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Country report

Non-discrimination

Spain

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Country report
Non-discrimination
Spain

Lorenzo Cachón

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CONTENTS

EXECUTIVE SUMMARY

1. Introduction

There have been great social and political changes in Spain in the last 40 years. Major transformations have taken place in the country's social structure, forming a much more diverse society in ethnic and religious (and other) terms. One of the greatest changes has been Spain's transformation into a country of immigration. Up to the mid-1980s, the only notable differentiated ethnic group was that formed by the 600 000 Roma living in the country. In the late 1990s, immigration underwent a very sharp acceleration, and by 31 December 2014, the number of foreigners with legal residence in Spain was 4 925 089, which represents 10.5 % of the total population. The largest groups are from Morocco, Romania, Ecuador and Colombia. The rapid rise in immigration poses new challenges to Spanish society, including increased risks related to discriminatory practices. Some 80 % of Spaniards are Catholics (mostly non-practising), 4 % are members of other religious groups (chiefly Islam and Protestantism) and 16 % are non-believers or atheists.

In the political sphere, the Spanish Constitution of 1978 laid down the legal framework of a coexistence governed by democratic principles, making equal treatment and non-discrimination one of the basic pillars of a non-confessional state. Although few actions are brought before the courts, discriminatory practices occur relatively often, on various grounds. These discriminatory processes chiefly affect certain migrant groups and Roma.

There are several specific social and employment programmes for combating discrimination on various grounds. There are also positive action programmes to combat discrimination in fields such as gender and disability. All these programmes are of value, although they are not very effective in their overall impact.

In recent years there have been numerous conflicts between the rights of organisations with an ethos based on religion or belief (the Catholic Church, with which Spain signed an agreement in 1976 that is still in force) and other rights to non-discrimination. This has generated a significant amount of jurisprudence in Spain[1] and the ECtHR.[2]

The great recession suffered by Spain since 2008 and the policies that Governments have been implementing to address it have led to a marked change in policy priorities. The struggle for equality, which had a strong momentum between 2005 and 2010, has slowed. The Comprehensive Bill on equal treatment and non-discrimination, presented in 2011, has been withdrawn. Social dialogue about discrimination has also stopped. An exception in this panorama is that the Parliament of Catalonia has approved the first integral law in Spain on the rights of gay and lesbian persons (This law applies only to the region of Catalonia).[3]

The upcoming general elections in Spain (November 2015) might bring back the struggle for equality as a policy priority. In this new context, it is possible that the Comprehensive Bill on equal treatment and non-discrimination could be taken into consideration in the new Parliament. It is also possible that a revision could be made to the 1976 international agreement between Spain and the Holy See.

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1 Constitutional Court Decisions of 13 February 1981, 5/1981; 27 March 1985, 47/1985; 12 June 1996, 106/1996; and 14 April 2011, 51/2011.

2 Court decision of ECtHR, 12 June 2014, *Fernández Martínez v. Spain* (Application no. 5603/07).

3 Law 11/2014, of 10 October, to guarantee the rights of lesbian, gay, bisexual, transgender and intersex people and to eradicate homophobia, biphobia and transphobia (BOE, 20 November 2014).

2. Main legislation

Equality is one of the highest values of the legal system established by the Spanish Constitution of 1978. The most notable international instruments combating discrimination have been ratified during Spain's democratic period since 1976 and these instruments have informed the Constitution and the laws passed since then:

- International Convention on the Elimination of All Forms of Racial Discrimination;
- International Covenant on Civil and Political Rights;
- International Covenant on Economic, Social and Cultural Rights;
- Convention on the Elimination of All Forms of Discrimination against Women;
- Convention on the Rights of Persons with Disabilities and its Optional Protocol;
- ILO Convention 97 on Migration for Employment;
- ILO Convention 111 on Discrimination (Employment and Occupation);
- Convention for the Protection of Human Rights and Fundamental Freedoms;
- Protocol No. 12 to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms.

Spanish law has developed the principle of equal treatment in various legal fields, mainly labour and criminal law. Under labour law, discriminatory legislative provisions, clauses of collective agreements, individual agreements and unilateral managerial decisions are considered as null and void; and discriminatory acts by employers are specified as very serious offences. Under the criminal law, racism or xenophobia is an aggravating circumstance in the commission of a crime, and a number of provisions specify racist offences and consider serious discrimination in employment as an offence. There are also anti-discriminatory measures in the administrative, civil and education spheres.

The transposition of Directives 2000/43 and 2000/78 is made in Chapter III of Title II of Law 62/2003,[4] on fiscal, administrative and social measures. This has three sections: The first section (Articles 27-28) contains a general transposition of the definitions of direct and indirect discrimination, harassment and instructions to discriminate. The second section (Articles 29-33) transposes various aspects of Directive 2000/43. The third section (Articles 34-43) includes measures on equal treatment and non-discrimination at work on the basis of religion or belief, disability, age and sexual orientation. It fully transposes the employment and training provisions in Directive 2000/43 and Directive 2000/78. Law 62/2003 was amended in 2014 in relation to independent bodies.[5]

Following Law 62/2003, EU directives have been implemented in various other laws and have influenced policy changes in Spain on anti-discrimination legislation for different grounds and in different fields.

Various other laws are relevant: Law 27/2007,[6] of 23 October 2007, on recognising sign language and speech aid systems; and RDL 1/2013[7] of 29 November 2013, approving the General Law on the rights of persons with disabilities and their social inclusion, which regulates all aspects of disability and replaces the three pieces of disability legislation that were in force up to that date.

3. Main principles and definitions

The Spanish Constitution states that Spaniards are equal before the law and that they may not in any way be discriminated against on account of birth, race, sex, religion,

[4] Law 62/2003, 30 December 2003, on fiscal, administrative and social measures (BOE, 31 December 2003).
[5] By Law 15/2014, 16 September 2014, on rationalisation of the public sector and other measures of administrative reform (BOE, 17 September 2014).
[6] BOE, 24 October 2007.
[7] BOE, 3 December 2013.

opinion or any other condition or personal or social circumstance (Article 14). Moreover, it enjoins the public authorities to promote conditions that ensure that the freedom and equality of individuals and of the groups that they form are real and effective; to remove obstacles that impede or hamper the fulfilment of such freedom and equality; and to facilitate the participation of all citizens in political, economic, cultural and social life (Article 9). The Spanish Constitutional Court[8] has ruled that the principle of equality is not breached by action on the part of the public authorities to counter the disadvantages experienced by certain social groups even when they are given more favourable treatment, as the aim is to give different treatment to effectively different situations.

These principles have been developed in the Spanish legal system.

Discrimination on various grounds is generally combated by the same regulations, and the grounds of unlawful discrimination normally specified are a person's origin, including racial or ethnic origin, sex, age, marital status, religion or beliefs, political opinion, sexual orientation, trade union membership, social status or disability.

National law has implemented the duty to provide reasonable accommodation for disabled people, both in general terms and specifically in the field of employment.

The Criminal Code[9] specifies racial or ethnic motives as aggravating circumstances in various offences and misdemeanours. Organic Law 7/1980,[10] of 7 July 1980, on religious freedom, proclaims the principle of non-discrimination, establishing that religious beliefs shall not constitute a reason for inequality or discrimination before the law. Religious reasons may not be a ground for preventing anyone from performing any work, activity, responsibility or public office.

Law 62/2003 contains a rather minimal – and sometimes not exactly literal – transposition of Directives 2000/43 and 2000/78, covering all grounds of discrimination. The definitions of both direct and indirect discrimination are included, although in the definition of direct discrimination there is no reference to the situation where a person 'has been or would be treated' less favourably, but only to 'present situations of unfavourable treatment'. Harassment, instructions to discriminate and victimisation are defined and prohibited. In the case of victimisation, the law introduces a modification in the Workers' Statute, annulling employers' decisions which constitute adverse treatment of employees as a reaction to a complaint within the company or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination.

There is no explicit mention in Spanish legislation of discrimination based on assumed characteristics. RDL 1/2013 addresses disability discrimination based on association. For other grounds, discrimination by association may be regarded as implicitly covered by the law, and judicial interpretation might be required.

The exceptions to the principle of equal treatment provided for in Spanish legislation are along the lines of those in Article 4 of Directives 2000/43 and 2000/78. As for churches and organisations with a specific ethos, Organic Law 7/1980 on religious freedom sets out the right of registered churches and religious communities to lay down their own organisational rules and internal and staff regulations, which may include clauses on the safeguarding of their religious identity and personality, as well as due respect for their beliefs, without prejudice to the rights and freedoms recognised by the Constitution and in particular those of freedom, equality and non-discrimination.

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8 See Constitutional Court Decision, 1 July 1987, 128/1987.

9 Organic Law 10/1995, 23 November 1995, on the Criminal Code (BOE, 24 November 1995), modified by Organic Law 1/2015, 30 March 2015 (BOE, 31 March 2015).

10 BOE, 6 July 1980.

In private organisations with a specific ethos, the exemptions apply at three stages of the employment relationship: access to employment; performance of activities in the organisation; and dismissal as a consequence of those activities.

There are no specific national rules about multiple discrimination.

4. Material scope

The material scope of the prohibition of discrimination is of a general nature. All the fields mentioned by Directives 2000/43 and 2000/78 are covered by the general principle of equality laid down in Article 14 of the Spanish Constitution. Besides gender, racial or ethnic origin, religion or beliefs, disability, age and sexual orientation, other grounds are expressly mentioned in Spanish laws: marital status; place of origin; social status; political ideas; ideology; affiliation to a trade union; language within the State of Spain; and family ties with other workers in the same enterprise. In some fields, especially employment, discrimination is expressly prohibited by current legislation, in both the public and private sectors.

In fields such as social protection and social advantages, education and access to it, and the supply of goods and services available to the public, including housing, the applicable regulations do not usually contain explicit anti-discrimination clauses, but they are subject to the general principle stated in the Constitution. Law 62/2003 establishes anti-discrimination measures in these fields, but only for discrimination on the grounds of racial or ethnic origin.

5. Enforcing the law

The Spanish Constitution provides that all fundamental rights are protected by the ordinary courts of law. Moreover, appeals for protection in respect of such rights may be lodged at the Constitutional Court once ordinary proceedings have been exhausted. As well as having recourse to administrative proceedings (through the Labour Inspectorate and the Education Inspectorate), the conciliation procedures for civil and social matters, the ordinary courts and the Constitutional Court, victims of discrimination may appeal to the ombudsmen if the issue concerns acts by the public administration.

The Spanish Constitution entitles any physical or legal person invoking a legitimate interest to be a party to proceedings relating to the violation of fundamental rights and freedoms. Organisations and trade unions are entitled to act on behalf of (but not in support of) victims of discrimination. This general rule (Law 1/2000[11] of 7 January 2000, regulating civil procedure, and Law 29/1998[12] of 13 June 1998, regulating administrative jurisdiction) also relates to anti-discrimination legislation: in Law 62/2003 (in cases of discrimination on the ground of racial or ethnic origin and only in fields other than employment); in RDL 2/1995 on employment litigation (on grounds of racial or ethnic origin, religion or beliefs, disability, age or sexual orientation in the field of employment); and in the General Law on the rights of persons with disabilities (RDL 1/2013) (on the ground of disability in the fields of access to and supply of goods and services and employment).

Law 36/2011[13] of 10 October 2011, on employment litigation procedure, in its regulation of capacity and procedural legitimisation, mentions workers or their legitimate representatives if the former are incompetent or if the claimant is a legal entity. Furthermore, this law provides that trade unions may appear in court for and on behalf of their members who authorise them to do so, in order to defend their individual rights.

[11] BOE, 8 January 2000.
[12] BOE, 14 June 1998.
[13] BOE, 11 October 2011.

The Criminal Code includes racist motives as an aggravating circumstance in any offence and penalises, among other acts, incitement to discriminate, dissemination of abusive material, discrimination in public services and professional or corporate discrimination, along with associations promoting discrimination. Racial discrimination is also penalised in the context of offences against employees.

The Civil Procedure Law (Law 1/2000) regulates the burden of proof in court and shifts the burden of proof in certain cases. In the field of antidiscrimination law, Law 62/2003 establishes the possibility of a shift in the burden of proof on the ground of discrimination by racial or ethnic origin (in all fields) (Article 32), and in the field of employment on the ground of discrimination by racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 36). The General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013) establishes a shift in the burden of proof on the ground of disability (Article 77).

Sanctions have been established in the field of employment for all grounds and for the ground of disability in all fields. In the field of employment, Law 5/2000[14] of 4 August 2000, on offences and penalties in social matters, was amended by Law 62/2003. Any unilateral decisions by an employer involving unfavourable direct or indirect discrimination on the grounds of age or disability or unfavourable or adverse treatment relating to remuneration and other working conditions, on the grounds of gender, racial or ethnic origin, civil or social condition status, religion or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, family ties with other employees or language within the Spanish State, as well as decisions of the employer entailing unfavourable treatment of workers as a reaction to a complaint within the company or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination, are very serious offences. On the ground of disability, the General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013) establishes a system of sanctions. Legislation establishes a maximum amount for the fines (EUR 187 515 in the field of employment and EUR 1 million in the field of disability), but does not establish any ceiling for compensation.

There are generally few rulings on racial discrimination in the courts, which usually treat cases as violations of other types of legal right, such as aggression and damage to property, without taking account of racist motivation. A further complication is that those concerned do not bring many actions, owing to bureaucracy and to the small number of convictions. However, court actions have been brought on account of discrimination – against Roma, immigrants or black Spaniards – that have attracted a degree of public interest.

Situation testing is not expressly provided for in Spanish law, but nor is it forbidden. It might therefore be used as a form of evidence in discrimination cases. Statistical evidence has been used in some judgments, especially in cases of sex discrimination in the employment field.

The main positive action measures in place on a national level are 1) broad social policy measures (such as positive action for Roma or the use of sign language and speech aid systems for people with disabilities); 2) quotas for persons with disabilities; and 3) some preferential treatment for persons with disabilities (such as special employment centres and occupational centres or a preferential right to geographical mobility).

The directives were transposed in Spain in 2003 with no formal social dialogue, either with the social partners or with NGOs. Currently, in addition to the Council for the

[14] BOE, 5 August 2000.

elimination of racial or ethnic discrimination, there are other organisations that can facilitate social dialogue: the National Disability Council (which institutionalises the collaboration of associations of persons with disabilities with national Government. The council started its work in 2005), the National Roma Council (a participatory and advisory body on general and specific public policy affecting the integral development of the Roma population in Spain), the Advisory Commission on Religious Freedom (created in 1980, the commission aims to review, report on and present proposals with respect to issues relating to the enforcement of the law, religious discrimination being one of these issues), and the Forum for the Social Integration of Immigrants (a collegiate consultative, informative and advisory body on the integration of immigrants).

6. Equality bodies

Law 62/2003 (as amended by Law 15/2014, on the rationalisation of the public sector and other measures of administrative reform) established the Council for the elimination of racial or ethnic discrimination (*Consejo para la eliminacion de la discriminación racial o étnica*). This council was set up on 28 October 2009 and became operational on that date.

Royal Decree 1262/2007 (modified by RD 1044/2009) regulates the composition, competences and regulations of the council. The council has the following characteristics: it is attached to the Ministry of Health, Social Services and Equality; it is a collegiate Spanish governmental body; and its functions include the three functions described in Article 13.2 of Directive 2000/43: providing independent assistance to victims, conducting independent surveys and publishing independent reports. Since the enactment of Law 15/2014, the council has formally developed its functions 'with independence'.

The council's make-up is of a fundamentally governmental nature, as the law states that it is to be formed by all the ministries with responsibilities in the areas referred to by Article 3.1 of Directive 2000/43, with the participation of the autonomous regions, the local authorities, the employers' organisations and trade unions, and other organisations representing interests related to the racial or ethnic origin of persons. The Council consists of a chair and 28 members, 14 of whom are members of the public administration and 14 of whom are social partners and stakeholders. They are distributed as follows: a) seven members representing central Government, all with the rank of director general; b) seven members from other tiers of government; c) four members from the social partners; and d) 10 members representing organisations and associations whose activities are linked to the promotion of equal treatment and non-discrimination on grounds of racial or ethnic origin.

In June 2010 the council launched the Network of centres of assistance for victims of racial or ethnic discrimination, involving seven major NGOs. The network ceased functioning in 2012, but it has been working again since 15 March 2013, when the contract of provision of services was signed with the *Fundación Secretariado Gitano* (FSG). To achieve the best service, FSG has outsourced services with six other organisations that specialise in assisting victims of discrimination: ACCEM, the *Cruz Roja Española*, the *Fundación CEPAIM*, the *Movimiento contra la Intolerancia* and the *Movimiento por la Paz y Red Acoge*. Between 15 March 2013 and 31 December 2013, the Network assisted with 376 cases: 231 individuals and 145 collective. In 2014 (1 January to 31 December), it assisted with 556 cases: 318 individuals and 238 collective. The council is not yet well known by the public, and its scope for antidiscrimination action is limited, but the formal recognition of its independence by Law 15/2014 and the launch of the network could improve the understanding of its roles and improve its efficiency.

7. Key issues

Potential breaches of the directives include the following:

- The term 'has been or would be treated' is not included in the Spanish definitions of direct discrimination;
- There are two differences in relation to Article 2.2.b of the directives, the words 'criterion or practice' are not included, and the directives say 'persons' in the plural, whereas the Spanish transposition says 'person' in the singular;
- The words 'hostile' and 'degrading' are not included in the definitions of harassment;
- Sanctions have been established only in the field of labour (for all grounds) and disability (in all fields).

Other issues of concern are:

- The effectiveness of the Council for the Elimination of Racial or Ethnic Discrimination is questionable, because it is made up primarily of Government representatives. This could jeopardise the independence of the council (although this is formally recognised by the law).
- This legislation based on the directives is not well known or understood by the main players in the legal system. This is one of the main reasons why there have so far been hardly any proceedings in Spain in which these provisions have been applied.
- Given the dispersion of the norms on (shifting) the burden of proof, the differences in their definitions and the jurisprudence of the Constitutional Court, it would be appropriate to merge the definitions into one legal text.
- In the last 10 years, notable progress has been made in the fields of disability and sexual orientation, with highly significant legal innovations. However, this notable legal progress has not been accompanied by actual changes in behaviour in society or in discriminatory practices.
- The situation of teachers of religion in state schools. This issue is difficult to resolve because international agreement between the Holy See and Spain signed in 1976, just before approval of the present Spanish Constitution, is still in force.
- In January 2011 the Spanish Government introduced the first version of the Comprehensive Bill for Equal Treatment and Non-discrimination (Proyecto de Ley integral para la igualdad de trato y la no discriminación). Following consultations with organisations with a legitimate interest, the bill was delivered to Parliament on 10 June 2011, but the call for early elections for 20 November 2011 suspended parliamentary consideration of the bill. The bill was of great importance and created an equality body, for all grounds and in all fields, which was independent, which could be effective and whose functions were broader than those required by the directives. However, with the electoral victory of the conservative Popular Party and the change of Government, a similar bill will not be approved by the legislature in 2011-2015. Nevertheless, the mere existence of this bill is a good example of three types of problems with Spanish legislation in this field: 1) the dispersion of the rules makes it difficult to visualise a coherent anti-discrimination framework at legislative level; 2) the poor transposition of some aspects of the directives; and 3) the shortcomings of the specialised body. These three factors were overcome with the Comprehensive Bill for Equal Treatment and Non-discrimination. This bill also added some content that went beyond the directives.

Current best practice in Spain includes:

- Positive actions for Roma (racial or ethnic origin in all fields);
- Sign languages and speech aid systems (positive action measures on the ground of disability);
- National Disability Council (disability in all fields);
- Integral Law on the rights of gay and lesbian persons in Catalonia (sexual orientation).

RÉSUMÉ

1. Introduction

L'Espagne a connu d'importants bouleversements sociaux et politiques au cours des 40 dernières années. Des transformations majeures ont marqué la structure sociale du pays, créant une société beaucoup plus diversifiée en termes ethniques et religieux (entre autres). L'un des principaux changements a été la transformation de l'Espagne en pays d'immigration. Jusqu'au milieu des années 1980, le seul groupe ethnique véritablement différencié était formé des 600 000 Roms vivant dans le pays. L'immigration a connu une forte accélération à partir de la fin des années 1990 de sorte qu'au 31 décembre 2014, le nombre d'étrangers en séjour légal sur le sol espagnol atteignait 4 925 089 personnes, soit 10,5 % de l'ensemble de la population. Les groupes les plus importants viennent du Maroc, de Roumanie, d'Équateur et de Colombie. Cette hausse rapide du taux d'immigration pose de nouveaux défis à la société espagnole, notamment en termes d'accroissement des risques de pratiques discriminatoires. Environ 80 % des Espagnols sont catholiques (non pratiquants pour la plupart), 4 % adhèrent à d'autres groupes religieux (islam et protestantisme principalement) et 16 % sont non croyants ou athées.

Dans le domaine politique, la constitution espagnole de 1978 fixe le cadre juridique d'une coexistence régie par des principes démocratiques faisant de l'égalité de traitement et de la non-discrimination l'un des piliers d'un État non confessionnel. Même si peu d'actions soient intentées en justice, les pratiques discriminatoires sont relativement fréquentes et se fondent sur des motifs divers. Elles visent principalement certains groupes de migrants et les Roms.

Plusieurs programmes à vocation sociale ou axés sur l'emploi ont été spécifiquement mis en œuvre pour lutter contre la discrimination fondée sur divers motifs. Des programmes d'action positive ont également été instaurés pour lutter contre la discrimination en rapport avec le genre et le handicap notamment. Aussi valables soient-ils, ces programmes ne s'avèrent cependant pas très efficaces en termes d'impact global.

De nombreux conflits ont opposé ces dernières années les droits des organisations ayant une éthique ancrée dans la religion ou les convictions (l'Église catholique avec laquelle l'Espagne a signé en 1976 un accord qui est toujours en vigueur) et d'autres droits relevant de la non-discrimination. Ils sont à l'origine d'une abondante jurisprudence à la fois en Espagne[15] et au niveau de la CouEDH.[16]

La grande récession dont souffre l'Espagne depuis 2008 et les mesures mises en œuvre par les gouvernements pour y faire face ont conduit à une réorientation majeure des priorités au niveau des politiques. La lutte pour l'égalité connaît un ralentissement après avoir bénéficié d'une forte impulsion entre 2005 et 2010. Le projet de loi intégrale sur l'égalité de traitement et la non-discrimination, présenté en 2011, a été retiré. Il a été mis fin par ailleurs au dialogue social sur la discrimination. Le tableau ainsi brossé connaît une exception avec l'approbation par le parlement catalan de la première loi intégrale adoptée en Espagne pour la reconnaissance des droits des personnes homosexuelles (laquelle s'applique exclusivement à la région de Catalogne).[17]

[15] Cour constitutionnelle: arrêts n° 5/1981 du 13 février 1981, n° 47/1985 du 27 mars 1985, n° 106/1996 du 12 juin 1996 et n° 51/2011 du 14 avril 2011.

[16] CouEDH, arrêt rendu le 12 juin 2014 dans l'affaire *Fernández Martínez c. Espagne* (requête n° 5603/07).

[17] Loi n° 11/2014 du 10 octobre visant à garantir les droits des personnes lesbiennes, gays, bisexuelles, transgenres et intersexuelles et à éradiquer l'homophobie, la biphobie et la transphobie (BOE du 20 novembre 2014).

Les élections générales qui auront lieu prochainement en Espagne (novembre 2015) pourraient refaire une priorité de la lutte pour l'égalité et conduire le nouveau parlement à réexaminer le projet de loi intégrale sur l'égalité de traitement. Une révision de l'accord international conclu en 1976 entre l'Espagne et le Saint-Siège pourrait également intervenir.

2. Législation principale

L'égalité est l'une des plus hautes valeurs du système juridique instauré par la constitution espagnole de 1978. Les instruments internationaux de lutte contre la discrimination les plus notoires, ratifiés au cours de la période démocratique espagnole débutant en 1976, ont étayé la Constitution et les lois adoptées depuis lors:

- la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Nations unies);
- le pacte international relatif aux droits civils et politiques (Nations unies);
- le pacte relatif aux droits économiques, sociaux et culturels (Nations unies);
- la convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes (Nations unies);
- la convention relative aux droits des personnes handicapées et son protocole facultatif (Nations unies);
- la convention n° 97 de l'OIT sur les travailleurs migrants;
- la convention n° 111 de l'OIT concernant la discrimination (emploi et profession);
- la convention de sauvegarde des droits de l'homme et des libertés fondamentales (Conseil de l'Europe);
- le protocole n° 12 à la convention de sauvegarde des droits de l'homme et des libertés fondamentales (Conseil de l'Europe).

Le droit espagnol a développé le principe de l'égalité de traitement dans différents domaines juridiques, et principalement dans ceux du droit pénal et du droit du travail. Le droit du travail prévoit que les dispositions législatives, les clauses de conventions collectives, les contrats individuels et les décisions unilatérales d'employeurs revêtant un caractère discriminatoire sont nuls et sans effet, et que les actes discriminatoires commis par des employeurs constituent des infractions très graves. Le droit pénal dispose pour sa part que le racisme ou la xénophobie constitue une circonstance aggravante du délit; plusieurs dispositions mentionnent spécifiquement les délits à caractère raciste et pénalisent les actes graves de discrimination en matière d'emploi. Des mesures de lutte contre la discrimination ont également été prises dans les domaines administratif, civil et éducatif.

La transposition des directives 2000/43 et 2000/78 est assurée au travers des trois sections du titre II, chapitre III, de la loi n° 62/2003[18] instituant des mesures budgétaires, administratives et sociales: la première section (articles 27 et 28) contient une transposition générale des définitions de la discrimination directe et indirecte, du harcèlement et de l'injonction de pratiquer une discrimination; la deuxième section (articles 29 à 33) transpose divers aspects de la directive 2000/43; et la troisième section (articles 34 à 43) contient des mesures relatives à l'égalité de traitement et la non-discrimination au travail en rapport avec la religion ou les convictions, un handicap, l'âge et l'orientation sexuelle; elle transpose intégralement les dispositions des directives 2000/43 et 2000/78 pour ce qui concerne l'emploi et la formation. La loi n° 62/2003 a été modifiée en 2014 pour ce qui concerne les organismes indépendants.[19]

[18] Loi n° 62/2003 du 30 décembre 2003 portant sur les mesures budgétaires, administratives et sociales (BOE du 31 décembre 2003).

[19] Par la loi n° 15/2014 du 16 décembre 2014 relative à la rationalisation du secteur public et à d'autres mesures de réforme administrative (BOE du 17 septembre 2014).

À la suite de la loi n° 62/2003, les directives de l'UE ont été mises en œuvre au travers de diverses autres lois et ont contribué à certaines réorientations législatives de l'Espagne en matière de lutte contre la discrimination fondée sur divers motifs et intervenant dans divers domaines.

On peut citer parmi ces autres lois pertinentes la loi n° 27/2007[20] du 23 octobre 2007 sur la reconnaissance de la langue des signes et les systèmes d'aide à la parole, et le décret-loi royal (RDL) n° 1/2013[21] du 29 novembre 2013 portant approbation de la loi générale sur les droits des personnes handicapées et leur inclusion sociale, qui régit tous les aspects du handicap et remplace les trois actes législatifs relatifs au handicap en vigueur jusqu'à cette date.

3. Principes généraux et définitions

La constitution espagnole dispose que les Espagnols sont égaux devant la loi et ne peuvent en aucune façon faire l'objet d'une différence de traitement motivée par la naissance, la race, le sexe, la religion, les convictions ou toute autre raison ou circonstance personnelle ou sociale (article 14). Elle enjoint en outre les pouvoirs publics à promouvoir des conditions qui garantissent que la liberté et l'égalité des personnes et des groupes qu'elles forment soient réelles et effectives; à supprimer les obstacles qui empêchent ou entravent la concrétisation de cette liberté et de cette égalité; et à faciliter la participation de tous les citoyens à la vie politique, économique, culturelle et sociale (article 9). La Cour constitutionnelle espagnole[22] a dit pour droit qu'il n'y avait pas violation du principe de l'égalité lorsque les pouvoirs publics prennent des mesures pour compenser les désavantages subis par certains groupes sociaux, même lorsque ceux-ci bénéficient d'un traitement plus favorable, le but étant l'octroi d'un traitement différent en réponse à des situations effectivement différentes.

Le système juridique espagnol a développé ces principes.

Les règlementations destinées à lutter contre une discrimination illégale sont généralement les mêmes quel que soit le motif considéré – les motifs habituellement visés étant l'origine de la personne (y compris son origine raciale ou ethnique), son sexe, son âge, son état matrimonial, sa religion ou ses convictions, des opinions politiques, son orientation sexuelle, son appartenance syndicale, son statut social ou son handicap.

La législation nationale a mis en œuvre l'obligation d'offrir un aménagement raisonnable aux personnes handicapées, de manière générale et dans le domaine de l'emploi en particulier.

Le code pénal[23] stipule que les motifs raciaux ou ethniques constituent des circonstances aggravantes dans le cas de divers délits et infractions. La loi organique n° 7/1980[24] du 7 juillet 1980 sur la liberté religieuse proclame le principe de non-discrimination en établissant que les convictions religieuses ne constituent pas un motif d'inégalité ou de discrimination devant la loi. Des raisons d'ordre religieux ne peuvent être invoquées pour empêcher quiconque d'exercer un travail, une activité, une responsabilité ou une fonction publique.

La loi n° 62/2003 contient une transposition plutôt minimale – et pas toujours littérale – des directives 2000/43 et 2000/78 couvrant tous les motifs de discrimination. Elle

[20] BOE du 24 octobre 2007.
[21] BOE du 3 décembre 2013.
[22] Voir l'arrêt n° 128/1987 de la Cour constitutionnelle du 1er juillet 1987.
[23] Loi organique n° 10/1995 du 23 novembre 1995 (BOE du 24 novembre 1995), modifiée par la loi organique n° 1/2015 du 30 mars 2015 (BOE du 31 mars 2015).
[24] BOE du 6 juillet 1980.

comprend les définitions de la discrimination directe et de la discrimination indirecte, même si la première se contente de faire référence à des «situations actuelles de traitement moins favorable» sans faire aucune référence à une situation dans laquelle une personne est traitée de manière moins favorable qu'une autre «ne l'a été ou ne le serait». Le harcèlement, les injonctions de pratiquer une discrimination et les rétorsions sont définis et interdits. En ce qui concerne les rétorsions, la loi introduit une modification de la loi portant statut des salariés par laquelle elle annule les décisions de l'employeur donnant lieu à un traitement défavorable de travailleurs en réaction au dépôt d'une plainte au sein de l'entreprise ou à toute action juridique visant à faire respecter le principe de l'égalité de traitement et de non-discrimination.

La législation espagnole ne fait aucune mention explicite de la discrimination fondée sur des caractéristiques présumées. Le RDL n° 1/2013 régit la discrimination par association en ce qui concerne le handicap; quant aux autres motifs, cette forme de discrimination peut être considérée comme implicitement couverte par la loi et requiert parfois une interprétation judiciaire.

Les dérogations au principe de l'égalité de traitement prévues par la législation espagnole correspondent à celles visées à l'article 4 des directives 2000/43 et 2000/78. En ce qui concerne les églises et les organisations s'inscrivant dans une éthique particulière, la loi organique n° 7/1980 sur la liberté religieuse consacre le droit des églises et communautés religieuses enregistrées de fixer leurs propres règles organisationnelles ainsi que leur règlement intérieur et leur règlement du personnel – lesquels peuvent comporter des clauses relatives à la protection de leur identité et personnalité religieuses, ainsi qu'au respect de leurs convictions, sans préjudice des droits et libertés reconnus par la Constitution et plus particulièrement des droits à la liberté, à l'égalité et à la non-discrimination.

Pour ces organisations privées s'inscrivant dans une éthique particulière, les dérogations s'appliquent à trois étapes de la relation professionnelle: l'accès à l'emploi, l'exercice de l'activité au sein de l'organisation et le licenciement du fait de cette activité.

Il n'existe pas de règle nationale spécifique concernant la discrimination multiple.

4. Champ d'application matériel

Le champ d'application matériel de l'interdiction de discrimination revêt un caractère général. Tous les domaines visés par les directives 2000/43 et 2000/78 sont régis par le principe général de l'égalité énoncé à l'article 14 de la constitution espagnole. Outre le genre, l'origine raciale ou ethnique, la religion ou les convictions, le handicap, l'âge et l'orientation sexuelle, d'autres motifs sont explicitement mentionnés dans des lois espagnoles: l'état matrimonial, le lieu de naissance, statut social, idées politiques, idéologie, appartenance syndicale, connaissance de la langue de l'État espagnol et liens familiaux avec d'autres travailleurs dans la même entreprise. Dans un certain nombre de domaines, et en matière d'emploi plus particulièrement, la discrimination est expressément interdite par la législation actuelle à la fois dans le secteur public et dans le secteur privé.

Dans des domaines tels que la protection sociale et les avantages sociaux, l'enseignement et l'accès à celui-ci, et la fourniture de biens et de services mis à la disposition du public, y compris le logement, les réglementations applicables ne contiennent généralement pas de clauses explicites d'interdiction de discrimination, mais elles sont assujetties au principe général consacré par la Constitution. La loi n° 62/2003 instaure des mesures de lutte contre la discrimination dans ces domaines, mais celles-ci visent uniquement la discrimination fondée sur l'origine raciale ou ethnique.

5. Mise en application de la loi

La constitution espagnole dispose que l'ensemble des droits fondamentaux sont protégés par les juridictions ordinaires, mais un pourvoi en appel peut être introduit auprès de la Cour constitutionnelle pour faire valoir ces droits lorsque les voies de recours ordinaires ont été épuisées. Outre la possibilité de recourir aux procédures administratives (via l'inspection du travail et l'inspection de l'enseignement), aux procédures de conciliation en matière civile et sociale, aux juridictions ordinaires et à la Cour constitutionnelle, les victimes de discrimination peuvent s'adresser aux médiateurs si la question concerne des agissements de l'administration publique.

La constitution espagnole prévoit que toute personne physique ou morale faisant valoir un intérêt légitime peut être partie à des procédures intentées pour non-respect des libertés et droits fondamentaux. Les organisations et les syndicats sont habilités à agir au nom (mais pas en soutien) de victimes de discrimination. Cette règle générale (loi n° 1/2000[25] du 7 janvier 2000 régissant la procédure civile et la loi n° 29/1998[26] du 13 juin 1998 régissant la juridiction civile) s'applique également dans le cadre de la législation antidiscrimination: tel est le cas de la loi n° 62/2003 (en cas de discrimination fondée sur l'origine raciale ou ethnique et uniquement dans d'autres domaines que l'emploi); du RDL n° 2/1995 relatif aux conflits du travail (les motifs étant l'origine raciale ou ethnique, la religion ou les convictions, le handicap, l'âge ou l'orientation sexuelle et le domaine couvert étant l'emploi); et de la loi générale sur les droits des personnes handicapées (RDL n° 1/2013) (le motif étant le handicap et les deux domaines visés étant l'accès et la fourniture de biens et de services et l'emploi).

