Proving discrimination[*]

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The question of how to prove discrimination is of strategic importance in its prohibition. Whilst overt discrimination is prohibited, those who are responsible for discrimination may be tempted to practise it in such a manner as to make it difficult to detect by an outside observer. In particular, they may attempt to conceal discrimination by using procedures, practices and criteria that appear non-discriminatory, but are nevertheless calculated to produce the same kind of exclusion as overt discrimination. Directives 2000/43/EC and 2000/78/EC[1], which on this point are formulated in almost identical terms, offer two responses to the challenge posed to the elimination of discrimination by such avoidance strategies. Firstly, they envisage widening the range of prohibited discrimination from direct to indirect discrimination, which occurs in the case of an apparently neutral provision, criterion, or practice that tends to put individuals with particular characteristics "at a particular disadvantage", unless such a provision, criterion, or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary[2]. Secondly, they envisage that in civil cases, the person who is allegedly the victim of discrimination can impose the obligation on the respondent party to prove that it has not infringed the principle of equal treatment by presenting facts that allow a *prima facie* case for discrimination to be constructed[3].

Inspired by the laws on gender equality[4], these two responses, which back up the prohibition of direct discrimination by prohibiting indirect discrimination, and share the burden of proof of discrimination so that it is not solely borne by the victim, nevertheless raise complex questions[5]. There are two questions of particular interest within this context. The first question concerns the connection between the definition of prohibited indirect discrimination and the use of a particular method to prove discrimination, which involves referring to statistical data, a method that Directives 2000/43/EC and 2000/78/EC accept without actually imposing them on Member States[6]. The second question relates to using situational tests to establish the existence of prohibited discrimination.

I. Proof by statistics

1. Added value of evidence involving statistics

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[*] This text, which originates from an ERA report, is a synthesis of a report prepared by the Migration Policy Group.

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[1] Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment of persons irrespective of racial or ethnic origin, *Official Journal of the European Communities,* No. L 180 of 19 July 2000, p. 22; and Directive 2000/78/EC of the Council of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *O.J.E.C.*, No. L 303 of 2 December 2000, p. 16.

[2] Article 2(2, b), of Directive 2000/43/EC; Article 2(2, b), of Directive 2000/78/EC.

[3] Article 8 of Directive 2000/43/EC; Article 10 of Directive 2000/78/EC.

[4] For the first significant relevant rulings in this area, see C.J.E.C., 31 March 1981, *Jenkins*, 96/80, Case Book, p. 911; and C.J.E.C., 13 May 1986, *Bilka-Kaufhaus GmbH*, 170/84, Case Book, p. 1607. In relation to Directive 97/80 of 15 December 1997 on the burden of proof in cases concerning gender equality in pay and treatment, see *O.J.E.C.* No. L 14 of 10 January 1998, p. 6, which, however, subsequent to the abovementioned precedent of Bilka-Kaufhaus, contains a different definition of indirect discrimination.

[5] These issues are covered in more detail in *O. De Schutter*, Discrimination and the Labour Market. Liberty and Equality in Relationships at Work, Bern-Oxford-New York-Vienna, P.I.E. Peter Lang, 2001.

[6] See Consideration 15 of the Preamble to Directive 2000/43/EC, and Consideration 15 of the Preamble to 2000/78/EC. Both Directives envisage that the minimal extent to which they prescribe conditions for the burden of proof will not prevent Member States from introducing rules of evidence more favourable to plaintiffs (Article 8(2) of Directive 2000/43/EC; article 10(2) of Directive 2000/78/EC).

There are two distinct definitions of indirect discrimination in the law on equal treatment, each of which leads to very different consequences. A first approach involves the concept of *disparate impact*: if a measure which is apparently neutral (that is, it does not appear to involve any differences in the treatment of the members of group A and those of group B), *in practice* affects the members of one group to a much greater extent, the measure will be considered suspect, and may not be maintained unless it can be objectively and reasonably justified. This approach to indirect discrimination is the same as that adopted by the abovementioned Directive 97/80 of 15 December 1997 on the burden of proof in cases concerning gender equality in pay and treatment, according to which "indirect discrimination exists if a provision, criterion, or practice which is apparently neutral affects a *significantly larger proportion of the members of one sex*, unless such a provision, criterion, or practice is appropriate and necessary, and can be justified by objective factors independent of the gender of those concerned" (author's emphasis). This approach is based on a statistical analysis of the impact which an apparently neutral measure has on the two relevant categories: it is the task of the judge applying the principle of equal treatment to evaluate whether the statistics presented to him are valid, i.e. "they relate to a sufficient number of individuals, they do not reflect purely fortuitious or conjectured phenomena, and they appear to be of general significance"[7].

