

SPAIN

Disclaimer: The national thematic studies were commissioned as background material for the comparative report on *Access to justice in Europe: an overview of challenges and opportunities* by the European Union Agency for Fundamental Rights (FRA). The views expressed in the summaries compiled from the national thematic studies do not necessarily reflect the views or the official position of the FRA. These summaries are made publicly available for information purposes only and do not constitute legal advice or legal opinion. They have not been edited.

Contents

1.	National court system	1
2.	Restrictions regarding access to justice	4
3.	Length of judicial proceedings	5
4.	Are procedures concluded within a reasonable time?	12
5.	Does provision exist for speedy resolution of particular cases?.....	13
6.	Is it possible to waive the right of access to a judicial body?.....	14
7.	Access to non-judicial procedures	15
8.	Legal aid	20
9.	Forms of satisfaction available to a vindicated party	25
10.	Adequacy of compensation	27
11.	Rules relating to the payment of legal costs	28
12.	Rules on burden of proof	28

1. National court system

The Spanish judiciary is structured on a hierarchical system, which divides the Spanish territory into autonomous communities, provinces, judicial districts and municipalities. The courts are also organised into four categories: civil, criminal, social and administrative. The Supreme Court is the highest court and has jurisdiction over the entire country. The Constitutional Court is not a part of the judicial power and deal with special appeals invoking constitutional provisions such as individual constitutional complaints, unconstitutionality complaints, etc. Hierarchically below the Supreme Court is situated the National Court in Madrid which has jurisdiction over the entire territory, and hears criminal cases of national or international importance, and civil cases involving the central administration. Within the National Court are the Central Criminal Courts and the Central Investigating Courts.

In each Autonomous Community there is a High Court of Justice which is the highest court at this level and with competence only over the respective Autonomous Community. The Provincial

Court is the highest court in each province. Other courts which exist on a provincial basis are the Mercantile Courts, Criminal Courts– for sentencing below five years – Administrative Courts, Social (Labour) Courts etc.

The judicial districts¹ have First Instance Courts which hear civil cases, and Investigating Courts, which prepare the criminal cases to be tried in higher courts. In some municipalities there are Justices of the Peace ruling on minor civil cases.

The Spanish appeal system can be briefly described as follows:

In civil law matters at first instance the issue is attributed to a First Instance Court. In a second instance the issue is attributed to the Provincial Court through a *recurso de apelación* (appeal from first instance). Against the judgment of the Provincial Court a *recurso de casación* (cassation) can be lodged with the Supreme Court. For claims under 90 € the first instance court is the Justice of the Peace (if there is one) and the appeal has to be lodged with the First Instance Court.

In criminal law matters it must be distinguished between offences punishable with prison sentence of up to 5 years and those exceeding 5 years. For offences punishable with prison sentence up to 5 years, the investigation phase is held before an Investigating Court and the oral phase before a Criminal Court. The accused may lodge an appeal with the Provincial Court. The investigation phase regarding offences punishable with a prison sentence exceeding 5 years is held by an Investigating Court and the oral phase is held by the Provincial Court. The accused may lodge a cassation with the Supreme Court.

In administrative law matters the first instance court is the Administrative Court. The applicant may lodge an appeal with the Administrative Chamber of the High Court of Justice. When the invalidity of a general disposition has been declared (not the invalidity of an administrative act) a cassation may be lodged with the Supreme Court.

In Labour law matters the first instance court is the Labour Court (Social Court). An appeal may be lodged with the High Court of Justice.

According to Article 117 par. 1 of the Constitution judges are “independent, irremovable, responsible, and subject only to the rule of law”. Judges are not subjected to any orders or

¹ A unit of territory made up of one or more bordering municipalities.

instructions by any other power of the State or other judges². In order to guarantee the independence of the judges Article 117 par. 2 of the Constitution establishes that “The Judges and Magistrates may only be dismissed, suspended, transferred or retired on the grounds and subject to the safeguards provided for by the law.” According to the Organic Act on the Judicial Power judges may only be removed in case of renouncement, retirement, disability, loss of the Spanish nationality or if they have been condemned with a prison sentence.

