

Combating sexual orientation discrimination in employment: legislation in fifteen EU member states

Report of the *European Group of Experts
on Combating Sexual Orientation Discrimination*¹
about the implementation up to April 2004 of
*Directive 2000/78/EC establishing a general framework
for equal treatment in employment and occupation*

15 Spain

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The contents of the Group's report do not necessarily reflect the opinion or position of national authorities or of the European Commission. The report, submitted in November 2004, aims to represent the law as it was at the end of April 2004; only occasionally have later developments been taken into account.

The full text of the report (including English versions of all 20 chapters and French versions of most chapters, plus summaries of all chapters both in English and French) will be published on the website just mentioned; links to it will be given on www.emmeijers.nl/experts.

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15.1 General legal situation

With the coming into force of the Spanish Constitution in 1978 the laws that most severely oppressed homosexuals under Franco's dictatorship were abolished. Also, in 1988, there was a statutory reform of the Criminal Code of 1973, removing the crime of public scandal which had been used to punish mostly male homosexual conduct. The new Criminal Code of 1995 criminalises certain forms of discrimination on the basis of sexual orientation, including severe employment discrimination. Still, gays and lesbians are not allowed to marry, or to jointly adopt children and, as of yet, there is no general legislation on either registered partnerships or de facto unions. The newly appointed socialist government of Prime Minister Zapatero has promised to pass legislation on registered partnership and to amend the civil code so as to allow same-sex marriage.

On 30 December 2003 Spain finally enacted the first statutory measure to implement both Directives 2000/43 and 2000/78 in a law that deals with very different topics, including fiscal, administrative and social measures (*Ley 62/2003, de medidas fiscales, administrativas y de orden social*) and that formally presents itself as a supplement to the 2004 General Budget Statute and its economic policy objectives. In the report the statute will be referred to as Statute 62/2003. The legislation came into force as of 1 January 2004. Obviously, the legislation (enacted under the former centre-right wing government of Prime Minister Aznar) would have gained more visibility had it dealt only and explicitly with equality and anti-discrimination instead of being dumped together with other legal measures that are completely unrelated to the topic of equality. The law explicitly states that it aims at implementing the Directives 2000/78 and 43/2000, setting a general framework to fight against racial or ethnic discrimination, giving the legal definition of both direct and indirect discrimination and modernising the regulation of equal treatment and non-discrimination in employment (*Exposición de Motivos III*). To this purpose the statute introduces concrete changes to existing legislation such as el Estatuto de los Trabajadores (Workers' Statute), *la Ley de Integración Social de los Minusválidos* (Statute on the Social Integration of Disabled), *la Ley de Procedimiento Laboral* (Statute on Employment Procedure), *la Ley sobre Infracciones y Sanciones en el Orden Social* (Statute on Infractions and Remedies on the Social Order) and the legislation on the public service.

15.1.1 Constitutional protection against discrimination

Under the heading of citizens' rights and freedoms, the Spanish Constitution³ includes a provision (art. 14) whereby Spaniards are equal before the law, so that discrimination on the basis of birth, race, sex, religion, opinion or any other condition or personal or social circumstance is forbidden. The non-discrimination clause is binding on both public and private employers. Although the provision does not refer to sexual orientation explicitly, because of its well recognised open-ended nature sexual orientation would probably be a covered ground. There are some lower court but no constitutional cases explicitly confirming this. However, in view of the Framework Directive 2000/78 and other

³ See *Boletín Oficial del Estado* (Official Journal of the State) of 29 December 1978.

ECJ and ECtHR case law (e.g. *Salgueiro da Silva Mouta v. Portugal*⁴) it would be almost unthinkable that the Constitutional Court would decide otherwise. This is so because art. 10(2) of the Constitution makes it mandatory that constitutional rights be interpreted in the light of relevant international norms. Indeed, in its interpretation of the constitutional concept of sex discrimination the Court has systematically called upon European Directives and upon case law of both the ECJ and the ECtHR.

15.1.2 *General principles and concepts of equality*

The constitutional equality principle of art. 14 is interpreted as requiring the legislator to show that difference in treatment is justified by an objective and reasonable ground. The inclusion of a list of prohibited grounds for discrimination means that when differentiations are made on these grounds, or on those presumably included in the open list (such as, presumably, sexual orientation), the degree of judicial scrutiny will be higher, as it will in principle be assumed that differentiations on those grounds are illegitimate. Art. 9(2) of the Constitution is also relevant. It provides that public authorities will promote the conditions so that the freedom and equality of the individual and of the groups to which s/he belongs are real and effective, removing those obstacles which may hinder their enjoyment and facilitating the participation of all citizens in the political, economic, social, and cultural life. This has been interpreted as an endorsement of a more substantive as opposed to a purely formal notion of equality, and thus has been called upon to justify and conceptualise affirmative action or promotional measures, not as exceptions to the principle of equality but rather as constitutionally legitimate ways to implement equality.

Art. 28 in Statute 62/2003 refers to the principle of equality and defines it (in art. 28(1)(a)) as the absence of any kind of direct or indirect discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation.⁵

15.1.3 *Division of legislative powers relating to discrimination in employment*

Spain has a quasi-federal structure which divides powers between the central authorities and those of its Autonomous Regions with their own legislator and government. The Constitution provides that the basic regulation of employment relations both in private and public spheres has to be done through national statutes.⁶ Moreover, it is the central legislator (and not the regional legislators) that has exclusive jurisdiction over labour law, the basic regulation of public administration and the regime of civil servants working for the central administration (art. 149(1)(7) and 149(1)(18) of the Constitution).⁷ Autonomous Communities can then implement such legislation in areas that fall directly under their jurisdiction and supplement the state legislation with norms relative to their own civil service.

⁴ European Court of Human Rights, 21 December 1999, appl.n n 33290/96, Reports of Judgements and Decisions, 1999-IX.

⁵ *La ausencia de toda discriminación directa o indirecta por razón del origen racial o étnico, la religión o convicciones, la discapacidad, la edad o la orientación sexual de una persona.*

⁶ Arts. 35(2) and 103(3) of the Constitution.

⁷ Art. 149(1)(7) and 149(1)(18) of the Constitution.

Due to the fact that only the central authorities have the jurisdiction to pass criminal legislation (art. 149(1)(6) of the Constitution) any criminal sanction of sexual orientation discrimination has to be decided by the national parliament.

15.1.4 *Basic structure of employment law*

Other than the Constitution itself which, again, has to be interpreted in the light of international norms validly ratified or otherwise binding in Spain (including European Law, and agreements such as those ratified under the auspices of the International Labour Organisation), labour law in Spain comprises a diverse set of normative sources including statutes, governmental regulations, collective agreements, work contracts and customs.

As far as private employment is concerned, the basic statutory regime is covered by the *Estatuto de los Trabajadores* [Workers' Statute] adopted in 1980 as national legislation. This statute comprises the basic norms regarding hiring, types and duration of contracts, rights and duties that derive from an employment contractual relationship, and all those norms about individual and collective relations within private employment.

As for public employment, the legal regime covers a whole set of acts and regulations of both central and regional authorities, which encompass access, conditions of employment, promotion, and professional and economic benefits of civil servants.⁸ The basic principles governing public employment are mentioned in the Constitution. They include the right of everyone to enter public service in equal conditions (art. 23(2) of the Constitution) and the principle of merit and capacity (art. 103 of the Constitution). Usually, public employment is performed as civil service and when that is the case specific norms for the public service apply. However, public entities can also hire personnel through ordinary work contracts in which case the Workers' Statute applies together with those rules on the public function that are compatible with it.

15.1.5 *Provisions on sexual orientation discrimination in employment or occupation*

- *Constitutional level*

The constitutional principle of equality in art. 14 and its anti-discrimination mandate which presumably cover discrimination on the grounds of sexual orientation, apply directly to private employment.

- *Statutory level*

In application of art. 14's constitutional mandate, the *Estatuto de los Trabajadores* [Workers' Statute] also recognises the right of workers not to be discriminated against in access to employment or once employed. Although prior to Statute 62/2003 the provision contained no explicit mention to sexual orientation (it mentioned other grounds of discrimination such as sex, *marital*

⁸ Among those norms we can cite the *ley 30/84 and 23/88 de Función Pública del Estado* [statutes 30/84 and 23/88 of Public Service in the State], *ley 13/95 de contratos de la administración pública* [statute 13/95 of working contracts in the public administration], *ley 6/97 de organización y funcionamiento de la organización general del Estado* [statute 6/97 on the organisation and functioning of the general state organisation] and *ley 7/85 de Administración local y demás legislación complementaria* [statute 7/85 of local administration and additional complementary legislation].

status, age, race, social condition, language, religious or political beliefs, and union membership) art. 37(1) of the Statute has now changed this and sexual orientation is now also explicitly mentioned.⁹ The same applies to art.17 of the Workers' Statute which, as a corollary, contemplates a general principle of non-discrimination in work relations making it explicit that this refers to equality in areas such as access to employment, pay, work schedule or work conditions, and which after the reform (art. 37(4) of Statute 62/2003) mentions also sexual orientation.¹⁰ Art. 16(2) of the Workers' Statute provides that hiring agencies (which in Spain have to be non-profit) have to ensure the principle of equality and non-discrimination in access to employment within their realm of action and after the reform (art. 37(3) of Statute 62/2003) mentions the sexual orientation ground explicitly. Also, Statute 62/2003 (in art. 39) has modified Statute 45/1999, concerning the relocation of workers in the framework of a trans-national contractual work relation.¹¹ Art. 3 of Statute 45/1999 falls under the chapter dedicated to the obligations of employers who relocate their workers to Spain. Art. 3(1) refers to the employment conditions of relocated employers. Under it, art. 3(1)(c) refers to the equal treatment and non-discrimination of workers on several grounds. The provision now explicitly adds a reference to both direct and indirect discrimination and includes sexual orientation in the list of grounds.