A second approach is based on the idea that certain measures, although they are not explicitly based on a prohibited distinguishing criterion, are nevertheless *liable to be disadvantageous, intrinsically or by their very nature, to persons belonging to a category protected from discrimination*, without the need to establish statistically whether a disparate impact has actually occurred to the detriment of individuals in such a category. It is this second approach that was inspired by precedents in Community law concerning prohibition of discrimination on the basis of nationality in relation to the free movement of labour[8], and which is reflected in directives based on Article 13 EC. Indeed, Articles 2(2) of Directives 2000/43/EC and 2000/78/EC envisage that indirect discrimination occurs in the case of an apparently neutral criterion that is actually suspect because it is liable to put members of certain protected categories at a particular disadvantage.

However, use of the method of disparate impact is not excluded by these directives. Both of them in their respective preambles state that "indirect discrimination can be established by any means, including on the basis of statistical evidence." The use of such an option – the admissibility of evidence for discrimination based on statistics – allows us to pass from one concept of indirect discrimination to the other. The range of applications of prohibition of indirect discrimination has been broadened: the admissibility of statistics as evidence allows not only the use of "suspect" measures to be prohibited (i.e. measures that by their very nature appear to have been chosen to produce a discriminatory effect, which allows the burden of proof to be passed to the person responsible for such measures, without the need to calculate the statistical impact of such measures), but also the use of measures that prove to have a disparate impact on certain protected categories.

2. Statistical method of proving discrimination

[7] C.J.E.C., 27 October 1993, *Enderby*, C-127/92, *Case Book*, p. I-5535 (paragraph 17).

[8] Since the *Sotgiu* ruling of 12 February 1974, it has been established in case law that in matters concerning the free movement of labour, "principles of equal treatment [...] not only prohibit overt discrimination based on nationality, but also all dissembled forms of discrimination which, while using different distinguishing criteria, lead to the same result"; the *Sotgiu* ruling goes on to deduce "that it cannot be ruled out that criteria such as place of origin or residence of a worker can, depending on the circumstances, amount in terms of their practical effect, to an equivalent of discrimination on the basis of nationality which is prohibited by the Treaty" (C.J.E.C., 12 February 1974, *Sotgiu*, 152/73, *Case Book*, p. 153 (paragraph 11)).

The approach to indirect discrimination that examines *disparate impact* raises some sensitive methodological issues. It is based on a statistical comparison of two groups, a "reference" group (pre-procedure group) and a "post-procedure" group comprising all the individuals who have undergone a procedure whose impact we are attempting to measure. Within each of these groups, individuals are divided into two categories, A and B, corresponding respectively to a dominant or majority class and a class which is the minority class or has traditionally been disadvantaged. A distinction between the two classes can be made on the basis of criteria such as gender, racial or ethinic origin, religion or beliefs, age, disability or sexual orientation. The ratio of A/B represents the proportions of each class in the pre-procedure group, while A' / B' is the ratio of the classes in the post-procedure group. The procedure being evaluated to see if it constitutes indirect discrimination can be identified as suspect if there is a significantly lower representation of the protected group (B) in the post-procedure group (subsequent to selection) than in the reference group (prior to selection), i.e., $A / B < A' / B'$, which enables the burden of proof to be shifted to the respondent. In this case, it is incumbent upon the person responsible for the procedure to justify it by demonstrating that it serves a legitimate aim and that the measures it allegedly uses to achieve such an aim are appropriate and necessary for it to be achieved.

In terms of method, use of statistics requires that a) the reference group is defined with sufficient precision; b) each individual can be categorized (as A or B, in our example); and c) a threshold has been specified above which the impact of a "neutral" measure linked to a prohibited distinguishing criterion is considered disparate, and as such justifies shifting the burden of proof. Identification of these conditions is the starting point for analysis leading to the use of this method of proving discrimination, or, to put it in legal terms, this technique for enabling the victim to shift the burden of proof, i.e. to construct a *prima facie* case for discrimination. It will then be incumbent upon the respondent to demonstrate that this case is unfounded.