According to Article 316 par. 1 of the Organic Act on the Judicial Power the judges are appointed (and removed) by the General Council of the Judiciary (CGPJ) whereas magistrates (judges at the Provincial Courts, The High Courts of Justice in the Autonomous Communities, the National Court and the Supreme Court) and presidents of Courts are appointed by means of a Royal Decree of the Government upon proposal of the CGPJ.

The CGPJ is an independent organ which governs the Spanish judicial power. The CGPJ is composed by 20 members and the President who will be also appointed as the President of the Supreme Court. The members are proposed by the Congress and the Senate. Twelve of its members shall be judges and magistrates of all judicial categories and eight members chosen amongst lawyers and other jurists of acknowledged competence with more than fifteen years of professional practice. The members of the Council are appointed for a five-year period and they cannot be reelected with the exception of the President.

It should be highlighted that the independence of the judges is strongly linked to their impartiality. According to a landmark case of the Constitutional Court (154/2001)³ there is subjective and objective impartiality. The subjective impartiality refers to the relations of the judge to the parties of the proceeding whereas the objective impartiality refers to the relation of the judge to the subject of the judicial proceedings (previous contact with the *thema decidendi*). In order to ensure at least the appearance of impartiality of the judges Article 127 par. 1 of the Constitution prohibits the membership of judges in political parties and trade unions. Besides, the Organic Act on the Judicial Power establishes a series of incompatibilities with other jobs. Moreover, according to the Organic Act on the Judicial Power the parties of a civil, social (labour) or contentious-administrative proceeding can challenge and request the removal of judges if there is a “matrimonial link” (or a similar situation) or friendship between the judge and one of the litigants, if the judge has interests in the disputed matter etc.

² Article 117 par. 1 of the Constitution and Article 1 of the *Ley Orgánica del Poder Judicial* [Organic Act on Judicial Power] amended by Organic Act 19/2003 of 23. December. Spain/ State Official Journal of 02/07/1985.

³ See Annex 2.

Accordingly, since judges are appointed and removed by an independent organ whose Members are proposed by the representatives of the people in the Congress and the Senate and they may be removed only on the grounds of specific objective reasons established by the law and taking into consideration that the parties of a judicial proceeding may challenge and request the removal of impartial judges, it can be assumed that the judicial bodies in general, and thus also those in charge of claims in the area of non-discrimination are independent.

2. Restrictions regarding access to justice

Some restrictions exist regarding access. As for discrimination in the employment field, it should be pointed out that according to the Act on Labour Procedure (recast)⁴ modified by Act 62/2003 on fiscal, administrative and social measures, which transposes Directives 2000/43 and 2000/78, in conjunction with the Act on Workers' Statute⁵, the time limit for claims based on discrimination on the grounds stipulated by Directives 200/43, 200/78 and 2006/54 expires one year after the termination of the work contract. This limitation is imposed in order to ensure legal certainty and finality. The limitation period of one year does not undermine the right to access since it is generous enough to allow a good preparation of the legal action. Besides, the fact that claims may be lodged with the courts even after termination of the work relationship in which discrimination allegedly took place, contributes to guarantee the effectiveness of the right of access to justice taking into account that many persons who have been discriminated during the working relationship are not ready to take legal action against their employer before the termination of that relationship.

Moreover, the Act on Effective Equality between Women and Men, which transposes the Equal Treatment Directive, establishes that: "the capacity and legitimacy to participate in civil, social and contentious-administrative proceedings relating to the defence of the right to equality between women and men is incumbent upon natural and corporate persons having a legitimate interest therein"⁶. The requirement of a legitimate interest does not undermine the right to effective judicial protection neither but aims to prevent *actio popularis*. In contrast the Act on Effective Equality between Women and Men stipulates that only the person subject to sexual harassment or harassment on the grounds of sex will be legally capacitated to institute the

⁴ Recast adopted by means of *Real Decreto Legislativo 2/1995, de 7 de abril* [Legislative Royal Decree 2/1995 of 7. April]. Spain/ State Official Journal of 11/4/1995.

