

Executive Summary

Country Report Spain 2010 on measures to combat discrimination

By Lorenzo Cachón

1 Introduction

There have been great social and political changes in Spain in the last 35 years. Major transformations have taken place in the country's social structure, forming a much more diverse society in ethnic and religious terms. One of the greatest changes has been Spain's transformation into a country of immigration. Up to the mid-1980s, the only notable differentiated ethnic group in Spain was that formed by the 600,000 gypsies living in the country. In the late 1990s, immigration underwent a very sharp acceleration, and by December 2010, the number of foreigners with legal residence in Spain was 5,747,734, which represents 12% of the population. The largest groups are from Morocco, Romania, Ecuador and Colombia. The rapid rise in immigration poses new challenges to Spanish society, including increasing risks related to discriminatory practices. Some 80% of Spaniards say that they are Catholics (mostly non-practising), 2% say that they are members of other religions (chiefly Islam and Protestantism) and 16% say that they are non-believers or atheists.

In the political sphere, the Spanish Constitution of 1978, adopted with a wide social and political consensus, laid down the legal framework of a coexistence governed by democratic principles, making equal treatment and non-discrimination one of the basic pillars of a non-confessional state. Spanish legislation clearly provides for the general principle of equal treatment in keeping with the Constitution and international treaties. However, there are major problems in its application. Although few actions are brought before the courts, discriminatory practices occur relatively often, on various grounds. Such discrimination may be institutional, especially in the application of certain legal provisions; structural, due to situations in employment, education or housing to which certain groups are driven by the market; or the work of individuals. These discriminatory processes chiefly affect certain migrant groups and gypsies.

Directives 2000/43 and 2000/78 were jointly transposed in Law 62/2003 (30 December), on fiscal, administrative and social measures. This law, and therefore the transposition of both directives, came into force on 1 January 2004. They were transposed with no debate in society and no political or parliamentary debate. Since the general election of March 2004, social dialogue has been re-established in this field.

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

On 16 February 2007, the government approved the *Strategic Plan for Citizenship and Integration (of Immigrants) 2007-2010*. One of the key points of the plan is equal treatment and the combating of discrimination.

2 Main legislation

Equality is one of the higher values of the legal system established by the Spanish Constitution of 1978. Moreover, Article 10 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 relevant 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 the laws passed since then:

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

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

The transposition of Directives 2000/43 and 2000/78 is made in Chapter III of Title II of Law 62/2003 (30 December), which has three sections:

- The first section (Articles 27-28) contains a general transposition of the definitions of direct and indirect discrimination, harassment and instructions to discriminate.

- The second section (Articles 29-33) transposes various aspects of Directive 2000/43. The 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, the entitlement of legal entities to engage in proceedings and the reversal of the burden of proof.
- The third section (Articles 34-43) includes measures on equal treatment and non-discrimination at work on the basis of religion or belief, disability, age and sexual orientation. It transposes fully what is provided in relation to employment and training in Directive 2000/43 and Directive 2000/78. First, it specifies the possibility of adopting positive action measures for certain groups at work for the various reasons specified in both directives, and introduces the reversal of the burden of proof. Then it amends various labour laws so as to adapt them to the directives. Finally, it provides for the promotion of equality on various grounds in collective bargaining and the promotion of equality plans to address disability issues in companies.

Some recent laws are relevant in this field of equal treatment: Law 13/2005, which regulates marriage for homosexual couples on equal terms with heterosexual ones, and Law 14/2005, which regulates the terms on which workers take early retirement under collective agreements. In 2007, three new laws concerning non-discrimination were approved: Law 49/2007 on offences and sanctions in the field of equality for disabled people; Law 27/2007 on recognising sign language and speech aid systems; and Law 2/2007 on regulating the amendment of entries in official registers regarding people's sex.

In January 2011, the Spanish Government adopted the first version of the Comprehensive Bill on equal treatment and non-discrimination (*Anteproyecto de Ley integral para la igualdad de trato y la no discriminación*). This draft is now being subject to consultations with organisations with a legitimate interest. The bill will probably arrive in Parliament in May 2011 and will come into effect by the end of 2011.¹

¹ The bill covers all the grounds of the European directives and also adds disease, sexual identity and language. With regard to the fields covered, the bill states that "this Law shall apply in all areas of political, economic, cultural and social life", and in particular, it explicitly refers to all fields of Directive 2000/43 and 2000/78. The bill provides definitions of all the discrimination concepts in a consistent manner with the directives and includes a definition on multiple discrimination and discrimination by mistake. Rules regarding burden of proof are also provided in accordance with the directives. The bill establishes one general regime for infractions and sanctions.

