

Anti-discrimination Legislation in EU Member States

A comparison of national anti-discrimination legislation on the grounds of racial or ethnic origin, religion or belief with the Council Directives

SPAIN

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Report prepared by

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under the guidance of

Migration Policy Group

on behalf of the

**European Monitoring Centre
on Racism and Xenophobia
(EUMC)**

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The views expressed in the reports do not necessarily reflect the opinions of the EUMC, the European Community and its Member States.

The information in the reports cover a period up to September 2001 and may not contain developments which have taken place since that date.

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PREFACE

The European Union (EU) is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to all Member States. The right to equality before the law and the protection of all persons from discrimination, together with the respect and promotion of the rights of minorities is essential to the proper functioning of democratic societies.

Strategies and activities to combat racism, xenophobia and anti-Semitism form an integral part of the European Union's work on equality, justice and social inclusion.

The Amsterdam Treaty which entered into force in May 1999, introduced a new article 13 into the EC Treaty. The European Commission proposed a package of measures to implement article 13 in November 1999 which led to the adoption in 2000 of a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and a Council Directive establishing a general framework for employment equality and a Council Decision establishing a Community action programme to combat discrimination.

The European Monitoring Centre on Racism and Xenophobia (EUMC) was established by the EU during 1997 as part of the EU's aim to combat racism, xenophobia and anti-Semitism more effectively at a European level. The EUMC has the task to provide the Community and its Member States with objective, reliable and comparable data at the European level on the phenomena of racism, xenophobia and anti-Semitism in order to help them when they take measures or formulate courses of action. It also undertakes studies and examines examples of good practice, formulates conclusions and opinions and publishes an Annual Report.

The EUMC as part of its work in the field of legislation commissioned a study to compare Member States' anti-discrimination legislation and the article 13 directives. Information from the study was used to produce a series of country reports. The reports aim:

- to provide an overview of existing anti-discrimination legislation on the grounds of race or ethnic origin, religion or belief in the Member States and draw a comparison with the anti-discrimination Directives;
- to support the implementation of the directives by the Member States by indicating to each Member State the developments in other Member States (with the view that by providing information on the variety of approaches adopted by Member States to deal with the same issues Member States could benefit from the experience of each other);
- to identify areas which may require further development;
- to support the European Commission in the framework of the Community Action Programme in particular under Strand 1 - Analysis and evaluation, and
- to support wider debate as the issue is of interest to a variety of sectors in society.

The EUMC takes the opportunity to thank Migration Policy Group for its work on this Study and hopes that this publication will be a useful contribution to overcoming discrimination.

Beate Winkler, Director EUMC

FRAMEWORK OF THE STUDY

Joint Project 1999-2000 “Research on national and European legislation combating racism”

In 1999, The European Monitoring Centre on Racism and Xenophobia (EUMC) undertook a joint project with Migration Policy Group on “Research on national and European legislation combating racism”. The period covered in the project was from 1 May 1999 to 31 January 2000. The project carried out a comparative study on existing legislative provisions to combat discrimination on grounds of race or ethnicity and religion and belief and the proposal for a Directive concerning the elimination of racial and religious discrimination (known as Starting Line) and the proposal of the European Commission for a Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, COM (1999) 566 final, 1999/0253 (CNS).

EUMC Project 2001-2002 “Study on the comparison of the adopted Article 13 Council Directives with existing national legislation in the EU Member States”

By the end of 2000, with the adoption of Council Directives 2000/43/EC (Implementing the principle of equal treatment irrespective of racial or ethnic origin) and 2000/78/EC (Establishing a general framework for equal treatment in employment and occupation), there existed at the European Community level an actual framework for Member States on which to base, adapt or amend national legislation.

Terms of reference of the study

With the change in the legal situation at the European Community level, the EUMC decided to follow up the Joint Project of 1999 by commissioning a new study on legislation. The study would:

- produce a report on the comparison of the adopted Article 13 Council Directives with existing national legislation in the EU Member States. The grounds of discrimination to be examined in the Council Directives for the purposes of the comparative study and report would be limited to racial or ethnic origin and religion or belief; and
- update the country reports from the Joint project with Migration Policy Group (MPG): checking to see how the adopted Council Directives compare with existing legislation in all fifteen Member States; including information on any changes in legislation in the fifteen Member States that have occurred since the drafting of the Joint Project Reports.

Timeline of the study

The EUMC launched a call for tender process in May 2001 and selected Migration Policy Group to undertake the new study.

Information was collected up until September 2001. This enabled the draft reports from the study to be completed in time for submission to the meeting of the Legal Working Group to prepare the implementation of Directives 2000/43 and 2000/78 on non-discrimination into national law which was convened by the European Commission in November 2001. The Legal Working Group had an opportunity to examine the reports and make comments by 7 December 2001. Comments received by the EUMC were then examined and incorporated where relevant and as appropriate.

Format and scope

The format for the study is a list of questions, some optional for the purposes of the EUMC, related directly to the articles of the Council Directives. Optional questions were included in the reports provide information related to gender discrimination and the new Protocol 12 to the European Convention on Human Rights. Optional questions were not essential for the reports (and are therefore not included in every report) as they do not relate directly to the Council Directives, but may provide useful complementary information.

The information provided indicates provisions in the Constitutions, the Criminal law, Civil law and Administrative Law of the relevant EU Member State. Every care has been taken to ensure that the translations of titles of legislation from the original language are as accurate as possible, but they are for information purposes only and should not be regarded as the definitive or official translations by the European Union. The title of the piece of legislation in its original language has been included and should be referred to.

Final Caveat

The reports cover legal aspects as well as institutional mechanisms to promote equal treatment and combat discrimination as outlined by the Council Directives. In all reports there is a description of the legal and institutional situation and an indication of whether their compatibility with the Council Directives should be reviewed, some reports may indicate case law where it exists to complement the information on the legal provision, there is an element of evaluation in the reports, but the main emphasis has been to indicate what provisions exist without necessarily trying to evaluate them. As a result there may be some discrepancy between reality and the situation reflected by the law.

The final decision whether national legislation is compatible with the Council Directives rests with the European Court of Justice.

Introduction

Racial and ethnic discrimination, never totally eliminated in Europe, resurfaced when European societies became increasingly diverse as a result of continuous intra and extra European migration. Governments and civil society organisations responded by designing programmes to combat these forms of discrimination. In some countries these programmes included the adoption of comprehensive anti-discrimination legislation.

Policy responses at the level of the European Communities go back as far as the re-launch of the common market in the mid-eighties. This operation moved also social issues up on the European agenda, including equal treatment and anti-discrimination. In 1984, the European Parliament established the Parliamentary Committee of Inquiry into the Rise of Fascism and Racism, leading to the adoption of the Evrigenis Report in 1986. In the same year the European Parliament, the Council of Ministers and the European Commission adopted the Joint Declaration against Racism and Xenophobia. In 1991 a second report on the issue was published by the European Parliament (the Ford Report). From the early nineties non-governmental organisations started to call for European legislative measures and drafted their own legislative proposal, called the Starting Line, which received the support of the European Parliament, some governmental agencies and a great number of non-governmental organisations¹. In 1994, the Consultative Commission on Racism and Xenophobia was established, which in its final report made a series of recommendations including the adoption of European legal measures against racism². In the same year the final decision was taken by the Council of Ministers to designate 1997 as the European Year against Racism. The European Year offered tremendous opportunities to increase the support for a European strategy against racism, including for the adoption of legal measures against racism. At the same time the 1996/7 Intergovernmental Conference discussed proposals for Treaty changes, one of them being a proposal for the inclusion of an anti-discrimination clause in the EC-Treaty.