⁵ Recast adopted by means of *Real Decreto Legislativo 1/1995, de 24 de marzo* [Legislative Royal Decree 1/1995 of 24. March]. Spain/ State Official Journal of 29/3/1995.

⁶ Article 12 par. 2.

respective legal action. Therefore, no associations, organisations or other legal entities having a legitimate interest in ensuring that no sexual harassment or harassment on the grounds of sex occurs may take legal action on behalf or in support of the complainant as established by Article 17 par. 2 of the Equal Treatment Directive 2006/54/EC (recast). Accordingly, the Act on Effective Equality between Women and Men fails to transpose correctly that Directive into the Spanish legal order.

As for the remaining scope of application of Directive 2000/43 outside of the employment field (education, social protection, access to goods and services) it should be highlighted that there is a dispute falling under the administrative jurisdiction, there would be no possibility to waive the right of access to a judicial body. Should the dispute falls under the civil jurisdiction, a waiver of the right of access would be possible since there is no general legal provision prohibiting the waiver of the right of access to a judicial body in discrimination cases.

3. Length of judicial proceedings

The following judgments regarding non-discrimination within the scope of the Employment Framework Directive 2000/78 (discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation) can be mentioned:

With regard to discrimination on the grounds of religion or belief:

- Constitutional Court Judgment 49/2003 of 17 March 2003 (1st Instance 7 months; 2nd Instance 5 months; Supreme Court 9 months; Constitutional Court 48 months): declares the right not to be discriminated on the grounds of belonging to a political party in view of the fact that the claimant was fired as soon as his political affiliation became known;
- Constitutional Court Judgment 171/2003 of 29 September 2003 (1st Instance 9 months; 2nd Instance 8 months; Constitutional Court 30 months): concludes that the claimant's right to the freedom of association was violated in view of the fact that he was discriminated by removing him from a designated position as soon as his affiliation to a labour union became known;
- Constitutional Court Judgment 168/2006 of 5 June 2006 (1st Instance 2 months; 2nd Instance 6 months; Supreme Court 9 months; Constitutional Court 37 months): concludes that the claimant was discriminated by being fired due to his affiliation to a labour union;

- Constitutional Court Judgment 247/2006 of 24 July 2006 (1st Instance 3 months; 2nd Instance 12 months; Supreme Court 12 months; Constitutional Court 33 months): concludes that the claimant was discriminated by being transferred and having his pay reduced due to union membership and participation in union meetings.

With regard to discrimination on the grounds of disability:

- Judgment 211/2009 of the Provincial Court of Madrid of 6 Mayo 2009⁷ (2nd Instance 7 months): the Court in appeal orders airlines Iberia and Air Nostrum to compensate symbolically three deaf youngsters who in 2004 were not allowed to board the plane unless they were accompanied by a tutor or interpreter. The Court also ordered the airlines to take “all the necessary measures to put an end to the violation of the rights of persons with disabilities”. This is the first judgment concerning the discrimination of persons with disabilities based on the Act on equal opportunities, non-discrimination and universal accessibility of persons with disabilities, in force since 2003.

With regard to discrimination on the grounds of age:

- Constitutional Court Judgment 280/2006 of 9 October 2006 (1st Instance 7 months; 2nd Instance 8 months; Constitutional Court 41 months): even though the Court declares in this judgment that any collective bargaining agreement which obliges a worker to early retirement is discriminatory, it does not offer any satisfaction to the claimant as the collective agreement was concluded prior to the Act which so established;
- Supreme Court Judgment 1592/2004 of 9 March 2004 AENA (*Aeropuertos Nacionales y Navegación Aérea*) (Social Section) (1st Instance 4 months; 2nd Instance 10 months; Supreme Court 14 months): the Court annuls the clauses of collective agreements forcing workers to retire at age 65, because there is no national provision permitting such compulsory retirement. In its legal arguments the Supreme Court made extensive use of the considerations and articles of Directive 2000/78 and concluded that it is discriminatory on the grounds of age to force workers to retire at 65 if there is no provision justifying differences of treatment based on age “by legitimate employment policy, labour market and vocational training objectives”.

