

WORKING PAPERS

FOR DIVERSITY, AGAINST DISCRIMINATION

EQUAL TREATMENT IN SPAIN: FACTS, GUARANTEES, PROSPECTS

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(coordinators)

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Undesirable

The guard won't let me in.
I'm over the age limit.
I come from a country that no longer exists.
My papers aren't in order.
I'm missing a stamp.
I need another signature.
I don't speak the language.
I don't have a bank account.
I failed the entrance test.
They did away with my job in the big factory.
I was made redundant today and for ever.
I have absolutely no connections.
I have been in this world a long time.
And now our masters say it is time for me
to shut up and sink into the garbage.

José Emilio Pacheco
2009 Cervantes Award Winner

Executive summary

1. Discrimination, a social problem so deep-rooted yet barely perceived by the majority

Over the course of this and its previous term in office, Spain's socialist Government has made the aim of equal treatment and opportunities for all citizens one of the core issues on its agenda. Progress in the field of gender inequality is indisputable, in the form for example of the Effective Equality Act and the Gender Violence Act. The recognition of the right of homosexual people to marry constitutes a landmark of international significance. Transsexuals have seen their right to dignity as citizens recognised in the Gender Identity Act. With regard to the Romani community, the Romani Council (*Consejo del Pueblo Gitano*) and the Institute of Romani Culture (*Instituto de Cultura Gitana*) have been set up. The very creation of a specific Ministry of Equality in itself represents further proof of significant progress in this field. One of the aims of the Spanish Presidency of the European Union during the first half of 2010 is precisely equality. Many further examples could be given. It would seem to be no overstatement to claim that, after six years of political action, at least in some aspects of the fight against discrimination, Spain is now at the forefront in Europe.

Nonetheless, the growing diversity of Spanish society demands that the public authorities act with renewed vigour. That progress has been made does not mean that no further progress is needed. We will only succeed in the future if we underpin diversity and, to achieve this goal, all public authorities must commit to driving forward equality policies. The aim of this paper is to sketch out a number of perspectives which will help shed light in identifying the direction which anti-discrimination policy should be taking in the immediate future.

Despite the importance of the task, though, it is apparently absent from the political debate. Why? The data from the European Commission's Eurobarometer on Discrimination in the European Union in November 2009 (EC, 2009.A) illustrate that the phenomenon of discrimination is still a fairly unknown one for the majority. It is a relatively invisible phenomenon in terms of public opinion. People are not aware that discrimination takes place, and so there is little willingness to consider urgent measures to tackle such discrimination.

The phenomenon does, however, exist, and we run the risk that it will expand in the future unless we take appropriate measures in the present. This is illustrated by the most recent reports into the issue in Spain: the annual report *Raxen. Crisis Económica, Xenofobia y Neofascismo en España*, produced by the NGO *Movimiento contra la Intolerancia* (MCI, 2009); the ACODI Action Against Discrimination Report, published by Women's Link Worldwide (WLW, 2007); the 2009 report into discrimination against the Romani people from the *Fundación Secretariado Gitano*, entitled *Discriminación y Comunidad Gitana* (FSG, 2009); the study *Evolución del Racismo y la Xenofobia en España*, overseen by Cea D'Ancona and Valles Martín for the *Observatorio Español del Racismo y la Xenofobia* (Cea D'Ancona, 2009) and the "Jóvenes LGTB" research undertaken by Marta Garchitorena for the FELGTBE (State Federation of Lesbians, Gays, Transsexuals and Bisexuals), in partnership with the Ministry of Employment and Social Affairs.

A successful struggle against discrimination requires substantial funding, it is true (although perhaps not as much as people might think), but a failure in this struggle would prove more expensive in terms of social segregation and, almost inevitably, violence. The economic and social costs of unequal treatment are far greater than those of equal treatment policies. In some countries where there is a lack of support for diversity integration measures we have seen the creation of what we would refer to as parallel societies, the clearest example of which would be ghettos occupied only by those on a low income and/or ethnic minority groups. It has meanwhile been demonstrated that proper management of diversity provides social cohesion, helps towards balanced growth and even has beneficial outcomes for private enterprise.

It is furthermore a question of defining the society we aspire to for the future of our country; it is a matter, above all, of values. In this regard, the preservation of a tolerant and inclusive society is an issue which does not just affect minorities: it affects us all. We cannot, then, settle on what has been achieved; we must continue to make progress.

2. Underpinning diversity: strengthening weakened citizenship

We have over recent years undoubtedly seen substantial developments in social integration policies focusing on those groups particularly well protected by anti-discrimination legislation (ethnic minorities, national minorities, religious minorities, homosexuals), although much less progress has been made in policies to recognise the differences contributed by such groups.

This situation is expressed in an almost complete absence of most such groups from two significant public stages: public institutions and the media. This is a vitally significant circumstance. It is essential that we integrate diversity within public institutions and foster media attention on this reality in order to prevent equality policies from being confined purely to the periphery of the problem rather than its fabric.

And until knowledge of such differences is improved, through the positive recognition of diversity, negative stereotypes will continue to prosper, and in this regard we will be building our equality policies on sand. Deliberative democracy not only requires social pluralism as a condition for its existence, but must also espouse it as a value. Democracy does not simply accept but also propounds difference.

Spain will become increasingly diverse; homogeneity belongs the past. We have two options. The first, inaction, which could see diversity evolve into confrontation, difference into dispute. The second, to take advantage of our growing diversity in order to enrich our society, giving it additional facets, experiences and knowledge. In order to ensure that the sum of our differences enriches the communal whole, we must guarantee harmonious coexistence and respect for difference, which in other words means underpinning diversity.

Equality policies should therefore above all, without abandoning the traditional approach to improving the socio-economic conditions of the groups in question, adopt this new focus of extending rights of citizenship: they should become diversity management policies.

Active equality policies must play a key role in this regard. And this is the path taken by the Dependency Act, extending new rights of citizenship to dependent persons. Alongside new citizenship rights for people with disability (Sign Language Act). We must continue our efforts in this field.

But it is first of all essential that we shape a systematic, coherent anti-discrimination legislation in line with EU Law, a progressive legislation, guaranteeing effective application to our social reality. We are not talking about legalistic constructs of negligible impact, but rather laying the foundations of coexistence based on equality in order to take our country forward into the future. We are in truth talking of what is a prerequisite in order to extend full citizenship to millions of people. It is in this sphere that the proposals laid down in this working paper will be traced out.

3. The European model for the fight against discrimination and its (incomplete) incorporation within Spanish legislation

In almost all European States anti-discrimination legislation has been modified and extended over recent years in order to transpose the Equality Directives adopted in 2000, especially the racial equality and employment equality texts.

What features should we consider particularly indicative of discrimination?

European Anti-discrimination Law is being built on the protection of six features, two of these more intensely (gender and ethnicity/race), although the remainder are in the process of receiving equivalent treatment (religion/convictions, age, disability, sexual orientation/gender identity).

Where a feature is identified as being particularly indicative of discrimination, there is a specific mandate on public authorities to counter that form of discrimination, including a mandate on the courts and on the Constitutional Court to be particularly strict in dealing with measures or standards which employ such features in order to discriminate. Identification of an indicative feature in a regulation raises the level of alert: it substantially increases the protection against discrimination. This then makes it particularly important to identify which indicative features should be dealt with in EU and Spanish law.

The truth of the matter is, as acknowledged in the report on progress made in equal opportunities and non-discrimination in the EU published by the European Parliament's Employment and Social Affairs Committee on 17 April 2008 (EP, 2008), that the developmental map of Anti-discrimination Law in Europe reveals a spectrum of diverse legislation with no shared method of implementation or harmony regarding transposition of the Directives. At the Community level we should be achieving harmonious, integrated and coherent development in the fight against all

forms of discrimination, avoiding an undesirably hierarchical approach to protection based on different features or grounds for protection.

The lack in Europe of a uniform model for the fight against discrimination is also reflected in Spanish legislation which, on the positive side, has gradually taken on board the advances imposed by Europe (shaping Anti-discrimination Law in Spain too, mainly, although not exclusively, focusing on six aspects: gender, racial or ethnic origin, religion or beliefs, disability, age and sexual orientation), although the downside is that the approach adopted has been scattergun and uneven (as at the European level), and on occasion half-hearted (with some considerable gaps and omissions when compared with the European model).

In Spain, gender, disability and sexual orientation (and identity) equality policies have gradually achieved significant levels of development (albeit with their problems and obstacles), whereas the fight against discrimination based on ethnicity/race, religion/beliefs and age is still at the embryonic stage.

Given this situation, this working paper proposes that future legislation in Spain should mete out a comprehensive treatment in the legal struggle against discrimination to provide a global, reasonable and rationalising framework for all provisions (and there are indeed many) regarding Anti-discrimination Law, a framework which would serve to develop the inevitable differences in how each feature is dealt with. There must, though, be an underlying and uniform regulatory framework.

We meanwhile propose that Spanish legislation should feature a broad list of indicative features going beyond the six aspects employed in Europe, to add birth, national origin, wealth, genetic characteristics, language, physical appearance and sexual identity, and that the approach should be open, in other words it should be possible to include new features, perhaps with the addition of a final reference to any type of discrimination prohibited by law or by the international conventions to which Spain is part.

The option of a broad and open list is based on the extension of the list in Article 21 in the European Charter of Fundamental Rights, on current Spanish legislation, on the case-law of the Constitutional Court, but above all on a conviction that discrimination is a shifting phenomenon which must be pursued wherever it raises its head, whether this is against ethnic minorities, against women, but also against new dimensions, such as the homeless or the obese, as it is only through such a comprehensive vision that we will achieve the true aim of such laws, which is not to protect certain specific groups in a paternalistic manner, but to guarantee the coexistence of all.

What forms of conduct should be prohibited and promoted?

The fundamental right not to suffer discrimination on the base of gender, race, etc. would cover equal treatment and equal opportunities. Equal treatment deals with the banning of various forms of discrimination: direct, indirect, presumed, concealed and by association, multiple discrimination and the duty of reasonable accommodation. Equal opportunities covers the promotion of positive action.

Although EU law offers certain conceptual certainties regarding all these issues, there nonetheless remain some considerable grey areas. This working paper conceptually clarifies each of these concepts, inviting Spain's lawmakers to follow suit. And it is important to define clearly the concept in order precisely to establish the scope of the anti-discrimination mandate. This is not a mere terminological discussion, but involves establishing which forms of conduct should be prohibited and which should not, which situations should be protected and fostered by public authorities, and which not.

Should immigrants be included?

The new impetus behind anti-discrimination policy in Spain should be launching a powerful message against xenophobia, among other reasons because immigrants are more likely to find themselves frequent victims of attacks on their dignity as people. It is one thing to have an immigration policy which, quite legitimately, may be more or less restrictive, dealing as it does with the concept of sovereignty, state borders, limited resources, etc., and quite another to have a policy of fundamental rights, which is cosmopolitan in implication. Foreigners do not have the right to enter or to live or work in Spain except in accordance with the established legislation, but any foreigner living within Spanish national borders must be able to enjoy the right not to suffer discrimination for any of the reasons referred to above, in exactly the same way as a Spanish citizen. There should, then, be no reason whatsoever for any possible distinction in treatment between nationals and foreigners, but on the contrary rather, immigrants should be one of those minorities which the new legislation should particularly be focusing on in this regard.

What material scope should be covered by the principle of non-discrimination?

Employment is, without a doubt, a fundamental aspect of a citizen's life, but not the only one. EU law covers other fields where the principle of equal treatment should be guaranteed: healthcare, social benefits, education, access to publicly available goods and services, including housing. Spain's public authorities should at the least in their future legislation cover these material areas as indicated in EU Law.

Procedural guarantees for legal protection against discrimination?

The most enterprising and significant aspect of European law undoubtedly regards not so much recognition of the prohibition of discrimination, but rather the procedural guarantees to ensure this is complied with. This is particularly important in Spain, where the problem is found more in the execution of existing anti-discrimination legislation rather than legislative shortcomings. A broad spectrum of guarantees exists, and some of these have of course been incorporated within the Spanish framework, although others quite strikingly have not.

This working paper proposes that future legislation should establish specific judicial and administrative procedures regarding non-discrimination, extending the recognition of associations before the courts in bringing legal action in cases of discrimination, and including a broader and more specific catalogue of penalties serving as both compensation and prevention. Our proposal regarding such measures includes extending the current debarment from public sector procurement on those in breach of gender or disability equality regulations (Act 30/2007) to all other indicative features.

Institutional guarantees? - The need for an equality body

Article 13 of the Race Equality Directive requires that the Member States designate “bodies” to assist victims of racial or ethnic discrimination, to conduct research into the forms and prevalence of discrimination, and to publish reports and recommendations. The Gender Equality Directive (Article 8) and the 2008 Proposals for Directives (equal treatment on the basis of age, disability, sexual orientation, beliefs and convictions, Article 12; self-employed work and gender equality, Article 10) establish the same obligation with regard to the other features protected under European Law. The structure of this equality body within each state thus forms part of the mandatory European system for the fight against discrimination. The creation of such an institution is not a choice. It is set in stone.

Nonetheless, according to the Annual Report of the EU Agency for Fundamental Rights (FRA, 2009), Spain is, along with the Czech Republic and Poland, the only country not to have such a body up and running, as the Council for the Promotion of Equal Treatment and Non-Discrimination of Persons with Racial or Ethnic Origin cannot, in terms of its functions or its structure, be viewed as an appropriate transposition of the terms of the European legislation.

The creation of this body is not only an EU obligation, but is a glaring need if we wish successfully to implement anti-discrimination legislation. Without a specialised body, with broad functions, one can scarcely imagine how progress in anti-discrimination policy could make it off the drawing board and onto the street. It is in any case understandable that the timing of the creation of such a new body should of course always be aligned with the State's budgetary capabilities.

This working paper proposes the creation in Spain of a public body to safeguard diversity and combat discrimination, with sufficient budgetary resources and autonomy in order to guarantee the levels of independence required under European regulations, and that its functions should include assistance for victims, information and direct support in legal cases, while also adopting a proactive role including the issuing of recommendations, the design of good practice, supervision of positive action plans and the pursuit of independent research into discrimination.

4. The principle of non-discrimination at the Constitutional Court: case-law open to improvement in the field of ethnically motivated discrimination

The Constitutional Court has clearly built up a body of case-law regarding the principle of equality (Article 14 of the Spanish Constitution) comparable with that of any other Supreme Court in neighbouring countries. Clear progress has, meanwhile, been supported or vouchsafed in non-discrimination against women: Constitutional Court Judgement (STC) 128/1987 (*crèche bonus*), STC 12/2008 (*parity in electoral lists*), STC 59/2008 (*Gender Violence Act*); homosexuals, STC 41/2006 (*Alitalia case*); people with disability, STC 269/1994 (*quotas of disabled people in the civil service*).

It is, meanwhile, incontrovertible that the case-law regarding discrimination based on ethnic/racial identity leaves considerable room for improvement. It is particularly significant in this regard that, in the only two cases to have reached the Constitutional Court involving ethnic/racial discrimination, the *Williams* case (STC 13/2001) and the *Romany marriage* case, (STC 69/2007), both judgements were challenged by international human rights bodies, demonstrating the lack of sensitivity of the Constitutional Court in terms of dealing with respect for difference in equality based on ethnic or racial grounds.

According to certain court judgements, ethnically based discrimination in Spain gives no cause for alarm: the actions of the public authorities in this regard have

simply been rubber-stamped. However, when such cases have been brought before international bodies the decision has been quite the opposite. This circumstance casts great light on the state of affairs. And the Constitutional Court is not alone: there is a lack of effort in the fight against ethnically/racially motivated discrimination in Spain's criminal policy as a whole.

5. Solid criminal policy against discrimination

Equality of treatment must, of course, be expounded (persuasively, through information, education, awareness-raising, etc.), but must at the same time be imposed (using the applicable legal penalties), as equality will never be achieved through a natural and spontaneous process (which would instead generally benefit those already in a position of strength); it does not simply grow on trees, but requires sustained efforts over time on behalf of all socio-economically disadvantaged minorities. Equality is born out of daily efforts to civilise. Prevention is therefore required in equality policies, along, where necessary, with repression.

And in this regard it must straight away be pointed out that, despite the existence in Spain of substantial legal penalties against discrimination, there is nonetheless no solid or consistent criminal policy to fight against all forms of discrimination, meaning that regulations are not applied, or are insufficiently or inappropriately applied. The situation is, naturally, a diverse one in terms of the different features of discrimination. Criminal prosecution of gender discrimination, above all in the field of gender violence, is in general taken seriously. The same cannot, however, by any stretch of the imagination, be said of other aspects.