The actual inclusion of such a clause as Article 13 of the Treaty establishing the European Community (TEC) renews Europe's human rights commitments and strategically lays the foundation for policies that promote equality and value diversity. The European Commission started to draft anti-discrimination legislation as soon as the amended EC Treaty took effect (1 May 1999) and presented its first proposals in the same year. In one and half years two legislative measures and an action programme were adopted³. The Directive on racial and ethnic discrimination, the Racial Equality Directive⁴, prohibits both

¹ Isabelle Chopin, *The Starting Line: A harmonised approach to the fight against racism and to promote equal treatment*. In: *European Journal of Migration and Law* I (1): 1999; Jan Niessen, *The Amsterdam Treaty and NGO responses*. In: *European Journal of Migration and Law* II (2): 2000; Isabelle Chopin, *Possible harmonisation of anti-discrimination legislation in the European Union. European and non-governmental proposals*. In: *European Journal of Migration and Law* II (3 and 4): 2000.

² Final report from the Consultative Commission on Racism and Xenophobia to the General Affairs Council, Brussels, May 1996 (6871/1/96 RAXEN 18).

³ Council Directive implementing the principle of equal treatment between persons irrespective of racial and ethnic origin (OJ L 180, 19/07/2000.b); Council Directive establishing a general framework for employment equality (OJ L 303, 02/12/2000); Council Decision establishing a Community action programme to combat discrimination (OJ L 303 02/12/2000).

⁴ This Directive was adopted first. For the negotiation process see, Adam Tyson, *The negotiation of the European Community Directive on Racial Discrimination*. In: *European Journal of Migration and Law* III (2): 2001.

direct and indirect discrimination, as well as harassment, victimisation and instruction to discrimination. The material scope includes access to employment and working conditions, all kinds of vocational training, membership in professional organisations, social protection including health, social advantages, education and access to goods and services which are available to the public, including housing. The Directive allows positive action. The Directive obliges Member States to ensure judicial and/or administrative procedures for the enforcement of the obligations under the Directive and allows non-governmental actors to start legal action in cases of discrimination. The burden of proof is more equally divided between a victim of racism and the perpetrator. The Framework Directive for employment equality forbids discrimination on grounds of religion and belief in employment.

While the Commission drafted the proposals for the two Directives and the Council negotiated on the texts, the Migration Policy Group started in co-operation with the European Monitoring Centre on Racism and Xenophobia (EUMC) a research project. The research compared the requirements under the Starting Line and the proposal for a Racial Equality Directive with existing legislation in the fifteen Member States. The intention of the research was to clearly describe what the individual Member States would need to do in order to comply with the developing European standards⁵. After the adoption of the two Directives the research was updated⁶, again in close co-operation with the European Monitoring Centre, by a group of independent experts who were part of the Europe-wide project *Implementing European Anti-Discrimination Law*, a joint initiative of the Migration Policy Group, the European Roma Rights Center and Interights⁷.

The incorporation of the Directives into the national laws of the Member States in 2003 will keep the combat against discrimination on the national and European agendas. The transposition process requires the active involvement of national and European governmental and non-governmental institutions. The fifteen country reports and the synthesis report may contribute to a well-informed debate on the required adaptations of the laws in the Member States.

Jan Niessen, Director, Migration Policy Group

Isabelle Chopin, Migration Policy Group

⁵ The fifteen country reports were made available at EUMC's web-site: Isabelle Chopin and Jan Niessen (eds), *Research on national and European legislation combating racism*. Joint project of the Migration Policy Group and the European Monitoring Centre on Racism and Xenophobia; Project period 1 May 1999 -31 January 2000.

⁶ For this purpose religion and belief – grounds of discrimination in the Framework Directive - were included in the comparison.

⁷ The group also prepared country reports for eleven accession states published in March 2002.

Introductory Remarks⁸

Reading the XIV Report on Racial Discrimination presented by Spain to the UN, reveals that the prosecutor's offices and courts record show very few racial discrimination complaints. The report states that "certain offences, such as assault or threats, which may have been committed for racist reasons, are dealt with judicially, in both criminal and procedural terms, on the basis of the resulting injury, so that the underlying motive of racial discrimination, if present, does not appear in the records or statistics of the different Procurator's Departments". There are concerns that preliminary investigations are not always rigorous enough, that improvements can be made in researching evidence and dealing with witnesses. There is probably a need for definite instructions and appropriate training to be given to the different authorities with responsibility for such cases. However, it is also important here to point out the problem of the lack of human and financial resources in the Spanish judicial system, resulting in the clogging up of the courts and long delays.

In addition, a real effort should be made to provide information about the existence of legislative tools and the potential for their application. The legislation covering equal treatment and combating racial and ethnic discrimination is very dispersed and sometimes lacks clarity and coherence, making it difficult to use.

Since the number of cases of racial and religious discrimination is low, there is little jurisprudence in this field. Nevertheless, attention should be drawn to some interesting jurisprudence developed by the Constitutional Court (CC) regarding equality between men and women. There are also several judgements from the same Court concerning parties who advocate hatred and discrimination, in which the Constitutional Court makes its position clear on the limits of freedom of expression (judgement 214/1991, 11 November, Constitutional Court; judgement 176/1995, 11 December, Constitutional Court).

There is a wealth of literature in the field of fundamental rights and freedoms and consequently on the principle of equal treatment, but very few studies have been devoted specifically to discrimination on the grounds of racial or ethnic origin.

An important development in the political field took place on 31 May 2001. The two main, Spanish political parties, the PP (*Partido Popular* – Popular Party) and the PSOE (*Partido Socialista Obrero Español* – Spanish Socialist Workers' Party) signed a "Covenant on Justice Reform". This Covenant is a declaration by means of which Spain's two main political parties have committed themselves to reforming the justice system over the next few years. Faced with the crisis in the justice system, the Covenant recognises the necessity of improving the functioning of the administration of justice and of drawing together the needs and interests of the citizen. The Covenant comprises 23 points listing the main amendments and improvements which must be undertaken. Among these

⁸ This report was written by Maria Miguel Sierra under the direction of Migration Policy Group for the EUMC project on comparing existing national legislation in EU Member States with the Article 13 Directives (Council Directives 2000/43/EC (Implementing the principle of equal treatment irrespective of racial or ethnic origin) and 2000/78/EC (Establishing a general framework for equal treatment in employment and occupation)). It includes information from a previous report by Ms Maria Miguel Sierra which was part of a joint project of the Migration Policy Group and The European Monitoring Centre on Racism and Xenophobia entitled « Research on national and European legislation combating racism ».

amendments, there are plans to improve the Organic Law of the Constitutional Court, in order to fully guarantee the rights and freedoms enshrined in the Constitution; to reinforce local justice; to provide better training for the staff responsible for the administration of justice; to draft a “Charter of Citizens’ Rights” based on the principles of transparency and information which will establish the rights of the end users of the law; to introduce new technologies and modernise the infrastructure; as well as more and better adapted funding, the development of a new law of criminal procedure which will include the jurisprudence from the Constitutional Court and which is aimed particularly at making the procedures more flexible, at the improvement of accelerated procedures and at the establishment of appropriate methods of investigation. Particular attention will be paid to the establishment of proportionate and reasonable timetables and to new forms of arbitration, mediation and conciliation.