Similar considerations can be found in:

⁷ Although the period covered by the investigation ends with 2008 and as we have indicated only the judgments of the Constitutional Court and the Supreme Court are analyzed, we consider that mention should be made of this particular judgment as it concerns the first case regarding discrimination against persons with disabilities under the Act on equal opportunities, non-discrimination and universal accessibility of persons with disabilities (2003).

- Supreme Court Judgment 1593/2004 of 9 March 2004 (1st Instance 3 months; 2nd Instance 8 months; Supreme Court 12 months);
- Supreme Court Judgment 2354/2004 of 6 April 2004 (1st Instance 8 months; 2nd Instance 7 months; Supreme Court 11 months);
- Supreme Court Judgment 8110/2004 of 15 December 2004 (1st Instance 8 months; 2nd Instance 2 months; Supreme Court 12 months);
- Supreme Court Judgment 3534/2005 of 1 June 2005 (1st Instance 6 months; 2nd Instance 3 months; Supreme Court 14 months);
- Supreme Court Judgment 15092/2005 of 21 December 2005 (1st Instance 3 months; 2nd Instance 6 months; Supreme Court 10 months).

With regard to discrimination on the grounds of sexual orientation:

- Constitutional Court Judgment 41/2006 of 13 February 2006 (1st Instance 3 months; 2nd Instance 6 months; Constitutional Court 33 months): in this individual appeal for protection the Court concludes that the claimant's right not to be discriminated for being a homosexual is violated by his dismissal from work.

Worth mentioning are also:

- Constitutional Court Judgment 87/2004 of 10 May 2004 (1st Instance 3 months; 2nd Instance 9 months; Constitutional Court 48 months), where the Court concludes that the right to effective judicial protection and the right of equality under the law have been violated as family dependencies were not taken into account when choosing the candidate for the job, while this was a decisive criterion in case of candidates with equal capacities.
- Constitutional Court Judgment 5/2007 of 15 January 2007 (1st Instance 5 months; 2nd Instance 7 months; Constitutional Court 37 months), where the Court concludes that the right not to be discriminated on the grounds of nationality was violated in the case of two Spanish teachers who received less pay than their Italian colleagues while working in a private educational centre located in Spain, but depending on the Italian State, without any objective or reasonable justification.

In the following judgments the Constitutional Court declared that the right to effective judicial protection was violated by not observing the prohibition of victimisation⁸ in labour relations:

- Constitutional Court Judgment 38/2005 of 28 February 2005 (1st Instance 3 months; 2nd Instance 5 months; Supreme Court 12 months; Constitutional Court 48 months);
- Constitutional Court Judgment 144/2005 of 6 June 2005 (1st Instance 1 month; 2nd Instance 7 months; Supreme Court 11 months; Constitutional Court 41 months);
- Constitutional Court Judgment 16/2006 of 19 January 2006 (1st Instance 2 months; 2nd Instance 3 months; Supreme Court 9 months; Constitutional Court 31 months);
- Constitutional Court Judgment 44/2006 of 13 February 2006 (1st Instance 2 months; 2nd Instance 5 months; Supreme Court 9 months; Constitutional Court 28 months);
- Constitutional Court Judgment 65/2006 of 27 February 2006 (1st Instance 3 months; 2nd Instance 2 months; Supreme Court 15 months; Constitutional Court 24 months).