La loi n° 36/2011[27] du 10 octobre 2011 relative à la procédure de règlement des conflits du travail fait référence, lorsqu'elle régit la capacité et la légitimation procédurale, aux travailleurs ou à leurs représentants légitimes au cas où les premiers sont incompétents ou si le plaignant est une personne morale. Cette loi dispose en outre que les syndicats peuvent se présenter en justice au nom et pour le compte de leurs membres afin de défendre, moyennant leur consentement, les droits personnels de ceux-ci.

Le code pénal inclut les motifs racistes au titre de circonstance aggravante de tout délit et pénalise, entre autres actes, l'incitation à la discrimination, la diffusion de matériel offensant, la discrimination dans les services publics et la discrimination professionnelle ou d'entreprise, ainsi que les associations qui prônent la discrimination. La discrimination raciale est également pénalisée dans le cadre d'infractions à l'encontre de salariés.

La loi n° 1/2000 sur la procédure civile réglemente la charge de la preuve en justice et renverse cette charge dans un certain nombre de cas. En ce qui concerne la législation antidiscrimination, la loi n° 62/2003 crée la possibilité d'un renversement de la charge de la preuve lorsque la discrimination est motivée par l'origine raciale ou ethnique (dans tous les domaines) (article 32) ainsi que dans le domaine de l'emploi lorsqu'elle est motivée par l'origine raciale ou ethnique, la religion ou les convictions, le handicap, l'âge ou l'orientation sexuelle (article 36). La loi générale sur les droits des personnes handicapées sur leur inclusion sociale (RDL n° 1/2013) établit un renversement de la charge de la preuve pour le motif du handicap (article 77).

Des sanctions ont été instaurées pour tous les motifs dans le domaine de l'emploi et pour le motif du handicap dans tous les domaines. Dans le domaine de l'emploi, la loi n° 5/2000[28] du 4 août 2000 sur les infractions et les sanctions en matière sociale a été modifiée par la loi n° 62/2003. Les décisions unilatérales d'un employeur impliquant une

[25] BOE du 8 janvier 2000.
[26] BOE du 14 juin 1998.
[27] BOE du 11 octobre 2011.
[28] BOE du 5 août 2000.

discrimination directe ou indirecte défavorable fondée sur l'âge ou un handicap, ou un traitement défavorable ou préjudiciable en matière de rémunération ou autres conditions d'emploi, fondé sur le genre, l'origine raciale ou ethnique, l'état civil ou le statut social, la religion ou les convictions, les idées politiques, l'orientation sexuelle, l'appartenance ou la non-appartenance à un syndicat, l'adhésion à des conventions syndicales, des liens familiaux avec d'autres salariés ou la connaissance de la langue de l'État espagnol, ainsi que les décisions de l'employeur donnant lieu à un traitement défavorable de travailleurs en réaction au dépôt d'une plainte au sein de l'entreprise ou à toute action juridique visant à faire respecter le principe de l'égalité de traitement et de non-discrimination, constituent des infractions très graves. Pour ce qui concerne le motif du handicap, le régime de sanction est fixé par la loi générale sur les droits des personnes handicapées et leur inclusion sociale (RDL n° 1/2013). La législation fixe un montant minimum pour les amendes (187 515 euros dans le domaine de l'emploi et 1 million d'euros pour ce qui concerne le handicap) mais ne fixe aucun plafond pour les indemnisations.

Les décisions judiciaires en matière de discrimination raciale sont généralement peu nombreuses, les juridictions ayant plutôt pour habitude de traiter ce type d'affaires comme des cas de non-respect d'autres formes de droits conférés par la loi (agression ou atteinte aux biens, par exemple) sans tenir compte de la motivation raciste. Les choses se compliquent encore du fait que la lourdeur administrative et le faible nombre de condamnations tendent à dissuader les intéressés d'engager des poursuites. Des actions en justice pour cause de discrimination – à l'égard de Roms, d'immigrés ou d'Espagnols de race noire – ont toutefois suscité un certain intérêt public.

Le test de situation n'est pas explicitement prévu par le droit espagnol, mais il n'est pas interdit pour autant. Il pourrait dès lors être utilisé comme forme de preuve dans des affaires de discrimination. Des preuves statistiques ont été prises en compte lors de certains arrêts, en particulier lorsqu'il s'agissait de discrimination fondée sur le sexe dans le domaine de l'emploi.

Les principales mesures d'action positive mises en place au niveau national sont les suivantes: 1) larges mesures relevant de la politiques sociale (action positive en faveur des Roms ou usage de la langue des signes et de systèmes d'aide à la parole pour les personnes handicapées, par exemple); 2) quotas en faveur des personnes handicapées; et 3) un certain traitement préférentiel à l'égard des personnes handicapées (centres d'emploi et centres professionnels spécialisés ou droit préférentiel en termes de mobilité géographique notamment).

Les directives ont été transposées en Espagne en 2003 sans qu'aucun dialogue social ait été formellement organisé, que ce soit avec les partenaires sociaux ou avec des ONG. À l'heure actuelle, outre le Conseil pour l'élimination de la discrimination raciale ou ethnique, plusieurs autres organisations peuvent faciliter le dialogue social: le Conseil national du handicap (qui institutionnalise la collaboration d'associations de personnes handicapées avec le gouvernement national, et qui a démarré ses activités en 2005), le Conseil national pour les Roms (organe participatif et consultatif en matière de politique publique générale et spécifique affectant le développement intégral de la population rom en Espagne), la Commission consultative relative à la liberté religieuse (instituée en 1980, cette commission a pour mission d'examiner, de faire rapport et de présenter des propositions sur des questions relevant de l'application de la loi – la discrimination religieuse étant l'une de ces questions) et le Forum pour l'intégration sociale des immigrés (organe collégial consultatif d'information et de conseil concernant l'intégration des immigrés).

6. Organismes de promotion de l'égalité de traitement

La loi n° 62/2003 (telle que modifiée par la loi n° 15/2014 relative à la rationalisation du secteur public et à d'autres mesures de réforme administrative) institue le Conseil pour l'élimination de la discrimination raciale ou ethnique (*Consejo para la eliminacion de la discriminación racial o étnica*), lequel a été créé le 28 octobre 2009 et a démarré son activité à cette date.

Le décret royal n° 1262/2007 (modifié par le décret royal n° 1044/2009) définit la composition, les compétences et le règlement du Conseil, qui présente les caractéristiques suivantes: il est attaché au ministère de la Santé, des services sociaux et de l'égalité; il s'agit d'un organisme gouvernemental collégial; et son mandat couvre les trois fonctions décrites à l'article 13, paragraphe 2, de la directive 2000/43, à savoir apporter une aide indépendante aux victimes, conduire des études indépendantes et publier des rapports indépendants. Le Conseil a formellement développé ses fonctions «avec indépendance» depuis le vote de la loi n° 15/2014.

La composition du Conseil est de nature essentiellement gouvernementale puisque la loi stipule qu'il doit être constitué de tous les ministères ayant des compétences dans les domaines visés à l'article 3, paragraphe premier, de la directive 2000/43 avec la participation des régions autonomes, des autorités locales, des organisations d'employeurs et des syndicats, et d'autres organisations représentant des intérêts liés à l'origine raciale ou ethnique. Le Conseil comprend un président et 28 membres, dont 14 appartiennent à l'administration publique et 14 sont des partenaires sociaux et des parties prenantes. Ils se répartissent comme suit: a) sept membres représentent le gouvernement central – tous ayant le grade de directeur général; b) sept membres appartiennent à d'autres niveaux de l'administration publique; c) quatre membres représentent les partenaires sociaux; et d) 10 membres représentent des organisations et associations dont les activités sont liées à la promotion de l'égalité de traitement et à la non-discrimination fondée sur l'origine raciale ou ethnique.

Le Conseil a inauguré en juin 2010 le Réseau des centres d'aide aux victimes de discrimination raciale ou ethnique avec la participation de sept grandes ONG. Le réseau a cessé de fonctionner en 2012, mais il a repris ses activités le 15 mars 2013 lors de la signature d'un contrat de prestation de services avec la *Fundación Secretariado Gitano* (FSG). Afin d'offrir le meilleur service, la FSG sous-traite des prestations à six autres organisations spécialisées dans l'aide aux victimes de discrimination: l'ACCEM, la *Cruz Roja Española*, la *Fundación CEPAIM*, le *Movimiento contra la Intolerancia* et le *Movimiento por la Paz y Red Acoge*. Entre le 15 mars 2013 et le 31 décembre 2013, le Réseau a fourni une assistance dans le cadre de 376 dossiers (231 individuels et 145 collectifs). En 2014 (1er janvier au 31 décembre), il a apporté son aide dans 556 dossiers (318 individuels et 238 collectifs). Le Conseil est encore peu connu du public, et son champ d'action contre la discrimination reste limité, mais la reconnaissance formelle de son indépendance par la loi n° 15/2014 et le lancement du Réseau pourraient contribuer à faire mieux comprendre son rôle et à améliorer son efficacité.

7. Points essentiels

Les éléments suivants pourraient être constitutifs d'une violation des directives:

- les termes «ne l'a été ou ne le serait» ne figurent pas dans les définitions espagnoles de la discrimination directe;
- il existe deux différences par rapport à l'article 2, paragraphe 2 sous b), des directives: les mots «un critère ou une pratique» ne sont pas inclus, et les directives parlent de «personnes» au pluriel tandis que la transposition espagnole par de «personne» au singulier;
- les mots «hostile» et «dégradant» ne sont pas inclus dans les définitions du harcèlement;

- des sanctions ont uniquement été établies dans le domaine du travail (pour tous les motifs) et pour le motif du handicap (dans tous les domaines).

D'autres éléments sont préoccupants:
- l'efficacité du Conseil pour l'élimination de la discrimination raciale ou ethnique est discutable dans la mesure où il est principalement composé de représentants du gouvernement – ce qui pourrait compromettre son indépendance, bien que celle-ci soit formellement reconnue par la loi;
- les principaux acteurs du système juridique n'ont qu'une connaissance ou une compréhension limitée de cette législation basée sur les directives. Telle est l'une des raisons majeures pour lesquelles les dispositions législatives en question n'ont encore pratiquement jamais été invoquées dans des procédures intentées en Espagne;
- étant donné la dispersion des normes concernant (le renversement de) la charge de la preuve, les disparités entre leurs définitions et la jurisprudence de la Cour constitutionnelle, il conviendrait de fusionner les définitions en un seul et même texte juridique;
- des progrès notoires ont été accomplis au cours des dix dernières années dans les domaines du handicap et de l'orientation sexuelle avec des innovations majeures sur le plan légal. Ces avancées juridiques ne se sont toutefois pas traduites par de réels changements en termes de comportement de la société ni de pratiques discriminatoires;
- la situation des professeurs de religion dans les écoles publiques est une problématique difficile à résoudre parce que l'accord international signé entre le Saint-Siège et l'Espagne en 1976, juste avant l'approbation de la constitution espagnole actuelle, est toujours en vigueur;
- le gouvernement espagnol a présenté en janvier 2011 la première version du projet de loi intégrale sur l'égalité de traitement et la non-discrimination (*Proyecto de Ley integral para la igualdad de trato y la no discriminación*). Après consultation des organisations y ayant un intérêt légitime, le projet de loi a été soumis au parlement le 10 juin 2011, mais la convocation d'élections pour le 20 novembre 2011 en a suspendu l'examen parlementaire. Il s'agissait d'un projet de loi extrêmement important, qui instituait notamment un organisme pour l'égalité de traitement compétent pour tous les motifs et tous les domaines; indépendant; potentiellement efficace; et doté d'un mandat plus large que celui exigé par les directives. Étant donné toutefois la victoire électorale du parti populaire conservateur et le changement de gouvernement, aucun projet de loi similaire ne sera adopté par le législateur durant la période 2011-2015. Il n'en reste pas moins que l'existence même de ce projet de loi illustre bien les trois types de problèmes que pose la législation espagnole en la matière: 1) la dispersion des règles, qui empêche la visualisation d'un cadre antidiscrimination cohérent au niveau législatif; 2) la transposition médiocre de certains aspects des directives; et 3) les carences au niveau de l'organisme spécialisé. Le projet de loi intégrale sur l'égalité de traitement et la non-discrimination réglait ces trois problématiques et contenait même certains éléments allant plus loin que les directives.

On peut citer au titre de bonnes pratiques en Espagne:
- des actions positives en faveur des Roms (motif de l'origine raciale ou ethnique dans tous les domaines);
- la langue des signes et les systèmes d'aide à la parole (mesures d'action positive axées sur le handicap);
- le Conseil national du handicap (motif du handicap dans tous les domaines);
- la loi intégrale pour la reconnaissance des droits des personnes lesbiennes et gays adoptée en Catalogne (orientation sexuelle).

ZUSAMMENFASSUNG

1. Einleitung

In Spanien haben in den letzten 40 Jahren bedeutende soziale und politische Veränderungen stattgefunden. Die Gesellschaftsstruktur des Landes hat sich stark gewandelt, sodass die Gesellschaft heute hinsichtlich ethnischer, religiöser und auch sonstiger Gesichtspunkte eine größere Vielfalt aufweist. Eine der markantesten Veränderungen ist die Verwandlung Spaniens in ein Einwanderungsland. Bis Mitte der 1980er-Jahre war die einzige deutlich differenzierte Ethnie die ethnische Gruppe der Roma, von denen etwa 600.000 in Spanien lebten. Ab Ende der 1990er-Jahre stieg die Einwanderungsquote stark an und am 31. Dezember 2014 lag die Zahl der ausländischen Staatsangehörigen, die ihren rechtmäßigen Wohnsitz in Spanien hatten, bei 4.925.089 und damit anteilig bei 10,5 % der Gesamtbevölkerung. Die wichtigsten Herkunftsländer sind Marokko, Rumänien, Ecuador und Kolumbien. Der rasche Anstieg der Zuwanderungszahlen stellt die spanische Gesellschaft vor neue Herausforderungen, so z. B. ein erhöhtes Risiko hinsichtlich diskriminierender Praktiken. Etwa 80 % aller spanischen Staatsangehörigen sind katholischen Glaubens (größtenteils nicht praktizierend), 4 % gehören anderen Religionsgemeinschaften an (hauptsächlich Islam und Protestantismus) und 16 % sind Nichtgläubige bzw. Atheisten.

Auf politischer Ebene legte die spanische Verfassung von 1978 den Rechtsrahmen für ein auf demokratischen Grundsätzen beruhendes Zusammenleben fest und machte Gleichbehandlung und Nichtdiskriminierung zu einem der wichtigen Grundpfeiler eines nicht-konfessionellen Staates. Auch wenn nur wenige Fälle vor Gericht landen, kommt es dennoch relativ häufig vor, dass Menschen aus verschiedenen Gründen diskriminiert werden. Solche diskriminierenden Praktiken betreffen vornehmlich bestimmte Migrantengruppen und Roma.

Es gibt einige gezielte Sozial- und Beschäftigungsprogramme zur Bekämpfung der Diskriminierung aus verschiedenen Gründen. Zudem existieren Programme für positive Maßnahmen, um Diskriminierung z. B. aufgrund von Geschlecht oder Behinderung zu bekämpfen. All diese Programme sind wertvoll, entfalten jedoch insgesamt keine große Wirkung.

In den vergangenen Jahren kam es zu zahlreichen Konflikten zwischen den Rechten solcher Organisationen, deren Ethos auf Religion oder Glaube beruht (die katholische Kirche, mit welcher der spanische Staat 1976 ein Abkommen unterzeichnet hat), und anderen Rechten auf Nichtdiskriminierung. Dies hat zu einer umfassenden Rechtsprechung in Spanien[29] und vor dem EGMR geführt.[30]

Die schwere Rezession, die Spanien seit 2008 durchlebt, und die folglich von Regierungsseite umgesetzten politischen Maßnahmen hatten deutlich veränderte politische Prioritäten zur Folge. Zwischen 2005 und 2010 bemühte man sich sehr um das Erreichen von Gleichstellung, doch dies hat nun nachgelassen. Ein 2011 vorgelegter Gesetzentwurf über Gleichbehandlung und Nichtdiskriminierung wurde zurückgenommen. Auch der soziale Dialog über Diskriminierung ist verstummt. Die Ausnahme bildet ein vom Parlament von Katalonien verabschiedetes Gesetz über die Rechte schwuler und lesbischer Personen – das erste seiner Art in Spanien. Allerdings gilt das Gesetz nur in Katalonien.[31]

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[29] Verfassungsgerichtsurteile vom 13. Februar 1981, 5/1981, 27. März 1985, 47/1985, 12. Juni 1996, 106/1996 und 14. April 2011, 51/2011.

[30] Gerichtsbeschluss des EGMR, 12. Juni 2014, *Fernández Martínez gg. Spanien* (Beschwerde Nr. 5603/07).

[31] Gesetz 11/2014 vom 10. Oktober über die Rechte lesbischer, schwuler, bisexueller, transgeschlechtlicher und intersexueller Personen und zur Bekämpfung von Homophobie, Biphobie und Transphobie (BOE, 20. November 2014).

Es ist möglich, dass das Thema Gleichstellung im Zuge der anstehenden Parlamentswahlen im November 2015 wieder auf die politische Tagesordnung gesetzt wird. In diesem neuen Kontext ist ebenfalls denkbar, dass sich das neue Parlament wieder mit dem Gesetzentwurf über Gleichbehandlung und Nichtdiskriminierung befasst. Es besteht zudem die Möglichkeit, dass das 1976 geschlossene internationale Abkommen zwischen Spanien und dem Heiligen Stuhl überarbeitet wird.

2. Wichtigste Gesetze

Die Gleichstellung aller ist einer der Grundwerte des 1978 durch die spanische Verfassung geschaffenen Rechtssystems. Die bedeutendsten internationalen Rechtsinstrumente zur Bekämpfung von Diskriminierung hat Spanien in der demokratischen Periode seit 1976 ratifiziert. Diese Instrumente wurden bei der Ausarbeitung der Verfassung und aller seither verabschiedeten Gesetze berücksichtigt:

- Internationales Übereinkommen zur Beseitigung jeder Form von Rassendiskriminierung,
- Internationaler Pakt über bürgerliche und politische Rechte,
- Internationaler Pakt über wirtschaftliche, soziale und kulturelle Rechte,
- Übereinkommen zur Beseitigung jeder Form von Diskriminierung der Frau,
- Übereinkommen über die Rechte von Menschen mit Behinderungen und sein Fakultativprotokoll,
- Übereinkommen Nr. 97 der Internationalen Arbeitsorganisation über Wanderarbeiter,
- Übereinkommen Nr. 111 der Internationalen Arbeitsorganisation über die Diskriminierung in Beschäftigung und Beruf,
- Konvention zum Schutz der Menschenrechte und Grundfreiheiten,
- Protokoll Nr. 12 zur Konvention des Europarats zum Schutz der Menschenrechte und Grundfreiheiten.

In der spanischen Gesetzgebung findet der Gleichbehandlungsgrundsatz auf verschiedenen Rechtsgebieten Anwendung, vornehmlich im Arbeits- und Strafrecht. Im Arbeitsrecht gelten diskriminierende Rechtsvorschriften, Tarifvertragsklauseln, Einzelverträge und einseitige Managemententscheidungen als null und nichtig. Diskriminierende Handlungen seitens des Arbeitgebers werden als schwerwiegende Verstöße betrachtet. Das Strafrecht wertet rassistische oder fremdenfeindliche Motive beim Begehen einer Straftat als erschwerende Umstände. Es finden sich einige Bestimmungen zu konkreten rassistischen Straftaten, und schwerwiegende Diskriminierung am Arbeitsplatz ist strafbar. Auf Verwaltungs-, Zivilrechts- und Bildungsebene finden sich ebenfalls Maßnahmen zur Bekämpfung von Diskriminierung.

Die Umsetzung der Richtlinien 2000/43 und 2000/78 erfolgt durch Titel II Kapitel III des Gesetzes 62/2003[32] zur Einführung steuerlicher, verwaltungsrechtlicher und sozialer Maßnahmen. Es besteht aus drei Abschnitten: Der erste Abschnitt (Artikel 27-28) enthält die allgemeinen Definitionen der Begriffe mittelbare und unmittelbare Diskriminierung, Belästigung und Anweisung zur Diskriminierung. Im zweiten Abschnitt (Artikel 29-33) werden verschiedene Aspekte der Richtlinie 2000/43 umgesetzt. Der dritte Abschnitt (Artikel 34-43) beinhaltet Maßnahmen zur Gleichbehandlung und Nichtdiskriminierung am Arbeitsplatz auf der Grundlage von Religion oder Glauben, Behinderung, Alter oder sexueller Orientierung. Er setzt die in den Richtlinien 2000/43 und 2000/78 enthaltenen Bestimmungen zu Beschäftigung und Ausbildung vollumfänglich um. Gesetz 62/2003 wurde 2014 in Bezug auf unabhängige Organe abgeändert. [33]

[32] Gesetz 62/2003 vom 30. Dezember 2003 zur Einführung steuerlicher, verwaltungsrechtlicher und sozialer Maßnahmen (BOE vom 31. Dezember 2003).

[33] Durch Gesetz 15/2014 vom 16. September 2014 über die Rationalisierung des öffentlichen Dienstes und andere Maßnahmen zur Verwaltungsreform (BOE vom 17. September 2014).

Im Anschluss an Gesetz 62/2003 wurden EU-Richtlinien in Spanien auch in verschiedenen anderen Gesetzen umgesetzt und haben zudem zu einem Kurswechsel beigetragen, was Gesetze zur Nichtdiskriminierung aus verschiedenen Gründen und in unterschiedlichen Bereichen angeht.

Einige weitere Gesetze sind relevant: Gesetz 27/2007[34] vom 23. Oktober 2007 zur Anerkennung der Gebärdensprache und von Sprachhilfesystemen und das RDL 1/2013 (Real Decreto Ley)[35] vom 29. November 2013 zur Anerkennung des allgemeinen Gesetzes über die Rechte von Menschen mit Behinderungen und ihre soziale Eingliederung, welches alle Bestimmungen zu den Rechten von Menschen mit Behinderungen enthält und drei zuvor parallel existierende Gesetze ablöst.

3. Wichtigste Grundsätze und Definitionen

In der spanischen Verfassung heißt es in Artikel 14: „Die Spanier sind vor dem Gesetz gleich und niemand darf wegen seiner Abstammung, seiner Rasse, seines Geschlechtes, seiner Religion, seiner Anschauungen oder jedweder anderer persönlicher oder sozialer Umstände diskriminiert werden." Artikel 9 legt darüber hinaus fest, dass es den öffentlichen Gewalten obliegt, „die Bedingungen dafür zu schaffen, dass Freiheit und Gleichheit des Einzelnen und der Gruppe, in die er sich einfügt, real und wirksam sind, die Hindernisse zu beseitigen, die ihre volle Entfaltung unmöglich machen oder erschweren, und die Teilnahme aller Bürger am politischen, wirtschaftlichen, kulturellen und sozialen Leben zu erleichtern." Das spanische Verfassungsgericht[36] hat in einem Urteil entschieden, dass das Gleichheitsprinzip nicht verletzt wird, wenn die Behörden Maßnahmen ergreifen, um der Benachteiligung bestimmter gesellschaftlicher Gruppen entgegenzuwirken, selbst wenn dies bedeutet, dass diese Gruppen bevorzugt behandelt werden, da das Ziel eine unterschiedliche Behandlung in faktisch unterschiedlichen Situationen sei.

Diese Grundsätze wurden im spanischen Rechtssystem entwickelt.

Das Verbot der Diskriminierung aus verschiedenen Gründen findet sich in der Regel in denselben Bestimmungen. Als Gründe für rechtswidrige Diskriminierung werden typischerweise angeführt: Herkunft, einschließlich ethnische Herkunft, Geschlecht, Alter, Familienstand, Religion oder Glaube, politische Ansichten, sexuelle Orientierung, Gewerkschaftsmitgliedschaft, Sozialstatus oder Behinderung.

Die Pflicht, sowohl allgemein als auch speziell im Beschäftigungsbereich angemessene Vorkehrungen für Menschen mit Behinderungen zu treffen, ist in der nationalen Gesetzgebung verankert.

Das Strafgesetzbuch[37] definiert rassistische oder ethnische Motive für verschiedene Straftaten und Vergehen als erschwerende Umstände. Das Organgesetz 7/1980[38] vom 7. Juli 1980 zur Religionsfreiheit enthält den Grundsatz der Nichtdiskriminierung und schreibt vor, dass religiöse Überzeugungen nicht zu Ungleichbehandlung bzw. Diskriminierung vor dem Gesetz führen dürfen. Niemand darf aufgrund seiner Religion daran gehindert werden, eine Arbeit aufzunehmen, einer Aktivität nachzugehen oder ein verantwortliches bzw. öffentliches Amt zu bekleiden.

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[34] BOE vom 24. Oktober 2007.
[35] BOE vom 3. Dezember 2013.
[36] Siehe Verfassungsgerichtsurteil vom 1. Juli 1987, 128/1987.
[37] Organgesetz 10/1995 vom 23. November 1995 zum Strafgesetzbuch (*Ley Orgánica del Código Penal*, BOE vom 24. November 1995), abgeändert durch Organgesetz 1/2015 vom 30. März 2015 (BOE vom 31. März 2015).
[38] BOE vom 6. Juli 1980.

Im Gesetz 62/2003 sind eher minimale – und manchmal nicht sehr wortgetreue – Umsetzungsbestimmungen für die Richtlinien 2000/43 und 2000/78 bezüglich aller Diskriminierungsgründe enthalten. Das Gesetz enthält Definitionen sowohl für unmittelbare als auch mittelbare Diskriminierung; allerdings wird in der Definition der unmittelbaren Diskriminierung nicht Bezug genommen auf eine Situation, in der eine Person eine weniger günstige Behandlung „erfahren hat oder erfahren würde", sondern lediglich auf „gegenwärtige Situationen von Benachteiligung". Belästigung, Anweisung zur Diskriminierung und Viktimisierung sind definiert und verboten. Was Viktimisierung angeht, so wurde mit dem Gesetz eine Änderung des Arbeitnehmerstatuts eingeführt, wonach Entscheidungen des Arbeitgebers nichtig sind, wenn sie als Benachteiligung von Arbeitnehmern anzusehen sind und infolge einer internen Beschwerde oder von gerichtlichen Schritten gegen das Unternehmen zur Durchsetzung des Gleichbehandlungs- und Nichtdiskriminierungsgrundsatzes getroffen wurden.

Diskriminierung aufgrund vermuteter Eigenschaften wird in der spanischen Gesetzgebung nicht ausdrücklich erwähnt. RDL 1/2013 befasst sich mit Diskriminierung durch Assoziierung aufgrund einer Behinderung. Diskriminierung durch Assoziierung aus anderen Gründen kann als implizit in der Gesetzgebung enthalten angesehen werden und bedarf möglicherweise der gerichtlichen Auslegung.

Die Ausnahmen zum Gleichbehandlungsgrundsatz im spanischen Recht richten sich nach den in Artikel 4 der Richtlinien 2000/43 und 2000/78 angeführten möglichen Sonderregelungen. Was Kirchen und Organisationen mit einem bestimmten Ethos betrifft, so wird registrierten Kirchen und Religionsgemeinschaften im Organgesetz 7/1980 zur Religionsfreiheit das Recht eingeräumt, ihre eigenen organisatorischen Regelungen, internen Richtlinien und Personalordnungen festzulegen. Darin dürfen beispielsweise gewisse Bestimmungen zum Schutz ihrer religiösen Identität und der gebührenden Achtung ihrer Glaubensvorstellungen enthalten sein, unbeschadet der in der Verfassung verankerten Rechte und Freiheiten, insbesondere der Rechte auf Freiheit, Gleichheit und Nichtdiskriminierung.

Für private Organisationen mit einem bestimmten Ethos sind die Ausnahmen auf drei Stadien des Arbeitsverhältnisses anwendbar: Zugang zur Beschäftigung, Ausführung von Aktivitäten innerhalb der Organisation und Kündigung als Folge solcher Aktivitäten.

Es gibt keine bestimmten nationalen Regelungen zur Mehrfachdiskriminierung.

4. Sachlicher Anwendungsbereich

Der sachliche Anwendungsbereich des Diskriminierungsverbots ist allgemeiner Natur. Alle in den Richtlinien 2000/43 und 2000/78 genannten Bereiche werden durch das allgemeine Gleichheitsprinzip in Artikel 14 der spanischen Verfassung abgedeckt. Neben Diskriminierungsgründen wie Geschlecht, ethnischer Herkunft, Religion oder Glauben, Behinderung, Alter und sexueller Orientierung werden im spanischen Recht folgende Gründe ausdrücklich angeführt: Familienstand, Herkunftsort, Sozialstatus, politische Ansichten, Weltanschauung, Gewerkschaftszugehörigkeit, Sprache innerhalb Spaniens sowie familiäre Beziehungen zu anderen Arbeitnehmern innerhalb des Unternehmens. In manchen Bereichen, insbesondere im Beschäftigungsbereich, ist eine Diskriminierung durch geltendes Recht ausdrücklich verboten, sowohl im öffentlichen als auch im privaten Sektor.

Die geltenden gesetzlichen Bestimmungen für Aspekte wie Sozialschutz und soziale Vergünstigungen, Bildung und Zugang zu Bildung sowie die Versorgung mit Gütern und Dienstleistungen (wie z.B. Wohnraum) enthalten in der Regel keine ausdrücklichen Nichtdiskriminierungsbestimmungen, sondern sind dem in der Verfassung verankerten allgemeinen Grundsatz unterworfen. Das Gesetz 62/2003 legt für diese Bereiche

Nichtdiskriminierungsmaßnahmen fest, allerdings nur für Diskriminierung aufgrund der ethnischen Herkunft.

5. Rechtsdurchsetzung

Aus der spanischen Verfassung geht hervor, dass alle Grundrechte durch die ordentliche Gerichtsbarkeit geschützt sind. Darüber hinaus kann zum Schutz dieser Rechte auch das Verfassungsgericht angerufen werden, wenn der ordentliche Rechtsweg erfolglos beschritten wurde. Diskriminierungsopfer haben Zugang zu Verwaltungsverfahren (durch die Arbeits- oder Bildungsaufsichtsbehörde), zivilen und sozialen Schlichtungsverfahren, der ordentlichen Gerichtsbarkeit und dem Verfassungsgericht. Überdies können sie sich an die jeweilige Ombudsperson wenden, wenn der Fall die öffentliche Verwaltung betrifft.

Gemäß der spanischen Verfassung kann jede natürliche oder juristische Person als Verfahrensbeteiligte auftreten, die ein berechtigtes Interesse an einem Fall hat, der die Grundrechte bzw. Grundfreiheiten betrifft. Organisationen und Gewerkschaften haben das Recht, im Namen von (jedoch nicht zugunsten von) Diskriminierungsopfern aktiv zu werden. Diese allgemeine Regel (Gesetz 1/2000[39] vom 7. Januar 2000 zur Regelung von Zivilverfahren sowie Gesetz 29/1998[40] vom 13. Juni 1998 zur Regelung der Verwaltungsgerichtsbarkeit) findet auch in der Antidiskriminierungsgesetzgebung Anwendung: im Gesetz 62/2003 (in Fällen von Diskriminierung aufgrund der ethnischen Herkunft, nur in Bereichen außerhalb des Beschäftigungsbereichs), im RDL 2/1995 zu arbeitsrechtlichen Gerichtsverfahren (in Fällen von Diskriminierung aufgrund von ethnischer Herkunft, Religion oder Glauben, Behinderung, Alter oder sexueller Orientierung im Beschäftigungsbereich) und im allgemeinen Gesetz über die Rechte von Menschen mit Behinderungen (RDL 1/2013) (in Fällen von Diskriminierung aufgrund einer Behinderung in den Bereichen Beschäftigung und Versorgung mit Gütern und Dienstleistungen).

Das Gesetz 36/2011[41] vom 10. Oktober 2011 zu arbeitsrechtlichen Gerichtsverfahren regelt Rechtsfähigkeit und verfahrensrechtliche Legitimation und bezieht sich in dieser Hinsicht auf Arbeitnehmer oder ihre legitimen Vertreter, falls die Vorgenannten verhandlungsunfähig sind oder der Kläger eine juristische Person ist. Darüber hinaus können laut diesem Gesetz Gewerkschaften bei entsprechender Befugnis für bzw. im Namen ihrer Mitglieder vor Gericht erscheinen, um deren individuelle Rechte zu verteidigen.

Das Strafgesetzbuch sieht vor, dass rassistische Motive für jedwede Straftat als erschwerende Umstände gewertet werden. Strafbar sind beispielsweise die Anstiftung zur Diskriminierung, die Verbreitung von beleidigendem Material, die Diskriminierung im öffentlichen Dienst, berufliche Diskriminierung und diskriminierungsfördernde Vereinigungen. Rassistische Diskriminierung gegen Arbeitnehmer steht ebenfalls unter Strafe.

Das Zivilprozessrecht (Gesetz 1/2000) regelt die gerichtliche Beweislast und kann die Last der Beweisführung in bestimmten Fällen umkehren. In der Antidiskriminierungsgesetzgebung bietet das Gesetz 62/2003 die Möglichkeit einer Beweislastumkehr in Fällen von Diskriminierung aufgrund der ethnischen Herkunft (in allen Bereichen) (Artikel 32) und im Beschäftigungsbereich in Fällen von Diskriminierung aufgrund von ethnischer Herkunft, Religion oder Glauben, Behinderung, Alter oder sexueller Orientierung (Artikel 36). Das allgemeine Gesetz über die Rechte von Menschen mit Behinderungen und ihre soziale Eingliederung (RDL 1/2013) sieht eine

[39] BOE vom 8. Januar 2000.
[40] BOE vom 14. Juni 1998.
[41] BOE vom 11. Oktober 2011.

Beweislastumkehr in Fällen von Diskriminierung aufgrund einer Behinderung vor (Artikel 77).

Im Beschäftigungsbereich sind für jedwede Art von Diskriminierung Sanktionen festgeschrieben. In allen Bereichen muss bei einer Diskriminierung aufgrund von Behinderung mit Sanktionen gerechnet werden. Das Gesetz 5/2000[42] vom 4. August 2000 zu Straftatbeständen und Strafen in sozialen Angelegenheiten betrifft den Beschäftigungsbereich und wurde durch Gesetz 62/2003 abgeändert. Als schwerwiegende Verstöße werden angesehen: einseitige Entscheidungen eines Arbeitgebers, die entweder eine unmittelbare oder mittelbare Diskriminierung aufgrund von Alter oder Behinderung darstellen oder als nicht begünstigende oder benachteiligende Behandlung bezüglich Gehalt und anderer Arbeitsbedingungen angesehen werden können, die der Arbeitgeber von Geschlecht, ethnischer Herkunft, Personenstand oder Sozialstatus, Religion oder Glauben, politischen Ansichten, sexueller Orientierung, gewerkschaftlicher Zugehörigkeit bzw. Nicht-Zugehörigkeit, familiären Beziehungen zu anderen Arbeitnehmern innerhalb des Unternehmens oder der Sprache innerhalb Spaniens abhängig zu machen scheint sowie Entscheidungen des Arbeitgebers, wenn sie als Benachteiligung von Arbeitnehmern anzusehen sind und infolge einer internen Beschwerde oder von gerichtlichen Schritten gegen das Unternehmen zur Durchsetzung des Gleichbehandlungs- und Nichtdiskriminierungsgrundsatzes getroffen wurden. Was Diskriminierung aufgrund einer Behinderung angeht, so sieht das allgemeine Gesetz über die Rechte von Menschen mit Behinderungen und ihre soziale Eingliederung (RDL 1/2013) ein Sanktionssystem vor (Artikel 77). In der Gesetzgebung ist ein Höchstbetrag für Geldbußen festgelegt (187.515 EUR im Beschäftigungsbereich und 1 Mio. EUR bei Fällen von Diskriminierung wegen Behinderung), eine Obergrenze für Entschädigungszahlungen gibt es jedoch keine.

