse expressed in terms of human rights.
2. Racism, xenophobia and discrimination against the migrant population require the implementation of educational action aimed at the population in general which take into account the importance of training the people who train them. More specifically, the training of those responsible for



the education of boys and girls helps to combat stereotyping in which discrimination is justified and plays an important multiplier role.

Similarly, training must be put in place for State security forces and bodies and legal operators. There are examples in Spain and in France.

It should not be forgotten that the effectiveness of the measures taken to combat racism, xenophobia and discrimination against the migrant population requires that they be known to the migrant population itself.

3. For a rights-based approach, it is essential that the migrant population, through its representative entities, can participate in the platforms where decisions concerning them are taken. From this point of view, it is useful for the State to facilitate the creation of associations that can be used for mediation. The diversity of the population must be taken into account so that the greatest possible diversity of migrants (women, people with disabilities, children, girls and adolescents, etc.) can be represented.



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