The bill creates the "Authority for the equal treatment and nondiscrimination", which responds to the characteristics of the equality body provided for in the directives. It is an independent body and the law sets the legal basis for the effective performance of its duties. These include the ones marked by the directives but also others, such as mediation, investigation of cases of discrimination on its own initiative, intervention in litigation, training, etc. It will have jurisdiction on all grounds of discrimination.

3 Main principles and definitions

The Spanish Constitution states 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. (Article 14.)

Moreover, it enjoins the public authorities

to promote conditions that ensure that the freedom and equality of individuals and of the groups that they form are real and effective; to remove obstacles that impede or hamper the fulfilment of such freedom and equality; and to facilitate the participation of all citizens in political, economic, cultural and social life. (Article 9.)

These articles show that the principle of equal treatment has been one of the fundamental values informing the whole Spanish legal system since the adoption of the Constitution in 1978. The Spanish Constitutional Court (SCC) 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. (SCC 128/87.)

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

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

The Criminal Code specifies racial or ethnic motives as aggravating circumstances in various offences and misdemeanours. Organic Law 7/1980 on religious freedom proclaims the principle of non-discrimination, establishing that

religious beliefs shall not constitute a reason for inequality or discrimination before the law. Religious reasons may not be a ground for preventing anyone from performing any work, activity, responsibility or public office.

Law 62/2003 contains a rather minimal – and sometimes not exactly literal – transposition of Directives 2000/43 and 2000/78, covering all grounds of discrimination.

The definitions of both direct and indirect discrimination are included, although in the definition of direct discrimination there is no reference to the situation where a person “has been or would be treated” less favourably, but only to “present situations of unfavourable treatment”. Harassment, instructions to discriminate and victimisation are defined and prohibited. However, in the case of the definition of harassment, the terms “hostile” and “degrading” are not mentioned. In the case of victimisation, the law introduces a modification in the Workers’ Statute, annulling employers’ decisions

which constitute adverse treatment of employees as a reaction to a complaint within the company or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination.

There is no explicit mention in Spanish legislation of discrimination based on assumed characteristics, nor of discrimination based on association with persons with particular characteristics. However, discrimination by association may be regarded as implicitly covered by laws.

The exceptions to the principle of equal treatment provided for in Spanish legislation are along the lines of those in Article 4 of Directives 2000/43 and 2000/78. As for churches and organisations with a specific ethos, the organic law on religious freedom states the right of registered churches and religious communities to

lay down their own organisational rules and internal and staff regulations, which may include clauses on the safeguarding of their religious identity and personality, as well as due respect for their beliefs, without prejudice to the rights and freedoms recognised by the Constitution and in particular those of freedom, equality and non-discrimination.

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

There are no national specific rules about multiple discrimination, but the Comprehensive Bill on equal treatment and non-discrimination (see point 2) plans for the adoption of such rules.

4 Material scope

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

In some fields, especially employment, such as access to employment including selection criteria, recruitment conditions and promotion, vocational guidance and vocational training, working conditions and membership of and involvement in workers' or employers' organisations, discrimination is expressly prohibited by current law, in both the public and private sectors.

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

5 Enforcing the law

The Constitution provides that all fundamental rights are protected by the ordinary courts of law. Moreover, appeals for protection in respect of such rights may be lodged at the Constitutional Court (CC) once ordinary proceedings have been exhausted.

The organic law on the protection of fundamental rights contains a short procedure for civil and criminal jurisdiction and also for administrative proceedings. 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 if the issue concerns acts by the public administration, as well as to the Labour Inspectorate and the Education Inspectorate.

The Constitution entitles any physical or legal person invoking a legitimate interest to be party to proceedings relating to the violation of fundamental rights and freedoms. Claims in respect of discrimination are normally supported by various organisations, such as non-governmental organisations (NGOs) working with gypsies or immigrants, NGOs active in combating racism, or the trade unions. These organisations are entitled to be party to legal proceedings.

Law 62/2003 provides that authorised legal entities for the defence of legitimate collective rights and interests may engage in any judicial procedure on behalf of the complainant, with his or her approval, with a view to making effective the principle of equal treatment based on racial or ethnic origin.