On the other hand, the Criminal Code of 1995 sanctions as a crime against the rights of workers, both in the public and private sectors, conduct that amounts to serious employment discrimination, among others, on grounds of sexual orientation (art. 314 of the Criminal Code under Title XV on crimes against the rights of employees). The provisions reads as follows: *those who produce a serious discrimination in public or private employment against somebody based (among other things)... on his or her sexual orientation or family situation and who do not re-establish equality before the law after being called upon to do so or having been sanctioned by the administrative authorities for not doing so, and compensate for the economic loss the worker might have incurred because of the discrimination will be punished with prison from 6 months to 2 years or economic sanction¹² from 6 to 12 months.*¹³

⁹ Art. 4(2)(c) of the Workers' Statute: *[Los trabajadores tienen derecho] a no ser discriminados directa o indirectamente para el empleo, o una vez empleados por razones de sexo, estado civil, edad dentro de los límites marcados por esta ley, origen racial o étnico, condición social, religión o convicciones, ideas políticas, orientación sexual, afiliación o no a un sindicato, así como por razón de lengua, dentro del Estado español.*

¹⁰ Art. 17 of the Workers' Statute: *'Se entenderán nulos y sin efecto los preceptos reglamentarios, las cláusulas de los convenios colectivos, los pactos individuales y las decisiones unilaterales de los empresarios que contengan...discriminaciones directas o indirectas en el empleo, así como en materia de retribuciones, jornada y demás condiciones de trabajo.. por razón de orientación sexual.'*

¹¹ Artículo 39. *Modificaciones de la Ley 45/1999, de 29 de noviembre, sobre el desplazamiento de trabajadores en el marco de una prestación de servicios transnacional.*

¹² Art. 50 Criminal Code provides that economic sanctions are to be calculated on the basis of minimum of 200 pesetas per day and a maximum of 50, 000 pesetas per day, that a month is equal to 30 days and a year equal to 365 days.

¹³ Art. 314 Criminal Code: *'Los que produzcan una grave discriminación en el empleo, público o privado, contra alguna persona por razón de su ...orientación sexual, situación familiar...y no restablezcan la situación de igualdad ante la Ley tras requerimiento o sanción administrativa, reparando los daños económicos que se hayan derivado, serán castigados con la pena de prisión de seis meses a dos años o multa de seis a doce meses.'*

To my knowledge, no reported cases have been decided with an application of this anti-discrimination employment provision, so it is not clear how the indeterminate concept ‘serious discrimination’ will be interpreted.

In the military domain, traditionally one of the most controversial ones, the principle of non-discrimination is now explicitly recognised (Art. 185 of the *Reales Ordenanzas de las Fuerzas Armadas* of 1978 [Royal Ordinances of the Armed Forces]). There is no explicit mention to sexual orientation but the open-ended constitutional clause ‘or any social or personal condition’ is reproduced.

15.1.6 *Important case law precedents on sexual orientation discrimination in employment or occupation*

In Spain only judicial decisions from the highest courts, the Constitutional Court and the Supreme Court, set binding precedents. Thus far, we have no decision regarding employment discrimination on the basis of sexual orientation from either court. The highest court decision that we have is a decision by the extinguished *Tribunal Central del Trabajo* [Central Work Tribunal] in 1986 which considered that firing a worker because of his homosexuality amounted to unacceptable discrimination and forced the employer to reinstate the employee.¹⁴ Most of the legal claims brought forward by homosexuals have dealt less with direct sexual orientation discrimination than with access to benefits or prerogatives linked to the worker’s marital status such as, typically, access to a survivor’s pension.

15.1.7 *Provisions on discrimination in employment or occupation that do not (yet) cover sexual orientation*

As mentioned above, art. 14’s constitutional anti-discrimination clause (with direct effect in labour relations) does not specifically mention sexual orientation. Moreover, art. 35(1) in the Constitution recognises that everyone has the right and the duty to work and to freely choose a profession, to promotion through work and to fair pay without discrimination on the basis of sex. Again, nothing is said with regards to sexual orientation. However, after the reform of the Statute 62/2003 aimed at implementing the Directive the employment anti-discrimination provisions in the Workers’ Statute (arts. 4 (2)(c), 16(2) and 17) which did not mention sexual orientation explicitly before, now do.

15.1.8 *Provisions on sexual orientation discrimination in other fields than employment and occupation*

Since 1995 art. 511 and 512 of the Criminal Code punish private persons and civil servants who, in their fulfilment of a public service or in the exercise of a professional or business activity, deny a person, association, foundation, firm, or corporation a service to which s/he would otherwise be entitled or have access to, on grounds of sexual orientation. Also, art. 22 of the Criminal Code foresees that one of the circumstances that aggravates criminal responsibility is having committed a crime motivated by the victim’s sexual orientation (art. 22). Moreover art. 510(1) includes in the definition of the crime of incitement to discrimination, the promotion of hatred or violence against groups or

¹⁴ *Sentencia del Tribunal Central de Trabajo* [Decision of the Central Work Tribunal] of 21 January 1986.

associations on the grounds of the members' belonging to a certain sexual orientation. Art. 510(2) punishes those who, aware of the falsity of certain information or with absolute disdain for truth, spread injurious information about groups or associations on the grounds of their sexual orientation. Finally, art. 515(5) of the Criminal Code classifies as illegal associations those associations that promote or incite discrimination, hatred and violence against persons, groups or associations on the basis of sexual orientation or family situation.

The Statute of Political Parties¹⁵ provides that a political party will be declared illegal when, in its activity, it violates democratic principles, especially when this activity aims at deteriorating or undermining the system of freedoms or to abolish the democratic system by means of one of the following conducts, if performed in a serious and recurring way: a) systematically violating freedoms and fundamental rights, by promoting, justifying, or condoning ... the exclusion or persecution of people because of their sexual orientation.

Finally, some regional statutes are starting to recognise the principle of non-discrimination on the grounds of sexual orientation in their recent legislation on all kinds of issues.¹⁶

15.2 The prohibition of discrimination required by the Directive

15.2.1 Instrument(s) used to implement the Directive

As mentioned above, on 30 December 2003 Spain finally enacted the first statutory measure to implement the Directive in a law that deals with very different topics, including fiscal, administrative and social measures (*Ley*

¹⁵ *Ley Orgánica de Partidos Políticos (Boletín Oficial del Estado of 28 June 2002, num. 154).*

¹⁶ Some examples of this kind of legislation include: Navarra's statute providing for the legal equality of stable partnerships (*Ley Foral 6/2000, of 3 July 2000 of Navarra para la igualdad legal de las parejas estables*) whereby in the interpretation and application of the Navarra legal order, nobody can be discriminated against on the grounds of the family group to which s/he belongs, whatever the origin of the family group, parental, marital, or a family grounded on union of two people who live in an analogous affective relation, regardless of their sexual orientation (art.1); the Statute of La Rioja for development co-operation (*Ley de La Rioja de Cooperación al Desarrollo (Boletín Oficial del Estado of 16 July 1999, num. 169)*) which, in art. 2 on the leading principles that inspire the co-operation of this region to developing countries, states that the participation of the citizenry in such co-operation activities has to be without discrimination on the basis of sexual orientation; The Statute of Andalusia on Volunteer Work (*Ley de Voluntariado de Andalucía (Boletín Oficial del Estado of 7 August 2001, num. 188/2001)*) which recognises in art. 7 the right to profit from voluntary work without discrimination on the basis of sexual orientation and in art. 11, among the rights of the people who perform voluntary work, the right to the respect of their freedom, dignity, privacy, beliefs and sexual orientation, and to be exempt from discriminatory treatment that undermines their fundamental rights; Catalonia's statute on local police forces which has been modified (*Boletín Oficial del Estado of 2 February 1999, num. 28/1999, Modification of Statute 16/1991 of 10 July 1991*) to prohibit actions by the local police which amount to discrimination on the basis of (among other things), sexual orientation (art. 48(b)); The Basque Country's regulatory norms on social services (*Normas Reguladoras de Servicios Sociales (Boletín Oficial País Vasco of 12 November 1996, num. 218/1996)*), which provide that the system of social services will be governed by the principles of equality and universality meaning that people should have access to social services without discrimination on the grounds of sexual orientation and that positive measures will be taken to ensure equality of opportunities and treatment and Murcia's statute on the promotion and participation of young people (*Ley de promoción y participación juvenil de la Comunidad Autónoma de la Región de Murcia (Boletín Oficial del Estado of 2 June 1995, num. 131/1995 [p. 16271])*) which contemplates among the leading principles of the policies aimed at ensuring the effective integration and social, political, economic and cultural participation of young people the principle of universality meaning that those policies cannot discriminate on the basis of sexual preferences.

62/2003, de medidas fiscales, administrativas y de orden social). Statute 62/2003 explicitly states that it aims at implementing the Directive, setting a general framework to fight against racial or ethnic discrimination, spelling out the legal definition of both direct and indirect discrimination and modernising the regulation of equal treatment and non-discrimination in employment.

Also, increasingly, collective agreements, whose binding nature is constitutionally guaranteed (art. 37 of the Constitution), recognise in an express way the prohibition of discrimination in employment on the basis of sexual orientation.

15.2.2 Concept of sexual orientation (art. 1 Directive)

Statute 62/2003 does not define sexual orientation, neither does art. 314 of the Criminal Code. Whereas the Criminal Code refers to 'su' which, in Spanish can mean both his or her, art. 4(2)(c) of the Workers' Statute as amended by Statute 62/2003 does not make reference to the pronoun so that it may presumably cover both actual and presumed sexual orientation.

15.2.3 Direct discrimination (art. 2(2)(a) Directive)

Art. 28 in Statute 62/2003 incorporates for the first time a definition of direct and indirect discrimination into the Spanish legal order. Before that, those definitions had been judicially constructed. Art. 28(1)(b) defines direct discrimination as follows: direct discrimination is taken to occur where a person *is treated* less favourably than another in a comparable situation on the grounds of his or her racial or ethnic origin, religion or belief, disability, age or sexual orientation.¹⁷ Note that art. 2(a) of the Directive refers to 'when a person *has been or would be treated*' and the Spanish version of the Directive also refers to both possibilities (*haya sido o pudiera ser tratada*).

15.2.4 Indirect discrimination (art. 2(2)(b) Directive)

Statute 62/2003 also contains a definition of indirect discrimination (art. 28(1)(c)). According to it, indirect discrimination is taken to occur where an apparently neutral statutory or administrative provision, a conventional or contractual clause, a single agreement or a unilateral decision would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless they are objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.¹⁸ Note that the Directive refers to a 'provision, criterion or practice' (as does the Spanish version of the Directive) whereas the Spanish legislation refers in more inclusive

¹⁷ 'Discriminación directa: cuando una persona sea tratada de manera menos favorable que otra en situación análoga por razón de origen racial o étnico, religión o convicciones, discapacidad, edad u orientación sexual'.