Es gibt allgemein wenige Gerichtsurteile zum Thema rassistische Diskriminierung, da solche Fälle in der Regel als Verstöße gegen andere Rechte gewertet und z. B. als Angriff oder Sachbeschädigung behandelt werden, ohne ein mögliches rassistisches Motiv in Betracht zu ziehen. Weitere Komplikationen entstehen dadurch, dass die Betroffenen häufig nicht vor Gericht ziehen, da sie durch bürokratische Hürden und die geringe Zahl an Verurteilungen abgeschreckt werden. Dennoch gab es einige Gerichtsverfahren in Diskriminierungsfällen – Diskriminierung von Roma, Einwanderern oder schwarzen spanischen Staatsangehörigen –, die starkes öffentliches Interesse hervorgerufen haben.

Situationstests sind laut spanischem Recht nicht ausdrücklich vorgesehen, jedoch auch nicht verboten. Sie könnten daher in Diskriminierungsfällen als eine Art der Beweisführung eingesetzt werden. Für manche Urteilsfindungen wurden statistische Daten herangezogen, hauptsächlich in Fällen von Geschlechterdiskriminierung im Beschäftigungsbereich.

Die wichtigsten positiven Maßnahmen, die auf nationaler Ebene ergriffen wurden, sind: 1.) breite sozialpolitische Maßnahmen (z. B. zugunsten von Roma, und der Einsatz von Gebärdensprache und Sprachhilfesystemen für Menschen mit Behinderungen), 2.) Quoten für Menschen mit Behinderungen und 3.) einige Maßnahmen zur Begünstigung von Menschen mit Behinderungen (z. B. spezielle Beschäftigungs- und Berufszentren sowie ein Vorzugsrecht auf geografische Mobilität).

Die Richtlinien wurden in Spanien im Jahr 2003 ohne formellen sozialen Dialog mit Sozialpartnern oder Nichtregierungsorganisationen (NRO) umgesetzt. Gegenwärtig gibt es neben dem Rat für die Bekämpfung rassistischer und ethnischer Diskriminierung noch weitere Organisationen, die einen sozialen Dialog herbeiführen können: der Nationale Rat für Behinderung (der 2005 die Arbeit aufnahm und die Zusammenarbeit zwischen der

[42] BOE vom 5. August 2000.

Regierung und Verbänden von Menschen mit Behinderungen institutionalisiert), der Nationale Roma-Rat (ein partizipatives und beratendes Organ für allgemeine und spezifische öffentliche Politik, die die ganzheitliche Entwicklung der Roma-Bevölkerung in Spanien betrifft), die Beratende Kommission für Religionsfreiheit (eine 1980 eingerichtete Kommission zur Überprüfung, Berichterstattung und Vorstellung von Vorschlägen bezüglich verschiedener Aspekte, die mit dem Gesetzesvollzug zusammenhängen, so z. B. Diskriminierung aufgrund der Religion) und das Forum für die soziale Integration von Einwanderern (eine akademische Körperschaft zur Beratung und Information zur Integration von Einwanderern).

6. Gleichbehandlungsstellen

Mit dem Gesetz 62/2003 (abgeändert durch das Gesetz 15/2014 über die Rationalisierung des öffentlichen Dienstes und andere Maßnahmen zur Verwaltungsreform) wurde der Rat für die Bekämpfung rassistischer und ethnischer Diskriminierung (*Consejo para la eliminacion de la discriminación racial o étnica*) eingerichtet. Der Rat nahm am Tag seiner Gründung, dem 28. Oktober 2009, seine Arbeit auf.

Das Königliche Dekret (*Real Decreto*) 1262/2007 (abgeändert durch RD 1044/2009) regelt die Zusammensetzung, Zuständigkeiten und Verordnungen des Rates. Der Rat zeichnet sich durch die folgenden Merkmale aus: Er untersteht dem Ministerium für Gesundheit, Soziales und Gleichstellung, ist ein akademisches Regierungsgremium und seine Aufgabe ist es, die in Artikel 13 Absatz 2 der Richtlinie 2000/43 beschriebenen Funktionen zu erfüllen, indem er unabhängige Unterstützung für Diskriminierungsopfer bereitstellt, unabhängige Untersuchungen durchführt und unabhängige Berichte veröffentlicht. Seit Inkrafttreten des Gesetzes 15/2014 hat der Rat seine Funktionen formal „in Unabhängigkeit" erweitert.

Die Struktur des Rates ist grundsätzlich staatlicher Art, da in dem Gesetz festgelegt ist, dass er von all denjenigen Ministerien zu bilden ist, die für die in Artikel 3 Absatz 1 der Richtlinie 2000/43 genannten Bereiche zuständig sind, unter Einbeziehung der autonomen Regionen, Kommunalbehörden, Arbeitgeberverbände und Gewerkschaften sowie weiterer Organisationen, die Interessen bezüglich der ethnischen Herkunft von Personen vertreten. Der Rat besteht aus einem Vorsitzenden und 28 Mitgliedern: 14 aus der öffentlichen Verwaltung und 14 aus den Reihen der Sozialpartner und weiteren Interessenvertreter. Die genaue Zusammensetzung ist folgendermaßen: a) sieben Mitglieder vertreten die Zentralregierung, alle mit dem Rang eines Generaldirektors, b) sieben Mitglieder kommen aus anderen Regierungsebenen, c) vier Mitglieder kommen aus den Reihen der Sozialpartner und d) zehn Mitglieder vertreten Organisationen und Verbände, die sich für die Förderung von Gleichbehandlung und Nichtdiskriminierung aufgrund der ethnischen Herkunft einsetzen.

Im Juni 2010 rief der Rat in Zusammenarbeit mit sieben großen NRO das Netzwerk der Zentren zur Unterstützung von Diskriminierungsopfern ins Leben. Das Netzwerk stellte seine Arbeit 2012 vorübergehend ein, ist aber seit dem 15. März 2013 wieder aktiv, nachdem ein Dienstleistungsvertrag mit der *Fundación Secretariado Gitano* (FSG) unterzeichnet wurde. Um die bestmöglichen Dienste anbieten zu können, hat die FSG sechs weitere Organisationen, die auf die Unterstützung von Diskriminierungsopfern spezialisiert sind, mit der Erbringung von Leistungen betraut: ACCEM, das *Cruz Roja Española*, die *Fundación CEPAIM* sowie *Movimiento contra la Intolerancia* und *Movimiento por la Paz y Red Acoge*. Vom 15. März 2013 bis 31. Dezember 2013 leistete das Netzwerk in 376 Fällen Unterstützung, davon waren 231 Einzelfälle und 145 kollektive Fälle. Im Jahr 2014 (1. Januar bis 31. Dezember) leistete es in 556 Fällen Unterstützung, davon in 318 Einzelfällen und 238 kollektiven Fällen. Der Rat ist in der Öffentlichkeit bisher noch weitgehend unbekannt und sein Mandat auf Nichtdiskriminierungsmaßnahmen beschränkt. Allerdings könnte die formelle

Anerkennung seiner Unabhängigkeit durch das Gesetz 15/2014 und die Schaffung des Netzwerks zu einem erweiterten Bewusstsein über seine Funktionen und zu wirksameren Maßnahmen führen.

7. Wichtige Herausforderungen

Als potenzielle Verstöße gegen die Richtlinien sind unter anderem anzusehen:

- Die spanische Definition von „unmittelbarer Diskriminierung" enthält keinen Bezug auf eine Situation, in der eine Person eine weniger günstige Behandlung „erfahren hat oder erfahren würde",
- Es gibt zwei Unterschiede zu Artikel 2 Absatz 2 Buchstabe b der beiden relevanten Richtlinien: In der spanischen Gesetzgebung fehlen die Begriffe „Kriterien oder Verfahren", und in den Richtlinien ist die Rede von „Personen" im Plural, wohingegen der spanische Gesetzestext von „Person" im Singular spricht.
- Die spanischen Definitionen für „Belästigung" enthalten im Gegensatz zu den Richtlinien nicht die Begriffe „Anfeindungen" und „Erniedrigungen".
- Sanktionen sind lediglich für den Beschäftigungsbereich (für jedwede Form von Diskriminierung) und für Diskriminierung aufgrund von Behinderung (in allen Bereichen) festgeschrieben.

Weitere Beanstandungen sind:

- Die Wirksamkeit des Rates für die Bekämpfung rassistischer und ethnischer Diskriminierung ist fraglich, da er vornehmlich aus Regierungsvertretern besteht. Dies könnte die Unabhängigkeit des Rates untergraben (welche allerdings gesetzlich anerkannt ist).
- Die wichtigsten Akteure des Rechtssystems haben keine gute Kenntnis bzw. kein gutes Verständnis dieser auf den Richtlinien beruhenden Gesetze. Dies ist einer der Hauptgründe dafür, dass es bisher in Spanien kaum Gerichtsverfahren gab, in denen diese Bestimmungen angewandt wurden.
- Angesichts der verstreuten Vorgaben zur Beweislast(umkehr), der Unterschiede in den jeweiligen Definitionen und der Rechtsprechung des Verfassungsgerichts wäre es angebracht, alle bestehenden Definitionen in einem einzigen Gesetzestext zu vereinheitlichen.
- In den letzten zehn Jahren hat Spanien bemerkenswerte Fortschritte in den Bereichen Behinderung und sexuelle Orientierung gemacht und wichtige gesetzliche Neuerungen eingeführt. Allerdings haben diese beträchtlichen rechtlichen Fortschritte nicht zu tatsächlichen Veränderungen im gesellschaftlichen Verhalten bzw. bezüglich diskriminierender Praktiken geführt.
- Die Situation von Religionslehrern an staatlichen Schulen. Dieses Problem ist nur schwer zu lösen, da internationales Abkommen zwischen Spanien und dem Heiligen Stuhl, das 1976 kurz vor Verabschiedung der aktuellen spanischen Verfassung unterzeichnet wurde, nach wie vor in Kraft ist.
- Im Januar 2011 stellte die spanische Regierung die erste Version des Gesetzentwurfs über Gleichbehandlung und Nichtdiskriminierung (*Proyecto de Ley integral para la igualdad de trato y la no discriminación*) vor. Im Anschluss an Konsultationsverfahren mit Organisationen mit einem berechtigten Interesse wurde der Gesetzentwurf am 10. Juni 2011 dem Parlament vorgelegt. Die parlamentarische Prüfung des Entwurfs wurde jedoch ausgesetzt, nachdem für den 20. November 2011 vorgezogene Wahlen gefordert wurden. Der Gesetzentwurf war sehr wichtig und sorgte für die Schaffung einer Gleichbehandlungsstelle für die Befassung mit Diskriminierung aus allen Gründen und in allen Bereichen. Die Gleichbehandlungsstelle war unabhängig, konnte wirksam arbeiten und war mit Aufgaben betraut, die über die Vorgaben der Richtlinien hinausgingen. Mit dem Wahlsieg der konservativen *Partido Popular* und dem damit einhergehenden Regierungswechsel jedoch wird für die Legislaturperiode 2011-2015 kein ähnlicher Gesetzentwurf verabschiedet werden. Allerdings lassen sich an der schieren Existenz dieses Gesetzentwurfs gut drei Arten von Problemen aufzeigen, die im

spanischen Recht auf diesem Gebiet bestehen: 1.) Aufgrund der Zerstreuung der Regelungen kann man sich nur schwer vorstellen, wie ein kohärenter rechtlicher Nichtdiskriminierungsrahmen aussehen könnte, 2.) einige Aspekte der Richtlinien wurden im spanischen Recht nur unzureichend umgesetzt und 3.) die spezialisierte Einrichtung weist Mängel auf. Diese drei Faktoren wurden mit dem Gesetzentwurf über Gleichbehandlung und Nichtdiskriminierung überwunden. In diesem Gesetzentwurf finden sich auch Inhalte, die über die Vorgaben der Richtlinien hinausgehen.

Zu den derzeit erfolgreichen Praktiken in Spanien zählen unter anderem:

- Positive Maßnahmen für Roma (gegen Diskriminierung aufgrund der ethnischen Herkunft in allen Bereichen),
- Einsatz von Gebärdensprache und Sprachhilfesystemen (positive Maßnahmen gegen Diskriminierung aufgrund einer Behinderung),
- Nationaler Rat für Behinderungen (zur Bekämpfung von Diskriminierung aufgrund einer Behinderung in allen Bereichen),
- Gesetz über die Rechte schwuler und lesbischer Personen in Katalonien (sexuelle Orientierung).

INTRODUCTION

The national legal system

Public administration, as defined in the Spanish Constitution (SC) of 1978, is structured on three levels: central Government; autonomous communities (regional Governments); and local authorities. Central Government has a series of exclusive powers (SC, Article 149) that include criminal and procedural law, civil legislation, labour and social security law, the basic structure and coordination of healthcare, the basic structure of education and the basic legal system for public administration. The autonomous communities manage some of these fields, such as health and education, and also have the power to adopt legal regulations developing or complementing central Government legislation in some fields. In some of the fields mentioned in Directive 2000/43, such as social advantages, and access to and supply of goods and services that are available to the public, including housing, all three tiers of government – central, regional and local – have jurisdiction. Conflicts of power between central Government and the autonomous communities are resolved by the Constitutional Court (SC, Article 161).

International treaties signed by Spain are included in the domestic legal system (SC, Article 96). Spain has ratified practically all of the international instruments combating discrimination, including Protocol 12 to the ECHR.

Spain is a non-confessional state: the Constitution of 1978 clearly proclaims a separation between church and state. In practice, religions are treated in different ways. Catholicism is the dominant religion: it is expressly mentioned in the Constitution and enjoys the closest official relationship with the Government, as well as financial support.

List of main legislation transposing and implementing the directives

The main pieces of legislation transposing and implementing the two anti-discrimination directives are the following two laws:

Law 62/2003 of 30 December 2003 on fiscal, administrative and social measures (*Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y de orden social*) [LFASM][43]
Date of adoption: 30 December 2003
Entry into force: 1 January 2004
Grounds covered: Racial or ethnic origin, religion or beliefs, disability, age, sexual orientation
Material scope: Employment, social protection, social advantages, education, access to goods and services.
[Amended by Article 18 of Law 15/2014[44] of 16 September 2014 on the rationalisation of the public sector and other measures of administrative reform]

General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013, 29 November 2013) (*Ley General de derechos de las personas con discapacidad y de su inclusión social*) [GLRPDSI][45]
Date of adoption: 29 November 2013
Entry into force: 4 December 2013
Grounds covered: Disability

[43] BOE (Spanish Official Journal*),* 31 December 2003.
[44] BOE, 17 September 2014.
[45] BOE, 3 December 2013.

Material scope: Equal opportunities, non-discrimination, and universal access for persons with disability in all fields (employment, social protection, social advantages, education, access to goods and services).

This legislation is complemented by Law 27/2007,[46] which recognises sign languages and regulates their use, and Law 13/2005[47] of 1 July 2005, which amends the Civil Code with regard to the right to enter into a contract of matrimony, allowing homosexual couples to marry with the same rights as heterosexual couples.

[46] BOE, 24 October 2007.
[47] BOE, 2 July 2005.

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

The Spanish Constitution includes the following articles dealing with non-discrimination:

Article 14: 'Spaniards are equal before the law and may not in any way be discriminated against on the grounds of birth, race, sex, religion, opinion or any other condition or personal or social circumstance'.

Disability, age and sexual orientation are not expressly included in Article 14 of the Spanish Constitution, but case law tends to include them under 'any other condition or personal or social circumstance'. The Constitutional Court ruled that disability (Judgment no. 269/1994 of October 1994)[48] and sexual orientation (Judgment no. 41/2006 of February 2006)[49] are included in the generic phrase 'any other personal or social circumstance'.

Article 16: Freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than that necessary to maintain public order according to the law'.

Article 53 introduces guarantees of fundamental rights and freedoms and also of the principle of equality and non-discrimination.

Article 9 provides a positive obligation on the part of public authorities to promote equality, since they have to 'promote conditions that ensure that the freedom and equality of individuals and of the groups that they form are real and effective; to remove obstacles that impede or hamper the fulfilment of such freedom and equality; and to facilitate the participation of all citizens in political, economic, cultural and social life'. This article views positive action and measures promoting equality not as exceptions to the principle of equality but rather as constitutionally legitimate ways to implement equality.

Moreover, Article 49 adds: 'The public authorities shall implement a policy of welfare, treatment, rehabilitation and integration for those with physical, sensory or mental disabilities, to whom they shall give the necessary specialised attention and specific protection so that they may enjoy the rights that this Title provides for all citizens'.

The Constitutional Court[50] has ruled that the principle of equality is not breached by action on the part of the public authorities to counter the disadvantages experienced by certain social groups 'even when they are given more favourable treatment, for the aim is to give different treatment to effectively different situations'.

Article 10.2 recognises the role of the international treaties on human rights in construing domestic provisions: 'provisions relating to fundamental rights and freedoms recognised by the Constitution shall be interpreted pursuant to the Universal Declaration on Human Rights and the international treaties and agreements ratified by Spain'.

All these articles have a general material scope.

[48] See Constitutional Court Decision, 3 October 1994, 269/1994.
[49] See Constitutional Court Decision, 13 February 2006, 41/2006.
[50] See Constitutional Court Decision, 1 July 1987, 128/1987.

These provisions apply to all areas covered by the directives. Their material scope is broader than those of the directives.

The constitutional anti-discrimination provisions are directly applicable.

The constitutional equality clauses can be enforced against private actors (as opposed to the state).

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination explicitly covered

The following grounds of discrimination are explicitly prohibited in national law:
- gender
- racial or ethnic origin
- religion or beliefs
- disability
- age
- sexual orientation
- marital status
- origin
- social condition
- political ideas, ideology
- affiliation to a union
- use of languages of the State of Spain
- family ties with other workers in an enterprise
- nationality

2.1.1 Definition of the grounds of unlawful discrimination within the directives

a) Racial or ethnic origin

National law on discrimination does not define the terms 'racial or ethnic origin', and neither do the Workers' Statute or the Criminal Code.

Neither of the two judgments of the Constitutional Court (STC 13/2001, Case of Williams,[51] and STC 69/2007, Case of Muñoz Díaz)[52] which have addressed the issue of racial or ethnic origin provides a definition of 'racial or ethnic origin'. The court refers to 'Romani ethnic origin' (*étnia gitana*) but without defining traits that might characterise it.

b) Religion or belief

Religion is not defined in Spanish legislation. There is, however, a *negative* definition of religion, i.e. the legislator specifies only what religion is not, not what it is. Article 3.2 of the Organic Law on religious freedom[53] states that 'activities, intentions and entities relating to or engaging in the study of and experimentation on psychic or parapsychological phenomena or the dissemination of humanistic or spiritual values or other similar non-religious aims do not qualify for the protection provided in this Act'.

In spite of this, for a long time the practice of the General Directorate for Religious Affairs, under the authority of the Ministry of Justice, was to refuse to register religious denominations on the Register of Religious Entities on the ground of these denominations' lack of religious aims. However, the situation has changed since Constitutional Court judgment 46/2001 of 15 February.[54] In this case, the Unification Church (*Iglesia de la Unificación*) challenged the resolution of the General Director for Religious Affairs of 22 December 1992 and the judgments of the National High Court (*Audiencia Nacional*) (30 September 1992) and of the Supreme Court (14 June 1996), refusing to include this church in the register.

[51] See Constitutional Court Decision, 29 January 2001, 13/2001.
[52] See Constitutional Court Decision, 16 April 2007, 69/2007.
[53] BOE, 6 July 1980.
[54] See Constitutional Court Decision, 15 February 2001, 46/2001.

The administrative resolution maintained that the Unification Church lacked a true religious nature, and was beyond the scope of protection under the Law on religious freedom (according to Article 3.2). The resolution stated in its reasoning that a church or religious denomination had to have, among other defining features, a body of adherents other than the organisation's leading members. It also stated that, in order for a group or organisation to be properly described as religious, the following prerequisites must be met: 1) belief in the existence of a higher being, transcendent or otherwise, with whom communication is possible; 2) belief in a body of doctrine (dogma) and rules of behaviour (moral rules), somehow derived from this higher being; 3) ritual practice, whether individual or collective (worship), constituting the adherents' institutional means of communication with the higher being.

The Constitutional Court, however, asserted that the administrative resolution violated the right to collective religious freedom because the state, in the activity of registration, can only check that the entity is not excluded by Article 3.2 of the Organic Law on religious freedom, and that its activities do not violate the entitlement of others to the free exercise of rights and freedoms, nor are they detrimental to public safety, welfare or morality – the elements defining public order protected by the law in a democratic society, according to Article 16.1 of the Constitution. Following this judgment, the Government cannot judge the religious character of entities wishing to join the register, and must confine itself to verifying that, in view of their statutes, goals and aims, these entities are not excluded by Article 3.2.

Article 3.2 of the Law on religious freedom allows 'sects' to be excluded from the Register of Religious Associations. Registration on the register is voluntary for religious organisations, but it gives them a religious legal personality, which gives their places of worship the right of inviolability and provides some tax benefits. Religious freedom is protected regardless of whether a religious organisation is inscribed on the register. There is no special legislation or specific register for sects.

c) Disability

The General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013) provides (Article 4) that they: 'Are persons with disabilities who have physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others (...) For the purposes of this law, persons with a disability shall be deemed to be those with a recognised degree of impairment equal to or greater than 33 %'.

This definition has two parts, with very different orientations. The second part retains the medical perspective of disability and has an administrative utility: individuals need to have this degree of impairment in order to claim some rights. The first part, inspired by the CRPD, is based on the social model of disability and is coherent with the concept of 'disability' from the Court of Justice of the European Union in joined cases C-335/11 and C-337/11.

In any event, those with a recognised entitlement to social security pensions for permanent disability rated as total, absolute or severe shall be deemed to be affected by an impairment equal to or greater than 33 %, together with passive-class pensioners with a recognised entitlement to a retirement pension or a pension for retirement due to permanent incapacity (Article 4.2). This provision affects the existing material scope of the law on the social integration of disabled persons and covers social benefits, social security, education, work and housing, and access to goods and services. It could be said that the establishment of a degree of impairment (of 33 % or greater) and the role of an official body are in breach of Directive 2000/78, as the directive neither specifies degrees nor provides for a body to recognise them. However, there does not seem to be any contradiction between Spanish legislation and the directive as the directive does not

specify all aspects of how disability is to be dealt with, the provisions of Law RDL1/2013 seem reasonable and proportionate, and all of this is subject to judicial protection. The ECJ did not address this issue when it gave a definition of disability in its ruling on the *Chacón Navas* case.

d) Age

National law on discrimination does not define the term 'age', and neither does the Workers' Statute or the Criminal Code. The courts do not give a definition of 'age'. However, 'age' is commonly understood to mean the number of years completed by one person.

e) Sexual orientation

National law on discrimination does not define the term 'sexual orientation', and neither does the Workers' Statute or the Criminal Code. The Judgment of the Constitutional Court (STC 41/2006, Case of *PC v. Alitalia Italian Airlines*)[55] recognises that 'sexual orientation' is a protected ground under Article 14 of the Spanish Constitution. However, the Constitutional Court does not define 'sexual orientation'.[56]

2.1.2 Multiple discrimination

In Spain, prohibition of multiple discrimination is not covered in legislation.

However, Organic Law 3/2007 on the effective equality of women and men (*Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres*) contains the first reference to multiple discrimination in Spanish law. Article 20 provides that 'the public authorities shall, in the preparation of studies and statistics, devise and introduce the necessary mechanisms and indicators to show the incidence of other variables whose recurrence generates situations of multiple discrimination in the various spheres of action.'

In Spain, there is no case law dealing with multiple discrimination. Although neither the Constitutional Court nor the Supreme Court has used the term 'multiple discrimination', the High Court of Justice of Galicia, in its judgment 3041/2008, confirmed the invalidity of a dismissal of an employee because the company had infringed her right to equal treatment 'without discrimination on grounds of gender, (...) opinion or any personal or social circumstance' (Article 14 of the Spanish Constitution), and her right to 'ideological freedom' (Article 16 of the Spanish Constitution). The court declared dismissal by discrimination to be null on various grounds, but without being able to specify one of them as more important than the other: the court noted that there was discrimination on several grounds, but at no time used the concept of 'multiple discrimination'.

2.1.3 Assumed and associated discrimination

a) Discrimination by assumption

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[55] See Constitutional Court Decision, 13 February 2006, 41/2006.

[56] In 2014 Catalonia approved the first comprehensive law in Spain on the rights of gay and lesbian persons (The law is only for the region of Catalonia): Law 11/2014, of 10 October 2014, to guarantee the rights of lesbian, gay, bisexual, transgender and intersex people and to eradicate homophobia, biphobia and transphobia (BOE, 20 November 2014). The law was designed as a comprehensive law inspired by Directive 2000/78 and, to achieve its aim, it goes beyond this Directive. The law begins by defining direct discrimination, indirect discrimination, discrimination by association, discrimination by error and multiple discrimination. Further, it defines the instruction to discriminate, harassment on grounds of sexual orientation, gender identity or gender expression, victimisation and secondary victimisation. However, the law does not define 'sexual orientation'.

In Spain, there is no mention of discrimination based on assumed characteristics. The Workers' Statute, Article 28 of Law 62/2003 (transposing directives 2000/43 and 2000/78) and the Criminal Code[57] speak only of personal characteristics and not of 'assumed characteristics'. However, discrimination on the ground of 'assumed characteristics' may be regarded as implicitly included in these laws.

b) Discrimination by association

In Spain, the following national law prohibits discrimination based on association with persons with particular characteristics, but only in the field of disability.

The General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013) formally introduced into Spanish legislation for the first time the concept of discrimination by association in the field of disability. RDL 1/2013 defines discrimination by association (Article 2. e): 'Discrimination by association exists when a person or group to which they belong is subjected to discriminatory treatment because of their relationship to each other by motive or by reason of disability'. Article 63 of RDL 1/2013 notes that the principle of equal opportunities for persons with disabilities is infringed when 'direct or indirect discrimination, discrimination by association', etc. occur.

Although not explicitly covered by anti-discrimination legislation (except for disability), this principle may be assumed to be implicitly covered by Law 62/2003 (Article 28). However, this is a matter to be decided on by judges, taking into account the judgment in Case C-303/06: *Coleman v. Attridge Law and Steve Law*.

2.2 Direct discrimination (Article 2(2)(a))

a) Prohibition and definition of direct discrimination

In Spain, direct discrimination is prohibited in national law, and it is defined.

Law 62/2003 on fiscal, administrative and social measures (Article 28.1.b) defines direct discrimination as 'where a person is treated less favourably than another in a comparable situation on grounds of racial or ethnic origin, religion or beliefs, disability, age or sexual orientation'.

The expression 'has been or would be treated' (Directive 2000/43 and Directive 2000/78, Article 2.2.a) is not included in the Spanish definitions of direct discrimination.

Article 2.c of the General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013) states that direct discrimination 'shall be taken to occur where a person is treated less favourably than another in a comparable situation on the grounds of his or her disability'.

b) Justification of direct discrimination

The law does not permit justification of direct discrimination generally, or in relation to particular grounds

2.2.1 Situation testing

a) Legal framework

[57] BOE, 24 November 1995.

In Spain, situation testing is permitted in national law. Situation testing is not expressly provided for in Spanish law, but nor is it forbidden. It might therefore be used as a form of evidence in discrimination cases. Procedural law in Spain is flexible and considers valid all possible evidence.

b) Practice

In Spain, situation testing is used in practice, even if not frequently. The method was used for the first time in sociological research conducted by the ILO in 1995, in the framework of comparative research between European countries (IOE, 1996). However, it has not been used by equality bodies or NGOs to combat discrimination.

It cannot be said that there is reluctance to use situational testing as evidence in court – the question has simply not arisen. It is therefore possible and probable that developments in other countries will influence evolution, both in the law and in the courts, in this field. European practices have influenced the acceptance of situation testing and so are mentioned in some judgments.

2.3 Indirect discrimination (Article 2(2)(b))

a) Prohibition and definition of indirect discrimination

In Spain, indirect discrimination is prohibited in national law, and it is defined.

Law 62/2003 defines indirect discrimination as 'where a legal or administrative provision, a clause of a collective agreement or contract, an individual agreement or a unilateral decision, although apparently neutral, would put a person of a certain racial or ethnic origin, religion or belief, disability, age or sexual orientation at a particular disadvantage in relation to others, provided that such provision is not objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary' (Article 28.1.c).

In the field of disability, the General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013) also defines indirect discrimination: 'where a legal or administrative provision, a clause of a collective agreement or contract, an individual agreement or a unilateral decision, or a criterion or practice, or an environment, product or service, though apparently neutral, may put a person at a particular disadvantage in relation to others owing to a disability, provided that such provision is not objectively justified by a legitimate aim and means of achieving that aim, are not appropriate and necessary' (Article 2.d).

There are two differences in relation to Article 2.2.b of Directive 2000/43 (also included in Directive 2000/78). The first is that the directive refers to a 'provision, criterion or practice', whereas the Spanish law transposing the directives (62/2003) refers to a 'legal or administrative provision, a clause of a collective agreement or contract, an individual agreement or a unilateral decision'. All these situations are referred to as 'provision', and the words 'criterion or practice' are not included. The second difference is that the directive says 'persons' in the plural, whereas the Spanish transposition says 'person' in the singular. This use of the singular generates a certain ambiguity in the law as to whether a group of persons is covered as such. However, the jurisprudence interprets indirect discrimination in the same sense as the European directives.

b) Justification test for indirect discrimination

Law 62/2003 does not specify how indirect discrimination is to be justified. The general provision in Article 2.2.b includes the phrase: 'unless [the indirect discrimination] is objectively justified by a legitimate aim and the means of achieving that aim are

appropriate and necessary'. The courts must analyse whether the measure is appropriate and necessary to pursue a legitimate aim and whether there is any case law on this issue. In most cases of indirect discrimination, statistics are used as circumstantial evidence.

c) Comparison in relation to age discrimination

Law 62/2003 does not specify how a comparison is to be made in relation to age discrimination.

2.3.1 Statistical evidence

a) Legal framework

In Spain, there are national rules permitting data collection. According to these rules, age and disability are treated very differently from ethnic or racial origin, religion or belief or sexual orientation.

Organic Law 15/1999 of 13 December 1999, on the protection of personal data, includes ethnic or racial origin, religion or belief and sexual orientation among 'specially protected personal data'. Article 7 of that law provides that 'no one may be forced to disclose details of his ideology, religion or beliefs. Only with the express written consent of the person concerned may personal data revealing ideology, trade union affiliation, religion or beliefs be processed'. The law further provides that 'personal data referring to racial origin, health and sexual life may only be gathered, processed and transferred where, for reasons of general interest, a law so provides or the person concerned expressly consents thereto'.

As a result, employers may not gather data on the ethnic or racial origin, religion or beliefs or sexual orientation of their workers. However, there are some exceptions to this general rule, such as those arising from Article 4.2 of Directive 2000/78.

In March 2011, the Committee on the Elimination of Racial Discrimination (CERD) reiterated its recommendation to Spain 'on the collection of statistical information on the ethnic and racial composition of its population and urges it to conduct a census of their population' with information on people's ethnic and racial origin (CERD/C/ESP/CO/18-20, paragraph 8).

The situation is different in the field of disability. Spanish laws not only allow but actually encourage the keeping of records inasmuch as employers (and those in other social fields, such as education) must gather such data about their workforce if they wish to benefit from the various measures for promoting job creation in which the disabled are specially protected.

Data relating to age may be collected with no legal impediments. Such data are compiled from Government files, which is secondary data, or from surveys, which is primary data. Some of the data that provide statistical evidence of social inequality in various fields are used as evidence to justify positive action, but they have never been used in the courts to make a case of possible indirect discrimination.

In Spain, statistical evidence is permitted by national law in order to establish indirect discrimination.

Although this is not expressly provided for in law, complainants have a right to require or request that respondents provide data that may be necessary for them to determine whether there has been a prima facie case of discrimination.

b) Practice

In Spain, statistical evidence in order to establish indirect discrimination is used in practice. It is not very common, but it is spreading in the Spanish courts. In the civil and administrative fields (the spheres of application of Directives 2000/43 and 2000/78) there are no agencies or authorities that can conduct formal investigations. In criminal cases, the Public Prosecution Service can conduct all investigations that are deemed necessary. Statistical evidence has been used in some judgments, especially in cases of sex discrimination in the employment field, and there is no reluctance to use statistical data as evidence in court.

As regards access to employment, Judgment 1161/2005 of the Superior Court of Cantabria, of 14 November 2005, notes the existence of indirect sex discrimination in the selection process of a chemical company. The court concluded that the selection criteria used by the company (regarding the holders of a vocational qualification in a technical branch) generated an adverse impact on women, because they are underrepresented in this field. A similar conclusion was reached by the Basque Superior Court in its Judgment 305/2001, of 30 January 2001, based on statistical data.

In terms of salary supplements, Judgment 982/2008 of the Superior Court of the Canary Islands, of 30 June 2008, considered that the fact of granting a salary for certain professional categories in the company, in which workers were predominantly men, but not for others, in which greater numbers of women worked, constituted indirect discrimination.

The evolution of the situation in other countries and, in particular, the jurisprudence of the Court of Justice of the European Union, have played an important role in the presentation of data collection in the Spanish courts.

Constitutional Court Decision 240/199958 used statistical evidence to qualify the failure to grant maternity leave to a female doctor working in Castilla y León as sex discrimination. According to the judgment, the fact that those permissions are granted only to public service doctors and not to temporary doctors can be considered discriminatory, because the former group are almost exclusively men and the latter group are generally women. The ruling upheld the use of situation testing.

Judgment 1161/2005 of the Supreme Court of Cantabria, of 14 November 2005, considered a report from expert advisors to be acceptable as evidence, and cited the example of reports by the Institute for Women (as this public institution was known at the time).

2.4 Harassment (Article 2(3))

a) Prohibition and definition of harassment

In Spain, harassment is prohibited in national law, and it is defined.

