

## REMEDIES AND SANCTIONS FOR DISCRIMINATION

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### **1.- INTRODUCTORY REMARKS.-**

Directives numbers 43 and 78 come to engross the national legislation on equal treatment principle. All the State members already had national legislation in force prohibiting somehow the discriminatory treatment. However it is has been a reality that the legislation in force was not enough, or at least, it was not implemented correctly.

The intention of the Directives was to ensure that State Members make true the equal treatment principle. It is under the responsibility of the State through their public services and workers, and citizens in particular to prevent discriminatory practices.

The aim of this legislation is to inspire Members States to legislate, to adopt administrative procedures, to provide citizens with a Body to control the level of implementation of the equal treatment.

I have been asked to speak about the Redress and Sanctions under this legislation<sup>2</sup>:

The directives make clear that everyone who is a victim of discrimination or who considers that they have been unfairly treated because of their personal characteristics

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<sup>2</sup> Articles 15 and 17 of the Directive 43 and 78.

or another circumstance establish on the Directives, should have **adequate means of legal protection and an effective right of redress** (i.e. they should be able to the reestablishment of their rights).

The Directives set the end, the aim, but the way to implement them is under the National government, they decide whether this will be through judicial or administrative procedures, such as tribunals. Governments can also choose to establish conciliation.

The directives impose an obligation on governments to ensure that people bringing complaints of unfair treatment have the right to be supported and represented by their trade union or by specialist associations or organisations. At the same time, they have to make sure that the sanctions to be applied in cases where discrimination has occurred are '**effective, proportionate and dissuasive**'.

The commission has relayed on members states government, which means that each government may understand very different thing on what has to be done, what is effective, proportionate and dissuasive. But according to the European Court of Justice, in the case law on sex discrimination, Member States must provide remedies which ensure "real and effective" protection for individuals' rights and which have a real and deterrent effect on employers.

However, the particular **remedies are left to a decision at national level**. In this respect, the Directives do not require an obligation to contract (example: giving a job or selling goods to a specific person) as damages claims will usually be sufficient. However, a Member State may choose under its national law to impose such a sanction if constitutional law allows for it.

A Member State may **not put an upper limit** on the amount of financial compensation to be paid to victims of discrimination.

**In the Case of Cohen (2004)**, “to be effective a remedy and sanction must achieve the desire outcome. To be proportionate, they must adequately reflects the gravity, natural and extend of the loss and/or harm; and to be dissuasive, sanction must deter future acts of discrimination”.

The key countries are Belgium, The Netherlands, France, Denmark, Ireland, Sweden and United Kingdom, because they already had a fairly extensive system of protection against discrimination before the enforcement of both Directives.

## **2. PROCEDURES – ADMINISTRATIVE AND LEGAL CHANNELS APPROPRIATE FOR CHALLENGING VIOLATIONS OF ANTI-DISCRIMINATION LEGISLATION. THE PARTICULAR CASE OF SPAIN.**

### **The constitutional procedure**

The Spanish legal system is based on The Constitution<sup>3</sup> as supreme law. The text contains not only values to inspire the future legislation, but also concrete rights. These rights are divided in two different categories, the fundamental rights, and the general rights. The equal treatment is considered both a value<sup>4</sup> and a fundamental right<sup>5</sup>.

There is a positive obligation on the State to promote the implementation of these rights<sup>6</sup>, and it will be responsible if it fails for any malfunctioning of the services provided by the State.

The Constitution declares that the interpretation of the rights and freedoms will be in accordance with the international treaties and conventions<sup>7</sup>.

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<sup>3</sup> Spanish Constitution of 27 of December 1978. BOE 311/1978, Ref Boletín: 78/31229

<sup>4</sup> Spanish Constitution Art 1.1

<sup>5</sup> S.C. Art. 14

<sup>6</sup> SC Art. 9.2

<sup>7</sup> Art. 13 SC

The rights and freedoms set forth in the Constitution are guaranteed by the Constitutional Court<sup>8</sup>, by the **recurso de amparo**<sup>9</sup>. Any individual may file a complaint before the Constitutional Court, if considers that any of his fundamental rights has been violated by any legal disposition, juridical act, or administrative act. This complaint must be filed within 20 days after the last resolution has been issued where the violation occurred. The invocation of the violation of the equal treatment right must be connected with the enjoyment of other rights or freedoms. This remedy is just to preserve the right or freedom violated and it will not include a compensation for damages. The sentence will resolve whether there has been a violation or not, the nullity of the legal disposition or act, the re-establishment in the full enjoyment of the right violated and the measures to guarantee the enjoyment of the rights or freedom violated.

There is legal aid guarantee for the victim.