¹⁸ 'Discriminación indirecta: cuando una disposición legal o reglamentaria, una cláusula convencional o contractual, un pacto individual o una decisión unilateral, aparentemente neutros, puedan ocasionar una desventaja particular a una persona respecto de otras por razón de origen racial o étnico, religión o convicciones, discapacidad, edad u orientación sexual, siempre que objetivamente no respondan a una finalidad legítima y que los medios para la consecución de esta finalidad no sean adecuados y necesarios'.

terms to 'a statutory or administrative provision, a conventional or contractual clause, a single agreement or a unilateral decision.'

The criminal provision refers to discrimination without specifying what is covered by it. Given its criminal nature it would be especially important to have a more clear definition of what forms of discrimination are included. It is not clear whether or not it covers indirect discrimination.

15.2.5 Prohibition and concept of harassment (art. 2(3) Directive)

Art. 28(2) in Statute 63/2003 conceptualises harassment as a form of discrimination and according to art. 28(1)(d) it is defined as 'any unwanted conduct related to a person's religion or belief, disability, age, or sexual orientation that takes place with the purpose or effect of violating the dignity of a person and creating an intimidating, humiliating or offensive environment.'¹⁹

It is important to notice that before Statute 62/2003 the concept of harassment in employment had been to a large extent jurisprudentially constructed. It referred predominantly to forms of sexual harassment and it was not clear whether it could be conceptualised as a form of discrimination, especially of discrimination other than *sex discrimination*.

The Constitutional Court had conceptualised *sexual harassment*, both of the *quid pro quo* (with an explicit threat regarding the negative consequences if the worker refuses the requested sexual favour) and hostile environment type by a private employer as an infringement of the constitutional right to privacy in art. 18 of the Constitution, accepting that it might also be considered a form of indirect sex discrimination given the statistics that show that women are more often victims of sexual harassment than men.²⁰

The Workers' Statute had recognised employees' rights to their privacy, to the due respect of their dignity, and to be protected against verbal or physical offences of a sexual nature (art. 4(2)(e)). This provision had been relied upon by the courts to protect workers mostly against sexual harassment, and only more recently against other forms of harassment.²¹ This provision has now been amended by Statute 62/2003 so that, beside the right of workers to the respect of their privacy and dignity and to be protected against verbal or physical offences of sexual nature, it now explicitly adds 'the right to be protected against harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation'.²²

Finally, the Criminal Code also punishes *sexual harassment*. In art. 184(1) it sanctions those who *in the framework of an employment relation* (hence, not necessarily just the employer)... *ask for a sexual favour for oneself or a third*

¹⁹ 'toda conducta no deseada relacionada con el origen racial o étnico, la religión o convicciones, la discapacidad, la edad o la orientación sexual de una persona, que tenga como objetivo o consecuencia atentar contra su dignidad y crear un entorno intimidatorio, humillante u ofensivo'.

²⁰ See *Sentencia del Tribunal Constitucional* [Constitutional Court Decision] 13 December 1999, 224/1999.

²¹ See *Sentencia del Juzgado de lo Social de Gerona* [Social Tribunal of Gerona], 17 September 2002, and *Sentencia del Tribunal Supremo*, 23 July 2001 describing forms of moral harassment.

²² 'protección frente a ofensas verbales y físicas de naturaleza *sexual* y frente al acoso por razón de origen racial o étnico, religión o convicciones, discapacidad, edad u *orientación sexual*'.

*party and with that behaviour provoke to the victim an objective and seriously intimidating, hostile or humiliating situation.*²³

15.2.6 *Instruction to discriminate (art. 2(4) Directive)*

Art. 28(2) of Statute 62/2003 provides that '[A]ny instruction to discriminate against persons on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation will be considered discrimination'²⁴ in strict application of art. 2(4) of the Directive.

No extensive interpretation is generally allowed in the criminal domain and so whether the instruction to discriminate qualifies as 'producing a discrimination' that art. 314 of the Criminal Code refers to is more dubious.

15.2.7 *Material scope of applicability of the prohibition (art. 3 Directive)*

Art. 34 in Statute 62/2003 defines the scope of application of the measures dealing with equal treatment and non discrimination in employment contained in the law. According to it, these 'measures are aimed at the real and effective accomplishment of the principle of equal treatment and non discrimination in relation to access to employment, membership of or involvement in an organisation of workers or employers, working conditions, work promotions and continuous professional training and retraining, access to self-employment or to occupation and membership of and involvement in any organisation whose members carry on a particular profession'.²⁵ The most significant difference between the text of the Spanish legislation and the Directive is that the latter is a little more explicit in that it contains specifications that are absent in the Spanish text. Thus, art. 3(1)(a) in the Directive specifies that conditions for access to employment, to self-employment or to occupation includes selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy (this specification is missing in the Spanish statute). Also, art. 3(1)(c) in the Directive specifies that it applies to employment and working conditions, including dismissals and pay (and again, this specification is missing in the Spanish statute). Since the Spanish legislation is intended as a transposition of the Directive it will most likely be interpreted in its light so that the absence of those specifications is not deemed to be very relevant. It is also worth noting that the Workers' Statute, which now explicitly refers to the prohibition of sexual orientation discrimination, already recognised that discrimination is prohibited both as regards access to employment and employment itself²⁶ and as regards to *pay, work hours, and other work conditions*.²⁷ To better comply with the Directive it would have been desirable to

²³ Art. 184.1 Criminal Code: '*El que solicitare favores de naturaleza sexual para sí o para un tercero, en el ámbito de una relación laboral...y con tal comportamiento provocare a la víctima una situación objetiva y gravemente intimidatoria, hostil o humillante....*'.

²⁴ '*Cualquier orden de discriminar a las personas por razón de origen racial o étnico, religión o convicciones, discapacidad, edad u orientación sexual se considerará en todo caso discriminación*'.

²⁵ '*medidas para que el principio de igualdad de trato y no discriminación sea real y efectivo en el acceso al empleo, la afiliación y la participación en las organización sindicales y empresariales, las condiciones de trabajo, la promoción profesional y la formación profesional ocupacional y continua, así como en el acceso a la actividad por cuenta propia y al ejercicio profesional y la incorporación y participación en cualquier organización cuyos miembros desempeñen una profesión concreta*'.

²⁶ Art. 4 (2) (c) *Estatutos de los Trabajadores*.

²⁷ Art. 17 *Estatutos de los Trabajadores*.

make an explicit reference to dismissal as well. However, throughout the years the Constitutional Court has also interpreted art. 14's constitutional anti-discrimination mandate (with regard to other grounds of discrimination such as sex) as prohibiting discrimination regarding access, treatment and conditions of employment covering things such as advertisement of the vacancies, renewal of contracts, pay and dismissal.

The Spanish provision mentions 'continuous professional training and retraining' but the Directive is more explicit in its mention to 'access to all types and all levels of vocational guidance, vocational training, advanced vocational training and retraining including practical work experience' (art. 3.1 (b)).

The Constitution explicitly sanctions the fundamental right of access to public office and functions (which includes public employment) in equal conditions (art. 23(2) of the Constitution) and makes reference to the leading principles of the civil service including those of *merit and capacity* (art. 103 of the Constitution).

The Criminal Code provision (art. 314) on the other hand only refers to those 'who produce a serious discrimination' in public or private employment but does not spell out what amounts to 'producing a serious discrimination'. Nor is it clear whether producing a serious discrimination in employment can be interpreted as covering access to employment.

15.2.8 *Personal scope of applicability: natural and legal persons whose actions are the object of the prohibition*

In strict application of art. 3(1) of the Directive, art. 27(2) of Statute 62/2003 provides that the measures for the application of the principle of equal treatment under it apply to every person, both in the public and the private sector.

Moreover, the prohibition of discrimination sanctioned in the Constitution and in the Workers' Statute, but not in the criminal code (only natural persons are considered perpetrators of crimes under the Spanish legal order), apply to both natural and legal persons²⁸ and to both the private and the public sector.²⁹

As for the private sector, the prohibition on discrimination and violating workers' fundamental rights is mainly addressed to the employer but can also be made applicable to managers,³⁰ and, presumably to co-workers or the labour union. Finally, art. 16(2) of the Workers' Statute, which refers to the prohibition of hiring agencies to discriminate on several grounds (which did not include sexual orientation) has now been modified by Statute 62/2003 (art. 37(3)) and now makes reference to sexual orientation.

²⁸ See arts. 10 and 17 of the Workers' Statute.

²⁹ The constitutional mandate of non-discrimination has been recognised as binding both public and private employers. The Criminal Code (art. 314) refers to discrimination in private or public employment and the *Sentencia del Tribunal Constitucional* [Constitutional Court decision], 3 August 1983, 85/83 has recognised that citizens ought not to be discriminated against, once incorporated into the public sector.

³⁰ See art. 1o *Real Decreto* [Royal Decree] 1382/1985, of 12 August 1985.

15.3 What forms of conduct in the field of employment are prohibited as sexual orientation discrimination?

Statute 62/2003 which is intended to implement the Directive does not offer much in terms of specifying the kind of conduct that amounts to sexual orientation discrimination. The only other provision that prohibits employment discrimination on the basis of sexual orientation is that of the Criminal Code (art. 314), which, again, does not define what forms of conduct amount to such. The prohibitions that derive from the Constitution are at best implicit. Statute 62/2003 has indeed modified the Workers' Statute so that it now explicitly prohibits employment discrimination based on sexual orientation, but again this legislation does not say much in terms of the specific conduct that amounts to discrimination. Therefore, much of what will be said in the next pages is the result of general legal reasoning.

15.3.1 *Discrimination on grounds of a person's actual or assumed heterosexual, homosexual or bisexual preference or behaviour*

There seems to be little doubt that art. 314 of the Criminal Code would cover a person's sexual preference, as that seems to follow from the notion of sexual orientation referred to. Since the Constitution contains an open-ended anti-discrimination clause referring to 'any other personal or social *condition*' I think that it would also cover a person's sexual identity.

As far as sexual behaviour is concerned, there are no reported cases to judge as to whether or not it would be covered by art. 314 of the Criminal Code. There is at least one lower court decision outside the employment field that supports this option.³¹

As far as the constitutional anti-discrimination clause is concerned, if read as covering sexual orientation, I think it would also cover the expression of forms of sexuality typical of those orientations. There is no doubt that the freedom to exercise one's sexuality is covered by the right to the free development of one's personality and the right to privacy (arts. 10 and 18 of the Constitution). However, it is interesting to notice that there may still be vestiges of discrimination of this sort in the military domain (see below 15.6.4).