Law 62/2003 (Article 28.1.d) defines harassment as 'all unwanted conduct related to racial or ethnic origin, religion or convictions, disability, age or sexual orientation that takes place with the purpose or effect of violating the dignity of a person and creating an intimidating, humiliating or offensive environment'.

Law 62/2003 also amends the Workers' Statute. Article 4.2.e of the law states that workers are entitled 'to their privacy and to due respect of their dignity, including

[58] See Constitutional Court Decision, 20 December 1999, 240/1999.

protection against verbal or physical offences of a sexual nature'. This provision has been invoked by the courts to protect workers mostly against sexual harassment, and only more recently against other forms of harassment. Law 62/2003 (Article 37.2) adds the right to be protected 'against harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

Besides this, a new paragraph has been added to Article 54.3(g) of the Workers' Statute, which considers 'harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, towards the employer or the people that work in the enterprise' to be an offence meriting disciplinary dismissal.

In Spain, harassment explicitly constitutes a form of discrimination.

Law 62/2003 (Article 28.2), the General Law on the rights of persons with disabilities and their social inclusion (Article 2) and the Workers' Statute (Article 54.2.2) specify harassment as a form of discrimination.

The words 'hostile' and 'degrading' (Directive 2000/43 and Directive 2000/78, Article 2.3) are not included in the Spanish definition of harassment.

b) Scope of liability for harassment

In Spain, where harassment is perpetrated by an employee, the employer is not liable.

Liability for discrimination is personal and only affects individuals or organisations that have committed acts of discrimination, both in civil and criminal law. For example, employers or, in the case of racial or ethnic origin, service-providers such as landlords, schools, and hospitals, cannot be held liable for the actions of employees or for the actions of third parties (e.g. tenants, clients or customers). Likewise, trade unions or other professional associations cannot be held liable for the actions of their members.

2.5 Instructions to discriminate (Article 2(4))

a) Prohibition of instructions to discriminate

In Spain, instructions to discriminate are prohibited in national law. 'Instructions' are not defined, however.

In Spain, instructions to discriminate explicitly constitute a form of discrimination.

Law 62/2003 (Article 28.2) provides that 'any instruction to discriminate against persons on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, will be considered discrimination'.

Instructions to discriminate may also be considered to be covered by Article 314 of the Criminal Code, which specifies 'causing discrimination' as an infringement against workers' rights. Article 18 of the Criminal Code includes incitement as a crime, and this may be applied to cases of incitement to discrimination.

b) Scope of liability for instructions to discriminate

In Spain, the instructor and the discriminator are liable.

Liability for discrimination is personal and only applies to natural or legal persons who cause discrimination or harassment or who make instructions to discriminate, but we should remember that the instruction to discriminate is a discriminatory act (as expressly noted in Article 28.2 of the Law 62/2003 on fiscal, administrative and social measures).

2.6 Reasonable accommodation duties (Article 2(2)(b)(ii) and Article 5 Directive 2000/78)

a) Implementation of the duty to provide reasonable accommodation in the field of employment

In Spain, the duty to provide reasonable accommodation is included in the law, and it is defined.

The General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013) sets out a duty to provide reasonable accommodation for persons with disabilities (Articles 2.m and 63). Article 2.m defines reasonable accommodation as: 'necessary and appropriate modifications and adaptations of the physical, social and attitudinal environment to the specific needs of persons with disabilities not imposing a disproportionate or undue burden, where needed in a particular case effectively, and practice to facilitate accessibility and participation and to ensure to persons with disabilities the enjoyment or exercise, on an equal basis with others, of all human rights'.

Article 63 states that 'It is understood that the right to equality of opportunity for persons with disabilities is violated (...) when by reason of disability, (...) [a] breach [occurs] of the requirements of accessibility and of reasonable accommodation'.

b) Practice

For the purpose of determining whether a burden is disproportionate, Article 40.2 of RDL 1/2013 states: 'It will be considered whether the burden is excessive if it is sufficiently remedied by measures, aids or subsidies for persons with disabilities, as well as financial costs and other measures involved and the size and volume of total business of the organisation or company'.

National law does not provide clearly for a shift in the burden of proof for claims relating to reasonable accommodation. However, Article 77 of Law RDL 1/2013 could allow a judge to shift the burden of proof if a person with disabilities is claiming the right to reasonable accommodation.

c) Definition of disability and non-discrimination protection

The definition of disability for the purposes of claiming reasonable accommodation (both with regard to employment and with regard to the more general area) is the same as for claiming protection from discrimination in general. This means that only those meeting the threshold of 33 % disability are entitled to reasonable accommodation.

d) Duties to provide reasonable accommodation outside the field of employment

In Spain, there is a duty to provide reasonable accommodation for persons with disabilities outside the employment field.

The material scope of Law RDL 1/2013, which sets out a duty to provide reasonable accommodation for persons with disabilities, is social protection, healthcare, education, employment, telecommunications and the information society; urbanised public spaces, infrastructure and construction; transport; goods and services to the public; relations with public administrations; the administration of justice; cultural heritage; and employment.

The definition of 'disproportionate burden' in this context is the same definition that is used with regard to employment.

e) Failure to meet the duty of reasonable accommodation

In Spain, failure to meet the duty of reasonable accommodation counts as discrimination.

Failure on the part of a company to comply with its obligation to provide reasonable accommodation (with regard to employment) constitutes indirect discrimination. As established in Articles 2.d and 2.m of the General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013), this may be justified only if such accommodation would constitute a disproportionate burden.

When a disabled person is fit to work or to undergo training, the absence of such accommodation cannot be justified by a company decision involving unfavourable treatment of a disabled worker. Such a decision would be discriminatory, except if there is a disproportionate burden.

The Law establishes sanctions in the event of a breach of the duty to provide reasonable accommodation (RDL 1/2013, Article 80). The Law defines a breach of accommodation duties as a serious offence and establishes sanctions up to a maximum of EUR 1 million. Such a breach does not equate to a form of discrimination.

f) Duties to provide reasonable accommodation in respect of other grounds

In Spain, there is a duty to provide reasonable accommodation in respect of other grounds in the public and private sectors, but only on the ground of religion or belief.

Cooperation agreements with three religious communities (Evangelical, Jewish and Islamic) contain specific regulations to ensure reasonable accommodation for employees of these religions. The three agreements contain provisions in the field of employment (religious holidays) and in areas outside employment (special diets).

The weekly day of rest of the Seventh Day Adventist and Jewish communities (Friday evening and all of Saturday) can be granted instead of the day provided by Article 37.1 of the Workers' Statute as the general rule (Saturday afternoon or Monday morning and all of Sunday), but only with the agreement of all the parties, which case law has interpreted as being possible only if this is requested by the employee before the contract is signed.

Moreover, members of the Islamic communities affiliated with the Islamic Commission may request to stop work every Friday from 13.30 to 16.30 and one hour before sunset during Ramadan. This right is also subject to an agreement with the employer, and the hours not worked must be made up. There is some interesting doctrine on this subject in the Madrid High Court's judgment of 27 October 1997. In this case, pursuant to a request for adaptation of working hours, the court – not once referring to the Cooperation Agreement – stated that, although the courts of first instance should make employers adapt working hours, thus allowing their employees to meet their religious obligations properly, as well as not making them behave in a way incompatible with their beliefs, the worker must show honesty and good faith by indicating his or her religious faith and the special working hours arising from it when applying for the job (Rossell 2008: 104-107).

In the case of the Islamic Commission and the Jewish community, there is a list of religious holidays that can replace those established in Article 37 of the Workers' Statute, again with the agreement of both parties. As for special diet (adaptation of food to Islamic religious precepts and mealtimes during the Ramadan fast), this possibility is provided only for Muslims interned in public establishments (prisons and other centres) and on military premises, as well as in public and subsidised private schools, where requested, and not as an obligation, since Article 14.4 of the agreement clearly states

only that, in such cases, 'attempts shall be made'. In the field of employment, therefore, there are no provisions on this issue.

g) Accessibility of services, buildings and infrastructure

In Spain, national law requires services that are available to the public, buildings and infrastructure to be designed and built in a disability-accessible way.

The General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013) requires services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way. The objective of this law is to 'ensure the right to equality of opportunity and treatment, as well as the effective and real exercise of rights by persons with disabilities under equal conditions with respect to other citizens' (Article 1). Following this general statement, the law defines its material scope in the following fields: telecommunications and the information society; urbanised public spaces, infrastructure and construction; transport; goods and services to the public; relations with public administrations; the administration of justice; cultural heritage; and employment.

The law defines 'universal accessibility' as 'the condition to be met by environments, processes, goods, products and services, as well as objects, instruments, tools and devices to be understandable, usable and practicable by all persons in safety and comfort and to be more autonomous in as natural a way as possible' (Article 2.k). Article 23.2 provides that 'the basic requirements for accessibility and non-discrimination shall, for each sphere or area, establish specific measures for preventing or eliminating discrimination, and for offsetting disadvantages or difficulties'. Article 23.2 provides that all this must be done taking into account the various types and degrees of disability, which should inform both the initial design and the reasonable accommodation of environments, products and services in each of the law's spheres of application.

Law RDL 1/2013 (Article 81) defines a breach of accommodation duties as a serious offence and establishes sanctions of up to a maximum of EUR 1 million. Such a breach does not equate to a form of discrimination.

Law RDL 1/2013 (Article 23.1) provides that the Government 'will regulate the basic conditions of accessibility and non-discrimination to ensure the same level of equal opportunities for all persons with disabilities.

In implementation of this provision (previously included in Article 10.2 of Law 51/2003), the following standards have been laid down:

A) In access to and supply of goods and services which are available to the public

a) Accessibility and non-discrimination standards in relations to central Government. These are regulated by Royal Decree 366/2007 of 16 March, and the technical specifications and characteristics for the decree's application are set out in an implementing order issued by the Prime Minister's Office (PRE/446/2008 of 20 February).
b) To facilitate the exercising of the right to vote for visually disabled persons, Royal Decree 1612/2007 of 7 December 2007 provided an accessible voting procedure applicable to electoral processes, which was designed to allow blind and severely visually disabled persons to identify their voting option independently and with fully guaranteed secrecy. This was regulated by Ministerial Order INT/3817/2007 of 21 December 2007.
c) Accessibility and non-discrimination standards in the information society. These are regulated by Royal Decree 1494/2007 of 12 November 2007, adopting the

regulations on basic standards for access by disabled persons to technologies, products and services linked to the information society and the media.

d) Accessibility and non-discrimination standards in transportation. The regulations refer to vehicles and also to buildings and facilities involved in transport activity, and they may be found in Royal Decree 1544/2007 of 23 November 2007 regulating basic standards of accessibility and non-discrimination in access to and the use of transport by disabled persons.

Law 26/2011 of 1 August 2011, on normative adaptation to the UN Convention on the Rights of Persons with Disabilities, regulates specific protocols relating to civil protection for persons with disabilities, to ensure that they are assisted in emergency situations.

B) In housing, public spaces and infrastructures

Accessibility and non-discrimination standards in public spaces and infrastructures. These are set out in Royal Decree 505/2007 of 20 April 2007, which was further developed by Housing Ministry Order VIV/561/2010 of 1 February 2010.

In Spain, national law contains a general duty to provide accessibility by anticipation for persons with disabilities. The expression 'accessibility for persons with disabilities by anticipation' does not appear in Spanish legislation. However, article 2.k of the General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013) aims to provide for accessibility by anticipation in areas such as access to and supply of goods and services that are available to the public, as well as housing, public spaces and infrastructures.

In Spain, the autonomous regions have exclusive responsibility (i.e. they legislate and execute legislation) for accessibility in their territories. Most of the autonomous regions have opted to pass laws establishing the principles, objectives, definitions and regulations to be specified by technical regulations in various spheres. Both these laws and the technical regulations tend to be very similar in the various autonomous regions. There are, however, national regulations that lay down basic accessibility conditions that all the autonomous regions must meet, as described above.

h) Accessibility of public documents

As an aspect of the right to equality, the General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013) states that 'The Government will protect particularly intensively the rights of persons with disabilities in terms of (...) information'.

In 2006 and 2007, a series of provisions introduced an obligation to use Braille in some cases in Spain:

- Law 29/2006 of 26 July 2006, on guarantees and the rational use of medicines and health products, has introduced a requirement for all containers of medicines to have information in Braille.
- Royal Decree 1612/2007[59] makes it easier for persons with visual disabilities to exercise their right to vote and requires the administration to provide electoral ballot papers in Braille for blind persons who request it. This has already been common practice in every election since 2008.

[59] Royal Decree 1612/2007, of 7 December 2007, on voting accessible to persons with visual disabilities (BOE, 8 December 2007).

- Royal Decree 366/2007[60] requires that, in the information offices of administrations, relevant information must be available in at least two of the three sensory modalities: visual, audible and tactile (raised letters or Braille), and that interactive information systems must be available in Braille.
- Decree 1494/2007[61] requires telecommunication operators to provide invoices and conditions of service provision in Braille or large print.
- Royal Decree 1544/2007[62] establishes an obligation for public transit stops to have information in Braille, and taxis adapted for persons with disabilities must have fare information in Braille.

Law 27/2007, recognising sign languages and speech aid systems, recognises Spanish Sign Language as the language of those deaf, hearing-impaired and deaf-blind persons in Spain who freely decide to use it. The law covers the use of sign-language interpreters in various public and private spheres: 1) publicly provided goods and services (education, training and employment, health, culture, sport and leisure); 2) transport; 3) relations with the public administration; 4) political participation; and 5) the media, telecommunications and the information society.

The use of sign language is quite common in those fields.

[60] Royal Decree 366/2007, of 16 March 2007, on accessibility and non-discrimination of persons with disabilities in their relations with the central Government (BOE, 24 March 2007).

[61] Royal Decree 1494/2007, of 12 November 2007, on conditions for access of disabled persons to the technologies, products and services related to the information society and media services (BOE, 21 November 2007).

[62] Royal Decree 1544/2007, of 23 November 2007, on basic conditions of accessibility and non-discrimination for access and use of modes of transport for persons with disabilities (BOE, 4 December 2007).

3 PERSONAL AND MATERIAL SCOPE

3.1 Personal scope

3.1.1 EU and non-EU nationals (Recital 13 and Article 3(2) Directive 2000/43 and Recital 12 and Article 3(2) Directive 2000/78)

In Spain, there are no residence or citizenship/nationality requirements for protection under the relevant national laws transposing the directives.

The personal scope of protection against discrimination is general for all residents. The law does not make distinctions regarding equal treatment of Spaniards, nationals of other EU countries and non-EU nationals. There are no requirements of citizenship/nationality for protection under the relevant national laws transposing the directives.

The seventh additional provision of Law 62/2003, entitled 'Non-applicability to immigration law', states that the articles transposing the directives do not affect the regulations provided 'in respect of the entry, stay, work and establishment of aliens in Spain under Organic Law 4/2000'. The justification for this provision is based on Article 3.2 of Directives 2000/43 and 2000/78. However, it should not be forgotten that Law 4/2000 regulates the issues of 'work and establishment', which are liable to be affected by the directives and are not covered by the exclusion outlined in Article 3.2 of the directives.

3.1.2 Protection against discrimination (Recital 16 Directive 2000/43)

a) Natural and legal persons

In Spain, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of protection against discrimination.

The prohibition of discrimination in the Constitution (Article 14), in Law 62/2003 (Article 27.1) and in the Workers' Statute applies to both natural and legal persons. Article 27.2 of Law 62/2003 provides that measures for the application of the principle of equal treatment under it apply to every person (both natural and legal), in both the public and private sectors.

In Spain, the personal scope of anti-discrimination law covers natural and legal persons for the purpose of liability for discrimination.

The answer is the same (Law 62/2003, Article 27.2): liability for discrimination is personal and affects individuals or organisations who have committed acts of discrimination. As Rubio-Marín (2004) indicates, for the private sector, the prohibition on discrimination and the violation of workers' fundamental rights is mainly addressed to the employer, but this can also be made applicable to managers, and presumably to co-workers or the relevant labour union.

b) Private and public sector including public bodies

In Spain, the personal scope of the national law covers the private and public sectors, including public bodies, for the purpose of protection against discrimination.

The prohibition of discrimination in the Constitution (Article 14) and in the Workers' Statute applies to both private and public bodies. Article 27.2 of Law 62/2003 provides that measures for the application of the principle of equal treatment under it apply to every person (both natural and legal), in both the public and private sectors.

In Spain, the personal scope of anti-discrimination law covers the private and public sectors, including public bodies, for the purpose of liability for discrimination.

Law 62/2003 (Article 27.2) establishes that liability for discrimination is personal and affects individuals or organisations who have committed acts of discrimination.

3.2 Material scope

3.2.1 Employment, self-employment and occupation

In Spain, national legislation applies to all sectors of private and public employment, self -employment and occupation for the five grounds. This includes contract work, self-employment, military service and the holding of a statutory office.

The material scope of the prohibition of discrimination is of a general nature. All the fields mentioned by Article 3 of Directive 2000/43 on racial or ethnic origin are covered by the general principle of equality laid down in Article 14 of the Spanish Constitution.

Although Directive 2000/78 refers only to the field of employment, discrimination on the grounds on religion or belief, disability, age or sexual orientation is prohibited in all areas, public and private. This applies not only to the fields mentioned in Directive 2000/43 (social protection, social advantages, education, access to and supply of goods and services available to the public, including housing), but also to other possible fields, even if there is not an explicit anti-discrimination provision, because of the general and direct applicability of Article 14 of the Constitution.

National legislation applies the principle of non-discrimination to all public and private sectors of employment and occupation, including contract work, self-employment and the holding of a statutory office.

The Constitution (Article 23.2) explicitly grants the fundamental right of access in equal conditions to public office and functions, which includes public sector employment, and makes reference to the guiding principles of the civil service, including those of merit and ability (Article 103).

Article 34 of Law 62/2003 defines the scope of application of measures dealing with equal treatment and non-discrimination in employment on all the grounds of Directives 2000/43 and 2000/78 as follows: 'measures are aimed at the real and effective realisation of the principle of equal treatment and non-discrimination in relation to access to employment, membership of or involvement in organisations of workers or employers, working conditions, professional promotion and vocational and continuous professional training, access to self-employment or to an occupation and membership of and involvement in any organisation whose members carry on a particular profession'.

Article 4.2.c of the Workers' Statute (modified by Law 62/2003, Article 37) recognises that workers are entitled in their working relationship 'not to be subjected to direct or indirect discrimination in employment nor, once occupied, on the grounds of sex, civil status, age within the limits set in the present law, racial or ethnic origin, social condition, religion or belief, political ideas, sexual orientation, membership or non-membership of a trade union, or for language reasons within Spain'.

The Criminal Code (Article 314) provides that an offence is committed against workers' rights by 'whosoever causes serious discrimination in public or private employment', but it does not specify what constitutes 'serious discrimination'.

3.2.2 Conditions for access to employment, to self-employment or to occupation, including selection criteria, recruitment conditions and promotion, whatever the branch of activity and at all levels of the professional hierarchy (Article 3(1)(a))

In Spain, national legislation includes – although not explicitly – conditions for access to employment, to self-employment or to an occupation, including selection criteria, recruitment conditions and promotion on the five grounds, whatever the branch of activity and at all levels of the professional hierarchy, in both the private and public sectors, as described in the directives.

This second part of Article 3.1.a of the directive is missing from Spanish Law 62/2003, which transposes it. However, this may be considered unnecessary, because its references to equal access to employment are clear and sufficient. Moreover, Article 2 of Law 56/2003 of 16 December 2003, on employment, specifies the foremost general objective of employment as being: 'To guarantee real equality of opportunities and non-discrimination, taking into account the provisions of Article 9.2 of the Spanish Constitution, in access to employment and in actions aimed at providing such access, along with a free choice of profession or trade without discrimination, on the terms provided in Article 17 of the Workers' Statute'.

Article 16.2 of the Workers' Statute (as modified by Law 62/2003, Article 37) regulating non-profit employment agencies, guarantees equal treatment and non-discrimination on all of the grounds mentioned in the directives in access to employment through such agencies.

All labour regulations affect labour relations in both the private and public sectors.

The employment of civil servants is regulated by the Civil Service Statute, which establishes special standards in the public sector, but all employees are equally subject to the principle of equal treatment.

3.2.3 Employment and working conditions, including pay and dismissals (Article 3(1)(c))

In Spain, national legislation includes working conditions covering pay and dismissals, for all five grounds and for both private sector and public sector employment.

Non-discrimination in employment and working conditions, including pay and dismissals, is expressly recognised in Article 17.1 of the Workers' Statute (modified by Law 62/2003, Article 37), which is entitled 'Non-discrimination in working relations'. It states: 'all legislative provisions, clauses of collective agreements, individual agreements and unilateral managerial decisions which provide for unfavourable direct or indirect discrimination on the grounds of age or disability, or which provide for unfavourable or adverse discrimination in employment, whether in relation to remuneration, working time, or other working conditions, on the grounds of sex, origin, including racial or ethnic origin, civil status, social condition, religion or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, or family ties to other workers in the enterprise, or by reference to the languages of the Spanish state, shall be regarded as void and without effect'.

With the distinction between 'unfavourable direct or indirect discrimination on the grounds of age or disability' and 'unfavourable or adverse discrimination in employment' in relation to other grounds, the provision facilitates positive action in the fields of age and disability. Article 8.12 of the Law on violations and sanctions of labour laws (modified by Law 62/2003, Article 41) considers 'unilateral decisions by the employer which involve unfavourable direct or indirect discrimination for reasons of age or disability or which

contain positive or adverse discrimination relating to remuneration, working time, training, promotion, and other employment conditions, on the grounds of sex, origin, including racial or ethnic origin, civil status, social condition, religion or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, family ties with other workers in the enterprise, or language within the Spanish State' to be very serious infringements.

In September 2008, the Spanish branch of Aerolíneas Argentinas dismissed a homosexual worker. The worker's complaint was accepted by the Madrid Social Court no. 35, which declared the dismissal void and therefore obliged the airline to take the worker back and pay all wage arrears. The judgment ruled that it was proven in the proceedings that the worker's sexual orientation had given rise to various forms of unfavourable treatment, culminating in his dismissal. In his judgment, the judge stated that unfavourable treatment based on sexual orientation was discriminatory, and therefore the worker's dismissal was declared void. The grounds cited were international and Community legislation (the judgment quotes Article 13 of the Treaty establishing the European Community, but not Directive 2000/78/EC) and also national legislation (the Spanish Constitution and the Workers' Statute). As the judge considered that sexual orientation fell within the sphere of fundamental rights, he asked the employer to prove that the dismissal was not due to the worker's sexual orientation. However, the employer was unable to demonstrate objective grounds for the dismissal. The judgment solidly documented the animosity towards the worker from the outset on the part of his boss because of the former's homosexuality, and how that animosity was kept up continuously until the time of his dismissal.[63]

– Occupational pensions constituting part of pay

As for occupational pensions, the General Social Security Act (Legislative Royal Decree 1/1994 of 20 June 1994) contains no anti-discrimination clause and establishes differences on the grounds of age (and of other conditions, but not religion or beliefs, disability, sexual orientation or racial or ethnic origin). Article 29.1 of Law 62/2003 establishes that 'measures to ensure that the principle of equal treatment and non-discrimination on the grounds of racial or ethnic origin is real and effective in (…) social benefits and (…) the supply of and access to goods and services'. Discrimination in these fields is therefore unlawful, but Law 62/2003 provides no measures to make the principle of equal treatment 'real and effective'.

Moreover, Law 62/2003 does not contain any specific provision for social benefits, such as occupational pensions, on the grounds of Directive 2000/78 (religion or belief, age, disability and sexual orientation). However, the differences established by the Law on occupational pensions in the field of age are reasonable and proportionate and in accordance with EU legislation. Moreover, the general principle of equal treatment is also applicable to occupational pensions.

3.2.4 Access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience (Article 3(1)(b))

In Spain, national legislation applies to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses.

[63] Social Court nº 35 of Madrid. Sentence 84/2009, 23 February 2009.

The Workers' Statute (Article 4) recognises promotion and professional training as rights. These are protected against discrimination on all of the grounds included in the directives.

Article 34 of Law 62/2003 includes this subject in relation to all the grounds of Directives 2000/43 and 2000/78: 'measures are aimed at the real and effective realisation of the principle of equal treatment and non-discrimination in relation to access to (…) professional promotion and vocational and continuous professional training'. Given the structure of the education and training system in Spain, this text includes all the aspects covered by Article 3.1.b of Directive 2000/43.

The Organic Law on qualifications and vocational training (Law 5/2002 of 19 June) states that one of the principles of the national system of qualifications and vocational training is 'access, on equal terms for all citizens, to the various forms of vocational training' (Article 2).

The Organic Law on universities (6/2001 of 21 December) provides that students are entitled to 'freedom of opportunities and the absence of discrimination on personal or social grounds, including disability, in access to universities and admission to university faculties, during university courses and in the exercise of their academic rights' (Article 46).

3.2.5 Membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations (Article 3(1)(d))

In Spain, national legislation includes membership of and involvement in workers' or employers' organisations, as formulated in the directives for all five grounds and for both private sector and public sector employment.

Article 34 of Law 62/2003 includes this subject in relation to all the grounds of Directives 2000/43 and 2000/78: 'measures are aimed at the real and effective accomplishment of the principle of equal treatment and non-discrimination in relation to (…) membership of or involvement in organisations of workers or employers (…) or to occupation and membership of and involvement in any organisation whose members carry on a particular profession'.

Article 17.1 of the Workers' Statute and Article 8.12 of the Law on offences and penalties in social matters (both modified by Law 62/2003, Articles 37 and 41) also include this aspect of equal treatment.

3.2.6 Social protection, including social security and healthcare (Article 3(1)(e) Directive 2000/43)

In Spain, national legislation covers social protection, including social security and healthcare, as formulated in the Racial Equality Directive.

The Social Security system is based on four principles: universality, unity, solidarity and equality (Royal Decree 1/1994 of the General Law on social security, Article 2). This statement on equality should be understood to cover all grounds of European directives (and the Spanish Constitution).

Moreover, Article 29.1 of Law 62/2003 states that 'the aim of this section [of Chapter III of the Law] is to establish measures to ensure that the principle of equal treatment and non-discrimination on the grounds of racial or ethnic origin is real and effective in education, health, social benefits and services, housing and, in general, the supply of and

access to goods and services'. There is a general recognition of the principle of non-discrimination on the grounds of racial or ethnic origin in these areas in line with Article 3.1 of Directive 2000/43; so, discrimination in these fields is unlawful, but neither this section of Law 62/2003 nor any other part of it provides any such measures to make the principle of equal treatment 'real and effective'. To be 'real and effective', judicial interpretation is required and, in some cases, the Criminal Code (articles 510-512) must be taken into consideration. This same consideration applies to the four following sections of this report.

– Article 3.3 exception

Law 62/2003 does not contain any specific provisions in relation to the exception in Article 3(3) of Directive 2000/78 on the grounds of religion or belief, age, disability and sexual orientation. Various social security and social protection provisions establish differences on grounds of age, and of other conditions, but not religion or beliefs, disability, sexual orientation or racial or ethnic origin.

The ECtHR held on 3 April 2012, in the case of *Manzanas v. Spain*, that there had been a 'Violation of Article 14 (prohibition of discrimination) of the ECHR. The case concerned a difference in treatment between priests of the Catholic Church and Evangelical ministers regarding the calculation of their pension rights. The ECtHR observed that, prior to the promulgation of the Constitution of 1978, the Royal Decree of 1977 had provided that priests and ministers of churches registered with the Ministry of the Interior had to be treated as salaried employees and brought within the general social security scheme. However, this was not applicable to the Evangelical minister until 1999. The court agreed with the Government that there had been objective and non-discriminatory reasons for integrating religious ministers into the general social security scheme at different times. However, the refusal to recognise Mr Manzanas's right to receive a retirement pension and to count his earlier years of service towards the minimum period of pensionable service amounted to a different treatment from that applied, by law, to other situations which appeared to be similar, the only difference here being one of religious faith. Although the reasons for the delay in bringing ministers into the general social security scheme fell within the state's margin of appreciation, the court considered that the Government had failed to justify the reasons why a difference of treatment between similar situations, based solely on grounds of religious belief, had been maintained. The judgment of ECtHR is interesting because the 'appeal for protection' (*recurso de amparo*) of Mr Manzanas was not taken into consideration by the Spanish Constitutional Court, which must change its criteria in this area.

3.2.7 Social advantages (Article 3(1)(f) Directive 2000/43)

In Spain, national legislation includes social advantages, as formulated in the Racial Equality Directive.

Law 62/2003 recognises the principle of non-discrimination on the grounds of racial or ethnic origin in social benefits (Article 29.1), in line with Directive 2000/43, although this law does not provide any measures to make the principle of equal treatment 'real and effective'. To be 'real and effective', judicial interpretation is required and, in some cases, the Criminal Code (articles 510-512) must be taken into consideration.

Any clauses introducing differences of treatment in 'social advantages' on the grounds of racial or ethnic origin, religion or beliefs, disability or sexual orientation would be discriminatory (Spanish Constitution, Article 14), but not on the grounds of age if the differences are 'objectively and reasonably justified by a legitimate aim'. For example, it is common practice for there to be special discount rates for young people and the elderly for public transport and some private transport.

Beyond the measures established by Law RDL 1/2013, there are some social advantages for persons with disabilities, such as special discounts for transport or in accessing some services at local level. Other social benefits, such as benefits for large families and childbirth benefits, whether national, regional or local, must respect the principle of non-discrimination and should be proportionate to the special circumstances for which they are designed.

Law RDL 1/2013 establishes that services available to the public, buildings and infrastructure should be designed and built in a disability-accessible way.

In Spain, the lack of any definition of social advantages does not raise any problems.

3.2.8 Education (Article 3(1)(g) Directive 2000/43)

In Spain, national legislation includes education as formulated in the Racial Equality Directive.

Law 62/2003 recognises the principle of non-discrimination on the grounds of racial or ethnic origin in education (Article 29.1), in line with Directive 2000/43; but this law does not provide any measures to make the principle of equal treatment 'real and effective'. To be 'real and effective', judicial interpretation is required and, in some cases, the Criminal Code (articles 510-512) must be taken into consideration.

Equal treatment and non-discrimination have been consolidated as basic principles of education in Spain. For example, the first three principles of quality as listed in Organic Law 2/2006 on Education (OLE),[64] modified by Organic Law 8/2013, on improving the quality of education (OLCE),[65] refer to equal treatment and equal opportunities in Article 1, as follows: a) Quality in education for all pupils, regardless of their social condition and circumstances; b) Fairness, guaranteeing equality of opportunities, educational inclusion and non-discrimination, and acting to offset personal, cultural, economic and social inequalities, especially those due to disability; c) Transmission and implementation of values that foster personal freedom, responsibility, democratic citizenship, solidarity, tolerance, equality, respect and justice, and helping to overcome discrimination of any kind.

The debate on school segregation has become high profile in Spain, with a large rise in the number of immigrants and foreigners of school age over the past six years. Foreign children, such as Roma children, are mostly concentrated in state schools (as opposed to private schools).

The passage of the OLE through Parliament in 2005 was marked by a fierce campaign against it by conservative organisations because, among other issues, the law seeks to establish a more even distribution of pupils with special needs[66] between state schools (*centros públicos*) and state-subsidised private schools (*centros privados concertados*). One of the key points of the political debate was the clash between the so-called right of parents to freely choose a school for their children, and the right to education and access thereto on equal terms. The OLCE modifies the OLE to introduce the 'freedom of education' as a principle of the education system, and it defines 'freedom of education' as 'the right of parents, mothers and legal tutors to choose for their children the kind of education and the school, within the framework of constitutional principles' (Article 1.g).

[64] Organic Law on education, Law 2/2006, 3 May 2006 (BOE, 4 May 2006).
[65] Organic Law on quality of education, Law 8/2013, 9 December 2013 (BOE, 10 December 2013).
[66] LOE Article 71.2 defines pupils with 'special needs' as those who 'require educational support different to what is given ordinarily, because of their special educational needs, specific learning difficulties or high intellectual capacity or because they have joined the education system late, or because of their personal conditions or school history.'

The law strikes a balance between these principles, stating that 'families may apply for admission at the schools to which they wish to send their children' (Article 86.3), but it also provides for the possibility of setting up 'committees or other bodies to guarantee admission'. It further provides that: 'The various tiers of government shall ensure that pupils with special needs for educational support are distributed evenly between schools (…) To this end, they shall establish the proportion of pupils with these characteristics to be admitted into each state school and subsidised private school, and shall ensure that schools have the staffing and funding required for such support (Article 87).

The OLE provides that 'in no event shall there be discrimination on the grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance' (Article 84.3).

The OLE also provides that the various tiers of government shall develop compensatory measures in relation to persons, groups and regions in adverse situations and shall provide the necessary economic resources and support. 'Groups' refers in particular to Roma people and immigrants.

– Pupils with disabilities

In Spain, the general approach to education for pupils with disabilities does not raise general problems.

The Organic Law on education (OLE) provides, in Article 74, that schooling for pupils with special educational needs, including those resulting from disability 'shall be governed by the principles of standardisation and integration and shall guarantee non-discrimination and effective equality in access to and continuance in the [mainstream] education system', but it adds that 'measures may be introduced to make the various stages of education more flexible, when considered necessary. Schooling for such pupils in special educational units or centres, which may continue up to the age of 21, shall be provided only when their needs cannot be met in the framework of measures catering for diversity in ordinary centres'. The OLE also provides a measure for positive action (Article 75), stating that 'The educational authorities shall establish a reserve quota of places in vocational training for pupils with disabilities.'

A special education system is provided that can be either temporary or permanent for those disabled persons for whom attendance is impossible within the ordinary educational system, one of the aims of which is professional training.

In conclusion, the law sets out guarantees of the right to education for pupils with disabilities. The general criterion is that persons with disabilities should be integrated – and they are – in the mainstream educational system, if necessary with special support; special systems are provided only when their educational needs cannot be met in the mainstream system. Beyond this formal structure, it should be noted that the quality of the education offered by the two systems is very different. Special schools for pupils with disabilities work well and the problem is usually a lack of sufficient places. The quality of the education for pupils with disabilities in the mainstream educational system is poor and has worsened in recent years as a result of budget cuts, which reduced resources and staff in compensatory education during the great recession.

– Trends and patterns regarding Roma pupils

In Spain, there are no specific patterns in education regarding Roma pupils, such as segregation.

The Organic Law on education (OLE) provides, in Article 74, that schooling for pupils with special educational needs 'shall be governed by the principles of standardisation and

integration and shall guarantee non-discrimination and effective equality in access to and continuance in the [mainstream] education system'.

The law also provides that the various tiers of government shall develop compensatory actions in relation to persons, groups and regions in adverse situations and shall provide the necessary economic resources and support. 'Groups' refers in particular to Roma people (and immigrants).

For the academic year 2012-13, (according to the latest data released by the Ministry of Education), 420 686 non-university students in Spain (equivalent to 5.1 % of the student population) have had some kind of 'educational support'. 40 % (167 903) of these students received support for special educational needs associated with disability; 42 % (177 238) for other specific needs (developmental disorders of language or learning, students with severe lack of knowledge of the language of instruction or in a situation of socio-educational disadvantage) (an important part of this group are Roma); 3 % (14 623) received support for late integration in the Spanish educational system (almost all are immigrants); and the remaining 15 % received support for other reasons, or were unclassified.