Article 1⁹

Is there any legal framework at national level that puts into effect the principle of equal treatment, or that is designed to combat discrimination on the basis of racial or ethnic origin and/or on the basis of nationality and/or on the basis of religion or belief? If so, what is the nature of this framework?

The principle of equality is one of the fundamental principles of the Spanish legal system. This section will examine the main provisions relating to the principle of equality and consequently non-discrimination, as well as relevant jurisprudence.

A. Constitution

In the Spanish Constitution (SC), (BOE¹⁰ 29.12.78) equality represents a *higher value* of the legal system (Art. 1.1).

“It is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong are real and effective; to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life.” (Art. 9.2)

“Human dignity, the inviolable and inherent rights of human beings, the free development of the personality, respect for the law and for the rights of others are fundamental to public order and social peace.” (Art. 10.1)

⁹ Discrimination on the grounds of race and ethnic origin is covered by the Council Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (further: **Racial Equality Directive**); discrimination on the grounds of religion and belief (but only in employment and occupation) is covered by the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (further: **Employment Equality Directive**). Until Article 5, the provisions of the two Directives correspond in content and numbering; as of Article 5, the content of the articles corresponds, but the numbering differs; the report follows the numbering of the Race Directive; the numbers of the corresponding articles on religion and belief in the Employment Directive will be mentioned in a footnote.

¹⁰ BOE - Boletín Oficial del Estado – Official State Bulletin

In Title I (Fundamental Rights and Duties), Article 14 establishes that, “Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other condition or personal or social circumstance.”.

While the principle of equality is clearly established for Spaniards, Article 13.1 states that, “Aliens shall enjoy in Spain the public freedoms guaranteed by this Title, under the terms established by treaties and the law.”

Article 13.1 has been the subject of numerous controversies and interpretations regarding the meaning of the expression, “the terms established by treaties and the law”. We shall examine later the jurisprudence from the Constitutional Court (CC) on this issue.

Article 10.2 of the SC provides that, “The principles relating to the fundamental rights and freedoms recognised by the Constitution shall be interpreted in compliance with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain.”

Finally, Article 53.1 establishes that the exercise of these rights and freedoms shall be regulated by law but that, in no circumstances, may the law interfere with their essential content.

Jurisprudence from the Constitutional Court relating to the rights of aliens (Art. 13 SC)

The Constitutional Court (CC) has handed down many decisions on legal scope and constitutional configuration with regard to the rights of aliens.

In judgement 107/84, 23 November, the Court established:

“The issue of entitlement and the exercise of rights and more specifically the issue of equality in the exercise of rights, which is the question which concerns us here, thus depends on the right affected. There are rights which apply equally to Spaniards and to aliens, the regulation of which must be the same for all; there are rights which do not apply in any circumstances to aliens (those recognised in Article 23 of the Constitution, in accordance with Article 13.2 and with the exception contained in those articles); there are other rights which apply to non-alien, in accordance with the provisions of the treaties and laws, where the difference of treatment for Spaniards as regards their application is admissible (...)”

The judgement thus establishes three categories of rights:

1. Constitutional rights which are recognised for all
2. Other rights accorded to aliens which are derived from Spanish laws and treaties
3. Rights from which aliens are excluded:
 - Participation in public affairs and access to public employment (Art. 23), with the exception of active and passive suffrage in municipal elections, in pursuance of the criteria of reciprocity established by treaty or by law (Art. 13.2)
 - Freedom of movement and residence (Art. 19)

- The right of petition (Art. 29)
- The right to work (Art. 35)

The third point comes from a literal interpretation of the Constitution (“All Spaniards have the right ...”).

According to the same judgement, the basis of equal treatment between Spaniards and aliens is found in the guarantee of human dignity in Article 10.2 of the Constitution.

After declaring that human dignity is the basis of the rights enjoyed as an individual and not as a citizen of a State, the Court goes on to list a series of rights which are inherent to human dignity, “rights such as the right to life, moral and physical integrity, privacy, ideological freedom, etc., apply to aliens because of their own constitutional mandate” (Note that the list is not exhaustive).

Another important judgement is judgement 115/87, 7 July, which resolves the appeal of unconstitutionality presented by the Ombudsman (*Defensor del Pueblo*) against certain articles of Organic Law 7/1985 on the rights and freedoms of aliens, developing Article 13 of the Constitution.

This judgement establishes the interpretation criteria to be applied generally to the rights recognised by the Constitution.

So, in relation to the right of assembly, after recalling that the Constitution makes no reference to the nationality of the person, who exercises the right, the CC confirms that: “The problem is not knowing whether the difference in treatment between aliens and Spaniards in the exercise of the right is possible, rather it is knowing whether the legislature has respected the preceptive and imperative content established by Article 21.1 of the Constitution”.

This same judgement (regarding the right of association) establishes that Article 13.1 of the Constitution “accords the legislature the possibility of establishing supplementary conditions for the exercise of fundamental rights by aliens, but in every case the legislature must respect the constitutional prescriptions, (...) the legislature may not confiscate the actual content of the right, when this has already been directly recognised by the Constitution as applying to aliens, to whom the mandate contained in Article 22.4 of the Constitution also applies”.

The judgement adds “It is possible to regulate the entitlement of a Spaniard or an alien differently in this group of rights, but this must always remain within the framework of the essential content of the right and of a systematic interpretation of all these rights”.

According to the CC, the function of the international treaties on human rights ratified by Spain is to configure the “exact profile” of the constitutional rights (judgements 28/1991 and 24/1993).

Thus in judgement 94/1993, 22 March, relating to the expulsion from the territory of a foreign worker, based on the idea that the right to freedom of movement and the right of residence are not rights which are essential to guarantee human dignity, the CC confirms

“although the freedom of the legislature is considerable, it is not absolute” and it invokes the ratification of the International Covenant on Civil and Political Rights which, under Article 12, recognises the freedom of movement for all persons legally established on the territory of the State. Thus, “the laws and treaties which govern the movement of aliens in Spain must respect the limited, but definite extent of the freedoms recognised for all persons who are legally present on the territory of the State”. Consequently, aliens residing legally in Spain “enjoy the protection recognised in Article 19 of the Spanish Constitution (SC), even though this many not necessarily be on the same terms which apply to Spaniards, except in cases determined by the laws and treaties to which Article 13.1 of the SC refers”.

This judgement is extremely important because it removes the limitation imposed by a literal interpretation of the Constitution which grants the right of freedom of movement and residence only to Spaniards (cf. Tripartite Construction judgement 107/84).

Finally, it should be noted that the Constitutional Court also recognised that there may be a violation of human rights due to the inaction of the authorities, which is the case if the legislature should have issued a legal rule provided for by the Constitution, in order to develop the exercise of a right, and did not respect this mandate (judgement 291/1994, 17 October).

B. Incorporated international legislation

Mention has already been made of the interpretative nature of the international treaties and agreements ratified by Spain in the sphere of fundamental rights (Art. 10.2 of the SC). There are also international standards which, once ratified, form an integral part of internal legislation. This is the case for European legislation and the conventions of the International Labour Organisation (ILO).