As for whether or not the provisions would cover a person's assumed and not only actual sexual orientation, nothing is said in the existing legislation. Art. 314 of the Criminal Code, refers to *su orientación sexual* (possessive pronoun that stands for his or her) and thus, strictly speaking seems to cover only actual and not presumed sexual orientation. In spite of this, the most extensive interpretation has been supported at least by one lower criminal court in the interpretation of the Criminal Code's provision aggravating criminal responsibility when the crime is committed with the motivation of the victim's

³¹ In the *Sentencia de la Audiencia Provincial de Barcelona (sección 3a)* [Sentence of the Provincial Court of Barcelona] of 20 June 2000, a doorman had asked a couple of men who were kissing in a disco to leave the place, whereas heterosexual couples were freely kissing. The judge decided that this conduct was discrimination on the ground of sexual orientation of the kind prohibited by art. 14 of the Constitution although not sufficiently serious to qualify as a criminal conduct under art. 512 of the Criminal Code (which prohibits to those exercising a profession or running a business denying somebody a service to which s/he might otherwise have access to, because of his or her sexual orientation).

sexual orientation.³² Art. 4(2)(c) of the Workers' Statute as recently amended by art. 37 of Statute 62/2003 does not include the pronoun so that it can be interpreted as covering also presumed sexual orientation. In any event, given that forcing somebody to disclose his or her sexual orientation would clearly be considered a breach of his or her right to privacy under art. 18 of the Constitution, it is likely that, however defined, discrimination on the basis of sexual orientation will also cover discrimination on the basis of a belief about an individual's sexual orientation whether or not this proves to be the case.

15.3.2 *Discrimination on grounds of a person's coming out with, or not hiding, his or her sexual orientation*

Again, nothing is explicitly contemplated in the relevant anti-discrimination provisions of Statute 62/2003. The most likely scenario of this specific kind of discrimination is one in which the person has a right to be it, but not a right to tell it. The problem, presumably, could lie not so much in telling it to co-workers (as this kind of expression would certainly be covered by the worker's generic freedoms of expression and right to privacy) but in telling it to the outside world (clients, the media) to the extent that this may entail some damage to the image of the firm at least as long as homosexuality is not more widely accepted. The scholarly doctrine is divided between those that claim that all the employer can expect and demand from the worker is the good performance of his or her employment and that therefore the worker's private life is none of the employer's business,³³ and those that are somewhat more cautious and inclined to analyse situations on a case-by-case basis in the understanding that until homosexuality is generally accepted, the employer's interest in not being associated with it cannot simply be dismissed.³⁴ I do not think this second interpretation is compatible with the Directive. My intuition is that, with the recent incorporation of an explicit prohibition of discrimination on the grounds of sexual orientation in the employment legislation 'don't tell' policies will be considered as either direct or indirect discrimination.

15.3.3 *Discrimination between same-sex partners and different-sex partners*

- *Related to Marriage*

The Spanish Constitution contemplates the right of men and women to marry (art. 32). Most of the scholarly doctrine as well as the Constitutional Court have taken this to mean that men and women have the right to marry each other and hence, that the only marital institution that is constitutionally 'privileged' is heterosexual marriage.³⁵ Indeed the Civil Code sanctions only marriage *between* a man and a woman (art. 44). The Workers' Statute recognises a set

³² See *Sentencia de la Audiencia Provincial de Cantabria* [decision of Cantabria's provincial court], no. 19/2001 (*sección 2*) of 4 October 2001, accepting the aggravating circumstance even though the victim was not a homosexual as the aggressor had wrongly assumed in application of art. 22(4) of the Criminal Code which does not expressly refer to the victim's actual and presumed sexual orientation but only to the victim's sexual orientation.

³³ Goñi Sein 1988, 257-258 and Vicente Pachés 1998, 347.

³⁴ See Montoya Melgar 1983, 16. Indeed a couple of pre-constitutional judicial cases accepted this line of argument in justifying the dismissal of employees. See *Sentencia del Tribunal Supremo* [decision of the Supreme Court] of 27 October 1965, Ar. 4816 and *Sentencia del Tribunal Central de Trabajo* [Central Labour Court] of 24 January 1977, Ar. 266.

³⁵ See *Auto del Tribunal Constitucional* 222/94 of 11 July 1994.

of marital statuses or family status-related benefits that either require marriage or reflect the scheme of the heterosexual union and hence from which people in homosexual unions are excluded, and which may amount to invalid discrimination on the grounds of sexual orientation at least in some cases (see below 15.6.4).

Thus far the exclusion that has stirred up the largest controversy in front of the courts has been the exclusion of non-married partners from widower's pensions as sanctioned in a legal provision of the Social Security Statute.³⁶ This exclusion has been upheld as non-discriminatory by the Constitutional Court³⁷ and this line of reasoning has been followed by lower courts.³⁸ As the Directive excludes social security benefits, little progress can be expected in this area.

There are however promising signs coming from the increasing practice to include clauses in Collective Agreements that specify that benefits legally reserved to married couples extend to stable unions (especially if they are registered) and the increasing regional legislation regulating de facto unions which, within their realm of jurisdiction, extend benefits thus so far reserved to married couples.³⁹ Also, as mentioned, the new elected socialist government has promised to open marriage to gays and lesbians.

- *Unrelated to Marriage: Registered partnership*

In Spain there is no general statute on civil unions with a generalised system of registry for partnership. The newly elected socialist government has promised to change this during its current mandate. In 1994 a municipality established the first municipal register without regard to the couple's sexual orientation and this example was then followed by hundreds of other municipalities and several autonomous communities. Registration is no substitute for marriage. The regional statutes on de facto unions attach to it some legal effects, mostly the option that partners stipulate their economic regime. Most collective agreements extending benefits to non-marital partnerships require that the partnership be registered. In spite of registration, the marital status of the partners is not changed, nor are there any consequences that ensue regarding the children of the partners.

For our purposes, it is interesting to note that as far as public employment in the region is concerned, these regional statutes extend to registered partners the same regime of benefits, permits, health and social benefits as those enjoyed by married couples.

³⁶ Art. 160 of the *Ley General de Seguridad Social* [General Statute on Social Security], *Decreto* [Decree] 2065 of 30 May 1974.

³⁷ *Sentencia del Tribunal Constitucional* [Constitutional Court Decision], 15 November 1990, 184/1990.

³⁸ See *Sentencias de los Tribunales Superiores de Justicia* [Decisions of the Superior Justice Courts (highest regional courts) Madrid No 558/1999. no. 52/1999, no 339/2001 and Andalusia no 1590/2001. But see also decision *del Juzgado de lo Social de Madrid* n. 29, of September 1994 extending the pension to a de facto partner on the basis of art. 14's equality provision of the Constitution.

³⁹ See *Ley de uniones estables de Cataluña* (L. 10/98 of 15 July 1998), arts. 9 and 27 ; *Ley de parejas estables no casadas de Aragón* (L. 6/99 of 26 March 1999), art. 18, *Ley de parejas estables de Navarra* (L. Foral 6/00, of 3 July 2000), art. 13; *Ley de uniones de hecho de Valencia* (L. 1/01 of 6 April 2001), art. 9; *Ley 18/2001, de 19 de diciembre de parejas estables de Baleares*, DA 2; *Ley 11/2001 de 19 de diciembre de uniones de hecho de la Comunidad de Madrid*, art. 8; *Ley de parejas estables de Asturias* (l. 4/02 of 23 May 2002), art. 7; *Ley de parejas de hecho de Andalucía* (L 5/2002 of 28 December 2002), art. 21; *Ley 5/2003 de 6 de marzo de parejas de hecho de Canarias*, art. 11; *Ley 5/2003 de 20 de marzo de parejas de hecho de Extremadura*, art. 10 and *Ley Reguladora del régimen jurídico aplicable a las parejas de hecho del País Vasco* (Ley 2/2003 of 7 May 2003), art. 11.

- *Unrelated to Marriage: unregistered de facto unions*

Sometimes the prejudices that same-sex partners encounter hinge on the assumption that the family union is a heterosexual one. Thus, there are some benefits that the Workers' Statute attaches to the fact of having and/or raising a child and are phrased on the assumption that the parents (biological or adoptive, married or unmarried) are of a different sex. In this regard it is important to note that in Spain one can adopt a child as a single parent and inquiry into that person's sexual orientation is not allowed. Joint adoption was initially foreseen as a possibility for married couples only (art. 175(4) of the Civil Code) but was extended to different-sex non-married couples in 1987.⁴⁰ Same-sex partners cannot adopt jointly nor can the same-sex partner adopt the biological son or daughter of his or her partner.⁴¹ In my opinion all of this amounts to different types of indirect employment discrimination of same-sex couples jointly raising a child (see below 15.6.4).

As mentioned above, many collective agreements are making up for the legislation's vacuum in the protection of non-married partners by explicitly stating that the privileges that the law grants to married partners should extend to stable or de facto unions.⁴² The explicit inclusion of same-sex partners, however, is exceptional. It is far more common to either refer to different-sex partners, or to de facto stable unions without any further specification. Given that employers tend to interpret the clauses in the most restrictive ways - excluding same-sex partners in the process - there is growing litigation in this regard. The results have thus far been erratic. The National Railway Company (*RENFE*), for instance, has been sued in different occasions and although it has lost in front of the lower courts it has systematically appealed with different degrees of success.⁴³ It has finally changed its rules to extend benefits to same-sex partners.⁴⁴

There are indeed growing signs of change in social awareness and acceptance of the equal rights of same-sex partners. Just recently the rules on military residence of the Guardia Civil (special body of the security forces concerned mostly with internal security and order) have been amended to allow same sex partners to occupy them. Also, there is some incipient judicial practice that explicitly takes changes in social perception ('the new social reality') as a relevant criterion for judicial interpretation. Thus, with regards to welfare and health benefits, where the law allows those benefits to cover non-married stable partners - although the original intent was to limit this to opposite-sex partners -

⁴⁰ *Ley 21/1987, disposición adicional 3.*

⁴¹ As of today, two of the regional statutes mentioned in note 55, Navarra's and that of the País Vasco have extended the option of adoption to same sex partners. They have been challenged in front of the Constitutional Court and the case is still pending.