This working paper proposes a number of specific solutions to resolve this situation, ranging from reforms of the Criminal Code and the structure of the Public Prosecution Office to ensuring that the statistical systems in place at law enforcement agencies, public prosecutor's offices and law courts have specific labels for the classification and quantification of criminal offences which could involve one of the aspects of discrimination subject to special protection.

1

Discrimination, a social problem so deep-rooted yet barely perceived by the majority

Why are we today still talking of inequality and discrimination? Is this not in truth an issue which has largely been overcome, or is at least on the way to being resolved? Anyone asking either of those questions would undoubtedly outrage all those who dedicate or have dedicated their lives to combating all forms of discrimination. They are, however, relevant if we bear in mind the fact that, according to the European Commission's Eurobarometer on Discrimination in the European Union from November 2009 (EC, 2009.A) (analysing data for the year 2008), no fewer than 55% of the Spanish population feel that the country is making sufficient efforts in this regard (the European average is 49%). If, then, the problem is being adequately dealt with by means of the current resources, why make fresh proposals, why focus attention on deficiencies and shortcomings, why, in short, call for new focuses and impetus in addressing the issue?

Over the course of this and its previous term in office, Spain's socialist Government has made the aim of equal treatment and opportunities for all citizens one of the core issues on its agenda. Recalling, at times explicitly (as, for example, in the case of same-sex marriages) the noted theory of the Israeli philosopher Avishai Margalit, the policy of Rodríguez Zapatero as head of government has aimed at all times to strive for a decent society, in other words one in which institutions do not humiliate the individuals subject to their authority, and where citizens are not allowed to do so to one another. The republican ideal of liberty has been pursued, in the sense of non-domination as proposed by Philip Pettit (Pettit, 2009). Progress in the field of gender inequality is indisputable, in the form for example of the Effective Equality

Act and the Gender Violence Act. The recognition of the right of homosexual people to marry constitutes a landmark of international significance. Recognition of the identity of the gender of transsexuals. The law against racism and xenophobia in sport. With regard to the Romani community, the Romani Council and Institute of Romani Culture have been set up. The very creation of a specific Ministry of Equality in itself represents further proof of significant progress in this field. One of the aims of the Spanish Presidency of the European Union during the first half of 2010 is precisely that of equality. Many further examples could be given. It would seem to be no overstatement to claim that, after six years of political action, at least in some aspects the fight against discrimination Spain is now at the forefront in Europe.

There still, however, remains much to be done, as discrimination represents a stubborn social reality, hard to uproot and with a great capacity to mutate within an increasingly diverse society. The growing diversity of our society requires the ongoing political impetus of all public authorities to generate well-being, rather than conflict, coexistence rather than tension. The fact that we have made progress does not mean that we can now stand aside if our aim is to secure the future. The aim of this paper is to sketch out a number of ideas revealing the direction which anti-discrimination policy should be taking in the immediate future.

Despite the importance of the task, though, it is apparently absent from the political debate. Why? The truth is that, despite everything, discrimination is still not particularly well understood by the majority. The social *invisibility* of forms of discrimination was, for example, revealed by the conclusions of the aforementioned Eurobarometer (EC, 2009.A). It is worthwhile highlighting two main ideas in the study: on the one hand, most European citizens feel that there is less discrimination than five years ago in all fields, especially gender (65% compared to 24%), disability (60% compared with 29%) and sexual orientation (60% compared with 28%), although disagreement is greater regarding ethnicity (48% as against 41%), age (47% as against 42%) and religion/convictions (56% as against 32%). Meanwhile, “only” 16% of Europeans claim they have been discriminated against (on the basis of one of the six features protected under European Law: gender, ethnicity, religion/convictions, sexual orientation/identity, age and disability) over the past year (15% in Spain), although 26% state that they have witnessed the discrimination or harassment of others (31% in Spain) especially on the grounds of ethnicity (61% of Europeans feel this is the most widespread form). This disparity is connected with the fact that perceptions of discrimination increase in accordance with general factors such as youth, educational levels or living in an urban context, feeling oneself part of an ethnic minority (fewer than 15% feel that they are), having personally experienced discrimination or having social contact with members of minorities.

The difference between the 26% witnessing discrimination of others and 16% perceiving discrimination themselves illustrates that a significant proportion of acts of discrimination are not perceived as such by their victims. The concept of discrimination is (im)perfectly unfamiliar. This circumstance is consistent with other forms of “ignorance”: only 30% of Europeans (36% of Spaniards) claim to be familiar with the rights enjoyed by persons suffering some form discrimination, while 71.2% feel that diversity (ethnic, gender, etc.) is not sufficiently reflected in the media.

One natural concomitant of such invisibility is the particularly widespread concept among more conservative segments of society that equality policy is expensive, above all during a time of crisis, and that the only beneficiaries are the members of those minorities afforded special protection. These two commonplaces are as widespread as they are unfounded. A successful struggle against discrimination requires substantial funding, it is true (although perhaps not as much as people might think¹), but a failure in this struggle would prove more expensive in terms of social segregation and, almost inevitably, violence. One warning sign is provided by the levels of structural disintegration which may be observed in some other European countries, where a lack of measures to support integration, on the one hand, and of protection against discriminatory practices on the other, have led to the creation of what we could call “parallel societies”, often most visibly seen in the form of ghettos or marginalised neighbourhoods in major cities populated only by those on a low income and/or ethnic minority groups.

The result of continuous policy over the course of decades during which diversion integration has been improperly handled may be seen in social structures which prevent or impede the social participation of certain groups because of their race or ethnic background, as a result of a lack of economic and educational resources. It is not hard to observe the effects generated by the vicious circles which begin with the social exclusion of one generation, with the consequent problems of obstacles in accessing the educational system or labour market on the part of members of the following generation. Poverty and social expenditure represent a part of the costs involved in such negligence. The waste of human resources and lack of social cohesion another. However, the point at which such political and social failure is most visibly expressed is when such misguided policies result in juvenile delinquency or even full-scale violence, as occurred in the suburbs of Paris in the summer of 2008.

1 On 14 August 2008 the German Anti-discrimination Agency published the results of a study indicating that the costs of introducing anti-discrimination legislation in Germany had been overestimated. The figure suggested for the direct costs was 26 million Euros. The study concluded that one should not too readily assume that anti-discrimination legislation represents a heavy burden on the economy (see *European Anti-Discrimination Law Review*, 8, July 2009, p. 48).

The economic and social costs of unequal treatment are far greater than those of equal treatment and opportunity policies, which in fact also have a beneficial impact on the economy. The history of immigration in Spain is a good example of the benefits associated with the inclusion of previously excluded groups within the economy. Some four million immigrants arrived in Spain between 1996 and 2005. This increase in the population, and in particular the active population, was responsible for much of the economic growth experienced over that period. According to a study carried out by the *Oficina Económica del Presidente* (Economic Adviser in the Prime Minister Office), to analyse immigration and the Spanish economy over the period 1996-2006 (OEP, 2006), it is estimated that incoming migration between 1996 and 2005 made a substantial contribution to economic growth. During the period registering the most intense influx, between 2001 and 2005, immigrants contributed almost 40% to the GDP growth rate, which stood at 3.1% per year. This contribution to well-being can more directly be expressed in terms of per capita income. Over the period 1996-2005 as a whole, the net impact of immigration represented an increase in the per capita income of all Spanish citizens of 623 Euros per person. This is one example of the positive economic consequences which a more diverse society may offer.

Another positive economic effect is seen in the world of business. The concept of diversity management was devised by the private sector in the late 1990s and may be viewed as the other side of the coin of legislation to govern equal treatment. It is a wide-ranging concept covering not only gender equality policies but also, for example, measures intended to strike a balance between professional and family life, along with anti-discrimination measures in recruitment and awareness-raising regarding certain groups or minorities. Equal treatment policies inevitably do have direct costs, but these are offset by the considerable economic benefits, as demonstrated by the following specific examples of good practice in diversity management:

- a) **Measures to balance professional and family life**, above all in facilitating or encouraging a return to employment after maternity leave. Various studies demonstrate that it is more costly for a company to replace a person (in most cases a woman) than to seek flexible solutions allowing it to continue employing the worker. The higher the individual's level of education, the more expensive replacement proves. The spectrum of possible measures includes advice, flexible working hours and remote working, along with crèche services at the company itself.

According to a study by Germany's Federal Ministry for the Family, Old People, Women and the Young (BMFSFJ, 2003) the average cost of replacement (hiring

a different person rather than encouraging the same individual to return) is 9,500 Euros (low salary level), 23,200 Euros (intermediate salary level) or 43,200 Euros (high salary level). The model employed in calculating the difference in cost between the existence and absence of flexible measures suggested that by applying such measures a company could achieve a 55% saving.

The British government calculated the cost of replacing a female senior manager as £50,000 (DTI, 2003). The same report cited the example of the Nationwide Building Society, which introduced several of the aforementioned flexibility measures, and succeeded in raising the level of post-maternity returns to 91.5%. This represented an increase of 30% over the past 10 years, and a saving of £ 3 million. However, there are not only significant economic impacts at the company level but also benefits for the economy as a whole, by encouraging greater inclusion of women within the labour market, and thereby increasing the active population.

- b) Reduction in staff turnover.** This is another of the positive consequences most often cited by companies as an effect of good diversity management. TNT Austria, for example, applied an effective diversity management initiative which succeeded in reducing staff turnover from 25% in 2000 to 10% in 2003, with a similar reduction in absenteeism (EC, 2005) The Royal Mail in the United Kingdom estimates that it saved 7 million Euro by introducing measures to combat harassment of colleagues on the basis of their membership in a particular group.
- c) Needs for human resources and innovation at the company itself.** 40% of companies surveyed by the European Commission stated that the greatest economic benefit of diversity policies came from recruiting and maintaining high-quality staff drawn from a wide range of backgrounds (EC, 2005). The Spanish group VIPS, for example, bases its policy on the greater loyalty, meticulousness and sales focus of its foreign employees. A more diverse workforce and a greater awareness of the needs of different groups also involve innovative products and new markets. Deutsche Bank targeted a specific campaign at gays and lesbians, and witnessed at first hand the benefits of this in that segment's response to their strategy. The British company Tesco has seen an increase of 250% over the past two years in its sales of products for ethnic minorities, a phenomenon it associates directly with its programme to recruit from among this group.

In line with such examples, most companies surveyed on the European Business Test Panel (EC, 2005) confirmed the positive results of measures applied to their business (83%, as opposed to 17%). The examples given above explain why. Sound diversity management not only achieves an environment allowing individuals belonging to different groups to take part in society through the labour market, but can also have a substantial economic impact. It is a strategy which may be seen as part of Corporate Social Responsibility (CSR), contributing to increased sustainability of the production model, as it is economically more profitable and socially more dynamic. Companies can expand their access to qualified human resources by making themselves attractive to new groups. The demographic change which we are now clearly seeing will make this an increasingly significant aspect. More satisfied employees register greater motivation, efficiency and loyalty, and as a result are more productive and creative for their companies. They also provide access to new markets through new specialist products responding to the specific needs of groups previously not taken into consideration, or advertising campaigns focusing particularly on them. Lastly, good diversity management improves the company's reputation and can make it more attractive for former and new clients.

Meanwhile, the achievement of equal treatment and opportunities is an aim which must necessarily involve all of us as active players (majorities and also minorities: the latter must also do their own "homework", for example by combating internal discrimination within the group; only in this way can it be demonstrated that we are dealing not with paternalistic policies but genuine measures for equality). It meanwhile also benefits all of us, not only minorities but also majorities, whose social relationships will more just and equitable. The struggle for equality is connected with a new way of relating to and coexisting with one another in society, based on equality and liberty for all. It involves new forms of social contract. It is an issue which affects us all.

The figures presented nonetheless highlight the paradox of discrimination as a phenomenon which is deeply rooted, but at the same time unknown both by the social majority and by many of the individuals suffering its consequences, who are often unaware of their rights. An ignorance which, nonetheless, may (wrongly) be viewed as optimistic, since the majority perception tends to minimise the harsher edges of the problem. This type of optimism may even perhaps be greater in Spain, where the question as to whether the current economic and financial crisis could lead policies to promote equality to be seen as less important, and that they may therefore receive less funding, is answered in the negative by 55% of those surveyed (the European average is a mere 34%, compared with 49% who suspect that this is

the case). If the fight against discrimination is already properly being handled, what is the need for reform?

Nonetheless, reports drawn up by Third Sector bodies working in the field of equal treatment depict a landscape still very much requiring work. The 2009 Raxen Report (MCI, 2009), for example, highlights the growth in xenophobia in Spain. It features many other figures, but the most disturbing are those for fatalities caused by crimes of hate and the numerous incidents of racism and intolerance in different towns and cities, as comprehensively detailed in its pages. We should also consider the disturbing data from the survey “*Actitudes ante la Inmigración y Cambio de Valores*”, conducted by the *Centro de Estudios sobre Migraciones y Racismo* (CEMR, 2008) in 2008, which asked school pupils aged between 14 and 18 about their attitudes towards immigration and changing values. According to the figures, 37% would prefer a “white Spain of Western culture”, while 20% would support “a Spanish Le Pen who would throw out the Moroccans and blacks” (the figure in 1997 was “only” 10.7%). The report also calls to mind the study into young people and immigration, “*Jóvenes e Inmigración*”, published by the *Instituto de la Juventud* (INJUVE, 2008), which revealed that 14% of young people would be prepared to vote for a racist party (in 2002 the figure was 11%). According to a nationwide study into co-existence at school during compulsory secondary education, the *Observatorio Estatal de Convivencia Escolar*, covering secondary school pupils from across Spain (except Catalonia) (OEC, 2008), almost one half (46%) of Spanish teenagers would be fairly or wholly unwilling to work with a Latin American. And more than half would turn their back on a Jewish classmate. The same study also rang a warning bell about the growing harassment of obese young people. Almost all students surveyed in drawing up the report into homophobia in the Spanish educational system published by the *Comisión de Educación del Colectivo de Lesbianas, Gays, Transexuales y Bisexuales de Madrid* (COGAM, 2006) suggested that high schools were a dangerous place for gays and lesbians as a result of harassment.

The ACODI Action against Discrimination Report published by *Women’s Link Worldwide* (WLW, 2007) for its part describes 612 cases of discrimination in Spain. The most critical scenarios identified are: discrimination by civil servants (above all in access by immigrants to health services), discrimination in access to public spaces, combined gender and ethnic violence in public spaces by police officers and security guards hired by state bodies, racial violence by police officers and security guards; racial violence at borders (above all in Spain’s enclaves of Ceuta and Melilla on the African mainland). The report also analyses the problems experienced in gaining access to justice on the part of those who have suffered discrimination (in particular on ethnic grounds).

Another report of relevance is *Discriminación y Comunidad Gitana*, published each year by the *Fundación Secretariado Gitano* (FSG, 2009) based on the cases of discrimination which it directly compiles in its core activity as a mediator in the workplace for the Romani community. The 2009 report, covering events from 2008, while acknowledging a degree of progress confirms an increase in discrimination at work against Romani people (partly as a result of the economic downturn); the existence of multiple discrimination suffered by Romani women (above all in accessing goods and services); the worrying situation in the field of education (with Romani students being segregated at some institutions, and even in one case in Madrid autonomous region an attempt at a forced “swap” of a school with a Romani majority and another with a non-Romani majority and worse facilities); the media remains the most active agent of discrimination; public authority tolerance towards discrimination; the absence of effective means of reparation and the “extended” effect of discrimination (the Foundation itself being the victim of racist aggression during the past year).

Discrimination on the basis of HIV in Spain is documented in the FIPSE study (2005). This research analyses the existence of arbitrary discrimination through legislation, protocols and the internal regulations of institutions and in everyday life in ten areas: health care, employment, legal proceedings, public authorities, social well-being, housing, education, family and reproductive life, insurance and other financial services and access to other services or public establishments. The result indicates that although there is no discrimination in legislation in Spain, the phenomenon does exist in certain spheres when one analyses regulations and internal protocols, and is apparently broadly documented in the field of everyday practice, with negative practices being uncovered in every one of the areas listed. In this same regard, the survey into sexual habits undertaken by the *Instituto Nacional de Estadística* in 2004 reveals the fact that one in three Spaniards state they would not study or work with a person infected with HIV. Another study into sexual conduct and HIV risk among the Spanish adult population found that 18.3% of Spaniards would not leave their children in the company or care of an HIV positive individual, while 27.7% had doubts (Paéz *et al.*, 2003).