The following judgments should be mentioned within the framework of the Directive 2006/54/EC (recast) of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation:

With regard to sexual harassment:

- Constitutional Court Judgment 250/2007 of 17 December 2007 (1st Instance 3 months; 2nd Instance 18 months; Supreme Court 24 months; Constitutional Court 45 months), where the Court annuls the judgments following that in first instance which did conclude that the harassment suffered by the claimant constituted a violation of her right to dignity, equality and non-discrimination on the grounds of gender.

With regard to discrimination on the grounds of gender in matters of employment and occupation:

- Supreme Court Judgment 3663/2000 of 4 May 2000 (1st Instance 1 month; Supreme Court 22 months; Constitutional Court 40 months). The Court reviews a judgment rendered regarding a claim concerning the right to equality and non-discrimination on the grounds of gender in access to the workplace due to the fact that a later judgment of the Constitutional Court concluded that discrimination on the grounds of gender existed. The Constitutional

⁸ In Spain known as the right to immunity: the right of the claimant to be protected against negative repercussions inflicted upon him/her because of lodging a claim.

Court considered that indirect discrimination existed based on the absence of women hired for the professional category of workshop specialists.

- Constitutional Court Judgment 183/2000 of 10 July 2000 (1st Instance 6 months; 2nd Instance 20 months; Constitutional Court 49 months): the Court concludes that the right not to be discriminated on the grounds of gender was violated as the indemnity for termination of the contract was calculated on the basis of wages which had been judicially declared discriminatory on the grounds of gender;
- Constitutional Court Judgment 203/2000 of 24 July 2000 (1st Instance 1 month; 2nd Instance 3 months; Constitutional Court 24 months): the Court considers that the right not to be discriminated on the grounds of gender was violated due to the denial of the right to leave to a civil servant for the purpose of child care;
- Constitutional Court Judgment 20/2001 of 29 January 2001 (1st Instance 34 months; Constitutional Court 33 months): the Court considers that the right not to be discriminated on the grounds of gender was violated in the case of a temporary civil servant who was dismissed because of maternity;
- Constitutional Court Judgment 10/2001 of 13 February 2001 (1st Instance 2 months; Constitutional Court 56 months): in an appeal for individual protection the Court considers that the right to effective judicial protection was violated as the claimant was unable to obtain satisfaction in claiming that his dismissal violated fundamental rights due to discrimination on the grounds of maternity, considering that the Court of first instance refused to admit the claim stating that previously a conciliation attempt was to be made;
- Constitutional Court Judgment 5/2003 of 20 January 2003 (1st Instance 5 months; 2nd Instance 10 months; Supreme Court 11 months; Constitutional Court 40 months): the judgment examines the negative measures taken against a few female workers for having filed a claim of discrimination on the grounds of gender resulting in a judicial decision declaring void their dismissal and obliging the company to readmit them; the Constitutional Court concludes that the right to effective judicial protection has been violated;
- Constitutional Court Judgment 17/2003 of 30 January 2003 (1st Instance 3 months; 2nd Instance 10 months; Constitutional Court 48 months): according to the Court discrimination on the grounds of gender exists when the temporary contract of a female worker is terminated for reasons of pregnancy;