It is of value here to take a brief look at the international agreements ratified by Spain, which have an impact regarding equal treatment and non-discrimination.

Universal Declaration of Human Rights

This declaration is expressly mentioned in Article 10.2 of the Constitution as a source of interpretation of the standards relating to fundamental rights.

International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) which was ratified by Spain on 23 April 1969 (Boletín Oficial Estado (BOE) 17.5.69)).

On 13 January 1998 (BOE 11.6.98), Spain recognised the competence of the Committee for the Elimination of Racial Discrimination to receive and examine communications from persons or groups of persons considering themselves victims of violations of the rights laid down in the Convention (Art. 14 CERD).

Spain also recently (13 October 1999, BOE 25.11.99) withdrew the reservation made in Article 22 of the Convention which states that “Any dispute between two or more State Parties with respect to the interpretation or application of this Convention (...) shall, at the

request of any of the parties to the dispute, be referred to the International Court of Justice for decision”.

International Covenant on Civil and Political Rights (Ratified by Spain on 27 April 1977 (BOE. 30.4.77)).

International Covenant on Economic, Social and Cultural Rights (Ratified by Spain on 27 April 1977 (BOE 30.4.77)).

Within the framework of the Council of Europe; Spain subscribed to the European Social Charter (ratified on 29 April 1980 (BOE 26.6.80)) and the Convention on the Legal Status of Migrant Workers (ratified on 6 May 1980 (BOE 18.6.83)).

Also in relation to the social sphere, there is the ILO Convention 97 on Migration for Employment (ratified on 23 February 1967 (BOE 7.7.67)) and the ILO Convention 111 on Discrimination (Employment and Occupation) (ratified on 26 October 1967 (BOE 4.12.68)).

Then, of course, there is the EU legislation, which has primacy over national legislation, but this subject will not be enlarged upon here.

C. Civil Code

Article 27 of the Civil Code establishes the principle on the basis of which “aliens enjoy the same civil rights in Spain as Spaniards, with the exception of provisions contained in specific laws and treaties”.

D. Penal Code (L.O 10/1995, 23 November)

a) Aggravating circumstances

Article 22.4 stipulates that there is aggravating circumstance of criminal responsibility if, “the offence is committed for reasons which are racist, anti-Semitic or [based on] another sort of discrimination concerning the ideology, religion or beliefs, ethnic origin, race or nationality of the victim, as well as his or her sex or sexual orientation or any illness or disability from which he or she suffers”.

b) Offences against the rights of workers

“Those who perpetrate serious discrimination in the sphere of employment, public or private, against a person because of his or her ideology, religion or beliefs, ethnic origin, race or nationality (...) and who do not restore the state of equality before the law after formal notice or administrative sanction, compensating for economic damages caused, will be sentenced to imprisonment for a period of between six months and two years and a fine of between six and twelve months”.

c) Offences relating to the exercise of fundamental rights and public freedoms

Article 510.1

“Those who incite discrimination, hatred or violence against groups or organisations for racist, anti-Semitic or other motives relating to religion and beliefs...” shall be punishable.

Article 510.2

“Those who disseminate material which is offensive to groups or organisations in relation to their ideology, religion or beliefs, the race, ethnic origin or nationality of their members...” shall be punishable.

Article 511.1

“Any official of the public services who refuses a person a benefit to which he or she has a right, because of his or her ideology, religion or beliefs, race, ethnic origin or nationality...” shall be punishable.

Article 512

“Those who, in the exercise of their professional activities or activities as employers, refuse a person a benefit to which he or she has a right because of his or her ideology, religion or beliefs, race, ethnic origin or nationality...”

Article 515

Organisations which “incite discrimination, hatred or violence against persons, groups or organisations because of their ideology, religion or beliefs, or the race, ethnic origin or nationality of their members or some of their members” shall be deemed unlawful.

d) Crimes of genocide

Article 607.2

“The dissemination by any means of ideas or doctrines which deny or justify the crimes termed in the previous paragraph or which assert the rehabilitation of regimes or institutions which support practices which generate these (genocide) shall be sentenced to a period of imprisonment of between one and two years”.

Note also Organic Law 1/1979, 26 September, on the penitentiary system, which stipulates in Article 3, that the penitentiary authorities must respect the human person and that prisoners must not be subjected to discrimination on the grounds of race or religion.

E. Social legislation

Law 5/80 Básica de empleo (Basic Law on Employment) (BOE 17.10.80)

In Article 38.2 this law stipulates: “Equal opportunities and equal treatment shall be the basic principles of employment policy, provided that this does not establish distinction, exclusion or preference for reasons linked to race, sex, religion, political opinion, trade union membership, national descent or social background”.

Law 10/94 Sobre medidas urgentes de fomento a la ocupación (On emergency measures to promote employment)

In article 1.2 this law provides that private employment agencies must guarantee the principle of equal access to employment and that they shall not establish discrimination on the grounds of race, origin or religion.

Law 8/88 Sobre Infracciones y Sanciones de Orden Social (Law on Violations and Sanctions of the Labour Laws) (BOE 15.4.88)

The following are considered to be very serious offences “Unilateral decisions by the employer which involve unfavourable discrimination for reasons of age or which contain positive or adverse discrimination relating to remuneration, training, promotion and other employment conditions for reasons based on sex..., race, religion,...” (Art. 8.12).

Article 28.2 considers it to be a serious offence “to establish conditions, through advertising, the dissemination of job advertisements or by any other means, which constitute positive or adverse discrimination for access to employment for reasons linked to sex, age, civil status, religion...”.

F. Organic Law 7/1980, 5 July, on religious freedom

Art. 1: The State guarantees the fundamental right to freedom of religion and worship recognised in the Constitution.

Art. 1.2: Religious beliefs shall not constitute a reason for inequality or discrimination in the eyes of the law. Religious reasons may not be cited for preventing anyone from exercising any work, activity, responsibility or public office.

Art. 2: The freedom of religion and worship includes the right of all persons:

- a) To profess or not to profess religious beliefs chosen freely, to change their faith or to abandon it; to express their beliefs or absence of belief freely or to abstain from any such expression.

G. Law 1/1990, on the Education System

The statement of the grounds for the law stipulates that “Education allows progress to be made in combating discrimination and inequality, be it on the grounds of birth, race, sex, religion or opinion or on the basis of family or social situation (...)”.

Article 1.1.: The Spanish education system, configured with the principles and values of the Constitution and based on respect for the rights and freedoms recognised by the Constitution (...), shall be oriented towards the attainment of the objectives set out in the Law on the Right to Education, particularly: teaching of respect for fundamental rights and freedoms and the exercise of tolerance and freedom.

Article 2.3: Educational activity shall be developed in accordance with the following principles:

- c) Effective equal rights between the sexes, the rejection of any form of discrimination and respect for all cultures.

H. Organic law 8/2000, 22 December, on the rights and freedoms of aliens in Spain and their social integration, which amends LO 4/2000, 11 January

The provisions, which are of interest here, are those in Title I: Rights and Freedoms of Aliens, and in particular Chapter I: Rights and Freedoms of Aliens, and Chapter IV: Anti-discrimination Measures.