A more recent study undertaken by the *Sociedad Española Interdisciplinaria del SIDA* (2009) confirmed, across a representative sample of the Spanish population, the figure that one in three Spaniards would discriminate against a person with HIV in different aspects of daily life (school, work, shopping). The study throws up disturbing figures about the desire of the populace to segregate people with HIV. 20% of the population, for example, feel that people with HIV should in certain places be kept separate to protect public health, while 18% of the population believe that the

names of people with HIV should be made public in order to allow those who so wish to avoid them.

The study also illustrates the degree to which the population places the blame on those with HIV. 19.3% of the population, for example, believe that those infected with HIV or suffering from AIDS are responsible for their illness.

These beliefs and attitudes are reflected in the willingness of the sample population to associate with people with HIV. 18.8% of those surveyed thus stated they would have nothing to do with a person with HIV or AIDS. Meanwhile, of all the forms of relationship which might exist, 42.2% stated that they would maintain a friendship with a person infected with or suffering from the illness, while only 6.5% would consider a stable emotional relationship, the percentage dropping to 4.8% in the case of a casual relationship. Only 6.9% stated that they would work with a person with HIV.

The report *“Evolución del Racismo y la Xenofobia en España”* published in 2009 by the *Observatorio Español del Racismo y la Xenofobia* (Cea D’Ancona, 2009) presents similarly worrying figures. Spanish society is offering a unique example, at the height of an economic crisis, of sensitivity in the treatment of the immigrants who have over recent years arrived in Spain en masse. No significant conflicts have been seen in this regard, unlike the situation elsewhere in Europe. We must, however, once again reiterate that we need to remain on the alert and act before it is too late. The issue raised by the refusal of Vic City Council to place illegal immigrants on the municipal population register sets the alarm bells ringing, among other aspects because it received worrying social and even political support. The aforementioned report similarly uncovers a disturbing increase in the willingness of the Spanish population to accept immigrants. There is a growing perception that there are too many immigrants, that those who do not have their papers in order should be returned to their countries of origin, that they are taking the jobs of Spanish citizens, that they are better protected by the public authorities than Spaniards themselves, that they eat up public resources and are responsible for a worsening in basic social services such as health and education. The report reveals an increased unwillingness to accept immigrants as neighbours, seeing their role simply as a back-up labour force provided that they do not cause a nuisance for Spaniards.

The study *“Jóvenes LGTB”*, undertaken by sociologist Marta Garchitorea for the FELGTB, with a grant from the Ministry of Employment and Social Affairs (2009), presents a worrying picture of discrimination against young people belonging to sexual minorities in both the education and health systems, among their social

groups and even their own families (an aspect which gives discrimination based on sexual orientation or gender identity a particularly distinct status and specific characteristics). 49.1% of the young people surveyed stated that they had suffered psychological and/or physical violence at their educational institution; 59.7% in public spaces; 32.6% among their social group; and lastly as many as 21.2% within their family.

We should not, however, overdramatize. The general conduct of the Spanish population is tolerant and free of prejudice. What these reports do, however, indicate is that we cannot overlook the fact that xenophobia, racism and discriminatory attitudes remain a serious threat. If we wish to secure the future, we must react before it is too late.

2

Underpinning diversity: strengthening weakened citizenship

The battle for equality has two major facets. On the one hand equal treatment, in other words the prohibition of any form of direct or indirect discrimination. And on the other, equal opportunities, by which we mean a requirement that public authorities adopt measures to balance out the socially disadvantaged position of certain groups which are subject to deeply rooted prejudices. In this text we will refer essentially to equal treatment, as this is not even fully guaranteed in all circumstances, although it must be remembered that equal treatment and equal opportunities are two sides of the same coin, two aspects which must be a guaranteed in parallel.

Shortcomings in equal treatment and opportunities in Spain are revealed, as both cause and consequence, in the almost total absence of most of the groups subject to special protection under Anti-discrimination Law (ethnic minorities, religious minorities, people with disability, homosexuals, bisexuals, etc.) from major public arenas: political institutions and the media. There are, meanwhile, other groups who are gradually finding their place, such as women, although they have not yet achieved full quality. This is a vitally significant circumstance. It is essential that we integrate diversity within public institutions and foster media attention on this reality in order to prevent equality policies from being confined purely to the periphery of the problem rather than its fabric. Because an incorrect approach to equality not only compromises the *Rechtsstaat*, in that it involves a public action (or omission) which fails adequately to secure the rights of individuals; not only undermines the clause of the Social State, to the extent that “real and effective” equality of individuals and groups subject to actual disadvantage is not guaranteed; but also weakens the principle of the Democratic State since women and certain social minorities find themselves excluded from the political process, by means of informal

but nonetheless substantial barriers. However one may wish to measure it, one of the criteria for the quality of democracy is that there must be no voiceless, isolated social groups, excluded from the political sphere. This turns them into non-persons, a non-participating caste, second-class citizens. The *metics* of the Greek city state, neither freemen nor slaves. The fact that minorities are not presented with a level playing field in the realms of public life and the media prevents the eradication of the negative stereotypes to which members of these groups are subject, prejudices which lie at the heart of social discrimination, which operates above all by means of pejorative generalisations, hence the particular injustice of this type of aggression against human dignity: individuals will be treated negatively in some of their social relationships because they are associated with prejudices linked to some indicative personal trait: ethnicity, gender, etc.

There can be no doubt that over recent years substantial progress has been made in policies for the social integration of the groups referred to, although we have advanced far less in policies to recognise the differences contributed by such groups. And until knowledge of such differences is improved, through the positive recognition of diversity, negative stereotypes will continue to prosper, and in this regard we will be building our equality policies on sand. Deliberative democracy not only requires social pluralism as a condition for its existence, but must also espouse it as a value. Democracy does not simply accept but also propounds difference². Hence the fact that the title of this report, which is otherwise not especially original, is “for diversity, against discrimination”. As examples do not simply pander to mental lethargy, let us consider two. The Romani community has been living on Spanish soil more than 500 years. Over all those years has there been no historical or cultural contribution to our shared history which might be included in school textbooks? Can we therefore be surprised if some Romani children feel themselves completely alien within a school which in no way attempts to reflect the positive contributions of their ethnic community? As for people with disability, a proper focusing of the fight against discrimination must be based on their right of full participation in politics (incidentally, how many disabled politicians are there?), social, working and cultural life, on the same terms as other citizens. Meaning that it is not people with disability who should be adapting, but rather society which must eliminate obstacles and barriers preventing them from fully exercising their rights.

2 One issue which must be considered, although it cannot be discussed here, is why a diversity of interests, ideologies and identities is in turn a problematic concept, and why it represents a challenge for democracy, a subject recently dealt with by Wolfgang Merkel (2009). The author in any event calls for “inclusion” as a response to the problem, although not “assimilationist” inclusion, but rather formulae involving hard-to-strike balances (since not even the expansion of social rights will itself do away with all diversities), which are different depending on the country and time, between diversity and socio-political cohesion.

The groups covered by Anti-discrimination Law are generally not dealt with by the media, or not in a proper and balanced manner (with a tendency to highlight the more negative, sensationalist or extreme aspects), nor are they sufficiently involved in political institutions or public office (in other words, the percentage of holders of public posts and positions is substantially lower than the percentage which such groups represent of the overall population). This leads directly to social invisibility, underpinning rather than undermining stereotypes. Equality policies should therefore, without abandoning the traditional approach to improving the socio-economic conditions of the groups in question, above all adopt this new focus of extending rights of citizenship.

Spain will become increasingly diverse, homogeneity belongs to the past. We have two options. The first, inaction, which could see diversity evolve into confrontation, difference into dispute. The second, to take advantage of our growing diversity in order to enrich our society, giving it additional facets, experiences and knowledge. In order to ensure that the sum of our differences enriches the communal whole, we must guarantee harmonious coexistence and respect for difference, which in other words means underpinning diversity. We must commit to diversity management policies. Active equality policies must play a key role in this regard. And this is the path taken by the Dependency Act, extending new rights of citizenship to dependent persons. Alongside new citizenship rights for people with disability (Sign Language Act). But it is first of all essential that we shape a systematic, coherent anti-discrimination legislation in line with EU law, progressive, and guaranteeing effective application to our social reality. We are not talking of legalistic constructs of negligible impact, but rather laying the foundations of coexistence based on equality in order to take our country forward into the future. In truth what we are talking of is the quest for a better society capable of securing its future. Of what is a prerequisite in order to extend full citizenship to millions of people. It is within this sphere that the proposals presented further on will be traced out.

3**The European model for the fight against discrimination and its (incomplete) incorporation within Spanish legislation****3.1 Main characteristics of the model**

In almost all European States anti-discrimination legislation has been modified and extended over recent years in order to transpose the Equality Directives adopted in 2000, above those on race equality (Directive 2000/43/EC of the Council, of 29 June 2000) and on equal treatment in employment and occupation (Directive 2000/78/EC, of the Council, of 27 November 2000). The European Union's Anti-discrimination Law includes a highly advanced corpus of regulations and practices in the field of equality and the prohibition of discrimination. The eighth recital of the Decision designating 2007 as European Year of Equal Opportunities for All states, for example, that "European legislation has significantly raised the level of guaranteed equality and protection against inequalities and discrimination across the European Union and acted as a catalyst for the development of a more coherent, rights-based approach to equality and non-discrimination". The Union has in fact established a fairly precise system for dealing with equal treatment, including benchmark definitions, guarantees in legal proceedings such as the reversal of the burden of proof, demands for dialogue with the third sector and social agents, and above all the obligation to appoint bodies to promote equality. This system has received ongoing confirmation since the year 2000, most recently so far with the Proposal for a Directive of the European Parliament and of the Council on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, of 3 October 2008.

3.2 Indicative features: European regulations and incorporation into Spanish law

European Anti-discrimination Law is being built on the protection of six features, two of these more intensely (gender and ethnicity/race), although the remainder are in the process of receiving equivalent treatment (religion/beliefs, age, disability, sexual orientation/gender identity). Where a feature is identified as being particularly indicative of discrimination, there is a specific mandate on public authorities to counter that form of discrimination, including a mandate on the courts and on the Constitutional Court to be particularly strict in dealing with measures or standards which employ such features in order to discriminate. Identification of an indicative feature in a regulation raises the level of alert: it substantially increases the protection against discrimination. This then makes it particularly important to identify which indicative features should be dealt with in EU and Spanish law.

Equality between men and women is part of European Union social policy and is an integral element of the Community acquis. The entry into force of the Treaty of Amsterdam on 1 May 1999 represented a milestone in the EU's equality policy. Up until that point the constitutional texts referred only to the principle of equal pay in one isolated provision, the former Article 119 of the Founding Treaty of 1957. Such a limited legal basis did not prevent the European Commission, from the early 1970s onwards, from promoting directives, programmes and funding initiatives, while also championing awareness-raising campaigns. Article 119 of the Treaty establishing the European Community served as such a useful "gateway" that it gradually led to the creation, through derivative law, of European gender equality policy. The most significant influence exerted by Community Law over national jurisdiction in this regard was Directive 76/207/EEC, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. This directive was modified on 23 September 2007 in order to adapt it to the evolution of legislation and the Treaty of Amsterdam, and also to include new provisions regarding major issues such as sexual harassment and its consideration as direct discrimination, while it was subsequently "codified" together with other provisions on equality between men and women in the form of Directive 2006/54. Outside the field of work and employment, mention should be made of Directive 2004/113/EC, of 13 December 2004, implementing the principle of equal treatment between men and women in the access to and supply of goods and services. In Spain, Organic Act 3/2007, of 22 March 2007, for the effective equality of men and women, is the law transposing into Spanish legislation the rules and principles derived from European law in this field.

As for racial discrimination, 29 June 2000 saw approval, on the basis of Article 13 of the EC Treaty³, along with the subsequent Article 21 of the Charter of Fundamental Rights of the European Union⁴, of Directive 2000/43/EC, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. This is an important Directive which, within the context of the “anti-discrimination package” approved by the Commission on 25 November 1999⁵, marks a turning point in the Community’s anti-racism policy. The purpose of Directive 2000/43 is to “lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment” (Article 1), its structure reproducing that of the other Directive forming part of the “anti-discrimination package” approved by the Commission on 25 November 1999, namely Directive 2000/78, of the Council, of 27 November 2000, establishing a general framework for equal treatment in employment and occupation. The most significant differences between the two Directives come down to three particulars: the latter Directive refers to discrimination on the basis of “religion or belief, disability, age or sexual orientation” (Article 1); its sphere of application refers only to employment (whereas the scope of Directive 43/2000 is considerably larger); and lastly, and inevitably, given that the different situation of each disadvantaged social group requires a slightly different legal response, Anti-discrimination Law regarding religion, belief, disability, age and sexual orientation is subject to a greater number of limitations than in the case of racial origin⁶. Indeed, the Proposal for a Directive of 2 July 2008, on religion and belief, disability, age or sexual orientation, is intended to raise the level of anti-discrimination protection in the Employment Equality Directive to the same levels as in the Racial Equality Directive.

3 Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

4 Charter of Nice, 7 December 2000: “Any discrimination based on any ground such as... race, colour, ethnic or social origin... shall be prohibited”.

5 Along with the Proposal for Directive 43/2000, the “package” comprised the Directive Proposal (later passed as 2000/78/EC) establishing a general framework for equal treatment in employment and occupation, and the proposal for the Decision subsequently issued as number 2000/750/EC, of the Council, establishing a Community action programme to combat discrimination (2001 to 2006).

6 Article 2.5 of the Directive provides that “this Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others”. A number of articles set out the specific aspects applicable to each indicative feature. For example, Article 3.4 allows states to exempt the Armed Forces from the terms of the Directive regarding discrimination on the basis of age and disability.

The truth of the matter is, however, as acknowledged in the report on progress made in equal opportunities and non-discrimination in the EU published by the European Parliament's Employment and Social Affairs Committee on 17 April 2008 (EP, 2008), that the developmental map of Anti-discrimination Law in Europe reveals a patchwork of diverse legislation with no shared method of implementation or harmony regarding transposition of the Directives, within a context of citizens who are insufficiently informed as to their rights. Meanwhile, Anti-discrimination Law has been subject to an uneven development depending on the various features protected, an aspect highly criticised by the aforementioned Report. We need to be achieving harmonious, integrated and coherent development in the fight against all forms of discrimination, avoiding an undesirably hierarchical approach to protection based on different features or grounds for protection. The lack in Europe of a uniform model for the fight against discrimination is also reflected in Spanish legislation which, on the positive side, has gradually taken on board the advances imposed by Europe (shaping Anti-discrimination Law in Spain too, mainly although not exclusively focusing on six aspects⁷: gender, racial or ethnic origin, religion or beliefs, disability, age and sexual orientation), although the downside is that the approach adopted has been scattergun and uneven (as at the European level), and on occasion half-hearted (with some considerable gaps and omissions when compared with the European model).

In Spain, gender, disability and sexual orientation (and identity) equality policies have gradually achieved significant levels of development (albeit with their problems and obstacles), whereas the fight against discrimination based on ethnicity/race, religion/beliefs and age is still at the embryonic stage. All these must be borne in mind, as future legislation would be required to deal on a comprehensive basis with the legal fight against discrimination which, although we are not beginning from scratch (this is not a form of the 'Big Bang' beginning), must in any case provide an overall, reasonable, rationalising framework for all provisions (and there are indeed many) involved in Anti-discrimination Law. Spain's legislators need to provide such a model, such a general framework, including all Spanish Anti-discrimination Law. The six features referred to in European Law must necessarily be included, although there can be no doubt that the forms of social discrimination are changing, and it would therefore be necessary to establish an open list in order to take account in the future new and particularly hateful grounds for discrimination. In this regard, the Spanish Constitutional Court held recently (Judgement 62/2008, of 26 May 2008)

⁷ The Spanish Fiscal, Administrative and Social Measures Act (Act 62/2003, of 30 December 2003) serves to transpose into Spanish legislation Directive 2000/43, with article 28 defining equal treatment and the various forms of discrimination related with "racial or ethnic origin, religion or convictions, disability, age or sexual orientation".

that illness could be considered a situation protected under Article 14 of the Spanish Constitution if it is taken into consideration as an element for the segregation or stigmatisation of the sufferer (although this was not found to apply in the specific case giving rise to the Judgement), meaning that illness should therefore also be included in the list. Meanwhile, in its Judgement 176/2008, of 22 December 2008, the Constitutional Court found that transsexuals were also protected by the prohibition on discrimination provided in Article 14 of the Spanish Constitution, although transsexuality as a category is not specifically referred to in that text. Article 14 of the Constitution does refer to other features which we have not made mention of, such as birth and opinions (similar to yet different from beliefs). National origin is also covered as a factor subject to the ban on discrimination, under Article 23 of Organic Act 4/2000, on the rights and liberties of foreigners in Spain and their social integration. Foreigners can, of course, be dealt with differently from nationals in terms of the system of entry, residency, employment and political enfranchisement, but in no other aspects. The Dutch list also includes civil status. Sweden and Germany list only the six features of European Law. The Belgian list additionally includes property, language, future state of health, physical or genetic characteristics and social origin (a long, albeit closed list). Bulgaria has likewise opted for a long list (including the human genome and political affiliation), but in its case the list is left open. Particular mention should be made of France, where the legislation covers any form of discrimination.