3. Admissibility of statistics in legal proceedings

The legal difficulties connected with using statistical data arise from the processing of personal data, often considered "sensitive", which pre-supposes categorization of a group of individuals. Certain types of personal data relating to racial origin, political opinions, religious and other beliefs, health, and sex life, are subjected to particularly rigorous processing, because of the risk of discrimination implied by the use of such data[9]. As a result, we find ourselves confronting a paradox: use of data considered sensitive is subject to particular restrictions, because such data refers to characteristics that are irrelevant for the making of decisions relating to an individual, and which could entail the risk of discriminatory practices. However, if the victim of a discriminatory practice needs to support his case by using particular statistical data that will enable a *prima facie* case for discrimination to be constructed, and thus to oblige the respondent to demonstrate that he has not been guilty of the discriminatory behaviour in question, it is necessary to use such sensitive data. Before we can assert that a particular provision, system, or criterion has a disparate impact on persons defined in terms of their racial or ethnic origins, religion or beliefs, age, disability or sexual orientation, we need to divide both the individuals who are members of the "reference group" and those who are members of the post-procedure group on the basis of such criteria.

[9] See Article 8 of Directive 95/46/EC of the European Parliament and the European Council of 24 October 1995 on the protection of individuals in respect of the treatment of personal data and the free circulation of such data (*O.J.E.C.*, No. L 281 of 23 January 1995, p. 31) which, in relation to this area, paraphrases Article 6 of the Convention for the Protection of Individuals in Respect of Automated Processing of Personal Data, submitted for signing within the Council of Europe on 28 January 1981 (E.T.S. No. 108).

Although space does not permit an in-depth discussion of this problem here, it does at least need to be referred to.

A second difficulty arises from the nature of "shifting" the burden of proof which is made possible by the presentation of statistics. According to Consideration 21 of Directive 2000/43/EC, "the rules of the burden of proof must be adapted when there is a *prima facie* case of discrimination, and for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought". It has been suggested that such shifting of the burden of proof imposes the obligation on the respondent to prove a *negative fact*, i.e. prove that he has *not* practised differential treatment on the basis of a prohibited distinguishing criterion (while attempting to conceal such direct discrimination by using an apparently neutral measure, and thus avoiding any obvious differences in treatment), or otherwise prove that he has *not* implemented any provisions, criteria, or practices which are apparently neutral but liable to place persons to whom prohibited discriminatory motives relate at a particular disadvantage (lack of indirect discrimination). However, this fact should not impair the admissibility of this method of obtaining evidence. Firstly, in the event of shifting the burden of proof as prescribed by the provisions of Article 8 of Directive 2000/43/EC and Article 10 of Directive 2000/78/EC and allowing the plaintiff to oblige the respondent to prove that he has not been guilty of the discrimination for which certain facts provide a *prima facie* case, proof of a "negative fact" is only required in relation to facts that have been proved – a circumstance which the expression "shifting the burden of proof" obscures, somewhat regrettably. Secondly, as the European Court of Human Rights has recognized, in a passage that is all the more striking for having been written within the context of a penal charge, the obligation incumbent upon the prosecution to prove the facts it alleges is a right of the defendant[10]. "This right, however, is not absolute, as factual and legal presumptions are a feature of all legal systems, which obviously the Convention does not bar provided the signatory States do not exceed certain limits and take into account the importance of the issue and the need to preserve the rights of the defence."[11]

Thirdly, while envisaging that Member States will take the necessary steps to ensure that a person who considers himself a victim of discrimination is authorized to demonstrate to a court or to another relevant authority facts that support a *prima facie* case for the existence of direct or indirect discrimination, and thus to oblige the respondent party to prove that it has not infringed the principle of equal treatment, Directives 2000/43/EC and 2000/78/EC exclude this system from penal cases[12]. There are two reasons for such an exclusion. The first relates to the principle of legality in penal cases (*nullum crimen sine lege*). According to the European Court of Human Rights, this provision implies that an individual needs to know "on the basis of the relevant clause and, if need be, with the help of its interpretation by the courts, which acts and omissions he must answer for"[13]. However, a broad interpretation of this principle would imply that it is opposed to charging behaviour as a criminal act in a situation where, at the time when the behaviour occurred, the agent could not know that he would have

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[10] A law in which the presumption of innocence is explicitly derived from Article 6(2) of the European Convention of Human Rights, but which, according to the Court, "goes with the general idea of a fair trial in the sense of Article 6(1)" (European Court of Human Rights (Section 4), ruling on *Phillips v. United Kingdom* of 5 July 2001, paragraph 40).

[11] Ibid., paragraph 40. The court is referring to its own precedents; European Court of Human Rights, ruling on *Salabiaku v. France* of 7 October 1988, Series A No. 141-A, paragraph 28.