The Labour Procedure Act, in its regulation of capacity and procedural legitimisation, mentions workers or their legitimate representatives if the former are incompetent or if the plaintiff is a legal entity. Furthermore, this law provides that trade unions may appear in court for and on behalf of their members who authorise them to do so, in order to defend their individual rights.

The Criminal Code includes racist motives as an aggravating circumstance in any offence and penalises, among other acts, incitement to discriminate, dissemination of abusive material, discrimination in public services and professional or corporate discrimination, along with associations promoting discrimination. Racial discrimination is also penalised in the context of offences against employees. The corresponding sanctions may be prison sentences in the most serious cases. However, it is highly unusual for such sanctions to be applied as punishment for discrimination and so they cannot be said to be effective.

Law 62/2003 introduces the shift of the burden of proof for civil, administrative and labour proceedings, although it was provided for discrimination based on gender.

As for sanctions, the Offences and Sanctions in the Social Sphere Act was 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, civil status, social condition, religion or belief, political ideas, sexual orientation, membership or non-membership of a trade union, adherence to trade union agreements, family ties with other employees or language within the Spanish State, as well as decisions of the employer entailing unfavourable treatment of workers as a reaction to a complaint within the company or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination, are very serious offences. The sanction for such offences is a fine ranging from 3,005 EUR to 90,152 EUR depending on the seriousness of the offence. Additionally, these sanctions, once they are no longer subject to appeal, will be made public.

Law 49/2007 on offences and sanctions in the field of equality for disabled people establishes a system of sanctions in the field of discrimination on the ground of disability.

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

Situation testing is not expressly provided for in Spanish law, but nor is it forbidden. It might therefore be used as a form of evidence in discrimination cases. To date, no judgments have made use of situation testing.

Statistical evidence is permitted by law in order to establish discrimination, but has never been used in practice.

6 Equality bodies

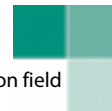
Law 62/2003 establishes a Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. Royal Decree 1262/2007 (modified by Royal Decree 1044/2009) regulates the composition, competences and regulations for the council. The council has the following characteristics: it is attached to the Ministry of Equality; it is a collegiate Spanish governmental body; and 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 the law, but does in Royal Decree 1262/2007. Its make-up is of a fundamentally governmental nature, as the law states that the council is to be formed by all the ministries with responsibilities in the areas referred to by Article 3.1 of Directive 2000/42, with the participation of the autonomous regions, the local authorities, the employers’ organisations and trade unions, and other organisations representing interests related to the racial or ethnic origin of persons. This council was set up on 28 October 2009 and became operational on that date.

The council consists of a chair and 28 members, 14 of whom are members of public administration and 14 of whom are social partners and stakeholders. They are distributed as follows: a) seven members representing central government, all with the rank of director general; b) seven members from other tiers of government; c) four members from the social partners; and d) 10 members representing organisations and associations whose activities are linked to the promotion of equal treatment and non-discrimination on grounds of racial or ethnic origin.

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. Its functions, as formally defined by this Royal Decree in 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. It provides that the council may: a) advise and report on indirect anti-discrimination practices in its various spheres of action; b) promote informative, awareness and training actions to promote equal treatment and non-discrimination; c) establish information exchange and cooperation relationships with similar bodies; and c) establish cooperation and partnership mechanisms with other bodies, entities and high institutions working to defend fundamental rights.

Title III of the Comprehensive Bill on equal treatment and non-discrimination (see point 2) will create the "Authority for the equal treatment and non-discrimination" that will correspond to the characteristics of the equality body provided for in the directives.

In addition, the National Disability Council on Equal Opportunities, Non-discrimination and Universal Accessibility for Disabled People was reformed under Law 51/2003 and regulated by Royal Decree 1865/2004. This council is an inter-ministerial collegiate advisory body that institutionalises the collaboration of associations of disabled people and their families with national government. The council started its work in 2005.

Royal Decree 891/2005 (27 July) set up the National Roma Council as a collegiate participatory and advisory body on general and specific public policy affecting the integral development of the Roma population in Spain.

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 the integration of immigrants. It consists of 10 representatives of public administration, 10 representatives of immigrants' associations, and 10 representatives of social support organisations, including trade unions and employers' organisations with an interest and involvement in the field of immigration.