REPORT ON MEASURES TO COMBAT DISCRIMINATION
Directives 2000/43/EC and 2000/78/EC

COUNTRY REPORT 2013

SPAIN

Lorenzo Cachón

State of affairs up to 1st January 2014

This report has been drafted for the **European Network of Legal Experts in the Non-discrimination Field** (on the grounds of Race or Ethnic Origin, Age, Disability, Religion or Belief and Sexual Orientation), established and managed by:

Human European Consultancy
Maliestraat 7
3581 SH Utrecht
Netherlands
Tel +31 30 634 14 22
Fax +31 30 635 21 39
office@humanconsultancy.com
www.humanconsultancy.com

Migration Policy Group
Rue Belliard 205, Box 1
1040 Brussels
Belgium
Tel +32 2 230 5930
Fax +32 2 280 0925
info@migpolgroup.com
www.migpolgroup.com

All reports are available on the website of the European network of legal experts in the non-discrimination field:
http://www.non-discrimination.net/law/national-legislation/country-reports-measures-combat-discrimination.

This report has been drafted as part of a study into measures to combat discrimination in the EU Member States, funded by the European Community Programme for Employment and Social Solidarity – PROGRESS (2007-2013). The views expressed in this report do not necessarily reflect the views or the official position of the European Commission.

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INTRODUCTION

0.1 The national legal system

Explain briefly the key aspects of the national legal system that are essential to understanding the legal framework on discrimination. For example, in federal systems, it would be necessary to outline how legal competence for anti-discrimination law is distributed among different levels of government.

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.

Conflicts of power between central government and the autonomous communities are resolved by the Constitutional Court (SC, Article 161).

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.

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, as is the case for conventions of the United Nations, the International Labour Organisation (ILO) and the European Council. The Universal Declaration of Human Rights is mentioned in Article 10.2 of the SC as a source for interpreting provisions relating to fundamental rights. The International Convention on the Elimination of All Forms of Racial Discrimination was ratified by Spain in 1969; the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights in 1977; the Convention on the Elimination of All Forms of Discrimination against Women in 1980; and the Convention on the Rights of Persons with Disabilities and its Optional Protocol in 2007. Also in relation to the social sphere, there is ILO Convention 97 on Migration for Employment, which was ratified in 1967, and ILO Convention 111 on Discrimination (Employment and Occupation), ratified in 1967. Within the framework of the Council of Europe, Spain ratified the Convention for the Protection of Human Rights and Fundamental Freedoms in 1979, and Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms in January 2008. Spain has also signed up to the European Social Charter, which was ratified in 1980, and the Convention on the Legal Status of Migrant Workers, ratified in 1980.

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.

The relationship between the State and the Catholic Church is defined by four international treaties of 1979 between Spain and the Holy See, which cover economic, religious educational, military and judicial matters. Jews, Muslims and Protestants have been recognised by the government as having an influence in Spanish society and have therefore acquired official status through bilateral agreements, which were signed in 1992. Other religions are under the protection of freedom of religion and the Constitution specifies in Article 16 that the public authorities will maintain cooperative relationships with them, although these religions do not have any special agreements with the State.

Directives 2000/43 and 2000/78 were jointly transposed in Law 62/2003 of 30 December on fiscal, administrative and social measures (*Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y de orden social*) published on 31 December 2003 in the *Spanish Official Journal* (BOE) in Chapter III (*Medidas para la aplicación de la igualdad de trato* – Measures for the application of equal treatment) of Title II (*De lo social* – Social Matters) (Articles 27 to 43 of the law). This law, and therefore the transposition of both directives, came into force on 1 January 2004.

The directives were transposed under the former centre-right government with no debate in society at large. There was no formal dialogue with industry or with NGOs, as suggested by the directives, and no political or parliamentary debate. Moreover, the transposition was effected in a law known in parliamentary terms as an accompanying law (*Ley de acompañamiento)*, in which over 50 existing laws were amended. This use of accompanying laws to amend many other laws has been repeatedly criticised, for example, by the Spanish Economic and Social Council (ESC), which has to report urgently on the bills for accompanying laws. In its report adopted on 7 October 2003, the ESC points to:

> *a deterioration of legal guarantees as a result of the use of a law regulating a profusion of disparate matters and that is not easily accessible to or comprehensible by the citizens affected by it.*

and remarks that the bill:

> *is not confined to matters directly related to the implementation of the Finance Bill and is used on occasion to introduce legal amendments of a significance*

greater than that pertaining to a bill supplementing the Finance Bill.[1]

Chapter III of Law 62/2003, by which both directives are transposed, 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 given in the two directives.
- The second section (Articles 29-33) transposes various aspects of Directive 2000/43 on equal treatment irrespective of racial or ethnic origin. The scope of the provisions is defined in accordance with Article 3 of the directive, except as regards employment and training. They include the possibility of adopting positive action measures for certain groups in order to compensate for disadvantages linked to racial or ethnic origin, the entitlement of legal entities to engage in proceedings concerning matters of racial or ethnic origin, and the inversion of the burden of proof.
  The section also establishes a Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin (*Consejo para la promoción de la igualdad de trato y la no discriminación de las personas por el origen racial o étnico).*
- The third section (Articles 34-43) includes measures on equal treatment and non-discrimination at work. It transposes fully the provisions on employment and training in Directive 2000/43 and Directive 2000/78. It first specifies the possibility of adopting positive action measures for certain groups in order to compensate for disadvantages experienced at work for the various reasons specified in the two directives, and introduces the inversion of the burden of proof. Then, in Articles 37-41, it amends various labour laws so as to adapt them to the directives: the Workers' Statute Act (*Estatuto de los Trabajadores*); a law on the social integration of the disabled *(Ley de Integración Social de los Minusválidos*); a law on the employment litigation procedure *(Ley de Procedimiento Laboral*); a law on offences and penalties in social matters *(Ley sobre Infracciones y Sanciones en el Orden Social*); and a law on the relocation of workers in the framework of the provision of transnational services *(Ley sobre el desplazamiento de trabajadores en el marco de una prestación de servicios transnacional*). Finally, in Articles 42 and 43, it provides for the promotion of equality on various grounds in collective bargaining and the promotion of equality plans to address questions of disability in companies.

In the field of disability, the General Law on the Rights of Persons with Disabilities and their Social Inclusion (RDL 1/2013) (*Ley General de derechos de las personas con discapacidad y de su inclusión social*) regulates all aspects of disability and was approved after the entry into force of the UN Convention on the Rights of Persons

[1] For a critique of the transposition of both directives in Spain, see Cachón (2004b) and Arias and Hierro (2005).

with Disabilities. Law RDL 1/2013 repealed laws 13/1982, 51/2003 and 26/2011, whilst substantially incorporating the content of these three laws. This legislation is complemented by Law 27/2007, which recognises sign languages and regulates their use (*Ley 27/2007, de 23 de octubre, por la que se reconocen las lenguas de signos españolas y se regulan los medios de apoyo a la comunicación oral de las personas sordas, con discapacidad auditiva y sordociegas*).

Law 13/2005 of 1 July, which amends the Civil Code with regard to the right to contract matrimony (*Ley 13/2005, de 1 de Julio, por la que se modifica el Código Civil en material de derecho a contraer matrimonio*) allows homosexual couples to marry with the same rights as heterosexual couples.

0.2 Overview/State of implementation

List below the points where national law is in breach of the Directives or whether there are gaps in the transposition/implementation process, including issues where uncertainty remains and/or judicial interpretation is required. This paragraph should provide a concise summary, which may take the form of a bullet point list. Further explanation of the reasons supporting your analysis can be provided later in the report.

This section is also an opportunity to raise any important considerations regarding the implementation and enforcement of the Directives that have not been mentioned elsewhere in the report.
This could also be used to give an overview of the way (if at all) national law has given rise to complaints or changes, including possibly a reference to the number of complaints, whether instances of indirect discrimination have been found by judges, and if so, for which grounds, etc.

Please bear in mind that this report is focused on issues closely related to the implementation of the Directives. General information on discrimination in the domestic society (such as immigration law issues) are not appropriate for inclusion in this report.

Please ensure that you review the existing text and remove items where national law has changed and is no longer in breach.

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 "provision", and the words "criterion or practice" are not included. The second is that the directives say "persons" in the plural and 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. But 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 are not covered by the exclusion outlined in Article 3.2 of the directives.
- Although Section 2 of Chapter 3 of Title 2 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".
- The principle of protection against victimisation is transposed, but only in the field of labour.
- 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.
- Law 62/2003 recognises the possibility that legal entities and associations may engage "on behalf" of the complainant, but only in the field of employment and not "or in support", as stated in Article 10 of Directive 2000/43.

This omission has few practical consequences because there is a general recognition that entities and associations may become involved if they "have a legitimate interest". (See section 6.2 of this report.)

In relation to the Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin, there are two difficulties.

To begin with, its independence is uncertain for at least two reasons. First, the definition of its functions omits the word "independent", which appears three times in Article 13.2 of the directive, once in each description of the body's three functions. Secondly, its effectiveness is questionable because it is made up primarily of

government representatives. Royal Decree 1262/2007 of 21 September regulates the composition, competences and regulations of the council (BOE, 3 October 2007).

Law RDL 1/2013 (art. 4.2) provides that

> *Persons with disabilities shall be deemed those who have been recognised as having a degree of disability equal to or greater than 33 per cent*

and this state of affairs must be recognised by an official body. It could be argued that both points are 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.

The Spanish Government decided not to use the additional period up to 2 December 2006 for the implementation of Directive 2000/78 (Article 18) in relation to age and disability, but transposed the directive in Law 62/2003. In both cases, Spanish law meets the requirements of Directive 2000/78.

The government that came into office in March 2004, and whose term of office was renewed following the 2008 elections, has given strong impetus to policies against discrimination in all fields. In its first term from 2004 to 2008 it was especially active in fields such as gender equality, and introduced a major law in the field, disability – it introduced two new laws, and sexual orientation, with a law on same-sex marriage. In its second term beginning in 2008, it has undertaken to table a bill in parliament on equal treatment on all grounds and in all fields. This bill was likely to remedy some of the shortcomings of the transposition made in 2003 of Directives 2000/43 and 2000/78. It was the “Comprehensive Bill on equal treatment and non-discrimination” (*Proyecto de Ley integral para la igualdad de trato y la no discriminación*) that arrived at the Parliament on 19 June 2011 after consultations with organisations with a legitimate interest (both NGOs and trade unions). The bill had three features. It provided guarantees for individuals in the form of mechanisms to ensure that the exercise of rights is introduced. The law was general and the bill seeks to redress deficiencies and imbalances between various fields. It was comprehensive as it covers all grounds and fields. The Law created the Authority for the equal treatment and non-discrimination as an independent body. The bill included discrimination by association, multiple discrimination and discrimination by mistake. But the early dissolution of Parliament for the general election of 20 November 2011 caused the bill to decay.

The new government formed by the Popular Party (conservatives) in December 2011 will not present this bill again in the Parliament in this term. Equality policies are not part of the priorities of the Popular Party and the equal treatment and non discrimination was not in its electoral program. Moreover, this Party had been very critical with the Comprehensive Bill for Equal Treatment and non-discrimination. Therefore, we should not expect that the new conservative Government submit a similar project to the Parliament.

Although some court decisions are starting to apply the EU directives, this is a field in which Spain has made little progress in recent years.

0.3 Case-law

*Provide a list of any important case-law in **2012** within the national legal system relating to the application and interpretation of the Directives. (The **older case-law mentioned in the previous report should be moved to Annex 3)**. Please ensure a follow-up of previous cases if these are going to higher courts. This should take the following format:*

Name of the court
Date of decision
Name of the parties
Reference number (or place where the case is reported).
Address of the webpage (if the decision is available electronically)
Brief summary of the key points of law and of the actual facts (no more than several sentences).

➔Please use this section not only to update, complete or develop last year's report, but also to include information on important and relevant case law falling under both anti-discrimination Directives (Please note that you may include case-law going beyond discrimination in the employment field for grounds other than racial and ethnic origin)
Please describe trends and patterns in cases brought by Roma and Travellers, and provide figures – if available.

No official report on the situation of the Roma in recent years in Spain has been produced, nor an evaluation of policies to improve their living and working conditions or to combat discrimination that affects them in different areas of social life (work, home, etc.). However, there are two very important aspects that can be noted. First, poverty and unemployment have increased among the Roma during the Great Recession due to the austerity policies implemented in the European Union and Spain over the last four years (FSG, 2013). Second, a significant number of Roma from Romania have arrived in Spain under the intra-EU human mobility framework. In general, this group face worse living and working conditions than the Spanish Roma. Although there have not been any social tensions associated with the presence of Roma from Romania in Spain, as has been the case in other EU countries, there have been cases of discriminatory acts.

Some of these acts can be classified as “institutional discrimination” since they were committed by police officers who were found guilty and sentenced. On 19 April 2010, two Catalan police officers (*Mossos d'Esquadra*) arrested L.L.S., a Romanian Roma woman, who was with her two-month-old daughter begging at the entrance of a supermarket in Barcelona. L.L.S. showed the police the family book documenting that the baby was her daughter, but the two police officers accused L.L.S. of kicking

her daughter several times. L.L.S. was arrested - and released the next day - and 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 her parents for eight months (until 22 December 2010). L.L.S and her husband initiated proceedings challenging the placement of their child and denouncing the two officers for document forgery and false accusation. In the Judgment, the two policemen admitted their guilt. The Provincial Court of Barcelona (Sentence 1135 of 10 December 2013)[2] sentenced the two policemen to two years in prison for the crime of document forgery, false accusation and denunciation. They must also pay €12,000 to L.L.S. and her husband for the moral (non-pecuniary) damage caused. Although the Judgment makes no reference to discrimination, the fact that L.L.S. was a poor, Romanian, Roma woman clearly underlies the two policemen's behaviour. The *Fundación Secretariado Gitano* (Roma Secretariat Foundation, the most important NGO which works with the Roma in Spain) acted as the representative of L.L.S and her husband in court.

Name of the court: Spanish Constitutional Court
Date of decision: 14 February 2013
Reference number: Judgment 41/2013
Address of the webpage: http://www.boe.es/boe/dias/2013/03/12/pdfs/BOE-A-2013-2724.pdf
Brief summary: The surviving partner of an unmarried couple, heterosexual or homosexual, is entitled to a widowhood pension from 1 January 2008, as established by Law 40/2007 of 4 November on Measures in the Field of Social Security. This law equates unmarried couples with married couples in terms of the survivor's pension. In addition, a third additional provision of this Law extends this right retroactively to a member of a *de facto* union whose partner had died prior to the Law's entry into force (1 January 2008), where the survivor is in a situation of special need. For this provision to be applicable, the Law establishes, among other requirements, that the couple "had had children together", meaning natural or adopted children.

On 10 March 2008, four years after his partner's death, a resident of Barcelona asked Social Security to grant him a survivor's pension. The National Institute of Social Security refused on the grounds that the law requires that the couple has a common descendant (child). But this was a homosexual couple, and for much of their life together (1982 to 2004) homosexual couples had not been permitted to adopt. On 18 November 2008, Court no. 33 of Barcelona raised a question of unconstitutionality before the Spanish Constitutional Court. The Court's reasoning was that the requirement of having children together is unenforceable for unmarried couples of the same sex if they are biological children and very difficult to enforce in practice in the case of adoption, as the right of unmarried couples (heterosexual or homosexual) to adopt was recognised in Catalonia only in 2005. According to the

[2] http://www.gitanos.org/upload/37/69/Sentencia_ok.pdf.

Court, the requirement to have children together, although apparently neutral, discriminated against unmarried couples of the same sex, as it excluded them from a widowhood pension. The Court invoked the judgment of the Court of Justice of the European Union of 1 April 2008, C-267/2006, *Maruko v. Versorgungsanstalt der deutschen Bühnen*, which considered it contrary to Directive 2000/78/EC to deny a survivor's pension to a surviving member of a same-sex couple in a comparable situation to that of a surviving spouse receiving the social security benefit in question.

The Constitutional Court gave its response in Judgment 41/2013 of 14 February 2013. The Judgment provides that the requirement of having had children together to access the widowhood pension in the case of *de facto* unions (heterosexual or homosexual) established by the third additional provision of Law 40/2007 is a direct violation of the principle of equality before the law enshrined in article 14 of the Spanish Constitution. According to the Judgment, the difference in treatment established by the law in question between couples on the grounds of whether they have had children together or not, not only obeys no objective reason related to the essence or purpose of the special widowhood pension regulated in the additional provision of Law 40/2007, but also leads to a disproportionate result, by preventing unreasonably certain survivors of unmarried couples access to the protection provided by the pension, as the requirement of having children together is unenforceable (for biological or legal reasons).

As the Judgment considers the requirement to "have children together" contrary to the principle of equality before the law, the Court does not give any consideration to whether "sexual orientation" was the cause of unconstitutionality (because the provision applies not only to homosexual couples but also to heterosexuals who have not had or adopted children together).

1 GENERAL LEGAL FRAMEWORK

Constitutional provisions on protection against discrimination and the promotion of equality

a) Briefly specify the grounds covered (explicitly and implicitly) and the material scope of the relevant provisions. Do they apply to all areas covered by the Directives? Are they broader than the material scope of the Directives?

Equality and non-discrimination

Equality is one of the "highest values of the legal system" established by the Spanish Constitution of 1978[3] (Article 1.1), together with liberty, justice and political pluralism.

The Constitution proclaims the general principle of equality and non-discrimination in its 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.*

As Puente (2003) points out,

> *this provision has a special place within the text of the Constitution (in Chapter II, but before its two Parts, namely those concerning 'Fundamental rights and civil liberties' and 'Rights and obligations of citizens'). This makes it possible to recognise the fundamental right to both equality and non-discrimination. Article 14 thereby guarantees the two specific functions of the principle of equality: placing objective limits on the exercise of power, and providing for the rights of the individual.*

Rubio-Marín (2004) notes that the constitutional principle of equality in Article 14 is interpreted as requiring the legislator to show that difference in treatment is justified by objective and reasonable grounds. The inclusion of an open-ended list of prohibited grounds of discrimination means that when differentiations are made either on the grounds specified or on those deemed to be included – such as, presumably, sexual orientation, age and disability – the degree of judicial scrutiny will be higher, as it will be assumed in principle that differentiation on those grounds is illegitimate.

Article 16 of the Spanish Constitution proclaims that the

[3] *Constitución Española* (Spanish Constitution) of 27 December 1978 (BOE, 29 December 1978).

> *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.*

It also states that, "Nobody may be compelled to make statements regarding his religion, beliefs or ideology."

Moreover, Article 10.2 of the Spanish Constitution recognises the role of the main international treaties on human rights in construing domestic provisions. This article of the Spanish Constitution states that

> *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.*

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 laws passed since then. They include:

- Universal Declaration on Human Rights
- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- Declaration on the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief
- European Convention on Human Rights
- Convention on the Rights of Persons with Disabilities.

Disability, age and sexual orientation are not expressly included in Article 14 of the Spanish Constitution. But case law tends to include them as "any other condition or personal or social circumstance". The Constitutional Court ruled that disability (Judgment no. 269/1994 of October 1994)[4] and sexual orientation (Judgment no. 41/2006 of February 2006),[5] are included in the generic phrase "any other personal or social circumstance".

The Constitutional Court has implemented the principle of equality ever since its early judgments and adopted the doctrine of the European Court of Human Rights, which requires objective and reasonable justification for differential treatment. Judgment 200/2001[6] contains a reminder of doctrine on discrimination:

- the principle of equality does not mean the prohibition of all unequal treatment, but that differentiation must be analysed as to whether it is reasonable or not;

[4] See *Sentencia Tribunal Constitucional* (Constitutional Court Decision), 3 October 1994, 269/1994.
[5] See *Sentencia Tribunal Constitucional* (Constitutional Court Decision), 13 February 2006, 41/2006.
[6] See *Sentencia Tribunal Constitucional* (Constitutional Court Decision), 4 October 2001, 200/2001.

- on occasion, different treatment of different situations may be required, resulting in the achievement of real and effective equality;
- temporary positive measures may be taken in order to achieve true equality for a disadvantaged group;
- quotas for persons with disabilities, and in general, measures to promote the equal opportunities of people affected by diverse forms of disability, are constitutional.

The Constitution also states that "Aliens in Spain shall enjoy the civil liberties guaranteed by this title, on the terms established by treaties and the law" (Article 13).

b) Are constitutional anti-discrimination provisions directly applicable?

Promotion of equality

While Article 14 of the Spanish Constitution contains a formal recognition of equality and non-discrimination, Article 9 provides the positive obligation for the public authorities to promote equality since they must

> *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 of the Constitution 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[7] 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".

c) In particular, where a constitutional equality clause exists, can it (also) be enforced against private actors (as opposed to the State)?

[7] See *Sentencia Tribunal Constitucional* (Constitutional Court Decision), 1 July 1987, 128/1987.

Applicability of the constitutional principles of equality and non-discrimination

Constitutional equality and anti-discrimination provisions are directly applicable. Article 53 of the Constitution introduces guarantees of fundamental rights and freedoms and also of the principle of equality and non-discrimination. The second paragraph of this article refers to the possibility for any citizen to file a claim for protection under Article 14

> *by means of preferential and summary proceedings in the ordinary courts and, where appropriate, by lodging an action for infringement of fundamental rights and freedoms with the Constitutional Court.*

The equality and non-discrimination clause can be enforced against both public and private actors (see, for example, Law 62/2003, Article 27.2).

2 THE DEFINITION OF DISCRIMINATION

2.1 Grounds of unlawful discrimination

Which grounds of discrimination are explicitly prohibited in national law? All grounds covered by national law should be listed, including those not covered by the Directives.

In the Spanish Constitution, the grounds of unlawful discrimination expressly mentioned in Article 14 are:

- birth
- race
- sex
- religion
- opinion or
- any other condition or personal or social circumstance.

Law 62/2003 transposing Directives 2000/43 and 2000/78 expressly mention the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 27).

The Workers' Statute (Articles 4.2.c and 17.1, in the revised text given in Article 37 of Law 62/2003) expressly mentions: gender, marital status, age, origin, racial or ethnic origin, social condition, religion or beliefs, disability, political ideas, sexual orientation, affiliation or non-affiliation to a union, or language of the state of Spain, or family ties with other workers in a company.

The Criminal Code (Organic Law 10/1995), in its section on offences in relation to the exercise of fundamental rights and civil liberties guaranteed by the Constitution, punishes "those who incite discrimination..." and those who disseminate defamatory information against groups on racist, anti-Semitic or other grounds relating to ideology, religion, beliefs, family background, belonging to a race or ethnic group, national origin, gender, sexual orientation, illness, or disability (Article 510). The Criminal Code specifies as a circumstance aggravating criminal liability the fact of

> *committing an offence on racist, anti-Semitic or other grounds relating to the ideology, religion or beliefs of the victim, the ethnic group, race, or nation to which he belongs, his gender or sexual orientation, or any illness or disability that he suffers from. (Article 22.4).*

Article 314 punishes offences against workers' rights, referring to:

> *Those responsible for serious discrimination in a public or private workplace against any person by reason of his ideology, religion or beliefs, ethnic group, race or nationality, gender, sexual orientation, family background, illness or*

disability, legal or trade-union representation of workers, family relationship with other employees, or use of any of the official languages within the State of Spain.

Organic Law 7/1980 on religious freedom (Article 1.2) proclaims the principle of non-discrimination, providing that

religious beliefs shall not constitute a basis for inequality or discrimination before the law. Religious grounds may not be cited to prevent anyone from performing any work, activity, responsibility or public office.