⁴² See, for instance, *Convenios Colectivos de la Red de Ferrocarriles Nacional* [collective agreements of the National Railway] (*Boletín Oficial del Estado* of 18 July 2000), Iberia (*Boletín Oficial del Estado* of 16 December 1999) that can be found at <www.boe.es>.

⁴³ See *Sentencias de los Juzgado Social* [decision of social provincial courts] de Barcelona, Valladolid, Madrid (15 January 2002) and Sevilla and *sentencia del Tribunal Superior de Justicia de Cataluña* [decision of the regional court], 3 September 1998, n. 5637/1998.

⁴⁴ There have been similar conflicts with Iberia employees in relation to the interpretation of its collective agreement as covering only different-sex or also same-sex de facto unions.

some lower courts have been willing to extend the benefits to same-sex partners.⁴⁵

15.3.4 *Discrimination on grounds of a person's association with gay/lesbian/bisexual/heterosexual individuals, events or organisations*

Nothing is said in the legislation. However now that an explicit prohibition of sexual orientation discrimination in employment exists, an extensive interpretation is much more likely than before, when the only explicit prohibition of the kind was contained in the Criminal Code. In any event, the discrimination may be related to an activity which in itself deserves constitutional protection through other means such as freedom of speech, association, union, manifestation, assembly, etc.

15.3.5 *Discrimination against groups, organisations, events or information of/for/on lesbians, gays or bisexuals*

Nothing is explicitly mentioned in the legislation. However it may be the case that the activity is covered by other constitutional provisions such as freedoms of speech, assembly, information, manifestation or right to form a union, all of which apply also in the employment domain.

15.3.6 *Discrimination against a person's refusal to answer, or answering inaccurately, a question about sexual orientation*

Nothing is explicitly provided in legislation. However, the freedom of religion and ideology and the right not to declare one's ideological or religious beliefs (art. 16 of the Constitution) has been interpreted as implying that the worker can freely choose his or her ideas, vital options and religious or political convictions, and needs to be protected against intrusions or retaliatory measures by the employer.⁴⁶ Also relevant is the right to privacy, sanctioned both constitutionally (art. 18) and statutorily (art. 4(2)(e) of the Workers' Statute), which covers the right of non-intrusion into one's intimate and private sphere. Thus there seems to be widespread consensus that the employer is not allowed to inquire into aspects of the worker's private life that are fully inconsequential to determine his or her adequacy for the employment and this will presumably be the case with his or her sexual orientation, so that the worker can refuse to answer or give an inaccurate answer to a question about his or her sexual orientation in the name of the right to privacy without having this negatively affect him or her, unless the sexual orientation is somehow related to the performance of the work.⁴⁷

⁴⁵ See *Sentencia del Tribunal Superior de Justicia de Navarra* [Decision of the Superior Court of Justice of Navarra] No. 401/2000.

⁴⁶ See *Sentencias del Tribunal Constitucional* [Constitutional Court Decisions], 22 April 1993, 142/1993; 292/1993 of 18 October 1993 and 145/1999 of 22 July 1999.

⁴⁷ See De Vicente Pachés 1998, 108; Goñi Sein 1988.

15.3.7 *Discrimination on grounds of a person's previous criminal record due to a conviction for a homosexual offence without heterosexual equivalent*

Nothing is foreseen in the legal order. In this regard it is interesting to notice that although homosexuality was fully decriminalised in 1979, and there was a general amnesty, only very recently have the police filings of dangerous individuals (that referred to the person's sexual orientation) been destroyed.

15.3.8 *Harassment*

As we saw in 15.2.5, art. 28(2) in Statute 63/2003 conceptualises harassment as a form of discrimination and art. 28(1)(d) in the same statute defines it as 'any unwanted conduct related to a person's religion or belief, disability, age, or sexual orientation that takes place with the purpose or effect of violating the dignity of a person and creating an intimidating, humiliating or offensive environment'.⁴⁸ It is interesting to note that both art. 2(3) in the Directive and its Spanish translation refer not only to an *intimidating, humiliating or offensive environment*, but also to *hostile or degrading* environment. It is not clear why the Spanish legislator has decided to leave two adjectives out of the list, or what the implications, if any, of such omission could be. One thing is clear. One cannot say that the Spanish legislator has accorded harassment the narrowest meaning because, in their common understanding, some of the descriptors included (such as *offensive*) are hardly less serious than those left out (*hostile* and *degrading*).

The Workers' Statute already recognised employees' rights to their privacy, to the due respect of their dignity, and to be protected against verbal or physical offences of a sexual nature (art. 4(2)(e)) and, as mentioned, has now been modified to include 'the right to be protected against harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation'. This concept of harassment will now presumably be interpreted in the light of the definition of harassment in Statute 62/2003.

As for the prohibition in the criminal code, as mentioned, it only refers to *sexual* harassment. Art. 184(1) of the Criminal Code refers to those who *in the framework of an employment relation* (hence, not necessarily just the employer)... *ask for a sexual favour for oneself or a third party and with that behaviour provoke to the victim an objective and seriously intimidating, hostile or humiliating situation*⁴⁹ (no intent is thus required but the situation cannot be measured *only* according to the victim's sensitivity given the requirement of objectivity). The punishment is aggravated *when the person who harasses does so taking advantage from his or her hierarchical employment position; when he or she either explicitly or implicitly threatens the worker with harming his or her*

⁴⁸ 'toda conducta no deseada relacionada con el origen racial o étnico, la religión o convicciones, la discapacidad, la edad o la **orientación sexual** de una persona, que tenga como objetivo o consecuencia atentar contra su dignidad y crear un entorno intimidatorio, humillante u ofensivo'.

⁴⁹ Art. 184(1) Criminal Code: 'El que solicitare favores de naturaleza sexual para sí o para un tercero, en el ámbito de una relación laboral...y con tal comportamiento provocare a la víctima una situación objetiva y gravemente intimidatoria, hostil o humillante....'.

legitimate employment expectations (art. 184(2)) or when the victim is especially vulnerable because of age, sickness or condition (art. 184(3)).⁵⁰

Making unwelcome sexual advances to a person of the same sex will qualify as sexual harassment of the type criminally prohibited if the behaviour provokes an objective and seriously intimidating, hostile or humiliating situation for the victim (art. 181 of the Criminal Code). It will qualify as a violation of the worker's right not to be discriminated against on the ground of sexual orientation (according to art. 4(2)(c) of the Workers' Statute and 28(1)(d), and 28(2) of Statute 62/2003) if it can be shown that this unwanted conduct is related to the person's sexual orientation and takes place with the purpose or effect of violating the dignity of the person and creating an intimidating, humiliating or offensive environment.

As far as using derogatory language or expressing negative opinions about homosexuality or about gay, lesbian or bisexual person, if the conduct is sufficiently harmful it could qualify as an infringement against the workers' right to the respect of their dignity and to be protected against verbal offences (art. 4(2)(e) of the Workers' Statute) whether or not it qualifies technically as harassment in view of the definition of the concept that art. 28(1)(d) in Statute 63/2003 gives. On the other hand, it is well-consolidated doctrine by the Constitutional Court that the constitutional freedom of expression (art. 20) has limitations due to the recognition of the right to honour (art. 18) so that insults are not covered. Moreover the Criminal Code considers the crime of affront or insult as actions or expressions which damage the dignity of others, affecting their reputation or self-esteem when due to their nature, effects or circumstances these expressions would be perceived as serious according to public opinion (art. 208 of the Criminal Code).

As for *outing* or revealing a person's sexual orientation against his or her will, it is not clear that this will be conceptualised as discrimination or harassment. Again, the legal order is silent to this regard. However, the constitutionally and statutorily recognised right to privacy probably encompasses the right not to disclose information about one's sexual orientation and the protection against interference by others (art. 18 of the Constitution, and art. 4(e) of the Workers' Statute). The Criminal Code punishes the conduct of those who in order to find out about a person's private life intercept his or her email, correspondence, communications, etc. without the consent of the person (art. 197); aggravates the sanction when the information affects aspects related to a person's sexual life (art. 197), and increases the punishment when the conduct is performed by a civil servant taking advantage of his or her position (art. 196). It also and separately punishes those who reveal confidential information concerning others to which they might have had access because of their job or professional relation (art. 199).⁵¹ Also relevant is a Law (*Ley Orgánica* 15/1999 of 13 December 1999) on the protection of personal data. The Constitutional Court

⁵⁰ Art. 184(2)/184(3) Criminal Code: '*Si el culpable del acoso sexual hubiera cometido el hecho prevaliéndose de una situación de superioridad laboral...o con el anuncio expreso o tácito de causar a la víctima un mal relacionado con las legítimas expectativas que aquella pueda tener en el ámbito de la mencionada relación...o cuando la víctima sea especialmente vulnerable, por razón de su edad, enfermedad o situación.*'

⁵¹ On the general protection of personal data see also (*Ley Orgánica* [Organic Law] 15/1999 of 13 December 1999) providing that data can only be revealed if there is consent of the person affected (art. 5.c).

has interpreted that the right to privacy covers the right to have control over one's personal data.⁵²

15.4 Exceptions to the prohibition of discrimination

15.4.1 Objectively justified indirect disadvantages (art. 2(2)(b)(i) Directive)

Literally reproducing the exception defined in art. 2(2)(b)(i) in the Directive, art. 28(1)(c) of Statute 62/2003 provides that indirect discrimination is taken to occur where an apparently neutral statutory or administrative provision, a conventional or contractual clause, a single agreement or a unilateral decision would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared to other persons *unless they are objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.*⁵³

15.4.2 Measures necessary for public security, for the protection of rights of others, etc. (art. 2(5) Directive)

None are explicitly mentioned.

15.4.3 Social security and similar payments (art. 3(3) Directive)

Statute 62/2003 does not contain any specific provision in this regard. Survivor's pensions are limited to married partners (art. 174(1) of the *Ley General de Seguridad Social* [General Law on Social Security]), and the newly appointed socialist government has promised to extend them to registered partners. Several other social security benefits have thus far been limited to the married spouse. One is an economic premium in case of death of the spouse to cover the expenses of the burial which is to go to whoever has incurred in the costs, though a priori it is assumed that the persons who have incurred in the expense, and hence to whom the payment should go are the surviving spouse, children of the survivor, and the rest of the family members living with him or her (art. 173 of the Social Security Law). There is also the right to compensation in case of work-related death or work-related sickness that goes to the surviving spouse (art. 177(1) of the Social Security Law). Finally art. 215 of the Social Security Law provides for unemployment subsidy to unemployed persons with family responsibilities. Given that the Directive exempts social security payments the Directive is probably not going to have any effect on these situations though the newly elected socialist government has promised to remove any kind of discrimination on the grounds of sexual orientation also from social security legislation.