One significant provision is Article 14 of the European Convention on Human Rights, identifying the following features: sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Meanwhile Additional Protocol 12 to the Convention (opened up on 4 November 2000, on the 50th anniversary of the ECHR) provides that: "The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status". This (open) list involves certain changes in wording compared with Article 14. The report on progress made in equal opportunities and non-discrimination in the EU published by the European Parliament (EP, 2008) recommends (in paragraph H.1) that the States take into consideration in their respective anti-discrimination legislation all factors of discrimination under Article 21 of the Charter. Particular reference is made to the feature of physical appearance in terms of access to employment (paragraph H.4), an aspect not covered by the Equality Directives.

Clearly inspired by the list in the Rome Convention, another principle to be taken into consideration is likewise Article 21 of the European Charter of Fundamental

Rights, which outlaws “any discrimination”, in particular where based on: “sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation”. This list has clearly served to guide the legislation of various States and must be taken into consideration in future laws in Spain. The list contains the six features included in European derivative law, with the addition of “colour” as well as race, a perhaps unnecessary inclusion, along with social origin, membership of a national minority, language, property and birth. References to national minorities and language could be hugely problematic in practice. A reference to “national minorities” makes sense in an international text (one need only think of the Balkans) more than within a national context, where minorities are protected by means of the political process rather than through fundamental rights, which in the case of Spain would make little sense. As for language, this would be inevitable, in a country with several languages such as Spain, taking into consideration at all times the fact that protection against discrimination cannot outlaw positive action measures undertaken by political authorities to protect those minority languages which find themselves in a position of vulnerability. While the contents of the list are problematic, no less challenging are the omissions, for example references to sexual identity or chronic illnesses (such as AIDS), or physical appearance, for example, and so this list should be viewed as setting a lower rather than upper limit.

Spanish law should then allow for a broader and more open list, in other words one capable of including new features, perhaps with the addition of a final reference to any form of discrimination prohibited by law or by the international conventions to which Spain is part.

The option of a broad and open list is based on the considerable scope of the list in Article 21 of the European Charter of Fundamental Rights, on Article 14 of the European Convention on Human Rights, on current Spanish legislation, on the case-law of the Constitutional Court, but above all on a conviction that discrimination is a shifting phenomenon which must be pursued wherever it raises its head, whether this is against ethnic minorities, against women, but also against new dimensions, such as the homeless or the obese, as it is only through such a comprehensive vision that we will achieve the true aim of such laws, which is not to protect certain specific groups in a paternalistic manner, but to guarantee the coexistence of all.

One last key point is the particular position of gender in connection with the other indicative features. The notion of gender runs transversely through all other features, giving it a unique status. If one bears in mind that the discrimination suffered by women is the most basic or primary, and is then added to, in sequence, to other

forms of discrimination (meaning that if an immigrant suffers discrimination, then an immigrant woman will suffer even more; if a disabled person finds it difficult to secure employment, a disabled woman will have even less possibility of success, etc.), the inevitable conclusion would be that any equality policy must take into consideration the different position of women and men, both in its diagnosis and the measures to be introduced. This thus requires a gender reading of all policies to combat discrimination (not only in the case of gender-based discrimination itself).

3.3 Right to non-discrimination: equal treatment and equal opportunities

All European nations include in their legislation definitions of Anti-discrimination Law based on the contents of European Union Law. These definitions are in part reflected in Spanish law, for example in the first Act of Transposition (62/2003) and the Effective Equality between Men and Women Act.

However, in terms of equal treatment, it would be extremely positive to have a comprehensive Act presenting a renewed catalogue of all these definitions, and importantly adding certain more recent features and improving the technical approach to others. Although EU law offers certain conceptual certainties, there nonetheless remain some considerable grey areas. And it is important to define clearly the concept in order precisely to establish the scope of the anti-discrimination mandate. This is not a mere terminological discussion, but involves establishing which forms of conduct should be prohibited and which should not, which situations should be protected and fostered by public authorities, and which not.

In accordance with European provisions, the system of interpretation should be as follows: the fundamental right not to suffer discrimination on the base of gender, race, etc. would cover equal treatment and equal opportunities or a mandate or principle of positive action.

Equal treatment

The fact that the fundamental right not to suffer discrimination includes equal treatment and equal opportunities raises no conflict in legal theory, although the latest features of European Law have come about in this regard through the expansion of the concept of equal treatment. A complete and updated classification of this should at the least take into consideration the fact that equal treatment involves

a prohibition on direct and indirect discrimination, harassment and instructions to discriminate. Most States do cover all these four varieties on a similar (although not identical) basis, as set out in Community law. To these types of discrimination we should add new forms of expression, such as assumed, concealed and multiple discrimination and discrimination by association.

- Direct discrimination

Direct discrimination occurs when a person is treated less favourably than another in an analogous situation on the basis of gender, race, etc. This definition has already been included in Spanish law in Article 28.1.b of Act 62/2003, although this incorporation was incomplete (and hence incorrect) in terms of Article 2.2.a of Directive 43/2000, since the latter text refers not only to a situation where an individual is treated worse than another on the basis of protected features, but also where this has taken place in the past and/or could take place with regard to hypothetical terms of comparison. The most precise definition of direct discrimination is that of a situation where, in accordance with specifically protected features (gender, age, etc.) a person is, *has been or could be* treated less favourably than another in an analogous or comparable situation. This is the definition with Spanish law should adopt.

- Harassment

According to Article 2.3 of the Race Equality Directive, *harassment* must be judged as discrimination where undesirable conduct regarding ethnic/racial origin occurs with the aim or result of violating the dignity of a person, creating an intimidating, hostile, degrading, humiliating or offensive environment. Some legislations have specified the meaning of this concept, such as for example in Slovakia, defining it as a treatment which a person could reasonably perceive as harassment. This definition places the emphasis on the perception of the victim, although the court or other legislations could take into consideration some form of objective standard. One interesting aspect is that certain legislations, such as the German one, for example, prohibit not only harassment by superiors at a company, but also place a duty on employers to protect their employees against discrimination from their peers or third parties.

- Instructions to discriminate

Instructions to discriminate must also be viewed as discriminatory conduct. One example is provided by the sentence of the French Court of Cassation of 7 June 2005,

which ruled as prohibited discrimination an instruction given by the owner of a property to a real estate agent not to lease the property to people with “foreign” surnames.

- Indirect discrimination

According to Article 2.2.b of the Race Equality Directive, *indirect* discrimination occurs where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. This definition has indeed been appropriately incorporated within Spanish law, in Article 28.1.c of Act 62/2003. Indirect discrimination is also known as “impact” (as opposed to direct discrimination, which would involve “treatment”), because ultimately it involves a comparison of the differing impact which a legal difference in treatment (in principle neutral, in other words not based on specifically protected indicative features) has on members of the group being protected (ethnic minorities, women, etc), in comparison with the majority. Statistical data must be employed for this purpose in order to assess the inequality of impact.

- Duty of reasonable accommodation

One measure intended to prevent clear indirect discrimination is the *duty of reasonable accommodation* which, according to Article 5 of the Employment Equality Directive, comprises the adoption of appropriate measures allowing a person with disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. Identical treatment for people with and without disability (in other words a failure to respect this duty with regard to people with disability) would represent conduct impacting negatively on them. Spanish law should therefore include this obligation, having first prohibited indirect discrimination. As is clear, the greatest problem in this clause is its lack of definition, given that it is established under the provision that it should not represent a disproportionate burden on employers. Paragraph 21 of the recitals to the Employment Equality Directive sets out certain principles which it would in one way or another be desirable to include within Spanish legislation in order to place limits on the initial ambiguity of the clause, such as the financial cost of the duty, the financial resources of the company or organisation in question and the possibility of obtaining public funding or any other assistance for this purpose. The duty of reasonable accommodation is applied under European Union Law in connection with disability, but could also apply to beliefs/religions, as demonstrated by the valuable experience of Anglo-Saxon legal systems in this regard.

- Assumed, concealed or associative discrimination

To the aforementioned forms of discrimination we must add “assumed” or “mistaken” discrimination (based on a presumption about another person which is factually incorrect, for example discriminating against someone because one believes she is a lesbian, despite this not being the case), and “concealed” discrimination (hiding a true desire to discriminate, for example a refusal to lease a property to a Romani tenant, claiming that it has already been leased, although this is not in fact true), and “discrimination by association”, in other words discrimination which may be suffered by certain individuals because of their relationship with others having specific characteristics (for example, a woman could be denied employment because she is the mother of a disabled person, based on a belief that given the considerable care the child will require, she will regularly be absent from work). It should be remembered that the Judgement in the *Coleman* case, settled by the Court of Justice of the European Union on 17 July 2008, found that discrimination based on disability also protected those individuals who, although not disabled themselves, suffered direct discrimination or harassment in their work because of their ties to a disabled person⁸. Another recent example: the Industrial Tribunal of Caen, confirming the observations of France’s High Authority Against Discrimination, recognised for the first time in that country discrimination by association, in this case the discriminatory dismissal of a worker because of the trades union activities of his partner, imposing a penalty of fifteen thousand Euros in damages to be paid to the victims. Many States (among others, for the moment, Spain, but also Austria, Belgium, Cyprus, Denmark, Finland, Italy, Latvia, Malta, Poland and Slovenia) do not include such cases in their legislation, thus referring to future judicial interpretation. Some States do provide for assumed discrimination, ruling that the law refers to “actual or assumed” race (for example France). The Austrian law of 2005 extends protection to people caring for disabled persons. No legal system, however, for the moment covers all the categories referred to at the same time. Spain could then, in this regard, be the pioneer.

- Multiple discrimination

Another form of discrimination which may be direct or indirect, but which in any event constitutes a violation of equal treatment and which must therefore be included within Spanish law, is multiple discrimination.

⁸ In this case the Luxembourg Court held that occupational discrimination had applied in the case of the dismissal of a mother who was caring for her disabled son.

The concept of multiple discrimination is far from clear, but would seem to involve all situations where two or more factors or traits of discrimination interact simultaneously, leading to a specific form of discrimination. One example would be women belonging to ethnic minorities, doubly discriminated against on the basis of their gender and their ethnicity, in a specific, different and more serious way than would be suffered by the men of their same ethnic group.

In truth, in order for the concept of multiple discrimination to be functional as an objective of public policy and as a principle for legal interpretation, it requires a precise definition. To begin with, in this context, we must disregard multiple discrimination as a descriptor of situations where a person is discriminated against successively and not simultaneously in different social relationships on the basis of different indicative features (gender, ethnicity, disability, etc.). Having accepted that such discrimination involves several concurrent features at the same time, it would meanwhile not be of particular interest to include within its scope any manifestation of this type whatsoever, among other reasons because the list of possible combinations would be overlong (for example women from ethnic minorities, disabled women, homosexual, bisexual and transsexual women, elderly women, women of specific religious beliefs, disabled people from ethnic minorities, elderly disabled people, young homosexuals, etc.), especially if one takes into consideration not simply two features, but three or more. If everything is multiple discrimination, then in truth nothing is. Too broad a concept inevitably loses its intensity.

Although this issue has barely been studied (among other reasons because the concept is still more theoretical and political than regulatory and judicial), and there is therefore no great agreement in the legal literature as to the meaning and scope of multiple discrimination, the usefulness of the term would lie in its usage only in those cases where two or more indicative features combine to create specific discrimination not suffered either by members of the majority group or (and this is what truly defines the concept) those members of the “privileged” majority of the minority group. In other words, multiple discrimination should be employed only to identify those cases where there is an (invisible and worse treated) “minority within the minority”. It is no coincidence in this regard that the concept was coined in feminist Afro-American literature in the United States specifically, in connection with women from ethnic minorities, who would suffer the same discrimination as men of that minority, and also be discriminated against by them. This more specific approach to the concept of multiple discrimination would result in a shorter list of cases, beginning as stated with women from ethnic minorities (one could in Spain consider Romani women and immigrant women without resources). Another example could be homosexuals (both male and

female) from ethnic minorities. Or elderly women in certain circumstances. This is a novel proposal for debate.

Equal opportunities: positive action

All with reference to equal treatment. Greater conceptual problems arise in terms of equal opportunities, in other words a mandate on public authorities to promote positive action or different favourable legal treatment for citizens in a position of actual disadvantage. In this regard, as recently highlighted by the European Commission Report entitled *International perspectives: on positive action measures*, published in June 2009 (EC, 2009B) “in spite of the wealth of EC legislation supporting the use of positive action however, limited progress has been made in defining the parameters for positive action and its application.” We must ultimately view with some suspicion the inconsistent and reluctant definition of “positive action” provided by EC Law as an exception to equal treatment (based on a mistaken belief that equal treatment means “identical treatment”). Article 5 of the Race Equality Directive (and the equivalent Article 35 of Act 62/2003) states that, in order to guarantee true equality, the principle of equal treatment “shall not prevent” the States from adopting specific measures (referred to in the title of the article as “positive action”) in order to prevent or compensate for actual disadvantages suffered by minorities. Obviously, equality could not prevent positive action specifically intended to guarantee such equality. Quite the opposite. Equal treatment requires as its complement such equality of opportunity. Equal treatment and equal opportunities are two sides of the same coin, not a rule and its exception⁹. For this reason the concept of positive action should be legally identified with the adoption of specific measures on behalf of groups sharing an indicative feature, such as women, people with disability or ethnic minorities, with the aim of fighting against the material inequality suffered by that group within society, without this representing any exception whatsoever to the principle of equal treatment, but rather a reinforcement thereof.

There remains one last concept to be discussed, the most hotly debated, the fear of which has led to such a cautious definition of “positive action” (with the aim of

9 For the same reason there can be no rational basis for the provision set out in Article 7.2 of the Employment Equality Directive establishing that “with regard to disabled persons, the principle of equal treatment shall be without prejudice to the rights of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment”. How could such measures possibly not represent an exception to be equal treatment? Otherwise equal treatment would constitute an insurmountable barrier to equal opportunities... Equality would be hugely undermined, in the very name of equality!

preventing the door inadvertently being opened): we refer to quotas or rules of preference, traditionally referred to as “positive or reverse discrimination”.

In the first place, the definition of the concept as “positive” or “inverse” discrimination is incorrect. No discrimination can be positive, as “discrimination” directly equates to unconstitutional differentiation, for which reason if we define something as discrimination, however inverse or positive it may be, we are condemning it to the category of unconstitutionality, and that is not the case with all preference rules or quotas.

Nonetheless, a distinction should be made between this type of positive action and others, since although they are not all unconstitutional, it is nonetheless true that they require a specific judgement of constitutionality, as they involve meting out different and more favourable legal treatment to members of a factually disadvantaged group which (unlike in the case of other forms of positive action, which could be defined as moderated positive action) simultaneously leads to specific, different and worse legal treatment for one or various members of the majority group. According to the case-law of the Court of Justice in Luxembourg, some rules of preference or quotas are acceptable, while others are not. For example, a preference rule for women in promotion within public employment, provided that the level of positions to be filled is subject to female under-representation (less than 50%), provided it respects criteria of merit and ability and the rule of priority is not absolute or unconditional, but allows for the consideration in a male competitor of certain individual features tipping the balance in his favour, does comply with EC Law (the Marschall Judgement of 11 in November 1998). If the preference rule is absolute, it does not comply with EC Law (the Kalanke Judgement of 17 October 1995). We should consider the possibility of recognising in Spanish law rules of priority or quotas on behalf of members of legally protected groups (in fact such measures already exist in terms of access to public and private employment and entry to universities for people with disability¹⁰), provided that guarantees are respected, such as recognition by law, a transitory and exceptional basis and, above all, proportionality. We must nonetheless bear in mind at all times that these are extreme and exceptional measures, and the debate as to their introduction must therefore be much more detailed.

