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Artificial Intelligence and Gender Biases in Recruitment and Selection Processes

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AI in recruitment and the risk of gender bias in France

Jean-Philippe Lhernould

University of Poitiers

1. Introduction: the situation in France

1.1 Use of AI for the purpose of recruitment and selection processes: a growing phenomenon

Although in France less than half of recruitments are made through internet, the **use of AI in recruitment and selection processes is a growing phenomenon**. Several articles published in national newspapers make a presentation of the stakes, issues and potentialities of such e-tools¹.

The purpose of **many French start-up companies**² is to develop algorithms in the field of “predictive recruitment”. Some of them have already implemented tests where selected candidates via the algorithmic method can be consequently tested through interim contracts³. For instance the “365Talents” start-up has recourse to machine learning algorithms to identify skills among candidates and automatically suggest new opportunities. A last example among others is the “keycooptsystem”, an algorithm designed by a French start-up business to optimise compatibility between a company job offers and candidates⁴.

To date, some leading companies emerge on the AI-assisted recruitment process market, such as “AssessFirst” who works *inter alia* for a major retail store (BHV) and “Easyrecrue” which has designed algorithms working with automated video interviews of job candidates.

On the clients’ side, **large companies, interim agencies and marketplaces**⁵ show **interest in algorithms**. For instance, France Ranstad interim agencies use a chatbot to evaluate the adequacy rate between job offers and profiles. The Credit agricole du nord de France, a French leading bank, uses automated video for a pre-selection of candidates. Official statistics show that 27% of French companies have recourse to a recruitment software package which includes e-tools selecting job applications used

¹ See in particular https://www.lemonde.fr/economie/article/2019/04/10/pour-recruter-les-grands-groupes-misent-sur-les-algorithmes_5448041_3234.html

² There would be nearly 600 of them (see CNIL report, cited below).

³ *Onvabosser.fr*. The start-up behind this website is funded by the dating site « Attractive world + »

⁴ <https://www.keycoopt.com>.

⁵ For instance, « *leboncoin.fr* » marketplace, *Syntec recrutement* interim agencies.

by 83% of these companies⁶. Unsurprisingly, according to the same survey, employers with a high recruitment volume are more likely to use algorithms.

The interest in algorithms for recruitment purposes also extends to public institutions such as Pole Emploi public jobcentre which launched an application aiming to encourage unsolicited job applications to companies through an algorithm model. Similarly, the APEC (national job centre reserved for managers) uses algorithms to improve adequacy between CVs and job offers.

All in all, it appears that **stakeholders are attracted but also very careful about the use of AI tools in recruitment procedure**. They believe that such tools cannot fully replace human intervention. They are also aware that AI tools can hide discriminatory practices. All stakeholders, including AI operators, consider that AI are far from being under control yet and therefore there is much room for improvement.

1.2 Robust regulations to combat AI gender-related discriminations

In France, the legal reflection started with the confrontation between AI and data protection, fundamental freedoms and ethics. The legal debate moved then gradually towards more specific issues such as the links between AI and discrimination. **With respect to employment and in particular to recruitment procedures, there is no specific regulation on AI.**

French law however provides a broad set of regulations aiming to combat gender-related discriminations which are likely to apply in the context of AI recruitment procedures. These regulations have a various background, some of them are based on traditional labour rules whereas recent regulations deal directly with AI subjects in general. Three types of regulations are relevant:

- **Labour rules focusing on recruitment procedures**
 - Recruitment techniques must be relevant with regard to the objective pursued⁷. This entails in particular that the **recruitment method has to be reliable**. For the French labour administration, if a criterion of “scientific relevance” is not required, a reasonable degree of reliability is needed⁸. Any scientifically invalid technique must be disregarded.
 - If the recruitment interview can take any form and can take place anywhere (including through videoconference), it should be considered that **any**

⁶ “Les progiciels de recrutement en 2016 : quel équipement ? quels usages ?”, APEC study, June 2017, see <https://corporate.apec.fr/home/nos-etudes/toutes-nos-etudes/les-progiciels-de-recrutement--q.html>

⁷ Article L1221-8 of the French labour code.

⁸ Ministry of labour circular 93-10 of 15 March 1993.