### Criminal provisions and procedure

The criminal legal system is based among others, in the legality principle. This will prevent any arbitrary behaviour. Every sanction and pain is fixed in the Criminal Code<sup>10</sup> and in the specific legislation for special crimes.

The violation of several constitutional rights is considered a criminal offence, but the violation of the equal treatment is an aggravating circumstance of a crime, the racist or anti-Semitic motives of the offender, as well as motive connected with ethnic, ideology, religion or beliefs of the victim<sup>11</sup>. These aggravating crimes will be prosecuted ex officio.

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<sup>8</sup> Organic Law 2/1979, 3 of October, about Constitutional Court. BOE 239/1979, de 5 octubre 1979 Ref Boletín: 79/23709. (LO TC)

<sup>9</sup> Art. 41-58 L.O.T.C

<sup>10</sup> Criminal Code. Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal. BOE 281/1995, de 24 November 1995 Ref Boletín: 95/25444

Set in force in 1995.

<sup>11</sup> Art 22.4 of the Criminal Code

The incitement to discriminate or to hate against groups<sup>12</sup>, the illegal association for the promotion of discrimination or hate against persons, groups or associations<sup>13</sup> are considered criminal offences. It is considered a crime the particular that discriminate in charge of a public service<sup>14</sup>.

It is a crime to discriminate a person in the private or public labour market when has a racist, ethnic, ideology, religion or believe motivation<sup>15</sup>. The particular that discriminate in the exercise of his professional or business duties will commit a crime.

It would be desirable to reconsider the definition of harassment in the criminal legislation.

Any victim of the crimes described above, may file a criminal complaint. It may be done with or without legal assistance. Legal aid is provided for private prosecution even if the crimes are also prosecuted by the public prosecutor *ex officio*. Popular prosecution is also allowed for groups of individuals with legitimate aim. The procedure to follow is regulated under the Criminal Procedure Code<sup>16</sup>. The code of procedure is in force since 1882 amended in several occasions since then.

The criminal remedy is quite accessible, free of charge for victims, psychological assistance is provide for victims of violent crimes, but it is quite rare to get condemnatory sentences for perpetrators. Judges and prosecutors are reluctant to consider the racial motivated crimes. On the other hand, not many lawyers are aware of the legislation in force.

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<sup>12</sup> Art. 510 of the Criminal P. Code

<sup>13</sup> Art. 515.4 of the Criminal P. Code

<sup>14</sup> Art. 511 of the Criminal P. Code

<sup>15</sup> Art. 314 of the Criminal Penal Code.

<sup>16</sup> Ley de Enjuiciamiento Criminal, Real Decreto de 14 de septiembre de 1882. GM 283/1882, de 10 octubre 1882

## Civil, administrative and labour legal provisions

The prohibition of discrimination is present in many other laws covering different aspects of life such as employment<sup>17</sup>, education<sup>18</sup> and religion<sup>19</sup>.

**Civil remedy:** The transposition of the directives has not produced any change in the civil remedies. The Civil Code does not cover the consequences of any discriminatory practise in contracts, torts, obligations, testamentary, succession and donations. There is a reference in family law, when article 1328 declares the nullity of any obligation or disposition made against the equality of rights between spouses.

The legal action will be represented in a civil complaint for compensation for damages, but the victim will find many difficulties:

- Legal aid is provided, but not many victims are aware of their rights and lawyers are not very familiar in the subject.
- Judges are not aware of the new legislation in force; they are compelled to do so by law.
- The extreme difficulty to fix the amount of money for compensation for damages
- To prove that the amount of money is the equivalent to the violation of the right. Physical damages are valuated in one scale, but there are no scales or any other reference for moral damages. The final amount of money, if so, is an arbitrary decision for judges; they will fix the amount regarding their own experience in consideration to the facts and circumstances of the case.
- Judicial Costs are high in terms of time. The final decision may take between one and three years.
- Expert's opinions are expensive and sometimes this cost is not covered by the legal aid system and it has to be afforded by the victims.

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<sup>17</sup> Ley 5/80 “Ley Básica de Empleo”; Ley 8/88 “sobre Infracciones y Sanciones de Orden Social”;

<sup>18</sup> Ley 1/90 “sobre el Sistema Educativo”

<sup>19</sup> Ley 7/80 “de Libertad Religiosa”

- There are cases that are not covered. In example, let's think in a housing case. A person of Roma origin wants to rent an available flat to a private owner. When the visit is arrange, the flat is "already rented". There is no contract; there is only an offer to rent. The case law does not give solutions to the victim and in this case, the remedy does not fulfil the expectative of the directives.