Chapter I: Rights and Freedoms of Aliens

Article 3.1: establishes the principle of equal treatment between Spaniards and aliens in the enjoyment of the rights and freedoms recognised in Title I of the Constitution, in this law and in other laws which regulate the enjoyment of these rights. Aliens, who exercise the rights recognised by this law, do so under conditions of equality with Spaniards (general interpretative criteria).

Article 3.2: refers to the constitutional principle according to which the fundamental rights of aliens shall be interpreted in accordance with the international treaties and agreements on these issues, which have been signed by Spain, and adds “provided that the profession of different religious beliefs or ideological or cultural convictions are not invoked to justify acts or behaviour which are contrary to them.”

Aliens in regular situation have:

- the right to freedom of movement and choice of residence (Art. 5.1)
- the right of suffrage in municipal elections where reciprocal agreements exist (Art. 6.1)
- the right of assembly and right to demonstrate (Art. 7)
- the right of association (Art. 8)
- the right to education under the same conditions as Spaniards (Art. 9)
- the right to work and to social security, this includes employed and self-employed occupations (Art. 10.1)
- the right to work in the public services (Art. 10.2)
- the right to belong to a union and the right to strike (Art. 11)
- the right to medical aid (Art. 12)
- the right to assistance for housing (Art. 13)
- the right to Social Security and to social services under the same conditions as Spaniards (Art.14)

All aliens shall have the right to basic compulsory education, to basic social services and benefits and to public medical aid in emergency.

Chapter IV: Anti-discrimination measures

Art. 23.1: Definition of discrimination

Art. 23.2: List of discriminatory acts.

It is interesting to note that this new law on aliens has taken into account the jurisprudence in the field of law relating to aliens, and that this text even goes beyond the Constitution by clearly establishing the recognition of rights, which the Constitution reserves for Spaniards: right to freedom of movement, right to work.

Conclusion

There is a legislative framework implementing the principle of equal treatment and there are numerous provisions in different laws which prohibit discrimination on the grounds of race or ethnic origin, as well as discrimination on the grounds of religion or belief.

Article 2.1 and Article 2.2(a) and 2.2(b)

Is there a definition of direct and indirect discrimination in your national legal system? Is there a need to introduce definitions of direct and indirect discrimination, as defined in Article 2.2(a) and 2.2(b) of the Directive, into national legislation?

Are there comparable definitions in national law in relation to gender discrimination?

Art. 23.1 of the Organic Law on the rights and freedoms of aliens in Spain provides the following definition:

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

With regard to discrimination against workers (Art. 23.2e), the law adds the definition of what should be considered as indirect discrimination: “any treatment derived from the adoption of criteria which are detrimental to the interests of workers because of the fact that they are aliens or because they belong to a specific race, religion, ethnic group or nationality”.

The method used in Article 23.1 of the Organic Law on the rights and freedoms of aliens in Spain may seem strange, in that Article 23.1 sets out in a single definition what is understood by direct and indirect discrimination, and, in Article 23.2, there is a list of the actions which are considered to be discriminatory, and then Article 23.2e provides a definition of what should be understood by indirect discrimination, but only with regard to workers. This lack of coherence and similar ambiguities have been found in other provisions, where various different words are used to qualify discrimination – serious, very serious, favourable, unfavourable, adverse – without it being clear what they correspond to.

Jurisprudence

It is useful to turn for a moment to the existing jurisprudence from the Constitutional Court regarding equality between men and women and to look at how this has evolved over the years, especially with regard to the concept of discrimination.

At first, the Constitutional Court used the term discrimination to denote any unjustified or arbitrary difference in treatment, without there being any objectivity (Sentencia del Tribunal Constitucional (STC) 22/1981).

Some time later, the Court interprets the obligation not to discriminate as the prohibition of taking certain elements into account as differentiation criteria. These elements (birth, race, sex etc.) are those expressly contained in Article 14 of the Constitution. (STC 83/1984).

After a judgement of 1987, the Court allows that “Article 14 comprises, on the one hand, the general equality clause and, on the other, the prohibition of discrimination on specific grounds, including sex, and this represents an explicit prohibition of the preservation of differences which are historically deeply rooted and which have put sections of the population in positions which are disadvantageous and openly contrary to the dignity of the individual recognised in Article 10 of the SC”.

This judgement (STC 128/87) allows different treatment in favour of a woman because, according to the Court, the intention was to eliminate existing situations of discrimination.

This is the beginning of what legal theory calls “Compensatory jurisprudence”.

After this judgement, the Court goes on to look at “hidden” discrimination where there are apparently other reasons for the difference in treatment, although in reality it is the person’s sex which has been taken into account and has influenced the establishment of the difference (STC 166/1988).

In a judgement of 1991 (STC 145/1991), the Court moves into the sphere of indirect discrimination.

The judgement establishes that when a woman invokes discrimination in employment, the judge may not limit him/herself to analysing the reasonableness or the objective justification for the difference in treatment, but must also examine whether what appears to be a strictly reasonable differentiation in fact hides discrimination contrary to Article 14.

In terms of sex discrimination at work, the Supreme Court was recently required to make a judgement on an apparently neutral practice in a bank, which the Court defined as indirect discrimination. The bank wanted to fill 52 branch deputy posts. 95 men (75%) and 31 women (25%) submitted applications for these posts. Forty men (77%) and 12 women (23%) were promoted. There is no obvious sign of discrimination here, since the numbers of men and women appointed are in proportion with the numbers of applications submitted by each group.

The Court looked into the reasons why so few women had submitted applications, even though the staff at the bank are fifty per cent men and fifty per cent women.

Its conclusion was: “that the employer has an established practice whereby invitations, suggestions and recommendations are made to certain employees to submit applications. There is a significant difference between the numbers of male and female staff who are “invited” to submit applications which leads to real and effective (although hidden and not apparent) sex discrimination”.

Conclusion

There is a definition of direct and indirect discrimination. However, these definitions do not correspond exactly with the definition in the Directive. In terms of equality between men and women, the jurisprudence from the Constitutional Court has brought developments in the concept of discrimination

Article 2.3

Is unlawful harassment an identifiable concept in national law? Is there a definition of harassment in the national law that corresponds to that in the Directive? Is it necessary to introduce such a definition into national legislation?

Are there comparable definitions in national law in relation to gender discrimination?

There is no definition like the one in Article 2.3 of the Directive. The Spanish government should take measures in order to introduce such a definition into national legislation.

The definition of sexual harassment is found in Article 184 of the Penal Code and is as follows:

“1. Those soliciting favours of a sexual nature, for themselves or for a third party, within the context of a work relationship, an educational situation or the provision of services, in a continuing or habitual manner, and who, through this behaviour, put the victim into a situation which is objectively and seriously intimidating, hostile or humiliating shall be punished as the perpetrator of sexual harassment with a custodial sentence of 6 to 12 weekends or a fine of 3 to 6 months.

2. If the party guilty of sexual harassment acts by exploiting a situation of superiority in the field of work, education or hierarchy, or expressly or tacitly imparts to the victim some harm with regard to the legitimate expectations he or she might have within the context of that relationship, the penalty shall be a custodial sentence of 12 to 24 weekends or a fine of 6 to 12 months.