In summary, the different grounds of unlawful discrimination expressly mentioned in Spanish law are the following:

- 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.

2.1.1 Definition of the grounds of unlawful discrimination within the Directives

a) How does national law on discrimination define the following terms: (the expert can provide first a general explanation under a) and then has to provide an answer for each ground)

i) racial or ethnic origin,

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

ii) religion or belief,

National law on discrimination on religion or belief does not define the terms religion or belief and neither does the Workers' Statute or the Criminal Code.

iii) *disability. Is there a definition of disability at the national level and how does it compare with the concept adopted by the Court of Justice of the European Union in Joined Cases C-335/11 and C-337/11 Skouboe Werge and Ring, Paragraph 38, according to which the concept of 'disability' must be understood as: "a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers" (based on Article 1 UN Convention on the Rights of Persons with Disabilities)?*

The General Law on the Rights of Persons with Disabilities and their Social Inclusion provides (RDL 1/2013) (art. 4) that:

> *Persons with disabilities are those 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 disabilities shall be deemed to be those with a recognised degree of disability equal to or greater than 33 per cent.*

This definition has two parts with a very different orientation. The second part retains the medical perspective of disability and has an administrative purpose: 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" defined by 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 norm affects the existing material scope of the law on the social integration of the disabled 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 RDL 1/2013 seem reasonable and proportionate, and all this is subject to judicial protection. The ECJ did not address this issue when it gave a definition of disability in its ruling in *Chacón Navas* (see below) and *Werge and Ring*.

With regards to the concept of disability in Directive 2000/78 (and also the interpretation of this concept in Spanish law), in 2005 there was an important

judgment from the Court of Justice of the European Communities in Case C-13/05, *Chacón vs Eurest*, on the question referred for a preliminary ruling by Madrid Social Court no. 33 (Cabeza 2013).[8] Mrs Chacón Navas was dismissed by the company Eurest while on sick leave on 28 May 2004. The company recognised that her dismissal was unlawful and offered her compensation. Mrs Chacón Navas filed a suit against Eurest asking for her dismissal to be declared void and for the company therefore to be obliged to take her back. Before making a ruling on the issue, the judge of Madrid Social Court no. 33 referred a question for a preliminary ruling (OJ 19.3.2005) to the Court of Justice of the European Communities.

The Court established that the concept of disability "must […] be given an autonomous and uniform interpretation" (paragraph 42) and, in the context of Directive 2000/78,

> *the concept of disability must be understood as referring to a limitation that results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life (paragraph 43).*

It went on to state:

> *However, by using the concept of disability in Article 1 of that directive, the legislature deliberately chose a term that differs from 'sickness'. The two concepts cannot therefore simply be treated as being the same (paragraph 44).*

It also states that "in order for the limitation to fall within the concept of disability, it must therefore be probable that it will last for a long time" (paragraph 45).

On the protection of persons with disabilities as regards dismissal, the court established that

> *a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by Directive 2000/78*

and that

> *the prohibition, as regards dismissal […] precludes dismissal on grounds of disability which […] is not justified by the fact that the person concerned is not*

[8] This was the second case referred to the court on Directive 2000/78, after the Mangold case (C-144/04), and the first on the concept of "disability" for the purpose of the directive. The questions referred to the court for a preliminary ruling aroused great interest, as shown by the remarks sent in by six governments and by the EU Commission. Against the Commission's judgment, the court deemed that the questions referred were admissible.

competent, capable and available to perform the essential functions of his post (paragraph 52).

On these grounds, the Court ruled:

1) *A person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down for combating discrimination on grounds of disability by Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.*
2) *The prohibition, as regards dismissal, of discrimination on grounds of disability contained in Articles 2(1) and 3(1)(c) of Directive 2000/78 precludes dismissal on grounds of disability which, in the light of the obligation to provide reasonable accommodation for people with disabilities, is not justified by the fact that the person concerned is not competent, capable and available to perform the essential functions of his post.*
3) *Sickness cannot as such be regarded as a ground in addition to those in relation to which Directive 2000/78 prohibits discrimination.*

All this doctrine is similar to that established in Spain by the legal provisions cited in the above paragraphs, which clearly distinguish between illness and disability. Following this judgment, the Madrid Social Court declared that Chacón's dismissal was "unfair", rather than "void", as would have happened if the illness had been equivalent to "disability".

Spanish legislation establishes the obligation to provide reasonable accommodation for persons with disabilities but does not transpose the remaining content of recital 17 of Directive 2000/78/EC.

iv) age,

National law on discrimination does not define the term age and neither does the Workers' Statute or the Criminal Code.

v) sexual orientation?

National law on discrimination does not define the term sexual orientation, and neither does the Workers' Statute or the Criminal Code.

b) *Where national law on discrimination does not define these grounds, how far have equivalent terms been used and interpreted elsewhere in national law? Is recital 17 of Directive 2000/78/EC reflected in the national anti-discrimination legislation?*

i) racial or ethnic origin

None of the two judgments of the Constitutional Court (STC 13/2001, Case Williams, see section 4.4. and STC 69/2007, Case Muñoz Díaz, see Annex 3) which have addressed the issue of racial or ethnic origin provide a definition of "racial or ethnic origin". STC refers to "roma ethnia" but without defining traits that might characterize it.

ii) *religion or belief (e.g. the interpretation of what is a 'religion' for the purposes of freedom of religion, or what is a "disability" sometimes defined only in social security legislation)?*

Religion is not defined in Spanish legislation. The principles of religious freedom, neutrality and non-discrimination prohibit the Spanish legislation from doing so. There is, however, a negative definition of religion in Article 3.2 of the Organic Law on religious freedom. This article states in its second paragraph 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.*

The legislator specifies only what religion is not, not what it is.

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. 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 the Supreme Court (14 June 1996), refusing to include this church in the register.

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 to determine the concept of religion,

> *it is a widely held opinion, reflected in the Spanish Academy Dictionary, that the elements making up the concept of religion are: a) an organic whole of dogma or beliefs related to transcendence, a higher being or a divinity; b) a body of moral rules regulating the individual and social behaviour of the adherents to a religious denomination, derived from that dogma; c) concrete and definite acts*

of worship, an external manifestation of the relationship between the adherents to a religious denomination and the higher being or divinity; and d) as a consequence of the existence of acts of worship, although this is not an essential element, ownership of places to which the adherents may go to perform such acts... In conclusion, 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 (quoted above), and that its activities do not violate the entitlement of others to the free exercise of rights and freedoms nor are 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. It seems that, in administrative practice as well as in case law, up to 2001 "religion" was implicitly understood to come from the Judeo-Christian tradition, and to a more limited extent, from Islam.

However, after this judgment it seems clear that 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 also protected regardless of whether a religious organisation is inscribed on the register. There is no special legislation or specific register for sects.

A Supreme Court Decision (4118/2011 of February 14) canceled the Lleida City Council Ordinance banning the wearing of full face veils (burka or niqab) in public city spaces. The fundamental argument of this Decision is that the use of the veil by some women is part of their religious freedom. Religious freedom is a fundamental right recognised in the Spanish Constitution (art. 16) and can only be regulated by a law passed in Parliament. Therefore, the Decision voids the City Council Ordinance because Lleida City Council cannot put any restriction on freedom of religion. The Supreme Court also poses another relevant question: Should the burka be banned on the grounds that women who wear it are victims of coercion? For the Supreme

Court “in doctrinal studies on the justification for a ban of this type, it is not uncommon to emphasise the risk of the perverse effect that may arise from this measure, that is to say the confinement of women in their immediate family, if you decide to put their religious convictions before other considerations, which ultimately would be contrary to the objective of integration in different social spaces; in short, instead of serving the elimination of discrimination, such a measure could contribute to increasing it if you close these spaces to the women in question”. The Supreme Court ruling does not preclude the possibility that the legislator (the Spanish Parliament) could regulate the wearing of the burka in an appropriate manner. This means that it is possible to ban the wearing of the burka and niqab in Spain, but it must be done through a law, as it affects the exercise of a fundamental right.

As the Supreme Court Decision states, regulation of the use of the burka is “a problem with a strong political dimension, raised in different countries (...) (that) are far from having achieved a minimum consensus because of their different cultural and constitutional frameworks”. The Supreme Court Decision argues that the wearing of the full veil is part of religious freedom, which is a fundamental right; but another section of public (political and legal) opinion argues that the full veil is an imposition of the most fundamentalist Islam and symbolises the oppression of women.

iii) Disability

Disability is defined in general legislation on disability and social security. Social security legislation gives two definitions of disability:

a) As regards contributory benefits, the “situation of workers who, after undergoing prescribed treatment and receiving medical discharge, suffer severe anatomical or functional impairment that may be objectively determined and is likely to be permanent, and that diminishes or removes their ability to work”; and
b) As regards non-contributory benefits, “impairments likely to be permanent, whether physical or mental, congenital or otherwise, that alter or render ineffective the physical, mental or sensory capacity of those suffering from them” (Articles 136.1 and 136.2 of the General Social Security Law).

The definition of “disability” in the General Law on the Rights of Persons with Disabilities and their Social Inclusion (Law RDL 1/2013) is much more extensive than that given in the Social Security Law, in that it refers to the consequences of the impairment and the integration of persons with disabilities not only in work but also in other fields such as education, social benefits, social security and housing. In general terms, it defines a person with a disability as:

any person whose capacity for integration in education, work, or society is found to be diminished as a consequence of an impairment, congenital or otherwise, that is likely to be permanent, in their physical, mental, or sensory capacities (Article 4).

iv) Age

The courts do not give a definition of "age". But commonly it is understood by "age" the number of years completed by one person.

v) sexual orientation

The Judgment of the Constitutional Court (STC 41/2006, Case PC vs Alitalia Italian Airlines, see Annex 3) recognizes that "sexual orientation" is a protected ground of Art. 14 of the Spanish Constitution. But that Judgment does not define "sexual orientation".

c) Are there any restrictions related to the scope of 'age' as a protected ground (e.g. a minimum age below which the anti-discrimination law does not apply)?

Up to 2001, the tenth additional provision of the Spanish Workers' Statute authorised clauses in collective agreements for the termination of employment contracts when workers reached retirement age at 65 without prejudice to the provisions of the social security regulations. In 2001, this provision was repealed because, as was argued in the preamble of the law repealing it,[9] it "was based on demographic and labour-market realities different from those of today". But some collective agreements continued to include such clauses. Two judgments by the Supreme Court of 9 March 2004, both referring to the collective agreement of the AENA, (*Aeropuertos Nacionales y Navegación Aérea*) declared these clauses illegal (see Annex 3).

On 3 December 2004, the trade unions and employers' organisations signed an agreement with the government to reintroduce the provision into the Workers' Statute and thereby enable the social partners to include clauses in collective agreements on the termination of contracts when employees reach the ordinary retirement age, provided that certain conditions are met.

On 29 June 2005, the Spanish Parliament passed a law[10] inserting a tenth additional provision into the Workers' Statute. This provision states that

> *collective agreements may include clauses allowing the employment contract to be terminated when the employee reaches the ordinary retirement age as established in social security regulations,*

but adds two provisos. First, the measure

> *is to be linked to objectives consistent with the employment policy expressed in the collective agreement, such as improvement of stability in employment,*

[9] Royal Decree-Law 5/2001 of 2 March on urgent measures to reform the labour market in order to promote employment and to improve the quality thereof (BOE, 3 March 2001).
[10] Law 14/2005 on clauses in collective agreements concerning employees reaching the ordinary retirement age (*Ley 14/2005, de 1 de Julio, sobre cláusulas de los convenios colectivos referidas al cumplimiento de la edad ordinaria de jubilación, BOE, 2 July 2005*).

> *conversion of temporary contracts into indefinite ones, maintenance of employment, recruitment of new workers, or any other objectives aimed at enhancing quality of employment.*

Secondly, a clause was introduced stating that

> *a worker whose employment contract is terminated must have covered the minimum contribution period, or a longer one if so provided in the collective agreement, and must meet the other prerequisites specified by social security legislation for entitlement to a contributory retirement pension.*

This law of 25 June 2005 resolved the problems raised by the Supreme Court ruling of 9 March 2004 in that, on one hand, a law was passed enabling such compulsory retirement clauses to be included in collective agreements, and on the other, they are not discriminatory because they are to be "objectively and reasonably justified", as they have been declared to be linked to "legitimate employment policy, labour market and vocational training objectives", as stated in Article 6 of Directive 2000/78.

On this question, the judge of Madrid Social Court no. 33 requested a preliminary ruling from the Court of Justice of the European Communities (C-411/05) regarding the possibility of a compulsory retirement clause being discriminatory because it has no objective and reasonable justification, such as legitimate objectives of employment policy, as required by Article 6 of Directive 2000/78.

The question referred to the *Palacios de la Villa vs. Cortefiel* case regarding the termination of the plaintiff's employment contract under the textile industry collective agreement in the Madrid Region, which was already in force when Law 14/2005 was passed and which does not include clauses linking compulsory retirement to employment policy. Other similar actions were being brought in various social courts.

The judge asked the court whether the principle of equal treatment barring discrimination on the ground of age (Article 13 of the Treaty and Article 2.1 of Directive 2000/78) is in conflict with a national law (the Transitory Provision of Law 14/2005) granting validity to compulsory retirement clauses established in collective agreements with the sole requirements that the worker must have reached the ordinary retirement age and must meet the conditions provided in Spanish social security legislation for entitlement to a contributory retirement pension. If the answer to this question was affirmative, the judge asked if, therefore, this national legislative provision should not be applied in the case in hand.

The ECJ's judgment of 16 October 2007 stated:

> *The prohibition of any discrimination on grounds of age […] must be interpreted as not precluding national legislation pursuant to which compulsory retirement clauses contained in collective agreements are lawful where such clauses provide as sole requirements that workers must have reached retirement age,*

> *set at 65 by national law, and must have fulfilled the conditions set out in the social security legislation for entitlement to a retirement pension under their contribution regime, where the measure, although based on age, is objectively and reasonably justified in the context of national law by a legitimate aim relating to employment policy and the labour market, and it is not apparent that the means put in place to achieve that aim of public interest are inappropriate and unnecessary for the purpose.*

The judgment therefore accepted that Spanish legislation in this field is in keeping with Directive 2000/78/EC.

2.1.2 Multiple discrimination

a) *Please describe any legal rules (or plans for the adoption of rules) or case law (and its outcome) in the field of anti-discrimination which deal with situations of multiple discrimination. This includes the way the equality body (or bodies) are tackling cross-grounds or multiple grounds discrimination.*
Would, in your view, national or European legislation dealing with multiple discrimination be necessary in order to facilitate the adjudication of such cases?

There are no provisions addressing multiple discrimination. However, Organic Law 3/2007 on 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.*

Legislation dealing with multiple discrimination would be necessary at national level. This issue was addressed adequately in the Comprehensive Bill on Equal Treatment and Non-discrimination presented by the government in 2011 (see paragraph 0.2). But the bill will no longer be resumed in the present legislature.

b) *How have multiple discrimination cases involving one of Art. 19 TFEU grounds and gender been adjudicated by the courts (regarding the burden of proof and the award of potential higher damages)? Have these cases been treated under one single ground or as multiple discrimination cases?*

No High Court judgment in Spain has used the term "multiple discrimination".

The High Court of Justice of Galicia (TSJG), in its judgment 3041/2008 (see Annex 3) 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). In its reasoning, the court referred to the concept of "multiple discrimination", but without using this term.

2.1.3 Assumed and associated discrimination

a) Does national law (including case law) prohibit discrimination based on perception or assumption of what a person is? (e.g. where a person is discriminated against because another person assumes that he/she is a Muslim or has a certain sexual orientation, even though that turns out to be an incorrect perception or assumption).

There is no mention in Spanish legislation of discrimination based on assumed characteristics. The Workers' Statute, Law 62/2003 (transposing Directives 2000/43 and 2000/78) and the Criminal Code 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) Does national law (including case law) prohibit discrimination based on association with persons with particular characteristics (e.g. association with persons of a particular ethnic group or the primary carer of a disabled person)? If so, how? Is national law in line with the judgment in Case C-303/06 Coleman v Attridge Law and Steve Law?

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RDL 1/2013) formally introduced discrimination by association into Spanish legislation for the first time, but only in the field of disability. RDL 1/2013 defines discrimination by association as follows (art. 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 people 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), it may be assumed to be implicitly covered. But it is a matter to be decided by judges taking into account the judgement in Case C-303/06 *Coleman v Attridge Law and Steve Law*.

The Comprehensive Bill on Equal Treatment and Non-discrimination specifically addressed, for the first time in Spain, discrimination by association applying the doctrine of the Coleman case. But the Bill was not approved by Parliament (see Paragraph 0.2).

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

a) How is direct discrimination defined in national law? Please indicate whether the definition complies with those given in the directives.

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.[11]

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.

Law 62/2003 (Article 38) provides the same definition of direct discrimination as the General Law on the Rights of Persons with Disabilities and their Social Inclusion (RDL 1/2013). Article 2.c. of this law states that direct discrimination "shall be considered to occur where a person is treated less favourably than another in a comparable situation on the grounds of his or her disability".

The seventh additional provision of Law 62/2003, entitled "Non-applicability to immigration law", states that 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".

This means that a different definition of direct, and indirect, discrimination remains in force in this organic law, which applies to aliens, chiefly non-Community citizens. Article 23.1 of OL 4/2000 defines as discrimination:

[11] The Law on the rights and duties of aliens (OL 4/2000) (*Ley Orgánica 4/2000, de 11 de enero, de derechos y libertades de los extranjeros en España y de su integración social*), has two articles devoted to "anti-discrimination measures". It defines discrimination as "any act which, directly or indirectly, entails a distinction, exclusion, restriction or preference in relation to a foreigner on the grounds of race, colour, descent or national or ethnic origin, or religious beliefs and practices, and whose purpose or effect is to negate or limit the recognition or exercise, in equal conditions, of human rights and fundamental freedoms in the political, economic, social or cultural spheres." In addition, it defines indirect discrimination as "any treatment stemming from criteria having an adverse effect on workers on account of their being foreigners or members of a particular race, religion, ethnic group or nationality." OL 4/2000 makes no reference to provisions or practices; moreover, it refers only to "workers", whereas the directive refers to "persons" in general. This was the first reference in Spanish legislation to indirect discrimination, in a law whose scope is confined to aliens. The seventh additional provision of Law 62/2003 states that the provisions of Chapter III (i.e. transposition of Directives 2000/43 and 2000/78) do not affect the Law regulating the rights and freedoms of aliens in Spain (OL 4/2000).

> *any act which, directly or indirectly, implies a distinction, exclusion, restriction or preference with regard to an alien on the basis of race, colour, descent, national or ethnic origin, or religious convictions and practices, and which has the aim or the effect of negating or restricting the recognition or exercise, in conditions of equality, of human rights and fundamental freedoms in the political, economic, social or cultural sphere.*

Despite the fact that the law says "directly or indirectly", it may be noted that the content of the article corresponds to the concept of direct discrimination, although it does not use the expression "is treated less favourably" from Article 2.2.a of Directive 2000/43.

b) Are discriminatory statements or discriminatory job vacancy announcements capable of constituting direct discrimination in national law? (as in Case C-54/07 Firma Feryn).

Yes. Article 16.2 of the Workers' Statute provides that the public and private employment services should guarantee:

> *the principle of equal treatment in access to employment, and may not make any discrimination on grounds of origin, including racial or ethnic origin, gender, age, […] religion or beliefs, [...] sexual orientation, [...] or disability.*

Accordingly, any job advertisement that does not respect this precept constitutes direct discrimination, even when an employer advertises a vacancy directly without using an employment service.

c) Does the law permit justification of direct discrimination generally, or in relation to particular grounds? If so, what test must be satisfied to justify direct discrimination? (See also 4.7.1 below).

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

d) In relation to age discrimination, if the definition is based on 'less favourable treatment' does the law specify how a comparison is to be made?

In relation to age discrimination, the definition is based on "less favourable treatment", but the law does not specify how a comparison is to be made.

2.2.1 Situation Testing

a) Does national law clearly permit or prohibit the use of 'situation testing'? If so, how is this defined and what are the procedural conditions for admissibility of such evidence in court? For what discrimination grounds is situation testing

permitted? If not all grounds are included, what are the reasons given for this limitation? If the law is silent please indicate

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) Outline how situation testing is used in practice and by whom (e.g. NGOs, equality body, etc.).

The method was used 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.

c) Is there any reluctance to use situation testing as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?

Some judgments of the Constitutional Court, in relation to cases involving indirect discrimination between women and men, used the situation testing to inform their decisions, for example, Judgment 240/1999.

European practices have influenced the acceptance of situation testing and so are mentioned in some judgments.

d) Outline <u>important</u> case law within the national legal system on this issue.

The Judgment of the Constitutional Court 240/1999[12] uses the testing situation to qualify as sex discrimination not granting maternity leave to a woman doctor working in Castilla y León. According to the judgment, the fact that those permissions are granted only to public service doctors and not the temporary doctor, can be considered discriminatory because the first group are almost exclusively men and the second women. The ruling upholds the use of situation testing.

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

a) How is indirect discrimination defined in national law on discrimination? Please indicate whether the definition complies with those given in the directives.

[12] Judgment of the Constitutional Court 240/1999, 20 December 1999.

Law 62/2003 (Article 28.1.c) 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, though apparently neutral, would put a person of a certain racial or ethnic origin, religion or beliefs, 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.*[13]

In the field of disability, the General Law on the Rights of Persons with Disabilities and their Social Inclusion (RDL 1/2013) provides the following definition:

> *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 the means of achieving that aim are appropriate and necessary (Article 2.d).*

The first case in which a court applied legislation on indirect discrimination on the grounds of disability took place in 2009. The airline Air Nostrum, a subsidiary of Iberia Líneas Aéreas de España, refused to allow three deaf people on board on the ground that they were unaccompanied. It claimed that according to its flight operation manual the safety of these people could be at risk in an emergency. A court of first instance ruled in Iberia's favour, but the Madrid Provincial Court, in its judgment 211/2009 of 6 May 2009, ruled in favour of the three deaf people, represented by representatives of the National Confederation of the Deaf and the Spanish Committee of Disabled People. The Madrid Provincial Court deemed that this is a case of "indirect discrimination" and noted that Law 51/2003 (then in force) prevailed over Iberia's flight operation manual, and that not allowing these three deaf persons on board may be regarded as "indirect discrimination". It ordered Iberia to take steps to ensure that "the infringement of the rights of persons with disabilities ceases and that deaf persons are not discriminated against in its flights". This is also the first court ruling to apply the concept of "indirect discrimination" in access to goods and services in Spain.

[13] Prior to the transposition of the directives into Spanish law the concept of "indirect discrimination" was established only in the Immigration Act. But the first ruling of the Constitutional Court (CC) on this matter was judgment 145/1991 of 1 July 1991, according to which the prohibition contained in Article 14 CE must also cover "not only the notion of direct discrimination, meaning prejudiced differential treatment due to gender where gender is the object of direct consideration, but also the notion of indirect discrimination, which includes treatment not formally discriminatory but that arises due to the factual differences that occur among workers of both sexes and prejudiced unequal consequences due to the differentiated and unfavourable impact that formally equal or reasonable unequal treatment has on the workers of one or the other sex due to the difference of sex". The CC made similar rulings in its judgments 58/1994 of 28 February; 147/1995 of 16 October; and 41/1999, of 22 March.