- automated distance-evaluation tool excluding human assessment should be forbidden⁹.**
- **The applicant must be informed of the methods and techniques of recruitment assistance used by the employer¹⁰.**
 - **No personal information on an applicant can be collected** without prior information of the person concerned¹¹.
 - **Labour rules focusing on gender discrimination**
 - It is **prohibited for an employer to turn down a job application on the grounds of (inter alia) gender¹².**
 - Labour law rules on **protection of pregnancy and maternity** prevent such parameters to be taken into account directly or indirectly by an algorithm.
 - Law 2008-496 of 27 May 2018 includes a definition of the concept of **indirect discrimination** in line with that of EU law. This concept is key in the context of algorithms which are suspected to have recourse to neutral criterion hiding gender discrimination. At this stage, there has been no case-law before French courts dealing with AI techniques. However, the French Cour de cassation has already applied the concept of indirect discrimination to a case where part-time workers (mainly female workers in practice) were excluded from access to a retirement scheme¹³. More recently, the Court of Cassation ruled that the dismissal of a female employee upon her return from a parental leave is an indirect discrimination on the grounds of gender¹⁴. Like any other parameters amounting to gender indirect discrimination, part-time work and parental leave cannot be used wrongly - directly or indirectly - by algorithms.
 - **Transversal regulations on ethics, data protection and public liberties**
 - It is forbidden for a **machine to make without human intervention any decisions involving “crucial consequences” for individuals.¹⁵**
 - **any individual concerned is granted the right to obtain information on the rationale behind the algorithm.¹⁶**
 - The French constitutional court¹⁷ set a double constitutional principle according to which: 1) **the person in charge of the algorithm management**

⁹ National Committee Informatics and Freedom - CNIL – Decision 2002-17 of 21 March 2002

¹⁰ Article L1221-8 of the French labour code.

¹¹ Article L1221-9 of the French labour code.

¹² Article L1132-1 of the French labour code.

¹³ Case 10-21.489, 6 June 2012.

¹⁴ Case 18-15.682, 14 November 2019.

¹⁵ Law 78-17 of 6 January 1978 (Article 10 amended).

¹⁶ Law 78-17 of 6 January 1978 (Article 39 amended).

¹⁷ Decision n° 2018-765 DC, 12 June 2018.

must control this tool and its evolutions, and must be able to explain in a clear manner its functioning to any persons concerned; 2) an individual administrative decision may never be exclusively founded on an algorithm.

2. Policy debates: key issues and on-going reforms

2.1 AI and (gender) discrimination: a subject of major interest for policy makers

It has been demonstrated by a French public institution that algorithms can lead to “sexist” decisions¹⁸. Two thorough reports on AI have been issued by top public institutions, the National Commission on Informatics and Liberty (CNIL)¹⁹ and the Defender of Rights (Défenseur des droits, French equality body)²⁰. Both reports discuss AI and discrimination matters, including recruitments and selection procedures. However, they do not really discuss gender issues as such. The CNIL report insists on ethical matters and **highlights the mix of interest and distrust toward AI by French companies**, the fact that AI could help recruitments become more neutral is being at the same time emphasised.

The French highest administrative court, which is the guardian of public liberties, also focuses in a report on AI ethical issues and, in this regard, suggests the drafting of a law for predictive algorithms²¹. This report is very general and does not focus on AI and gender discriminations in the context of recruitment procedure.

As already said, reports carried out on the topic of AI reveal that if companies are interested in AI tools for the purpose of recruitment procedures, they are also very much aware of the limits and issues posed by these e-tools. Risks of biases, in particular “cloning recruitments”, discriminations, biased predictions are highlighted by the various reports as well as by HR managers²². The need to combine algorithms with human intervention is constantly recalled by French stakeholders. In this context,

¹⁸ Haut Conseil à l'Égalité entre les femmes et les hommes (Council for equality between women and men), *Premier état des lieux du sexisme en France*, 2019, see www.haut-conseil-egalite.gouv.fr/IMG/pdf/hce_etatdeslieux-sexisme-vf-2.pdf.

¹⁹ “Comment permettre à l'homme de garder la main”, December 2017, see <https://www.cnil.fr/fr/comment-permettre-lhomme-de-garder-la-main-rapport-sur-les-enjeux-ethiques-des-algorithmes-et-de>

²⁰ Algorithmes: prévenir l'automatisation des discriminations, 2020, see www.defenseurdesdroits.fr/sites/default/files/atoms/files/synth-algos-en-num-16.07.20.pdf

²¹ Conseil d'Etat, *Étude annuelle 2014 - Le numérique et les droits fondamentaux*. See <https://www.conseil-etat.fr/ressources/etudes-publications/rapports-etudes/etudes-annuelles/etude-annuelle-2014-le-numerique-et-les-droits-fondamentaux>

²² See for instance in the French Randstad group : <https://resources.grouperandstad.fr/decryptages/recrutement-le-defi-des-biais-algorithmiques/>

the French association of diversity managers (AFDM) issued **a guide to help companies overcome the biases of AI tools**. A leading French think tank, l'institut Montaigne, drafted **recommendations for policy makers and companies for "AI without discrimination"**²³. The same goal is pursued by the "laboratoire pour l'égalité" NGO which commits in favour of a "non-sexist AI"²⁴. It is interesting to highlight a joint research project between Ranstad France interim agency and Supélec, a famous French engineering school²⁵ aiming to explore opportunities and limits of AI²⁶.