⁵² *Sentencia del Tribunal Constitucional* 254/1993.

⁵³ '*Siempre que objetivamente no respondan a una finalidad legítima y que los medios para la consecución de esta finalidad no sean adecuados y necesarios*'.

15.4.4 Occupational requirements (art. 4(1) Directive)

Art. 34(2)(2) in Statute 62/2003 provides that there will not be discrimination on the listed grounds, including sexual orientation where, 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes an essential and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate'. Thus, the provision reproduces the occupational requirement exception of art. 4(1) of the Directive.⁵⁴ Also, art.16(2) of the Workers' Statute which referred to the prohibition of hiring agencies to discriminate on several grounds (which did *not* include sexual orientation) and has now been modified by Statute 62/2003 (art. 37), so that it now makes reference to sexual orientation as well as all the other grounds under the two Directives has also been modified to add the proviso 'as long as workers are apt to perform the work or employment'.

15.4.5 Loyalty to the organisation's ethos based on religion or belief (art. 4(2) Directive)

Neither Statute 62/2003 nor any other piece of legislation addresses this issue at all. Thus, in the legal order there is no definition of what ought to be considered as an ideological organisation or what academia has called 'tendency organisation'. However, according to general constitutional doctrine, since the principle of good faith that has to rule in work relations (art. 5(a) of the Workers' Statute), employees in ideological or 'tendency' organisations can be asked to conform to a minimal extent with the organisation's ethos.⁵⁵ Both doctrine and courts have made it explicit that even within ideological institutions one has to distinguish between 'ideological' and 'neutral positions' within the organisation. Only the former are about transmitting the ideology of the institution and thus those in which ideological affinity can be expected.⁵⁶ In our case, given the longstanding rejection of homosexuality by the Catholic faith this brings up interesting issues concerning religious institutions. In relation to those, especially to private religious schools, the Constitutional Court has considered that, once again, the most relevant factor to be taken into consideration is what the job itself consists of. If it is strictly linked to the spreading of the schools' ethos, constraints will be more justifiable than if the job consists in developing some purely technical expertise or is restricted to the pure transmission of knowledge.⁵⁷ According to some scholarly doctrine this would allow employers in this kind of institutions to inquire about the worker's sexual orientation.⁵⁸ On the other hand some scholars have pointed out that it is a worker's conduct and not his sexual preference per se that could be seen as violating the institution's

⁵⁴ 'Las diferencias de trato basadas en una característica relacionada con cualquiera de las causas a que se refiere el párrafo anterior no supondrán discriminación cuando, debido a la naturaleza de la actividad profesional concreta de que se trate o al contexto en que se lleve a cabo, dicha característica constituya un requisito profesional esencial y determinante, siempre que el objetivo sea legítimo y el requisito proporcionado'.

⁵⁵ See *Sentencia del Tribunal Constitucional* [Constitutional Court Decision], 27 March 1985, 47/1985.

⁵⁶ Calvo Gallego 1995, 171 and *Sentencia del Tribunal Constitucional* [Constitutional Court Decision], 12 June 1996, 106/1996.

⁵⁷ See *Sentencia del Tribunal Constitucional* [Constitutional Court Decision], 13 February 1981, 5/1981.

⁵⁸ Vicente Pachés 1998, 111; Fernández López 1985, 440.

ethos so that it is only when the conduct is notorious and has the capacity to discredit the institution's ethos that measures can be taken.⁵⁹

15.4.6 Positive action (art. 7(1) Directive)

Art. 35 in Statute 62/2003 provides that 'with a view to ensuring full equality on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, the principle of equality shall not prevent maintaining or adopting specific measures in favour of certain groups in order to prevent or compensate for disadvantages that they may encounter in those matters that fall within the scope of this section'.⁶⁰ Also, art. 42 in the same Statute provides that 'collective agreements may include measures directed to fight against every form of employment discrimination, to encourage equality of opportunities and to prevent harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation'.⁶¹

Moreover the Workers' Statute provides that in order to promote the hiring of groups with special difficulties in finding employment the government can decide to give fiscal incentives to business so as to promote the hiring and the work stability of those groups (art. 17(3) of the Workers' Statute). More generally, the Constitutional Court has repeatedly held that affirmative action measures are not to be seen as discriminatory. Rather, the Court has interpreted that actions of the public authorities to remedy the employment disadvantage of certain socially marginalised groups actually is required by a commitment to equality properly understood (art. 14 in relation to art. 9.2 of the Constitution). There have been no cases in which those measures have been struck down in the understanding that they could amount to discrimination. Rather, they have been scrutinised to ensure that they did not have stigmatising effects for the vulnerable groups themselves. Hence, though never applied to measures addressed at gays, lesbians or bisexuals thus far,⁶² the doctrine seems to go further than the Directive in that it does not see affirmative action as an exception (whether legitimate or not) but rather as a fulfilment of equality.

15.5 Remedies and enforcement

15.5.1 Basic structure of enforcement of employment law

Conflicts regarding either private employment or the hired personnel of public entities (subject to labour law) are resolved by the social jurisdictional branch

⁵⁹ Fernández López 1985, 440.

⁶⁰ *'Para garantizar en la práctica la plena igualdad por razón de origen racial o étnico, religión o convicciones, discapacidad, edad y orientación sexual, el principio de igualdad de trato no impedirá que se mantengan o se adopten medidas específicas a favor de determinados colectivos destinadas a prevenir o compensar las desventajas que les afecten relativas a las materias incluidas en el ámbito de aplicación de la presente sección'.*

⁶¹ *Artículo 42. Fomento de la igualdad en la negociación colectiva.*

'Los convenios colectivos podrán incluir medidas dirigidas a combatir todo tipo de discriminación en el trabajo, a favorecer la igualdad de oportunidades y a prevenir el acoso por razón de origen racial o étnico, religión o convicciones, discapacidad, edad u orientación sexual'.

⁶² Rather the doctrine has thus far only been applied to measures addressed at women (see, for instance, *Sentencia del Tribunal Constitucional* [Constitutional Court Decision] 128/1987) and people with disabilities (see, for instance, *Sentencia del Tribunal Constitucional* [Constitutional Court Decision] 269/1994).

composed by the *juzgados de lo social de única instancia* (specialised social and labour first and only instance courts), *las salas de lo social de los Tribunales de primera y segunda instancia* (first instance and appeal chambers specialised in social and labour law), *Tribunales Superiores de Justicia* (regional high courts) and *la Audiencia Nacional* (national appeals court) and the *sala de lo social del Tribunal Supremo* (the social and labour law chamber of the Supreme Court). When the conflicts are due to an action by the administration subject to administrative (and not labour) law, the jurisdictional branch which is competent is the *jurisdicción contencioso-administrativa* (administrative disputes jurisdiction) which requires the prior exhaustion of whatever administrative appeals there may be and which is formed by *juzgados y tribunales contenciosos administrativos, en primera y segunda instancia* (first instance and appellate administrative disputes courts), and by the *sala de lo contencioso-administrativo del Tribunal Supremo* (the administrative disputes chamber of the Supreme Court). The *Tribunal Supremo* (the highest instance within the ordinary judiciary) is in charge of solving appeals to unify contradictory doctrine of lower courts and its decisions are generally binding and thus constitute a source of law.

When the infringement of some constitutional right is at stake, including the right not to be discriminated against, there is no need to exhaust administrative appeals, there is the option to make use of a special and faster judicial procedure provided for by both the labour and administrative judicial orders in front of the ordinary courts. Finally, once the appeals within the judiciary have been exhausted, there is a right to present the claim in front of the Constitutional Court.

15.5.2 Specific and/or general enforcement bodies

Currently there are no specific enforcement bodies, either national or regional, dealing with discrimination on the grounds of sexual orientation.⁶³ It is interesting to note that there are special offices both at national and regional level and within unions where complaints regarding the discrimination of other vulnerable groups such as women, immigrants, young people and people with disabilities can be addressed.⁶⁴ Finally, Statute 62/2003 only foresees the creation of a Council for the promotion of equal treatment and non-discrimination of people on the grounds of their *ethnic origin or race* (art. 33).

On the other hand there are Work Inspectors within the Departments of Labour and Social affairs, at the central level or dependent on the Autonomous Communities, with a wide range of functions including, most importantly, supervising the general compliance with labour law.

⁶³ Only the Basque Country's statute on de facto unions (*Ley Reguladora del régimen jurídico aplicable a las parejas de hecho del País Vasco, Ley 2/2003 of 7 May 2003*) foresees a special office with that purpose.

⁶⁴ For an overview of the social actions addressed at these groups (but not to homosexuals or bisexuals) see the web page of the Department of Labour www.mtas.es/guia2002/texto/guia.htm.

15.5.3 *Civil, penal, administrative, advisory and/or conciliatory procedures (art. 9(1) Directive)*

Within the employment domain there are a series of mechanisms to prevent conflicts or resolve them without having to go to court or having to exhaust existing judicial appeals. Thus, there is a conciliatory procedure which is mandatory both before and during the judicial process.⁶⁵ In charge of conciliation are both first instance labour judges and administrative conciliatory bodies which operate both at a national and regional level. If conciliation is achieved, the process ends and the result achieved has the force a judicial decision would have. Both the parties and third parties can appeal the decision of the conciliatory body.

Besides these conciliatory bodies, the law authorises workers and employers to include mechanisms for conflict resolution in collective agreements whose function may consist of conciliation, mediation or arbitration and, depending on what has been decided in the agreement, their use in case of conflict may be optional or mandatory.⁶⁶

As far as public entities are concerned, although they are not allowed to partake in conciliatory procedures, before appealing to the judicial process the claim has to be presented in front of the competent administrative authority, and only exhaustion of the administrative path is in principle required.