In relation to the obligation to make reasonable accommodation (see section 2.6 of this report), the General Law on the Rights of Persons with Disabilities and their Social Inclusion (RDL 1/2013) adds that:

> *Reasonable accommodations are necessary and appropriate modifications and adaptations, carried out in an effective and practical manner, of the physical, social and attitudinal environment to the specific needs of persons with disabilities that do not impose a disproportionate or undue burden, where needed in a particular case, 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 2.m).*

The Law on the rights and duties of aliens (OL 4/2000), stipulates that

> *indirect discrimination is defined as any treatment stemming from criteria having an adverse effect on workers on account of their being aliens or belonging to a particular race, religion, ethnic group or nationality (Article 23.2.e).*

It refers only to "workers", whereas the directive refers to "persons" in general, and it makes no reference to provisions or practices, which the directives do.

b) What test must be satisfied to justify indirect discrimination? What are the legitimate aims that can be accepted by courts? Do the legitimate aims as accepted by courts have the same value as the general principle of equality, from a human rights perspective as prescribed in domestic law? What is considered as an appropriate and necessary measure to pursue a legitimate aim?

Law 62/2003 does not specify how indirect discrimination is to be justified. In most cases of indirect discrimination statistics are used as circumstantial evidence. The judgment of the Supreme Court of Cantabria n º 1161/2005, of 14 November, considered acceptable as evidence the report of expert advisors, and cites the example of reports of the Institute for Women (a public institution).

The general provision in Article 2.2.b is included: "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 if the measure is appropriate and necessary to pursue a legitimate aim and there is any case law on this issue.

c) Is this compatible with the Directives?

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 is that the Directive says “persons” in the plural and 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 as such is covered. However, the jurisprudence interprets indirect discrimination in the same sense as the European directives.

d) In relation to age discrimination, does the law specify how a comparison is to be made?

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

e) Have differences in treatment based on language been perceived as potential indirect discrimination on the grounds of racial or ethnic origin?

Differences in treatment based on language must not be perceived as potential indirect discrimination on the grounds of racial or ethnic origin if such requirements are appropriate and necessary. The courts have never taken a view on this matter.

2.3.1 Statistical Evidence

a) Does national law permit the use of statistical evidence to establish indirect discrimination? If so, what are the conditions for it to be admissible in court?

Though 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 is a prima facie case of discrimination.

b) Is the use of such evidence widespread? Is there any reluctance to use statistical data as evidence in court (e.g. ethical or methodology issues)? In this respect, does evolution in other countries influence your national law (European strategic litigation issue)?

Use of statistical evidence is not 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 not reluctance to use statistical data as evidence in court.

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

c) *Please illustrate the most important case law in this area.*

As regards access to employment, the Judgment of Superior Court of Cantabria 1161/2005, of 14 November, notes the existence of indirect sex discrimination in the selection process of a chemical company. The Court concludes that the selection criteria used by the company (the holders of a vocational training in technical branch) generates an adverse impact on women because they are underrepresented in this field. Similar conclusion is reached by the Basque Superior Court Judgment 305/200, of 30 January, based on statistical data.

In terms of salary supplements, the Judgment of Superior Court of Canary Islands 982/2008, of 30 June, considered to constitute indirect discrimination the fact of granting a salary for certain professional categories of the company, which workers are predominantly men, and do not in others in which greater numbers of women work.

d) *Are there national rules which permit data collection? Please answer in respect to all five grounds. The aim of this question is to find out whether or not data collection is allowed for the purposes of litigation and positive action measures. Specifically, are statistical data used to design positive action measures? How are these data collected/ generated?*

As regards national rules that permit data collection, 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 on the protection of personal data (Ley Orgánica 15/1999 de Protección de Datos de Carácter Personal) includes ethnic or racial origin, religion or belief and sexual orientation among "specially protected personal data". Article 7 of that law provides, pursuant to Article 16 of the Spanish Constitution, 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.

The Committee on the Elimination of Racial Discrimination (CERD) has reiterated (March 2011) 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 the 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 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.

2.4 Harassment (Article 2(3))

a) *How is harassment defined in national law? Does this definition comply with those of the directives? Include reference to criminal offences of harassment insofar as these could be used to tackle discrimination falling within the scope of the Directives.*

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.*

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

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 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, a new paragraph has been added to Article 54.3(g) of the Workers' Statute, considering as an offence meriting disciplinary dismissal:

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.

b) Is harassment prohibited as a form of discrimination?

Paragraph 2.2 of Article 54 of the Workers' Statute adds:

Harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation is considered, in all events, as a discriminatory act.

Law 62/2003 (Article 28.2) and the General Law on the Rights of Persons with Disabilities and their Social Inclusion (Article 2) specify harassment as a form of discrimination.

c) Are there any additional sources on the concept of harassment (e.g. an official Code of Practice)?

Until the enactment of Law 62/2003, the only definition of harassment in the Spanish legislation was contained in the Criminal Code, with the regulation of the crime of sexual harassment only:

whoever asks for sexual favours, for himself or a third party, in the context of a continued or habitual labour, teaching or service relationship and with that behaviour creates for the victim an objective and serious intimidating, hostile or humiliating situation, will be punished as a perpetrator of sexual harassment.

Rubio-Marín (2004) notes that Article 184.1 of the Criminal Code refers to those who in the framework of an employment relationship (hence not necessarily the employer) solicit a sexual favour for themselves or for a third party and by that behaviour create an objective and seriously intimidating, hostile or humiliating situation for the victim. No intent is thus required, but the situation cannot be measured only by the victim's reaction, given the requirement of objectivity. The punishment is increased when the person who harasses does so taking advantage of his or her hierarchical position in employment; when he or she either explicitly or implicitly threatens to harm the worker's legitimate career expectations (Article 184.2); or when the victim is especially vulnerable because of age, sickness or situation (Article 184.3). All these prohibitions are understood to refer both to people of different genders and to people of the same gender.

d) What is the scope of liability for discrimination)? Specifically, can employers or service providers (in the case of racial or ethnic origin, but please also look at the other grounds of discrimination) e.g. landlords, schools, hospitals, be held liable for the actions of employees? Can they be held liable for actions of third parties (e.g. tenants, clients or customers)? Can the individual harasser or

discriminator (e.g. co-worker or client) be held liable? Can trade unions or other trade/professional associations be held liable for actions of their members?

Liability for discrimination is personal and only affects individuals or organizations who have committed acts of discrimination.

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 actions of third parties (e.g. tenants, clients or customers). Likewise, trade unions or other professional associations cannot be held liable for actions of their members.

2.5 Instructions to discriminate (Article 2(4))

a) *Does national law (including case law) prohibit instructions to discriminate? If yes, does it contain any specific provisions regarding the liability of legal persons for such actions?*

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.

However, Law 62/2003 does not contain any specific provision regarding the liability of legal person for such actions.

Instructions to discriminate may also be considered to be covered by Article 314 of the Criminal Code, when it specifies “causing discrimination” as an infringement against workers’ rights, as well as Article 23.2.b of OL 4/2000 on the rights of aliens, when it states that all acts imposing stricter conditions on aliens than on Spaniards are discriminatory acts.

b) Does national law go beyond the Directives’ requirement? (e.g. including incitement)

The Spanish penal code includes (art. 18) incitement as a crime. And it could be applied to cases of incitement to discrimination.

c) What is the scope of liability for discrimination? Specifically, can employers or service providers (in the case of racial or ethnic origin)(e.g. landlords, schools, hospitals) be held liable for the actions of employees giving instruction to discriminate? Can the individual who discriminated because s/he received such an instruction be held liable?

Liability for discrimination is personal and only applies to natural or legal persons who cause discrimination, harassment and instruction to discriminate. But we should remember that the instruction to discriminate is a discriminatory act (as expressly noted in art. 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) *How does national law implement the duty to provide reasonable accommodation for people with disabilities? In particular, specify when the duty applies, the criteria for assessing the extent of the duty and any definition of 'reasonable'. For example, does national law define what would be a "disproportionate burden" for employers? Is the availability of financial assistance from the State to be taken into account in assessing whether there is a disproportionate burden?*

It is worth recalling that Spanish legislation speaks of disability in connection with certain benefits such as reasonable accommodation where "persons with disabilities shall be deemed to be those with a recognised degree of disability equal to or greater than 33 per cent," recognised by an official body.

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RDL 1/2013) states the duty to provide reasonable accommodation for persons with disabilities. Article 2.m defines reasonable accommodation as follows:

> *Reasonable accommodations are necessary and appropriate modifications and adaptations, carried out in an effective and practical manner, of the physical, social and attitudinal environment to the specific needs of persons with disabilities that do not impose a disproportionate or undue burden, where needed in a particular case, 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.*

and art. 63 states that

> *It is understood that the right to equality of opportunity for people with disabilities is violated (...) when by reason of disability, there occurs (...) a breach of the requirements of accessibility and of reasonable accommodation (...).*

The General Law establishes sanctions in the event of a breach of the duty to provide reasonable accommodation (RDL 1/2013, art. 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.

For the purpose of determining whether a burden is disproportionate, Article 40.2 of RDL 1/2013 states:

> *To determine whether the burden is excessive, it is necessary to consider whether it is sufficiently remedied by measures, aids or subsidies for persons with disabilities, as well as the financial and other costs of the measures involved and the size and volume of total business of the organisation or company.*

b) *Please also specify if the definition of a disability for the purposes of claiming a reasonable accommodation is the same as for claiming protection from non-discrimination in general, i.e. is the personal scope of the national law different (more limited) in the context of reasonable accommodation than it is with regard to other elements of disability non-discrimination law.*

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 non-discrimination in general (i.e. “a recognised degree of disability equal to or greater than 33 per cent”).

c) *Does national law provide for a duty to provide a reasonable accommodation for people with disabilities in areas outside employment? Does the definition of “disproportionate burden” in this context, as contained in legislation and developed in case law, differ in any way from the definition used with regard to employment?*

Article 2.m of Law RDL 1/2013 establishes a duty to provide reasonable accommodation by anticipation. Reasonable accommodation is defined as:

> *necessary and appropriate modifications and adaptations, carried out in an effective and practical manner, of the physical, social and attitudinal environment to the specific needs of people with disabilities that do not impose a disproportionate or undue burden, where needed in a particular case, 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.*

This measure does not provide for an individualised duty to make an accommodation (as is envisaged under Art. 5, Dir. 2000/78), but rather a duty to "facilitate accessibility" by anticipation. Such measures should of course reduce, but do not remove, the need for individualised accommodations.

The material scope of Law RDL 1/2013 is telecommunications and the information society; urbanised public spaces, infrastructure and construction; transport; goods and services accessible by the public; relations with public administrations; administration of justice; cultural heritage; and employment.

Individuals who require specific accommodation can also base a claim on Article 66. The same article establishes:

> *The discrepancies between the applicant for reasonable accommodation and the obligated subject may be settled through the arbitration system provided for in Article 74 of this Law, without prejudice to the administrative or judicial protection appropriate in each case.*

Social Security and Healthcare

The general legislation regulating these fields includes no specific provisions for reasonable accommodation. However, social security and healthcare are regarded as public services and are treated in the same way as other public services. Social security is the responsibility of central government and is governed by the same rules applicable to the management of all public services. Healthcare is managed by the autonomous regions. Beyond this consideration it is hard to say what reasonable accommodation may consist of in social security and healthcare.

Education

Equal treatment and non-discrimination have been consolidated as basic principles of education in Spain. One of the principles of equality listed in the Organic Law on Education (Law 2/2006) refer to equal treatment and equal opportunities as:

> *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.*

However, the law makes no reference to reasonable accommodation. Remarks similar to those made with regard to Social Security and Healthcare may be made here.

Access to and supply of goods and services which are available to the public

Law RDL 1/2013 provides (in its third additional provision) that *existing* goods and services "liable to reasonable adjustment" must be adjusted before 2017.

Housing and Public spaces and infrastructures

Law RDL 1/2013 provides (in its third additional provision) that *existing* developed public areas and housing "liable to reasonable adjustment" must be adjusted before 2017.

The definition of "disproportionate burden" is the same for employment and areas outside employment (see point a) of this answer).

d) Does failure to meet the duty of reasonable accommodation count as discrimination? Is there a justification defence? How does this relate to the prohibition of direct and indirect discrimination? What is the potential sanction? (i.e.: fine)

The 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), that 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.

e) Has national law (including case law) implemented the duty to provide reasonable accommodation in respect of any of the other grounds (e.g. religion)

i) race or ethnic origin

There are no specific accommodations.

ii) religion or belief

Cooperation agreements with the various religious communities (Evangelical, Jewish and Islamic) contain specific regulations to ensure reasonable accommodation for employees of particular religions. The three agreements contain provisions on religious holidays and special diets.

The weekly day of rest of the Seventh Day Adventists 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 belonging to the Islamic Commission may request to stop work every Friday from 13.30 to 16.30 and one hour before sundown during Ramadan. This right is also subject to an agreement with the employer, and the hours not worked must be made up. There is interesting doctrine on this subject in the judgment of the Madrid High Court 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 – states 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 centers or establishments (prisons and other centers) 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 this case "attempts shall be made". In the field of employment, therefore, there are no provisions on this issue.

iii) Age

There are no specific accommodations.

iv) sexual orientation

There are no specific accommodations.

f) Please specify whether this is within the employment field or in areas outside employment

i) race or ethnic origin

There are no specific accommodations.

ii) religion or belief

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

iii) Age

There are no specific accommodations.

iv) sexual orientation

There are no specific accommodations.

g) Is it common practice to provide for reasonable accommodation for other grounds than disability in the public or private sector?

No.

h) Does national law clearly provide for the shift of the burden of proof, when claiming the right to reasonable accommodation?

No. National law does not provide clearly for the shift of the burden of proof in claims relating to reasonable accommodation. However, article 77 of Law RDL 1/2013 (see Paragraph 6.3) could allow a judge to decide to shift the burden of proof if a person with disabilities is claiming the right to reasonable accommodation.

i) Does national law require services available to the public, buildings and infrastructure to be designed and built in a disability-accessible way? If so, could and has a failure to comply with such legislation be relied upon in a discrimination case based on the legislation transposing Directive 2000/78?

Yes, Law 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 the General Law on the Rights of Persons with Disabilities and their Social Inclusion (RDL 1/2013) 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 on an equal basis to other citizens…" (art.1). After this general statement, the law defines its material scope as the fields of: telecommunications and the information society; urbanised public spaces, infrastructure and construction; transport; goods and services accessible by the public; relations with public administrations; administration of justice; cultural heritage; and employment.

The law defines "universal accessibility" and "reasonable accommodation":

> *Universal accessibility is the condition that must be met by environments, processes, goods, products and services, as well as by objects, instruments, tools and devices, to be understandable, usable and practicable by all people in safety and comfort and in the most autonomous and natural way possible (Article 2.k).*
>
> Reasonable accommodations are necessary and appropriate modifications and adaptations, carried out efficiently and practically, of the physical, social and attitudinal environment to the specific needs of persons with disabilities that do not impose a disproportionate or undue burden, where needed in a particular case, 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 2.m).*

Article 23.2 provides that:

> *the basic requirements for accessibility and non-discrimination shall, for each sphere or area, determine specific measures for preventing or eliminating discrimination, and for offsetting disadvantages or difficulties*

in each of these fields. The Law also provides (Article 23.2) that all this must be done taking into account the various types and degrees of disability, which should inform both the initial design and reasonable accommodation of environments, products and services in each of the law's spheres of application.

Law RDL 1/2013 defines (art. 81) 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.

j) Does national law contain a general duty to provide accessibility by anticipation for people with disabilities? If so, how is accessibility defined, in what fields (employment, social protection, goods and services, transport, housing, education, etc.) and who is covered by this obligation? On what grounds can a failure to provide accessibility be justified?

The expression "accessibility for people with disabilities by anticipation" does not appear in Spanish legislation (General Law on the Rights of Persons with Disabilities and their Social Inclusion, RDL 1/2013).

However, article 2.k of Law RDL 1/2013 aims to provide for accessibility by anticipation in fields such as access to and supply of goods and services that are available to the public, and housing and public spaces and infrastructures (see point c).

In Spain, the autonomous regions have exclusive responsibility (i.e. they legislate and execute legislation) in the field of accessibility in their territories. Most of the autonomous regions have opted to pass laws establishing the principles, objectives and 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 below.

Social Security and Healthcare

See considerations on these fields in point c).

Education

The Education Act (Law 2/2006) expressly provides in its Article 110 that educational centres should be adapted to the accessibility conditions provided in Law RDL 1/2013 and its implementing regulations.

Access to and supply of goods and services which are available to the public

See considerations on these fields in point c).

Housing and Public spaces and infrastructures

See considerations on these fields in point c).

k) Does national law require public services to also translate some or all of their documents in Braille? (i.e. Tax declarations, general information) Is translation in sign languages provided in some of the public services where needed? What is the practice?

A series of provisions introduced in 2006 and 2007 impose an obligation to use Braille in some cases in Spain:

- Law 29/2006 of 26 July on guarantees and rational use of medicines and health products (*Ley 29/2006, de 26 de julio, de garantías y uso racional de los medicamentos y productos sanitarios)* has introduced the requirement that all medicine containers have to feature information in Braille.
- Royal Decree 1612/2007[14] makes it easier for people with visual disabilities to exercise their right to vote and requires the administration to provide ballot papers in Braille for blind people on request. This has already been common practice in every election since 2008.
- Royal Decree 366/2007[15] requires that the relevant information must be available in the Information Offices of administrations in at least two of the three sensory modalities: visual, audible and tactile (raised letters or Braille), and interactive information systems must be in Braille.
- Decree 1494/2007[16] requires telecommunication operators to provide invoices and conditions of service provision in Braille or large print.

[14] Royal Decree 1612/2007, of 7 December, on voting accessible to people with visual disabilities (*Real Decreto 1612/2007, de 7 de diciembre, por el que se regula un procedimiento de voto accesible que facilita a las personas con discapacidad visual el ejercicio del derecho de sufragio*)
[15] Royal Decree 366/2007, of 16 March, accessibility and non-discrimination of people with disabilities in their relations with the central government (*Real Decreto 366/2007, de 16 de marzo, por el que se establecen las condiciones de accesibilidad y no discriminación de las personas con discapacidad en sus relaciones con la Administración General del Estado*).
[16] Royal Decree 1494/2007, of 12 November, conditions for access of disabled people to the technologies, products and services related to information society and media services (*Real Decreto 1494/2007, de 12 de noviembre, por el que se aprueba el Reglamento sobre las condiciones básicas para el acceso de las personas con discapacidad a las tecnologías, productos y servicios relacionados con la sociedad de la información y medios de comunicación social*).

- Royal Decree 1544/2007[17] establishes the 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 (*Ley 27/2007, de 23 de octubre, por la que se reconocen las lenguas de signos españolas y se regulan los medios de apoyo a la comunicación oral de las personas sordas, con discapacidad auditiva y sordociegas*) 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 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 public administrations; 4) political participation; and 5) the media, telecommunications and the information society.

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

l) Please explain briefly the existing national legislation concerning people with disabilities (beyond the simple prohibition of discrimination). Does national law provide for special rights for people with disabilities?

Royal Legislative Decree 1/2013, of 29 November, approved the General Law on the Rights of Persons with Disabilities and their Social Inclusion (RDL 1/2013). This Law integrates the following three laws: Law 13/1982, 7 April, on the Social Integration of Disabled People; Law 51/2003, 2 December, on Equal Opportunities, Non-discrimination, and Universal Accessibility for Persons with Disabilities; and Law 49/2007 on Offences and Sanctions in the field of Equality for Persons with Disabilities. The Law adapted the text of these previous laws in minor respects to comply with the International Convention on the Rights of Persons with Disabilities.

National law does not provide for special rights for people with disabilities. However, for example, Law 27/2007 represents an important advance in the rights of disabled people beyond the prohibition of discrimination, as it recognises sign languages and regulates their use.

Disability accessibility standards

Law RDL 1/2013 (art. 23.1) provides that:

[17] Royal Decree 1544/2007, of 23 November, basic conditions of accessibility and non-discrimination for access and use of modes of transport for people with disabilities (*Real Decreto 1544/2007, de 23 de noviembre, por el que se regulan las condiciones básicas de accesibilidad y no discriminación para el acceso y utilización de los modos de transporte para personas con discapacidad*).

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 each of the following fields: telecommunications and the information society; urbanised public spaces, infrastructure and construction; transport; goods and services that are accessible by the public; relations with public administrations; administration of justice; cultural heritage; and employment.

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

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

a) Accessibility and non-discrimination standards in relations with 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 exercise of the right to vote for the visually disabled people, Royal Decree 1612/2007 of 7 December provided an accessible voting procedure applicable to electoral processes designed to allow blind and severely visually disabled people to identify their voting option independently and with fully guaranteed secrecy. This was regulated by Ministerial Order INT/3817/2007 of 21 December.
c) Accessibility and non-discrimination standards in the information society. These are regulated by Royal Decree 1494/2007 of 12 November adopting the regulations on basic standards for access by disabled people to technologies, products and services linked to the information society and the media.
d) Accessibility and non-discrimination standards in means of transport. The regulations refer to vehicles and also buildings and facilities involved in transport activity and are to be found in Royal Decree 1544/2007 of 23 November regulating basic standards of accessibility and non-discrimination in the access to and use of means of transport by disabled people.

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

B) 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, which was developed by Housing Ministry Order VIV/561/2010 of 1 February.

Access to information

As an aspect of the right to equality, Law RDL 1/2013 states that "The government will protect particularly intensively the rights of people with disabilities in terms of (...) information (...)".

2.7 Sheltered or semi-sheltered accommodation/employment

a) To what extent does national law make provision for sheltered or semi-sheltered accommodation/employment for workers with disabilities?

There are two forms of support for disabled employment: semi-sheltered employment in the ordinary labour market and sheltered employment centres (Centros Especiales de Empleo, CEEs).

There are two types of measure for supporting employment of the disabled in the regular labour market:

1) Public and private companies with more than 50 employees are obliged to give 2% of jobs to disabled people.
2) Semi-sheltered employment: the public authorities provide various forms of aid in the form of subsidies, discounts to companies' social security contributions, subsidies to adapt workstations and aids of other kinds for various types of employment contract governed by general labour regulations, such as indefinite contracts, temporary contracts and stand-in contracts for the substitution of other disabled workers.

b) Would such activities be considered to constitute employment under national law- including for the purposes of application of the anti-discrimination law?

Yes, sheltered or semi-sheltered employment is under the national employment and anti-discrimination law.

In sheltered employment centres (see section 5 of this report), disabled people's employment relationship is a "special employment relationship", with the form of any current employment contract, but with certain peculiarities, which also appear in the working conditions.

Sheltered employment centres can enter into contracts with collaborating companies (empresas colaboradoras) in the ordinary labour market to allow disabled workers at the centre to provide their services in such companies.
These are known as employment enclaves (enclaves laborales) and form bridges between the sheltered labour environment of the centres and the ordinary labour market.

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)

Are there 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 in Spain. 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 in 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” that 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 Natural persons and legal persons (Recital 16 Directive 2000/43)

a) Does national law distinguish between natural persons and legal persons, either for purposes of protection against discrimination or liability for discrimination?

The prohibition of discrimination in the Constitution 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), both in the public and the private sector. As Rubio-Marín (2004) indicates, for the private sector, the prohibition on discrimination and violation of workers’ fundamental rights is mainly addressed to the employer, but can also be made applicable to managers, and presumably to co-workers or the labour union.

b) Is national law applicable to both private and public sector including public bodies?

Yes, national law is applicable to both private and public sector including public bodies.