In this regard we should welcome the legal precedent established by Judgement 13/2009 of the Spanish Constitutional Court, of 19 January 2009. The Court examined

10 And not only in Spain, but in most countries: Austria, Belgium, Cyprus, the Czech Republic, France, Germany, Greece, Italy, Lithuania, Luxembourg, Malta, Poland, Portugal and Slovenia, for example.

three cases regarding the civil service. The challenged Basque regional law instructed the public authorities to monitor assessment of compliance with the mandate for balanced representation (understood as a gender percentage of 60%/40% either way) in the composition of all bodies of the public authorities (the Court did not view this as unconstitutional since it involves only a mandate, not a rule). It secondly provided that the members of the bodies responsible for public employment access, provision and promotion processes within the Autonomous Basque Region must also respect this balanced composition (the Judgement likewise held this to be constitutional, since the members of those bodies were required to fulfil standards of merit and ability, and because exceptions to the rule were allowed if its non-applicability could properly be justified). It likewise specified that juries for awards and the acquisition of cultural and/or artistic resources were also to be balanced (which, naturally, was likewise found to be constitutional).

The Court also in this same Judgement analysed certain disputed aspects of the electoral system for the Basque Parliament and devolved institutions, as the law which had been challenged provided that lists of candidates should include at least 50% of women (throughout the list as a whole and within each band of six names). On the basis of the precedent established by Judgement 12/2008, of 29 January 2008, on the balanced composition of electoral lists regarding men and women (which had held the requirement for “balanced composition” in terms of gender to be constitutional with regard to electoral lists, in other words neither gender should represent more than 60% of candidates), it held first of all that this provision did not violate the terms of basic state law, requiring the presence of 40% of men or women, while allowing for “regional increases”. Meanwhile, the Basque provision was reasonable because, read in conjunction with the State law, it guaranteed that at least 40% of candidates would be men. It is true that the law challenged provides that the minimum presence of men on electoral lists should be 40%, and that of women 50%, although the Court held that this difference was fully justified for two reasons: first because it was intended to correct a historic situation of discrimination against women in public life, and secondly the measure was appropriate as it did not represent an unnecessary sacrifice of fundamental rights: the difference in percentage was not excessive, nor did it call into question any rights of men or of political parties.

3.4 Scopes of personal and material application of anti-discrimination law

To Spaniards and foreigners

The Race Equality and Employment Equality Directives apply to all persons within the territory of the Union, irrespective of the country to which they belong. Protection against discrimination in Member States may not be made dependent on nationality, citizenship or residency. This is an important point. The new impetus behind anti-discrimination policy in Spain should be launching a powerful message against xenophobia, among other reasons because immigrants are more likely to find themselves frequent victims of attacks on their dignity. It is one thing to have an immigration policy which, quite legitimately, may be more or less restrictive, dealing as it does with the concept of sovereignty, state borders, limited resources, etc., and quite another to have a policy of fundamental rights, which is cosmopolitan in implication. Foreigners do not have the right to enter or to live or work in Spain except in accordance with the established legislation, but any foreigner living within Spanish national borders must be able to enjoy the right not to suffer discrimination for any of the reasons referred to above, in exactly the same way as a Spanish citizen. There should, then, be no reason whatsoever for any possible distinction in treatment between nationals and foreigners, but on the contrary rather, immigrants should be one of those minorities which the new legislation should particularly be focusing on in this regard.

By public authorities and private individuals

Meanwhile, discriminatory behaviour may of course be perpetrated by public authorities or other individuals. It should be pointed out that neither of the European Directives specifies precisely who might bear responsibility for discriminatory behaviour, an issue which is of importance in the field of employment, where discrimination could come from other colleagues or clients, and one would need to establish whether the business owner was or was not liable for such conduct. It is in general less common for business owners to be held liable for discriminatory actions taken by third parties, although on occasion an employer may have failed in its duty of care.

Material scope: beyond employment

Article 3.1 of the Employment Equality Directive sets out the list of areas where the principle of equal treatment must be guaranteed: (1) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions; (2) access to all types and to all levels of vocational guidance and/or vocational training; (3) employment and working conditions, including dismissals and pay; and (4) membership of and involvement in an organisation of workers, employers or professionals. Employment is, without a doubt, a fundamental aspect of a citizen's life, but not the only one.

The Race Equality Directive extends its scope of protection to social protection, including Social Security and health care; social benefits¹¹; education; and access to goods and services available to the public and the offering thereof, including housing. The proposal for a Directive on Religious Equality, Disability, etc. of July 2008 likewise, in Article 3.1, extends protection against discrimination to these features, with important exceptions in terms of discrimination based on age (for example in connection with the Armed Forces, the establishment of special conditions for access to employment and to vocational, professional and employment training, including conditions of dismissal and recommendation, for young people, older workers and those with people in their care, with the aim of promoting professional integration or guaranteeing the protection of such persons; the establishment of minimum conditions in terms of age, professional experience or time in employment for access to jobs or certain benefits tied thereto; or the establishment of a maximum age for recruitment, based on training requirements for the job in question or the need for a reasonable active period prior to retirement).

Article 4.2 of the Employment Equality Directive likewise allows States to maintain or establish provisions pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the

11 A far from precise concept. In the document explaining the Dutch General Equal Treatment Act, "social benefits" (at times understood as "social advantages") should be understood as the economic or cultural benefits which may be provided by both public and private bodies: bursaries reduced public transport fares, reduced museum and cinema entrance charges, etc. The Belgian Act (Article 4.16) states that social advantages should be understood under the terms of Article 7.2 of Regulation (EEC) No. 1612/68, of the Council, of 15 October 1968, on freedom of movement for workers within the Community.

organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground (in my judgement, for example, sexual orientation). Article 4.2 of the Directive allows this type of organisation, within the aforementioned framework, to require that the persons working for them act with good faith and with loyalty to the organisation's ethos.

Spain's public authorities should at the least in their future legislation cover these material areas as indicated in EC Law.

3.5 Procedural guarantees for legal protection against discrimination

The most enterprising and significant aspect of European law, and that which has thus far been handled most inadequately in Spain, undoubtedly regards not so much recognition of the prohibition of discrimination, but rather the procedural guarantees to ensure this is complied with. This is particularly important in Spain, where the problem is found more in the execution of existing anti-discrimination legislation rather than legislative shortcomings. A broad spectrum of guarantees exists, and some of these have of course been incorporated within the Spanish framework, although others quite strikingly have not.

3.5.1 Judicial and public authority procedures

Article 7.1 of the Racial Equality Directive, Article 9.1 of the Employment Quality Directive and Article 7.1 of the Proposal for a Directive provides that States shall ensure that judicial and/or administrative procedures, including where they deem it appropriate conciliation procedures, for the enforcement of obligations under this Directive are available to all persons who consider themselves wronged by failure to apply the principle of equal treatment to them, even after the relationship in which the discrimination is alleged to have occurred has ended.

In no European State are discrimination disputes settled solely by the courts of law. All States combine judicial procedures (and civil, criminal, industrial or public authority legislation) with out-of-court procedures. In Spain there are institutions guaranteeing application of the principle of equal treatment (the Works Inspectorate and, of course, the courts), although this is as a part of their general functions, not within the context of specific procedures to combat discrimination. It is probably as

a result of this that there has been scarcely any litigation in Spain in certain fields, such as discrimination based on race/ethnicity or sexual orientation, although this has occurred with regard to other features (gender or disability). To a great extent, as highlighted by the reports regularly issued by the specialist third sector, discrimination based on race/ethnicity (and other factors) is generally not subject to any form of penalty. The lack of cases brought before the courts on such grounds may lead victims to believe that their cases are unlikely to prosper, and also suggests to discriminators that their conduct will go unpunished.

3.5.2 Procedural legitimization of associations

Associations, organisations or legal entities with a legitimate interest may, on behalf of or in support of the plaintiff, and with his or her authorisation, instigate any judicial or official proceedings to require compliance with the obligations of the Directives. The States have considerable room for manoeuvre in this regard, of course, although it is more common for associations to “support” the plaintiff than to act in proceedings “in his or her name”. Article 31 of Act 62/2003 transposed this obligation into Spanish legislation (although only with reference to racial/ethnic motives), but does not apply to other cases.

The Organic Effective Equality Act also included entitlement and legitimization to act in social processes involving the defence of the right to equality between men and women on the part of legal entities with a legitimate interest (Article 12.2). Article 181 of the Labour Proceedings Act recognises such legislation on the part of trade unions acting for and on behalf of their member workers, provided that the latter give their authorisation. Only in cases of sexual or gender-based harassment the legitimate entitlement is restricted to the person suffering the harassment (Article 12.3 of the Organic Act on the Effective Equality of Men and Women), notwithstanding the possibility that a class action could be brought in cases of gender-based harassment.

It would be particularly positive for Spanish law in the future to perform a comprehensive review favouring this type of procedural legitimization.

3.5.3 Burden of proof

As a result of the difficulties inherent in obtaining proof in cases of discrimination, the Directives require that the States adopt the measures required in order to guarantee that it is the respondent party which is required to demonstrate that it has not infringed the principle of equal treatment if an individual believing

him or herself to have been harmed by the failure to apply this principle claims before a court circumstances leading to a presumption that direct or indirect discrimination may apply. The reversal of the burden of proof does not, of course, apply to criminal cases, because of application of the principle of the presumption of innocence under Article 24 of the Spanish Constitution. With regard to civil and public authority litigation procedures, this guarantee was introduced by means of Act 62/2003 (Articles 32 and 36); in the field of employment: Article 40. The reversal of the burden of proof specifically with regard to gender equality is covered by Article 13 of Organic Act 3/2007.

3.5.4 Protection against retaliatory measures

Member States must also guarantee that individuals who have filed claims or demands for compliance with the principle of equal treatment should not be subject to any adverse treatment or negative consequences because of this. Several States have not properly transposed this requirement, either because they protect victims only within the context of industrial tribunal cases (and not others), or because they protect only victims and not other individuals who may have been involved in the case and who could receive adverse treatment, such as for example witnesses. According to the European Commission against Racism and Intolerance (the ECRI) in its Recommendation Report 7 (ECRI, 2002), section 27, the law should provide protection against any retaliatory measures for persons claiming to be victims of racial offences or racial discrimination, persons reporting such acts or persons providing evidence. In Spain, the basic provision transposing the European regulation is to be found at the end of Article 17.1, of the Workers' Statute¹².

3.5.5 Sanctions

The Directives require that States establish a system of sanctions in cases of infringement of the obligations imposed by them, which must be “effective, proportionate and dissuasive”, and which may include the payment of compensation to the victim. The concept of “effective, proportionate and dissuasive” sanctions was first coined by the Court of Justice in connection with gender-based discrimination cases. Its meaning must be established in each specific case in the light of the individual circumstances applicable.

12 “No validity shall meanwhile attach to any orders to discriminate or decisions of the business owner representing prejudicial treatment of workers in response to a claim brought at the company or in the event of official or court action intended to require compliance with the principle of equal treatment and non-discrimination”.

There is in practice a very wide range of possible remedies depending on the type of legislation (civil, public authority, industrial tribunal or criminal), its punitive nature or otherwise, etc. Sanctions may be compensatory, punitive or preventive (for example establishing exemplary compensation against the discriminator), etc. Almost all are based on an individual approach intended more as compensation and prevention. Moral and personal damages are at times included. With the exception of Great Britain, however, the financial sanctions for discrimination are not generally particularly high. In addition to fines and compensation, some legislations impose penalties such as publication of the decision¹³, debarment from exercising a profession or activity requiring public authorisation, an order to reinstate workers arbitrarily dismissed or to review recruitment or promotion procedures at the company, or to provide senior managers with training in equality issues¹⁴, suspension of permits, etc. This is undoubtedly an area which it would be extremely beneficial for Spanish legislators to examine: the possibility of including a broad and more finely tuned list of sanctions (considering not only the past, compensating for the harm caused, but also the future, on a preventive basis).

In some states, such as Great Britain for example, the equality body is authorised to impose sanctions where it finds evidence of the existence of discrimination. In others, a decision issued by the body may later be employed before a court in order to demand compensation. It is noteworthy that some equality bodies, such as in the UK, may immediately order binding, preventive or interim remedies against any organisation, forcing it to cease its discriminatory activity. A similar mechanism, a 'preventive action to cease discrimination', also exists in Belgium.

Spanish law has seen positive developments in the field of guarantees regarding gender equality since Organic Act 3/2007 which could perhaps be transferred to all factors of discrimination in future comprehensive legislation. By way of example it should be remembered that Article 10 of the Effective Equality between Men and Women Act provides the nullification of legal business and acts leading to discrimination on the basis of gender, giving rise to liability by means of a system of compensation and penalties which must be actual, effective and proportional to the harm suffered, along, where applicable, to the provisions of an effective and dissuasive system of penalties to prevent discriminatory conduct from taking place.

13 According to paragraph 12 of Recommendation 7 of the ECRI, as stated in the Explanatory Memorandum, non-monetary forms of reparation, such as the publication of all or part of a court decision, may be important in rendering justice in cases of discrimination.

14 A measure also suggested by the Recommendation referred to in the previous note (section 12). According to the text, such forms of reparation are important in promoting long-term changes at an organisation. The equality body should be involved in drawing up and supervising such programmes.

The aim of this principle is to guarantee compensation for victims of discrimination in all legal fields, combining very different forms of remedy.

As for action to cease a situation of discrimination which may be claimed by a victim, there would perhaps be the need to impose a general requirement on the basis of Article 5.1 of the Civil Proceedings Act¹⁵, although it would be desirable for this to be recognised in future comprehensive equal treatment legislation in an express and general manner (given the provision for numerous although specific cases).

Article 72.1 of the Organic Act on the Effective Equality between Men and Women penalises gender-based discrimination in the field of the provision of goods and services, with compensation for the harm caused. This is an objective liability arising irrespective of the intent or degree of diligence of the perpetrator of the discrimination. Compensation for moral damages is specifically covered by Article 8.2 of Act 51/2003 in connection with discrimination against persons with disability.

Meanwhile, Act 30/2007, of 30 October 2007, on Public Sector Procurement, transposing Directive 2004/18/EC, allows for debarment from procurement procedures, both in the phase of contractor selection (Article 49) and in the execution of public contracts (Article 102), which may be imposed against any parties in breach of gender or disability equality legislation. A number of Spain's regional legal systems have also incorporated such measures (the Basque Country, the Balearic Islands, Andalusia, etc). It should likewise be remembered that ECRI Recommendation Report 7 (ECRI, 2002) suggests in paragraph 9 that authorities be required to guarantee that those parties to whom they award contracts, loans, grants or other benefits respect and promote a policy of non-discrimination. Legislation should in particular stipulate that authorities granting contracts, loans, subsidies or other provisions impose a condition that the beneficiary respect and promote a policy of non-discrimination. Meanwhile, the law should specify that a violation of this condition would lead to termination of the contract, subsidy or other provision. It is likewise recommended, in item 16, that all public funding be suspended from any organisation promoting racism, including political parties.

Article 4.5 of Organic Act 1/2002, the Right of Association Act, provides that public authorities may not offer any form of assistance to associations which in their admissions or operational procedures discriminate on the basis of birth, race, gender, religion, opinions or any other personal or social circumstance or condition.

15 "The courts may be called on to issue a judgement regarding certain provisions, the declaration of the existence of rights and legal situations, the constitution, modification or termination thereof, execution, adoption of interim remedies and any other form of protection expressly established in law".

We could in fact consider going further than this, directly prohibiting associations which arbitrarily discriminate on grounds such as gender, gender identity or sexual orientation.

In short, future legislation in Spain will need to structure a system of guarantees and overall, consistent liability based on the various manifestations of this, which have over time been recognised under the Spanish legal system.

3.6 Institutional guarantees: equality bodies¹⁶

Article 13 of the Race Equality Directive requires that the Member States designate “bodies” to assist victims of racial or ethnic discrimination, to conduct research into the forms and prevalence of discrimination, and to publish reports and recommendations. The Gender Equality Directive (Article 8) and the 2008 Proposals for Directives (equal treatment on the basis of age, disability, sexual orientation, beliefs and convictions, Article 12; self-employed work and gender equality, Article 10) established the same obligation with regard to the other features protected under European Law. The structure of this equality body within each State thus forms part of the mandatory European system for the fight against discrimination. This would be one of the main elements to be included in future Spanish legislation. The creation of such an institution is not a choice. It is set in stone. It would meanwhile seem fairly clear that the Council for the Promotion of Equal Treatment and Non-Discrimination of Persons through Racial or Ethnic Origin, established by means of Article 33 of Act 62/2003 does not represent a full transposition of the terms of the Directives: neither with regard to its composition, its functions or its reference purely to racial/ethnic discrimination and no other forms. It is not an executive but a deliberative body. It is wholly different from the entity intended. This Council will need to be repositioned in accordance with the new body to be created.