3. If the victim is particularly vulnerable, because of his or her age, disability or situation, the penalty shall be a custodial sentence of 12 to 24 weekends or a fine of 6 to 12 months in cases provided for by Paragraph 1 and a custodial sentence of 6 months to one year in cases provided for by Paragraph 2 of this article.”

Article 4.2e of the Workers' Statute (law 8/80), proclaims the right to respect of privacy and the right to receive dignified treatment, including protection in the event of verbal, gesticular and physical offences of a lewd nature.

The Constitutional Court recently made a judgement (STC 224/1999, 13 December 1999) in which it refers to the Resolution of the Council of the European Communities of 29 May 1990 and Article 1 of the Recommendation from the Commission of 27 November 1991 on the protection of the dignity of women and men at work.

Conclusion

The concept of harassment does not exist in relation to discrimination on the grounds of race or ethnic origin. There is a definition of harassment in terms of discrimination on the grounds of sex.

Article 2.4

Is it unlawful under national law to give instruction to discriminate on the grounds of racial or ethnic origin or religion and belief? Is it deemed to be discrimination? Is there a need to introduce a similar principle in national law?

Are there comparable definitions in national law in relation to gender discrimination?

The instruction to discriminate is not included in these terms. The Penal Code talks about provocation to discriminate, promotion of discrimination and incitement to discrimination.

Article 510.1 of the Penal Code stipulates that “those who provoke discrimination, hatred or violence against groups or associations for racist, anti-Semitic or other reasons relating to their members’ ideology, religion or beliefs, family situation, membership of an ethnic group or race, national origin, sex, sexual orientation, illness or disability” shall be sentenced to imprisonment and a fine.

Furthermore, Article 515.5 of the Penal Code stipulates that associations “which promote discrimination, hatred or violence against persons, groups or associations because of their ideology, religion or beliefs, because of the ethnic group, race or nation to which their members or some of their members belong, their sex, sexual orientation, family situation, illness or disability” shall be considered illegal and shall be punished.

Conclusion

Provocation to discriminate, the promotion of discrimination and incitement to discrimination on the grounds of racial or ethnic origin or on the grounds of religion or belief are punished by law.

Article 3.1

Does the definition of ‘racial and ethnic discrimination’ and ‘discrimination on the grounds of religion and belief’ apply to all the fields of application listed in Article 3, both in the private and the public sectors?

To which other fields of application does the definition apply? (Compare with the fields of application listed in Protocol N° 12)

Is gender discrimination covered in the same fields?

The definition of racial and ethnic discrimination and discrimination on the grounds of religion and belief applies to the fields of application listed in Article 3 of the Directive in both the private and public sectors.

We have seen above that there are a large number of provisions relating to combating discrimination, mostly contained in criminal and social legislation.

Law 8/2000 on the rights and freedoms of aliens complements the provisions in force by listing a number of discriminatory acts in Article 23.1:

- a) Those perpetrated by the authority or official or person responsible for a public service who, in the exercise of his or her duties, by act or omission, perpetrates a discriminatory act.
- b) Those who impose harsher conditions than those imposed on Spaniards or who are resistant in the public offer of goods and services.
- c) All those who illegitimately impose harsher conditions than those imposed on Spaniards or restrict or limit access to work, housing, education, vocational training and social services and assistance, as well as any other right recognised by this law.
- d) All those who, through acts or omissions, prevent the exercise of an economic activity legitimately undertaken.

Conclusion

The definition of discrimination on the grounds of race or ethnic origin, or religion or belief applies to all the areas covered by Article 3 of the Directives.

Article 3.2

To what extent, if any, does national legislation go beyond the Directive in prohibiting discrimination on the ground of nationality?

On certain points, Spanish legislation appears to go beyond Article 3.2, particularly in the case of Article 10.2 of Chapter I of the Law on the Rights and Freedoms of Aliens which stipulates that aliens should have access to public employment on an equal footing with nationals of EU Member States.

Article 4

Do exemptions relating to genuine and determining occupational requirements exist at national level? Is it necessary to restrict any exemptions to those defined in Article 4?

Articles 4.2.c and 17 of the Workers' Statute prohibit the employer from adopting discriminatory measures which are discriminatory in the strict sense of the word – meaning measures which are detrimental to those who are subject to them, as well as privileges. The Workers' Statute prohibits these discriminations and privileges on the basis of sex, civil status, race, social situation, political or religious convictions, language, age, descent, kinship, union membership etc.

However, International Labour Organisation (ILO) Convention 111, ratified by Spain (BOE 4.12.68) stipulates that there is no discrimination if distinctions, exclusions or preferences are based on qualifications required by the employment.

Article 5¹¹

Are there any specific measures that aim to ensure or promote full equality or to compensate for disadvantages linked with racial or ethnic origin and religion or belief? Is the government considering adopting such measures?

Are there any comparable measures in relation to gender discrimination?

In certain laws there exists the possibility of establishing actions to benefit certain persons or groups.

One example is the law on the education system of 1990. Title V of this law is entitled “Compensation for inequalities in education”.

Article 63 stipulates that “In order to render effective the principle of equality in the exercise of the right to education, the authorities develop compensatory actions aimed at persons, groups and territorial regions with unfavourable situations, and provide the necessary economic resources”.

In spite of the apparent generosity of the text, much remains to be done in order to overcome effectively the disparities and inequalities experienced by certain groups. This applies in particular to the situation of Roma children and, to a lesser extent, to immigrant children, depending on the Autonomous Communities in which they live.

These actions require sufficient and appropriately adapted resources, both financial and human, and these resources will be available where the political will exists.

Jurisprudence

It is of interest in this section, too, to mention the jurisprudence from the Constitutional Court in relation to positive action measures in favour of women.

“Where situations are not identical, inequality in legal treatment is legal and admissible” (Judgement 114/83).

“The intervention of the public authorities to remedy the situation of certain social groups defined, for example, by sex (and this can be confirmed in the majority of cases as referring to women) and put, in the context of work, in positions of undeniable disadvantage, for reasons connected with traditions and customs which are deeply rooted in society and difficult to eliminate, cannot be considered as going against the principle of equality, even if it establishes treatment which is

¹¹ Article 7 in the Employment Equality Directive

more favourable, because it is about giving distinct treatment to situations which are effectively different” (Judgement 128/1987).

“The reference to sex in Article 14 implies the constitutional decision to end a historical situation of inferiority attributed to women and any difference based on this criteria is unconstitutional. Nevertheless, in the perspective of Article 9.2 of the Constitution, on the promotion of certain conditions of equality, it is not considered as discriminatory to adopt certain positive action measures to benefit women, in order to promote real and effective equality between men and women” (Judgement 3/1993).

Conclusion

The government should take measures in order to promote the principle of equal treatment and to compensate for the disadvantages which affect persons of a specific racial or ethnic origin and disadvantages linked to a specific religion or belief.

The positive action measures in favour of women were accepted by the jurisprudence of the Constitutional Court.

Article 6¹²

Are there any measures that protect the principle of equal treatment at national level that go beyond the minimum requirements of the Directive?

There are no measures going beyond what is proposed in the Directives, but the principle of equality, which is one of the cardinal principles of the Spanish legal system, has evolved towards greater equality between aliens residing legally on the territory and Spaniards.

While the rights of illegal residents are restricted, the fact remains that persons present on Spanish territory have the right to claim before the courts, the right not to be discriminated against insofar as all persons have the right to legal protection and a just and fair trial.