3.1.3 Scope of liability

Are there any liability provisions other than those mentioned under harassment and instruction to discriminate? (e.g. employers, landlords, tenants, clients, customers, trade unions)

The answer is the same: liability for discrimination is personal and only affects individuals or organizations who have committed acts of discrimination.

3.2 Material Scope

3.2.1 Employment, self-employment and occupation

Does national anti-discrimination legislation apply to all sectors of public and private employment and occupation, including contract work, self-employment, military service, holding statutory office? In case national anti-discrimination law does not do so, is discrimination in employment, self-employment and occupation dealt with in any other legislation?

In paragraphs 3.2.2 - 3.2.5, you should specify if each of the following areas is fully and expressly covered by national law for each of the grounds covered by the Directives.

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 sectors of public and private employment and occupation, including contract work, self-employment and holding 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 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 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 the 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, religious 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))

Does national law on discrimination include access to employment, self-employment or occupation as described in the Directives? In case national anti-discrimination law does not do so, is discrimination regarding access to employment, self-employment and occupation dealt with in any other legislation?
Is the public sector dealt with differently to the private sector?

The second part of Article 3.1.a of the directives specifies that conditions for access to employment, to self-employment or to occupation

> *includes selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion.*

This is completely missing from Spanish Law 62/2003 that transposes them. However, it may be considered unnecessary because its references to equal access to employment are clear and sufficient. Moreover, art. 2 of the Law 56/2003 of 16

December on employment specifies as the foremost general objective of employment:

> *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))

Does national law on discrimination include working conditions including pay and dismissals? In case national anti-discrimination law does not do so, is discrimination regarding working conditions dealt with in any other legislation?

In respect of occupational pensions, how does national law on discrimination ensure the prohibition of discrimination on all the grounds covered by Directive 2000/78 EC? NB: Case C-267/06 Maruko confirmed that occupational pensions constitute part of an employee's pay under Directive 2000/78 EC. In case national anti-discrimination law does not do so, is it dealt with in any other legislation?

Note that this can include contractual conditions of employment as well as the conditions in which work is, or is expected to be, carried out.

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) entitled "Non-discrimination in working relations":

> *Shall be regarded as void and without effect 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 favourable or adverse discrimination in employment, whether in relation to remuneration, working time, or other working conditions, on the grounds of sex, origin, include racial or*

> *ethnic origin, civil status, social condition, religious 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.*

With the distinction between "unfavourable direct or indirect discrimination on the grounds of age or disability" and "favourable or adverse discrimination in employment" in other grounds, the provision facilitates positive action in the field of age or disability. Article 8.12 of the Law on violations and sanctions of labour laws (modified by Law 62/2003, Article 41) considers as very serious infringements

> *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, include racial or ethnic origin civil status, social condition, religious 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.*

In September 2008, the Spanish branch of Aerolíneas Argentinas dismissed a homosexual worker. The worker's complaint was accepted by Social Court no. 35 of Madrid, 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 gave rise to various forms of unfavourable treatment, up to his dismissal. In the 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, though 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. This was a ruling of a Social Court that may be appealed against in higher courts, but it 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.[18]

Article 37 of the Law on the social integration of the disabled (LISMI) (modified by Law 62/2003, Article 38), pursues the equality of treatment of persons with disability in the ordinary system of work.

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

As to 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 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

> *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.*

So discrimination in these fields is 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 Community 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))

Does national law on discrimination include access to guidance and training as defined and formulated in the directives? In case national anti-discrimination law does not do so, is discrimination regarding working conditions dealt with in any other legislation?

Note that there is an overlap between 'vocational training' and 'education'. For example, university courses have been treated as vocational training in the past by the Court of Justice. Other courses, especially those taken after leaving school, may fall into this category. Does national law on discrimination apply to vocational training outside the employment relationship, such as that provided by technical schools or universities, or such as adult lifelong learning courses? If not does any other legislation do so?

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 on 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 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))

Does national law on discrimination include membership of, and involvement in workers or employers' organisations as defined and formulated in the directives? In case national anti-discrimination law does not do so, is it dealt with in any other legislation?

Article 34 of Law 62/2003 includes this subject on 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 field of equal treatment.

> *In relation to paragraphs 3.2.6 – 3.2.10 you should focus on how discrimination based on racial or ethnic origin is covered by national law, but you should also mention if the law extends to other grounds.*

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

Does national law on discrimination cover social protection, including social security and healthcare? In case national anti-discrimination law does not do so, is it dealt with in any other legislation?

In relation to religion or belief, age, disability and sexual orientation, does national law seek to rely on the exception in Article 3(3), Directive 2000/78?

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, the 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”.

This same consideration applies to the four following sections of this report.

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 *Manzanas v. Spain*, that there had been a “Violation of Article 14 of (prohibition of discrimination) the European Convention on Human Rights. The case concerned a difference in treatment between priests of the Catholic Church and Evangelical ministers regarding the calculation of their pension rights (see Section 0.3).

The ECtHR observed that, prior to 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. But 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. Whilst the reasons for the delay in joining ministers into the general social-security scheme fell within the States' 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 take 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)

Does national law on discrimination cover social advantages? In case national anti-discrimination law does not do so, is it dealt with in any other legislation?

> *This covers a broad category of benefits that may be provided by either public or private actors to people because of their employment or residence status, for example reduced rate train travel for large families, child birth grants, funeral grants and discounts on access to municipal leisure facilities. It may be difficult to give an exhaustive analysis of whether this category is fully covered in national law, but you should indicate whether national law explicitly addresses the category of 'social advantages' or if discrimination in this area is likely to be unlawful.*

See the discussion of Article 29.1 of Law 62/2003 in section 3.2.6 of this report. All the considerations outlined in that paragraph are applicable to the field of social advantages.

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, 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 the young and elderly in 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 in transport or in access to 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 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 to be designed and built in a disability-accessible way.

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

Does national law on discrimination cover education? In case national anti-discrimination law does not do so, is it dealt with in any other legislation?

This covers all aspects of education, including all types of schools. Please also consider cases and/ or patterns of segregation and discrimination in schools, affecting notably the Roma community and people with disabilities. If these cases and/ or patterns exist, please refer also to relevant legal/political discussions that may exist in your country on the issue.

Please briefly describe the general approach to education for children with disabilities in your country, and the extent to which mainstream education and segregated "special" education are favoured and supported.

See the discussion of Article 29.1 of Law 62/2003 in section 3.2.6. All the considerations in that paragraph are applicable to the field of education.

Equal treatment and non-discrimination have been consolidated as basic principles of education in Spain. For example, the first three principles of quality listed in the Organic Law on Education (LOE)[19] refer to equal treatment and equal opportunities as follows (article 1):

> *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 fostering personal freedom, responsibility, democratic citizenship, solidarity, tolerance, equality, respect and justice, and that help overcome discrimination of any kind.*

[19] Organic Law on Education (*Ley Orgánica de Educación*), Law 2/2006, 3 May (BOE, 4 May 2006).

Another principle of the Organic Law on education refers to equality between men and women: “Development of equality of rights and opportunities and promotion of real equality between men and women.”

The debate on school segregation has become high profile in Spain with the 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.

The passage of the Organic Law on education 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[20] 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 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 also providing the possibility of setting up “committees or other bodies to guarantee admission”. It also 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).*

It also 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 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 therefore.*

“Groups” refers in particular to Roma people and immigrants.

[20] 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.”

A judgment of the Supreme Court (21 June 2006; reference no. 3356/2000) has stated that it is not discriminatory to educate boys and girls separately. The trade union UGT (*Unión General de Trabajadores*) brought a legal action against three "Fomento" schools in Asturias linked to Opus Dei as they are schools subsidised with public funds by virtue of agreements with the regional education authorities but which educate boys and girls in separate classrooms. The trade union argued that the sexes should not be separated in education and that any private schools doing so should not be able to take advantage of agreements allowing them to receive public funding. In setting the rules for the admission of pupils to public and private schools, the Organic Law on education provides:

> *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).*

The law makes no express reference to agreements with segregated schools.

The Supreme Court ruling states that separate-sex education in the private sphere is lawful, and adds that "nor is there any express provision barring public support for schools offering such education." The ruling recalls that the International Convention against Discrimination in Education[21] states that "separate education systems … shall not be deemed to constitute discrimination", and notes that "mixed education is one means, but not the only one, of promoting the elimination of sexual inequality," and so its interpretation is that "international legislation leaves the issue open."

The court also mentions the arguments of the previous ruling of the National High Court (*Audiencia Nacional*), according to which

> *the mere fact that education is given solely to boys or to girls is not in itself discriminatory on the ground of sex, provided that the parents or guardians can choose, in a context of free education, between schools in a certain area.*

The judgment adopts the position of the State Legal Service (*Abogacía del Estado*) opposing the UGT's action, according to which

> *the fact that compulsory education given in public schools is mixed does not mean that it must be mixed in all schools*

and

> *This is an option that cannot be imposed, especially when the Constitution enshrines parents' right to choose the form of education that they wish for their*

[21] http://portal.unesco.org/en/ev.php-URL_ID=12949&URL_DO=DO_TOPIC&URL_SECTION=201.html.

> *children, guarantees freedom of establishment for schools and protects the right of private schools to define their own nature.*

A representative of the trade union UGT argued that:

> *agreements by which the State supports private schools came into existence to meet educational needs, and any school, when applying for such an agreement, should accept those requirements*

and

> *We consider that schools opting for segregation, separating boys and girls, should not be state-supported. And this has to do not with the freedom to establish schools but with the free nature of education.*[22]

In summary, although all the Spanish public schools and most private schools are mixed (i.e., male and female students), the Supreme Court states that separate-sex education in the private schools is lawful and that the mere fact that education is given solely to boys or to girls is not in itself discriminatory on the ground of sex.

The Law on the social integration of disabled people attempts to integrate the people with disabilities into:

> *the ordinary system of general education, receiving, in this case, the support and resource programmes that the Law recognises.*

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

The Organic Law on education (LOE) 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:

[22] There are no data on the number of schools that separate pupils into different classrooms by sex. Of the 22 706 non-university schools and colleges in Spain (in the academic year 2005-2006), it is estimated that between 120 and 150 separate pupils by sex (according to the Spanish Confederation of Schools and Colleges), and that 80% of these are state-subsidised private schools and the rest non-subsidised private schools. Most of them are linked to the Catholic Church (and especially to Opus Dei).

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 Organic Law on education 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."

In conclusion, the general criterion is that people 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.

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

Does national law on discrimination cover access to and supply of goods and services? In case national anti-discrimination law does not do so, is it dealt with in any other legislation?

a) Does the law 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)? If so, explain the content of this distinction.

See the discussion of Article 29.1 of Law 62/2003 in section 3.2.6 of this report. All the considerations in that paragraph are applicable to access to and supply of goods and services which are available to the public.

The law has not made a distinction between goods and services available to the public and those only available privately.

The airline, Air Nostrum, a subsidiary of Iberia Líneas Aéreas de España, refused to allow three deaf people on board on the grounds that they were unaccompanied. It claimed that according to its flight operation manual the safety of these people 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 people, represented by the National Confederation of the Deaf and the Spanish Committee of Disabled People's Representatives.

The Madrid Provincial Court deemed this a case of "indirect discrimination" and noted that Law 51/2003 of 2 December 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 people 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). It ordered Iberia to take steps to ensure that “the infringement of disabled people’s rights ceases and that deaf people 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.

b) *Does the law allow for differences in treatment on the grounds of age and disability in the provision of financial services? If so, does the law impose any limitations on how age or disability should be used in this context, e.g. does the assessment of risk have to be based on relevant and accurate actuarial or statistical data?*

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

Does national law on discrimination cover housing? In case national anti-discrimination law does not do so, is it dealt with in any other legislation?

To which aspects of housing does the law apply? Are there any exceptions? Please also consider cases and patterns of housing segregation and discrimination against the Roma and other minorities or groups, and the extent to which the law requires or promotes the availability of housing which is accessible to people with disabilities and older people.

See the discussion of Article 29.1 of Law 62/2003 in section 3.2.6 of this report. All the considerations in that paragraph are applicable to the field of housing.

The practical application of this legal statement 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 illegal construction or slum districts.

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

The 2009-2012 National Housing and Restoration Plan[23] are of universal scope, but are targeted in particular at the groups which have most difficulty in gaining access to decent housing, specifically including disabled people and their families and older people over 65. These plans also expressly mention immigrants and, implicitly, Roma

[23] Adopted by Royal Decree 2066/2008, of 12 December, adopting the 2009-2012 National Housing and Restoration Plan (BOE, 24 December 2009).

people within the term “groups in a situation, or at risk, of social exclusion”. There has been no public evaluation of this plan.

The April 5, 2013 the government has approved a new housing Plan (2013-2016) that has changed the priorities of the previous plan. The new plan encourages especially the rent and rehabilitation. Within the "Programme for the Promotion of rehabilitation" includes measures to carry out reasonable adjustments for accessibility.[24]

[24] Royal Decree 233/2013, of April 5, 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)

Does national law provide an exception for genuine and determining occupational requirements? If so, does this comply with Article 4 of Directive 2000/43 and Article 4(1) of Directive 2000/78?

Law 62/2003 (Article 34.2.2) reproduces the occupational requirement exception of Article 4.1 of the directive which provides:

> *Differences based on a characteristic related to any of the causes referred to in the previous paragraph [all the grounds of the 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 Organisation (ILO), 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 used the concept of "objective and reasonable justification" in discrimination cases (STC 22/1981).

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

a) *Does national law provide an exception for employers with an ethos based on religion or belief? If so, does this comply with Article 4(2) of Directive 2000/78?*

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 by-laws.*

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 these 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. In the first stage, before the signature of the contract, the 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 on 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. In 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. In the third stage, although the general rule says that a discriminatory dismissal is void, in these organisations with a specific ethos it will not be discriminatory if there has been behaviour hostile to that ethos.

In recent years, there have been problems recruiting religious education teachers in state schools where the ecclesiastical authorities have learned that the teachers were contracted civil marriage to 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 Galera vs Ministry of Education and Bishop of Almeria (nº 51/2011, 14 April 2011) (see Annex 3) states that the fact that Ms. Galera had contracted civil marriage to a divorced man (which is the only reason given by the Bishop of Almería to justify its decision), “is unrelated with the carried out educational activity of the applicant therefore does not affect their dogmatic knowledge or teaching skills”.

b) Are there any specific provisions or 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? (e.g. organisations with an ethos based on religion v. sexual orientation or other ground).

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.[25] Rubio-Marín (2004) has pointed that 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.[26] 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 in developing purely technical expertise or is restricted to the pure transmission of knowledge.[27] According to some academic doctrine, this would allow employers in this kind of institution to inquire about 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).

On 15 February 2007, the Constitutional Court adopted a judgment on the constitutionality of the agreement between Spain and the Vatican regarding teachers of religion.[28] 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 of 3 December on the education system), teachers of religion in Spanish state schools are hired by means of employment contracts made by the public authorities (regional governments), but in order to be so employed they require an "ecclesiastical declaration of suitability", 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, María del Carmen 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

[25] See *Sentencia Tribunal Constitucional* (Constitutional Court Decision), 27 March 1985, 47/1985.
[26] See *Sentencia Tribunal Constitucional* (Constitutional Court Decision), 12 June 1996, 106/1996.
[27] See *Sentencia Tribunal Constitucional* (Constitutional Court Decision), 13 February 1981, 5/1981.
[28] See *Sentencia Tribunal Constitucional* (Constitutional Court Decision), 15 February 2007, 38/2007.

an employment contract at various state schools since the academic year 1990/1991, 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) states that:

> *[…] if the bishop [withdraws] his proposal of the plaintiff 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 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 is 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 is based on grounds other than the fundamental right of religious freedom and 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.[29]

The Decision of the Constitutional Court 51/2011, of 14 April 2011 (Galera vs Ministry of Education and Bishop of Almeria)[30] (see paragraph 0.3) adds two new aspects in 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 Catholic religion teachers. 2) It provides that the civil marriage of a Catholic teacher "is unrelated with the educational activity" and that, therefore, cannot be justification for a job layoff.

[29] 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 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; controversial in society (the bishops and Catholic authorities expressed themselves in favour and the trade unions strongly against); and 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 will have notable consequences, as the ordinary courts will now have to sentence 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 plaintiff whose case gave rise to this judgment), or are not believers, but also because 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.

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

c) *Are religious institutions permitted to select people (on the basis of their religion) to hire or to dismiss from a job when that job is in a state entity, or in an entity financed by the State (e.g. the Catholic church in Italy or Spain can select religious teachers in state schools)? What are the conditions for such selection? Is this possibility provided for by national law only, or international agreements with the Holy See, or a combination of both? Is there any case law on this?*

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 proposal of hiring, activities and non-renewal or dismissal of teachers and the State hires, 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 dismissals of religious education teachers. These dismissals have generally resulted from arbitrary decisions of the diocese, and have therefore been declared unfair or void, deeming 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 (LOE) resolves satisfactorily this problem. Its third additional provision, relating to teachers of religion, provides (third additional provision):

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 not belonging to 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 in 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.

In my view, this provision of the LOE is in conformity with the Article 4(2) exception.

The case or Fernández Martínez (FM) v Spain of the ECtHR (see Section 0.3) reveals some important issues in this field. Although the non-renewal of the contract of F.M. as a teacher of Catholic religion preceded the adoption of this law. The ECtHR has held that the reason for the non-renewal of the employment contract of FM is strictly of religious nature. F. M. was a married priest and then "a secularised priest", and non-renewal of his contract occurs after he appeared in a newspaper expressing their support for optional celibacy for priests. For ECtHR the fact that F.M.

was “a secularised priest” makes the case different from other court precedents (Siebenhaar v. Germany (in 2011), Schüth v. Germany (in 2010) and Obst v. Germany (in 2010). And consider that “by not renewing the applicant’s contract, the ecclesiastical authorities were merely discharging their obligations that stemmed from the principle of religious autonomy”. However, as has highlighted the opinion of the ECtHR Spanish judge dissenting from the judgment of the ECtHR, the most important fact is that the employer is not the bishop but the state, which is who hires F.M. (and religious teachers of all public schools in Spain). And then the ethos of the employer is not a relevant argument.

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

a) Does national law provide for an exception for the armed forces in relation to age or disability discrimination (Article 3(4), Directive 2000/78)?

No explicit reference is made in the transposition of Directive 2000/78 to the exception for the armed forces in relation to age or disability discrimination under Article 3.4.

b) Are there any provisions or exceptions relating to employment in the police, prison or emergency services (Recital 18, Directive 2000/78)?

The law regulating access to the armed forces (Law 17/1999 of 18 May on staff regulations for the armed forces) provides:

> *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[31] […]. The tests to be passed in the recruitment systems […] shall serve to demonstrate the applicants’ necessary psychophysical aptitudes […]” (Article 63).*

Similar rules are applicable to employment in the police, prison or emergency services.

4.4 Nationality discrimination (Art. 3(2))

Both the Racial Equality Directive and the Employment Equality Directive include exceptions relating to difference of treatment based on nationality (Article 3(2) in both Directives).

[31] Royal Decree 1735/2000, of 20 October, 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).

a) *How does national law treat nationality discrimination? Does this include stateless status?*
What is the relationship between 'nationality' and 'race or ethnic origin', in particular in the context of indirect discrimination?
Is there overlap in case law between discrimination on grounds of nationality and ethnicity (i.e. where nationality discrimination may constitute ethnic discrimination as well?

The Law on the rights and duties of aliens (OL 4/2000) covers direct and indirect discrimination by nationality, but with definitions not similar to 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.

Article 34 of OL 4/2000 allows the Ministry of the Interior to recognise as stateless foreigners with no nationality who meet the requirements of the 1954 Convention relating to the status of stateless persons, and to issue the identity papers provided for in Article 27 of the Convention. This provision is implemented in the regulations recognising statelessness adopted in Royal Decree 865/2001 of 20 July, which provides:

> *Stateless people recognised as such shall be entitled to live in Spain and to engage in work, professional and business activities in accordance with the provisions of immigration regulations (Article 13).*

Article 23.2 of OL 4/2000 defines "indirect discrimination" in the sphere of immigration and 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.[32] 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 officer did not ask anyone else on the platform at that time for their identity cards. 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.

[32] UN HRC Communication No. 1493/2009, *Mrs Rosalind Williams Lecraf v. Spain*, 27 July 2009.

Mrs Williams filed a complaint with the Ministry of the Interior, which asserted that there was no order obliging the police to identify people by their racial characteristics. She then appealed to all the competent Spanish courts on the ground that she was a victim of racial discrimination. She lost all these appeals. The Spanish Constitutional Court, in a judgment of 29 January 2001,[33] which puts an end to proceedings in Spain, 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.*

Nearly six years after this Constitutional Court judgment, on 11 September 2006, R. Williams filed a complaint to the HRC, with the support of Open Society Justice Initiative, Women's Link Worldwide and SOS Racismo-Madrid.

The HRC declares 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 it was filed nearly six years after the proceedings in Spain were exhausted, due to the complainant's difficulties in 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, there are several considerations of interest:

a) *The Committee considers that identity checks carried out for public security or crime prevention purposes in general, or to control illegal immigration, serve a legitimate purpose. However, when the authorities carry out such checks, the physical or ethnic characteristics of the persons subjected thereto should not by themselves be deemed indicative of their possible illegal presence in the country.*
b) *In the present case, although there does not appear to have been any written order in Spain expressly requiring identity checks to be carried out by police officers based on the criterion of skin colour, it appears that the police officer considered himself to be acting in accordance with that criterion – a criterion considered justified by the courts which heard the case.*
c) *The complainant alleges that no one else in her vicinity had their identity checked and that the police officer who stopped and questioned her referred to her physical features to explain why she, and no one else in the vicinity, was being asked to show her identity papers [...] The Committee can only conclude*

[33] See *Sentencia del Tribunal Constitucional* (Constitutional Court Decision), 29 January 2001, 13/2001.

that the complainant was singled out for the identity check in question solely on the ground of her racial characteristics and that these characteristics were the decisive factor in her being suspected of unlawful conduct".

d) *Furthermore, the Committee recalls 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 "is 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."*

And, therefore, it deems that Spain:

1) *is under an obligation to provide the complainant with an effective remedy, including a public apology;*
2) *is also under an obligation to take all necessary steps to ensure that its officials do 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) *requests Spain to publish the Committee's views.*

Spain ratified the International Covenant on Civil and Political Rights on 27 April 1977, and the Optional Protocol on 25 January 1985. It is therefore bound by the HRC's views.

Apart from their significance to the parties, 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 of 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, paragraph 10), urged Spain to take effective measures to eradicate the practice of identifying controls 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.

b) *Are there exceptions in anti-discrimination law that seek to rely on Article 3(2)?*

As we said earlier, (see section 3.1.1 of this report), 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. 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 are not covered by the exclusion outlined in Article 3.2. of the directives.

As the Law on the rights and duties of aliens (OL 4/2000) requires foreigners to be in a regular situation in order to enjoy full protection of their rights, equality for them is not guaranteed in the labour market, education and training, social protection, social advantages, and access to and supply of goods and services, until they have regularised their situation and procured a residence permit, and a work permit in the case of workers. However, several Constitutional Court judgments in late 2007 overturned the distinction made by OL 4/2000 between residents with legal status and illegal immigrants in access to fundamental rights.

The court made eight rulings[34] in which it declared the distinction to be unconstitutional for freedom of assembly, freedom of association, the right to non-obligatory education, the right to organise, the right to strike and the right to free legal assistance.