In fact, according to the Annual Report of the EU Agency for Fundamental Rights (FRA, 2009), Spain is, along with the Czech Republic and Poland, the only country not to have such a body up and running, as the Council for the Promotion of Equal

16 Beyond the more focused analysis of certain European states, this paper draws on the conclusions of Rikki Holtmaat’s Report for the Directorate-General for Employment, Social Affairs and Equal Opportunities of the European Commission, published in March 2006 and entitled *Catalyst for Change? Equality bodies according to Directive 2000/43/EC - existence, independence and effectiveness*. The Report analyses all European equality bodies up to the end of 2005, suggesting that it is not fully up to date, given that this is an area of considerable dynamism and change, although it does offer a broad brushstroke picture of the European situation. The references in this paragraph to the “Report” should be understood as referring to the Holtmaat Report.

Treatment and Non-Discrimination of Persons through Racial or Ethnic Origin cannot, in terms of its functions or its structure, be viewed as an appropriate transposition of the terms of the European legislation.

The creation of this body is not only an EU obligation, but is a glaring need if we wish successfully to implement anti-discrimination legislation. Without a specialised body, with broad functions, one can scarcely imagine how progress in anti-discrimination policy could make it off the drawing board and onto the street. It is in any case understandable that the timing of the creation of such a new body should of course always be aligned with the State's budgetary capabilities.

We should add to the provisions of the EU Directives on the equality body the terms of ECRI General Policy Recommendation Report 2, of 13 June 1997 (ECRI, 1997), entitled "Specialised bodies in the fight against racism, xenophobia and antisemitism and intolerance at the national level". This document essentially recommends:

- A) Specialised bodies should be given terms of reference set out in a constitutional or other legislative text.
- B) Its functions should be: to work towards the elimination of the various forms of discrimination and to promote equality of opportunity and good relations between persons belonging to all the different groups in society; to monitor the content and effect of legislation and executive acts with respect to their relevance to the aim of combating racism, xenophobia, antisemitism and intolerance and to make proposals for possible modifications to such legislation; to advise the legislative and executive authorities with a view to improving regulations and practice in the relevant fields; to provide aid and assistance to victims, including legal aid, in order to secure their rights before institutions and the courts; to have recourse to the courts or other judicial authorities as appropriate if and when necessary; to hear and consider complaints and petitions concerning specific cases and to seek settlements either through amicable conciliation or, through binding and enforceable decisions; to provide information and advice to relevant bodies and institutions; to issue advice on standards of anti-discriminatory practice in specific areas which might either have the force of law or be voluntary in their application; to promote and contribute to the training of certain key groups without prejudice to the primary training role of the professional organisations involved; to promote the awareness of the general public to issues of discrimination and to produce and publish pertinent information and documents; to support and encourage organisations with similar objectives to those of the specialised

body; and, to take account of and reflect as appropriate the concerns of such organisations.

- C) The composition of specialised bodies should reflect society at large and its diversity.
- D) Specialised bodies should function without interference from the State and with all the guarantees necessary for their independence including the freedom to appoint their own staff (requiring protection against arbitrary dismissal or failure to renew appointments), to manage their resources as they think fit and to express their views publicly. They must have sufficient funding, and the funding should be subject annually to the approval of parliament. Specialised bodies should independently provide reports of their actions on the basis of clear and where possible measurable objectives for debate in parliament. A recent report published by Equinet (Yesilkagi, 2008) reveals that the independence of equality bodies varies considerably from one country to another, that the greater their financial and staff independence the more effective they are, and that most States have adopted the view that the independence of such bodies refers more to their operations than their status.
- E) Specialised bodies should be easily accessible to those whose rights they are intended to protect. They should consider setting up local offices in order to increase their accessibility and to improve the effectiveness of their education and training functions.
- F) Specialised bodies should operate in such a way as to maximise the quality of their research and advice and thereby their credibility both with national authorities and the communities whose rights they seek to preserve and enhance.

The body for the promotion of equality laid down in European Union Law and the specialised body referred to by the ECRI are inspired by the same principle¹⁷. They are perfectly complementary provisions (with the difference that the former has binding authority while the latter simply provides guidelines). The type of body imposed/recommended by Europe would seem fairly clear. The entity to be established in Spain should follow this pattern.

17 To this we should add the “Paris Principles” of the United Nations Human Rights Commission, passed by the General Assembly in December 1993, recommending that States establish independent human rights committees to perform the task of implementing and supervising universal human rights in each country.

Almost all States have now set up such a body, although they are a highly diverse group. The report by R. Holtmaat (Holtmaat, 2006) reveals that some focus only on Anti-discrimination Law, while others address human rights in general; that in some countries there is one single body, while in others there is more than one; that some (only a few, namely four, including Spain) deal only with racial/ethnic discrimination; that the financial resources available to them vary considerably, and in some cases they do not enjoy budgetary independence; that the number of employees also varies hugely (from 3 to 168 members of staff); that many bodies are not transparent in terms of their organisation and functioning; that the three functions assigned to them by the Directives are far from clear, and that several bodies do not in fact fulfil the mandate to assist victims of discrimination, although two thirds of them do have some power to investigate and settle complaints (although there is no general agreement as to what this requirement means); some bodies ultimately operate almost as “quasi-judicial” institutions, although most do not.

In terms of the independence of such bodies, the Report concludes that:

- A) A considerable number of them have been established not by Constitution or Act but by regulation, making their position vulnerable to changes in government policy. In Spain this body would need to be created by Act.
- B) A certain number of them have official ties to the Government, in the sense that members of the Government sit on the Board of the body or may in some way or another influence the policies of the institution, or exert undue influence over its research and documents. The composition of the body must guarantee independence from the government.
- C) A fair number of them also have official ties to the NGOs involved and it is not always clear how their independence from them is maintained (for example regarding the appointment or replacement of “representatives” of those NGOs on the institution’s Board). It must also be guaranteed that the body is independent of the third sector (although it does need to be involved as a key player¹⁸). It is

18 It should be remembered that the Directives require that States engage in dialogue with social agents and the specialist third sector in order to promote the principle of equal treatment. The Directives on “race equality” and “equality in employment” refer explicitly to the importance of the role performed by social interlocutors and non-governmental organisations in application of and compliance with anti-discrimination legislation. As acknowledged in the Commission’s Green Paper on “Equality and non-discrimination in an enlarged European Union” (28 May 2004), “NGOs continue to be key advocates for the development of non-discrimination policies in the EU”. According to the Commission, “they have an important role to play at national level in supporting the transposition of EC anti-discrimination legislation, raising awareness about new rights and obligations and providing assistance to victims”.

important that equality bodies should maintain a certain distance from those organisations active in the fight against discrimination, above all with the aim of maintaining an appearance of neutrality and objectivity. An equality body cannot allow itself to be seen as a lobbyist. In order to avoid this, the Report suggests various systems for appointing to its governing body independent experts (academics, judges, public prosecutors, etc.), above all for victim assistance; transparency in procedural rules for assistance and research; guarantees that the body's Board represents a broad spectrum of social organisations (including representatives of business associations, trade unions, NGOs, legal experts, Government representatives, etc.). The Paris Principles recommend a plural approach to the body's composition.

- D) Unofficial contacts with the Government and with NGOs raise a dilemma: although on the one hand such contact undermines the appearance of independence required by the body's mandate, on the other they may be desirable in order to join forces in combating discrimination. Not all equality bodies in Europe successfully strike the balance.
- E) Most of the directors and staff of equality bodies are public employees, meaning that under certain conditions they could be held to be in some way obliged to follow government instructions.
- F) The decision of equality bodies regarding their budgets and accounts is uncertain in very many cases, and not completely transparent.
- G) In various countries there would seem to be a serious lack of properly trained and skilled human resources. The low level of pay is the main reason for this situation.

The Holtmaat Report proposes a series of relevant indicators in order to establish an institution's independence: the existence of a sound legal basis for its existence, its mandate, objectives and competencies; sound budgetary independence; sufficient financial resources in order to exercise its competencies autonomously and to assemble a team of adequately experienced and trained individuals; the existence of secure status for the members of the body's governing board and its director, in terms of the independence of decision-making; its own premises, separate from government buildings; independence of the body from interference by non-governmental organisations; the transparency of the body before the general public, parliament, the press, etc., in terms of how it exercises its competencies and spends its budget.

Of all these requirements, which must be taken into consideration when establishing the Spanish equality body, it should be remembered that the principle of autonomy and budgetary adequacy guarantee the independence required under European regulations, and are there a necessary prerequisite.

The report also questions how effective these institutions are, an issue which is particularly difficult to measure. In order to assess their effectiveness, as the report suggests, one would need a “baseline document” to analyse the situation prior to the body’s activities, and a subsequent evaluation of the impact of its work. Except in the United Kingdom, such a baseline document would not appear to exist in any country. The idea of producing one in Spain would, however, seem appealing, in order to test the waters in terms of the situation of discrimination and also the regulatory and actual state of the fight against discrimination so far.

The Holtmaat Report also establishes that an inadequacy of funds and a lack of well-trained staff is the current position. Hence the inference that several bodies may not be properly performing their functions. France’s High Authority, which provides a good model, employed, according to its 2009 Report, a permanent staff of 81 individuals, 67% of whom are women, the (2008) annual expenditure of the institution amounting to 11.5 million Euros. The results of the survey of European equality bodies reveal that in most countries the task of assisting victims of discrimination is the most important and the best established. The ways in which such assistance is provided vary considerably. With regard to the other two functions attributed under Article 13 of the Race Equality Directive, the picture is less encouraging. Little research about the forms and prevalence of racial discrimination has been performed and few reports and recommendations about these issues have been published.

The main conclusion of the report into the situation of equality bodies in Europe is that, despite the fact that the deadline for transposition of the Race Equality Directive fell on 19 July 2003, there is still no consensus as to the meaning and scope of the essential wording of Article 13 of the Directive. The terms “assistance”, “research” and “reports” have not been defined, nor is it clear precisely what “independent” means, and there are no criteria for evaluation of the effectiveness of these institutions. Not all bodies in the different States even undertake all three functions established in the Directive, thereby constituting a flagrant breach. Meanwhile, a fair number of equality bodies undertake different (albeit similar) functions.

The Holtmaat Report in any event establishes that there are two different strategic models in Europe. On the one hand there are equality bodies which focus almost exclusively on the task of victim assistance: these may be classified as performing a

“reactive” (or “defensive”) role. Meanwhile there are bodies which emphasise above all their “proactive role” (for example attempting to prevent future discrimination, and which prioritise their activities in the field of research and the issuing of recommendations (for example devising codes of good practice and playing a role in the supervision of the implementation of positive action). Both functions, reactive and proactive, are referred to in the Directive. Europe’s legislators preferred not to choose between the two, instead demanding both aspects.

A comparative examination of equality bodies is of particular interest in terms of their functions, given that composition and organisation is an issue which depends substantially on the specific conditions of each legal structure, and above all with regard to the main role, that of victim support. As for the composition of the body, it is often the case that the governing body is appointed by the Government (for example, in Germany the Head of the Federal Anti-discrimination Office is appointed by the Federal Minister for the Family, the Elderly, Women and Youth; in Belgium the members of its Centre are chosen by the Prime Minister, 10 are from among the French-speaking community, 10 Walloon-speakers and 1 German-speaker, although it is fairly common for the Parliament to appoint a part of the body (for example, in Bulgaria five of the nine members are chosen by the National Assembly, including the President and Vice-President, the other four being appointed by the President of the Republic). In France the eleven members are chosen as follows (Article 2): 2 by the President of the Republic (one of these will be the President); 2 by the President of the Senate; 2 by the President of the National Assembly; 3 by the Prime Minister; 1 by the Vice-President of the Council of State; 1 by the First President of the Court of Cassation, and 1 by the President of the Economic and Social Council. In the Netherlands the nine members of the Equal Treatment Commission are chosen by the Minister of Justice (following consultation with other members of the Cabinet), while in United Kingdom the Commissioners are appointed by the Secretary of State.

It is also common for there to be a Consultative Board, with no executive role but rather providing consultancy, the members of which include representatives of the leading non-governmental organisations working in the sector along with experts (for example in Germany the Consultative Board is made up of 10 individuals, 5 men and 5 women, appointed by the minister for this field. Provision is also made for a Consultative Committee in France “with the aim of associating with its tasks qualified individuals chosen from among representatives of associations, trade unions, professional organisations and other persons operating in the field of the fight against discrimination and for the promotion of equality”, Art. 2). The different legal systems generally state that equality bodies must have balanced

representation of women and men, and also minorities (racial/ethnic, disabled people –in the United Kingdom, for example, one of the Commissioners must be a disabled person– and so forth).

Internally, equality bodies are generally divided into sections in accordance with the protected features. The UK Equality Commission, for example, includes a specialist committee dealing with the rights of disabled people.

3.6.1 The function of victim assistance

Providing assistance to victims of discrimination is the key function of any equality body. Experience demonstrates that there are very few people who feel they have been victims of discrimination who bring claims on their own, presumably because legal action is too stressful, expensive, lengthy and has no clear prospects of success.

In Europe there are two models of assistance: one which considers that it must include the investigation and resolution of claims and complaints (giving the body a quasi-judicial status with the capacity to hand down resolutions, which may be binding or otherwise), and another which does not do so, simply providing victims with information about the regulations and their rights, referring them to an organisation which can help them in presenting a legal case, or providing direct assistance in cases of strategic litigation, or otherwise assisting victims and the alleged violator of their equality rights to reach an amicable agreement (mediation). This is the most important decision which Spain must reach regarding the model for its body: does it want a body to investigate complaints on a neutral basis and pass binding decisions or non-binding opinions, or a body which will represent victims?

The Report argues in favour of giving equality bodies the power to consider and investigate discrimination claims, and this is in fact the case in most countries (in specific terms, two out of three). The scope of these investigative powers varies from one country to another, from vague provisions (as in Italy) to situations where the body has a status equivalent to that of a public prosecutor or investigating magistrate (as in France). In some cases it has the power to penalise those who refuse to provide the information requested (as in Hungary).

If one were to opt for a model involving a body with quasi-judicial powers to rule on cases, then, as found by the Report of the Dutch Equal Treatment Commission in 1999, in order to investigate and rule on a discrimination case in a neutral and

objective manner and to hand down an independent opinion or judgement, an equality body should not be responsible for assisting victims (it cannot be both judge and party). It should also be remembered that the alleged perpetrator of the discrimination enjoys the fundamental right, recognised by European and national law, not to incriminate him or herself, meaning that the equality body's powers of investigation could be hampered by this, along with other guarantees in terms of official penalty procedures.

The situation in this regard varies considerably across Europe. 12 equality bodies have no competency to assist victims of discrimination, while 18 do, and of these 11 are able to settle and investigate claims. The combination of these roles is not, apparently, always viewed as problematic, with certain systems being of the belief (unlike the opinion of the Dutch body) that settling and investigating cases may involve quasi-judicial functions. In Cyprus, Bulgaria and Hungary, for example, the power to settle and investigate complaints goes so far as the handing down of a binding judgement and the imposition of penalties on the perpetrator of the discrimination.

As for the efficiency of this type of task, the report concludes that although many claims are presented before equality bodies, very few cases nonetheless ultimately reach a decision. In Denmark, between 2003 and mid-2005 its Committee examined 142 cases, although (as a result of procedural obstacles) only 11 were settled in favour of the claimant. In France the situation is considerably better since, unlike in Denmark, the institution's powers of investigation are legally established and powerful. Other States lie closer to the Danish position (Greece, Estonia, Latvia and Portugal, for example). There exists a policy at some equality bodies which does not consider it necessary to invest considerable time and money in individual cases (what is referred to in the United Kingdom as named person investigation), the resolution of which would instead tend to be referred to the courts of law. They prefer reports and general recommendations.