3.2.9 Access to and supply of goods and services which are available to the public (Article 3(1)(h) Directive 2000/43)

In Spain, national legislation includes access to and supply of goods and services as formulated in the Racial Equality Directive.

Law 62/2003 recognises the principle of non-discrimination on the grounds of racial or ethnic origin in access to and supply of goods and services which are available to the public (Article 29.1), in line with Directive 2000/43; but this law does not provide any measures to make the principle of equal treatment 'real and effective'. To be 'real and effective', judicial interpretation is required and, in some cases, the Criminal Code (articles 510-512) must be taken into consideration.

An interesting ruling was made in relation to access to services which are available to the public. The airline Air Nostrum, a subsidiary of Iberia Líneas Aéreas de España, refused to allow three deaf persons on board, on the grounds that they were unaccompanied. It claimed that, according to its flight operation manual, the safety of these persons could be at risk in an emergency. A court of first instance ruled in Iberia's favour, but the Madrid Provincial Court, in judgment 211/2009 of 6 May 2009, ruled in favour of the three deaf persons, who were represented by the National Confederation of the Deaf and the Spanish Committee of Disabled Persons's Representatives. The Madrid Provincial Court deemed this a case of 'indirect discrimination' and noted that Law 51/2003 of 2 December 2000, on equal opportunities, non-discrimination, and universal accessibility for persons with disabilities, prevails over Iberia's flight operation manual, and that not allowing these three deaf persons on board may be regarded as 'indirect discrimination' pursuant to Article 6.2 of that law, which transposes Article 2.2.b of Directive 2000/78/EC. Although the directive only addresses employment discrimination, Law 51/2003 also covers discrimination with regard to access to goods and services. The provincial court ordered Iberia to take steps to ensure that 'the infringement of rights of disabled persons ceases and that deaf persons are not discriminated against in its flights'. This is the first court ruling to apply the concept of 'indirect discrimination' in access to goods and services in Spain. The sentence includes the definition of indirect discrimination of EU directives and notes that the rule which the company wanted to apply to prevent access to the flight to the three deaf persons was 'an apparently neutral provision (...) but could cause a particular disadvantage to these persons because of their disability'.

- Distinction between goods and services available publicly or privately

In Spain, national law does not distinguish between goods and services available to the public (e.g. in shops, restaurants, banks) and those only available privately (e.g. limited to members of a private association).

3.2.10 Housing (Article 3(1)(h) Directive 2000/43)

In Spain, national legislation includes housing as formulated in the Racial Equality Directive.

Law 62/2003 recognises the principle of non-discrimination on the grounds of racial or ethnic origin in housing (Article 29.1), in line with Directive 2000/43; but this law does not provide any measures to make the principle of equal treatment 'real and effective'. To be 'real and effective', judicial interpretation is required and, in some cases, the Criminal Code (articles 510-512) must be taken into consideration.

The practical application of the relevant legal statements could be improved. Immigrants of certain national origins and the Roma tend to congregate in certain districts. This leads to a significant segregation of the population. This circumstance becomes a problem when it is compounded by poor living conditions or even by illegal construction or slum districts.

On 5 April 2013 the Government approved a new National Housing Plan (2013-2016). The plan is of universal scope, but it is targeted in particular at the groups which have most difficulty in gaining access to decent housing, specifically including disabled persons and their families and people over 65. These plans also expressly mention immigrants and, implicitly, Roma people within the term 'groups in a situation, or at risk, of social exclusion'. This new plan focuses especially on rent and rehabilitation. The Programme for the Promotion of rehabilitation includes measures to carry out reasonable adjustments for accessibility.[67]

- Trends and patterns regarding housing segregation for Roma

In the case of the Roma, many Spanish local government authorities have carried out successful relocation programmes in towns. However, in some cases these relocation programmes have encountered opposition from other residents.

In Spain, there are no patterns of housing segregation and discrimination against the Roma. Policies that aim to facilitate the accommodation of the Roma are general policies, and integration is now favoured, especially in mixed working-class neighbourhoods. At the end of the Franco dictatorship, most Spanish Roma lived in substandard housing, much of it illegal and self-constructed (*chabolas*) in the slum suburbs of cities or towns (Cortés 1995). In the democratic period, numerous actions of relocation (national, regional and local) have radically changed this residential situation, and most of the Roma now live in homes in working-class neighbourhoods of cities and towns, some in areas with high concentrations of Roma and others in more diverse neighbourhoods (Rio 2014). However, due to the economic crisis that began in 2008 and the social policies that have been implemented, many Roma are being evicted and have had to leave their homes because they cannot pay their mortgages. As a result, there has been an increase in substandard housing among the Roma (FSG 2013).

[67] Royal Decree 233/2013, of April 5 2013, which regulates the Plan to promote rental housing, rehabilitation and urban renewal, 2013-2016 (BOE, 10 April 2013).

4 EXCEPTIONS

4.1 Genuine and determining occupational requirements (Article 4)

In Spain, national legislation provides for an exception for genuine and determining occupational requirements.

Law 62/2003 (Article 34.2.2) reproduces the occupational requirement exception of Article 4.1 of the directive, which provides that: 'Differences based on a characteristic related to any of the causes referred to in the previous paragraph [all the grounds of Directives 2000/43 and 2000/78] do not amount to discrimination when, owing to the nature of the specific professional activity concerned or the context in which it is carried out, such a characteristic constitutes an essential and determinant professional requirement, provided that the objective is legitimate and the requirement is proportionate'.

Prior to the transposition of the directives into domestic Spanish law, Article 17.2 of the Workers' Statute stated that 'exclusions, reservations and preferences in respect of unrestricted employment may be established by law'.

Convention 111 of the International Labour Organization, which stipulates that there is no discrimination if distinctions, exclusions or preferences are based on qualifications required for employment, was also applicable. With regard to 'legitimate and proportionate', this expression was not defined in Spanish legislation, but the Constitutional Court has used the concept of 'objective and reasonable justification' in discrimination cases (STC 22/1981).[68]

4.2 Employers with an ethos based on religion or belief (Article 4(2) Directive 2000/78)

– Exception for employers with an ethos based on religion or belief

In Spain, national law provides for an exception for employers with an ethos based on religion or belief.

Law 62/2003 provides for non-discrimination in employment on the grounds of religion or beliefs and amends other laws, such as the Workers' Statute, in this respect, but makes no reference to organisations with an ethos based on religion or beliefs.

For organisations with a specific ethos, Article 6 of the Organic Law on religious freedom states: 'Registered churches, faiths and religious communities shall be fully independent and may lay down their own organisational rules, internal and staff byelaws. Such rules, as well as those governing the institutions they create to accomplish their purposes, may include clauses safeguarding their religious identity and own personality as well as due respect for their beliefs, without prejudice to the rights and freedoms recognised by the Constitution and in particular those of freedom, equality and non-discrimination'.

In the opinion of the author, this provision is in keeping with Article 4.2 of Directive 2000/78. As Puente (2004) points out, the scope of these clauses is the regulation of employment relationships in such institutions. In private organisations with a specific ethos, the exemptions operate in practice at three stages of the employment relationship: the first being access to employment; the second being during the performance of an activity within the organisation; and the third being dismissal as a consequence of that activity. At the first stage, before the signature of the contract, the

[68] See Constitutional Court Decision, 2 July 1981, 22/1981.

general rule is that religious reasons cannot be claimed for preventing anyone from exercising their right to work. Moreover, according to Article 16.2 of the Constitution, nobody may be compelled to make statements regarding his/her religion, belief or ideology, which means that there is a prohibition against asking about the ideology or beliefs of the worker. However, in these organisations, questions about religion and belief, and the requirement that workers accommodate their private lives to the ethos of the enterprise, seem legitimate if the activity to be performed is linked to the ideological orientation pursued by the organisation. This is connected with the situation of religious education teachers in state schools. At the second stage, during the employment relationship, the employees have to show respect for the ideology of the enterprise. This respect for the ideology also includes out-of-work activities, if they affect this ethos. At the third stage, although the general rule says that a discriminatory dismissal is void, in those organisations with a specific ethos it will not be discriminatory if there has been behaviour hostile to that ethos.

– Conflicts between rights of organisations with an ethos based on religion or belief and other rights to non-discrimination

In Spain, there are specific provisions and case law in this area, relating to conflicts between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination.

In recent years, there have been problems recruiting religious education teachers in state schools where the ecclesiastical authorities have learned that the teachers were in a civil marriage with a divorced man or were living with partners without being married and, as a result, refrained from hiring such teachers, or dismissed them. The decision of the Constitutional Court in the case of *Galera v. Ministry of Education and Bishop of Almeria*[69] states that the fact that Ms Galera had entered a contract of civil marriage with a divorced man (which is the only reason given by the Bishop of Almería to justify the decision), 'is unrelated with the educational activity carried out by the applicant therefore does not affect their dogmatic knowledge or teaching skills'.

Conflicts may arise between the rights of organisations with an ethos based on religion or belief and other rights to non-discrimination, and these have been addressed both in the case law of the Constitutional Court and in constitutional doctrine.

According to general constitutional doctrine, since the principle of good faith should govern employment relationships (Article 5a of the Workers' Statue), employees in ideological or ethos-based organisations can be asked to conform to a minimal extent with the organisation's ethos.[70]

Both doctrine and the courts have made it explicit that, even within ideological institutions, one has to distinguish between ideological and neutral employment positions. Only the former are about transmitting the ideology of the institution and thus those in which ideological affinity can be expected.[71] For example, this brings up interesting issues given Catholicism's longstanding rejection of homosexuality. In this respect, especially in relation to private religious schools, the Constitutional Court has considered that, once again, the most relevant factor to be taken into consideration is what the job itself consists of. If it is strictly linked to spreading the school's ethos, constraints will be more justifiable than if the job consists of developing purely technical expertise or is restricted to the pure transmission of knowledge.[72] According to some academic doctrine, this would allow employers in this kind of institution to inquire about

[69] See Constitutional Court Decision, 14 April 2011, 51/2011.
[70] See Constitutional Court Decision, 27 March 1985, 47/1985.
[71] See Constitutional Court Decision, 12 June 1996, 106/1996.
[72] See Constitutional Court Decision, 13 February 1981, 5/1981.

the worker's sexual orientation (Vicente 1998). On the other hand, some scholars have pointed out that it is a worker's conduct and not his sexual preferences *per se* that could be seen as violating the institution's ethos, so that it is only when the conduct is notorious and has the capacity to discredit the institution's ethos that measures can be taken (Fernández 1985).

– Religious institutions affecting employment in state-funded entities

In Spain, religious institutions are permitted to select people (on the basis of their religion), to hire them or to dismiss them from a job when that job is in a state entity, or in an entity financed by the state (Organic Law on education 2/2006, third additional provision). In the author's view, this provision of the OLE is in conformity with the Article 4(2) exception.

On 26 February 1999, the Spanish Ministers of Education and Justice and the chairman of the Conference of Catholic Bishops signed an agreement on the financial and employment arrangements for teachers of religion. As a result, the bishop of each diocese decides on the hiring proposal, activities and non-renewal or dismissal of teachers, and the state hires them, pays their wages and compensates them in the event of dismissal, if appropriate. This situation has given rise to many conflicts in recent years, and various court rulings have been given against the dismissals of religious education teachers. These dismissals have generally resulted from arbitrary decisions of the diocese, and have therefore been declared unfair or void, it having been deemed that teachers have become unsuitable for their work as a result of getting divorced, drinking in bars, belonging to a trade union, etc. The Organic Law on education (OLE) resolves this problem satisfactorily. Its third additional provision, relating to teachers of religion, provides that:

1. 'Teachers of religion must meet the qualification requirements stipulated for the various forms of education regulated by this law, along with those stipulated in the agreements entered into between central government and the various religious denominations.
2. Teachers who are not public education staff and who teach religion in state schools shall be employed, in accordance with the Workers' Statute, by the respective levels of government. Their employment status shall be regulated with the participation of teachers' representatives. They shall be awarded their posts according to objective criteria of equality, merit and ability. These teachers shall receive the emoluments for temporary teachers at the respective level of education. They shall in all events be proposed by religious bodies and automatically re-employed each year. The relevant tiers of government shall determine whether contracts are full time or part time, according to the needs of schools. Their dismissal, where appropriate, shall be pursuant to the law'.

The case of *Fernández Martínez (FM) v. Spain* at the ECtHR[73] reveals some important issues in this field, even though the non-renewal of the contract of FM as a teacher of Catholic religion preceded the adoption of the OLE. The ECtHR held that the reason for the non-renewal of the employment contract of FM was strictly of a religious nature. FM was a married priest and then a secularised priest, and non-renewal of his contract occurred after he appeared in a newspaper expressing support for optional celibacy for priests. For the ECtHR, the fact that FM was 'a secularised priest' made the case different from other court precedents [*Siebenhaar v. Germany* (in 2011), *Schüth v. Germany* (in 2010) and *Obst v. Germany* (in 2010)]. It was also considered that, 'by not renewing the applicant's contract, the ecclesiastical authorities were merely discharging their obligations that stemmed from the principle of religious autonomy'.

[73] Court decision of ECtHR 12 June 2014, case of *Fernández Martínez v. Spain* (Application no. 5603/07).

The decision of the court was taken by nine votes to eight, and the eight judges (among them, a Spanish judge) developed a joint dissenting opinion. For these eight judges, the basis of the non-renewal of the applicant's appointment lay in the publicity given to his situation as a married priest and his membership of the Movement for Optional Celibacy for priests. It may well be that, under canon law, this publicity amounted to a scandal. However, whatever the consequences under canon law, it was for the ministry, and later for the domestic courts, to make sure that the secular reaction to the bishop's decision was adapted to the applicant's situation and in particular that it did not interfere disproportionately with his right to respect for his private and family life. In this connection the judges noted a number of factors of relevance in assessing the proportionality of the measure complained of. Following this analysis, they wrote: 'we [the eight judges] can now say that some of these factors appear to be particularly relevant. First, it was not the applicant's situation as such – which had been tolerated for many years by the Church – but the publicity given to it, that led to the non-renewal of his contract. While such publicity could be problematic for the Church, it is difficult to conceive how it could be so for the State. Second, as far as the applicant's teaching ability was concerned, there is no evidence that he had taught religion in a manner that contradicted the doctrine of the Church, or that the publicity given to his situation had resulted in disapproval by his pupils' parents or by his school. Third, and most importantly, the State's reaction was a drastic one: the applicant was not reappointed and no other measure was taken, with the result that he was in fact dismissed'. The joint dissenting opinion concluded: 'Having regard to all the circumstances of the present case, we find that the reasons put forward by the domestic authorities to justify the non-renewal of the applicant's employment, that is to say, ultimately, certain events relating to his personal and family situation, are not sufficient for it to be established that the interference with his right to respect for his private and family life was proportionate. In our opinion, it has therefore not been demonstrated that the interference was necessary in a democratic society to achieve the legitimate aim pursued, namely to respect the autonomy of the Catholic Church in relation to the authenticity and credibility of education in Catholic religion and ethics. We therefore conclude that there has been a violation of Article 8'.

On 15 February 2007, the Constitutional Court made a judgment on the constitutionality of the agreement between Spain and the Vatican regarding teachers of religion.[74] By virtue of the 1979 Agreement on education and cultural affairs between the Kingdom of Spain and the Vatican (and its development in the second additional provision of Organic Law 1/1990 on the education system, modified by Organic Law 8/2013, on improving the quality of education), teachers of religion in Spanish state schools are hired by means of employment contracts drawn up by the public authorities (regional Governments), but in order to be so employed they require an ecclesiastical declaration of suitability, which is granted by the diocesan bishop according to the Canonical Code and must be proposed by the bishop to the competent public authority. In October 2000, a teacher of religion in the Canary Islands, Ms Galayo, was notified that she would not be given a new contract because she was carrying on a romantic relationship with a man other than her spouse, from whom she had separated. This teacher had been working with an employment contract at various state schools since the academic year 1990/91, on the bishop's proposal. She filed an action for protection of fundamental rights to Social Court No 4 of Las Palmas de Gran Canaria.

The judgment dismissing the action (127/2001) stated that 'if the bishop [withdraws] his proposal of the claimant for the post, deeming that she is living in sin and is unsuitable to teach the Catholic religion, he is acting within the scope of his spiritual ministry and pursuant to the rules of the Agreement with the Vatican, with the value conferred thereon by Article 96 of the Constitution, exercising the discretional power bestowed on

[74] See *Sentencia Tribunal Constitucional* (Constitutional Court Decision), 15 February 2007, 38/2007.

him by Article 3 and other related provisions of that Agreement, and cannot be subjected to judicial review except negatively (…) and unless fundamental rights are infringed, but with the special conditions, distinctions and peculiarities of the sphere of education in the Catholic religion'.

The teacher lodged an appeal with the High Court of the Canary Islands. Before making its decision, the court submitted a request to the Constitutional Court for a ruling on the constitutionality of certain articles of the agreement between Spain and the Vatican.

The Constitutional Court's decision, which does not touch on the specific case of the teacher's dismissal, rules that the agreement between Spain and the Vatican is not unconstitutional. It provides general doctrine on two issues:

1. Regarding bishops' power to assess the conduct of teachers of religion and their 'testimony of Christian life' (as stated in Article 804 of the Canonical Code) before granting an 'ecclesiastical declaration of suitability' and, therefore, proposing the hiring or firing of such teachers, the Constitutional Court stated that 'the religious creed being taught must, therefore, be that defined by each church, community or denomination (…). It follows that the power to judge the suitability of the persons who are to teach their respective creeds rests with these denominations. According to the Constitution, it is permissible for this judgment not to be confined to a strict consideration of the teaching staff's knowledge of dogma or teaching ability, but also to cover aspects of personal behaviour in so far as personal testimony is a defining component of the religious community's creed, to the point of being vital to an aptitude or qualification for teaching, regarded ultimately and above all as a channel and instrument for the transmission of certain values, a transmission in which example and personal testimony are instruments that churches may legitimately regard as essential'.
2. Regarding the right of teachers of religion to effective judicial protection, the Constitutional Court first recalled that, in an earlier judgment (STC 1/1981), it had laid down the exclusive jurisdiction of judges and courts in the civil sphere, and that, in cases such as that of teachers of religion, this judicial protection entails, in the first place, that 'the courts should review whether the administrative decision was taken in accordance with the provisions of the law'; but, further to this review, the competent courts should also consider if the refusal of the diocesan bishop to propose the person was due to religious or moral criteria determining his/her unsuitability to teach religious education, which criteria are to be defined by the religious authorities according to the right of religious freedom and the principle of religious neutrality of the state, or, on the other hand, if the decision was based on grounds other than the fundamental right of religious freedom and was therefore not covered by this right. Moreover, once the strictly 'religious' grounds of the decision have been established, 'the court should weigh up the conflicting fundamental rights so as to determine what impact the right of religious freedom exercised in the teaching of religion in schools may have on the fundamental rights of workers in their employment relationship'.

This judgment, drawn up by the Constitutional Court President, makes no reference to EU Directive 2000/78, as might have been expected.[75]

[75] This was a highly complex judgment that addressed aspects of the right of religious freedom, the principle of the religious neutrality of the state, and effective judicial protection. It was a much-anticipated judgment (as there were 15 other constitutionality issues before the Constitutional Court in very similar cases), and it was highly controversial. It was politically controversial, in that there were favourable statements from the (socialist) Government and the (conservative) Popular Party, and highly critical ones from the United Left party; it was controversial in society (the bishops and Catholic authorities expressed themselves in favour and the trade unions strongly against); and it was legally controversial (with some highly critical statements to the effect that a sphere of religious precedence incompatible with the constitutional state was being permitted, and that teachers of religion could find themselves in a situation of discrimination). The judgment

The Decision of the Constitutional Court 51/2011 (*Galera v. Ministry of Education and Bishop of Almeria*)[76] adds two new aspects with respect to this doctrine: 1) It obliges judges to provide effective judicial protection by finding 'practicable criteria' and the 'proper and required weighting between fundamental rights on conflict' in the case of teachers of the Catholic religion. 2) It provides that the civil marriage of a Catholic teacher 'is unrelated with the educational activity.' Therefore, such a factor cannot be justification for a job layoff.

4.3 Armed forces and other specific occupations (Article 3(4) and Recital 18 Directive 2000/78)

In Spain, national legislation provides for an exception for the armed forces in relation to age discrimination.

The law regulating access to the armed forces (Law 17/1999 of 18 May 1999 on staff regulations for the armed forces) provides (Article 63): 'Entry into military training centres shall be by public competition, [guaranteeing] the constitutional principles of equality, merit and ability (…). Applicants must (among other conditions) (…) be 18 or older, and not have passed the age limits provided in the regulations[77] (…). The tests to be passed in the recruitment systems (…) shall serve to demonstrate the applicants' necessary psychophysical aptitudes'.

In Spain, national legislation does not provide for an explicit exception for the armed forces in relation to disability discrimination.

4.4 Nationality discrimination (Article 3(2))

a) Discrimination on the ground of nationality

In Spain, national law includes exceptions relating to difference of treatment based on nationality. The seventh additional provision of Law 62/2003, entitled 'Non-applicability to immigration law', states that the articles transposing the directives do not affect the regulations provided 'in respect of the entry, stay, work and establishment of aliens in Spain in Organic Law 4/2000'. The apparent justification for this provision is based on Article 3.2 of Directives 2000/43 and 2000/78. However, it should not be forgotten that Law 4/2000 regulates the issues of 'work and establishment' that are liable to be affected by the directives and that are not covered by the exclusion outlined in Article 3.2 of the directives.

Law 17/1999 on staff regulations for the armed forces was amended by Law 32/2002 of 5 July in order to allow foreigners to become professional soldiers. This law provides that: 'Foreigners who are nationals of countries legally identified as having special and traditional historical, cultural and linguistic ties with Spain may become professional soldiers'. No complaints have been lodged against this differentiation between Latin

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will have notable consequences, as the ordinary courts will now have to decide upon many complaints where teachers of religion have been dismissed. The grounds for such dismissals are normally that the teachers are separated or divorced and are living with another partner or have remarried (as in the case of the complainant whose case gave rise to this judgment), or are not believers, or that they have taken part in strikes or are affiliated to a trade union or a left-wing party. In the former cases, the courts are likely to judge, in keeping with this Constitutional Court doctrine, that the dismissals are fair, but in the latter cases the dismissals should be declared void. http://hj.tribunalconstitucional.es/HJ/docs/BOE/BOE-T-2007-5344.pdf.

[76] See *Sentencia Tribunal Constitucional* (Constitutional Court Decision), 14 April 2011, 51/2011.

[77] Royal Decree 1735/2000, of 20 October 2000, adopting the general regulations on entry and promotion in the armed forces (BOE, 21 October 2000), sets a minimum age of 23 for entry into the general forces, but the age limit is different for the various corps and scales in the army, and exceptions are provided for those joining the army from other armed corps such as the Civil Guard (Article 16).

Americans and other foreign nationals. Royal Decree 2266/2004 of 3 December 2004 increased the maximum quota of foreign nationals in the professional army and navy to 7 % of the total.

Royal Decree-Law 8/2004 of 5 November 2004, on allowances for those taking part in international peace and security operations, introduced a differentiation on the grounds of nationality that may be discriminatory. This RDL (Articles 1 and 2) recognises the right of 'Spanish' soldiers taking part in such operations to receive allowances. Although an instruction from the Under-Secretariat of the Ministry of Defence issued on 23 December 2004 recognises the right of foreign soldiers in the Spanish army to receive allowances of the same amount as those established for Spaniards, the RDL may be considered to infringe the principle of equal treatment on the grounds of origin or nationality.

In Spain, nationality (as in citizenship) is mentioned as a protected ground in national anti-discrimination law. The Organic Law on the rights and duties of aliens (OL 4/2000) establishes the principle of non-discrimination (Article 2bis), and covers direct (Article 23.1) and indirect (Article 23.2) discrimination by nationality (as in citizenship), but with definitions that are not similar to those used in Directives 2000/43 and 2000/78. Moreover, the provision on indirect discrimination refers only to alien 'workers', not to 'persons' as in Directive 2000/43. The definition of harassment by nationality is not included. OL 4/2000 establishes sanctions for discrimination on the basis of nationality (Article 54).

b) Relationship between nationality and 'race or ethnic origin'

The Law on the rights and duties of aliens (OL 4/2000) (Article 23.2) treats 'nationality' and 'race or ethnic origin' as equivalent when prohibiting discriminatory acts 'against a foreign citizen merely because of his condition as such or because he belongs to a particular race, religion, ethnic group or nationality.'

In 2009, the UN Human Rights Committee (HRC) published its views, in which it considered that there had been a violation of the International Covenant on Civil and Political Rights by Spain in the case of Rosalind Williams.[78] Mrs Williams, an Afro-American originally from the United States, acquired Spanish nationality in 1969. On 6 December 1992, at Valladolid railway station, a National Police officer asked to see her national identity card. The complainant asked the officer to explain the reasons for the identity check; the officer replied that he was obliged to check the identity of people 'like her', since many of them were illegal immigrants. He added that the National Police were under orders from the Ministry of the Interior to carry out identity checks on 'coloured people' in particular.

Following various complaints and appeals by Mrs Williams, the Spanish Constitutional Court, in a judgment of 29 January 2001,[79] justified the police action because it 'applied the racial criterion merely as indicating a greater likelihood that the person concerned was not Spanish', and because 'what might have been discriminatory would have been the use of a criterion [in this case a racial one] with no relation to the identification of persons for whom the law stipulates this administrative measure, in this case foreign citizens'. On 11 September 2006, Mrs Williams submitted a complaint to the HRC. The HRC declared the claim to be admissible in relation to Articles 2 and 26 of the International Covenant on Civil and Political Rights, but not in relation to Article 12, as the complainant requested, even though the complaint was submitted nearly six years after the proceedings in Spain were exhausted, due to the complainant's difficulties in

[78] UN HRC Communication No. 1493/2009, *Mrs Rosalind Williams Lecraf v. Spain*, 27 July 2009.
[79] See Constitutional Court Decision, 29 January 2001, 13/2001.

getting free legal assistance. There is a dissenting opinion as to the claim's admissibility, deeming that 'late communication' is 'an abuse of the right of submission'.

In the examination of the merits of the case, the committee recalled its jurisprudence that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant, but in this case 'the criteria of reasonableness and objectivity were not met', and the complainant has been offered no satisfaction, such as an apology by way of a remedy.' Accordingly, the HRC was 'of the view that the facts before it show a violation of Article 26, read in conjunction with Article 2, paragraph 3, of the Covenant.'

The committee deemed that Spain: 1) was under an obligation to provide the complainant with an effective remedy, including a public apology; 2) was also under an obligation to take all necessary steps to ensure that its officials did not repeat the kind of acts observed in this case; 3) the HRC 'wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's views'; and 4) requested Spain to publish the Committee's views.

Apart from their significance to the parties, the Human Rights Committee's views are also very significant in that they call into question the doctrine established by the Spanish Constitutional Court in its judgment of 2001, legitimising the use of the racial criterion as a valid indicator of nationality and as reason to assume that a foreigner's presence in Spain is more likely to be irregular. This judgment from the Spanish Constitutional Court had also been strongly criticised by human rights organisations and prominent jurists in Spain.

In March 2011, the Committee on the Elimination of Racial Discrimination (CERD/C/ESP/CO/18-20, para. 10), urged Spain to take effective measures to eradicate the practice of identification checks based on ethnic and racial profiles. Also, the committee recommended that Spain consider the review of those provisions that gave rise to interpretations that could be translated into discriminatory arrests and restrictions of the rights of foreign citizens. There has been no follow-up of this HRC view.

4.5 Work-related family benefits (Recital 22 Directive 2000/78)

a) Benefits for married employees

In Spain, it would not constitute unlawful discrimination in national law if an employer only provided benefits to those employees who are married.

Both the General Social Security Act and the Workers' Statute recognise a number of rights of the spouse and the status of matrimony, in some cases explicitly and in others implicitly. The Social Security Act, for example, recognises *inter alia* the spouse's rights to a survivor's pension (Article 174), to an allowance for burial costs (Article 173), and to compensation in the event of the other spouse's death due to an occupational accident (Article 177).

The Workers' Statute provides for 15 days of marriage leave (Article 37.3.a), up to four days for the serious illness or death of a spouse (Article 37.3.b) and, if both spouses are working for the same company and one is moved to a new location, the other is entitled to a transfer to the same place (Article 40.3), and so on.

Law 13/2005 amended the Civil Code with regard to the right to enter into a contract of matrimony.[80] The amended Article 44 of the Civil Code states that 'Men and women are entitled to contract matrimony pursuant to the provisions of this Code,' and a new paragraph was added providing that that 'both parties' being of the same sex shall neither prevent them from contracting matrimony nor diminish the effects thereof.' A further 16 articles were also amended, with the terms 'men/women' (*hombre/mujer*) being replaced by 'spouses' (*cónyuges*). These articles refer to the rights and duties of spouses, the custody of children, gifts and financial arrangements, etc. An additional provision states generally that 'Legal provisions containing any references to "marriage" shall be deemed applicable regardless of the sex of the spouses.' This amendment of the Civil Code, so simple in form, means that homosexuals are entitled to get married with exactly the same rights (custody of children, adoption, inheritance, etc.) as those enjoyed by heterosexual couples.

In Spain, there is a significant Roma community. Some Roma are married according to their community's own rites. The marriage is solemnised in accordance with Roma customs and cultural traditions and is recognised by that community. Normally, they have the family record book issued to the couple by the Spanish civil registration authorities (*Registro civil*). The Decision of the ECtHR of 8 December 2009 (Case of *Muñoz v. Spain*) highlighted the existence of discrimination against Roma couples in accessing some work-related family benefits, as well as the need for the Spanish Constitutional Court to change its doctrine in this field.

b) Benefits for employees with opposite-sex partners

In Spain, it would constitute unlawful discrimination in national law if an employer only provided benefits to those employees with opposite-sex partners. National law allows an employer to provide benefits that are limited to employees who are married, and this is current practice in some companies. However, it is illegal to limit these benefits to opposite-sex partners or to same-sex partners.

Two specific current questions are connected with registered partnerships and unregistered *de facto* unions. As Rubio-Marín (2004) says, in Spain there is no general statute on civil unions introducing a unified system for registering partnerships. In 1994, a municipality established the first municipal register for couples irrespective of their sexual orientation, and this example was then followed by hundreds of other municipalities and several autonomous communities. Registration is no substitute for marriage. Regional statutes on *de facto* unions attach some legal effects to it, mostly the option for the partners to stipulate their matrimonial property regime. Most collective agreements extending benefits to non-marital partnerships require that the partnership be registered. In spite of registration, the marital status of the partners is not changed, nor are there any consequences regarding the children of the partners. It is interesting to note that, as far as public sector employment in a regional context is concerned, these regional statutes extend to registered partners the same regime of benefits, permits, health and social benefits as that enjoyed by married couples.

The situation is more complicated in the case of unregistered *de facto* unions. Many collective agreements make up for the legislative vacuum regarding the protection of non-married partners by explicitly stating that the privileges granted by the law to married partners should extend to stable or *de facto* unions. Explicit inclusions of same-sex partners are, however, exceptional. It is far more common to refer either to different-sex partners or to *de facto* stable unions without any further specification. Given that employers tend to interpret the clauses in the most restrictive way – excluding same-sex partners – there is growing litigation in this regard. The results have thus far

[80] BOE, 2 July 2005.

been erratic. The National Railway Company (RENFE), for instance, has been sued on various occasions. It finally changed its rules to extend benefits to same-sex partners (see Rojo 2005).

4.6 Health and safety (Article 7(2) Directive 2000/78)

a) Exceptions in relation to disability and health/safety

In Spain, there are exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78).

Law 31/1995 of 8 November 1995, on the prevention of occupational hazards, provides regulations for the protection of workers such as disabled workers, who are at particular risk from certain hazards. Article 25 of the law states: 'Employers shall specially guarantee the protection of workers who, owing to their personal characteristics or known biological condition, including those with a recognised physical, mental or sensorial disability, are especially at risk from the hazards involved in their work. To this end, employers must take these aspects into account in hazard assessments and, pursuant thereto, shall take the necessary preventive and protective measures'. The law further states: 'Workers shall not be employed in posts in which, in view of their personal characteristics or known biological condition, or duly recognised physical, mental or sensorial disability, they may put themselves, other workers or other persons connected to the company in a dangerous situation, or, generally, where they are patently in a temporary condition unsuited to the psychophysical requirements of their respective posts of employment'.

4.7 Exceptions related to discrimination on the ground of age (Article 6 Directive 2000/78)

4.7.1 Direct discrimination

In Spain, national law does not provide an exception for direct discrimination on the ground of age.

Spanish legislation does not permit general direct discrimination on the ground of age, but the legislation permits differences of treatment based on age for some activities within the material scope of Directive 2000/78. These exceptions must be 'objectively and reasonably justified by a legitimate aim' (Directive 2000/78, Article 6). To this effect, each difference of treatment on the ground of age must be expressly stated in a law and must be justified by 'a legitimate aim'.

– Justification of direct discrimination on the ground of age

In Spain, it is possible, in specified circumstances, to justify direct discrimination on the ground of age.

In the field of social security and employment, there are issues that need to be examined from the perspective of possible discrimination on the ground of age. For some social benefits, age is integral to the benefit itself. For others, age is a factor limiting protection and, as such, benefits cannot be granted fully to all citizens. This second case may give rise to discrimination. In any event, sufficient justification is required. The justification cited by the law is normally the difficulty experienced by older workers in re-entering the labour market. In other cases, the justification relates to the different positions of social security contributors, including those performing no paid activity, and benefit recipients, in order to determine differences of treatment through social security (Blázquez, 2005).

a) Permitted differences of treatment based on age

In Spain, national law permits differences of treatment based on age for any activities within the material scope of Directive 2000/78 but, as pointed out above, these exceptions must be 'objectively and reasonably justified by a legitimate aim'.

Some of the differences of treatment based on age are linked to the protection against child labour: children under 18 cannot work at night or work overtime, and they are subject to special regulations regarding weekly rest periods (Workers Statute, Article 6 and 37). Other differences are linked to measures to promote employment: job-training contracts can be agreed with to workers aged between 16 and 25 years (Workers Statute, Article 11); and the Youth Guarantee plan, in the case of persons with disabilities, provides job-training contracts for people under 30 (Law 18/2014, Article 88). Other age differences arise regarding access to some benefits such as unemployment benefit (to which workers over the age of 55, among others, have access in some circumstances) (Law 1/1994 on Social Security, Article 215).

Some differences of treatment based on age have been annulled by the courts. For example, the Supreme Court[81] annulled the age limit contained in Royal Decree 614/1995 for entering the National Police (which was between 18 and 29 years).

b) Occupational pension schemes' fixed ages for admission or entitlements

In Spain, national law allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits, taking up the possibility provided for by article 6(2) of Directive 2000/78.