Law 4/2000 does not affect EU citizens, who are covered by specific regulations and cannot be discriminated against in relation to Spaniards. EU citizens of the 10 new Member States (except for Cyprus and Malta) were covered by temporary rules until 1 May 2006.

Citizens of Romania and Bulgaria did not enjoy the right of free movement immediately following the accession of their countries to the EU, but were obliged to wait for a transitional period to pass before they could enjoy this right. This transitional period came to an end on 1 January 2009 in Spain. (Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community).[35]

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:

> *Foreigners that are nationals of countries legally identified as having special and traditional historical, cultural and linguistic ties with Spain may become professional soldiers […].*

[34] Constitutional Court Judgments 236/2007 of 7 November (a real leading case), 259/2007 of 19 December, and 260, 261, 262, 263, 264 and 265/2007, all of 20 December.
[35] The corresponding annexes of the new Member States' accession treaties (except in the cases of Cyprus and Malta) provide the possibility of applying restrictions on the free circulation of workers from those countries in the European Union for a period of seven years.

No complaints have been lodged against this differentiation between Latin Americans and other foreign nationals. Royal Decree 2266/2004 of 3 December increased the maximum quota of foreign nationals in the professional army and navy to 7 per cent of the total.

Royal Decree Law 8/2004 of 5 November 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.

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

Some employers, both public and private, provide benefits to employees in respect of their partners. For example, an employer might provide employees with free or subsidised private health insurance, covering both the employees and their partners. Certain employers limit these benefits to the married partners (e.g. Case C-267/06 Maruko) or unmarried opposite-sex partners of employees. This question aims to establish how national law treats such practices. Please note: this question is focused on benefits provided by the employer. We are not looking for information on state social security arrangements.

a) *Would it constitute unlawful discrimination in national law if an employer only provides benefits to those employees who are married?*

Before commenting on the current situation, it is interesting to point out that the preamble to Law 13/2005 amending the Civil Code with regard to the right to contract matrimony (*Ley 13/2005, de 1 de Julio, por la que se modifica el Código Civil en material de derecho a contraer matrimonio*, BOE, 2 July 2005) states that

> *the reality of Spanish society in our time has become much richer, more plural and more dynamic than that in which the Civil Code was enacted. Couples of the same sex cohabiting on a basis of affection have become increasingly recognised and accepted in society, overcoming deep-rooted prejudices and stigmas. Today it is widely acknowledged that cohabitation in such couples is a means for a large number of people to develop their personalities, and through which such people provide each other with emotional and economic support, albeit with no status other than that of a strictly private relationship, given the lack of formal recognition in law, up to now.*

This provision is designed to end "a long history of discrimination on the ground of sexual orientation." It establishes:

a framework for personal realisation enabling those who freely adopt a sexual and emotional preference for persons of their own sex to develop their personalities in equal conditions.

Law 13/2005 thus amended Article 44 of the Civil Code, which 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 henceforth entitled to get married with exactly the same rights (custody of children, adoption, inheritance, etc.) as currently enjoyed by heterosexual couples.

According to the Spanish Centre for Sociological Research (CIS), two out of three Spaniards are in favour of homosexual marriages. However, the law was strongly opposed by some conservative sectors of society close to the Catholic Church. Two weeks before the law was passed, a demonstration was held with the presence of 20 of Spain's 80 Catholic bishops. The result of the parliamentary vote on 30 June 2005 was 187 in favour and 147 against.

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.

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 employment in the region 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 been erratic. The National Railway Company (RENFE), for instance, was sued on various occasions, and although it lost before the lower courts, it systematically appealed with varying degrees of success. It finally changed its rules to extend benefits to same-sex partners (see Rojo 2005).

In Spain there is a relevant 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 *Muñoz vs Spain*; see paragraph 0.3) highlighted the existence of discrimination against Roma couples Roma in the access to some work-related family benefits and the need for the Spanish Constitutional Court to change its doctrine in this field.

b) Would it constitute unlawful discrimination in national law if an employer only provides 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 a current practice in some companies. However, it is illegal to limit these benefits to opposite-sex partners.

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

a) Are there exceptions in relation to disability and health and safety (Article 7(2), Directive 2000/78)?

Law 31/1995 of 8 November on the prevention of occupational hazards provides regulations for the protection of workers especially at risk from certain hazards, such as disabled workers. 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.

b) Are there exceptions relating to health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance (turbans, hair, beards, jewellery, etc.)?

There are no other exceptions in health and safety law in relation to other grounds, for example, ethnic origin or religion where there may be issues of dress or personal appearance, such as turbans, hair, beards or jewellery.

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

Please, indicate whether national law provides an exception for age? (Does the law allow for direct discrimination on the ground of age?)
Is it possible, generally, or in specified circumstances, to justify direct discrimination on the ground of age? If so, is the test compliant with the test in Article 6, Directive 2000/78, account being taken of the Court of Justice of the European Union in the Case C-144/04, Mangold and Case C-555/07 *Kucukdeveci?*

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, art. 6). To this effect, each difference of treatment on grounds of age must be expressly stated in a law and must be justified by "a legitimate aim".

a) Does national law permit differences of treatment based on age for any activities within the material scope of Directive 2000/78?

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, 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 is the different positions of social security contributors, including those performing no paid activity, and benefit recipients, in order to determine differences of treatment in social security (Blázquez, 2005).

b) Does national legislation allow 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)?

National legislation (Article 161.2 of the General Social Security Act: RDL 1/1994 of 20 June) 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) of Directive 2000/78.

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

Are there any special conditions set by law for older or younger workers in order to promote their vocational integration, or for persons with caring responsibilities to ensure their protection? If so, please describe these.

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

4.7.2 Minimum and maximum age requirements

Are there exceptions permitting minimum and/or 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.[36] 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, the Civil Service Basic Statute, Art. 67). Some public professions have special regulations such as Judges, Prosecutors, Bailiffs, Notaries or University Professors, among others with a compulsory retirement at 70.

A Constitutional Court decision (78/2012) has ruled that it is unconstitutional to give preference to applicants under 65 years old for the opportunity to open a new pharmacy. (see Section 0.3).The Basque Parliament Law 11/1994 of 17 June 1994, on pharmaceutical management of the Basque Autonomous Community, provided that the authorization to open of a new pharmacy shall be granted to pharmacists over sixty-five 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 at stake 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 organization requirements; and, thirdly, it could not be admitted that refusal of a licence to pharmacists over sixty-five years constituted a positive action measure aimed at balancing the unfavourable position of starting members of the profession.

[36] See *Sentencia del Tribunal Constitucional* (Constitutional Court Decisión), 2 July 1981, 22/1981.

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

4.7.3 Retirement

In this question it is important to distinguish between pensionable age (the age set by the state, or by employers or by collective agreements, at which individuals become entitled to a state pension, as distinct from the age at which individuals actually retire from work), and mandatory retirement ages (which can be state-imposed, employer-imposed, imposed by an employee's employment contract or imposed by a collective agreement).

For these questions, please indicate whether the ages are different for women and men.

a) *Is there a state pension age, at which individuals must begin to collect their state pensions? Can this be deferred if an individual wishes to work longer, or can a person collect a pension and still work?*

Workers may begin to receive a public pension at age 65, provided the other requirements provided in the law (General Social Security Law, Article 161) are met. From 2013 this age will increase gradually each year until reaching the age of 67 years in 2027 (Law 27/2011 of 1 August, on improvement and modernization of Social Security, art. 4).

However, this does not mean that 65 (or 67) is the age of obligatory retirement from work and the labour market, apart from in the public sector or civil service, with some exceptions (see section c) below). This age applies both to contributory and non-contributory pensions and may be lowered by the government for

> *those groups or professional activities whose work is of an exceptionally strenuous, toxic, dangerous or unhealthy nature, and which have high levels of disease or mortality,*

or in the case of "disabled people with a degree of disability equal to or greater than 65 per cent." Early retirement may be taken from age 61 provided that certain requirements specified in the General Social Security Act (Article 161) are met.[37]

[37] On 2 February 2011, the government and the social partners (employers and trade unions) have signed the "Social and economic agreement for growth, employment and the guarantee of pensions". One of the aspects is that the normal age of retirement will be 67 years rather than the current 65. This agreement was included in Law 27/2011 of 1 August, on improvement and modernization of Social Security.

The conditions are the same for women and men.

b) *Is there a normal age when people can begin to receive payments from occupational pension schemes and other employer-funded pension arrangements? Can payments from such occupational pension schemes be deferred if an individual wishes to work longer, or can an individual collect a pension and still work?*

Law 27/2011 of 1 August, on improvement and modernization of Social Security delayed retirement age progressively each year from 65 to 67 years in 2027; so that it will moved from 65 to 67 by 2027. The average retirement age at 2011 was 64.

The conditions are the same for women and men.

c) *Is there a state-imposed mandatory retirement age(s)? Please state whether this is generally applicable or only in respect of certain sectors, and if so please state which. Have there been recent changes in this respect or are any planned in the near future?*

The retirement age is voluntary. The rule requiring people to retire at no later than 69 was declared unconstitutional (see section 4.7.3 of this report).

However, retirement at 65 is compulsory in the civil service, but you can request an extension to 70 years (Law 7/2007 of 12 April, the Civil Service Basic Statute, Art. 67). Some public professions have special regulations such as Judges, Prosecutors, Notaries, Bailiffs or University Professors (compulsory retirement at 70), among others.

The conditions are the same for women and men.

d) *Does national law permit employers to set retirement ages (or ages at which the termination of an employment contract is possible) by contract, collective bargaining or unilaterally?*

On 3 December 2004, the trade unions and employers' organisations signed an agreement with the government to reintroduce a provision into the Workers' Statute enabling the social partners to include clauses in collective agreements on the termination of contracts when employees reach the ordinary retirement age, provided that certain conditions are met.

On 29 June 2005, the Spanish Parliament passed a law inserting a tenth additional provision into the Workers' Statute Act. This provision states that

> *collective agreements may include clauses allowing the employment contract to be terminated when the employee reaches the ordinary retirement age as established in social security regulations*

and adds two provisos (see sections 0.3 and 2.1.1 of this report).

The conditions are the same for women and men.

e) Does the law on protection against dismissal and other laws protecting employment rights apply to all workers irrespective of age, if they remain in employment, or are these rights lost on attaining pensionable age or another age (please specify)?

The laws protecting employment rights apply to all workers irrespective of age.

The conditions are the same for women and men.

f) Is your national legislation in line with the CJEU case law on age (in particular Cases C-229/08 Wolf, C-499/08 Andersen, C-144/04 Mangold and C-555/07 Kücüdevici C-87/06 Pascual García [2006], and cases C-411/05 Palacios de la Villa [2007], C-488/05 The Incorporated Trustees of the National Council on Ageing (Age Concern England) v. Secretary of State for Business, Enterprise and Regulatory Reform [2009], C-45/09, Rosenbladt [2010], C-250/09 Georgiev, C-159/10 Fuchs, C-447/09, Prigge [2011]) regarding compulsory retirement?

Yes. The judgment of the CJEU 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).

4.7.4 Redundancy

a) Does national law permit age or seniority to be taken into account in selecting workers for redundancy?

Spanish law allows no distinctions on the ground of age in the case of redundancy. However, in practice many redundancies in companies affect the youngest employees because they have been in the company for less time or the eldest because they have access to early retirement schemes.

National law permits the taking into account of seniority in selecting workers for redundancy.

b) If national law provides compensation for redundancy, is this affected by the age of the worker?

Redundancy payments are provided for in the Workers' Statute (Title I, Chapter III, Section IV). Officially, such payments are not affected by the worker's age, 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)

Does national law include any exceptions that seek to rely on Article 2(5) of the Employment Equality Directive?

Spanish legislation does not reproduce explicitly the exceptions mentioned in Article 2.5 of the Framework Directive regarding measures necessary for the maintenance of public order and the prevention of criminal offences, for the protection of health and the rights of freedoms of others.

4.9 Any other exceptions

Please mention any other exceptions to the prohibition of discrimination (on any ground) provided in national law.

There are no other exceptions in Spanish law.

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

a) What scope does national law provide for taking positive action in respect of racial or ethnic origin, religion or belief, disability, age or sexual orientation? Please refer to any important case law or relevant legal/political discussions on this topic.

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 of the public authorities to remedy the employment disadvantage of certain socially marginalised groups is actually required by a commitment to equality properly understood.

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

In the field of employment, the Workers' Statute (Article 17.2) stipulates that the Parliament may specify "exclusions, reservations and preference" in employment for certain groups 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 (*Ley Orgánica de Educación*) of 2006 stipulates:

> *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 (Article 80).*

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 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 aiming to fight against every form of employment discrimination, to encourage equality of opportunities 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.*

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 measures cover many spheres of action of the public authorities: education, housing, health, training, employment and social services.

b) Do measures for positive action exist in your country? Which are the most important? Please provide a list and short description of the measures adopted, classifying them into broad social policy measures, quotas, or preferential treatment narrowly tailored. Refer to measures taken in respect of all five grounds, and in particular refer to the measures related to disability and any quotas for access of people with disabilities to the labour market, any related to Roma and regarding minority rights-based measures.

Roma

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 Roma school population is especially affected by the following measures:

- Compensatory education
- Measures for children with special educational needs
- “Living together” programmes (discipline programmes)
- Education in values
- Absenteeism control plan
- Reinforcement, guidance and support plan.

The Roma also have a special Roma development plan (2010-2012) and a National Roma Council (see section 7).

All measures of these plans have been adopted in the last decades and have improved significantly the social situation of the Roma in Spain.

Disability

In the field of disability, a wide range of positive measures have been introduced since the implementation of Law 13/1982 on the social integration of persons with disabilities in 1982. This law has now been replaced by the General Law on the Rights of Persons with Disabilities and their Social Inclusion (RDL 1/2013), which includes positive action measures in articles 67 and 68.

Its aim (Article 42 of Law RDL 1/2013) is to grant the necessary assistance and protection to seriously disabled people, to provide a quota system and other actions promoting the integration of disabled people into employment, and to prohibit discrimination in order to allow the complete personal fulfilment of disabled people and their total social integration. The Constitutional Court (STC 269/1994, October 1994) has recognised the legality of establishing a quota for disabled people 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 people. The Law (Art. 2.g) defines positive action measures as:

> *those specific measures aiming 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, working and cultural life, taking into account different types and degrees of disability.*

Article 67 establishes:

1. *The public authorities shall take positive action measures to benefit people with disabilities, who are likely to experience a greater degree of discrimination, including multiple discrimination, or lower equality of opportunity, such as women and children, who require more support in the exercise of autonomy and independent decision making, those suffering particular social exclusion and disabled people who usually live in rural areas.*
2. *As part of the official policy of family protection, public authorities shall also take positive action measures with respect to families where one of their members is a person with disabilities.*

Article 68 of this Law 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
- Rules, criteria, or more favourable practices.

These measures shall be minimum provisions, without prejudice to any other measures that may be established by the autonomous communities in the spheres of their jurisdiction.

The Law institutes measures promoting equality, together with measures of positive action that aim to compensate for disability. Among those are:

- awareness programmes, information and training (art. 20);
  - adaptation by public administrations of their quality management programmes to ensure equal opportunities for people with disabilities (art. 70);
- measures to encourage innovation and the development of technical standards (art. 71);
- participation by organisations representing people with disabilities (art. 73);
- plans and programmes relating to accessibility and non-discrimination (Fourth Additional Provision).

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RDL 1/2013) lays out four systems of workplace integration for people with disabilities: a) integration into the ordinary work system; b) occupation in special employment centres (which provide goods and services for the market but offer special conditions of employment) or "labour enclaves" (see Section 2.7.b of this report); c) self-employment; and d) occupational education centres, when owing to the degree of disability, they cannot access any of the other options.

As regards integration into the ordinary system of work, there is support for various measures, which can be described as positive actions or measures of reverse discrimination:

- a quota system (at least 2% of the workforces of public and private companies with 50 or more employees must be disabled);
- Incentives[38]
  1. Indefinite contracts
     a. Subsidy (aid of EUR 3,900 to companies for each indefinite contract)

[38] Initially established in Royal Decree 1441/1983 of 11 May regulating measures for the promotion of employment for the disabled. Subsequent legislation has amended this Royal Decree's provisions.

b. Bonuses in social security contributions (reduction of companies' social security contributions, reimbursed by the public employment services)
c. Support for professional training
d. Bonuses for the adaptation of work stations (subsidies for the adaptation of work stations)
e. Fiscal measures

2. Temporary contracts
   a. Bonuses in companies' social security contributions.

Special employment centres are for people with a disability rating of more than 70%, and have as objectives: a) productive work, producing goods to be sold on the market; b) assuring disabled workers paid work while providing rehabilitation services and improving their social integration; and c) to integrate the largest possible number of people 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 also limited to the same degree.

The objective of occupational centres is to improve the social and personal integration of people with disabilities whose capacity remains below the limits that permit integration through the special work centres.

The Law on the social integration of the disabled of 1983 places an obligation on publicly owned and private companies with more than 50 workers to meet a 2% disability quota. However, repeated failure to comply with this provision resulted in the publication of Royal Decree 27/2000 of January 14 on alternative measures for compliance with the quota in favour of disabled workers. This rule specifies two measures substituting for quotas: a) entering into contracts for goods and services with special employment centres; and b) donations in cash to foundations and public associations that have as an objective, among others, promoting the employment integration of disabled people.

This employment quota for people with disabilities is equally applicable to public administration. Law 7/2007 of April 12 (modified by Law 26/2011 of August 1, on normative adaptation to the UN Convention on the Rights of Persons with Disabilities) establishes:

> *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.*

The law does not provide special subsidies for the lower performance of a disabled worker in the ordinary work system, but grants a subsidy of 50% of the minimum wage in the case of special work centres.

Law 3/2012, of July 6, on urgent measures to reform the labour market has established some new positive action measures in favor of persons with disabilities. Among them, the following:

- The preferential right to geographical mobility to protect the health of persons with disabilities. Article 11 establishes that, 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 had another vacancy in their workplaces in a locality in which such treatment is more accessible.
- The ability to prioritize staying in jobs in cases of redundancy or measures of geographic mobility.

Accessibility currently poses problems: there are many non-adapted public and private buildings and many public and private services not adapted to the needs of certain groups of citizens.

The National Accessibility Plan 2004-2012 was adopted on 25 July 2003. This plan was a strategic framework of actions intended to ensure that new environments, products and services are made to be accessible to the greatest possible number of citizens (via the Design for All model) and that those already existing are suitably adapted. The plan had the following five objectives:

1) To consolidate the Design for All model and its implementation in new products, environments and services. To disseminate information on and application of accessibility.
2) To introduce accessibility as a basic criteria of quality in public management.
3) To create a complete and efficient regulatory system for the promotion of accessibility eminently applicable on the ground.
4) To adapt environments, products and services to Design for All criteria in a progressive and balanced manner.
5) To promote accessibility in new technologies.

To this end, 18 strategies were adopted, implemented by 58 specific actions. Although the plan covered nine years, it was divided into three periods of three years each. In this context, on 12 July 2004 a cooperation agreement was signed between the Ministry of Labour and Social Affairs and the ONCE Foundation for cooperation in the social integration of persons with disabilities with a view to developing a universal accessibility programme. There has not been a public evaluation of the results of the 2004-2012 plan yet.

Law 27/2007 recognising sign languages and speech aid systems (*Ley 27/2007, de 23 de octubre, por la que se reconocen las lenguas de signos españolas y se regulan los medios de apoyo a la comunicación oral de las personas sordas, con discapacidad auditiva y sordociegas*) 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.

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 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 this 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 deaf persons' access to information and communication, taking into account their heterogeneity and their specific needs.

Sexual orientation/gender identity

Though it cannot be strictly described as positive action, it is worth noting Law 3/2007 regulating the amendment of entries on official registers (*Registro civil*) regarding a person's sex (*Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas*). In Spain, there are some 3,000 transsexuals. Transsexuals wishing to change their name and sex in the register of births, marriages and deaths in Spain currently need a court order and must undergo sex reassignment surgery. This process takes several years and is moreover costly and hazardous.

The law solves this problem by allowing people to change their names in the register of births, marriages and deaths by submitting "existential evidence" ("*prueba de vida*") when the existing entry does not match the person's true gender identity. It also provides for name changes so that the person's name may be in keeping with the relevant gender.

This gender identity bill was included in the Spanish Socialist Party's electoral programme of 2004. In its preamble, the law states that transsexuality is a social reality that needs to be addressed by the law so as to guarantee the free personal development and dignity of those whose current gender identity does not match the

sex with which they were initially registered. The text of the law states that the reference to a person's sex in official registers can be amended once the applicant has proven that s/he has been diagnosed with "gender dysphoria" by means of a report from a registered doctor or psychologist. The applicant must also prove that s/he has been medically treated for at least two years in order to adjust his/her physical characteristics to the relevant sex. Proof that this requirement is met should be supplied in a report from the registered doctor under whose supervision the treatment was given. Both requirements may have been met either before or after the law's entry into force. Anyone proving that they have satisfied both requirements may request a change in the reference to their sex in official registers as of the day after the law is enacted. For a person's sex to be amended in official registers, it is not necessary for the medical treatment to have included sex reassignment surgery.

6 REMEDIES AND ENFORCEMENT

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

In relation to each of the following questions please note whether there are different procedures for employment in the private and public sectors.

a) What procedures exist for enforcing the principle of equal treatment (judicial/ administrative/alternative dispute resolution such as mediation)?

The Spanish Constitution provides in Article 53 that all fundamental rights, of which equality is one, are protected by the ordinary courts of law. The Organic Law on the protection of fundamental rights establishes that 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, criminal, labour or administrative. Moreover, appeals for protection in respect of such rights may be lodged at the Constitutional Court (CC) once ordinary proceedings have been exhausted. The Law on the rights and freedoms of aliens stipulates that foreigners are entitled to legal aid on the same conditions as Spaniards.

There are also conciliation procedures for civil and social matters. As well as having recourse to the ordinary courts and to the CC, victims of discrimination may appeal to the Ombudsmen, at both national and regional level, when the issue concerns acts by the public administration, as well as to the Employment Inspectorate in matters of employment and social security and to the Education Inspectorate, with regards to both private and public employment/education.

Conflicts regarding either private employment or the hired personnel of public entities (subject to labour law) are resolved by the social jurisdictional branch composed of the specialised social and labour first and 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 instanca*), 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 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, the highest instance within the ordinary judiciary, is responsible for judging appeals in order to unify contradictory decisions by lower courts. Its decisions are generally binding and thus constitute a source of law.

In the field of employment, Articles 63-68 of the Law 36/2011, of 10 October, regulating the social jurisdiction provides a compulsory conciliation procedure to be followed before any judicial appeal is lodged.

Article 40 of Law 62/2003, which transposes the directives, modifies Article 181 of the Law on the employment litigation procedure:

> *Actions for the defence of other fundamental rights and civil liberties, including the prohibition of discriminatory treatment and harassment […]*

may be heard in social courts pursuant to a special urgent procedure. As Rodríguez (2004) says, use of this type of procedure is conditional, firstly, on the period of prescription or predicted expiration of acts and conduct to which the discrimination relates, and secondly, on a clear presentation of the constituent facts of the discrimination.

Equally, a worker considered the victim of labour discrimination can make a claim in the criminal courts under Article 314 of the Criminal Code, but given the way this article describes the crime, it has very little chance of being applied.