Other obstacles arise regarding this victim assistance function, however, such as for example the following: the slowness of investigations and procedures; the lack of investigating powers and the ability to establish evidence (in Denmark the Committee does not have the power to request information from the "accused" and cannot interview witnesses; if the "accused" does not respond or disputes the Committee's version, the case cannot continue); the lack of powers to issue binding decisions (which can mean that the body's actions simply delay the case being presented before and resolved by the corresponding court authority).

One procedural model for victim assistance which could prove particularly attractive as a source of inspiration for the Spanish system is that of France:

- A) The victim files a discrimination claim. Any association (in existence at least 5 years prior to the circumstances) stating in its articles the aim of combating discrimination or assisting victims of discrimination may also be involved as a party jointly with the victim (if he or she agrees).
- B) The High Authority confirms receipt and, having investigated the circumstances (seeking out information, calling for explanations from any parties involved, who are entitled to give a statement in the company of a lawyer, where public servants and employees are also obliged to declare, carrying out studies, investigations and examinations, performing inspections on the ground, following authorisation by the Public Prosecutor's Office and under judicial control, etc.) it may:
 - a. reject the claim as manifestly unfounded;
 - b. refer it to the competent authority (if it does not enjoy competency);
 - c. proceed to arrange an amicable settlement (réglement amiable), a process which must be concluded within three months (extendable for a further three months on one single occasion); the High Authority proposes a mediator who must be accepted by both parties and who, having first conducted separate talks with each party, brings them together in an attempt to reach a settlement;
 - c. or it may officially process case. If it does so, the procedure continues as follows:

The High Authority may:

- a. reject the claim on substantive grounds,
- b. or settle it in various ways:
 - i. With a recommendation intended to modify conduct in the situation giving rise to discrimination, proposing reform or abolition. This recommendation may be general (for both the public sector and private sector), or may address individual parties (a company, for example). The parties affected must provide evidence, within a set period, of their implementation of the recommendations, since should they fail to do so the

- High Authority could place this on record in a specific report published in the Official Gazette of the French Republic.
- ii. Through mediation.
 - iii. If the circumstances constitute discrimination subject to penalties under the principles of the Employment and Criminal Codes, it may propose an agreed settlement to the perpetrator of the discrimination (involving compensation of no more than three thousand Euros in the case of natural persons or fifteen thousand in the case of legal entities, in addition to publication of the ruling). This must be accepted by the perpetrator and victim and approved by the Public Prosecutor. If it is not complied with, the High Authority could directly bring criminal action against the perpetrator of the discrimination.
 - iv. Act before judicial authorities at the request of the parties or of the judge.
 - v. Refer the case to the Public Prosecutor's Office in the case of serious offences.

In the year 2007, according to the report issued by the High Authority itself, and available on its website (www.halde.fr), 6,222 complaints were filed (an average of 518 per month). More than half of these dealt with public or private employment. The average period for processing a claim is 190 days. The High Authority has powers of investigation: it may call for documents, take statements (the parties may be accompanied by a lawyer), perform inspections on the ground (in the person of its agents, who require authorisation from the Public Prosecutor's Office), and conduct comparative analyses. In 2007 the High Authority issued 332 recommendations, arranged 49 mediation processes, 28 criminal settlements, was involved before the justice system on 115 occasions and referred 2 cases to the Public Prosecutor. The features of discrimination most often cited were national origin (25%) health and disability (19%), age (6%), gender (5%), trades union activity (4%) and sexual orientation (2%).

The 2008 Report also reveals data of interest. A total of 7,788 claims were presented. Of these, one half dealt with national origin (29%) or health/disability (21%). Once again, precisely one half dealt with public or private employment (recruitment, promotion, etc.). Over the course of 2008 6,414 cases were concluded, 3,522 being rejected, 737 referred to other authorities, 1,153 were abandoned by the claimant and 1,002 were subject to investigation. Of these, in 278 cases the Council adopted one deliberation and 457 measures: the High Authority presented observations

before the courts in 64 cases; there were 42 mediation proceedings, 17 criminal settlements, 197 general recommendations and 135 individual recommendations, and 4 notifications of the Public Prosecution Office. The percentage success rates are high: 70% for general recommendations, 77% for individual recommendations, 82% for observations before the courts and 54% for cases of mediation.

One interesting feature of the French High Authority is that it may act *ex officio* in cases of discrimination of which it learns (although if there is an identifiable victim he/she must give consent: Art. 4). The Dutch Equality Commission may also undertake investigations *ex officio* in order to identify “systematic” discrimination (Article 12.1 of the Act of 2 March modified in 2004).

Another particularly active and incisive model for the equality body is that of Bulgaria. Having received a complaint, the Commission may call for documents and information, request explanations from those involved or question witnesses. The examiner of the case must then prepare conclusions. A hearing is held, beginning with the corresponding Head of Section (there are three: gender, race/ethnicity, others) inviting the parties to undergo reconciliation. If they reach an agreement, the Commission will approve this and deem the case to be concluded (the Commission will then oversee compliance). If no agreement is reached the Commission will issue a ruling, establishing the offence committed, the party responsible, the type of penalty, its duration and intensity, or otherwise rule that no offence has been committed. This decision may be appealed before the Supreme Court. Victims may choose to turn either directly to a judge or to the Commission.

It should be borne in mind that the Spanish system already features a system not of mediation but of arbitration, for the resolution of claims and complaints in the field of equal opportunities, not discrimination and accessibility on the basis of disability, as laid down in Article 17 of Act 51/2003, further developed by means of Royal Decree 1417/2006. As is known, the arbitration system for disability claims is based on the following elements:

- The system excludes employment arbitration and complaints revealing reasonable evidence of a criminal offence or where a binding court judgement has already been handed down.
- Arbitration is, of course, voluntary. Organisations within the sector and the representatives of people with disability may also lodge complaints and claims.

- Arbitration boards are set up for each region, along with one central body for complaints affecting a territorial area greater than a region or for issues of State competency.
- The principles of the procedure are: free of charge, voluntary, equality among the parties, right of audience, rebuttal, lack of formalities, standardisation and accessibility. The arbitrator (where the claim involves a sum of less than three thousand Euros) or the arbitration board will reach an *ex aequo et bono* decision, unless the parties opt for *ex lege* proceedings.
- The board will examine the documentation submitted by the claimant, give a period for arguments and evidence (15 days) to be presented by the claimant and then by the respondent, and will subsequently, where applicable, arrange the hearing. The parties may reach an agreement to settle the dispute (conciliation decision). Otherwise the board will issue an arbitration decision (within a maximum period of four months from the date following the agreement to commence proceedings).

The function of victim assistance may thus take various forms: establishing procedures for resolution and/or arbitration and/or mediation, for example, although simple assistance for individual victims, while representing a substantial advance, could nonetheless place other forms of discrimination in the background; systematic discrimination, for example, the fight against which would require measures such as allowing equality bodies to perform actions and investigations *ex officio*, or an emphasis on so-called strategic litigation. Several of the most experienced equality bodies have adopted the policy of focusing their limited resources on certain specific cases which could lead to significant changes and could have a greater public benefit (through a change in legal precedent, where they affect a large number of people or those with considerable likelihood of success). This focus is more logical for those equality bodies which take the part of the victim¹⁹.

3.6.2 The function of conducting independent investigation into discrimination

The report confirms that this function, although recognised in most legal systems, is scarcely being implemented, among other reasons because bodies do not have a team of individuals with the relevant expertise (the members of these bodies are

19 See B. Dilou Jacobsen and E.O. Rosenberg: "Legal assistance to individuals powers and procedures of effective and strategic individual enforcement", in *Strategic Enforcement Powers and Competences of Equality Bodies*, Equinet, 2006, p. 15.

not generally lawyers, and are not experts in sociological or empirical analysis). Nor do they have a sufficient budget (in 2005, of 26 bodies entitled to perform research, only 12 did so).

On occasion the task of research is “outsourced” to universities, although this is not particularly frequent. Some countries have a policy of not commissioning this form of research from equality bodies, for example Finland and Sweden, as they do not feel that it need be performed (perhaps because it is undertaken by other institutions). Meanwhile, where research work does take place it is generally published in writing and on the website of the body, but not always submitted to the authorities.

3.6.3 The function of issuing recommendations and reports

The issuing of reports and recommendations likewise proves to be a far from popular task. Between 2003 and 2005, 13 equality bodies in Europe did not issue a single one. The main reason given for this was a lack of necessary resources. Such reports and recommendations are almost always published and passed on to the media, the Parliament or the Government, although in France the “losing” party may not be identified, unless the High Authority adopts a subsequent decision registering non-compliance with the individual recommendation issued.

The French High Authority has been issuing general recommendations of particular interest. The 2008 Report, for example, refers as “areas of most significant progress” to, among others, the following: recognition of age limits as discriminatory (for example in recruitment to certain jobs; enforced retirement will be discriminatory if not applied for legitimate purposes, etc.); a failure by school canteens to provide a menu suitable for students suffering from allergies is discriminatory, etc.

3.6.4 Other competencies

A fair number of equality bodies are given other competencies in addition to the three established in the Directives. Many of these are examples of the body being given a proactive role in the fight against discrimination. In France, for example, the High Authority may assist in establishing the position of the French Republic in international State negotiations regarding any form of discrimination. The ombudsman in Cyprus has the power to publish statistics and codes of good practice for both the public and private sectors. In the United Kingdom and Ireland these types of Code are not formally binding, although the courts are required to take them into consideration when ruling on discrimination cases.

The report by Bell *et al.*, *Developing Anti-Discrimination Law in Europe* (Bell, 2007) lists a number of powers not specifically included in the Directives which are, nonetheless, “interesting and useful”: (1) The Belgian organisation has the power to take legal action in the name of the public interest. Where the alleged violation has an identifiable victim the power of the Belgian Centre for Equal Opportunities and Opposition to Racism to act is conditional upon the consent of the victim. (2) The French High Authority has the role of ‘auxiliary of Justice’, whereby criminal, civil and administrative courts may seek its observations in cases under adjudication. (3) Employers can ask the Dutch Equal Treatment Commission for an opinion on whether their employment practice contravenes non-discrimination law. (4) In the case of an investigation of a complaint which results in a finding of direct intentional discrimination which constitutes criminal offence, the French High Authority can propose a “criminal transaction” (a kind of negotiated criminal sanction) to a perpetrator which can be either accepted or rejected. This could be a fine or publication (for instance in a press release). If the measure is rejected or not complied with the Authority can initiate a criminal prosecution, instead of the public prosecutor, before the criminal court.

The aforementioned report proposes a classification of the functions of equality bodies as follows:

- a) Legal protection against discrimination, either quasi-judicial or in the form of assistance for victims in finding their way within the judicial system.
- b) Consultancy work regarding the development of new legislation and monitoring the effects of Anti-discrimination Law.
- c) Research into the prevalence, forms and causes of discrimination.
- d) Public information campaigns in general and those addressing potential victims of discrimination in particular. This obligation is imposed in the Directives (Article 10 of the Race Equality Directive, 12 of the Employment Equality Directive and 10 of the Directive Proposal). This information must be disseminated in a manner accessible to disabled persons and minorities with no understanding of the official languages. The report on progress made in equal opportunities and non-discrimination in the EU published by the European Parliament (EP, 2008) confirmed that anti-discrimination legislation is far from familiar to European citizens, calling on European and national authorities to fulfil their duty to disseminate information by all means available to them.

- e) Work in cooperation with other institutions (public and private) in developing proactive policies and strategies to combat discrimination, including codes of practice, systems or plans for positive action, training of significant parties: judges, public prosecutors, employers, trades unions, service providers, etc.

These are, in essence, the functions which the Spanish equality body should undertake, without neglecting ongoing evaluation or monitoring of operations.

It should lastly be stressed that most legal systems make the equality body subject to regular accountability by means of a report (normally annual) presented before the Government and/or the Parliament. Parliamentary scrutiny would undoubtedly be preferable, in order to increase the social visibility of the report.

4

The principle of non-discrimination at the Constitutional Court: case-law open to improvement in the field of ethnically motivated discrimination

The Constitutional Court has clearly built up a body of case-law regarding the principle of equality (Article 14 of the Spanish Constitution) comparable with that of any other Supreme Court in neighbouring countries. Clear progress has, meanwhile, been supported or vouchsafed in non-discrimination against women: Constitutional Court Judgement (STC) 128/1987 (*crèche allowance case*); STC 12/2008 (*parity in electoral lists case*); STC 59/2008 (*Gender Violence Act case*); homosexuals, STC 41/2006 (*Alitalia case*); people with disability, STC 269/1994 (*quotas of disabled people in the civil service*).

It is, meanwhile, incontrovertible that the case-law regarding discrimination based on ethnic/racial identity leaves considerable room for improvement. It is highly significant in this regard that the only two cases to have reached the Spanish Constitutional Court involving ethnic/racial discrimination have been subject to review by international human rights tribunals and organisations.

First we have the celebrated *Williams* case, resulting in Constitutional Court Judgement 13/2001, of 29 January 2001, rejecting an appeal for constitutional protection against the police who demanded identification of a woman purely because she was black, holding that this demand involved neither open nor concealed discrimination (despite the fact that only she, of all the passengers alighting from the train, was asked for her papers).

Such a remarkable decision was, as one might expect, declared by the Human Rights Committee (Communication 1493/2006), of 27 July 2009, to run counter to Article 26 read in conjunction with Article 2.3 of the International Covenant on Civil and Political Rights. The Committee does not argue that general identity checks may not be performed in order to protect the safety of citizens or control illegal immigration, but rather that such checks may not be conducted on the basis of ethnic characteristics as the sole indicator of an individual potentially not having legal status in the country, which is exactly what happened in the case in question. In the judgement of the Committee, “the responsibility of the State party is evidently engaged... The Committee can only conclude that the author was singled out for the identity check in question solely on the ground of her racial characteristics and that these characteristics were the decisive factor in her being suspected of unlawful conduct”. The Spanish State is under an obligation to provide Ms Williams with an effective remedy, including a public apology, and also under an obligation to take all necessary steps to ensure that its officials do not repeat the kind of acts observed in this case. The call for a public apology incumbent upon the State offers a wonderful opportunity to demonstrate, as publicly as possible, the new impetus and new focus of equality policies (based on the principle of countering weakened citizenship). This apology in fact came in the form of a letter to the party concerned from the Ministry of the Interior, dated 20 January 2010, and a meeting with the Minister of Foreign Affairs. Both in the letter and in person, the Spanish State took the opportunity to apologise for its actions, giving an assurance that it was adopting all measures possible to ensure that such situations would not be repeated. This does indeed provide an excellent opportunity expressly to prohibit the use of racial principles by the Spanish police, clarifying any possible doubt as to their actions.

The other Judgement on racial discrimination likewise gives no grounds for satisfaction. The case in question was settled by Judgement 69/2007, of 16 April 2007, contested before the European Court of Human Rights and settled on 8 December 2009 in the case María Luisa Muñoz vs. Spain, in terms directly counter to the findings of the Spanish court. The judgement handed down in Strasbourg found in favour of a Spanish Romani woman who had been refused a widow’s pension by the national authorities, including the Constitutional Court, as she had not entered into matrimony by means of the legally valid ceremony at the time (Catholic Canon law, in 1971), but rather in accordance with Romani tradition and practice. The Spanish Constitutional Court held that such a denial did not constitute any form of ethnic discrimination, since the requirement to enter into valid marriage in accordance with the regulations in force at the time (1971) in order to be entitled to a pension affected Romani and non-Romani citizens alike. The Strasbourg Court, however,

held that there had been a violation of the prohibition against racial discrimination (Article 14 of the ECHR), in combination with the right to peaceful enjoyment of possessions under Article 1 of Additional Protocol 1.

The European Court refused to view the non-recognition of the traditional Romani form of marriage as marriage with civil effects as a violation of the right to matrimony established in Article 12 of the Rome Convention, or a form of racial discrimination prohibited under Article 14 of the same Convention. Civil marriage in Spain would be open to Romani as well as non-Romani individuals. The Judgement cannot, then, be read as a legal recognition of Romani marriage, an issue which would depend on the domestic legislation of each country.

The Judgements does not, as a result, have a general or objective impact which could likely be applied to many other subsequent cases. It is rather a decision attempting to offer a more just solution in a specific case.