[12] See Articles 8(3) and 10(3) respectively of the Directives.

[13] European Court of Human Rights, ruling on *Kokkinakis v. Greece* of 25 May 1993, Series A No. 260-A, paragraph 52; European Court of Human Rights, ruling on *S.W. v. United Kingdom* of 22 November 1995, Series A No. 335-B, paragraph 35; European Court of Human Rights, rulings on *Streletz, Kessler and Krenz v. Germany* and *K.-H. W. v. Germany* of 22 March 2001, paragraphs 50 and 45 respectively.

to answer for such behaviour before a criminal court – including situations where the law is perfectly clear, due to the uncertainty of the agent as to the context in which he is acting. When interpreted in this way, the principle of legality would result in exclusion of all offences of a purely material nature, i.e. those that do not include a moral element relating to the agent's state of mind at the moment of committing an offence. Under this interpretation, an agent would have to commit the offence consciously and intentionally for it to be considered a criminal act, as the material fact of it having been committed is not otherwise sufficient to justify incrimination. In particular, the agent's irrefutable error, in the sense of his ignorance of the criminal nature of the act under circumstances in which any reasonable and cautious individual would have been in the same state of ignorance, may amount to a reason for justifying the act. In the case where an agent, who is responsible for *individual* decisions, such as whether to agree to let a flat to someone, to recruit or promote an employee, is charged with not having foreseen the consequences in terms of *statistics*, which result from a series of individual decisions, and represent an accumulation of individual decisions, there is the possibility that the agent will plead an irrefutable error. For practical reasons, such as the fact that in companies and organizations the process of making individual decisions is often decentralized, it is not always possible to anticipate the statistical effect of the totality of individual decisions. It is quite possible that the persons responsible for such individual decisions were unaware of the criminal nature of their acts, or we could go even further and assert that it was impossible for them to be aware of this, given the absence of complete and perfectly up-to-date information on the impact such a decision could have on the statistics reflecting the totality of such decisions.

The second argument for excluding a shifting of the burden of guilt in penal procedures is derived from the principle of presumed innocence. Though Article 6(2) of the European Convention of Human Rights does not exclude certain presumptions in relation to individual defendants attempting to establish the guilt of a defendant on the basis of a *prima facie* approach could lead to an infringement of the presumption of innocence if it results in a shifting of the burden of proof, in other words it relieves the prosecution of the obligation to prove an offence[14]. Indeed, it is possible to argue that the use of statistical proofs is not so much a question of making it easier for victims to prove that an offence, i.e. the discriminatory behaviour of the defendant, has been committed, as of imposing a particular kind of behaviour on agents, by forcing them to take care that statistics do not give the impression that they are using discriminatory practices, on pain of penal sanctions. In this case, the use of statistical proofs would serve not so much to prove an independently committed offence as to demonstrate the presence of a constituent element of a repressed offence. However, this is not in keeping with either the spirit or the letter of Directives 2000/43/EC and 2000/78/EC. If such an method is to be retained, it would in any case require a more precise definition of the offence committed by an agent in not complying with particular objectives defined in terms of statistics. – for example, by identifying the ethnic composition of the workforce of a company in a particular region, or the allocation of council housing to various ethnic categories.

II. Situational tests

1. Added value of evidence of discrimination obtained using situational tests

The use of situational tests is intended to expose direct discrimination, that is, behaviour that involves treating an individual less favourably due to a particular characteristic of that individual than an individual in a comparable situation but without such a

[14] European Court of Human Rights, ruling on *Telfner v. Austria* of 20 March 2001, paragraphs 15-16.

characteristic, in situations where such discrimination is "masked", i.e. it is not openly declared by the person who practises it. Situational tests are comparable to practices used to help expose other offences and, in particular, those linked to organized crime. The most obvious analogy is that of the so-called "pseudo-purchases" used in the fight against drugs. Both practices involve taking an agent by surprise when his confidence has been gained and he does not suspect that his acts and gestures are under observation for use, if necessary, in legal proceedings.