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). Article 75 refers to the right to effective judicial care of persons with disability. It begins with a declaration:

> *The judicial protection of the right to equal opportunities for persons with disabilities shall include the adoption of all necessary measures to end the violation of the right and prevent future violations, thus re-establishing to the victim the full exercise of this right.*

Article 76 recognises the legitimate standing of legal persons who may legally defend the rights and interests of an individual disabled person and obtain reparation for this individual person.

There are no costs or other barriers that may act as deterrents to litigants seeking redress. The litigants must have a lawyer and, if they win the action, the judge may require the respondent to pay that lawyer's costs. If they cannot afford a lawyer, they may request a free duty lawyer.

As the former European Monitoring Centre on Racism and Xenophobia (EUMC) pointed out (2005), Spain is one of the countries where there are no available statistics on the number of cases related to discrimination brought to court.

b) Are these binding or non-binding?

All the cited judicial procedures are binding, but the conciliation procedures are not binding.

c) What is the time limit within which a procedure must be initiated?

The worker has 20 days in the case of dismissal and a year for other labour claims to bring an action (The time limit for civil cases varies considerably: from 3 months to a claim in a neighbourhood community up to 15 years in a medical claim).

d) Can a person bring a case after the employment relationship has ended?

A person can bring a case after the employment relationship has ended.

e) In relation to the procedures described, please indicate any costs or other barriers litigants will face (e.g. necessity to instruct a lawyer?) and any other factors that may act as deterrents to seeking redress (e.g. strict time limits, complex procedures, location of court or other relevant body).

The Spanish Constitution (Article 119) guarantee legal aid for those who "have insufficient means to litigate." Legal aid is governed by Law 1/1996, of 10 January, the Free Legal Assistance, with a regulation adopted in 2003 (Royal Decree 993/2003, of 25 July), and amended in 2005 (Royal Decree 1445/2005, of 2 December). In 2011, the government allocated 241 million euros to legal aid.

However, the Royal Decree-Law 3/2013, of 22 February, amending fees regime in the area of administration of justice and legal aid system (which entered into force on 24 February 2013) amended the Law 1/1996 and has tightened the conditions of income and wealth to be entitled to free legal assistance. In addition, this law has raised fees significantly for appeals before courts.

In Spain it is mandatory in the lawsuits to use a lawyer (who defends the individual plaintiff or defendant) and a solicitor (which represents them and is responsible for all formal issues in court), which increases significantly the processes.

Court proceedings are often long and complex. There are projects underway to simplify these procedures.

f) Are there available statistics on the number of cases related to discrimination brought to justice? If so, please provide recent data.

There are no statistics available on the number of cases related to discrimination brought to justice in Spain. One of the recommendations of ECRI in 2011 was collect and publish that data. On 4 November 2011, the Spanish Government approved the "Comprehensive strategy against racism, discrimination, xenophobia and related intolerance." This strategy reflects the intention of the government (socialist before the present) to collect such data. To date this has not been implemented.

In June 2010 the Council for the promotion of equal treatment (see Section 5) launched a Network of centres of assistance for victims of racial or ethnic discrimination involving seven NGOs. The Council has produced two reports on this network covering the years 2010 (June-December) and 2011 (the whole year) [The Network did not operate between January 2012 and March 2013, see Section 7.d]. According to the reports, in 2010 and 2011 the Network's centres identified 825 "incidents" that qualified as discriminatory. The reports explain that these "incidents" came to the Network's centres through individual or collective complaints or because the centres had detected a situation they consider discriminatory. The most common areas in which "incidents" took place were employment (19%), housing (17%) and media and the internet (17%). "Incidents" occurring in 2011 were resolved by negotiation between the parties (47%), legal advice (34%), mediation (9%) or complaints (9%). No information is available on the 9% of cases where a complaint was filed (and may have come before the courts). The provisional data for 2013 are as follows: the Network assisted in 376 cases, consisting of 231 individual cases and 145 collective cases.

g) Are discrimination cases registered as such by national courts? (by ground? Field?) Are these data available to the public?

No, discrimination cases are not registered as such by national courts and data is not available.

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

Please list the ways in which associations may engage in judicial or other procedures

a) Are associations entitled to act on behalf of victims of discrimination? (to represent a person, company, organisation in court)

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 complainant, 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.*

Article 31 of Law 62/2003 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 to widen the provisions regulating the procedural defence in Law 1/2000 of 7 January regulating the civil trial (Articles 11 and 11 bis) and in Law 29/1998 of 13 June 1998 regulating the administrative jurisdiction (Article 19), although any amendment to these two laws have been introduced by Law 62/2003. This legitimation applies, however, only in cases of discrimination on the grounds of racial or ethnic origin and only in fields other than employment.

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RDL 1/2013) applies in the fields of telecommunications and the information society; urbanised public spaces, infrastructure and construction; transport; goods and services that are accessible by the public; relations with public administrations; administration of justice; cultural heritage; and employment. It provides in its Article 76 that legal entities legally authorised to defend legitimate collective rights and interests may engage in proceedings on behalf and in the interest of a person who authorises them to do so 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 as to include engagement in pre-judicial administrative proceedings.

Articles 22 and 64 of Law RDL 1/2013 provide that its provisions regarding the safeguard and effectiveness of the measures contained in it have a supplementary character in respect of the provisions that are contained in other specific laws regarding the 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 the Law on employment litigation of 7 April 1995, in its regulation of representation and procedural defence, stipulates that trade unions may appear in court on behalf and in the interest of member workers that authorise them to do so, to defend their individual rights. However, this only applies to trade unions. Workers who are not members of any trade union may be party to proceedings by themselves or confer their representation to the solicitor's agent, a social worker member of a professional organisation or any person who is fully able to exercise his/her civil rights, or a solicitor if they want. 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 envisages under Articles 314, 510, 511 and 512 four discrimination crimes (Article 510 also punishes hate crimes) which are punishable with imprisonment and fines (Articles 314 and 510) or special disqualification for the exercise of the public service or of the profession etc. (Articles 511 and 512).

b) Are associations entitled to act in support of victims of discrimination? (to join already existing proceedings)

No. Article 31 of Law 62/2003 includes the words “on behalf”, but not the alternative “or in support”, as stated in Article 7(2) of Directive 2000/43.

c) What types of entities are entitled under national law to act on behalf or in support of victims of discrimination? (please note that these may be any association, organisation, trade union, etc.).

Claims in respect of discrimination are normally supported by various organisations, such as NGOs working with Roma or immigrants in cases of discrimination on the grounds of racial or ethnic origin, or organisations working with other groups that may have faced discrimination on the grounds of disability, sexual orientation, age or religion or belief.

d) What are the respective terms and conditions under national law for associations to engage in proceedings on behalf and in support of complainants? Please explain any difference in the way those two types of standing (on behalf/in support) are governed. In particular, is it necessary for these associations to be incorporated/ registered? Are there any specific chartered aims an entity needs to have; are there any membership or permanency requirements (a set number of members or years of existence), or any other requirement (please specify)? If the law requires entities to prove “legitimate interest”, what types of proof are needed? Are there legal presumptions of “legitimate interest”?

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

In Spanish law, the time period to engage in a proceeding is equivalent to the time limit for filing 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 CC). No personal action may be started in civil proceedings once the aforementioned time limit has expired. In proceedings in the employment and occupation field, 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)* where the term is of six months, or in cases of irregular material intervention of 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 the 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 in the corresponding public office. According to Article 35 CC, public legal entities of public interest and private legal entities do not need to be registered to be considered as legally constituted or constituted in a valid way. In regard to private legal entities, Organic Law 1/2002 of 22 March that regulates the right of association contains in its Chapter II 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 are not obligated to register in the register of associations.

The purpose of registration is to publicise the founding and statutes of the associations, as well as the standing of surety to third parties who become related to them and to their members in terms of Article 10(2) of OL 1/2002 that regulates the right of association.

According to OL 1/2002 that regulates the right of association, entities do not generally need to have specific chartered aims. The only exception to this is in Article 32. This exception applies when entities want the administration to declare them as being of public utility. The declaration procedure is provided in Article 35. The declaration may be revoked if the association fails to meet all the conditions and fulfill the obligations in Article 32 and Article 33 respectively.

The specific chartered aims are settled in Articles 32.1.a and b. Article 31.1.a says that the statutory aims must tend to promote the general interest and must be one or more of the aims listed there (for the purpose of this report: the promotion of constitutional values, of human rights, equal opportunities and tolerance etc.). Article 31.1.b provides that its activity may not be restricted to be of benefit to its associates and must therefore be opened to any other beneficiary person who may meet the conditions and characteristics contained in the aims of the association.

Every association must be constituted by at least three natural or legal persons legally constituted (Article 5.1). Associations under Law 62/2003 and Law RDL 1/2013 must furthermore have legal status. The procedure to obtain legal status is provided in Article 5.2 of Organic Law 1/2002 that regulates the right of association.

Organic Law 11/1985 on regulating trade union freedom provides in its Title II the procedure of acquisition of legal status by a trade union constituted under its provisions.

Law 62/2003 and Law 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 complainant(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 in Law 62/2003 and in Law RDL 1/2013 to act on behalf of victims of discrimination and the one that relates to consumers' and users' associations in Article 11 of the Law regulating the civil trial).

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 different from the legal situation of other citizens with respect to the same matter. The legitimate interest means the capacity of being a party in a proceeding and it focuses on the existence of a qualified and specific interest which relates to obtaining an advantage or avoiding or eliminating a (potential) of harm if the lawsuit filed by the party would be upheld by a judgement (Supreme Court Judgement, 4 March 2003, RJ 2003\2733). Therefore, the upholding of the lawsuit must have a legal utility for the plaintiff (Constitutional Court Judgements 60/1982; and 7/2001, among others). 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, would be imminent), but it must be concrete and true (real). This means, therefore, that the legitimate interest of a party in a proceeding presupposes that the judgement has had or may have a direct or an indirect impact on their legal situation. This impact must be real and, therefore, not only hypothetical (Supreme Court Judgement, 11 February 2003, 873/2003).

e) *Where entities act on behalf or in support of victims, what form of authorization by a victim do they need? Are there any special provisions on victim consent in cases, where obtaining formal authorization is problematic, e.g. of minors or of persons under guardianship?*

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 to 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 to this end, as the entity engages in proceedings through a solicitor member of the association, who is going to do so only with the approval of the complainant (see Articles 24 and 25 of Law 1/2000 regulating the civil trial). 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 that it has communicated to the member worker its intention to open the proceedings. The authorisation of the member worker will then be supposed except when there is a statement of the worker denying it.

In cases where obtaining formal authorisation is problematic because the victim lacks capacity to sue, e.g. minors or persons under guardianship, the general regulations settled in Articles 7 and 8 of Law 1/2000 regulating the civil trial may apply in all

jurisdictions (Article 16.4 of the Law on employment litigation, Article 18.1 of Law 29/1998 regulating the administrative jurisdiction). Article 7 of Law 1/2000 regulating the civil trial provides that natural persons who lack capacity to sue must appear at 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 order to appear at trial, the court, by judicial order, will designate a defence lawyer who will assume representation and defence until there is a person who can assume representation or assistance (Article 8 of the Law 1/2000 regulating the civil trial). The authorisation to engage in proceedings on behalf or in support of the victim who lacks capacity to sue will be given by his/her representative or the person who must assist, authorise or defend him/her in compliance with the law.

f) Is action by all associations discretionary or do some associations have a legal duty to act under certain circumstances? Please describe.

Action is discretionary by all associations.

g) What types of proceedings (civil, administrative, criminal, etc.) may associations engage in? If there are any differences in associations' standing in different types of proceedings, please specify.

Under Spanish law, associations may engage in any proceedings (see question above). There are no differences in an association's standing in different types of proceedings.

h) What type of remedies may associations seek and obtain? If there are any differences in associations' standing in terms of remedies compared to actual victims, please specify.

Associations under Spanish law act on behalf of one or more individual victims (see the aforementioned Article 76 of Law RDL 1/2013) with his/her/their approval and always seek remedies for the victims, not the association.

i) Are there any special rules on the shifting burden of proof where associations are engaged in proceedings?

No, there are not special rules on the shifting burden of proof where associations are engaged in proceedings.

*j) Does national law allow associations to act in the public interest on their own behalf, without a specific victim to support or represent (**actio popularis**)? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

Article 125 of the Spanish Constitution provides that citizens may exercise the *actio popularis* and take part in the administration of justice through the institution of the jury in the way and with respect of those criminal proceedings that the law may state, as well as in the customary law and traditional courts.

The *actio popularis* under Spanish law is a constitutional – not a fundamental - right that must be developed by a law that may limit it. A quick look at this article may lead us to the conclusion that, under Spanish law, the *actio popularis* is only possible in criminal proceedings. Nevertheless, there are already many voices in the doctrine 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 is only 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 in Article 101 of the Law regulating the criminal trial. The *actio popularis* may only be exercised against public crimes. Most crimes under Spanish law, including discrimination crimes, are public. The Constitutional Court has stated in its decision 175/2001 (26 July 2001) that not only private but also public legal entities may be considered as citizens in order to interpret the standing to exercise the *actio popularis*. Legal entities may therefore exercise the popular action in cases in which a discrimination/hate crime (see question above) has been committed.

*k) Does national law allow associations to act in the interest of more than one individual victim (**class action**) for claims arising from the same event? Please describe in detail the applicable rules, including the types of associations having such standing, the conditions for them to meet, the types of proceedings they may use, the types of remedies they may seek, and any special rules concerning the shifting burden of proof.*

No, 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 the civil trial, which allows consumers' and users' associations to take action in 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 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 y González 2001).

Although the texts of Article 76 of Law RDL 1/2013 and of Article 31 of Law 62/2003 speak of 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 may not be misinterpreted to understand that they contain the possibility of class actions in civil

proceedings, as in all these cases the wording is very different from the one in Article 11 of the Law regulating the civil trial.

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

Does national law require or permit a shift of the burden of proof from the complainant to the respondent? Identify the criteria applicable in the full range of existing procedures and concerning the different types of discrimination, as defined by the Directives (including harassment).

Law 62/2003, which transposes the directives, introduces a shift of the burden of proof into the Spanish legal system, although it was already present in the employment litigation procedure: for discrimination based on sex in Article 96 and for infringement of the freedom to join a union in Article 179. For civil, administrative and labour litigation procedures, the law provides that if well-founded evidence of discrimination on the grounds of racial or ethnic origin (in all fields of Directive 2000/43) and religion or belief, disability, age or sexual orientation (in employment) are inferred from the allegations of the plaintiff, it must be for the respondent to bring forward a reasonable and objective justification, sufficiently proven, of the measures adopted and their proportionality.

Article 32, which deals with discrimination in fields other than employment on grounds of racial or ethnic origin, and Article 36, which deals with discrimination in employment on all grounds of the directives of Law 62/2003 provides that

> *in those civil and administrative proceedings in which from the facts alleged by the plaintiff 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 with respect to matters falling within the scope of this section, it shall be for the respondent to give an objective and reasonable and sufficiently proven justification of the measures adopted and their proportionality.*

The text of Article 32 is similar, but on grounds of racial or ethnic origin in other fields.

The Law on the employment litigation procedure (Article 96) also established a shift of the burden of proof, and after the reform introduced by Law 62/2003 (Article 40), it now mentions not only discrimination on the ground of sex but also on all the grounds of the directives. Article 96 states

> *in those proceedings in which allegations, on the part of the claimant, exist 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.*

The General Law on the Rights of Persons with Disabilities and their Social Inclusion (RDL 1/2013) establishes a shift of the burden of proof when there is evidence of discrimination based on disability (art. 77)

The Constitutional Court has established case law on the burden of proof. In order for a shift in the burden of proof to occur, it is necessary that the claimant 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).*[39]

In another judgment, the Court 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).*[40]

In the grounds for a judgment given in 2008 (3041/2008 of 17 July), the High Court of Justice of Galicia supported the reversal of the burden of proof as there were signs justifying a "reasonable suspicion" that fundamental rights had been infringed, such as the employee's right not to be discriminated against for reasons of sexual orientation (as she had married another woman) and ideological freedom (as the employee had worked for a leftwing party that is often highly critical of some of the views taken by the Catholic Church). (See section 2.1.1.e above).

In criminal matters, the rule is the presumption of innocence. The Spanish Constitution states that all persons have the right to the 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 a proceeding that observes all the guarantees (STC 209/1999).*[41]

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

What protection exists against victimisation? Does the protection against victimisation extend to people other than the complainant? (e.g. witnesses, or someone who helps the victim of discrimination to bring a complaint).

[39] See *Sentencia Tribunal Constitucional* (Constitutional Court decision), 22 October 2001, 207/2001.
[40] See *Sentencia Tribunal Constitucional* (Constitutional Court decision), 18 December 2000, 308/2000.
[41] See *Sentencia del Tribunal Constitucional* (Constitutional Court decision), 21 November 1999, 209/1999.

The principle of protection against victimisation is transposed, but only in the field of labour.

Before the transposition, the Workers' Statute (Article 55.5) declared invalid those dismissals related to any of the grounds of discrimination covered by the Constitution or the legal system or which entail the violation of workers' fundamental rights and freedoms.

Law 62/2003 (Article 37) introduced changes into the Workers' Statute and into 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 discriminate 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 undertaking 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 undertaking 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 complainant, as might be the case of witnesses, but judges should also apply victimisation 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" of the enterprise (STC 002/2009).[42]

[42] See *Sentencia Tribunal Constitucional* (Constitutional Court decision), 12 January 2009, 002/2009. There is not a reversal of the burden of proof in all types of victimisation cases.

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

a) What are the sanctions applicable where unlawful discrimination has occurred? Consider the different sanctions that may apply where the discrimination occurs in private or public employment, or in a field outside employment.

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 (Law 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 (approved by Royal Legislative Decree 5/2000 of 4 August 2000) provides financial sanctions for legal, contractual, or collective agreements infractions in the field of employment by natural or legal persons; private employers; and public employers when these 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 to better comply with the directives, mostly by making 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 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 favourable or 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 undertaking 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 in Article 8 was added, specifying 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 among very serious infringements in the context of employment:

> *to establish employment conditions, be it through advertisements, diffusion or in any other way, that amount to favourable or adverse discrimination in access to employment on the grounds of sex, origin, comprised 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), including as gross contractual misconduct by the employee, punishable by disciplinary dismissal:

> *harassment of the employer or other employees in the undertaking on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation.*

Moreover, the reform of Article 17 of the Workers' Statute and Article 181 of the Law on the employment litigation procedure by Law 62/2003, stipulates 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, and that once 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 of an employer involving unfavourable direct or indirect discrimination on the grounds of age or disability, or favourable 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 undertaking or to any legal proceedings aimed at

enforcing compliance with the principle of equal treatment and non-discrimination, are 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 the 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 of previous warnings and requests by the Inspectorate; business turnover; number of workers or beneficiaries affected; 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 301 to EUR 3,005 (Article 15 Law 5/2000).

The Law on the employment litigation procedure, amended by Law 62/2003, lays down a special procedure for violations of fundamental rights and civil liberties enshrined in the Constitution. With the amendment introduced by Law 62/2003, this procedure covers the acts of discrimination or harassment specified in the directives. If the court judgment rules in favour of the complainant in respect of acts of discrimination or discriminatory harassment, the court will declare that act void, require the previous state of affairs to be restored, and 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 “imprisonment from six months to two years or a fine of 12 to 24 months” 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 of

> *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) provides 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 six to 12 months 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 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 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.

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 in the field of 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 involving 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", according to their seriousness. 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 daw 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) Is there any ceiling on the maximum amount of compensation that can be awarded?

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. (See point a).

c) Is there any information available concerning:

i) the average amount of compensation awarded to victims?

There is no information available concerning the average amount of compensation available to victims.

ii) the extent to which the available sanctions have been shown to be - or are likely to be - effective, proportionate and dissuasive, as required by the Directives?

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.

7 SPECIALISED BODIES, Body for the promotion of equal treatment (Article 13 Directive 2000/43)

When answering this question, if there is any data regarding the activities of the body (or bodies) for the promotion of equal treatment, include reference to this (keeping in mind the need to examine whether the race equality body is functioning properly). For example, annual reports, statistics on the number of complaints received in each year or the number of complainants assisted in bringing legal proceedings.

a) *Does a 'specialised body' or 'bodies' exist for the promotion of equal treatment irrespective of racial or ethnic origin? (Body/bodies that correspond to the requirements of Article 13. If the body you are mentioning is not the designated body according to the transposition process, please clearly indicate so).*

The Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin

Law 62/2003 (Article 33) establishes a Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin (*Consejo para la promoción de la igualdad de trato y no discriminación de las personas por el origen racial o étnico*). Royal Decree 1262/2007 of 21 September (modified by Royal Decree 1044/2009 of 29 June) regulates the composition, competencies and regulations for the Council (BOE, 3 October 2007). This is the only body that corresponds to the requirements of Article 13 of Directive 2000/43. This Council was set up on 28 October 2009 and became operational on this date.

The Council is not well known by the public yet and his objectives and possibilities for action are limited. It is a body which meets twice a year and has launched some actions from their set up in October 2009: The Council has created an anti-discrimination website (http://www.igualdadynodiscriminacion.org/home.do), has produced some reports; and the President of the Council participates in training on discrimination law.

The Comprehensive Bill for equal treatment and non-discrimination (see paragraph 0.2) proposed the creation of the "Authority for the equal treatment and non-discrimination". The Authority would have responded to the characteristics of the equality body provided for in the directives: an independent body with the legal basis for the effective performance of its duties (These would have included those mentioned in the directives, but also others such as mediation, investigation of cases of discrimination on its own initiative, intervention in litigation and training). The authority would have had jurisdiction on all grounds of discrimination.

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 (*Instituto de la Mujer*), which was declared as the equality body in matters of gender discrimination), there are three other bodies worth noting:

1) In the field of disability: The "National Disability Council" (*Consejo Nacional sobre la Discapacidad*) 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 occupation in line with Directive 2000/78, implementing what is provided in the directive's Articles 13 and 14.
   Despite this council's major role in the field of 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.
2) Regarding Roma people, Royal Decree 891/2005[43] 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.
   This council has reported on various government projects, such as the *Roma Development Plan*, which has been approved every year since 1989.
3) The Forum for the Social Integration of Immigrants (*Foro para la Integración Social de los Inmigrantes*), created by Law 4/2000,[44] is a collegiate consultative, informative and advisory body in the field of the integration of immigrants. It consists of 10 representatives of public administration, 10 of immigrants' associations and 10 of social support organisations, including trade unions and employers' organisations with an interest and involvement in the field of immigration.[45]

[43] Royal Decree 891/2005 of 27 July setting up the National Roma Council (BOE, 26 August 2005).
[44] Organic Law 4/2000 of 11 January on the rights and freedoms of aliens in Spain and their social integration.
[45] Royal Decree 3/2006 of 16 January on the make-up, competences and procedural rules of the Forum for the Social Integration of Immigrants (BOE, 17 January 2006).

b) *Describe briefly the status of this body (or bodies) including how its governing body is selected, its sources of funding and to whom it is accountable. Is the independence of the body/bodies stipulated in the law? If not, can the body/bodies be considered to be independent? Please explain why.*

The Council for the promotion of equal treatment of all persons [...] has the following characteristics:

- It is a collegiate Spanish governmental body.
- The council is attached to the Ministry of Health, Social Policy and Equality through the Directorate-General for Equality Opportunity, 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 the Directive 2000/43, with the participation of autonomous regions, local authorities, employers' organisations and trade unions, and other organisations representing interests related to the racial or ethnic origin of persons. Royal Decree 1262/2007 (modified by Royal Decree 1044/2009) specifies its composition.