It is important to notice that Statute 62/2003 (art. 40) modifies art. 181 of the Statute on Labour Procedure. This provision is under Chapter XI which contemplates a special legal proceeding for the protection of the freedom to unionise and provides that the same procedure applies for the protection of the rest of fundamental rights and freedoms and the prohibition of discrimination. The new text includes harassment claims as being also covered by this special legal proceeding whose main characteristic is that these cases are given priority over others and placed in a fast track procedure before the judiciary (art. 177 of the Statute on Labour Procedure).

As for the criminal procedure to implement art. 314 of the Criminal Code, it is the ordinary criminal procedure but given the way the crime is described it has very few chances of being applied. This is so because it can only start after an administrative process has taken place condemning the employers' conduct and, in spite of this, the employer insists on his or her discriminatory conduct and/or does not comply with the sanction decided in the previous administrative procedure.

15.5.4 *Civil, penal and/or administrative sanctions (art. 17 Directive)*

The Workers' Statute sanctions the 'nullity' of those administrative regulatory provisions, conventional or contractual clauses, agreements or unilateral decisions of the employer which amount to discrimination (art. 17 of the Workers' Statute). Statute 62/2003 (art. 37) has amended the provision to include explicit reference to discrimination on the grounds of sexual orientation.

⁶⁵ See arts. 63 and 66 of the *Ley de Procedimiento Laboral* [Statute of Employment Procedure] and arts. 82 and 83 of the *Estatuto de los Trabajadores* [Workers' Statute].

⁶⁶ See *Sentencia del Tribunal Constitucional* [constitutional court decision], 16 October 1989, 162/89, and *Sentencia del Tribunal Constitucional* [constitutional court decision], 14 November 1991, 217/91.

The provision, as amended, also makes explicit reference to the prohibition of both direct and indirect discrimination. The *Ley de Procedimiento Laboral* [statute on Employment Procedure], provides that once the nullity of the employer's action has been declared, the judicial decision will provide for the immediate halting of the damaging behaviour, the reposition to the situation prior to the violation of the worker's rights, the reparation of the consequences derived from the action, and compensation for the resultant harm (arts. 175, 180, and 181).

When the discriminatory conduct takes place at hiring, if the discriminatory act can be individualised as to its impact on a specific person, it seems that the solution should be to force the employer to hire the person.⁶⁷ On the other hand, when the affected individuals have been affected in a non-specific way (say, because they simply were excluded from entering the selection process), then the doctrine seems to agree that simply ordering a new and non-discriminatory process should be the best way to go.⁶⁸ If the discrimination takes place during a valid employment relationship, then a sentence or a decision that finds the discrimination claim well grounded must order the ending of the discriminatory conduct and compensation for its effect. If the discrimination concerned wages, the employer will not be able to restore equality by lowering the pay of the thus far privileged class.⁶⁹ Finally, if the worker's discrimination has amounted to dismissal, the employer will have to readmit the worker, recognise the salaries that he or she has lost and whatever other rights the worker had accumulated⁷⁰ and possibly other damages as well (art. 180 of the Labour Procedure Law).

Moreover, the law provides economic sanctions for the legal, contractual, and conventional infractions of the private employer (*Real Decreto Legislativo* [Royal Legislative Decree] 5/2000 of 4 August 2000 on infractions and sanctions related to the social domain (art. 5)). These sanctions are imposed by the competent Labour and Social Security Inspection and range from light, to serious, and very serious. Statute 62/2003 (art. 41) modifies Statute 5/2000 in the following ways: Art. 8 contains a list of what are to be considered very serious infractions in the area of labour relations. Art. 8(12) refers to those unilateral decisions of the employer that amount to discrimination related to pay, work schedule, training and promotion on several grounds which did not include sexual orientation. After the reform, explicit mention to direct and indirect discrimination has been added and sexual orientation has been added to the list of grounds. Also the provision now adds to those decisions that amount to discrimination a reference to those that 'amount to an adverse treatment of workers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination'. Also, art. 8(13)(bis) has been added. It now considers very serious infractions harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, when it takes place within the realm of prerogatives of the management, whoever the agent may be, as

⁶⁷ See Lousada Arochena 1996, 156.

⁶⁸ See Cruz Villalón 2001, 325.

⁶⁹ See *Sentencia del Tribunal Constitucional* [Constitutional Court Decision] 81/1982 regarding sex discrimination.

⁷⁰ *Sentencia del Tribunal Constitucional* [Constitutional Court Decision] 33/1986.

long as, when known by the employer, the latter does not undertake the necessary measures to prevent such infractions. Finally, art. 16(2), in the section about infractions in the area of hiring and under the list of those infractions that are considered very serious has been modified. It now provides that it is a very serious infraction of the employer or hiring agencies to establish employment conditions, be it through publicity or in any other way that amounts to discrimination on several grounds to which sexual orientation has been added.

Statute 62/2003 also modifies art. 54(2) of the Workers' Statute, adding subparagraph (g). The provision lists the grounds of disciplinary dismissals. It now adds, among the reasons of contractual misbehaviour, 'harassment of the employer or other employees in the undertaking on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation'⁷¹.

When the employer partakes in the criminal conduct of serious discrimination in employment on the ground of sexual orientation (art. 314) the sanction will consist in imprisonment from 6 months to 2 years, completed with an economic sanction regardless of the civil responsibility that may derive from the criminal conduct. As defined, the crime requires a serious discriminatory action and the employer must have been warned or sanctioned by the administrative authorities. Nothing is said as to which forms of discrimination are covered other than they have to be serious, so it is not clear that indirect discrimination is covered.

Finally, the crime of sexual harassment under art. 184 of the Criminal Code (not explicitly covering sexual orientation) is sanctioned with arrest from 6 to 12 weekends or an economic sanction. If the victim happens to be especially vulnerable because of his or her age, a sickness or his or her concrete situation the punishment is increased to arrest from 12 to 24 weekends or a higher economic sanction. If the person commits the crime taking advantage of his or her employment-related superiority or by threatening to undermine the worker's legitimate employment the punishment is arrest from 12 to 24 weekends or an higher economic sanction. Here again, if the victim happens to be especially vulnerable because of his or her age, a sickness or his or her concrete situation the punishment becomes imprisonment from 6 months to one year.

15.5.5 *Natural and legal persons to whom sanctions may be applied*

The administrative sanctions referred above are addressed to the private employer whether it is a natural or legal person (art. 1 of the Workers' Statute). As far as the criminal sanctions mentioned above, they can be imposed on both private and public employers whether it is a natural or legal person. If the latter, then the sanction will be imposed on those who administrate or are in charge of the service responsible for the criminal conduct, and on any accomplices (art. 318 of the Criminal Code).

As for the administrative sanction triggered by harassment, it will be imposed on the whoever is responsible for the conduct (e.g. co-worker or manager), and on the employer if the conduct takes place within the employer's realm of

⁷¹ 'El acoso por razón de origen racial o étnico, religión o convicciones, discapacidad, edad u *orientación sexual* al empresario o a las personas que trabajan en la empresa'.

managerial competence and, when known by the employer, s/he does not undertake the necessary measures to prevent it.⁷² As for the criminal type of sexual harassment, it applies to both public and private employers. Given that the statute does not specify otherwise, the sanction can only fall on whoever engages in the harassing conduct. Furthermore when the person who engages in the conduct enjoys a hierarchically superior position the punishment becomes higher, it seems that a harassing co-worker would also be punished for the crime, with a lesser sanction.

15.5.6 *Awareness among law enforcers of sexual orientation issues*

Given the scarcity of cases it is hard to tell the degree of awareness among the main law enforcers, the judges. In my view, given the reluctance of some ordinary judges to incorporate constitutional doctrine it will help that now all the anti-discrimination provisions in the Workers' Statute and not only those of the Criminal Code make explicit reference to sexual orientation.

15.5.7 *Standing for interest groups (art. 9(2) Directive)*

Apart from workers who can act in defence of their rights and legitimate interests, the legal order grants standing to workers' unions which may act in the name and interest of their affiliated members (art. 16 and 17 of the Labour Procedure Law) if the person directly concerned grants his or her authorisation (arts. 19, 20 and 175.2). Moreover, the courts have recognised the collective dimension of art. 14's anti-discrimination provision and, linked to it, standing for interest groups when the discriminatory treatment affects an unnamed group of workers that are not individually identified but can be identified through a group characteristic.⁷³

15.5.8 *Burden of proof of discrimination (art. 10 Directive)*

Art. 36 in Statute 62/2003 provides that 'in those civil and administrative procedures in which from the facts alleged by the plaintiff one may conclude the existence of well founded *indicia* of discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation with respect to matters falling within the scope of this section, it shall be for the respondent to give an objective and reasonable and sufficiently proved justification of the measures adopted and their proportionality'.⁷⁴ Note that the Directive provides that 'it shall be for the respondent to prove that there has been no breach of the principle of equal treatment' (art. 10). In this regard, the wording of the Spanish

⁷² See *Real Decreto Legislativo* [Royal Legislative Decree] 5/2000, of 4 August 2000, art. 8 (13)(bis) as amended by Statute 62/2003.

⁷³ See *Sentencia del Tribunal Supremo* [Supreme Court Decision] of 18 February 1994 (1994/1091) and of 2 February 2000 (2000/1438).

⁷⁴ *Artículo 36. Carga de la prueba.*

'En aquellos procesos del orden jurisdiccional civil y del orden jurisdiccional contencioso-administrativo en que de las alegaciones de la parte actora se deduzca la existencia de indicios fundados de discriminación por razón del origen racial o étnico, la religión o convicciones, la discapacidad, la edad o la orientación sexual de las personas respecto de las materias incluidas en el ámbito de aplicación de la presente sección, corresponderá al demandado la aportación de una justificación objetiva y razonable, suficientemente probada, de las medidas adoptadas y de su proporcionalidad'.

legislation seems to grant more protection to the alleged victim of discrimination in that it spells out the criteria that the proof has to meet to qualify as sufficient.

The Labour Procedure Statute also contemplates the shift of the burden of proof, and after the reform introduced by Statute 62/2003 (art. 40) it now mentions not only discrimination on the ground of sex but also on the ground of sexual orientation (art. 96 and art. 179(2) in connection to art. 181).

Presumption of innocence (art. 24(2) of the Constitution) however is the rule in the criminal domain so that, in those cases, the burden of proof is not shifted.