## **2. A *Employment and occupation related - all grounds.***

In December 2000, Spanish Parliament adopted the Organic Law 8/2000 "about rights and freedoms of aliens in Spain and their social integration", which modifies Organic Law 4/2000 "about rights and freedoms of aliens passed in January, same year. It is defined direct and indirect discrimination acts in the labour market. It establishes a judicial procedure based on the preference and summary principles. The violation is considered very serious. The main labour law is the Statute for Workers Law<sup>20</sup>.

The remedies available to a victim that suffered discrimination on the grounds of race or ethnic origin, religion or belief, disability, age or sexual orientation will depend whether a public authority or private body is accused of discrimination<sup>21</sup>.

In the case of a public authority, the victim may exhaust all the administrative proceedings at the administrative body as set forth in the Administrative Procedure Law<sup>22</sup>.

The complaint will be always against a resolution, administrative act or fact without respect to whether the resolution comes from the local, regional, state administrative body or public institutions. The victim is entitled to appeal the resolution to the upper administrative body. In any of the appeals the administrative body has the opportunity to challenge the discriminatory practice.

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<sup>20</sup> RDL 1/1995, 24 of march. BOE 75/1995, 29 of march 1995 Ref Boletín: 95/07730

<sup>21</sup> Sanctions are divide in three levels, minor, grave, or very grave.

<sup>22</sup> Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común (under the ordinary proceeding).

But if this fails, the victim may file a complaint before the court. There is an especial procedure for the protection of fundamental rights and freedoms in the procedure are in the Law 29/1998, of 13 of July, about the Contencioso-administrative Jurisdiction:

The Law regulates two kinds of processes, the ordinary and the special one. The first process will be a jurisdictional review respect not only about the legality of the administrative action, but also the possible discussion about its constitutionality. In the special process<sup>23</sup>, the discussion will be whether the relevant facts have fallen in the violation of a Fundamental Rights which are recognized from article 14 to 30.2 of the Spanish Constitution, however, it is possible even to start both process at the same time, in relation with the same act or rule. The effects of this procedure are the same of Recurso de Amparo before the Constitutional Court. The procedure is also summary and it is expressly contemplated the reverse of the burden of prove.

But if the employer or person accused of discrimination is a private person, the Labour Procedure Law, regulate a special procedure for the protection of trade unionism fundamental right, but it is extensive to other fundamental rights and freedoms<sup>24</sup>, including the prohibition of discriminatory practices in any matter o situation competence to the labour jurisdiction. This procedure of dismissal is excluded because it has a specific regulation<sup>25</sup>.

E.G. a person may fell that has been treated in a discriminatory way if there are advertising of posts which exclude for a job one of the gender when this is not necessary a work condition. On the other hand many times is very difficult to identify discrimination because the information to compare is not available to the victim (salaries, pay, selection, issue of permits and licences, access to vocational training,

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<sup>23</sup> Art. 114-122 LJCA.

<sup>24</sup> Arts. 175-181 LPL, Cap. XI del Title II, Book II. Real Decreto Legislativo 2/1995, 7 of April. BOE 86/1995, of 11 of April 1995 Ref Boletín: 95/08758.

<sup>25</sup> Art. 181 LPL

including vocational training in prisons, terms and conditions...). In these cases, the success of litigation is unknown.

## **2. B Non-employment or occupation related - race and ethnic origin**

The procedure for any kind of discrimination is always the same regardless of the ground. It will depend on the field the discrimination took place in order to clarify the competent jurisdiction.

It is available the written complaint before the national or regional Ombudsman. These complaints are letters to the Office of the Ombudsman, who will carry out investigation on the facts, but the resolution is of not compulsory effects, are more recommendations.

Collective actions are allowed only under the protection of consumers Law. This action is permitted in the Civil Law Procedure<sup>26</sup>, but more than one victim can litigate together in any other case.

## **2. C what avenue for an employment or non-employment complaint**

Labour market is very protective with the worker side. If the discrimination has occurred in the labour market, it is desirable to litigate under this jurisdiction. It is fast, secure and the employer has the burden of prove. The same guarantees offer the administrative jurisdictional procedure on the protection of fundamental rights and freedoms, but the labour jurisdiction is more flexible with formalities than the administrative one. The civil avenue is not the more convenient. It is slow, unclear and more complicated in terms of evidence and procedure.

In the summary proceedings time limit is very important. The sooner, the better. Legal assistance from the very beginning is desirable. In Spain Legal aid system is present in any jurisdiction, but in order to prevent a complaint out of the limit, it is

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<sup>26</sup> Art. 11, Civil Procedure Law 1/2000, 7 of January. BOE 7/2000, Ref Boletín: 00/00323

convenient that the victim apply for a date at the Legal Aid Office for legal assistance, where lawyers from the bar association and free of charge will give the first step to be taken (where to appear and what to say for interrupting the time limit until the lawyer is assigned to the case). Not in all Bar Association, but in many of them, are specialized groups of lawyers in matters such as aliens, family, labour, torts, tax, underage offenders, and human rights, that may help in the resolution of the case.