National legislation (Article 161.2 of the General Social Security Act – RDL 1/1994 of 20 June 1994) allows occupational pension schemes to fix ages for admission to the scheme or entitlement to benefits under it, thus taking up the possibility provided for by Article 6(2).

4.7.2 Special conditions for young people, older workers and persons with caring responsibilities

In Spain, there are special conditions set by law for older and younger workers in order to promote their vocational integration, and for people with caring responsibilities to ensure their protection.

There are many employment policy programmes, detailed in the national employment plans and on occasion funded by the European Social Fund, with participant age limits, normally designed to favour young people under 25 and older workers. For both groups, there are measures to support training and employment in the form of partially subsidised contracts. In the case of young people, the employment measures are work experience contracts, job-training contracts and subsidised contracts of indefinite duration. In the case of older workers, there are subsidised contracts of indefinite duration for people aged 45 to 55 in some cases, and for those aged over 52 in others. There is also a job-seeker's allowance programme for older workers who are at a particular disadvantage in the labour market (see Cachón 2004a).

The unemployment benefit system also makes age distinctions. For example, those aged over 52 who have used up their contributory unemployment benefit are entitled to an unemployment allowance until they reach retirement age, and those aged over 45 with family responsibilities (caring responsibilities) who have used up their contributory unemployment benefit are entitled to a variable allowance depending on certain

[81] See Supreme Court Judgment of 21 March 2011, 629/2009.

circumstances. 'Active job-seeking income' is granted to those aged over 45 who satisfy certain conditions.

4.7.3 Minimum and maximum age requirements

In Spain, there are exceptions permitting minimum and maximum age requirements in relation to access to employment (notably in the public sector) and training.

The Workers' Statute (Article 6) sets the minimum age for access to employment at 16. This is also the minimum age for access to vocational training.

There is no general rule establishing a maximum working age, since the provision of the Workers' Statute in 1980 setting a maximum age of 69 was declared unconstitutional by the Constitutional Court in 1981,[82] and nor is there a maximum age for taking part in vocational training.

The Workers' Statute, which regulates dismissal proceedings, applies equally to all workers without distinction of age.

Retirement at 65 is compulsory in the civil service, but civil servants can request an extension to 70 years (Law 7/2007 of 12 April 2007 and the Civil Service Basic Statute, Article 67). Some public professions, such as judges, prosecutors, bailiffs, notaries or university professors, have special regulations, with compulsory retirement at 70.

A Constitutional Court decision (78/2012)[83] has ruled that it is unconstitutional to give preference to applicants under the age of 65 years for the opportunity to open a new pharmacy. The Basque Parliament Law 11/1994 of 17 June 1994, on pharmaceutical management in the Basque Autonomous Community, provided that authorisation to open a new pharmacy shall be granted to pharmacists aged over 65 years only where there is no applicant below that age. The Constitutional Court delivered a judgment on 16 April 2012 holding that a rule prohibiting people over 65 from opening a new pharmacy is unconstitutional, because it goes against Article 14 of the Spanish Constitution, which prohibits discrimination on grounds of age. According to the judgment, the provision of Law 11/1994 was not justified or proportionate. Firstly, the Constitutional Court ruled that it was not constitutionally permissible to justify the prohibition contained in the provision concerned by the fact that turning 65 produces a decreased capacity to perform pharmaceutical care; secondly, it could not be determined that the measure met planning and service organisation requirements; and, thirdly, it could not be ascertained that refusal of a licence to pharmacists over 65 years of age constituted a positive action measure aimed at balancing the unfavourable position of people starting out in the profession.

The Supreme Court (Judgment of 21 March 2011)[84] declared Article 7.b of the rules for the selection process and training of the National Police (Approved by Royal Decree 614/1995, of 21 April 1995) to be null. This article provided for a lower limit (18 years) and an upper limit (30 years) to be applied to Police selection tests.

[82] See Constitutional Court Decision, 2 July 1981, 22/1981.
[83] See Constitutional Court Decision, 16 April 2012, 78/2012.
[84] See Supreme Court Judgment of 21 March 2011, 2185/2011.

4.7.4 Retirement

a) State pension age

In Spain, there is a state pension age, at which individuals must begin to collect their state pensions, but it can be deferred if an individual wishes to work for longer.

Workers may begin to receive a public pension at the age of 65, provided the other requirements set out by the law (General Social Security Law, Article 161) are met. Since 2013, this age has been increasing gradually each year, and it will continue to do so until it reaches the age of 67 in 2027 (Law 27/2011 of 1 August 2011, on the improvement and modernisation of Social Security, Article 4). This age applies to both contributory and non-contributory pensions, and may be lowered by the Government for those groups or professional activities where the work is of an exceptionally strenuous, toxic, dangerous or unhealthy nature, and where there are high levels of disease or mortality, or in the case of 'disabled persons with a degree of disability equal to or greater than 65 per cent.' Early retirement may be taken from the age of 61, provided that certain requirements specified in the General Social Security Act (Article 161) are met.

The conditions are the same for women and men.

b) Occupational pension schemes

In Spain, there is a normal age (65 or 67, see Law 27/2011) when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements, but payments from such occupational pension schemes can be deferred if an individual wishes to work for longer. The conditions are the same for women and men.

c) State-imposed mandatory retirement ages

In Spain, there are state-imposed mandatory retirement ages for the public sector, but not for the private sector.

The retirement age is voluntary in the private sector. The rule requiring people to retire no later than 69 was declared unconstitutional.[85] Retirement at 65 is compulsory in the civil service, although civil servants can request an extension to 70 (Law 7/2007 of 12 April 2007 and the Civil Service Basic Statute, Article 67). Some public professions, such as judges, prosecutors, notaries, bailiffs or university professors, have special regulations, with compulsory retirement at 70.

The conditions are the same for women and men.

d) Retirement ages imposed by employers

In Spain, national law does not permit employers to set the termination of an employment contract through collective bargaining. After various regulatory changes on this question in recent years, the 10th additional provision of the Workers' Statute states that 'clauses in collective agreements providing for the termination of the employment contract when the worker reaches the normal retirement age specified in the rules of Social Security are deemed null and void, whatever the extent and scope of these terms'.

e) Employment rights applicable to all workers irrespective of age

[85] See Constitutional Court Decision, 2 July 1981, 22/1981.

The laws protecting employment rights apply to all workers, both women and men, irrespective of age.

f) Compliance of national law with CJEU case law

In Spain, national legislation is in line with the CJEU case law on age regarding compulsory retirement. CJEU judgment C-411/05 (Palacios de la Villa, 2007), for example, explicitly accepted that Spanish legislation in this field is in compliance with Directive 2000/78/EC (López 2013).

4.7.5 Redundancy

a) Age and seniority taken into account for redundancy selection

In Spain, national law does not permit age to be taken into account in selecting workers for redundancy (Workers' Statute, Article 4). However, in practice many redundancies in companies affect the youngest employees because they have been in the company for less time, and they can also affect the oldest, because they have access to early retirement schemes.

In Spain, national law permits seniority to be taken into account in selecting workers for redundancy.

b) Age taken into account for redundancy compensation

In Spain, national law provides compensation for redundancy (Workers' Statute, Articles 49-57). Formally, such payments are not influenced by the age of the worker, but in practice they are, because their level is linked to the length of time for which the worker has worked for the company.

The current regulations on this matter are in line with Directive 2000/78. Actual practice in companies may also be said generally to conform to the directive, but in some cases indirect discrimination on the ground of age does occur, and should, where appropriate, be dealt with by the courts.

4.8 Public security, public order, criminal offences, protection of health, protection of the rights and freedoms of others (Article 2(5), Directive 2000/78)

In Spain, national law does not include exceptions that seek to rely on Article 2(5) of the Employment Equality Directive.

4.9 Any other exceptions

In Spain, there are no other exceptions to the prohibition of discrimination (on any ground) provided in national law.

5 POSITIVE ACTION (Article 5 Directive 2000/43, Article 7 Directive 2000/78)

a) Scope for positive action measures

In Spain, positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation is provided for in national law.

The principle of 'positive action' is rooted in the Spanish Constitution: Article 14 formally recognises equality before the law without discrimination on any of the grounds listed in the Constitution, while Article 9.2 requires the public authorities to promote 'the conditions to ensure that the freedom and equality of individuals and of the groups that they form are real and effective'. The positive action required by Article 9.2 should not be regarded only as a 'legitimate exception', but as a guarantee that the principle of equality is to be made effective. In this connection, the Constitutional Court has repeatedly held that affirmative action is not to be seen as discriminatory. Rather, the court has interpreted that actions by the public authorities to remedy the employment disadvantage of certain socially marginalised groups are actually required by a properly understood commitment to equality.

Positive action has been present in labour, educational and other provisions since the passing of the Spanish constitution in 1978 (Cachón 2004a).

In relation to employment, the Workers' Statute (Article 17.2) stipulates that the Parliament may specify 'exclusions, reservations and preference' in employment for certain groups who are at a disadvantage in the labour market. Article 17.3 states that the Government 'may specify measures of reservation, duration or preference in employment'.

In the educational field, the Organic Law on education of 2006 stipulates (Article 80): 'In order to render effective the principle of equality in the exercise of the right to education, the authorities shall develop compensatory actions aimed at persons, groups and territorial regions with unfavourable situations, and provide the necessary economic resources'.

In Law 62/2003, which transposes the directives, there are three articles (30, 35 and 42) that regulate positive action. Article 35 deals with discrimination in employment and in relation to occupation, and provides that, 'with a view to ensuring full equality on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, the principle of equality shall not prevent maintaining or adopting specific measures in favour of certain groups in order to prevent or compensate for disadvantages that they may encounter'. Article 42 provides that 'collective agreements may include measures intended to fight against every form of employment discrimination, to encourage equality of opportunity and to prevent harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

Article 30 of the same law, referring to the various spheres of employment included in Directive 2000/43 on the grounds of racial or ethnic origin, states: 'In order to guarantee full equality irrespective of racial or ethnic origin, the principle of equal treatment shall not prevent the maintenance or adoption of special measures benefiting certain groups, designed to prevent or to offset any disadvantages that they suffer as a result of their racial or ethnic origin'.

In the field of disability, there has been a wide range of positive measures since the implementation, in 1982, of Law 13/1982 on the social integration of persons with disabilities (now replaced by Law RDL 1/2013). The General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013) includes such positive action

measures in Articles 67 and 68. The aim of positive action is to grant the necessary assistance and protection to seriously disabled persons, to provide a quota system and other actions in favour of promoting the integration of disabled persons into employment, and to prohibit discrimination in order to allow the complete personal fulfilment of disabled persons and their total social integration (Article 42 of Law RDL 1/2013). The Constitutional Court[86] has recognised the legality of establishing a quota for disabled persons when selecting employees.

The General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013) provides a series of positive measures to combat the discrimination suffered by disabled persons. The law (Article 2.g) defines positive action measures as: 'those specific measures oriented to prevent or compensate for disadvantages caused by disability and to accelerate or achieve *de facto* equality of persons with disabilities and their full participation in the areas of political, economic, social, educational, and cultural work, in response to different types and degrees of disability'. Article 67 establishes that: '1) The public authorities shall take positive action measures to benefit persons with disabilities where there is likely to be a greater degree of discrimination, including multiple discrimination, or a lesser degree of equal opportunity discrimination, such as for women, for children who require more support for the exercise of autonomy or decision making and who suffer more acute social exclusion, and for disabled persons who usually live in rural areas. 2) Also, as part of the official policy of family protection, public authorities shall take positive action measures with respect to families when one of their members is a person with disabilities'. Article 68 of RDL 1/2013 specifies the content of measures for positive action on the ground of disability; these measures may consist of additional support (economic support, technical support, personal assistance, specialised services, special support and services for communication) or rules, criteria or more favourable practices.

The National Action Plan on Social Inclusion of the Kingdom of Spain 2013-2016 includes special measures to support those who are most vulnerable, which may be regarded as positive action. The 'most vulnerable' groups included in the plan are: A. homeless people; B. Persons with disabilities; C. elderly people; D. people in situations of dependency; E. immigrants, asylum seekers and beneficiaries of international protection; F. women victims of domestic violence; G. the Roma population; H. victims of discrimination on the grounds of racial or ethnic origin, sexual orientation and gender identity; I. people with addiction problems (drugs, alcohol, gambling, etc.); and J. prisoners or former prisoners. The measures cover many spheres of action covered by the public authorities: education, housing, health, training, employment and social services.

b) Main positive action measures in place on national level

Broad social policy measures

1. Positive actions for Roma (racial or ethnic origin): one of the groups given special attention in the National Action Plan is the Roma, but there are no positive measures aimed specifically at them. However, many measures aimed generally at pupils with special needs affect them more significantly than other groups. The following measures concern the Roma school population in particular:

   - Compensatory education
   - Measures for children with special educational needs
   - 'Living together' programmes (discipline programmes)
   - Education in values

[86] See Constitutional Court Decision, 3 October 1994, 269/1994.

- Absenteeism control plan
- Reinforcement, guidance and support plan.

The Roma also have a special Roma development plan (2010-2012) and a National Roma Council. All the measures under these plans have been adopted in recent decades, and have significantly improved the social situation of the Roma in Spain.

2. Sign languages and speech aid systems: Law 27/2007,[87] recognising sign languages and speech aid systems, recognises Spanish Sign Language as the language of those deaf persons in Spain who freely decide to use it, along with the learning, knowledge and use thereof. The law also provides and guarantees support for communication by deaf, hearing-impaired and deaf-blind persons. The law states that the education authorities must provide resources to promote the learning of Spanish Sign Language by deaf, hearing-impaired or deaf-blind pupils who freely opt to learn this language. The law covers the use of sign-language interpreters for deaf, hearing-impaired and deaf-blind persons and the provision of communication aids, where required, in various public and private spheres: 1) publicly provided goods and services (education, training and employment, health, culture, sport and leisure); 2) transport; 3) relations with public administration; 4) political participation; and 5) the media, telecommunications and the information society. The law also establishes a Centre for the Linguistic Standardisation of Spanish Sign Language. The purpose of this body is to investigate, promote and disseminate the language and to supervise its use.

   This law, apparently the first of its kind in Europe, responds to a long-standing demand from Spanish associations representing deaf, hearing-impaired and deaf-blind persons. Its aim is to facilitate access to information and communication by deaf persons, taking into account their heterogeneity and their specific needs.

Quotas

3. Quotas for persons with disabilities: the General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013) lays out different systems for workplace integration for persons with disabilities. One of them is integration into the ordinary work system by a quota system: at least 2 % of the workforces of public and private companies with 50 or more employees must be disabled persons (Article 42). For the public administration, Law 7/2007 of April 12 2007 establishes that 'In offers of public employment a quota will be applied of not less than 7 % of vacancies to be filled by persons with a disability (…) by which 2 % of the staff employed by the state administration will be reached progressively, provided that they pass selection' (Article 59).[88]

Preferential treatment narrowly tailored

4. Preferential treatment for persons with disabilities in employment: the General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013) also establishes two other systems of workplace integration for persons with disabilities: occupations in special employment centres and occupational centres. Special employment centres are for persons with a disability rating of more than 70 %, and have as objectives: a) to provide productive work, producing goods to be sold on the market; b) to assure disabled workers paid work while providing rehabilitation

[87] BOE, 24 October 2007.

[88] Companies have the possibility of avoiding the requirement to reserve quotas for workers with disabilities (performing various actions specifically provided for in Law RDL 1/2013, Article 42) but, if they violate the legal obligation, they can be sanctioned by the Labour Inspectorate with fines of up to EUR 6 250 if they are considered minor offences (RDL 5/2000, on offences and penalties in social matters, Articles 15 and 40).

services and improving their social integration; and c) to integrate the largest possible number of persons with disabilities into a normal work routine. Workers who can be integrated through these centres are those who have a disability equal or superior to 33 %, which means that their capacity to work is limited to the same degree. The objective of the occupational centres is to improve the social and personal integration of persons with disabilities whose capacity remains below the limits that permit integration through the special employment centres.

5. Preferential right to geographical mobility for persons with disabilities: Law 3/2012, of July 6 2012, on urgent measures to reform the labour market, has established some new positive action measures in favour of persons with disabilities. Among them is a preferential right to geographical mobility to protect the health of persons with disabilities: to exercise their right to health protection, workers with disabilities evidencing the need for rehabilitation treatment in another city have a prior right to take another job in the same professional group when the company has another vacancy in their workplaces in a locality where such treatment is more accessible (Article 11). They have also the ability to prioritise staying in jobs in cases of redundancy or in relation to measures of geographical mobility.

6 REMEDIES AND ENFORCEMENT

6.1 Judicial and/or administrative procedures (Article 7 Directive 2000/43, Article 9 Directive 2000/78)

a) Available procedures for enforcing the principle of equal treatment

In Spain, the following procedures exist for enforcing the principle of equal treatment: judicial, administrative and alternative dispute resolution such as mediation.

Judicial procedure

The Spanish Constitution provides (Article 53) that all fundamental rights are protected by the ordinary courts of law. This protection will be made effective, in the first place, by a special preferential and summary procedure that is regulated by the main procedural laws for all types of jurisdiction: civil (Law 1/2000, of 7 January 2000, on Civil Procedure), criminal (Law on criminal procedure of 14 September 1882, modified by Law 33/2002 of 24 October 2002), labour (Law 36/2011, of 10 October 2011, on employment procedure) or administrative (Law 29/1998, of 13 July 1998, on administrative procedure). Moreover, appeals for protection in respect of such rights may be lodged at the Constitutional Court once ordinary proceedings have been exhausted (Organic Law 2/1979, of 3 October 1979, on the Constitutional Court, modified by Organic Law 6/2007, of 24 May 2007). The Law on the rights and freedoms of aliens (OL 4/2000) stipulates that foreigners are entitled to legal aid on the same conditions as Spaniards.

Conflicts regarding either private sector employment or the hired personnel of public entities (who are subject to labour law) are resolved by the social jurisdictional branch, composed of the specialised social and labour only-instance courts (*juzgados de lo social de única instancia)*, the first instance and appeal chambers specialising in social and labour law (*las salas de lo social de los Tribunales de primera y segunda instancia*), the regional high courts (*Tribunales Superiores de Justicia*), the National High Court (*la Audiencia Nacional*) and the social and labour chamber of the Supreme Court (*Sala de lo social del Tribunal Supremo*).

When the conflicts are due to an action by the administration that is subject to administrative and not labour law, the jurisdictional branch that is competent is the administrative jurisdiction (*jurisdicción contencioso-administrativa*), which requires the prior exhaustion of whatever administrative procedures there may be, and which is formed by the first-instance and appellate administrative courts (*juzgados y tribunales contenciosos administrativos, en primera y segunda instancia*), and by the *sala de lo contencioso-administrativo del Tribunal Supremo* (the administrative chamber of the Supreme Court).

The Supreme Court (*Tribunal Supremo),* the highest instance within the ordinary judiciary, is responsible for judging appeals in order to reconcile contradictory decisions by lower courts. Its decisions are binding and thus constitute a source of law.

All the cited judicial procedures are binding, but are subject to possible appeals to higher courts.

Administrative procedure

There are also administrative procedures for civil and social matters. Victims of discrimination may appeal to the ombudsmen, at both national and regional level, when the issue concerns acts by the public administration.

In matters of employment and social security, victims of discrimination may appeal to the Employment Inspectorate (Law 42/1997, of 14 November 1997, on the Inspectorate of Labour and Social Security) and in matters of education to the Education Inspectorate (Organic Law 2/2006 of 3 May 2006, on Education). This applies to both employment and education with regard to both the private and public sectors.

The administrative procedures are binding, but can be appealed to the courts.

Conciliation procedure

There are also conciliation procedures for civil and social matters.

As regards employment, Articles 63 to 68 of Law 36/2011 of 10 October 2011, regulating social jurisdiction, provide a compulsory conciliation procedure, which is to be followed before any judicial appeal is lodged.

The General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013) establishes a voluntary system of arbitration to solve conflicts that may arise in matters of equal opportunities and discrimination (Article 74).

Conciliation procedures are not binding.

b) Barriers and other deterrents faced by litigants seeking redress

There are costs and other barriers that may act as deterrents to litigants seeking redress.

In Spain, it is mandatory in a lawsuit to use a lawyer (who defends the individual claimant or defendant) and a solicitor (who represents them and is responsible for all formal issues in court), which significantly complicates the process. Indeed, court proceedings are often long and complex, although there are projects underway to simplify these procedures. If the litigants win the action, the judge may require the respondent to pay their lawyer's costs.

If the litigants cannot afford a lawyer, they may request a duty lawyer free of charge, as the Spanish Constitution (Article 119) guarantees legal aid for those who 'have insufficient means to litigate.' Legal aid is governed by Law 1/1996, of 10 January 1996, on Free Legal Assistance. However, Royal Decree-Law 3/2013, of 22 February 2013, amending the fees regime for the administration of justice and the legal aid system, amended Law 1/1996 and tightened the income and wealth conditions for entitlement to free legal assistance. In addition, this law raised fees significantly for appeals before the courts, which could pose difficulties in securing adequate access to justice, especially in the case of resources for the higher courts.

The costs of legal aid are assumed mainly by the regional Governments (not by the national Government).

c) Number of discrimination cases brought to justice

In Spain, there are no available statistics on the number of cases related to discrimination that have been brought to justice. This fact was highlighted and denounced by the former European Monitoring Centre on Racism and Xenophobia in 2005. One of ECRI's recommendations in 2011 was to collect and publish those data. On 4 November 2011, the Spanish Government approved the 'Comprehensive strategy against racism, discrimination, xenophobia and related intolerance.' The Ministry of the Interior began to publish data on hate crimes in 2014. These data comprised complaints reported to the police, if resolved by the police. In 2014, 1 285 complaints were made to the police, of which 843 were resolved. When the police have been able to identify those

responsible that does not necessarily mean that the individuals were prosecuted and convicted of a hate crime. The reasons for the complaints were as follows:

Reason for making a complaint	Complaints	Complaints resolved by police	% of complaints resolved
Religion	63	37	59 %
Disability	199	140	70 %
Sexual orientation	513	397	77 %
Racism/Xenophobia	475	248	52 %
Others	34	21	62 %
Total	1 285	843	66 %

Source: Own elaboration from the Ministry of the Interior (2015)

In June 2010, the Council for the Promotion of Equal Treatment (see Section 7) launched the Network of Centres of Assistance for Victims of Racial or Ethnic Discrimination, involving seven NGOs. The council's website features two of its reports on this network relating to the ground of racial or ethnic origin, covering the period from June 2010 to December 2011. According to the reports, in 2010 and 2011 the network centres identified 825 'incidents' that qualified as discriminatory. The reports explained that these incidents had been brought to the network centres either though individual or collective complaints or because the centres had detected a situation they considered to be discriminatory. The most common areas where these incidents were recorded were employment (19 %), housing (17 %) and media and the internet (17 %). In 2011, incidents were resolved by negotiation between the parties (47 %), legal counselling (34 %), mediation (9 %) or complaints (9 %). No information is available on 9 % of cases where complaints were made (and may have come before the courts). In 2012 the network did not operate, because of administrative problems.

Although data have not yet officially been published on the council's website, in 2013 (from 15 March to 31 December) the network assisted with 376 cases: 231 individuals and 145 collective. In 2014 (from 1 January to 31 December), it assisted with 556 cases: 318 individuals and 238 collective.

d) Registration of discrimination cases by national courts

In Spain, discrimination cases are not registered as such by the national courts and, consequently, data are not available (apart from the data held by the Ministry of the Interior and by the council: see previous paragraphs)

6.2 Legal standing and associations (Article 7(2) Directive 2000/43, Article 9(2) Directive 2000/78)

a) Standing to act on behalf of victims of discrimination (representing them)

In Spain, associations, organisations and trade unions are entitled to act on behalf of victims of discrimination.

On racial or ethnic origin, Law 62/2003 (Article 31) provides that 'legal entities legally authorised to defend legitimate collective rights and interests may engage on behalf of the claimant, with his or her approval, in any judicial proceedings in order to make effective the principle of equal treatment based on racial or ethnic origin'. This article means, therefore, the legitimation of legal entities to engage in civil proceedings and in administrative court proceedings, but not in labour proceedings or in pre-judicial administrative matters. This legitimation may be interpreted as widening the provisions

regulating the procedural defence in Law 1/2000,[89] of 7 January 2000, regulating civil procedure (Articles 11 and 11bis) and in Law 29/1998,[90] of 13 June 1998, regulating administrative jurisdiction (Articles 18 and 19). The legitimation (in Law 62/2003) only applies, however, in cases of discrimination on the grounds of racial or ethnic origin and only in fields other than employment.

On Disability, the General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013), which applies to access to and the supply of goods and services (telecommunications and the information society; urbanised public spaces, infrastructure and construction; transport; goods and services to the public; relations with public administrations; the administration of justice; cultural heritage) and to employment, provides, in Article 76, that legal entities that are legally authorised to defend legitimate collective rights and interests may engage on behalf of and in the interests of the person who authorises them to do so in proceedings in order to make effective the principle of equal treatment, defending the individual rights of those persons to whom the effects of this engagement will apply. This engagement does not affect the individual standing of victims of discrimination and may be interpreted with respect to its inclusion in pre-judicial administrative proceedings.

Articles 22 and 64 of RDL 1/2013 provide that the law's provisions regarding the safeguard and effectiveness of the measures contained within it have a supplementary character in respect of the provisions that are contained in other specific laws regarding equal treatment in the field of employment and occupation.

In the field of employment the provisions of the Law on employment litigation remain in force for the defence of victims of discrimination on all the grounds contained in the directives. Article 20 of RDL 2/1995 of 7 April 1995, on employment litigation, in its regulation of representation and procedural defence, stipulates that trade unions may appear in court on behalf of and in the interests of member workers who authorise them to do so in order to defend their individual rights. However, this only applies to trade unions. Workers who are not members of any trade union may be parties to proceedings by themselves or may confer their representation to the solicitor's agent, to a social worker member of a professional organisation or to any person who is fully able to exercise his/her civil rights – or, if they wish, to a solicitor. The assistance of a lawyer is not mandatory during the pre-judicial proceedings (Article 21.1).

Legal entities may also act on behalf of victims of discrimination in criminal proceedings. The Criminal Code of 1995 (modified by Organic Law 1/2015) envisages, under Articles 314, 510, 511 and 512, crimes of discrimination punishable by imprisonment and fines (Articles 314 and 510) or by special disqualification from the exercise of public service, a profession etc. (Articles 511 and 512); Article 510 also punishes hate crimes.

Claims in respect of discrimination are normally processed on behalf of and with the authorisation of the victim by an organisation, such as NGOs working with Roma or immigrants, in cases of discrimination on the grounds of racial or ethnic origin, or by organisations working with other groups that may have been discriminated against on the grounds of disability, sexual orientation, age or religion or beliefs.

Under national law, the terms and conditions that are required in order for associations to engage in proceedings on behalf of claimants are regular ones. That means that there are no special terms and conditions that must be met for associations to engage in these proceedings.

[89] BOE, 8 January 2000.
[90] BOE, 14 June 1998.

In Spanish law, the time period for pursuing proceedings is equivalent to the time limit for submitting legal actions in the different jurisdictions. Therefore, personal actions in civil proceedings must be started within 15 years, unless there is a provision regarding a special time limit (Article 1964, Civil Code). No personal action may be started in civil proceedings once the aforementioned time limit has expired. In proceedings relating to employment and occupations, time limits for legal actions expire within 20 days, one year or three years, depending on the type of action being taken (Articles 59 and 60 of the Worker's Statute). In administrative court proceedings, the appeal in front of the court must be lodged within two months in all cases, except in cases of implicit (agency) action (*silencio administrativo*) (i.e. when the public administration fails to take action) where the term is of six months, or in cases of irregular material intervention by the administration (*vía de hecho*), where the term expires within 10 or 20 days if there has not been a request from the administration. The day on which these terms start depends on the action in question (see Article 46 of Law 29/1998 regulating administrative jurisdiction). In administrative matters, the terms and conditions are provided by specific laws.

In order to acquire legal status, trade unions must, according to Article 4 of Organic Law 11/1985 of 2 August 1985, on regulating trade union freedom, be registered with the corresponding public office. According to Article 35 of the Civil Code, public legal entities of public interest and private legal entities do not need to be registered to be considered as constituted legally or in a valid way. With regard to private legal entities, Chapter II of Organic Law 1/2002 of 22 March 2002, which regulates the rights of associations, contains the conditions that such associations must meet in order to be legally constituted. Associations that have been legally constituted have legal status and have the right to register, but they are not obligated to register in the register of associations.

Law 62/2003 and RDL 1/2013 only provide that legal entities must be legally authorised to defend legitimate collective rights and interests in order to be able to engage in proceedings on behalf of the claimant(s) with his/her/their approval. The proof of the authorisation is in their valid constitution according to OL 1/2002. The legitimate interest relates to the victim on whose behalf the association may engage in any judicial procedure (see question h below regarding class actions to understand the difference between the legitimisation of associations under Law 62/2003 and Law RDL 1/2013 in order to act on behalf of victims of discrimination and the provisions relating to consumers' and users' associations under Article 11 of the Law regulating civil trials).

According to the jurisprudence of the Constitutional Court and the Supreme Court, a legitimate interest may be held by those who find themselves in an individualised legal situation that is different from the legal situation of other citizens with respect to the same matter. 'Legitimate interest' means the capacity of being a party in the proceedings, and it focuses on the existence of a qualified and specific interest which relates to obtaining an advantage or avoiding or eliminating potential harm if the lawsuit filed by the party is upheld by a judgment.[91] Therefore, the upholding of the lawsuit must have legal utility for the claimant.[92] The legitimate interest may be individual or collective, direct or indirect, present or future (if the harm to be avoided or eliminated, and against which the lawsuit has been filed, is imminent), but it must be concrete and true (real). This means that the legitimate interest of a party in the proceedings presupposes that the judgment has had or may have a direct or indirect impact on their legal situation. This impact must be real and not just hypothetical.[93]

[91] Supreme Court Judgment, 4 March 2003, RJ 2003/2733.
[92] Constitutional Court Decisions 60/1982 and 7/2001, among others.
[93] Supreme Court Judgment, 11 February 2003, 873/2003.

Law 62/2003 and Law RDL 1/2013 only say that the entities would need the authorisation of the victims to act on their behalf, but they do not specify the form of the authorisation.

The same happens in Article 20(1) of the Law on employment litigation. It appears that the general regulations for all jurisdictions regarding the authorisation of the solicitor's agent and the solicitor to engage in proceedings on behalf of the victim of discrimination may apply to the authorisation of the entities acting to this end, given that such an entity engages in proceedings through a solicitor member of the association, who will act only with the approval of the claimant (see Articles 24 and 25 of Law 1/2000 regulating civil trials). However, Article 20(2) of the Law on employment litigation provides that, in the lawsuit, the trade union must prove the membership of the worker and must prove that it has communicated to the member worker its intention to open the proceedings. The authorisation of the worker member will then be presumed, except when there is a statement by the worker denying it.

In cases where obtaining formal authorisation is problematic because the victim lacks the capacity to sue, e.g. in the case of minors or persons under guardianship, the general regulations settled in Articles 7 and 8 of Law 1/2000 regulating civil trials may apply in all jurisdictions (Article 16.4 of the Law on employment litigation, Article 18.1 of Law 29/1998 regulating administrative jurisdiction). Article 7 of Law 1/2000, regulating civil trials, provides that natural persons who lack capacity to sue must appear at the trial by means of a representative or with the assistance, authorisation or defence required by law. If nobody represents or assists the natural person in appearing at the trial, the court, by judicial order, will designate a defence lawyer to assume representation and defence until there is another person who can assume representation or assistance (Article 8 of Law 1/2000 regulating civil trials). The authorisation to engage in proceedings on behalf of a victim who lacks capacity to sue will be given by his/her representative or by the person who must assist, authorise or defend him/her in compliance with the law. Only individuals holding a law degree can defend a person in court.

b) Standing to act in support of victims of discrimination

In Spain, associations, organisations and trade unions are not entitled to act 'in support' of victims of discrimination. Article 31 of Law 62/2003 includes the words 'on behalf' ('on behalf of the claimant, with his or her approval'), but not the alternative 'or in support', as stated in Article 7(2) of Directive 2000/43. Neither may associations intervene in support of the claimant in civil cases (Law 1/2000, Articles 11 and 11bis).

c) Actio popularis

In Spain, national law allows associations, organisations and trade unions to act in the public interest on their own behalf, without a specific victim to support or represent (*actio popularis*).

The *actio popularis* under Spanish law is a constitutional – not a fundamental – right that must be developed by a law that may limit it. Under Spanish law, the *actio popularis* is only possible in criminal proceedings. Nevertheless, there are already many voices in this area who defend the thesis of the exercise of the *actio popularis* in administrative court proceedings, and also constitutional jurisprudence, in which this possibility has been recognised. At the moment, outside the criminal law, the *actio popularis* in administrative court matters has only been recognised in the case of the Zoning Act of 20 June 2008. However, for the purpose of this report, we shall concentrate only on the *actio popularis* in criminal law.

The *actio popularis* in criminal proceedings is provided under Article 101 of the Law regulating criminal procedure. The *actio popularis* may only be exercised against public crimes and, under Spanish law, most crimes, including discrimination crimes, are public. The Constitutional Court has stated[94] that not only private but also public legal entities may be considered as citizens in order to interpret the possibility of exercising the *actio popularis*. Legal entities may therefore exercise the popular action in cases in which discrimination/a hate crime (see question above) has been committed.

d) Class action

In Spain, national law does not allow associations, organisations or trade unions to act in the interest of more than one individual victim (*class action*) for claims arising from the same event.

It is not possible for associations to act through a class action in the interest of more than one individual victim of discrimination for claims arising from the same event. Except under the provision in Article 11 of Law 1/2000, regulating civil trials, which allows consumers' and users' associations to take action in the form of a quasi-class action to protect the rights and interests of consumers and users who are members of these associations, as well as to protect the general interests of consumers and users, class actions or other forms of lawsuit similar to them are not allowed in civil proceedings under Spanish law (Carrasco and González 2001).

Although the texts of Article 76 of RDL 1/2013 and Article 31 of Law 62/2003 deal with the defence of legitimate collective rights and interests, and Article 17 of the Law on employment litigation mentions the possibility of trade unions and employers being authorised to defend their own financial and social interests, this should not be misinterpreted as allowing for the possibility of class actions in civil proceedings as, in all these cases, the wording is very different from the provisions of Article 11 of the Law regulating civil trials.

6.3 Burden of proof (Article 8 Directive 2000/43, Article 10 Directive 2000/78)

In Spain, national law requires a shift in the burden of proof from the claimant to the respondent.