15.5.9 *Burden of proof of sexual orientation*

The law is silent. I think that because the right to privacy covers the right not to disclose one's sexual orientation, the victim does not have to show his or her sexual orientation but only that there are indicia showing that he or she has been discriminated against because of his or her presumed sexual orientation.

15.5.10 *Victimisation (art. 11 Directive)*

Art. 37 in Statute 62/2003 introduces a change into the Workers' Statute (art. 17). Art.17(1) sanctions the nullity of those administrative regulatory provisions, conventional or contractual clauses, agreements or unilateral decisions of the employer which discriminate on several grounds, including now sexual orientation. A new paragraph, art. 17(2), has been added. This paragraph declares 'the nullity of the decisions of the employer that amounts to an adverse treatment of workers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination'.⁷⁵ Similarly, Statute 62/2003 has introduced modifications of the Statute 5/2000 on infractions and remedies in social domain (art. 41).⁷⁶ As mentioned above, art. 8 of the Statute 5/2000 contains a list of what are to be considered very serious infractions in the area of labour relations. With the reform of Statute 62/2003, art. 8(12) now adds to those decisions that amount to discrimination reference to those that 'amount to an adverse treatment of workers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination'.⁷⁷

Even before the new legislation, the Workers' Statute declared invalid those dismissals related to any of the grounds of discrimination covered by the Constitution or the legal system or which entail the violation of workers' fundamental rights and freedoms (art. 55(5) Workers' Statute and art. 118(2) of Labour Procedure Statute). Any dismissal connected to the worker's use of judicial remedies to fight against discrimination or harassment on the grounds of sexual orientation would make that dismissal invalid and the employer would be forced to readmit the worker because the Constitutional Court has interpreted

⁷⁵ 'Serán igualmente nulas las decisiones del empresario que supongan un trato desfavorable de los trabajadores como reacción ante una reclamación efectuada en la empresa o ante una acción judicial destinada a exigir el cumplimiento del principio de igualdad de trato y no discriminación'.

⁷⁶ Artículo 41. Modificaciones del texto refundido de la Ley sobre Infracciones y Sanciones en el Orden Social, aprobado por Real Decreto legislativo 5/2000, de 4 de agosto.

⁷⁷ ...'las decisiones del empresario que supongan un trato desfavorable de los trabajadores como reacción ante una reclamación efectuada en la empresa o ante una acción judicial destinada a exigir el cumplimiento del principio de igualdad de trato y no discriminación'.

that undertaking judicial actions for the protection of rights is a form of exercise of those very rights.⁷⁸ Indeed the Court has understood that the protection against victimisation goes further as it should encompass not only the right of the worker not to be unfairly dismissed but more generally to be protected against any kind of retaliatory measures by the employer.⁷⁹ The new legislation has thus followed this line.

15.6 Reform of existing discriminatory laws and provisions

15.6.1 Abolition of discriminatory laws (art. 16(a) Directive)

Although Statute 62/2003 introduces concrete changes to existing legislation such as *el Estatuto de los Trabajadores* (Workers' Statute), *la Ley de Integración Social de los Minusválidos* (Statute on the Social Integration of Disabled), *la Ley de Procedimiento Laboral* (Statute on Employment Procedure), *la Ley sobre Infracciones y Sanciones en el Orden Social* (Statute on Infractions and Remedies on the Social Order) and the legislation on the public service, all of the changes go to introducing explicit prohibition of direct and indirect discrimination on the grounds of sexual orientation and none entails the abolition of existing legislation because of its discriminatory nature.

15.6.2 Abolition of discriminatory administrative provisions (art. 16(a) Directive)

None to my knowledge.

15.6.3 Measures to ensure amendment or nullity of discriminatory provisions included in contracts, collective agreements, internal rules of undertakings, rules governing the independent occupations and professions, and rules governing workers' and employers' organisations (art. 16(b) Directive)

None have been added, so the general rules described above apply.

15.6.4 Discriminatory laws and provisions still in force

The provisions that consolidate different employment conditions to gays and lesbians are either contemplated in the country's social security legislation and or related to the person's marital status or condition as a biological and or adoptive parent. Although in a context where marriage is restricted to heterosexual couples and where same sex couples cannot adopt jointly or each other's descendants this may amount to discrimination it is not clear that the relevant provisions can be considered discriminatory within the meaning of the Directive.

Our Social Security legislation restricts in favor of the spouse a whole series of benefits. This includes survivor's pensions which are limited to married partners

⁷⁸ See *Sentencias del Tribunal Constitucional* [Constitutional Court Decisions] 197/98, 140/99 and 101/2000 of 10 April 2000.

⁷⁹ See *Sentencias del Tribunal Constitucional* [Constitutional Court Decisions] 7/93; 14/93 and 54/95.

(art. 174(1) of the *Ley General de Seguridad Social*⁸⁰); an economic premium in case of death of the spouse to cover the expenses of the burial which is to go to whoever has incurred in the costs, though a priori it is assumed that the persons who have incurred in the expense, and hence to whom the payment should go are the surviving spouse, children of the survivor, and the rest of the family members living with him or her (art. 173 of the Social Security Law). There is also the right to a compensation in case of work-related death or work-related sickness that goes to the surviving spouse (art. 177(1) of the Social Security Law). Some of these restrictions have been explicitly sanctioned by the courts (see Constitutional Court decision 125/2003, of 19 June 2003) and to the extent that they concern social security legislation may fall outside of the scope of the Directive.

As mentioned, the Workers' Statute recognises a set of marital status or family status-related benefits that either explicitly or implicitly (i.e. by granting family status only through marriage and not other forms of unions) exclude people in same sex unions. Among the benefits that the Workers' Statute recognises as deriving either explicitly or implicitly from marriage are: a 15 days permit at marriage (art. 37(3)(a)); remunerated permits of different duration because of death, accident, sickness, of family members including the spouse (art. 37(3)(b)); the right to the reduction of work hours and a proportional reduction of pay in order to take care of a family member in need under certain circumstances (art. 37(5)); the right to take employment leave in order to take care of a family member (art. 46(3)), and the right to be relocated geographically in order to facilitate marital life if one of the spouses is relocated (art. 40(3)). To the extent that these benefits hinge on the person's marital status, they may fall outside the scope of the Directive though this is more doubtful regarding those benefits which depend on being recognised as a family member and not as a spouse in the strict sense.

Different consideration may deserve the case of benefits that the employment legislation recognises in relation to the fact of raising a child, regardless of the marital status of the parents. Given that unlike different sex couples, same-sex partners cannot adopt jointly nor can the same-sex partner adopt the biological son or daughter of his or her partner, we can identify several instances of indirect employment discrimination of same-sex couples jointly raising a child. Among the controversial provisions in the Workers' Statute we have to mention: the right of the woman worker to reduce the work day in order to feed a baby under 9 months, a right that can also be granted to the father in the event that both work (art. 37(4)); the right of the mother or the father of a premature child to a daily one-hour absence or to reduce the work day in two hours (art. 37(4)(bis)); the right of the father of the child of a female worker to enjoy a part of her legal maternity leave (art. 48(4)) or the right of adoptive parents (father and mother) to jointly share the permit for child adoption (art. 48(4)). In my view, to the extent that these benefits do not require the couple to be married, they are clearly covered by the Directive and should be attached to the fact of raising a child jointly, more than to the fact of being the child's legal or biological parent, at least until same-sex couples are allowed to adopt jointly.

⁸⁰ General Law on Social Security.

Finally, regarding the military domain, although the principle of non-discrimination is now explicitly recognised (Art. 185 of the *Reales Ordenanzas de las Fuerzas Armadas* of 1978 [Royal Ordinances of the Armed Forces]), until 1986 sexual relations with a person of the same sex on military grounds were crimes of ‘dishonest acts’ that entailed prison and discharge from the military.⁸¹ After 1985 the provision was removed from the new Military Penal Code.⁸² However it became ‘a serious conduct against military discipline’ deserving disciplinary sanction⁸³ and in 1991 the Constitutional Court again held that homosexual relations in the armed forces had ceased to be criminal but could become, at least in certain circumstances, an administrative infraction if they offended the discipline, the service, or military dignity.⁸⁴ In 1998 the Statute on the Disciplinary Regime was modified, and again, it provided that those sexual relations on military grounds that offend against military dignity could deserve a disciplinary sanction.⁸⁵ The provision does not explicitly refer to homosexual relations, but only to those sexual relations which offend the military dignity. The problem is that homosexual relations have been considered as such. Whether or not it is still considered to be the case is unclear but the fact that general legislation has been passed and that the Workers’ Statute has been amended so as to prohibit employment discrimination on the grounds of sexual orientation might make it less likely so.

15.7 Concluding remarks

Some important mechanisms to fight against employment discrimination have existed, but as far as the prohibition of discrimination on the basis of sexual orientation in employment it has only become really explicit following the reforms introduced by Statute 62/2003. Before that, only a provision in the Criminal Code explicitly prohibited discrimination on the basis of sexual orientation in terms that were not adequate to implement the Framework Directive. After the reform of Statute 62/2003 the most crucial aspects of the Directive have been incorporated into the Spanish legal order. Unfortunately, the occasion has been misused to pass a more coherent, comprehensive and visible piece of legislation regarding employment discrimination. The most relevant shortcoming of the new legislation has to do with the insufficient degree of explicitness and concreteness of the material scope of application of the prohibition of discrimination. Some other differences regarding the wording of the Spanish legislation regarding the definition of indirect discrimination or of harassment may be of more or less significance depending on the concrete application. For the most part, though, Spain has correctly transposed the Directive. Progress in ensuring equal employment opportunities and conditions for gays and lesbians requires social change that makes coming out easier and addressing employment benefits linked to marital status, to the possibility of

⁸¹ Art. 352 *Código de Justicia Militar* [Military Justice Code] of 17 July 1945 explicitly declared constitutional by the Constitutional Court in its decision of 33/1985.

⁸² *Código Penal Militar* of 27 November 1986.

⁸³ *Ley 12/1985* of 27 November 1985, *Régimen Disciplinario de las Fuerzas Armadas* [Statute on the Disciplinary Regime in the Armed Forces].

⁸⁴ *Sentencia del Tribunal Constitucional* [Decision of the Constitutional Court] 196/1991.

⁸⁵ *Ley Orgánica 8/1998* of 2 December 1998, art. 8(24).

adoption or to social security legislation. Only the interpretation of scope of the Directive by the ECJ will probably determine how much of this progress is mandatory law already.

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