Actually, the council consists of a chair and 28 members. The only person appointed as such to the council is the chair, who, as specified in Royal Decree 1044/2009, shall be appointed by the Equality Minister,

> *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).*

This person may be discharged by the appointing authority. Of the 28 seats on the council, 14 are members of 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 for Equality Opportunity (which is to hold the council's second vice-chair);
   2) Justice Ministry;
   3) Interior Ministry;
   4) Education Ministry;
   5) Employment and Social Security Ministry;
   6) Health, Social Policy and Equality Ministry; and
   7) Housing Ministry.

b) Seven members from other tiers of government: four from the autonomous regions and three from local authorities.

c) Four members from 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.

The council chair and members 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 Directorate-General for Equality Opportunity.

One person has worked full time for the *Consejo* since 31 March 2012. In addition, six civil servants belonging to the Subdirectorate for Equal Treatment of the Ministry of Health, Social Services and Equality regularly provide part-time services to the *Consejo* (council secretariat, coordination of working groups, management of 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 setup, the Council cannot be said to be in line with ECRI general recommendation 2.

The Council does not have a "code of governance", 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 setup provided by the law (in its Article 33) is very similar to that of some existing governmental consultative bodies. Given that the option taken by the goverment was not to change the law, Royal Decree 1262/2007 regulating the council was unable to remedy these issues, though it improved the council's make-up by making it a joint body (half government, half stakeholders and social partners) and uses the word "independent" several times in speaking of the council's functions.

The council cannot be seen as an independent body in structural terms, for various reasons: 1) half of its members are formally representatives of 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; 2) it cannot choose its own

staff (because the council secretariat is a part of public administration itself, being a department of the Ministry of Equality); and 3) it has no infrastructure of its own.

The council cannot be regarded as independent *de iure* because it is not established as such either in Law 62/2003 or in Royal Decree 1262/2007. Nor may it be regarded as such *de facto*, among other reasons because of the presence of government representatives among its members.

The Ombudsman may establish mechanisms for cooperating and collaborating with the aforementioned council. With 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 1 of the Constitution, inter alia equality and non-discrimination on account of birth, race, sex, religion, opinion or any other condition or personal or social circumstance, monitoring the administration's activity and reporting to Parliament.

c) *Describe the competences of this body (or bodies), including a reference to whether it deals with other grounds of discrimination and/or wider human rights issues.*

Its functions include the three functions described in Article 13.2 of the directive. The word "independent" does not appear in the definitions of these three functions in Law 62/2003, but is used in Royal Decree 1262/2007. Functions, as formally defined by this Royal Decree (Article 3) are:

a) *Providing independent assistance to victims of direct or indirect discrimination on grounds of racial or ethnic origin in pursuing their complaints.*
b) *Conducting independent and autonomous surveys and analyses, and publishing independent reports, concerning discrimination [...].*
c) *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 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:

a) *advise and report on indirect anti-discrimination practices [the Royal Decree does not explain what is meant by indirect anti-discrimination practice, but the reference must be to Directive 2000/4]) in its various spheres of action;*
b) *promote informative, awareness and training actions and any others that may be required to promote equal treatment and non-discrimination;*
c) *establish information exchange and cooperation relationships with similar international, national, regional or local bodies or institutions; and*
d) *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.

d) *Does it / do they have the competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues?*

No, because of its lack of structural independence undermining the functional independence assigned to it, because half of the council's members are government representatives (see point g).

e) *Are the tasks undertaken by the body/bodies independently (notably those listed in the Directive 2000/43; providing independent assistance to victims of discrimination in pursuing their complaints about discrimination, conducting independent surveys concerning discrimination and publishing independent reports).*

It is harder to rate its independence in exercising its functions. As the author previously explained, the word "independent" does not appear in the definitions of the council's three functions in Law 62/2003 but it does appear in Royal Decree 1262/2007 in the redefinition of those functions. But this text is purely rhetorical if the council cannot, *de iure* and *de facto*, exercise the functions independently. And it does not have competence to provide independent assistance to victims, conduct independent surveys and publish independent reports, and issue recommendations on discrimination issues, especially because of its lack of structural independence undermining the functional independence assigned to it, for half of the council's members are government representatives. And they have half of any vote. This is quite apart from any considerations on the stakeholder members.[46]

Cachón (2009) has 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 a network of centres of assistance for victims of discrimination by racial or ethnic 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 by situations that have been found by the own NGOs. Then need to assess whether there are "clear indications" of direct or indirect discrimination (when it was found that a person or persons has been

[46] This appraisal which we have already made elsewhere (see Cachón 2010) coincides essentially with that made by the expert who drew up the report for the FRA (see T. Freixes "Thematic Legal Study on the Impact of the Race Equality Directive. Spain", FRA, 2009, especially paragraphs 97, 102 and 103).

effectively treated “differently and worse” because of the racial or ethnic origin), and if so, should recommend 1) negotiation, 2) mediation, 3) legal support, 4) psychological support, or 5) complaint. The performance of the NGO is not under supervision in matters of substance by the Council. The NGOs are funding from the Council for these interventions.

During 2012 the network has stopped working. Some administration officials have questioned the way it has carried out the recruitment of the NGO and is waiting to find a different administrative way to make possible contracting the NGOs to support victims of discrimination.

The Network of Assistance Centres has been working again since 15 March 2013. On this date, a service provision contract was signed with the Fundación Secretariado Gitano (FSG), which won the open tender organised by the Ministry. To ensure the best service, the FSG has outsourced the service to six other organisations that specialise in assisting victims of discrimination: the ACCEM, Cruz Roja Española, Fundación CEPAIM, Movimiento contra la Intolerancia, and Movimiento por la Paz y Red Acoge. From 15 March 2013 until 14 December 2013 (last available data) the Network assisted in 376 cases, 231 individual cases and 145 collective. Although the annual budget for the Network in 2013 was €600,000, the Network actually received €449,938 pro rata because the contract with the FSG began on 15 March 2013).

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

The Council could produce reports and recommendations with contributions by its member organisations, as other government consultative bodies do. For example, the Forum for the Social Integration of Immigrants produces reports and recommendations with no budget or staff, by making arrangements so that the experts from its member organisations may work jointly without being paid by the Forum.

In 2013, the Council conducted a survey on “Perceptions of discrimination on the grounds of racial or ethnic origin” among potential victims, and wrote two reports:

1. *Annual Report on the state of discrimination on the ground of racial or ethnic origin 2013*, based on the analysis of secondary sources on racial and ethnic discrimination. 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 the grounds of racial or ethnic origin.*

At the revision date of this report (May 2014), neither the survey nor the reports have been published yet.

Budget of the Council in 2012, 2013 and 2014 (planned) (euros):

Area	*2012*	*2013*	*Planned 2014*
Assistance to victims		*600,000*	*600,000*
Studies and reports	*27,634*	*98,857*	*100,000*
Personnel	*34,558*	*16,925*	*18,000*
Meetings, conferences and courses	*4,023*	*4,742*	*5,000*
Total	*66,215*	*703,599*	*705,000*

f) Does the body (or bodies) have legal standing to bring discrimination complaints or to intervene in legal cases concerning discrimination?

No. 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.

g) Is / are the body / bodies a quasi-judicial institution? Please briefly describe how this functions. Are the decisions binding? Does the body /bodies have the power to impose sanctions? Is an appeal possible? To the body itself? To courts? Are the decisions well respected? (Please illustrate with examples/decisions).

The council is not a quasi-judicial institution (see the competences and functions in point c.).

It should be noted that the transposition of Directive 2000/43 in Law 62/2003 did not define the equality body appropriately, as it guarantees neither the independence of its functions nor its effectiveness.

h) Does the body register the number of complaints and decisions? (by ground, field, type of discrimination, etc.?) Are these data available to the public?

No.

i) Does the body treat Roma and Travellers as a priority issue? If so, please summarise its approach relating to Roma and Travellers.

The council may conduct formal general investigations into discrimination against the Roma, but this is not necessary 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.

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

8 IMPLEMENTATION ISSUES

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

Describe briefly the action taken by the Member State

a) to disseminate information about legal protection against discrimination (Article 10 Directive 2000/43 and Article 12 Directive 2000/78)

Transposition

The directives were transposed in Spain with no formal social dialogue, either with the social partners or with the NGOs with a legitimate interest in the fields of the directives, which are many, and well organised; 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 left to the initiative of the parliamentary group supporting the government that 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, which made the overall proposition incomprehensible except to those familiar with the issue and with legislative processes;
- the bill was not submitted to the consideration of the Council of State (the highest government advisory body) or 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 was conducted.

Dissemination

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 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 co-financed with European funds 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 for citizenship and integration 2007-2010 (*Plan Estratégico de Ciudadanía e Integración 2007-2010*) renewed for 2011-2014, designed to establish strategic guidelines to promote the integration of immigrants in Spain, is to be adopted. 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, and with the ability to formulate proposals for action in this field);
- integrated programme of support to victims of discrimination;

- training of specialist staff and public employees in combating racial and ethnic discrimination;
- campaign of awareness-raising and information on equal treatment and non-discrimination;
- establishment of a data collection system on equal treatment and racist and xenophobic acts;
- creation of forums for the dissemination of knowledge and exchange of best practice;
- drawing up codes of conduct on equal treatment in public services and promotion of codes of conduct on equal treatment in private companies and services;
- signature of 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 to implement measures to encourage action by NGOs to combat discrimination.

b) to encourage dialogue with NGOs with a view to promoting the principle of equal treatment (Article 12 Directive 2000/43 and Article 14 Directive 2000/78) and

Dialogue with NGOs

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

- 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 of immigrants' associations and 10 of social support organisations, including trade unions and employers' organisations with an interest and involvement in the field of immigration.[47]
- 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.
- The National Disability Council recreated in the General Law on the Rights of Persons with Disabilities and their Social Inclusion (RDL 1/2013). This council has 15 members representing associations of persons with disabilities of

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

various kinds and its functions include issuing reports on draft legislation affecting equal opportunities, non-discrimination and universal accessibility.

c) *to promote dialogue between social partners to give effect to the principle of equal treatment within workplace practices, codes of practice, workforce monitoring (Article 11 Directive 2000/43 and Article 13 Directive 2000/78)*

Social dialogue

Collective agreements 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 Unión General de Trabajadores (UGT), signed the Multi-industry Agreement for Collective Bargaining 2003 (ANC 2003). This agreement sets out the criteria to serve as guidelines at the various levels of collective bargaining in Spain in 2003 and 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 follows:

> *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 expressly provided for in employment law, and through the promotion of specific actions aimed at eliminating direct or indirect discrimination. General clauses on equal treatment in collective agreements are appropriate instruments for helping to combat possible discrimination.

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 follow 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 the Employment and Collective Bargaining.[48] Although the agreement is more concise than the previous one in the anti-discrimination field, it includes among the objectives of collective agreements

> *the 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.

d) to specifically address the situation of Roma and Travellers. Is there any specific body or organ appointed on the national level to address Roma issues?

Roma

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. Anyway, this changed considerably in the legislation period 2004-2008 and 2008-2011.

"National Roma Integration Strategy in Spain 2012-2020" derives from (COM(2011)173). Strategy affects four key areas for social inclusion: Education, Employment, Housing and Health. In each brand quantified targets. In addition, the Strategy provides complementary lines of action in social action, participation, improving knowledge of this group, women's equality, non-discrimination, promotion of culture and special attention to Roma from other countries.

The Roma Development Plan, adopted each year from 1989, is a programme of action for social development and 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; (5) combat discrimination and racism towards the Roma.

The *National Roma Council* is organ appointed on the national level specifically to address Roma issues (see section 7 of this report).

[48] BOE, 6.2.2012.

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

a) Are there mechanisms to ensure that contracts, collective agreements, internal rules of undertakings and the rules governing independent occupations, professions, workers' associations or employers' associations do not conflict with the principle of equal treatment? These may include general principles of the national system, such as, for example, "lex specialis derogat legi generali (special rules prevail over general rules) and lex posteriori derogat legi priori (more recent rules prevail over less recent rules).

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

b) Are any laws, regulations or rules that are contrary to the principle of equality still in force?

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.

In the field of sexual orientation, inequality caused by the fact that homosexual couples had no access to certain social benefits was resolved in 2005 when Parliament passed a law amending the Civil Code that allows homosexual couples to marry with the same rights as heterosexual couples (see section 4.5 of this report).

9 CO-ORDINATION AT NATIONAL LEVEL

Which government department/ other authority is/ are responsible for dealing with or co-ordinating issues regarding anti-discrimination on the grounds covered by this report?

Although the transposition of Community 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).

With the creation of the Ministry of Equality in April 2008, the general duty for monitoring the implementation of the two directives moved to this ministry and its Directorate-General against Discrimination, 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 promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. In 2010, after a ministerial restructuring, it has become the Ministry of Health, Social Policy and Equality. In this Ministry, after a new ministerial restructuring at the end of 2012, the coordination in this fields is the Directorate-General for Equal Opportunity.

The department responsible for implementing policies to support the disabled is the General Secretariat for Social Policy, in the Ministry of Health, Social Policy 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.

Is there an anti-racism or anti-discrimination National Action Plan? If yes, please describe it briefly.

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 it strengthens, through political commitments, the means of protecting our rights. In sum, the plan is an instrument to promote, coordinate and evaluate jointly a series of very diverse actions 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 collecting various actions already 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 have not been priorities in the first two years of the current Spanish government. That is the main reason that no further significant measures have been taken in this field.

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ANNEX

1. **Table of key national anti-discrimination legislation**
2. **Table of international instruments**
3. **Previous case-law**

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

Name of Country: Spain **Date: 1 January 2014**

Title of Legislation (including amending legislation)	Date of adoption:dd/m/y	Date of entry in force from :dd/m/y	Grounds covered	Civil/Administrative/ Criminal Law	Material Scope	Principal content
Title of the law: *Constitución Española* (Spanish Constitution) Abbreviation: SC Date of adoption: 27.12.1978 Latest amendments: 27.08.1992 Entry into force: 30.12.1978 Webpage address: http://www.boe.es/	27.12. 1978	30.12. 1978	Race, sex, religion, opinion and "other personal or social condition or circumstance"	Constitution	All	Principle of equality and non-discrimination, and positive action
Title of the law: *Ley 62/2003, de 30 de diciembre, de medidas fiscales, administrativas y de orden social* (Law 62/2003, of	30.12. 2003	1.1. 2004	Racial or ethnic origin, religion or beliefs, disability, age,	Administrative/ Employment	All	Directives 2000/43 and 2000/78 are transposed in Title II, Chapter III, Art. 27, al 45.

30 December on fiscal, administrative and social measures) Abbreviation: LFASM Date of adoption: 30.12.2003 Entry into force: 1.1.2004 Latest amendments: No amend. Webpage address: www.boe.es			sexual orientation			Creates a specialised body dealing with racial or ethnic discrimination.
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: 15.3.2013 Webpage address: http://www.boe.es/	24.3. 1995	1.5. 1995	Gender, racial or ethnic origin, religion or beliefs, disability, age, sexual orientation	Administrative/ Employment	Employment and occupation	All rights and duties relating to labour, employment and occupation
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)	10.10. 2011	21.12. 2011	Gender, racial or ethnic origin, religion or beliefs, disability, age, sexual	Administrative/ Employment	Employment and occupation	Formal procedures relating to labour, employment and occupation

Abbreviation: LRSJ Date of adoption: 10.10.2011 Latest amendments: No amend. Entry into force: 21.12.2011 Webpage address: www.boe.es			orientation			
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: 16/3/2013 Entry into force: 1.1.2001 Webpage address: www.boe.es	4.8. 2000	1.1. 2001	Gender, racial or ethnic origin, religion or beliefs, disability, age, sexual orientation	Administrative/ Employment	Employment and occupation	Infractions and sanctions on the social order labour, employment and occupation
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	5.7. 1980	13.8. 1980	Religion	Administrative/ Employment	Religious freedom	Religious freedom

Latest amendments: No amend. Entry into force: 13.8.1980 Webpage address: http://www.boe.es/						
Title of the law: *Ley Orgánica 4/2000, 11 enero, sobre derechos y libertades de los extranjeros en España y su integración social (*Organic 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: 27.7.2011 Entry into force: 1.2.2000 Webpage address: http://www.boe.es/	11.1.2000	1.2.2000	Nationality	Administrative/ Employment	Administrative situation of aliens	Direct and indirect discrimination; the entire administrative situation of aliens
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:	23.11.1995	24.5.1996	Gender, racial or ethnic origin, religion or beliefs, disability, age, sexual orientation	Criminal	All criminal matters	Crimes against the rights of workers; all aspects of discrimination

27.12.2012 Entry into force: 24.5.1996 Webpage address: http://www.boe.es/						
Title of the law: *Ley General de derechos de las personas con discapacidad y de su inclusión social* (General Law on the Rights of Persons with Disabilities and its social inclusion) (BOE, 3 December 2013) Abbreviation: GLRPDSI Date of adoption: 29.11.2013 Latest amendments: No amend. Entry into force: 4.12.2013 Webpage address: http://www.boe.es/	29.11. 2013	4.12. 2013	Disability	Administrative/ Employment	Equal opportunities, non-discrimination, and universal access for persons with disability in all fields	Disabled equal opportunities; Improvement of working and living conditions; Infractions and sanctions in the field of equal opportunities for the disabled

ANNEX 2: TABLE OF INTERNATIONAL INSTRUMENTS

Name of country: Spain **Date: 1 January 2014**

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	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	1/2/1995	1/9/1995	None	Yes	Yes

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	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?
of National Minorities					
International Convention 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 Discrimination 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	26/1/1990	6/12/1990	None	Yes	Yes

Instrument	Date of signature (if not signed please indicate) Day/month/year	Date of ratification (if not ratified please indicate) Day/month/year	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?
Child					
Convention on the Rights of Persons with Disabilities	30/3/2007	3/12/2007	None	Yes	Yes

ANNEX 3: PREVIOUS CASE-LAW

Name of the court: Supreme Court (Social Division)
Date of decision: 9 March 2004
Name of the parties: AENA (Aeropuertos Nacionales y Navegación Aérea)
Reference number: nº 765/03 and nº 2319/03
Brief summary: The first Supreme Court judgments referring to Directive 2000/78 were given in the Social Division on 9 March 2004, annulling the clauses of collective agreements forcing workers to retire at age 65, because there is no national provision permitting such compulsory retirement.

In its legal arguments, the Supreme Court made extensive use of the considerations and articles of Directive 2000/78 and concluded that it is discriminatory on the grounds of age to force workers to retire at 65 if there is no provision justifying differences of treatment based on age "by legitimate employment policy or labour market and vocational training objectives". On this issue the courts have made many pronouncements. For example, four subsequent Supreme Court judgments have reproduced this doctrine, expressly quoting Directive 2000/78 in their legal reasoning. These judgments have led to an amendment of the Workers' Statute Act (see below in section 2.1.1 and section 4.7).

Name of the court: Constitutional Court
Date of decision: 13 February 2006
Name of the parties: P.C. vs. Alitalia Italian Airlines
Reference number: 41/2006
Brief summary: A Constitutional Court judgment has established important doctrine against discrimination on the grounds of homosexuality. Alitalia had dismissed a worker (P.C.) ostensibly for "indiscipline" at work in July 2002. The worker brought an action under Article 55.5 of the Workers' Statute for his dismissal to be declared void on the basis that he was the victim of discrimination on the grounds of his sexual orientation. Social Court no. 24 of Barcelona declared the dismissal void in November 2002. The company appealed against this ruling and the Social Division of the High Court of Catalonia found in the company's favour in June 2003, deeming the dismissal to be valid. The Constitutional Court (CC) overturned this ruling, and therefore invalidated the dismissal. The Constitutional Court allowed the worker's appeal (amparo) and quashed the ruling of the High Court of Catalonia on the grounds that the dismissal of the worker by Alitalia must be deemed void because it is a discriminatory act based on the worker's homosexuality. In the legal grounds for its ruling, the Constitutional Court cites, inter alia, Article 13 of the EC Treaty, Directive 2000/78 and certain articles of the Workers' Statute, which transposed the Directive (Articles 4.1.c, 4.2.e and 17.1 in conjunction with Article 55.5). At the time when the events took place, the Workers' Statute did not expressly include sexual orientation as a ground of discrimination. This was introduced into Spanish law with the transposition of Directive 2000/78 in December 2003. However, prior to transposition, the Statute did provide that any dismissal motivated by "any of the grounds of discrimination prohibited by the Constitution or the law" was void. The

court's legal reasoning also referred to Article 14 of the Spanish Constitution, which provides for equality before the law and prohibits discrimination "on the grounds of birth, race, sex, religion, opinion or any other personal or social condition or circumstance". Though sexual orientation is not expressly cited in the article, the Constitutional Court's ruling states that sexual orientation is "undoubtedly a circumstance included in the expression 'any other circumstance'". This means that protection against discrimination on the ground of sexual orientation existed prior to the transposition of Directive 2000/78 in December 2003, in the form of Article 14 of the Spanish Constitution.

The case is also significant because it indicates that there were signs that the worker had been psychologically harassed because of his sexual orientation. However, the Constitutional Court did not enter into an analysis of this issue.

It simply noted that Social Court no. 24 of Barcelona had declared the dismissal void because the worker had proven that there were "signs of psychological harassment because of his homosexuality". The consequence of this Constitutional Court ruling is that the dismissal is void (as Social Court n. 24 of Barcelona declared in November 2002) and that Alitalia must reinstate the worker and pay all his salary in arrears from the date of the dismissal (July 2002) (Article 55.6, Workers' Statute).

Name of the court: High Court of Justice of Galicia (TSJG)
Date of decision: 17 July 2008
Name of the parties: M.R. vs Radio Popular SA.
Reference number: 3041/2008
Brief summary: The High Court of Justice of Galicia (TSJG), confirmed the invalidity of the dismissal of an employee in the company Radio Popular (part of Cadena COPE, under the authority of the Spanish Bishops' Conference and accordingly of Catholic ideology) 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 employee had applied for special leave (for public sector service) to work as a press officer for the political party Bloque Nacionalista Galego in the Provincial Council of A Coruña. In the course of this period of leave, she married another woman. These circumstances came to the company's knowledge, and when the employee applied to rejoin Radio Popular, she was dismissed. A judge ruled in her favour and the High Court upheld the judgment. In the grounds for its decision, the High Court supports the reversal of the burden of proof where there are signs justifying a reasonable suspicion that fundamental rights may have been infringed, and it shows that the company had been unable to demonstrate that it had not infringed its employee's right not to be discriminated against for reasons of sexual orientation (as she had married another woman) or that the dismissal was not for ideological reasons (as she had been working for a leftwing party that is often highly critical of some of the views taken by the Catholic Church). The Court declared the dismissal void because both

fundamental rights (sexual orientation and ideological/political freedom) were infringed, but it did not use the term “multiple discrimination”.

Name of the court: European Court of Human Rights (ECtHR) (Third Section)
Date of decision: 8 December 2009
Name of the parties: Muñoz Díaz vs. Spain
Reference number: Application n. 49151/07
Brief summary: On 8 December 2009, the ECtHR held that Spain had violated Article 14 of the European Convention on Human Rights in conjunction with Article 1 of Protocol 1 in the case Muñoz Díaz vs. Spain. The applicant, Muñoz Diaz, complained about a refusal to grant her a survivor's pension, on the sole ground that she and her partner were not a married couple under Spanish law. She alleged that there had been a violation of Article 14 of the Convention taken together with Article 1 of Protocol No. 1 to the Convention and with Article 12 of the Convention. The applicant and Muñoz Diaz., both members of the Roma community, were married in November 1971 according to their community's own rites. The marriage was solemnised in accordance with Roma customs and cultural traditions and was recognised by that community. The applicant had six children, who were registered in the family record book issued to the couple by the Spanish civil registration authorities (Registro civil).