2. Methods for the use of situational tests

The use of situational tests involves exposing discriminatory behaviour by confronting those who are believed to be guilty of such behaviour with situations where their choices will betray their preferences for certain individuals on the basis of a "suspect" characteristic of other individuals who are otherwise in an identical situation. Situational tests therefore involve two groups, a "test" group characterized by a feature liable to give rise to discrimination, and a "control" group that is identical in terms of all relevant characteristics (professional qualifications, age, dress style, etc.). The comparability of the two groups must be beyond reproach; if discrimination is to be proved using this method, it is necessary to check comparability on the basis of a list of features, as complete as possible, that are likely to influence the decisions of a restaurant owner, a landlord, an employer, etc., depending on the circumstances of the case. The idea is simple: if the "suspect" feature is the only element that differentiates two individuals who, for example, act as job applicants, as potential tenants, or who wish to enter an establishment open to the public, then, *a priori*, the difference between the treatment of them can only be explained by supposing that the decision was influenced by this suspect feature, which allows us to construct a *prima facie* case for discrimination.

This kind of situational test permits the exposure of "masked" discrimination which is either undisclosed or concealed by neutral arguments that are in fact merely pretexts, and it is based on the assumption that the person responsible for discrimination is *aware* of the discriminatory nature of his behaviour. It can readily be deduced that situational tests cannot be used to identify indirect discrimination, linked to the use of certain criteria and certain procedures which, if applied to different groups, tend to place the members of certain groups at a particular disadvantage, as they involve a comparison between two candidates who are *identical in all aspects*, which would normally *prevent the selector from differentiating between the two competing candidates on any other basis than that of the only trait which distinguishes them* – for example, in the kind of situation where this technique tends to be applied, national or ethnic origin. The fact that the two candidates who, as the result of using particular methods of presentation, are virtually identical, means that the criteria or procedures suspected of causing indirect discrimination cannot possibly have any relevance; as the only feature that distinguishes the two candidates is the suspect trait, such criteria or procedures are not applicable to selection between the two candidates.

3. Admissibility of situational tests in legal proceedings

Evaluation of the admissibility of this type of evidence is sometimes difficult due to the risks of abuse it involves. At the very minimum, admissibility is subject to conditions concerning the method, which needs to be rigorously defined. Preferably, a person who is reasonably independent and credible, such as a bailiff, could guarantee the conditions in which the test is conducted. The role of such an individual, who is entrusted with the authentication of the situational test, can be summarized as two functions: i) he needs to ensure that while the test is being carried out there are no grounds for suspecting that criminal or culpable behaviour is provoked by the individuals conducting the test, which is simply intended to establish, or record, behaviour that would have occurred even if such a situation

had not been contrived; ii) he must ensure that the situational test is rigorously carried out, particularly in respect of the comparability of the persons belonging to the "test" group characterized by a suspect characteristic (for example, ethnic origin, or persons visibly displaying symbols of religious belief) with the persons belonging to the "control" group.

a. Private life and the risk of provocation

According to the European Court of Human Rights, infiltration by an agent with a fictitious identity does not constitute interference in "private life" if it is intended solely to uncover illegal activities[15]. However, the most recent precedents indicate that when infiltration contributes to the perpetration of an offence, it goes beyond the nature of infiltration in its strict sense, which involves purely passive observation of a criminal act and, as a result, the provocation of which the agents have been guilty impairs the fairness of the trial[16]. No such impairment occurs if infiltrated agents played only a passive role in the perpetration of an offence. For example, if they allowed themselves to respond to an offer and be supplied with a certain quantity of drugs, and did not act as *agents provocateurs* of an offence[17]. This is the first limit that needs to be kept in mind when attempting to prove discrimination using "situational tests". "Proving" discrimination is not the same as "provoking" it, and tests that involve contriving fictitious situations should not involve testing the ability of the suspected discriminator to resist temptation to commit the offence by offering him an opportunity to do so.

b. Fairness of evidence

The prohibition of provocation apparent from these precedents of the European Court of Human Rights is only an individual reflection of a wider principle of fairness in the methods used to prove an offence. This requirement has given rise to precedents in the French Court of Cassation relating to the specific issue of "situational tests". Its most recent judgment[18] was a ruling of 11 June 2002, passed on an appeal by the SOS Racism organisation, in which it overturned a ruling of 5 June 2001 passed by the Montpellier Appeals Court. The latter court discharged the respondents accused of racial discrimination based on origin or ethnicity in the provision of a service. According to the Appeals Court judge, the evidence had not been obtained by a fair procedure: "The test operation performed by groups of potential clients was implemented unilaterally by the organisation, which only made use of its own members and sympathisers. These were duly informed that the aim of the operation was not to gain admission to "La Nuit", "Soleil", or "Toro Loko", but to demonstrate the occurrence of segregation in the process of admission to these establishments".