- Constitutional Court Judgment 97/2003 of 2 June 2003(1st Instance 4 months; 2nd Instance 9 months; Constitutional Court 60 months): the Court annuls the previous judgments and recognizes the fundamental right of the claimant to use any pertinent evidence to prove that she was discriminated at work on the grounds of maternity;
- Constitutional Court Judgment 98/2003 of 2 June 2003 (1st Instance 32 months; Constitutional Court 58 months): in an individual appeal for protection the Court considers that discrimination on the grounds of gender exists as the claimant was removed from a designated position for being pregnant;
- Constitutional Court Judgment 161/2004 of 4 October 2004 (1st Instance 4 months; 2nd Instance 10 months; Constitutional Court 39 months): the Court considers that the right of an aviation pilot not to be discriminated on the grounds of gender was violated as she was suspended from work due to her pregnancy;
- Constitutional Court Judgment 175/2005 of 4 July 2005 (1st Instance 3 months; 2nd Instance 4 months; Supreme Court 10 months; Constitutional Court 49 months): the Court concludes that the right not to be discriminated on the grounds of gender was violated due to the termination of a temporary contract of a female workers for being pregnant;
- Constitutional Court Judgment 182/2005 of 4 July 2005 (1st Instance 5 months; 2nd Instance 6 months; Supreme Court 11 months; Constitutional Court 40 months): in an individual appeal for protection the Court confirms that discrimination on the grounds of gender exists as the claimant was withheld professional promotions on the grounds of pregnancies and maternity;
- Constitutional Court Judgment 214/2006 of 3 June 2006 (1st Instance 12 months; 2nd Instance 24 months; Constitutional Court 34 months): the Court concludes that the right not to be discriminated on the grounds of gender was violated as the job request of the unemployed claimant was suspended by the Public Employment Agency due to her maternity leave, reason for which she was not included in a candidate list for a job offer for which she held adequate qualifications;
- Constitutional Court Judgment 324/2006 of 20 November 2006 (1st Instance 3 months; Constitutional Court 42 months): the Court considers that discrimination on the grounds of gender exists as the claimant was not granted holiday leave for being on sick leave during her pregnancy;

- Constitutional Court Judgment 342/2006 of 11 December 2006 (1st Instance 3 months; 2nd Instance 6 months; Supreme Court 11 months; Constitutional Court 34 months): the Court considers that discrimination on the grounds of gender exists as the claimant was dismissed for being pregnant;
- Constitutional Court Judgment 3/2007 of 15 January 2007 (1st Instance 5 months; Constitutional Court 37 months): the Court considers that the claimant's fundamental right to non-discrimination on the grounds of gender was violated as she was denied a reduction of working hours to take charge of the legal custody of her six year old son;
- Constitutional Court Judgment 17/2007 of 12 February 2007 (1st Instance 4 months; 2nd Instance 4 months; Constitutional Court 46 months): the Court considers that the claimant's fundamental right to non-discrimination on the grounds of gender was violated by the termination of her contract during the trial period for reasons of various sick leaves during previous contracts as a result of complications during two pregnancies and subsequent abortions;
- Constitutional Court Judgment 74/2008 of 23 June 2008 (1st Instance 3 months; 2nd Instance 8 months; Supreme Court 14 months; Constitutional Court 25 months): the Court considers that the claimant's fundamental right to non-discrimination on the grounds of gender was violated by the termination of her contract due to pregnancy;
- Constitutional Court Judgment 92/2008 of 21 July 2008 (1st Instance 2 months; 2nd Instance 10 months; Supreme Court 13 months; Constitutional Court 25 months): the Court considers that the right to effective judicial protection was violated in relation to her right to non-discrimination on the grounds of gender due to her dismissal for reasons of pregnancy.

The following judgments should be pointed out in the framework of the Racial Equality Directive 2000/43 of 29 June 2000:

- Supreme Court Judgment 4165/2005 of 23 June 2005 (1st Instance 12 months; 2nd Instance 24 months; Supreme Court 48 months): the Court concludes that the request of the claimants for asylum should be admitted as in their home country they were being discriminated for being gypsy, reason for which they decided to come to Spain;
- Supreme Court Judgment 1172/2006 of 28 February 2006 (1st Instance 2 months; 2nd Instance 26 months; Supreme Court 36 months): the Court concludes that the request of the claimant for asylum should be admitted as in her home country she was suffering persecution

- in a similar sense Supreme Court Judgment 5343/2006 of 15 September 2006 (1st Instance 31 months; Supreme Court 36 months);
- Supreme Court Judgment 3827/2006 of 23 June 2006 (1st Instance 19 months; Supreme Court 26 months): the Court concludes that the request of the claimant for asylum should be admitted as she fled her home country for suffering persecution on the grounds of gender;
- in a similar sense Supreme Court Judgment 1303/2007 of 15 February 2007 (1st Instance 15 months; Supreme Court 40 months), where the Court concludes that the request of the claimant for asylum should be admitted as in her home country the claimant was suffering persecution on the grounds of gender;
- Constitutional Court Judgment 69/2007 of 16 April 2007 (1st Instance 2 months; 2nd Instance 19 months; Constitutional Court 49 months): the Court considers that the rejection of the widow's pension of a woman married according to the Roma customs does not constitute discrimination since the Spanish legal order does not recognise this form of matrimony (the case is now pending before the European Court of Human Rights).