The applicant and her family were granted first-category large-family status.

On 24 December 2000, the applicant's husband died and at the time of his death had been working and paying social security contributions for 19 years, supporting his wife (registered as such) and his six children as his dependants. The applicant applied for a survivor's pension. The National Institute for Social Security (INSS) refused to grant her one on the ground that she “[was] not and [had] never been the wife of the deceased prior to the date of death”, as required by Laws 30/1981 of 7 July 1981 (the Civil Code) and the General Social Security Act (RDL 1/1994 of 20 June 1994). The applicant filed a claim with the Labour Court. In a judgment of 30 May 2002 by Labour Court no. 12 of Madrid, she was granted an entitlement to receive a survivor's pension, her Roma marriage thus being recognised as having civil effects. The judgment said that

[…] Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin is applicable to the present case, where the denied benefit derives from the employment relationship of the insured person, who died from natural causes while he was still working.

The INSS appealed. In a judgment of 7 November 2002, the Madrid Higher Court of Justice quashed the impugned judgment. The applicant lodged an “amparo" (appeal) with the Constitutional Court, relying on the principle of non-discrimination in terms of race and social condition. In a judgment of 16 April 2007, the Constitutional Court (STC 69/2007) dismissed the appeal. The applicant complained that the refusal to grant her a survivor's pension, on the grounds that her marriage solemnised

according to the rites of the Roma minority to which she belonged had no civil effects, infringed the principle of non-discrimination recognised by the convention. The court found that it was disproportionate for the Spanish State, which issued the applicant and her Roma family with a family record book, granted them large-family status, afforded health-care assistance to her and her six children and collected social security contributions from her Roma husband for over 19 years, now to refuse to recognise the effects of the Roma marriage when it came to the survivor's pension. The court did not accept the Government's argument that it would have been sufficient for the applicant to enter into a civil marriage in order to obtain the pension claimed.

The prohibition of discrimination enshrined in Article 14 of the Convention is meaningful only if in each case the applicant's personal situation in relation to the criteria listed in that provision is taken into account exactly as it stands. To proceed otherwise in dismissing the victim's claims on the ground that he or she could have avoided the discrimination by altering one of the factors in question – for example, by entering into a civil marriage – would render Article 14 devoid of substance. Consequently, the court found that in the present case there had been a violation of Article 14 of the convention taken together with Article 1 of Protocol No. 1.

The most interesting aspect of this decision of the ECtHR is that it should lead to the Spanish Constitutional Court changing its doctrine in this field.

Name of the court: Madrid Provincial Court
Date of decision: 6 May 2009
Name of the parties: The National Confederation of the Deaf and the Spanish Committee of Disabled People's Representatives vs Iberia and Air Nostrum
Reference number: Judgment 211/2009
Brief summary: The airline, Air Nostrum, a subsidiary of Iberia Líneas Aéreas de España, refused to allow three deaf persons on board on the ground 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 its Judgment 211/2009 of 6 May 2009, ruled in favour of the three deaf persons, represented by the National Confederation of the Deaf and the Spanish Committee of Disabled People's Representatives. The Madrid Provincial Court deemed that this was a case of "indirect discrimination" and noted that Law 51/2003 of 2 December on equal opportunities, non-discrimination, and universal access 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. It ordered Iberia to take steps to ensure that "the infringement of the rights of persons with disabilities 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.

A Madrid court has twice requested preliminary rulings from the ECJ on the application of Directive 2000/78: in the Chacon Navas and Palacios de la Villa cases (see section 2.1.1 of this report) (see Cabeza 2013 and López 2013).

Name of the court: Constitutional Court
Date of decision: 14 April 2011
Name of the parties: Galera vs Ministry of Education and Bishop of Almeria
Reference number: 51/2011
Brief summary: Background: Ms. Resurreción Galera had been serving as a teacher of Catholic religion in various public schools since 1994 on the proposal of the Bishop of Almeria. In 2001 the Bishop informed her that she would not be proposed as a teacher of Catholic religion for the next school year, because she had contracted a marriage with a divorced man. The Bishop sent to the Ministry of Education the list of teachers of religion for the academic year 2001/2002 and this list did not contain Ms. Galera. In accordance with this proposal, and as set out in the Agreement of Spain and the Holy See on 3 January 1979, the Ministry did not sign with Ms. Galera the contract for the academic year 2001/2002. Ms. Galera files a complaint against the "dismissal" at the Social Court against the Ministry of Education, the Junta of Andalucia and the Bishop of Almeria. The Social Court nº 3 of Almería rejected the lawsuit (Judgment of 13 December 2001) on the grounds that there had not been any dismissal. This verdict was fully confirmed by the Tribunal Superior de Justicia de Andalucia (Judgment of 23 April 2002). Against these two judgments, Ms. Galera made demand for "Amparo" (protection) at the Constitutional Court (CC). In its application Ms. Galera raises two questions: 1) that her right to effective judicial protection has been violated (art. 24.1 of the Spanish Constitution (SC), and that it must be controlled by the Courts whether the proposal of the Bishop contrary to the renewal of the contract of the recurrent employee) infringed fundamental rights (arts. 18.1 and 14 SC) and if necessary declare as null and void the dismissal for non-renewal of contract. And 2) the two judgments ignore the right of the appellant to not suffer discriminatory treatment by her personal circumstances (art. 14 SC), as well as her right to personal and family privacy (art. 18.1 SC).

Content: The Decision of the Constitutional Court (DCC) on 14 April 2011 grants to Ms. Galera the "Amparo" (protection) requested and recognizes "her rights to not suffer discrimination by reason of her personal circumstances (art. 14 SC), to ideological freedom (art. 16.1 SC) in connection with the right to marry in legally established way (art. 32 SC) and personal and family privacy (art. 18.1 SC)". The argumentation of the CC has three points of great importance.

1. The CC recalls the DCC 38/2007 of 15 February, which had already pointed out that it should "ponder the eventual fundamental rights in conflict in order to determine what may be the modulation that may result from the right to freedom of religion which is exercised through the teaching of religion in schools and the fundamentals rights of workers in their working relationship".
2. The CC notes that "the waiver by judicial bodies to perform the required due weighting between fundamental rights on the conflict of religion teachers with

the right to freedom of religion of the ecclesiastical authority, or a weighting inadequate in the circumstances of the case, it means per se a violation of those rights". And therefore the CC cancels sentences alleged by the applicant.

3. The Judgment states that the fact that Ms. Galera had contracted civil marriage to a divorced man (which is the only reason given by the Bishop of Almería to justify its decision), "is unrelated with the carried out educational activity of the applicant therefore does not affect their dogmatic knowledge or teaching skills".
4. Therefore CC orders to the Social Court nº 3 of Almeria to issue a new sentence.

This Court has issued a new statement on 5 May 2011. In this Judgment it declares null and void the dismissal of Ms. Galera and condemned the Ministry of Education to reinstate the applicant and to pay her the wages owed from the date of dismissal.

This DCC complements the doctrine established in DCC 38/2007 and establishes two new aspects: 1) It obliges judges to do effective judicial protection by finding "practicable criteria" (DCC 38/2007) and the "proper and required weighting between fundamental rights on conflict" in the case of Catholic religion teachers. 2) It provides that the civil marriage of a Catholic teacher "is unrelated with the educational activity" and that, therefore, cannot be justification for a job layoff. This is a new element in the doctrine of the CC and is very relevant because 15 others cases with similar requests are pending.

There is not any reference to the EU law (Directive 2000/78) in the judgement.

Name of the court: ECtHR
Date of decision: 3 April 2012
Name of the parties: *Manzanas Martin v. Spain*
Reference number: Application no. 17966/10
Address of the webpage:
http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=905521&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649
Brief summary: The ECtHR held on 3 April 2012 in the case *Manzanas Martin v. Spain* (application no. 17966/10), that there had been a "violation of Article 14 (prohibition of discrimination) taken together with Article 1 of Protocol No.1 (protection of property) of the European Convention on Human Rights".

The case concerned a difference in treatment between Catholic priests and Evangelical ministers regarding the calculation of their pension rights. Whilst priests could have their previous years of religious service before joining the social security scheme taken into account in calculating their retirement pension – by paying the corresponding contributions – Evangelical ministers could not bring into account their years of service prior to joining the social security scheme.

A Royal Decree of 27 August 1977 had established that priests and ministers of all churches registered with the Ministry of the Interior should be treated as salaried employees and be covered by the social security scheme, but this was of immediate application only in respect of Catholic priests, who in 1998 were allowed to have their previous years of service taken into consideration in calculating their pension on condition that they made the capital payments corresponding to the recognised contribution years. Evangelical ministers only started being treated as salaried employees 22 years later (in 1999), following the conclusion of an agreement between the State and the Federation of Evangelical Religious Entities of Spain, but *without* any possibility of counting their earlier years of service towards the minimum period of pensionable service.

Mr Manzanas was a minister of the Evangelical Church from 1952 until 1991, when he retired. The Evangelical Church did not pay any social security contributions on his behalf. When he applied to the National Social Security Agency (INSS) for a retirement pension, his application was refused on the grounds that he had not completed the minimum period of pensionable service.

On 2005 the Barcelona Employment Tribunal upheld Mr Manzanas's claims and ordered the INSS to pay him a pension. The court found that the fact that Mr Manzanas had been deprived of access to a retirement pension on the same terms as Catholic priests infringed his rights to equal treatment and to religious freedom recognised by the Spanish Constitution of 1978.

The INSS appealed and the High Court of Justice of Catalonia set the decision aside on the ground that the inability to take into account Mr Manzanas' previous years' pastoral work was not because of negligence or delay on the part of the State, but because of a lack of legislation on account of the absence of a permanent agreement between the State and the Evangelical church authorities. The court held that Mr Manzanas did not satisfy the statutory conditions to qualify for a retirement pension. Mr Manzanas lodged an "appeal for protection" (*recurso de amparo*)[49] with the Constitutional Court but that was not taken into consideration. Then he appealed to the ECtHR on 2010.

Decision of the Court: The ECtHR observed that, prior to 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 Evangelical ministers until 1999. The Court agreed with the Government that there had been objective and non-discriminatory reasons for

[49] Any citizen may present an "appeal for protection" (*recurso de amparo*) to the Constitutional Court when it considers that there has been a violation of their fundamental rights and freedoms in any court judgment (Article 53.2 of the Spanish Constitution). Usually the Constitutional Court must decide whether or not to consider the request.

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. Whilst the reasons for the delay in bringing ministers into the general social security scheme fell within the States' 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.

Short analysis: The judgment of ECtHR is interesting for three reasons: for Mr. Manzazas; for the other 150 (estimated) retired Evangelical ministers in the same same situation as Mr Manzanas; and because the "appeal for protection" (*recurso de amparo*) of Mr Manzanas was not take into consideration by the Spanish Constitutional Court, which must change its criteria in this area.

Name of the court: Spanish Constitutional Court
Date of decision: 16 April 2012
Name of the parties: Question of unconstitutionality 4362-2011
Reference number: 78/2012
Address of the webpage:
http://www.boe.es/boe/dias/2012/05/16/pdfs/BOE-A-2012-6488.pdf
Brief summary: The Basque Parliament Law 11/1994 of 17 June 1994, on pharmaceutical management of the Basque Autonomous Community, provided that authorisation to open a new pharmacy would be granted to pharmacists over sixty-five years only when there are no other applications to the same competition (Article 34).

Under this rule, in May 2007 the Health Department of the Basque Government announced a competition to open a new pharmacy in Vitoria-Gasteiz. There were 38 applications, including one by F.E.S. The evaluation committee awarded F.E.S. the highest score, but the Health Department rejected the application as F.E.S. had reached the age of 65 years in June 2008. F.E.S. lodged an application for judicial review before the High Court of Justice of the Basque Country. Before resolving the case, the High Court of Justice presented a "constitutional question" to the Constitutional Court on 15 July 2011 regarding whether Article 34 of Law 11/1994 of the Basque Parliament is in accordance with Article 14 of the Spanish Constitution, which guarantees equal treatment on grounds of age.

Decision of the Court: The Constitutional Court passed sentence on 16 April 2012. It considered that a limitation on the opening of pharmacies by people over sixty-five years 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 sufficiently justified or proportionate to be admissible. Firstly, the Constitutional Court ruled that it was not constitutionally permissible to justify the prohibition contained in the provision in question by the fact that turning 65 results in a decreased capacity to perform pharmaceutical care; secondly, it could not be determined that the measure was necessary to meet planning and service organisation requirements; and, thirdly, it could not be held that the exclusion of pharmacists over sixty-five years constituted a positive action measure aimed at balancing the unfavourable position of starting members of the profession as a disadvantaged group.

Name of the court: ECtHR
Date of decision: 15 May 2012
Name of the parties: *Fernández Martínez v. Spain*
Reference number: Application nº 56030/07
Address of the webpage:
http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110916#{"itemid":["001-110916"]}
Brief summary: Fernández Martínez (F.M.) was a Catholic priest. In 1984 he applied to the Vatican for dispensation from the obligation of celibacy. In 1985 he was married in a civil ceremony. From 1991 onwards, he was employed as a teacher of the Catholic religion in a State-run secondary school in Murcia under a renewable one-year contract. In accordance with the provisions of an agreement of 1979 between Spain and the Holy See, it was the diocesan bishop's responsibility to confirm, every year, the renewal of the applicant's employment, 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 F.M. urging the ecclesiastical authorities to introduce optional celibacy. On 15 September 1997 the Vatican authorities granted F.M.'s request for dispensation from celibacy. On 29 September 1997 the Diocese of Cartagena informed the Ministry of Education of its intention not to approve the renewal of F.M.'s contract for the 1997/98 school year.

F.M. applied to Murcia Employment Tribunal no. 3, which gave its judgment on 28 September 2000. The judge upheld F.M.'s claim, declared his dismissal null and void and ordered his reinstatement in his former post. The Ministry of Education, the Education Authority for the Region of Murcia and the Diocese of Cartagena lodged an appeal (*recurso de suplicación*). In a judgment of 26 February 2001, the Murcia High Court of Justice upheld the appeal. The court referred to the bishop's prerogatives in such matters and took the view that in the present case there had not been a violation of Articles 14 (prohibition of discrimination), 18 (right to respect for private life) or 20 (freedom of expression) of the Spanish Constitution. Relying on these articles, F.M. lodged an "appeal for protection" (*recurso de amparo*) with the Constitutional Court. In a judgment of 2007, the Court dismissed the appeal because "... the interferences with the applicant's rights are neither disproportionate nor unconstitutional". Thereafter the Court dismissed the F.M.'s request that the decision

be declared null and void on the ground that two of the judges who had given the judgment were known for their affinities with the Catholic Church.

F.M. lodged an application (no. 56030/07) with the ECtHR against the Kingdom of Spain: 1) he complained about the lack of impartiality of two of the judges on the bench of the Constitutional Court; 2) he alleged that the non-renewal of his contract constituted an unjustified interference with his right to respect for his private life; and 3) he argued that the public manifestation of his beliefs concerning the celibacy of priests was the reason for the non-renewal of his contract and that this was incompatible with his rights to freedom of thought and expression.

Decision of the Court: The ECtHR began by accepting that the non-renewal of F.M.'s contract affected his chances of carrying on a professional activity and entailed consequences for the enjoyment of his right to respect for his "private life" within the meaning of Article 8. Article 8 of the Convention was hence applicable. The ECtHR summarised the main question arising in the present case: "whether the State was required, in the context of its positive obligations under Article 8, to uphold the applicant's right to respect for his private life against the Catholic Church's right to refuse to renew his contract. Accordingly, the Court, by examining how the Spanish courts balanced the applicant's right with the rights of the Catholic Church under Articles 9 and 11, will have to assess whether or not a sufficient degree of protection was provided to the applicant".

After recalling 1) that "the domestic courts were entitled (…) to weigh up the competing fundamental rights and were also competent to examine whether grounds other than those of a strictly religious nature played a part in the decision not to appoint a candidate, because religious grounds alone were protected by the principle of freedom of religion"; and 2) that F.M. was "a secularised priest", the ECtHR "takes the view that the circumstances used to justify the non-renewal of the applicant's contract were of a strictly religious nature". Moreover, "like the Murcia High Court of Justice, the Court finds that, by not renewing the applicant's contract, the ecclesiastical authorities were merely discharging their obligations that stemmed from the principle of religious autonomy" and that "since candidates decided of their own free will to apply for such religious education teaching posts, it would be unreasonable if their religious beliefs were not taken into account in the selection process, on the basis of guaranteeing the right to freedom of religion in its collective dimension".

The Court also dismissed the other claims of F.M.

This decision was adopted by a Chamber of the Court and was appealed to the Grand Chamber.

Dissent by the Spanish Judge: The Spanish Judge of the ECtHR disagreed with the majority in the main question: he believed that certain arguments can be made in support of the view that the non-renewal of the applicant's contract in October 1997

entailed a violation of Article 8 of the Convention. He put forward two reasons: 1) He argued that the fact that F.M. is "a secularised priest" is relevant but considered "that there is an even more important one: in the present case, the non-renewal decision was taken by the public authority responsible for education and not by the church authority". For that reason, the Decision of the ECtHR should not talk about "an employer whose ethos is based on religion ..." The diocese was never, at least not in a formal sense, F.M.'s employer. The judge believed that both the Spanish courts and this Court placed the doctrinal and institutional autonomy of the Church above F.M.'s fundamental rights; 2) The national decision-making body, followed by the Court, accepted that F.M.'s contract had not be renewed "on account of the publicity given to (F.M.'s) marital status and family way of life". The term "publicity" refers here to the article illustrated by a photograph published in a newspaper. In the diocese's view, this article had caused a scandal. The judge argued that one cannot invoke the notion of "scandal", based on the application of canon law. Such a justification would have been possible if the Church or F.M.'s professional circle had been unaware of his personal and family situation before the publication of the article. However, it was established that this information was already known to the diocese, the other teachers, the parents and the pupils of the two small cities where he taught Catholic religion classes to the satisfaction of schools. In opinion of the judge, when the Court "takes the view that the circumstances used to justify the non-renewal of the applicant's contract were of a strictly religious nature", the Court has not weighed the principles of religious freedom (of the Catholic Church) and of neutrality (of the Spanish State) against the F.M.'s rights and has taken a "clearly disproportionate decision".

Name of the court: ECtHR
Date of decision: 24 July 2012
Name of the parties: *Beauty Solomon vs. Spain*
Reference number: Application no. 47159/08
Brief summary: The ECtHR held on 24 July 2012 in the case *Beauty Solomon (B. S.) v. Spain*, that there had been a violation of Article 3 (prohibition of inhuman and degrading treatment – lack of an effective investigation) of the European Convention on Human Rights as regards the investigation and violation of Article 14 (prohibition of discrimination).

The case concerned a woman of Nigerian origin, Beauty Salomon, resident in Spain since 2003, who was arrested three times, on 15, 21 and 23 July 2005 respectively, by police officers while working as a prostitute in Palma de Mallorca. While purporting to carry out an identity check, the officers struck her with a stick and shouted discriminatory insults such as "black slut."

B. S. lodged two complaints (on 21 and 25 July 2005) with the Palma de Mallorca investigating judges, one for the facts of 15 and 21 July with a formal verbal complaint to Judge No. 8 of Palma de Mallorca and the second one for the facts of 23 July with a complaint to Judge No. 2 of Palma de Mallorca, denouncing a police officer for brutally attacking her hands and knees; she also complained that she had

been targeted in particular because of her race. The development of the two complaints was very similar. The investigating judges asked the police headquarters to produce an incident report. The chief of police explained in his reports that there were frequent patrols in the area in question as a large number of thefts and assaults had been reported by local residents; that B. S. had been arrested for interrogation; that the police officers had at no time used humiliating language or physical force; and the report gave the identities of the police officers on patrol at the time of the incidents, which differed from those indicated by B.S. in her statement.

The investigating judges made discharge orders and discontinued the proceedings on the ground that there was insufficient evidence of a criminal offence. In 2007, when the judges refused to review their decisions, holding that there was no objective confirmation of B.S.'s accusations against the police officers, B. S. lodged an appeal, which was examined by the Balearic Islands *Audiencia Provincial* in 2008. This tribunal confirmed the decisions of the judges. B. S. then twice lodged an "appeal for protection" (*recurso de amparo*) with the Constitutional Court (CC) but her claims were not deemed admissible (Decisions of the CC of 14 April 2008 and 22 December 2009).

In light of the failure by all national courts to investigate the facts, B. S., with the help of Women's Link Worldwide, brought the case to the European Court of Human Rights (ECtHR) in 2008.

Decision of the Court: On the investigations by the national authorities – Article 3

The Court considered that the investigative steps taken had not been sufficiently thorough and effective to satisfy the requirements of Article 3 of the Convention, and found a violation of Article 3 as regards the effectiveness of the investigation. In reaching this decision, the Court considered that where an individual claimed to have suffered ill-treatment infringing Article 3 at the hands of the police or similar State authorities, that Article, read in conjunction with Article 1, requires an effective official investigation capable of leading to the identification and punishment of those responsible. Although the complaints of B. Salomon had in practice been investigated, the Court noted that 1) the investigating judges had done no more than to request reports from the police headquarters and had relied solely on those to discontinue the proceedings. Furthermore, the reports had been produced by the Balearic Islands chief of police, who was the official superior of the accused police officers; 2) at the public hearing on 11 March 2008 the defendants had not been formally identified by B. S. and therefore, in the Court's view, the hearing could not be regarded as satisfying the requirements of Article 3, in that it had not provided an opportunity to identify the police officers involved; 3) the medical reports provided by B. S. recorded the presence of inflammation and swelling on the left hand after she had been arrested and questioned on 21 July 2005, and of abdominal pain and bruising to the hand and knee after she had been arrested on 23 July 2005. That aspect had not been investigated, on the grounds that the medical reports had been undated or had been insufficiently conclusive as to the cause of the injuries. The

Court considered, however, that the reports should have been the starting point for the judicial authorities' investigations; 4) that the investigating judges had not taken steps to interview anyone who had witnessed the altercations; nor had they investigated B. Solomon's allegations that she had been taken to the police station to sign a statement acknowledging that she had resisted the police.

Article 14 in conjunction with Article 3: The Court considered that, when investigating violent incidents, the State authorities had a duty to take all possible steps to unmask any racist motive and to establish whether ethnic hatred or prejudice might have played a role in the events. The Court noted that in her complaints of 21 and 25 July 2005 B. S. mentioned racist comments allegedly made by the police officers. She had also accused them of not arresting women with a "European phenotype" who carried out the same activity as she did. The courts dealing with her case had not investigated these allegedly racist attitudes. The Court considered that the domestic courts had not taken into account B. Solomon's special vulnerability inherent in her situation as an African woman working as a prostitute. The authorities had not taken all possible measures to ascertain whether or not a discriminatory attitude might have played a role in the events. The Court therefore concluded that there had been a violation of Article 14 (prohibition of discrimination) in conjunction with Article 3 (prohibition of inhuman and degrading treatment – lack of an effective investigation).

*Short analysis***:** The judgment is very important because the Spanish police force and judges need to effectively investigate complaints against police officers and must change some discriminatory practices, as the *Solomon* case has revealed. This case will also require that the Constitutional Court changes its criteria for "not admitting" some habeas corpus proceedings, as in the case of the claims presented by B. S.