The basic law of reference in this field is the Civil Procedure Law (Law 1/2000). This law regulates the burden of proof in court and provides, as a general rule, that the burden of proof is for the claimant (Article 217.2) but set the shift in the burden of proof in certain cases (Articles 217.3, 217.4 and 217.5). The law also establishes that 'the court shall consider the availability and ease of proof corresponding to each of the parties to the dispute' (Article 217.6). The reversal of the burden of proof under Law 1/2000 has been qualified by the court, which has stated that this fails to be a real reversal of the burden of proof, as both parties have obligations. That is, once the claimant proves 'the existence of discrimination-founded indications', it is for the defendant to prove 'the justification of the measures adopted and their proportionality'.[95]

In the field of anti-discrimination law, the most important provisions are contained in law 62/2003 and RDL 1/2013:

- General burden of proof on ground of discrimination by racial or ethnic origin: Law 62/2003, which transposes EU directives 2000/43 and 2000/78 in Spain: 'In those civil and administrative proceedings in which from the facts alleged by the claimant

[94] See Constitutional Court Decision, 26 July 2001, 175/2001.
[95] See, for example, the judgment of the Superior Court of Justice of Galicia of 23 November 2012.

one may conclude the existence of well-founded evidence of discrimination on the ground of racial or ethnic origin, it shall be for the respondent to give an objective and reasonable and sufficiently proven justification of the measures adopted and their proportionality' (Article 32).

- Burden of proof in the field of employment on ground of discrimination by racial or ethnic origin, religion or belief, disability, age or sexual orientation: Law 62/2003 provides that: 'In those civil and administrative proceedings in which from the facts alleged by the claimant one may conclude the existence of well-founded evidence of discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation (in the employment field), it shall be for the respondent to give an objective and reasonable and sufficiently proven justification of the measures adopted and their proportionality' (Article 36).
- General burden of proof on ground of discrimination by disability: the General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013) establishes a shift in the burden of proof when there is evidence of discrimination based on disability: 'In those proceedings in which from the facts alleged by the claimant one may conclude the existence of well-founded evidence of discrimination on the ground of disability, it shall be for the respondent to give an objective and reasonable and sufficiently proven justification of the conduct and the measures adopted and their proportionality' (Article 77).

Law 62/2003 amended the existing labour standard procedure at the time, and the current law on employment litigation procedure (Law 36/2011, of 10 October 2011) also established a shift in the burden of proof. Article 96 of Law 36/2011 states that: 'In those proceedings in which allegations exist, on the part of the claimant, of indications which are founded in discrimination for reason of sex, racial or ethnic origin, religion or beliefs, disability, age or sexual orientation, it shall rest with the respondent to provide sufficient proof of the objective and reasonable justification of the measures taken and of their proportional nature' (Article 40). This article is used increasingly widely in employment cases. For example, it began being applied in cases of sexual harassment and bullying when bullying was related to gender; but it now also applies in cases of bullying in general.

In criminal matters, the rule is one of presumption of innocence. The Spanish Constitution states that all persons have the right to a presumption of innocence (Article 24.2). The Constitutional Court has pointed out that this presumption is 'the cardinal principle of criminal procedure, which implies that any person accused of infringements is presumed innocent until the contrary is proved. This presumption of innocence shall only be removed if an independent court, which is impartial and established by law, declares the person's guilt in proceedings that observe all the guarantees.[96]

There is an important difference in the rules of the burden of proof on different grounds. In the case of discrimination on the grounds of sex, in order for a burden of proof to be produced, the standard requires only that the claimant's claims are based on discriminatory actions based on sex (Article 13 of Law 3/2007 and Article 217.5 of Law 1/2000). However, for all other grounds, anti-discrimination laws require that one may conclude from the facts alleged by the claimant that well-founded evidence of discrimination exists. That is, in cases of discrimination on grounds other than sex, there is a requirement for the claimant to present facts whereas, in the case of discrimination on grounds of sex, it appears from the literality of the rule that the burden of proof should always be applied by the courts. In this field the Spanish legislator has gone beyond the requirement of Article 19.1 of the EU Directive 2006/54, which requires that 'persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts

[96] See Constitutional Court Decision, 29 November 1999, 209/1999.

from which it may be presumed that there has been direct or indirect discrimination' (Article 19.1).

This has led to differences in doctrine. Some authors have noted that Article 13 of Law 3/2007 introduces a 'total, unconditional and automatic' reversal of the burden of proof and an unjustifiable 'fragmentation of anti-discrimination protection' (Castro and Alvarez 2007). However, other authors point out that the claimant should document the facts that could lead to a shift in the burden of proof (Martin 2007; Pérez 2008). This second approach is more reasonable and is in line with the jurisprudence of the Constitutional Court and with EU directives.

The Constitutional Court (CC) has established case law on the burden of proof, which should avoid this potential difference between discrimination based on sex and other grounds of discrimination. According to the CC, in order for a shift in the burden of proof to occur, it is necessary for the claimant to prove 'the existence of an indication that generates a reasonable suspicion, appearance or presumption in favour of such an affirmation; it is necessary on the part of the claimant to produce 'realistic proof' (STC 207/2001).[97] In another judgment, the CC indicates the 'requirement for a principle of burden of proof revealing the existence of a general discriminatory situation or of facts that lead to a strong suspicion of discrimination' (STC 308/2000).[98] The most recent judgment on this matter by the CC (STC 31/2014)[99] recalls its consistent doctrine and does that on a case of sex discrimination. The CC notes that, in order for a reversal of the burden of proof to occur, it 'is not enough simply for the actor to qualify the measure as a discriminatory measure'; it is also necessary 'to establish the existence of evidence that generates reasonable suspicion, an appearance or a presumption in favour of its claim'. Only then, when the latter happens, the defendant assumes 'the burden of proving the existence of sufficient real and serious reasons to qualify the decision as reasonable' (STC 98/2003).[100]

We should briefly recall what the CC stated in STC 144/2006[101] (and repeated in STC 31/2014): 'Any facts that are clearly indicative of the likelihood of injury of a substantive right, and those that have sufficient entity to reasonably open the hypothesis of an infringement of a fundamental right, will have probative aptitude (…). But they must unavoidably exceeded the minimum threshold of that necessary connection, because the claim cannot be based on purely rhetorical arguments or lack of accreditation of core elements for the connection itself with the claim'.

Therefore, it would appear that a literal interpretation of the rules in Spain gives a greater facility for the shift in the burden of proof in sex discrimination (Article 13 of Law 3/2007 and 217.5 of Law 1/2000). However, the Constitutional Court (and the Supreme Court) have established a common doctrine as to the rules that should govern the shift in the burden of proof in cases of discrimination on any grounds, and if there has been a violation of fundamental rights.

6.4 Victimisation (Article 9 Directive 2000/43, Article 11 Directive 2000/78)

In Spain, there are legal measures of protection against victimisation, but only in the field of employment.

Before the transposition was carried out, the Workers' Statute (Article 55.5) declared those dismissals that were related to any of the grounds of discrimination that are

[97] See Constitutional Court Decision, 22 October 2001, 207/2001.
[98] See Constitutional Court Decision, 18 December 2000, 308/2000.
[99] See Constitutional Court Decision, 24 February 2014, 31/2014.
[100] See Constitutional Court Decision, 2 June 2003, 98/2003.
[101] See Constitutional Court Decision, 8 May 2006, 144/2006.

covered by the Constitution or by the legal system, or which entailed the violation of workers' fundamental rights and freedoms, to be invalid.

Law 62/2003 (Article 37) introduced changes to the Workers' Statute and to Law 5/2000 on offences and penalties in social matters. The new version of Article 17.1 of the Workers' Statute stipulates the nullity of administrative regulatory provisions, clauses in collective agreements or contracts, agreements or unilateral decisions of an employer that has discriminated on all the grounds of the directives; and a new paragraph (Article 17.2) has been added. This paragraph states that 'the decisions of an employer that amount to adverse treatment of workers as a reaction to a complaint within the enterprise or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination shall likewise be void of effect.'

Similarly, Law 62/2003 (Article 41) introduced modifications to Law 5/2000 on offences and penalties in social matters. Article 8 of Law 5/2000 contains a list of very serious infractions in the area of employment. With the revision introduced by Law 62/2003, Article 8.12 now covers, in addition to discriminatory decisions, decisions that 'amount to adverse treatment of workers as a reaction to a complaint within the enterprise or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination.'

There are no legal provisions concerning the victimisation of persons other than the claimant, as might be the case for witnesses, but judges should also apply victim protection to them.

There is a reversal of the burden of proof when victimisation is directed towards a trade union representative if the worker claims 'anti-union conduct' by the enterprise (STC 002/2009).[102]

6.5 Sanctions and remedies (Article 15 Directive 2000/43, Article 17 Directive 2000/78)

a) Applicable sanctions in cases of discrimination – in law and in practice

Sanctions have been established only in the field of employment for all the grounds (Directive 2000/78) and for the ground of disability in all fields (RDL 1/2013), but not in the other fields covered by Directive 2000/43 on grounds of racial or ethnic origin, except in criminal law.

The Law on offences and penalties in social matters (Royal Legislative Decree 5/2000 of 4 August 2000) provides financial sanctions for legal, contractual or collective agreement infractions in the field of employment by natural or legal persons, private sector employers and public sector employers when these infractions affect employees in the service of the various tiers of public administration (civil servants are governed by special provisions). The law outlines three categories of infractions: minor, serious and very serious.

Law 62/2003 (Article 41) modified Law 5/2000 so as to better comply with the directives, mostly by making it more evident that discrimination on the grounds specified by the directives, including harassment and victimisation, amounts to a very serious infraction. Article 8.12 was amended to include the following among very serious infringements in the context of employment: 'unilateral decisions of the employer leading to unfavourable direct or indirect discrimination on the ground of age or disability, or unfavourable or

[102] See Constitutional Court Decision, 12 January 2009, 002/2009. There is not a shift in the burden of proof in all types of victimisation cases.

adverse treatment relating to remuneration, working time, training, promotion, and other working conditions, on the grounds of sex, origin, including racial or ethnic origin, marital status, social condition, religion or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, family ties with other employees, or language of the Spanish State, as well as decisions of the employer leading to unfavourable treatment of the workers as a reaction to a complaint within the enterprise or to any legal proceeding aimed at enforcing compliance with the principle of equal treatment and non-discrimination'. The sanction for such infringements is a fine ranging from EUR 6 251 to EUR 187 515, depending on the seriousness of the infringement.

New paragraph 13 was added to Article 8, specifying the following as a very serious infringement in the context of employment relations: 'harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation when it takes place within the scope of management authority, whoever the agent may be, provided that, when the employer is aware of it, the latter does not undertake the necessary measures to prevent such infractions.'

Article 16.2 was amended to include the following among very serious infringements in the context of employment: 'to establish employment conditions, be it through advertisements, broadcasting or in any other way, that amount to unfavourable or adverse discrimination in access to employment on the grounds of sex, origin, including racial or ethnic origin, marital status, social condition, religion or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, family ties with other employees, or language of the Spanish State'.

Law 62/2003 also modified Article 54.2 of the Workers' Statute, adding subparagraph g), which includes the following as gross contractual misconduct by the employee, punishable by disciplinary dismissal: 'harassment of the employer or other employees in the enterprise on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation'.

Moreover, the provisions of Law 62/2003, which reform Article 17 of the Workers' Statute and Article 181 of the Law on employment litigation procedure, stipulate the 'nullity' of those administrative regulatory provisions, clauses in collective agreements or contracts, agreements with or unilateral decisions of the employer that amount to discrimination, adding that, once the nullity of an employer's action has been declared, a judicial decision must provide for the immediate cessation of the damaging behaviour, a return to the situation prior to the violation of the worker's rights, reparation of the consequences ensuing from the action, and compensation for the resultant harm (see section 3.2.3 of this report).

As for sanctions, the Law on offences and penalties in social matters was also amended by Law 62/2003. According to the new law, unilateral decisions made by an employer that involve unfavourable direct or indirect discrimination on the grounds of age or disability, or unfavourable or adverse treatment relating to remuneration, working time, training, promotion, and other working conditions on the grounds of gender, racial or ethnic origin, marital status, social condition, religion or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, family ties with other employees, or language of the Spanish State, as well as decisions of the employer entailing unfavourable treatment of workers as a reaction to a complaint within the enterprise or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination, constitute very serious offences. The sanction for such offences is a fine ranging from EUR 6 251 to EUR 187 515, depending on the seriousness of the offence. Additionally, these sanctions, once they are no longer subject to appeal, are made public.

For each degree of seriousness of an offence – minor, serious and very serious – there is a corresponding range of fines: a minimum range (EUR 6 251 to EUR 25 000); a medium range (EUR 25 001 to EUR 100 005); and a maximum range (EUR 100 006 to EUR 187 515). The level of the fine is set in consideration of the following factors: negligence and intention of the offender; fraud or collusion; failure to abide by previous warnings and requests by the inspectorate; business turnover; the number of workers or beneficiaries concerned; harm caused; and quantity defrauded (Law 5/2000, Article 39). Additionally, these sanctions, once they are no longer subject to appeal, are made public.

Article 75.2 of the General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013) states: 'Any payment or compensation to which the corresponding claim may give rise shall not be limited by a previously established ceiling. Compensation for moral damage shall be payable even where there are no damages of a pecuniary nature and shall be set according to the circumstances of the infringement and the seriousness of the injury'.

Failure to comply with quotas or alternative measures for the promotion of the employment of persons with disabilities is sanctioned with a fine of EUR 620 to EUR 6 250 (RDL 5/2000, on offences and penalties in social matters, Articles 15 and 40). Unlike other labour sanctions, the sanction for breach of the quota for persons with disabilities is not graded, although it can be aggravated by repeated non-compliance.

The Law on employment litigation procedure, amended by Law 62/2003, sets out a special procedure for violations of the fundamental rights and civil liberties that are enshrined in the Constitution. With the amendment introduced by Law 62/2003, this procedure covers the acts of discrimination or harassment that are specified in the directives. If the court judgment rules in favour of the claimant in respect of an act of discrimination or discriminatory harassment, the court will declare that act void, will require the previous state of affairs to be restored and will provide for 'reparation of the consequences of the act, including any appropriate compensation.' That is, the law requires compensation (reparation and monetary damages) for the victims of discriminatory acts, the amount of which is to be set by the court.

Moreover, Article 314 of the Criminal Code is applicable. This provides for 'imprisonment from six months to two years or a fine of 12 to 24 months' (with a daily fee that can range from 2 to 400 euros) for those 'that do not restore a situation of equality in accordance with the law when required to do so or following an administrative penalty, making good any corresponding financial loss' when employers have been convicted for 'serious discrimination in a public or private workplace, against a person for reason of their ideology, religion, beliefs, ethnicity, race or nationality, gender, sexual orientation, family situation, illness or disability, maintenance of legal or workers' union representation, relationship with other company workers, or for use of any official languages of the state of Spain'.

However, beyond the field of employment it is worth noting that the Criminal Code (Article 22) specifies, as a general aggravating circumstance, the commission of any offence 'motivated by racism, anti-Semitism or any other kind of discrimination relating to the victim's ideology, religion or beliefs, the ethnic group, race or nation to which he belongs, his gender or sexual orientation, or any illness or disability from which he suffers'.

The Criminal Code expressly punishes offences against fundamental rights and civil liberties. Article 510 provides prison sentences of one to three years and a daily fine of 6 to 12 months (with a daily fee that can range from 2 to 400 euros) for 'any person inciting discrimination, hatred or violence against groups or associations on racist, anti-Semitic or other grounds relating to ideology, religion or beliefs, family situation, its members' forming part of an ethnic group or race, their national origin, gender or sexual

orientation or any illness or disability from which they suffer' and for any person 'disseminating defamatory information' about groups with these same characteristics. Article 511 provides prison sentences of six months to two years, a daily fine of 12 to 24 months (with a daily fee that can range from 2 to 400 euros) and disqualification from public office or employment for a period of three years for 'any individual responsible for a public service who denies the provision of a service to a person entitled thereto on the grounds of his ideology, religion or beliefs, national origin, gender, sexual orientation or family situation or any illness or disability from which he suffers', or where these acts are committed on the same grounds against an association or the members thereof. (All these articles have been modified by Organic Law 1/2015).

If any of these acts are committed by a public servant, he will moreover be disqualified from public office or employment for a period of two to four years. Article 512 stipulates disqualification from the exercise of a profession, trade, industry or business, for a period of one to four years, for 'those who, in the exercise of their professional or business activity, deny the provision of a service to a person entitled thereto on the grounds of his ideology, religion or beliefs, his forming part of an ethnic group, race or nation, his gender, sexual orientation or family situation or any illness or disability from which he suffers'.

The General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013) establishes a system of sanctions for discrimination on the ground of disability. The law defines as 'administrative offences' any infringements of the rights of persons with disabilities to equal opportunities, non-discrimination and universal access that involve direct or indirect discrimination, harassment or non-compliance with requirements for accessibility and reasonable accommodation, along with non-compliance with legally established positive action measures, especially where there are economic benefits for the offender.

These offences may be 'minor', 'serious' or 'very serious'. Offences are punished with fines ranging from a minimum of EUR 301 to a maximum of EUR 1 million, depending on their seriousness. The criteria taken into account when setting the level of fine are the offender's intention, negligence, fraud, non-compliance with prior warnings, business turnover and the number of people affected. This law complies with the provisions on disability in Article 17 of Directive 2000/78 (Sanctions), and it was drawn up in consultation with NGOs, as required by Article 14 of the directive: the law was negotiated with the Spanish Committee of Representatives of the Disabled (CERMI) and was reported on favourably by the National Disability Council. The autonomous regions were also consulted.

b) Ceiling and amount of compensation

Legislation establishes a maximum amount for the fines (EUR 187 515 in the field of employment and EUR 1 million in the field of disability), but does not establish any ceiling for compensation. RDL 1/2013 expressly states that 'compensation or reparation which may give rise to the corresponding claim shall not be limited by a ceiling set a priori' (Article 75).

There is no information available regarding the average amount of compensation awarded to victims of discrimination.

c) Assessment of the sanctions

National law does comply with the directives. However, there is no information concerning the extent to which the available sanctions have been shown to be effective, proportionate and dissuasive, as is required by the directives. In the author's opinion, the penalties are proportionate but they are not effective, neither are they dissuasive. They

are proportionate because the laws establish a ranking of offences (minor, serious and very serious) and penalties (minimum, medium and high grade), but they are not effective or dissuasive, because many cases of discrimination and violation of the law still occur, although not all of them reach the courts.

7 BODIES FOR THE PROMOTION OF EQUAL TREATMENT (Article 13 Directive 2000/43)

a) Body/bodies designated for the promotion of equal treatment irrespective of racial/ethnic origin according to Article 13 of the Racial Equality Directive.

The Council for the Elimination of Racial or Ethnic Discrimination

Law 62/2003 (Article 33) (as amended by Article 18 of Law 15/2014, of 16 September 2014, on rationalisation of the public sector and other measures of administrative reform)[103] established a Council for the Promotion of Equal Treatment of all Persons without Discrimination on the Grounds of Racial or Ethnic Origin. Since September 2014, it has been called the Council for the Elimination of Racial or Ethnic Discrimination (*Consejo para la eliminacion de la discriminación racial o étnica*). Royal Decree 1262/2007 of 21 September 2007 (modified by Royal Decree 1044/2009 of 29 June 2009) regulates the composition, competencies and regulations of the council (BOE, 3 October 2007).

The council is the only body that corresponds to the requirements of Article 13 of Directive 2000/43 (as is explicitly recognised in Law 15/2014). It was set up on 28 October 2009 and became operational on this date.

In addition to the Council for the Promotion of Equal Treatment of all Persons Without Discrimination on the Grounds of Racial or Ethnic Origin (and the Women's Institute – now the Institute for Women and Equal Opportunities – which was declared as the equality body in matters of gender discrimination), there are two other bodies worth noting:

1) Regarding Roma people, Royal Decree 891/2005[104] set up the National Roma Council (*Consejo Estatal del Pueblo Gitano*) 'as a collegiate participatory and advisory body on general and specific public policy affecting the integral development of the Roma population in Spain' (Article 1). Its overriding purpose is 'to promote participation and cooperation by Roma associations in the development of general policy and the promotion of equal opportunities and treatment for the Roma population' (Article 2). Its functions therefore include 'drawing up opinions and reports on draft legislation and other initiatives related to the council's purposes (…) and that affect the Roma population, and, in particular, the development of regulations on equal opportunities and equal treatment' (Article 3). Of the 40 members forming the council, half are from central Government and the other half are representatives of Roma associations. The council was set up and has been running since 2006. It has no specific budget, as it is an official advisory body. The measures it recommends are to be implemented by other bodies. The council has reported on various Government projects, such as the *Roma Development Plan*, which has been approved every year since 1989.
2) The Forum for the Social Integration of Immigrants (*Foro para la Integración Social de los Inmigrantes*), created by Law 4/2000,[105] is a collegiate consultative, informative and advisory body concerned with the integration of immigrants. It consists of 10 representatives of the public administration, 10 representatives from immigrants' associations and 10 representatives of social support organisations,

[103] BOE, 17 September 2014.
[104] Royal Decree 891/2005 of 27 July 2005 setting up the National Roma Council (BOE, 26 August 2005).
[105] Organic Law 4/2000 of 11 January 2000 on the rights and freedoms of aliens in Spain and their social integration.

including trade unions and employers' organisations with an interest and involvement in the field of immigration.[106]

b) Status of the designated body/bodies – general independence

The Council for the Elimination of Racial or Ethnic Discrimination has the following characteristics:

- It is a collegiate Spanish governmental body.
- The council is attached to the Ministry of Health, Social Services and Equality through the Institute for Women and Equal Opportunities, but is not part of the Ministry's hierarchal structure.
- Its make-up is of a fundamentally governmental nature, as the law states that the council is to be formed by all ministries with responsibilities in the areas referred to by Article 3.1 of Directive 2000/43, with the participation of autonomous regions, local authorities, employers' organisations and trade unions, and other organisations representing interests related to people's racial or ethnic origins. Royal Decree 1262/2007 (modified by Royal Decree 1044/2009) specifies its composition.

Currently, the council consists of a chair and 28 members. The only person who is appointed to the council as such is the chair, who, as specified in Royal Decree 1044/2009, shall be appointed by the Ministry of Health, Social Services and Equality 'from among persons of widely recognised prestige in the field of promoting equal treatment and combating discrimination on the grounds of racial or ethnic origin. He/she shall be appointed for a term of three years' (Article 4).

Of the 28 seats on the council, 14 are members of the public administration and 14 are social partners and stakeholders. They are distributed as follows:

a) Seven members representing central Government, all with the rank of director general, from the following ministries:
   1) Directorate General of the Institute for Women and Equal Opportunities (which is to hold the council's second vice-chair);
   2) Ministry of Justice;
   3) Ministry of the Interior;
   4) Ministry of Education;
   5) Ministry of Employment and Social Security;
   6) Ministry of Health, Social Services and Equality; and
   7) Ministry of Housing (Development).
b) Seven members from other tiers of government: four from the autonomous regions and three from local authorities;
c) Four members from among the social partners: two representing employers' organisations and two representing trade unions;
d) Ten members representing organisations and associations whose activities are linked to the promotion of equal treatment and non-discrimination on grounds of racial or ethnic origin.

These last two groups of members (social partners and stakeholders) elect the person holding the council's first vice-chair.

[106] Royal Decree 3/2006 of 16 January 2006 on the make-up, competences and procedural rules of the Forum for the Social Integration of Immigrants (BOE, 17 January 2006).

The council chair and members' posts are unpaid positions: they receive no remuneration or compensation for the meetings that they take part in. Only travel expenses are paid, for those living outside Madrid.

The council has a secretary's post, which is held by the head of the sub-directorate general for equal treatment and anti-discrimination at the Institute for Women and Equal Opportunities.

Royal Decree 1267/2007 (Article 9) specifies the reasons for cessation of membership of the council. This article does not affect the chair, however. It is necessary to distinguish three positions: 1) chair, 2) representatives of the administration and 3) representatives of organisations.

1. Chair: He/she is the only person appointed as such to the council by the Minister of Health, Social Services and Equality. The royal decree does not establish any causes for the removal of the chair of the council. Therefore, the chair may be freely removed by the minister who appointed him with no requirement for any particular motivation. That is to say, the Government can dismiss the chair of the council if he/she is not in line with its policies, in particular if he/she specifically expresses dissent over the Government's actions.
2. Representatives of the administration can be members of the council, depending on the positions they hold in the public administration with the rank of director general. The directors general are appointed by royal decree by the Council of Ministers on the proposal of the minister of the department. They can be freely removed by the same procedure (Article 18 of Law 6/1997, of April 14 1997, on the Organisation and Functioning of Central Government). This law does not establish any causes for the removal of a director general: they may be freely removed by the Government with no requirement for any particular motivation. That is to say, the Government can dismiss director general members of the council if they are not in line with its policies, in particular if they specifically express dissent over the Government's actions.
3. Representatives of organisations can only be dismissed for the reasons expressly provided for in Article 9 of Royal Decree 1267/2007. They cannot be dismissed on the ground of dissent over the Government's actions.

One person has been working for the council since 31 March 2012. In addition, six civil servants belonging to the Sub-directorate for Equal Treatment and Anti-discrimination of the Ministry of Health, Social Services and Equality regularly provide part-time services to the council (secretariat, coordination of working groups, management outsourcing, technical assistance, preparation of minutes, etc.).

The council cannot be said to have a board or commission, as it is a body in which decisions are taken by a plenary session with the participation of all its members. The council does have a non-executive standing committee, which deals with formalities and prepares the council's plenary sessions. It is made up of the chair, the two vice-chairs and a member from each of the four groups of members.

With this set-up, the council cannot be said to be in line with ECRI general recommendation 2.

The council does not have a code of governance as such, but its formal rules (*Reglamento de funcionamiento*) were adopted on 28 April 2010 and, on 3 December 2013, the council approved a 'multiannual action plan for the period 2013-2015'.

The ombudsman may establish mechanisms for cooperating and collaborating with the council. Under the constitution of the council, the ombudsmen (national or regional, wherever they exist) have not been deprived of their competences. The national

ombudsman acts as the Parliamentary High Commissioner for the defence of the rights contained in Title I of the Constitution, *inter alia*, those of equality and non-discrimination on account of birth, race, sex, religion, opinion or any other condition or personal or social circumstance. The ombudsman monitors the administration's activity and reports to Parliament.

The set-up provided by Law 62/2003 (Article 33) is very similar to that of some existing governmental consultative bodies. However, Law 15/2014 (Article 18) recognises that the council exercises its functions 'with independence'. Therefore, it may be said that the council can be regarded as independent *de jure*, because it is was established as such by a Law (Law 15/2014 amending Law 62/2003).

The council cannot be regarded as independent *de facto*, among other reasons because of the presence of Government representatives among its members: half of its members are formally representatives of the public administration; the seven representing central Government are of director-general rank (and so are appointed by the Council of Ministers); these Government representatives are full members with speaking and voting rights in all areas.

In addition, the council cannot be seen as an independent body in structural terms, for various reasons: it cannot choose its own staff (because the council secretariat is a part of the public administration itself, being a department of the Ministry of Health, Social Services and Equality, and it has no infrastructure of its own.

c) Grounds covered by the designated body/bodies

The council has competences only in relation to the ground of racial or ethnic origin.

d) Competences of the designated body/bodies – and their independent exercise

The functions of the council include the three functions described in Article 13.2 of Directive 2000/43. In accordance with Law 15/2014, the council formally develops its functions 'with independence'. Its functions are defined by Law 62/2003 (Article 33), as modified by Law 15/2014 (Article 18):

1. Providing assistance to victims of direct or indirect discrimination on grounds of racial or ethnic origin in pursuing their complaints.
2. Conducting analyses, and publishing reports, concerning discrimination on grounds of racial or ethnic origin.
3. Promoting measures conducive to equal treatment and the elimination of discrimination on racial or ethnic grounds and, where applicable, making appropriate recommendations and proposals (…).

In addition, in its definition of the council's functions, Royal Decree 1262/2007 assigns others that are not included in the directive. Accordingly, it provides that the council may:

1. Advise and report on indirect anti-discrimination practices in its various spheres of action;
2. Promote informative, awareness-raising and training activities and any others that may be required to promote equal treatment and non-discrimination;
3. Establish information exchange and cooperation relationships with similar international, national, regional or local bodies or institutions; and
4. Establish cooperation and partnership mechanisms with other bodies, entities and high institutions working to defend fundamental rights.

All these functions are of great interest and significantly enrich the council's sphere of action.

De jure, the council has the competence to provide independent assistance to victims, conduct independent surveys, publish independent reports, and issue recommendations on discrimination issues (following the amendments to Article 33 of Law 62/2003 by Article 18 of Law 15/2014), but it is difficult to assess how the council will independently exercise those functions *de facto* given the factors mentioned in previous paragraphs (half of its members are Government representatives, and the staff of the council themselves form part of the public administration).

The possibility of providing independent legal assistance to victims has been addressed via the Network of Centres of Assistance for Victims of Racial or Ethnic Discrimination. Cachón (2009) suggested the possibility of the council entering into agreements with various NGOs working in the human rights field in order to provide independent assistance to victims. Such an arrangement, if suitably managed, might allow the council to provide assistance to victims that, if unconditional, could thereby be described as independent.

In June 2010 the council launched the Network of Centres of Assistance for Victims of Racial or Ethnic Discrimination, involving seven NGOs. These NGOs work independently but follow a formal protocol established by the council, handling cases for possible victims of discrimination on request or dealing with situations that have been identified by the NGOs themselves. There is then a need to assess whether there are any 'clear indications' of direct or indirect discrimination (when it has been found that a person or people have been effectively treated 'differently and worse' because of their racial or ethnic origin). If there are any such indications, the recommendations may be 1) negotiation, 2) mediation, 3) legal support, 4) psychological support, or 5) complaint. The performance of the NGOs is not under scrutiny by the council in matters of substance. The NGOs draw funding from the council for these interventions.

In 2012, the network stopped working. Officials questioned the way in which it secured the contract with NGOs, and a different administrative mechanism is being sought to make it possible to contract NGOs to support victims of discrimination.

However, the Network of Assistance Centres has been working again since 15 March 2013, when a contract of provision of services was signed with the *Fundación Secretariado Gitano* (FSG), which won an open tender from the ministry. To achieve the best service, FSG has outsourced services with six other organisations that specialise in assisting victims of discrimination: ACCEM, the *Cruz Roja Española*, the *Fundación CEPAIM*, the *Movimiento contra la Intolerancia* and the *Movimiento por la Paz y Red Acoge*.

The council has a free helpline for victims (900 203 041), and two websites are available: www.asistenciavictimasdiscriminacion.org and http://www.igualdadynodiscriminacion.org/redOficinas/portada/home.htm.

The council could produce analyses, reports and recommendations with contributions from the various organisations, as occurs with other Government consultative bodies, such as the Forum for the Social Integration of Immigrants (which produces reports and recommendations with no budget or staff, although it makes arrangements so that the experts from the organisations comprising it may work jointly without having to be paid by the forum). However, is difficult to evaluate whether these analyses, reports and measures are in fact developed independently. They may be proposed by NGOs or experts independently, but they must be formally approved by the council (where half of the members are Government representatives).

During the year 2013, the council carried out a survey on 'Perceptions of discrimination on racial or ethnic origin' by potential victims, and produced two reports:

1. 'Annual Report on the state of discrimination on racial or ethnic origin 2013', based on an analysis of secondary sources relating to discrimination on racial or ethnic origin. This report analyses the status and evolution of discrimination on grounds of racial or ethnic origin in Spain in 2013.
2. 'Report on assistance to victims of discrimination on racial or ethnic origin'.

As at the revision date of this report (April 2015), neither the survey nor the reports has been published.

The budget of the council in 2013 and 2014 (current euros):

Items	2013	2014
Service assistance to victims	600 000	600 000
Studies and Reports	98 857	100 000
Personnel	16 925	18 000
Meetings, conferences and courses	4 742	5 000
Total	703 599	705 000

The council is not yet well known by the public, and its possibilities for antidiscrimination action are limited, but the formal recognition of its independence by Law 15/2014 and the launch of the network could improve the understanding of its roles and improve its efficiency.

e) Legal standing of the designated body/bodies

In Spain, the designated body does not have the legal standing to bring discrimination complaints (on behalf of identified victims or otherwise) or to intervene in legal cases concerning discrimination. The council is not entitled to take cases to court independently of a person individually complaining and has no criteria for selecting which powers to deploy on which issues.

f) Quasi-judicial competences

The Council for the Elimination of Racial or Ethnic Discrimination is not a quasi-judicial institution (see the competences and functions under point c.).

g) Registration by the body/bodies of complaints and decisions

The Council for the Elimination of Racial or Ethnic Discrimination does not register the number of complaints and decisions (by ground, field, type of discrimination, etc.).

However, the body does register the number of complaints relating to racial or ethnic origin that have been addressed by the Network of Assistance Centres, which was created by the council in 2010. Between 15 March 2013 and 31 December 2013, the network assisted with 376 cases: 231 individuals and 145 collective. In 2014 (from 1 January to 31 December), it assisted with 556 cases: 318 individuals and 238 collective.

h) Roma and Travellers

The council may conduct formal general investigations into discrimination against the Roma, but this is not necessarily a priority issue. Among the members of the council, there are two Spanish Roma organisations: the *Fundación Secretariado Gitano* and the *Unión Romaní*, which are very active associations in this field.

It is noteworthy that the *Fundación Secretariado Gitano* coordinates the council's Network of Centres of Assistance for Victims of Racial or Ethnic discrimination.

(See also the *National Roma Council* in point 7.a.)

8 IMPLEMENTATION ISSUES

8.1 Dissemination of information, dialogue with NGOs and between social partners

Transposition

The directives were transposed in Spain with no formal social dialogue, either with the social partners or with the numerous well-organised NGOs with a legitimate interest in the fields of the directives; nor was there any dissemination of information about the directives either before, during or after the transposition.

Elsewhere, we described the process as a 'hidden transposition' (Cachón 2004b), because:

- There was no specific law transposing the directives that might have made it possible to disseminate and publicise the work of the Spanish Parliament and Community policy on equal treatment set out in the directives.
- 'Equal treatment' does not appear in the law's title.
- The bill was not tabled as a Government bill, but was left to the initiative of the parliamentary group supporting the Government, which presented the text that the Government had been working on in the form of a large number of amendments to an accompanying law (*Ley de acompañamiento*) in Parliament. This made the overall proposition incomprehensible, except to those familiar with the issue and with legislative processes.
- The bill was not submitted for the consideration of the Council of State (the highest Government advisory body) or of the Economic and Social Council (an advisory body formed by the social partners).
- The bill was not submitted for consultation with the NGOs with a legitimate interest in the field.
- No member of the Government made any statement about it at any time.
- There was no parliamentary debate, because the parliamentary group that tabled the amendments refused to defend them, and thus the Spanish Parliament did not spend a single minute debating the content of the directives, although there were a few brief critical references from opposition groups as to the way in which the process had been conducted.

Law 15/2014 has been an improvement in the transposition of directives. It included the formal recognition of the independence of the Council for the Elimination of Racial or Ethnic Discrimination in the exercise of its functions.

Dissemination

No formal or informal process of dissemination and dialogue with NGOs and social partners took place in 2003, when the transposition of Directive 2000/43 was approved in Spain. In any case, this changed considerably during the legislative terms of 2004 to 2008 and 2008 to 2011.