In the case of aliens who are present illegally on the territory, the Constitutional Court has established a number of guarantees through its jurisprudence, for example:

- the invalidity of extraditions granted within the context of a procedure where fundamental rights were violated (Judgement 13/1994).
- the prohibition of expulsions if there is a fear that the expellee might suffer inhuman or degrading treatment in his or her country of origin (Judgement 44/1991).
- the confinement of aliens constitutes an exceptional measure, which should be adopted and controlled freely by the judges through a decision taken and applied on a case-by-case basis. It shall not last for more than forty days (Judgements 115/1987 and 144/1990).

¹² Article 8 in the Employment Equality Directive

Evaluation

There do not seem to be any measures going beyond what is proposed in the Directives, but jurisprudence establishes certain guarantees regarding non-discrimination in favour of persons residing illegally in the territory.

Article 7.1¹³

Are legal procedures available for the enforcement of the obligations under the Directive for those who consider themselves wronged?

Article 24 of the Constitution states that: all persons have the right to obtain effective protection from the judges and the courts in the exercise of their legitimate rights and interests, and, in no case, may they go undefended. All persons have the right of access to the ordinary judge predetermined by law; to the defence and assistance of a lawyer; to be informed of the charges brought against them; to a public trial; to the use of the evidence pertinent to their defence; to not make self-incriminating statements; to not declare themselves guilty; and to the presumption of innocence.

The guarantee of the fundamental rights and freedoms of individuals is entrusted first and foremost to the ordinary judges and courts, through the routes and remedies offered by the procedural laws, but provision is made in the Constitution for a specific and ultimate system for the protection of rights – the “recurso de amparo constitucional” (Art. 53.2 SC). The Constitutional Court is also set up as the ultimate guarantor of the fundamental rights and freedoms recognised in the Constitution.

A “recurso de amparo” can only be interposed in the face of violations of the rights and freedoms recognised in Articles 14 to 29 of the SC.

The “recurso de amparo” is open to all natural and legal persons who invoke a legitimate interest.

This procedure is free of charge.

Attention should also be drawn here to the Law on the Legal Protection of Fundamental Rights (Law 62/78, 26 December), which makes provision for a shortened form of procedure for both criminal and civil jurisdiction and administrative proceedings, in the case of a violation of the rights contained in this law.

Article 100 of the Code of Criminal Procedure: “criminal action arises from any offence or misdemeanour a criminal with the aim of punishing the guilty party, there may also be a civil action for the recovery of property, reparation for damages and compensation for injury caused by the offending action”.

It is worth looking again here at Article 24 of the Constitution, mentioned above, and the right to free legal assistance contained in Article 20 of the Law on the Rights and

¹³ Article 9.1 in the Employment Equality Directive

Freedoms of Aliens, which stipulates that aliens shall have the right to free legal assistance under the same conditions as Spaniards, regardless of the jurisdiction.

Conciliation procedures exist for civil matters (Art. 460 and subsequent articles of the Code of Civil Procedure) and for social matters (Art. 50 and subsequent articles of the Code of Social Procedure).

Conclusion

In principle, legislative provision is made for the protection of rights as established in Article 7.1 of the Racial Equality Directive and Article 9.1 of the Employment Equality Directive but, as has been indicated above, a reform of the justice system is in progress, with a view to making the means of protection more accessible and effective.

Article 7.2¹⁴

Is it possible for national associations or other legal entities to engage in legal proceedings for the enforcement of rights under the Directive?

Article 18.3 of the new Law on the Rights and Freedoms of Aliens stipulates that organisations for the defence of immigrants, which are legally constituted in Spain, may intervene in procedures in legal matters regarding aliens (Art. 18.2).

At the same time, the Constitution allows any natural person or legal entity invoking a legitimate interest to constitute themselves as a civil claimant in proceedings relating to the violation of fundamental rights and liberties (Art. 162.2 SC).

Article 7.3¹⁵

What time limits apply to the bringing of an action?

Law 62/1978, 26 December, on legal protection of the fundamental rights of the individual stipulates a time limit of 10 days (Article 8)

Article 8¹⁶

Does the principle of the reversal or easing of the burden of proof in cases of racial and religious discrimination exist in national law?

Are there comparable provisions in national law in relation to gender discrimination?

¹⁴ Article 9.2 in the Employment Equality Directive

¹⁵ Article 9.3 in the Employment Equality Directive

¹⁶ Article 10 in the Employment Equality Directive

Article 24 of the Constitution states that all persons have the right to the presumption of innocence. This presumption is “the cardinal principle of criminal procedure, which implies that any person accused of a offence 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 which observes all the guarantees (...). There are several aspects to this principle, including a procedural side, which involves transferring the burden of proof on the constitutive facts from the criminal charge, unless it is possible to call on a defence of *probatio diabolica* of the negative facts. This burden of proof applies to the accusing party” (STC 209/1999).

In social matters the Constitutional Court has oscillated between the presumption of innocence and the reversal of the burden of proof.

A judgement of 23 November 1981 allows that “in the event of a dismissal which is contested on the grounds of discrimination, it is the employer’s responsibility to prove that he or she acted with reasonable motives”.

Later the Court considered that “the right to the presumption of innocence cannot be restricted solely to the sphere of criminal conduct proceedings, but (...) it must also govern the adoption of any resolution, whether administrative or legal (Judgement 13/1982).

But later still the Court re-clarifies that “the natural field of application for this right is criminal procedure” (Judgement 81/1988).

Article 55 of the Law on the Workers’ Statute stipulates that when a worker is dismissed, the employer must prove the breach of the obligations he or she invokes.

The Law of Social Procedure (R.D.L. 521/1990) establishes in Article 96 : “In procedures where the existence of sex discrimination can be deduced, it is the defendant’s responsibility to provide an objective and reasonable justification, adequately demonstrated by the measures adopted and their proportionality”.

Conclusion

The reversal or adjustment of the burden of proof exists in social law.

Article 9¹⁷

Is the Directive’s definition of victimisation to be found in national law?

Are there comparable definitions in national law in relation to gender discrimination?

The concept of victimisation does not exist in the Spanish legal system. The legislature should take measures to introduce this concept.

¹⁷ Article 11 in the Employment Equality Directive

Article 10¹⁸

Which steps are necessary to ensure sufficient public awareness of existing laws? What arrangements currently exist to ensure that anti-discrimination legislation has been or will be brought to the attention of the public?

Does the government need to act to ensure that by means of information and training, and where necessary by effective sanctions, all officials and other representatives of the public authorities at every level abstain from any racially or religiously discriminatory speech or behaviour in the exercise of their functions?

It has been seen that the legal standards relating to combating racial and religious discrimination are numerous and are contained in different laws. The fact that they are so scattered makes it very difficult to bring them to the attention of the public.

At the same time, there is no specialised body in this area. It is essential that such a body be created and charged with receiving complaints, ensuring they are followed up, informing the population about the legal routes for combating racial and religious discrimination, proposing measures to the authorities and organising training and awareness campaigns.

This could be done on the model of the Institute for Women (*Instituto de la Mujer*) which successfully assumes this role in the area of equality between men and women.