It is desirable to keep as much evidence as possible, such as documents, witness testimony with personal data attached, in order to use them in a future trial. It will work testing; hidden cameras, photos, and any other kind of technical support that could provide any prove to the case.

The best practice is to get a legal aid lawyer from the specialized groups. The lawyer will provide any legal information required by the victim.

## **2. D Technical procedural requirements of each available remedy**

The time limits applicable to the remedy:

- **Recurso de amparo**, before the Constitutional Court: 20 days
- **Criminal complaint**: six month for minor offences and between 1 to 5 years for serious crimes
- **Civil complaint**: One year.
- **Administrative complaint**: between 10 days (special procedure) and 20 days for the ordinary procedure)
- **Labour complaint**: it will depend on the concrete case. From 5 days to 1 month.

The documents filed on the case must be originals, unless when there is an original or protocol in a public register.

## **2. E Existing support and obstacles at national level**

Litigation on discrimination is quite often in the labour and administrative jurisdiction. When the remedy is available, is used. The lack of information and with the Directives and national anti discrimination provisions on the part of judges, lawyers and prosecutors make unusual this litigation on the grounds of race, disability, and others.

Technical support is available to victims, legal aid of the bar associations, and other NGOs, Trade Unions may defend but not represent the victim in a trial or any other administrative proceedings. Interpreters are provided for victims and offenders.

The Equality Commission is unknown between any legal operators.

## **2. F Referrals to the European Court of Justice**

If we take into account that the directives legislation is unfamiliar to legal operators, the procedure that state under Article 234 of the Treaty is very rarely used in discrimination matters.

It is very important to know where there is a disputed issue of EU law and the judge is uncertain how to interpret a provision at EU law that a referral can be made by a national court to the European Court of Justice in Luxembourg. The parties to the proceedings can ask the national judge to grant a request for such a referral, or the judge can decide spontaneously to refer the case. Any court may make a referral, but only the national court of last instance is obliged to do so.

This may be a highly effective procedure because:

- Requesting a referral can concentrate the mind of the presiding judge and ensure that s/he gives proper consideration to the complaint, especially to the fact that it raises issues of European rights.
- National bodies, particularly public bodies, are impressed by its high profile and may take steps to avoid the exposure of discrimination at national level to pan-European scrutiny.
- The European Court is the only body that can give a **definitive** interpretation of the terms used in the Directives.

However this is a specialised procedure and expert EU lawyers familiar with its use need to be retained. In addition, it is important to note that the national case is "stayed" (put aside) until the ECJ has decided the issue before it, and this delay of sometimes two years can have serious consequences for the complainant.

## **2. G Petitions to the European Parliament**

The Committee on Petitions of the European Parliament can receive petitions from Citizens of the Union who wish the Committee to investigate their complaint/s that their rights under European Union law are not being properly respected.

## **2. H Alerting the European Commission to discriminatory administrative practices**

It is also possible to write directly to the Commission, which may often be a quicker process than that outlined above under 3.2.G. This could be done with a view to encouraging the Commission to initiate infringement proceedings against the offending State.

The Commission and the Parliament would be bound by the EU Charter of Fundamental Rights' provision on the right to good administration (Article 41) if adopted:

- Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
- This right includes:
  - o The right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
  - o the right of every person to have access to his or her file, while respecting the legitimate interest of confidentiality and of professional and business secrecy;
  - o The obligation of the administration to give reasons for its decisions.
- Every person has the right to have the Community made good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
- Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

## **2. I Complaints to the European Court of Human Rights**

In addition, when all effective national legal remedies have been exhausted, a person may, if the case concerns issues covered by the European Convention on Human Rights, apply to the European Court of Human Rights in Strasbourg (see Key Concepts section).

This can be done under Article 14 of the Convention when another Article is also engaged or, if the country has ratified it, under Protocol 12 to the Convention. Spain has neither signed nor ratified Protocol 12 although currently there is a parliamentary proposal aimed at ratifying this Protocol.

Collective complaints can also be made under the Council of Europe's European Social Charter.

## **2. J other international remedies**

Spain is a party to the 1<sup>st</sup> Optional Protocol to the International Covenant on Civil and Political Rights, or has accepted the right of individual petition under the Convention on the Elimination of all forms of Racial Discrimination or the Convention on the Elimination of Discrimination Against Women, complaints can be brought to those Committees.

NGOs/trade unions should also ensure that they alert the Committees which examine the State's periodic reports under the ICCPR, CERD, CEDAW and the Convention on the Rights of the Child to instances of discrimination.