Spain has undertaken some campaigns to disseminate anti-discrimination rules. It cannot be said that there have been major campaigns to spread awareness of the anti-discrimination rules that have had significant effects. However, there has been a marked improvement in anti-discrimination awareness, especially in areas such as gender, disability and sexual orientation.

In 2005, the support fund for the reception and integration of immigrants established equality and non-discrimination as its governing principles and undertook action in three fields:

- Support for programmes to combat racism and xenophobia;
- Training in equal treatment and non-discrimination for public sector employees and representatives of non-governmental organisations; and
- Transfer of knowledge and best practice.

Moreover, the Directorate General for the Integration of Immigrants has been running various programmes that are co-financed with European funds and that are aimed at creating the necessary instruments to protect and support victims of racial or ethnic discrimination in the context of the Operational Programme to Combat Discrimination (*Programa Operativo de Lucha contra la Discriminación*). Such programmes seek to facilitate access to employment for certain groups that have particular difficulties integrating into the labour market on equal terms.

In February 2007, a strategic plan was adopted for citizenship and integration in 2007-2010 (*Plan Estratégico de Ciudadanía e Integración 2007-2010*), and was renewed for 2011-2014. It was designed to establish strategic guidelines to promote the integration of immigrants in Spain. One of the key points of the plan is equal treatment and combating discrimination. This involves the following five objectives:

1. creating necessary and effective instruments for the protection and support of victims of discrimination on the grounds of racial or ethnic origin;
2. including equal treatment in all public policy;
3. combating discrimination on the grounds of racial or ethnic origin in the framework of the fight against all forms of discrimination;
4. providing suitable instruments for the systematic collection of data on equal treatment and discrimination;
5. involving the public in combating discrimination and promoting equal treatment.

To achieve these aims, the plan is to implement a number of programmes of action, in collaboration with the various levels of government and NGOs, in areas such as the following:

- implementation and strengthening of the Council for the Promotion of Equal Treatment of all Persons Without Discrimination on the Grounds of Racial or Ethnic Origin and support for the setting up of anti-discrimination units in the various tiers of government;
- promotion of the Spanish Observatory against Racism and Xenophobia (to conduct studies and analyses, with the ability to formulate proposals for action in this field);
- an integrated programme of support to victims of discrimination;
- training of specialist staff and public sector employees in combating racial and ethnic discrimination;
- a campaign of awareness-raising and information on equal treatment and non-discrimination;
- the establishment of a data collection system on equal treatment and racist and xenophobic acts;
- the creation of forums for the dissemination of knowledge and exchange of best practice;
- the drawing up of codes of conduct on equal treatment in public services and the promotion of codes of conduct on equal treatment in private companies and services;
- signing various international instruments on human rights and the protection of migrant workers' rights.

The Strategic Plan for Citizenship and Integration 2007-2010 and 2011-2014 is also intended to implement measures to encourage action by NGOs to combat discrimination.

Dialogue with NGOs

The structures in place to encourage dialogue with non-governmental organisations are:

- In the field of disability, the National Disability Council (*Consejo Nacional sobre la Discapacidad*) was established by the General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013). The council has 15 members representing various bodies within national Government, 15 members representing associations of persons with disabilities of various kinds and four expert advisors. Its functions include the issuing of reports, of a mandatory, non-binding nature, on draft regulations affecting equal opportunities, non-discrimination and universal accessibility. It is therefore a body with powers in the field of equal treatment in employment and occupations in line with Directive 2000/78, implementing the provisions of the directive's Articles 13 and 14. Despite this council's major role in relation to disability in Spain, it does not meet the criterion of being an 'independent mechanism' as provided by Article 33 of the UN Convention on the Rights of Persons with Disabilities.
- The Forum for the Social Integration of Immigrants, created by Law 4/2000, is a collegiate, consultative, informative and advisory body in the field of immigrant integration. It consists of 10 representatives of the public administration, 10 representatives of immigrants' associations and 10 representatives of social support organisations, including trade unions and employers' organisations with an interest and involvement in the field of immigration.[107]
- The Advisory Commission on Religious Freedom, created by the Organic Law on religious freedom (OL 7/1980), aims to review, report on and present proposals with respect to issues relating to the enforcement of the law, religious discrimination being one of these issues. Representatives of churches, denominations and religious communities or federations, appointed by the Ministry of Justice, participate in this body.

Social dialogue

Collective agreements between representatives of employers' organisations and trade unions are used to implement the principles of the directives.

On 30 January 2003, representatives of the Spanish Confederation of Employers' Organisations (CEOE), the Spanish Confederation of Small and Medium-Sized Companies (CEPYME) and the trade unions, *Comisiones Obreras* (CCOO) and the *Unión General de Trabajadores* (UGT), signed the Multi-industry Agreement for Collective Bargaining 2003 (ANC 2003). This agreement set out the criteria to serve as guidelines at the various levels of collective bargaining in Spain in 2003, and it was renewed for subsequent years until 2009. Chapter V (entitled 'Criteria relating to employment, internal flexibility, professional qualification and equal treatment in employment') contains sections on 'Equal treatment in employment', as 'The situation in employment and unemployment is uneven. Certain groups of workers have greater difficulty in finding work, either because of socio-cultural factors or prejudices or because of labour market conditions'.

Collective bargaining should help to remedy any inequality through the application of the principle of equal treatment as expressly provided for in employment law, and through the promotion of specific actions aimed at eliminating direct or indirect discrimination. The general clauses on equal treatment in collective agreements are appropriate instruments for helping to combat possible discrimination.

[107] This body is regulated by Royal Decree 3/2006 of 16 January 2006, on the make-up, competences and procedural rules of the Forum for the Social Integration of Immigrants (BOE, 17 January 2006).

General measures may be taken for some groups: in the case of women, through access to employment, vocational diversification and promotion; in the case of young people, though the promotion of stable employment for the young; in the case of immigrants, through the application of the same conditions that apply to other workers; and in the case of disabled workers, by promoting their integration into employment.

Although it will be necessary to pursue collective negotiations in various sectors and companies to see how the ANC is implemented, the inclusion of this anti-discrimination clause in line with Article 11.2 of Directive 2000/43 must be described as positive.

For the period 2012-2014, the social partners have signed the Second Agreement for Employment and Collective Bargaining.[108] Although the agreement is more concise than the previous one in the anti-discrimination field, it includes among the objectives of collective agreements 'compliance with the principle of equal treatment and non-discrimination in employment and working conditions, as well as the promotion of equal opportunities between women and men'. Although the only explicit reference relates to discrimination on the ground of sex, the clause can be applied to other grounds of discrimination.

Roma

The *National Roma Council* has been appointed at a national level specifically to address Roma issues (see section 7 of this report).

The Roma Development Plan, which has been adopted each year from 1989, is a programme of action for social development and for the improvement of the quality of life of Spanish Roma. Its objectives are the following: 1) improve the quality of life of the Roma population and implement the principle of equal opportunities in their access to systems of social protection; 2) encourage their participation in public and community life; (3) promote better coexistence among different social and cultural groups; (4) strengthen Roma associations; and (5) combat discrimination and racism towards the Roma.

The 'National Roma Integration Strategy in Spain 2012-2020' derives from COM(2011)173. The strategy affects four key areas for social inclusion: education, employment, housing and health. In each of these, targets have been set. In addition, the strategy provides complementary lines of action in social action, participation, improving knowledge about the group, women's equality, non-discrimination, promotion of culture and special attention to Roma who have come from other countries.

There is neither an official report on the situation of Roma in Spain in recent years, nor has there been an evaluation of policies to improve their living and working conditions or to combat discrimination affecting them in different areas of social life (work, home, etc.). However, there are two very important aspects that can be noted. First, there has been increasing poverty and unemployment among the Roma during the great recession, due to the implementation of austerity policies in the European Union and Spain during the last four years (FSG, 2013). Second, a significant number of Roma from Romania have arrived in Spain. This group of recent Roma immigrants has settled in Spain under the intra-EU human mobility framework. In general, this recent group of Roma immigrants face worse living and working conditions than Spanish Roma. Although there have not been any social tensions associated with the Roma of Romania in Spain, as has been the case in other EU countries, there have been some cases of discriminatory acts.

[108] BOE, 6 February 2012.

Some of these acts can be classified as 'institutional discrimination' since they were committed by police officers who were found guilty and sentenced for these practices. On 19 April 2010, two Catalan police officers (*Mossos d'Esquadra*) arrested LLS, a Romanian Roma woman, who was with her two-month-old daughter begging at the entrance of a supermarket in Barcelona. LLS showed the police the family book documenting that the baby was her daughter, but the two police officers accused LLS of kicking her daughter several times. LLS was arrested – and released the next day – and was banned from approaching her daughter. The baby was placed under the protection of the General Directorate of Care for Children and Adolescents of the Regional Government (*Generalitat de Catalunya*) and remained separated from his parents for eight months (until 22 December 2010). LLS and her husband initiated proceedings to challenge the placement of her child, denouncing the two officers for document forgery and false accusation. In the judgment, the two policemen accepted the facts. On 10 December 2013,[109] the Provincial Court of Barcelona sentenced the two policemen to two years in prison for the crimes of document forgery, false accusation and denunciation. They must also pay EUR 12 000 to LLS and her husband for the moral damage caused. Although the judgment makes no reference to the discrimination, the fact that LLS was a Romanian, poor and a Roma woman underlay the behaviour of the two policemen convicted of falsely accusing her of kicking her two-month-old baby. The *Fundación Secretariado Gitano* (Roma Secretariat Foundation, the most important NGO working with Roma in Spain) acted as the representative of LLS and her husband in court.

8.2 Compliance (Article 14 Directive 2000/43, Article 16 Directive 2000/78)

a) Mechanisms

Article 17.1 of the Workers' Statute declares the regulation precepts, clauses of collective agreements, individual pacts, and the unilateral decisions of discriminatory employers to be null.

b) Rules contrary to the principle of equality

There are no laws, regulations or rules still in force that are contrary to the principle of equality on the grounds specified in the directives.

[109] Provincial Court of Barcelona, Sentence 1135 of 10 December 2013.

9 COORDINATION AT NATIONAL LEVEL

Although the transposition of European directives is the responsibility of the Ministry of Justice under the coordination of the Ministry of Foreign Affairs, the department that drew up the texts transposing Directives 2000/43 and 2000/78 was the Ministry of Labour and Social Affairs (Directorate General for Labour).

The department responsible for implementing anti-discrimination policies is the Institute for Women and Equal Opportunities, a directorate general of the Ministry of Health, Social Services and Equality. This department has a general duty to monitor the implementation of the two directives (independently of the duties of other ministerial departments in their respective fields). The directorate general is also responsible for developing regulations applicable to the Council for the Elimination of Racial or Ethnic Discrimination.

The department responsible for implementing policies to support the disabled is the General Secretariat for Social Policy, in the Ministry of Health, Social Services and Equality. Most of the anti-discrimination issues covered by this report fall within this department's remit. However, we should note that there are other departments with responsibilities in matters of racial or ethnic discrimination, both in ministries and in other tiers of government, such as the autonomous communities and town councils.

Anti-racism and anti-discrimination National Action Plan

On 12 December 2008, the Council of Ministers adopted a Human Rights Plan. Eight ministries have participated in its drafting, together with NGOs and university institutes specialising in human rights. The plan adapts the Spanish legal system to international commitments concerning human rights, it involves public and private actors in defending them and, through political commitments, it strengthens the means of protecting people's rights. In sum, the plan is an instrument to promote, coordinate and evaluate jointly a series of very diverse actions that are being planned or implemented by the different Government actors, the administration, the legislature and judiciary.

On 4 November 2011, the Spanish Government approved the 'Comprehensive strategy against racism, discrimination, xenophobia and related intolerance'. In addition to drawing together various actions already included under Government plans, the strategy contains some compromises sought by ECRI (but not others). The strategy includes four blocks of activities: 1. analysis, information systems and criminal legal action on racism, racial discrimination, xenophobia and related intolerance; 2. promotion of institutional coordination and cooperation with civil society, 3. prevention and protection for the victims of racism, racial discrimination, xenophobia and related intolerance, and 4. specific areas (including education, employment, health, housing, media, internet, sports, and awareness) (see Cachón 2012).

Anti-racism and anti-discrimination policies are not priorities of the current Spanish Government. That is the main reason why there are no further significant measures in this field.

10 CURRENT BEST PRACTICES

1. Positive actions for Roma (racial or ethnic origin in all fields)

The National Roma Council (*Consejo Estatal del Pueblo Gitano*) is a participatory and advisory body on general and specific public policy affecting the integral development of the Roma population in Spain. Its overriding purpose is to promote participation and cooperation by Roma associations in the development of general policy and the promotion of equal opportunities and treatment for the Roma population. Of the 40 members forming the council, half are from central Government and the other half are representatives of Roma associations. The council has been running since 2006. This council has reported on various Government projects, such as the *Roma Development Plan.*

The Roma Development Plan, which has been adopted each year from 1989, is a programme of action for social development and for the improvement of the quality of life of Spanish Roma. Its objectives are the following: 1) improve the quality of life of the Roma population and implement the principle of equal opportunities in their access to systems of social protection; 2) encourage their participation in public and community life; (3) promote better coexistence among different social and cultural groups; (4) strengthen Roma associations; and (5) combat discrimination and racism towards the Roma (see sections 5.b, 7.a, and 8.1).

2. Sign languages and speech aid systems (positive action measures on the ground of disability)

Law 27/2007 recognising sign languages and speech aid systems recognises Spanish Sign Language as the language of those deaf persons in Spain who freely decide to use it, along with the learning, knowledge and use thereof. It also provides and guarantees support for communication by deaf, hearing-impaired and deaf-blind persons. This law, apparently the first of its kind in Europe, responds to a long-standing demand from Spanish associations representing deaf, hearing-impaired and deaf-blind persons. Its aim is to facilitate access to information and communication by deaf persons, taking into account their heterogeneity and their specific needs (see section 5.a).

3. National Disability Council (disability in all fields)

The National Disability Council (*Consejo Nacional sobre la Discapacidad*) was established by the General Law on the rights of persons with disabilities and their social inclusion (RDL 1/2013). The council has 15 members representing various bodies within national Government, 15 members representing associations of persons with disabilities of various kinds and four expert advisors. Its functions include the issuing of reports, of a mandatory, non-binding nature, on draft regulations affecting equal opportunities, non-discrimination and universal accessibility. The council has played an important role in the formulation of the Spanish legislation on disability (see section 7.a).

4. The Comprehensive Law on the rights of gay and lesbian persons in Catalonia, Spain (sexual orientation)

Law 11/2014, of 10 October 2014, to guarantee the rights of lesbian, gay, bisexual, transgender and intersex people and to eradicate homophobia, biphobia and transphobia, is a Catalan Law that establishes the conditions under which their rights are real and effective; facilitates their participation in all areas of social life; and contributes to overcoming stereotypes that negatively affect the social perception of these persons. The law has been designed as a comprehensive law, inspired by Directive 2000/78 but going beyond this directive. The law has been prepared with significant collaboration and consensus between associations in this field (see section 2.1.1).

11 SENSITIVE OR CONTROVERSIAL ISSUES

11.1 Potential breaches of the directives (if any)

The most important points where national law is in breach of the directives are the following:

- The term 'has been or would be treated' (Directive 2000/43 and Directive 2000/78, Article 2.2.a) is not included in the Spanish definitions of direct discrimination.
- There are two differences in relation to Article 2.2.b of the directives. The first is that the directives refer to a 'provision, criterion or practice', whereas the Spanish law (62/2003) refers to a 'legal or administrative provision, a clause of a collective agreement or contract, an individual agreement or a unilateral decision'. All these situations are referred to as a 'provision', and the words 'criterion or practice' are not included. The second difference is that the directives say 'persons' in the plural, whereas the Spanish transposition says 'person' in the singular.
- Law 62/2003 does not specify how indirect discrimination is to be justified.
- The words 'hostile' and 'degrading' are not included in the Spanish definitions of harassment.
- The seventh additional provision of Law 62/2003, entitled 'Non-applicability to immigration law', states that the articles transposing the directives do not affect the regulations provided 'in respect of the entry, stay, work and establishment of aliens in Spain in Organic Law 4/2000'. The justification for this provision is based on Article 3.2 of Directives 2000/43 and 2000/78. It should not be forgotten, however, that Law 4/2000 regulates the issues of 'work and establishment' that are liable to be affected by the directives and that are not covered by the exclusion outlined in Article 3.2 of the directives.
- Although Section 2 of Chapter III of Title II of Law 62/2003 states that 'the aim of this section is to establish measures to ensure that the principle of equal treatment and non-discrimination on the grounds of racial or ethnic origin is real and effective in education, health, social benefits and services, housing and, in general, the supply of and access to goods and services', neither this section of Law 62/2003 nor any other part of it provides any such measures to make the principle of equal treatment 'real and effective' because they do not establish any system of sanctions.
- The principle of protection against victimisation is transposed, but only in the field of employment.
- Sanctions have been established only in the field of labour (Directive 2000/78), but not in the other fields covered by Directive 2000/43 for discrimination on the grounds of racial or ethnic origin, except in criminal matters. Law 47/2007 on offences and sanctions in the field of equality for persons with disabilities establishes similar sanctions in all fields for discrimination on the ground of disability.

11.2 Other issues of concern

- The directives were transposed into national law with no dialogue either with the social partners or with the NGOs. This led to a formal transposition with shortcomings and difficulties of application in some cases, due to a lack of sanctions (except in the field of employment and on the ground of disability, in which there are sanctions). This legislation based on the directives is not well known or understood by the main players in the legal system. This is one of the main reasons why there have so far been hardly any proceedings in Spain in which these provisions have been applied.
- The effectiveness of the Council for the Elimination of Racial or Ethnic Discrimination is questionable, because it is made up primarily of Government

representatives. This could jeopardise the independence of the council (although this is formally recognised by the law).

- Law RDL 1/2013 (Article 4.2) provides that 'Persons who have been recognised as having a degree of disability equal to or greater than 33 % shall be considered as persons with disabilities'. This state of affairs must be recognised by an official body, and it could be argued that this point is in breach of Directive 2000/78, which makes no such provisions. The courts may in due course have to give a ruling on this matter.
- Given the dispersion of the norms on (shifting) the burden of proof, the differences in their definitions and the jurisprudence of the Constitutional Court, it would be appropriate to merge the definitions into *one legal text*.
- In the last 10 years, notable progress has been made in the fields of disability and sexual orientation, with highly significant legal innovations. However, this notable legal progress has not been accompanied by actual changes in behaviour in society or in discriminatory practices.
- The situation of teachers of religion in state schools. This issue is difficult to resolve because international agreement between the Holy See and Spain signed in 1976, just before approval of the present Spanish Constitution, is still in force.
- In January 2011 the Spanish Government introduced the first version of the Comprehensive Bill for Equal Treatment and Non-discrimination (*Proyecto de Ley integral para la igualdad de trato y la no discriminación*). Following consultations with organisations with a legitimate interest, the bill was delivered to Parliament on 10 June 2011, but the call for early elections for 20 November 2011 suspended parliamentary consideration of the bill. The bill was of great importance and created an equality body, for all grounds and in all fields, which was independent, which could be effective and whose functions were broader than those required by the directives. However, with the electoral victory of the conservative Popular Party and the change of Government, a similar bill will not be approved by the legislature in 2011-2015. Nevertheless, the mere existence of this bill is a good example of three types of problems with Spanish legislation in this field: 1) the dispersion of the rules makes it difficult to visualise a coherent anti-discrimination framework at legislative level; 2) the poor transposition of some aspects of the directives; and 3) the shortcomings of the specialised body. These three factors were overcome with the Comprehensive Bill for Equal Treatment and Non-discrimination. This bill also added some content that went beyond the directives.
- The great recession suffered by Spain since 2008 and the policies that Governments have been implementing to address it has led to a marked change in policy priorities. The struggle for equality, which had a strong momentum between 2005 and 2008, has slowed. There is no longer social dialogue about discrimination, and no real political interest is being taken in these subjects by the conservative Government. Some of the measures being taken through welfare cuts could be characterised as 'indirect discrimination' against immigrants.

12 LATEST DEVELOPMENTS

12.1 Legislative amendments

- Law 15/2014[110] amended Law 62/2003, changed the name of the equality body and recognised its independence with respect to its functions (See section 7 of this report).
- Catalonia has approved the first comprehensive law in Spain on the rights of gay and lesbian persons.[111] This law applies only to the Spanish region of Catalonia. (See section 2.1.1 of this report).

12.2 Case law

Name of court: Provincial Court of Barcelona
Date of decision: 10 December 2013 (Published in 2014)
Reference number: Sentence 1135/2013
Link to webpage: http://www.gitanos.org/upload/37/69/Sentencia_ok.pdf
Brief summary: On 19 April 2010, two Catalan police officers arrested a Romanian Roma woman, who was with her two-month-old daughter begging at the entrance of a supermarket in Barcelona. The two police officers accused the woman of kicking her daughter several times. The baby was placed under the protection of the Regional Government and remained separated from his parents for eight months.

The Provincial Court of Barcelona sentenced the two policemen to two years in prison for the crimes of document forgery, false accusation and denunciation.

Although the judgment makes no reference to discrimination, the fact that the woman was a Romanian, poor and a Roma woman underlay the behaviour of the two policemen convicted of falsely accused her of kicking her two month-old-baby.

Name of court: Criminal Court No. 6 of Barcelona
Date of decision: 13 March 2014
Reference number: Court decision 111/14
Brief summary: On 2011, two transsexual people wanted to enter a nightclub in Barcelona. The security guard responsible for access to the club denied them entry. He told them, 'my boss does not want to mix environments', clearly referring to their sexual identity.

The judgment of the Criminal Court convicted the security guard of the nightclub for 'a crime against fundamental rights and civil liberties in the form of denial of the provision of a service' (Article 512 of Criminal Code). The security guard was also sentenced to a special disqualification for the exercise of the profession of keeper of a nightclub for a period of one year, and had to compensate the two victims by EUR 300 each.

This sentence is very important, because it was the first time when Article 512 of the Criminal Code was applied and a person was convicted in Spain for discrimination on the basis of sexual orientation in the context of access to public services.

Name of court: ECtHR
Date of decision: 12 June 2014
Name of the parties: Fernández Martínez v. Spain
Reference number: Application no. 5603/07

[110] Law 15/2014, of 16 September 2014, on the rationalisation of the public sector and other measures of administrative reform.
[111] Law 11/2014, of 10 October 2014, to guarantee the rights of lesbian, gay, bisexual, transgender and intersex people and to eradicate homophobia, biphobia and transphobia.

Link to webpage: http://hudoc.echr.coe.int/eng?i=001-145068
Brief summary: Fernández Martínez (FM) was a married Catholic priest. From 1991 onwards, he was employed as a teacher of Catholic religion in a state-run secondary school in Murcia. In accordance with the provisions of an agreement of 1979 between Spain and the Holy See, it was the responsibility of the bishop of the diocese to confirm the renewal of an applicant's employment every year, and the Ministry of Education was bound by the bishop's decision. In 1996, the newspaper *La verdad* contained an article about the Movement for Optional Celibacy for priests. The article quoted comments by FM, urging the ecclesiastical authorities to introduce optional celibacy. On 29 September 1997, the Diocese of Cartagena informed the Ministry of Education of its intention not to approve the renewal of FM's contract for the 1997/98 school year. After various legal proceedings, FM lodged an appeal for protection (*recurso de amparo*) with the Constitutional Court. In a 2007 judgment, the court dismissed the appeal. Then, FM lodged an application with the ECtHR (no. 56030/07) against the Kingdom of Spain.

The Grand Chamber of the ECtHR's decision of 12 June 2014 found Article 8 of the ECHR to be applicable, as the non-renewal of the applicant's contract, on account of events mainly relating to personal choices he had made in the context of his private life, had seriously affected his chances of carrying on his specific professional activity. The court noted that, to justify his decision, the bishop had relied in particular on the notion of a 'scandal' following the publication in a newspaper of the article about the Movement for Optional Celibacy for priests. Even though the notion of scandal was not expressly provided for in the part of the Code of Canon Law concerning religious education teachers, the court said that it could be considered to refer to notions that were themselves in the canons, such as 'true doctrine', 'witness of Christian life' or 'religious or moral considerations'. On the basis of the clear wording of the agreement between Spain and the Holy See, FM could have reasonably foreseen that, in the absence of a certificate of suitability from the church, his contract would not be renewed. The court found that the non-renewal of his contract was thus in accordance with Spanish law.

Respect for the autonomy of religious communities recognised by the state implied, in particular, that the state should accept the right of such communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them that might pose a threat to their cohesion, image or unity. It was therefore not the task of the national authorities to act as the arbiter between religious communities and the various dissident factions that existed or might emerge within them. The court reiterated that but, for very exceptional cases, the right to freedom of religion as guaranteed under the convention excluded any discretion on the part of the state to determine whether religious beliefs or the means used to express such beliefs were legitimate. Moreover, the principle of religious autonomy prevented the state from obliging a religious community to admit or exclude an individual or to entrust someone with a particular religious duty. As a consequence of their autonomy, religious communities were entitled to demand a certain degree of loyalty from those working for them or representing them. The court said that FM had knowingly and voluntarily accepted a special duty of loyalty towards the Catholic Church, which limited the scope of his right to respect for his private and family life to a certain degree. Such contractual limitations were permissible under the convention, where they were freely accepted. In choosing to accept a publication about his family circumstances and his association with a protest-oriented meeting, FM had severed the bond of trust that was necessary for the fulfilment of his professional duties.

The court concluded, by nine votes to eight, that there had been no violation of Article 8, because the interference with the applicant's right to respect for his private life had been legitimate and proportionate.

Eight of the judges dissented (among them, the Spanish judge) and they produced a joint dissenting opinion. For these eight judges, the basis of the non-renewal of the

applicant's appointment lay in the publicity given to his situation as a married priest and in his membership of the Movement for Optional Celibacy for priests. It may well be that, under canon law, this publicity amounted to a 'scandal'. However, whatever the consequences under canon law, it was for the ministry, and later for the domestic courts, to make sure that the secular reaction to the bishop's decision was adapted to the applicant's situation and, in particular, that it did not interfere disproportionately with his right to respect for his private and family life. In this connection, the judges noted a number of factors of relevance in assessing the proportionality of the measure complained of. Following this analysis, they wrote: 'we [the eight judges] can now say that some of these factors appear to be particularly relevant. First, it was not the applicant's situation as such – which had been tolerated for many years by the Church – but the publicity given to it, that led to the non-renewal of his contract. While such publicity could be problematic for the Church, it is difficult to conceive how it could be so for the State. Second, as far as the applicant's teaching ability was concerned, there is no evidence that he had taught religion in a manner that contradicted the doctrine of the Church, or that the publicity given to his situation had resulted in disapproval by his pupils' parents or by his school. Third, and most importantly, the State's reaction was a drastic one: the applicant was not reappointed and no other measure was taken, with the result that he was in fact dismissed'.

The joint dissenting opinion concluded: 'Having regard to all the circumstances of the present case, we find that the reasons put forward by the domestic authorities to justify the non-renewal of the applicant's employment, that is to say, ultimately, certain events relating to his personal and family situation, are not sufficient for it to be established that the interference with his right to respect for his private and family life was proportionate. In our opinion, it has therefore not been demonstrated that the interference was necessary in a democratic society to achieve the legitimate aim pursued, namely to respect the autonomy of the Catholic Church in relation to the authenticity and credibility of education in Catholic religion and ethics. We therefore conclude that there has been a violation of Article 8.'

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ANNEX 1: TABLE OF KEY NATIONAL ANTI-DISCRIMINATION LEGISLATION

Please list below the **main transposition and anti-discrimination legislation** at both federal and federated/provincial level.

Country: Spain
Date: 1 January 2015

Title of legislation (including amending legislation)	Title of the law: *Constitución Española (*Spanish Constitution) Abbreviation: SC Date of adoption: 27.12.1978 Latest amendments: 27.09.2011 Entry into force: 30.12.1978 Web link: http://www.boe.es/boe/dias/1978/12/29/pdfs/A29313-29424.pdf Grounds covered: Race, sex, religion, opinion and "other personal or social condition or circumstance"
	Constitution
	Material scope: All
	Principal content: Principle of equality and non-discrimination, and positive action
Title of legislation (including amending legislation)	Title of the law: *Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y de orden social* (Law 62/2003, of 30 December 2003, on fiscal, administrative and social measures) Abbreviation: LFASM Date of adoption: 30.12.2003 Entry into force: 1.1.2004 Latest amendments: 16.09.2014 Web link: http://www.boe.es/boe/dias/2003/12/31/pdfs/A46874-46992.pdf Grounds covered: Racial or ethnic origin, religion or beliefs, disability, age, sexual orientation
	Administrative law
	Material scope: All
	Principal content: Directives 2000/43 and 2000/78 are transposed in Title II, Chapter III, Art. 27, al 45. Creates a specialised body dealing with racial or ethnic discrimination.
Title of legislation (including amending legislation)	Title of the law: *Real Decreto Legislativo 1/1995, 24 marzo, Estatuto de los Trabajadores* (Royal Legal Decree 1/1995, 24 March, Workers' Statute) Abbreviation: LWE Date of adoption: 24.3.1995 Entry into force: 1.5.1995 Latest amendments: 17/10/2014 Web link: http://www.boe.es/buscar/pdf/1995/BOE-A-1995-7730-consolidado.pdf Grounds covered: Gender, racial or ethnic origin, religion or beliefs, disability, age, sexual orientation
	Administrative law
	Material scope: Employment and occupation
	Principal content: All rights and duties relating to labour, employment and occupation
Title of legislation (including amending legislation)	Title of the law: *Ley 36/2011, de 10 de octubre, reguladora de la jurisdicción social (*Law 36/2011, of 10 October, regulating the social jurisdiction) Abbreviation: LRSJ Date of adoption: 10.10.2011

	Latest amendments: 28.1.2014 Entry into force: 21.12.2011 Web link: http://www.boe.es/buscar/pdf/2011/BOE-A-2011-15936-consolidado.pdf Grounds covered: Gender, racial or ethnic origin, religion or beliefs, disability, age, sexual orientation
	Administrative law
	Material scope: Employment and occupation
	Principal content: Formal procedures relating to labour, employment and occupation
Title of legislation (including amending legislation)	Title of the law: *Real Decreto Legislativo 5/2000, 4 agosto, Ley sobre Infracciones y Sanciones en el Orden Social* (Royal Legal Decree 5/2000, 4 August, Law on offences and penalties in social matters) Abbreviation: LOPSM Date of adoption: 4.8.2000 Latest amendments: 23.3.2015 Entry into force: 1.1.2001 Web link: http://www.boe.es/buscar/pdf/2000/BOE-A-2000-15060-consolidado.pdf Grounds covered: Gender, racial or ethnic origin, religion or beliefs, disability, age, sexual orientation
	Administrative law
	Material scope: Employment and occupation
	Principal content: Infractions and sanctions on the social order labour, employment and occupation
Title of legislation (including amending legislation)	Title of the law: Ley Orgánica 7/1980, 5 julio, de Libertad Religiosa (Organic Law 7/1980, 5 July, on Religious Freedom) Abbreviation: OLRF Date of adoption: 5.7.1980 Latest amendments: No amendments Entry into force: 13.8.1980 Web link: http://www.boe.es/buscar/pdf/1980/BOE-A-1980-15955-consolidado.pdf Grounds covered: Religion
	Administrative law
	Material scope: Religious freedom
	Principal content: Religious freedom
Title of legislation (including amending legislation)	Title of the law: *RDL 1/2013, 29 Noviembre, Ley General de derechos de las personas con discapacidad y de su inclusión social* (RDL 1/2013, 29 November, General Law on the Rights of Persons with Disabilities and their Social Inclusion) Abbreviation: GLRPDSI Date of adoption: 29.11.2013 Latest amendments: No amendments Entry into force: 4.12.2013 Web link: http://www.boe.es/boe/dias/2013/12/03/pdfs/BOE-A-2013-12632.pdf Grounds covered: Disability
	Administrative law
	Material scope: Equal opportunities, non-discrimination, and universal access for persons with disability in all fields
	Principal content: Disabled equal opportunities; Improvement of working and living conditions; Infractions and sanctions in the field of equal opportunities for the disabled
Title of legislation	Title of the law: *Ley Orgánica 4/2000, 11 enero, sobre derechos y libertades de los extranjeros en España y su integración social* (Organic

(including amending legislation)	Law 4/2000, 11 January, on the rights and liberties of aliens in Spain and their social integration) Abbreviation: OLRLA Date of adoption: 11.1.2000 Latest amendments: 31.3.2015 Entry into force: 1.2.2000 Web link: http://www.boe.es/buscar/pdf/2000/BOE-A-2000-544-consolidado.pdf Grounds covered: Nationality
	Administrative law
	Material scope: Administrative situation of aliens
	Principal content: Direct and indirect discrimination; the entire administrative situation of aliens
Title of legislation (including amending legislation)	Title of the law: *Ley Orgánica 10/1995, 23 noviembre, del Código Penal* (Organic Law 10/1995, 23 November, Criminal Code) Abbreviation: OLCC Date of adoption: 23.11.1995 Latest amendments: 30.3.2015 Entry into force: 24.5.1996 Web link: http://www.boe.es/buscar/pdf/1995/BOE-A-1995-25444-consolidado.pdf Grounds covered: Gender, racial or ethnic origin, religion or beliefs, disability, age, sexual orientation
	Criminal law
	Material scope: All criminal matters
	Principal content: Crimes against the rights of workers; all aspects of discrimination

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Country: **Spain**
Date: 1 January 2015

Instrument	Date of signature	Date of ratification	Derogations/ reservations relevant to equality and non-discrimination	Right of individual petition accepted?	Can this instrument be directly relied upon in domestic courts by individuals?
European Convention on Human Rights (ECHR)	24.11.1977	4.10.1979	Reservation with regards to Arts. 5 and 6 relating to the disciplinary regime of the armed forces	Yes	Yes
Protocol 12, ECHR	4.10.2005	13.2.2008	None	--	--
Revised European Social Charter	23.10.2000	Not ratified	--	System Co. Complaints Non signed	--
International Covenant on Civil and Political Rights	28.9.1976	27.4.1977	None	Yes	Yes
Framework Convention for the Protection of National Minorities	1.2.1995	1.9.1995	None	Yes	Yes
International Covenant on Economic, Social and Cultural Rights	28.9.1976	27.4.1977	None	No	Yes
Convention on the Elimination of All Forms of Racial Discrimination	13.9.1968	13.9.1968	None	Yes	Yes
Convention on the Elimination of Discrimina-tion Against Women	17.7.1980	5.1.1984	None	Yes	Yes
ILO Convention No. 111 on Discrimination	6.11.1967	6.11.1967	None	No	Yes
Convention on the Rights of the Child	26.1.1990	6.12.1990	None	Yes	Yes
Convention on the Rights of Persons with Disabilities	30.3.2007	3.12.2007	None	Yes	Yes

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