For the time being, IMSERSO (Instituto de Migraciones y Servicios Sociales) which depends on the Ministry of Employment and Social Affairs, could make provision for producing an information booklet on anti-discrimination legislation and the means of defence available for victims. This booklet could be accompanied by an information and awareness-raising campaign aimed at the general public.

The previous section looked at the existence of sanctions established with regard to representatives of the public authorities (Article 511.1 of the Penal Code) who perpetrate discriminatory speech or behaviour. The fact remains that a great deal of effort must still be put in to train and raise awareness among all representatives of the public authorities.

Faced with the problem posed by the conduct of police officers and the Civil Guard (*Guardia Civil*), the General Directorates of the Police and the Civil Guard decided to implement a course of training on human rights and non-discrimination, as well as a series of initiatives aimed at raising awareness among officers (cf. XIV report on racial discrimination presented by Spain to the UN Committee on the Elimination of Racial Discrimination).

It is to be hoped that this type of initiative will be extended to other categories of representatives of the public authorities and that it will be done with all the necessary determination.

¹⁸ Article 12 in the Employment Equality Directive, which has the following phrase in addition to Article 10 "for example at the workplace".

Conclusion

A great deal of work must be undertaken regarding information and awareness raising to shape public opinion. It is also essential that public servants and representatives of the public authorities receive appropriate training.

Article 11¹⁹

Are there any measures to promote the social dialogue on the issues of the Directives at national level?

Spain has a consultation body, the Forum for the Social Integration of Immigrants (*Foro para la integracion social de los Inmigrantes*), which was established by Royal Decree (490/1995, 7 April).

This forum comes under the Ministry of Social Affairs and its remit is specifically to promote participation and dialogue with representatives of civil society, to channel the requests from immigrants and to present proposals relating to the social integration of immigrants to the competent bodies.

The forum comprises a President appointed by the Ministry, representatives of the public authorities, associations, NGOs, unions and employers' organisations and observers.

Article 12²⁰

Are there any measures to promote the dialogue with non-governmental organisations at national level?

As mentioned in the previous section, NGOs are parties to the *Foro para la integracion social de los Inmigrantes*. It would be appropriate to create a structure dealing principally with racism.

Article 13²¹

Is there a specialised body to promote equal treatment, irrespective of race or ethnic origin at national level? If so, what are its powers and duties? Is such a body effective?

If not, would the government need to act in order to give this body such specific powers? What would be the procedure?

In Spain there is no official body responsible for providing information about and monitoring compliance with anti-discrimination legislation and the promotion of equal

¹⁹ Article 13 in the Employment Equality Directive.

²⁰ Article 14 in the Employment Equality Directive

²¹ There is **no** article in the Employment Equality Directive corresponding with article 13 of the Racial Equality Directive on specialised bodies

treatment. There are several different bodies and institutions which are charged with the protection of fundamental rights and freedoms:

- the ordinary courts (criminal, civil, administrative, social)
- the Constitutional Court
- the Ministry of Public Administration
- the Defensor del Pueblo (Ombudsman)
- the Inspectorate for Labour

The remit of the Office of the Ombudsman, regulated by Organic Law 3/1981, 6 April (BOE 7.5.81), is to ensure the respect by all the public authorities of the rights declared in Title I of the Constitution.

The Ombudsman conducts inquiries on its own initiative or on the basis of a complaint and has the power to make recommendations.

The Ombudsman may bring an appeal in a case of unconstitutionality. It presents an annual report on its activities to Parliament and these reports are made public

Although the Ombudsman does cover some of the functions described in Article 13 of the Directive, it is not a body for the promotion of equal treatment and its role should remain as it is at present, i.e. to ensure respect by the public authorities of constitutional rights.

Spain should establish a specialised body because there is currently, no structure, which assumes this role of promotion, supporting victims and conducting studies and which has the power to make recommendations.

Conclusion

There is no body which corresponds to the description in Article 13 of the Directive.

Article 14²²

Is action needed to ensure that national law guaranteeing equal treatment between individuals, irrespective of racial or ethnic origin and religion or belief, takes priority over other laws, regulations or administrative provisions?

Do national legislative or administrative procedures provide for declaring null and void those provisions in agreements, contracts or rules that relate to professional activity, workers and employers that are contrary to the principle of equal treatment?

Since equality is one of the *higher values* of the legal system (Article 1 of the Constitution), legislative, regulatory and administrative provisions should be in accordance with this value.

²² Article 16 in the Employment Equality Directive

Article 17 of the Workers' Statute (Law 8/80) stipulates that "regulatory precepts, clauses in collective agreements, individual agreements and unilateral decisions taken by employers which contain unfavourable discrimination on the basis of age or which contain favourable or adverse discrimination relating to employment, as well as to remuneration and other working conditions on the grounds of sex, origin, civil status, race, social situation, or religious ideas or practices shall be deemed null and void".

Conclusion

Since the principle of equality is one of the *higher values* of the Spanish legal systems, all provisions should, in principle, be in accordance with this principle.

Article 15²³

Is there a need for further effective and proportionate sanctions, penalties and remedies?

Do equivalent provisions already exist on the national level in other areas?

Some sanctions exist in relation to discrimination:

Law 8/88 on offences and sanctions in relation to the labour laws (BOE 15.4.88), mentioned above, contains several types of conduct which are contrary to the labour laws in relation to employment, social security, migration, emigration and work by aliens. It also makes provision for sanctions where a breach of social legislation is involved.

The Penal Code stipulates that certain types of conduct, in particular offences against workers' rights and rights relating to the exercise of fundamental rights and public freedoms, are criminally punishable.

At a more general level:

Article 1902 of the Civil Code points out that "*those who, by act or omission, cause harm to another, by misconduct or negligence are obliged to make good the damage caused*".

Article 100 of the Code of Criminal Procedure establishes that "criminal action arises from any offence or misdemeanour with the aim of punishing the guilty party, there may also be a civil action for the recovery of property, reparation for damages and compensation for injury caused by the offending action".

Law 29/1998, 13 July, on administrative jurisdiction stipulates in Articles 13 and 32 that the plaintiff may request that contentious acts or provisions be declared null and void, the adoption of measures relating to the full re-establishment of the status quo ante in regard to the plaintiff's legal situation, as well as compensation for damages and interest. If the petition is directed concerns an omission by the public authority, it may request that the authority is obliged to fulfil its obligations.

²³ Article 17 in the Employment Equality Directive

It should be noted that the chapter in the new law on aliens devoted to discrimination does not contain any sanctions, although it refers to Article 53.2 of the Constitution, stating that any victim of discrimination may make use of the “*recurso de amparo*” before the Constitutional Court.

Conclusion

Sanctions do exist but it is necessary to ensure that they really are “effective, proportionate and dissuasive”.

Article 16

What action (if any) has already been taken in order to comply with the Directives?

No action appears to have been taken in order to comply with the Directive.

Protocol N°12

- a) *Has your government signed Protocol N°12?*
- b) *Does your government intend to ratify Protocol N°12?*
- c) *What are the obstacles to the ratification of Protocol N°12 by your country? Are these obstacles political or legal? In the case of obstacles in national legislation, what are these?*

Spain has not yet signed Protocol N°12.

There is no legal obstacle to the signing and ratification of the Protocol, and as Spain has ratified a number of international instruments relating to equal treatment and non-discrimination, the obstacles seem to be political rather than legal.

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