An analysis of the grounds for the Appeals Court ruling suggests that the judge had doubts about the fairness of the "test" procedure, given that, due to their intention to expose

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[15] European Court of Human Rights, ruling on *Lüdi v. Switzerland* of 15 June 1992, paragraphs 36 and 40.

[16] See European Commission of Human Rights, report (anc. Art. 31) of 11 October 1990 on the case of *Radermacher and Pferrer v. Germany*, *E.C.H.R. Ann.*, vol. 34, p. 274; European Court of Human Rights, ruling on *Tereira de Castro v. Portugal* of 9 June 1998, *Case Book* 1998-IV, p. 1463, and paragraphs 42-43 and 31-39 in particular.

[17] See European Court of Human Rights, judgment on *G. Calabro v. Italy and Germany* of 21 March 2002 (Ruling No. 59895/00) (the use of infiltration does not infringe the right to a fair trial if the offence was not provoked by the agents).

[18] See also Court of Cassation of France (Criminal), 12 September 2000, *Fardeau et al* (rejecting the appeal to the Court of Cassation against a ruling by the Orleans Appeals Court of 2 November 1999 passing three convictions for racial discrimination and complicity, following statements by four North African youths and a journalist, and the statements of a bailiff who accompanied them, when the youths were refused admission to a night club).

the discrimination they suspected and were aiming to prove, the individuals involved in these situational tests may have behaved or dressed in such a way as to create conditions for admission to be refused by the night clubs in question. The Appeals Court judge noted that "even if the test revealed a difference in attitude on the part of the doormen, there are no reasons to assert that refusal was motivated by a strictly racial criterion. Testimony given to the magistrates' court and declarations made by the respondents during the hearing suggest that "La Nuit" and "Le Soleil" have a multi-racial clientele. The various respondents have denied practising racial discrimination, and there are no reasons for supposing that the respondents selected clients on the basis of racial criteria, other than the subjective opinion of the plaintiff. If selection did occur, it is a normal feature of this type of business, and reflects commercial considerations and the establishment's particular niche in the market, as in the case of clubs reserved for gays, blacks, heterosexuals and jet setters." The Appeals Court objected to the lack of comparability, and appeared to consider that there may have been grounds for refusing admission to militant SOS Racism members other than their ethnic origins. According to the Montpellier Appeals Court, in the absence of guarantees as to the conditions in which it is conducted, a "situational test" is not a sufficiently fair procedure to prove that discrimination has occurred: "... the method of testing used by the SOS Racism organisation, which was implemented without any involvement of police officers or bailliffs, is a procedure that lacks the transparency and fairness essential in the search for evidence in penal procedures, and it infringes the rights of the defence." This ruling was overturned by the Court of Cassation, mainly because of the consideration that in questioning the admissibility of "tests" as a means of proving the offence in question, the Appeals Court misinterpreted Article 427 of the Penal Procedures Code establishing the principle of freedom of penal evidence.

The abovementioned cases and in particular the latter case, which is the most relevant for our purposes, do indeed raise the issue of the admissibility of evidence presented by the prosecution in the course of penal proceedings. In such proceedings, the evidence is free in principle; however, it may be excluded, either because it has been obtained using an illegal procedure, or because the conditions under which it has been obtained or presented infringe general legal principles and, in particular, the rights of the defence. However, these, and the related wider concept of a fair trial, apply to both civil and penal cases. Generally speaking, conclusions reached in the course of penal proceedings in relation to techniques of obtaining evidence that infringe basic personal rights are transferable to proceedings in civil courts. An analogy would be a civil case in which one of the parties made use of a private investigator to "provoke" an offence that would then enable him to justify laying someone off[19] or initiating divorce proceedings on the basis of adultery by one of the spouses[20]. No one who has attempted to conduct an overall survey of cases in which private detectives or bailiffs resorted to tricks or stratagems, or participated in such stratagems organized by private parties, can have failed to observe the incoherence of the response by civil courts to such situations. In particular, situations in which a bailiff did not spontaneously reveal the capacity in which he was acting have given rise to contradictory responses by judges[21]. A strict legal framework defining the conditions applicable to such tests in Member States that anticipate using them to prove discrimination is therefore particularly desirable.

[19] Mons, Lab., 16 March 1995, unpublished, Justel No. 12433.
[20] Brussels, Civ. (Ch. 31), 28 June 1988, unpublished, No. 331.G.R. No.25264.
[21] See Ch. *De Valkene*er, Trickery in the Delivery of Penal Evidence, Brussels, Larcier, 2000, pp. 281-284.