2.2 Reflections on legal aspects concerning AI and gender discriminations during the recruitment process

Since in France, regulations dealing with ethical matters in line with algorithms are already in force²⁷, the preliminary question is to identify whether a specific regulation is needed for combating gender discrimination in the recruitment process through algorithmic methods. It seems clear at least that the existing legal framework, described above as robust, is useful in the context of gender discrimination²⁸. However, one may believe, and this is apparently the dominant view, that a specific regulation would be necessary to address the discrimination issues. The question whether further specific regulation is relevant is currently debated²⁹. To our knowledge, there is no on-going law proposal or no project of any kind by the French national authorities.

French legal literature on the subject of AI and gender discrimination remains sparse. Two papers in the field of labour law, which raise similar questions, can be identified³⁰. Legal authors point out the risks of "algorithms conception biases" which are likely to either duplicate discrimination patterns or create them. One question raised is whether a legal regulation is conceivable at the stage of the algorithm design. Other issues deal with biases relating to the way algorithms are used, highlighting the operators' obligation to comply with the law on ethics and public liberties (see above) and the prohibition to base recruitments exclusively on algorithms. The problem of lack of

²³ <https://www.institutmontaigne.org/publications/algorithmes-controle-des-biais-svp>

²⁴ <https://www.laboratoiredelegalite.org/2019/02/07/le-programme-2019-du-laboratoire-de-legalite-pour-une-intelligence-artificielle-non-sexiste/>

²⁵ <https://www.centralesupelec.fr/fr/randstad-et-centralesupelec-sassocient-pour-creer-une-chaire-sur-lintelligence-artificielle-et-le>

²⁶ <https://resources.grouperandstad.fr/decryptages/recrutement-le-defi-des-biais-algorithmiques/>

²⁷ See point 1.2.

²⁸ See point 1.2.

²⁹ For instance, L'institut Montaigne think tank is against a law on algorithmic discrimination.

³⁰ J. Porta, « Algorithme et risques discriminatoires » ? in. M. Mercat-Bruns, « Nouveaux modes de détection et de prévention de la discrimination et accès au droit: action de groupe et discrimination systémique : algorithmes et préjugés ; réseaux sociaux et harcèlement », Société de législation comparée, 2020 ; M. Peyronnet, « L'usage des algorithmes et de l'IA dans le recrutement : une occasion de ne plus discriminer ? », in « Intelligence artificielle, gestion algorithmique du personnel et droit du travail, Dalloz ed. 2020.

transparency of algorithms is also mentioned. Several more technical legal questions are pointed out by the authors and can be summarised as such:

- How to establish from a legal perspective the existence of an AI (gender) discrimination and, in relation to this question, how to arrange the burden of proof between individuals and companies when a discrimination is alleged or suspected?
- Who can be held responsible for the (gender) discrimination, the employer and/or the AI designer and/or the AI programme owner?
- What kind of discrimination is at stake when it finds its origin in an AI tool, direct, indirect? Or are these two traditional concepts ill-adapted and a specific type of discrimination should emerge, which is more fitted for AI deviant practices?
- How to identify gender discrimination when it finds its origin in an AI tool, especially since it is likely that the algorithm is responsible for intersectional discriminations (where gender is one among other fields of discrimination)?
- Are legal instruments, which target individual cases of (gender) discrimination, adapted to algorithms, which may be responsible for collective discrimination through the use of AI tools? In this respect, should class actions be designed to combat AI(gender) discriminations?
- To what extent should the concept of “systemic discrimination” be applied to fight against AI (gender) discriminations?

3. Recommendations

Based on the elements presented above, various recommendations can be made. The recommendations below include preventive measures as well as “detecting measures” and measures to redress discrimination.

- Awareness-raising of the issue of gender bias in algorithms
 - Awareness-raising actions targeting the IT people on discriminatory impact of algorithms, via communication in technical journals
 - Awareness-raising actions targeting the IT people on non-discrimination regulations, via communication in technical journals
 - Awareness-raising actions targeting the lawyers on better understanding of AI tools
 - Awareness-raising actions targeting employees’ representatives on the functioning of algorithms and risks encountered in the area of discrimination
 - Better information of the individuals on the risks of being discriminated through algorithms

- Combating potential risk of (gender) discrimination of algorithms in recruitment processes: legal and extra-legal measures
 - Encourage exchanges between HR stakeholders with a view of determining good practices (e.g. dissemination of code of conducts; adequate combination between AI tools and human intervention...)
 - Encourage dialogue between HR stakeholders and IT experts in order to help remove biases from algorithms
 - Support fundamental research to identify biases in existing algorithms and methods to improve/fix them
 - Encourage diversity in IT teams
 - Increase transparency and accessibility of algorithms
 - Encourage public authorities to provide an “audit platform” for algorithms, with the purpose of identifying those of them which are discriminatory
 - Encourage public authorities to certify algorithms which are “gender neutral”
 - Encourage close cooperation between national “equality bodies” and data protection bodies
 - Assess whether there is a need for a specific (gender) anti-discrimination rules with a view to combating algorithms discrimination and, if so, identify which specific rules would be relevant, in coordination with EU law
 - Assess whether, for the design of algorithms, some “sensitive variables” should be removed or made neutral with the purpose of avoiding gender discrimination