The Court held that the refusal of a survivor's pension was a discriminatory difference since it involved different treatment in comparison with other situations which should have been held as equivalent in terms of the effect of marital good faith, such as the existence of good faith in nullified marriages (Article 174 of the Social Security Act) or the precedent of the Constitutional Court in its Judgement 199/2004, the court holding that the right to a survivor's pension did apply in the case of a marriage entered into in accordance with the legal provisions (a Catholic ceremony) but not registered with the Civil Register on grounds of conscience. And that is the very point. The Spanish authorities treated María Luisa Muñoz differently from other situations comparable to hers, involving marital good faith. According to the Court, the good faith of the applicant regarding the validity of her marriage entered into in accordance with the Romani tradition was demonstrated by the fact that the Spanish authorities subsequently recognised the validity, or at least the appearance of validity, of her marriage by means of various documents: a family book, 'large family' status, Social Security card, all of these official documents. The Judgement is quite clear in this regard: "The Court finds that it is disproportionate for the Spanish State, which issued the applicant and her family with (all these official documents) now to refuse to recognise the effects of the Roma marriage when it comes to the survivor's pension". It also took into account the fact that in 1971, when they married, there was only one valid system, a Catholic ceremony (exemption from which required prior apostasy). In truth, the key to the differences between the Judgement of the Spanish Constitutional Court and the Strasbourg Court lies in the differing value afforded to Constitutional Court Judgement 199/2004 as a precedent: the Spanish court denied there was

any degree of similarity, whereas the European Court held that the difference in the settlement of the matter specifically constituted different and more prejudicial treatment, as prohibited by the Rome Convention.

To this the European Court added a further argument, the ethnic argument. The Judgement highlighted first of all that the belief of the applicant that her marriage was valid was also demonstrated by her membership of the Romani community “which has its own values within Spanish society”. The Court underlines “the international consensus” amongst the Contracting State of the Council of Europe “recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity that is of value to the whole community”. The Judgement meanwhile holds that membership of a minority does not release one from respecting laws governing marriage, but may nonetheless influence the manner in which the law is applied. The Court recalls the previous declaration that “the vulnerability of the Romani requires particular attention to be paid to their needs and distinctive lifestyle, both in general and in specific cases”. It is this affirmation which is questioned by the only dissenting voice, Judge Myjer, who held that the Spanish State could in no way be responsible for the ignorance of Ms Muñoz (the case would rather be one of an error), and that the aim of the case was instead to recognise the validity of Romani marriage (as had been portrayed by certain media sources).

The (sensitive) expressions regarding the Romani minority, however, serve, in the logic of argument, simply to underpin the good faith of the applicant (as demonstrated by other means, as has been seen). They may, in truth, not have been needed in reaching the same decision. And in any event they are scarcely connected with the main line of argument, since it may be seen that Ms Muñoz was unjustifiably meted out different treatment in comparison with other comparable cases, thereby giving rise to a case of general discrimination subject to prohibition, and it is difficult to see in what way the vulnerability of the Romani would influence the application of laws (presumably in a manner more favourable to them). No, it is not a question of applying laws more favourably to the Romani, but rather ensuring that they are not worse treated.

The Strasbourg Court thus argues on the basis of the general clause of equality of treatment, not the prohibition on racial/ethnic discrimination. The Court needed go no further in reaching its decision. The dispute did, however, raise intriguing possibilities as to interpretation on the basis of categories of Anti-discrimination Law (above all if, as held by the Spanish Court, one agrees that Judgement 199/2004 is not

a comparable case). One could in fact argue that the refusal of a pension in this case represented discrimination through lack of differentiation, indirect discrimination based on ethnicity, and multiple discrimination.

Ultimately, returning to the main argument, according to certain court judgements, ethnically based discrimination in Spain gives no apparent cause for alarm: the actions of the public authorities in this regard have simply been rubber-stamped. However, when such cases have been brought before international bodies the decision has been quite the opposite. This circumstance casts great light on the state of affairs. And the Constitutional Court is not alone: there is a lack of effort in the fight against ethnically/racially motivated discrimination in Spain's criminal policy as a whole.

5

Solid criminal policy against discrimination

Equality of treatment must, of course, be expounded (persuasively, through information, education, awareness-raising, etc.), but must at the same time be imposed (using the applicable legal penalties), as equality will never be achieved through a natural and spontaneous process (which would instead generally benefit those already in a position of strength); it does not simply grow on trees, but requires sustained efforts over time on behalf of all socio-economically disadvantaged minorities. Equality is born out of daily efforts to civilise. Prevention is therefore required in equality policies, along, where necessary, with repression.

And in this regard it must be pointed out, at the very outset, that Spain needs to go further in establishing and developing a clear criminal policy against all forms of discrimination, since what we now find is that there are regulations which are seldom effectively applied.

As highlighted on numerous occasions by the Public Prosecution Coordination Office of the Hate and Discrimination Offences Service at the Barcelona Provincial Public Prosecutor's Office (a body which, it is worth mentioning, represents an innovative approach and which should most definitely be introduced across the country), some of the main problems uncovered in the criminal prosecution of discrimination include the following:

Ignorance of the number of cases

First, because many of the offences committed are not reported. The presumably substantial number of cases in the shadows could have various explanations, such as

the victims' mistrust of the police and/or justice system, fears that a complaint could lead to adverse consequences (public disclosure of sexual orientation or expulsion from the country in the case of those without legal papers, for example), or others.

Meanwhile, the way in which the statistical systems of the Law Enforcement Agencies, Public Prosecutor's Offices and Courts of Justice are organised does not include specific labels to classify or quantify criminal offences which may include among the motives discrimination on the basis of those features subject to special protection (gender, ethnicity, sexual orientation/identity, age, disability, religion/convictions). The 2009 Amnesty International report into *The State of the World's Human Rights* (AI, 2009) lists Spain as one of only five States of the European Union with no official data on discrimination. This means that we do not know the true and precise number of crimes of hate and discrimination, and so from the very outset we are unable to establish an appropriate criminal policy to combat them.

Legislative reform should, then, expressly dictate that the information systems of the police and the various bodies of the justice administration be adapted in order to account for all crimes of hate and discrimination which are reported. We would also need to analyse the number of such offences remaining in the shadows, in other words those which have been committed but not reported.

Inadequate or improper application of criminal provisions

This problem takes on various forms. On occasion the penal response to conduct involving motives based on the rejection of a "different" person with the aim of attacking his or her dignity fails to capture the gravity of the circumstances, taking into consideration only physical harm and not the psychological harm done to the victim. We often find a certain tendency on the part of judges and public prosecutors to view as less serious events reported as threats, coercion, insults and harm, viewing these as misdemeanours rather than crimes.

At times victims of discrimination have found that they have not received appropriate treatment at police stations and in the courts, above all because of ignorance and a lack of training in Anti-discrimination Law, while there is also a lack of complaints about clearly inappropriate or even vexatious treatment, including in particular, given their gravity, police excesses. Specific mention should be made of the excesses perpetrated by private security guards, above all in the form of discrimination when applying the right to reserve admission to public establishments.

Another common problem is that police witness reports are generally incomplete and insubstantial. The tendency is to describe discriminatory attacks as just another aggression. The description of the discriminatory motives (through details derived from the statements of the victims and those involved, the recording of indications such as the symbols, badges, clothing or tattoos used by the alleged perpetrators) is crucial in order to classify properly the events in criminal and legal terms, above all to establish an aggravating factor of a racist or discriminatory motive, and also to adopt precautionary measures, such as remand or banning orders. Nor are particular efforts taken to establish possible membership, on the part of those involved, in organised groups the purpose of which is the perpetration of acts of violence, hate and discrimination, thereby preventing inclusion of the offence of unlawful association.

This diagnosis naturally implies the need for both law enforcement agencies and judges and public prosecutors to develop greater understanding, awareness and involvement in the prosecution of such offences. What we in fact find is inadequate knowledge of Anti-discrimination Law on the part not only of members of the law-enforcement agencies, judges, public prosecutors, but also court clerks, forensic experts, prison service employees and lawyers, along with the security guards and door staff employed by private security firms. Training in equal treatment and non-discrimination should ideally be mandatory for all those taking on such positions, and also be included in initial and ongoing training schemes.

Better criminal regulation

The list of discriminatory grounds given in Article 22.4 of the Criminal Code is not systematically tied in with other principles established in the Code regarding conduct intended to violate the fundamental right not to suffer discrimination, hence the need for one single list of discriminatory motives to be drawn up, to be applied to all offences of discrimination. This list would need to include certain new forms of discrimination such as aporophobia (hatred of the poor) and transphobia, which are not currently listed as aggravating circumstances. Taking the issue further, legal precedent sets no clear line regarding how to act in cases of assumed identity, where the perpetrator commits an offence in accordance with discriminatory motives and makes a mistake as to the status of the victim (for example, a gay hate attack on a person who is not in fact homosexual). It may be desirable to take the approach of establishing a new offence of “hate”, covering all acts or behaviour (isolated or repeated) of gratuitous violence inflicted on discriminatory grounds, with the purpose of humiliating and harassing the victim, creating a sense of terror, anguish or inferiority, without the need for reference to any specific list of causes or victims. The offence of provocation to hatred, violence and discrimination defined in Article

510 of the Criminal Code should also be modified in order to avoid any doubts as to interpretation of the concept of “provocation” (it would be preferable to employ more precise terms, such as “promotion” or “incitement”), while it should be made clear that the victims of such offences are not merely groups but also individuals, whether or not they belong to those groups, provided that the motive behind the offence is discrimination or hatred on the basis of their personal condition.

Another worthwhile initiative would be a review of the offence of discrimination in the workplace (Article 14, Criminal Code) as the circumstances currently required for its application make it practically useless²⁰.

As for offences involving the refusal to provide either public services (Article 511, Criminal Code), or professional or business activities (Article 512, Criminal Code), the terms require fine-tuning, since the concept of “provision” raises problems of interpretation and should be made more comprehensive in order to cover all forms of goods, merchandise or services. The expression “provisions to which one is entitled” arouses problems in many professional and business sectors where there are no regulations, making it impossible to punish many cases where services are not provided on discriminatory grounds. It would likewise be desirable to establish a specific provision in order to lay down for those offences listed under Articles 510 to 512 the supplementary consequences enumerated in Article 129 of the Criminal Code, in other words the possibility of enforced closure, dissolution or suspension of companies, premises or establishments, along with societies, associations or foundations, and a ban on future activities, operations or business in the course of which the aforementioned offences have been committed, fostered or concealed. One example highlighting the overriding need for such a measure is the “Europa” bookshop in Barcelona which, despite having a guilty verdict down against it in a binding sentence, and other pending charges brought by the Public Prosecutor involving offences of provocation to hate, violence or discrimination under Article 510 of the Criminal Code, has proved impossible to shut down. It continues to host conventions of the European Far Right and the Ku Klux Klan, and is still selling books justifying the Nazi Holocaust.

20 The truth is that at present in order for criminal action to be pursued the following five requirements must all apply: (1) an act of occupational discrimination; (2) the presence of one of the motives set out in the Act (which, it should be pointed out, do not cover all forms of discrimination); (3) prior official action in the form of a demand or sanction against the employer; (4) the employer must have failed to re-establish conditions of equality before the law following a public authority demand and (5) have also failed to make good the financial damages occasioned.

Lastly, crimes of genocide (Article 607) and crimes against humanity (Article 607 bis) should include other groups open to extermination or widespread attack, for example on the basis of sexual orientation or gender identity.

Lack of response to new forms of attack on equal treatment

We are, for example, seeing an increase in groups and organisations set up for the purpose of propagating the discourse of hate, violence and discrimination, many of them exploiting the new possibilities opened up by the Internet, in particular social networks along the lines of Facebook. One could say that we are beginning to see the emergence of a new “fascism 2.0”. There are, however, no specialist police units similar to those successfully set up to combat child pornography and financial fraud on the Web. In this regard the creation of such specialist units would be a step forward. One other possibility would be to give judges the power to order the provisional administration or blockage of websites, blogs, e-mail newsletters, etc. which incite hatred or discrimination, while also allowing for the possibility of such measures being imposed as a penalty for supplementary consequences under the Criminal Code.

Possibility of creating a Special Public Prosecutor’s Office for crimes of hate and discrimination

It would be particularly helpful and relevant for such a unit to be set up for the following reasons, in addition to those already outlined above: (1) Other specialist public prosecution offices have proved hugely effective in their respective spheres. (2) Various bodies working in the field of anti-discrimination have been calling for such a move for some time. (3) The growing complexity of investigations into crimes of hate and discrimination as a result of the proliferation on the Internet of racist, xenophobic, homophobic and similar materials, along with the activity of various urban tribes and groups which represent a danger in this regard.

6

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Annex 1

Legal texts of reference

International Legal Texts

A. Directives

1. Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, modified by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002.
2. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.
3. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.
4. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.
5. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).
6. European Commission Proposal of 2 July 2008 for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

7. Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.

B. Regulations and recommendations

1. Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.
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3. ECRI General Policy Recommendation N°7: National legislation to combat racism and racial discrimination, 13 December 2002.

C. Treaties and Conventions

1. Treaty establishing the European Economic Community, Rome 1957.
2. International Covenant on Civil and Political Rights, entered into force March 23, 1976.
3. Treaty on the European Union, Maastricht, 1992.
4. Charter of Fundamental Rights of the European Union 2000/C 364/01.
5. European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11 with Protocols No. 1 and 6, September 2003.
6. United Nations Human Rights Committee, Communication No. 1493/2006, 17 August 2009.

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2. BOE of 26/03/2002: Organic Act 1/2002, of 22 March 2002, governing the right of association.
3. BOE 289, of 03/12/2003: Act 51/2003, 2 December 2003, on equal opportunities, non-discrimination and universal access by persons with disability.
4. BOE 313, of 31/12/2003: Act 62/2003, of 30 December 2003 on taxation, administrative and social measures act.
5. BOE of 13/12/2006: Royal Decree 1417/2006, 1 December 2006, establishing the arbitration system for the settlement of claims and complaints involving equal opportunities, non-discrimination, and disabled access.
6. BOE 71, of 23/03/2007: Organic Act 3/2007, of 22 March 2007, for the effective equality of men and women.

Annex 2

Constitutional Court Judgement (STC)

| Judgement | Division and date | Appeal | Published |
|--------------|------------------------|-----------------|----------------|
| STC 128/1987 | 2nd, 16.07.1987 | R.A. 1123/1985 | BOE 191 - 1987 |
| STC 269/1994 | 1st, 03.10.1994 | R.A. 3170/1993 | BOE 267 -1994 |
| STC 13/2001 | 2nd, 29.01.2001 | R.A. 490/1997 | BOE 52 - 2001 |
| STC 199/2004 | 2nd, 14.11.2004 | R.A. 2365-2002 | BOE 306 -2004 |
| STC 41/2006 | 2nd, 13.02.2006 | R.A. 5038-2003 | BOE 125-2006 |
| STC 69/2007 | 1st, 16.04.2007 | R.A. 7084/ 2002 | BOE 123 - 2007 |
| STC 12/2008 | Plenary, 29.01.2008 | R.I. 4069/2007 | BOE 52 -2008 |
| STC 59/2008 | Plenary, 14.05.2008 | R.I. 5939-2005 | BOE 135-2008 |
| STC 62/2008 | 1st, 26.05.2008 | R.A. 3912-2005 | BOE 154- 2008 |
| STC 176/2008 | 1st, 22.12.2008 | R.A. 4595-2005 | BOE 21-2009 |
| STC 13/2009 | Plenary, 13.01.2009 | R.I. 4057-2005 | BOE 38-2008 |

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Annex 3

Table of Judgments of the Court of Justice of European Union

| Case | Date | Interpretation | Parties |
|----------|------------|----------------------|---|
| C-450/93 | 17.10.1995 | Directive 76/207 | Kalanke v. Freie Hansestadt Bremen |
| C-409/95 | 11.11.1997 | Directive 76/207/EEC | Hellmut Marschall v. Land Nordrhein-Westfalen |
| C-303/06 | 17.07.2008 | Directive 2000/78/CE | Employment Tribunal (UK) v. S. Coleman |

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Annex 4

Table of Judgements by the European Court of Human Rights

| Case | Date | Interpretation | Parties |
|----------|------------|---|---------------------|
| 49151/07 | 08.12.2009 | European Convention for the Protection of Human Rights and Fundamental Freedoms | Muñoz Díaz v. Spain |

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Working Papers Published

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Antonio Estella and Ksenija Pavlovic

2/2009. Why Imposing Limits on Executive Compensations? Recommendations for Spain.

Carlos Mulas-Granados and Gustavo Nombela

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4/2009. Program for a Progressive Politics: A Discussion Note. Philip Pettit

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6/2009. Europe's Economic Priorities 2010-2015. André Sapir

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Tsoukalis, Olaf Cramme, Roger Liddle

11/2010. The Liberal Renewal Of Social Democracy. Daniel Innerarity

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