Based on the above judgments, the average length of the judicial proceedings is the following:

- 1st Instance - 4,24 months. However, it should be noted that in those cases where the competent Court of first instance is not a regular Court but a higher or specialized Court (e.g. National Court) the time of resolution tends to be higher: 26,2 months;
- 2nd Instance - 9,3 months;
- Supreme Court - 18,77 months;
- Constitutional Court - 39,77 months.

4. Are procedures concluded within a reasonable time?

In general, judicial proceedings are concluded within a reasonable time taking into account the various instances. Thus, the Courts of First Instance take 3-4 months to reach a decision and the High Courts of Justice of the Autonomous Communities between 7 and 10 months. However, in

cases where the National Court acts as the Court of first instance proceedings tend to last longer and are not always concluded within a reasonable time. In the proceedings investigated above the average time of resolution was 26,2 months; in four cases the procedure took more than 31 months to be concluded.

Although the time of resolution of the procedures before the Supreme Court and the Constitutional Court may seem excessive in view of the cases listed above, taking into consideration the special characteristics of the proceedings concerned (Supreme Court: cassation and cassation for the unification of doctrine; Constitutional Court: individual constitutional complaint) it may be concluded that the time of resolution is not unreasonable.

It should be noted that as far as the procedure for handling individual constitutional complaints with the Constitutional Court are concerned, the reform of the Organic Act on the Constitutional Court *l*⁹ of 2007 will allow for the time of resolution to be shortened as it allows for these appeals to be handled also by the Court's Sections if so decided by the Chambers, provided consolidated doctrine can be applied for its resolution (before the reform only the Plenary was competent to handle individual constitutional complaints).

Finally, the 2008 Annual Report of the General Council of the Judiciary shows that the number of complaints on the grounds of undue delays in judicial proceedings diminished by 21% compared to the previous year.¹⁰

5. Does provision exist for speedy resolution of particular cases?

With regard to provisions establishing special procedures on grounds of urgency or sensitivity, it can be noted that Article 53 par. 2 of the Spanish Constitution with a view to the protection of specific fundamental rights provides that: "Any citizen may assert his or her claim to the protect the liberties and rights recognised in Article 14 a 29 y 30.2, by means of a preferential and summary procedure in the ordinary courts".

By virtue of this article a special procedure was created for the protection of fundamental rights which is preferential (it is handled with priority) and summary (rapid, express), extending to all

⁹ Spain/State Official Journal n° 239 of 05/10/1979.

¹⁰ <http://www.poderjudicial.es/eversuite/GetRecords?Template=cgpj/cgpj/principal.htm>

jurisdictions (administrative, civil, criminal and social). The competent Courts are the Courts of First Instance.

Standing is granted to all persons having a legitimate interest in the reestablishment of the infringed fundamental right (natural and legal persons, including aliens; European citizens are considered equal to Spanish nationals as holders of fundamental rights). The Public Prosecutor's Office and the National Ombudsman also have standing.

The *petitum* of the claim should contain the recognition of the infringed fundamental right, the declaration of the original decision, act or resolution to be void, the determination of the effects of the violation and full redress of the claimant's rights and freedoms and where necessary the adoption of protective measures. Both the examination and the execution of the procedure are carried out with preference over other procedures before the regular Courts.

With regard to the practical application of this procedure, it can be concluded that parties claiming that their fundamental rights have been violated by discrimination do not very frequently use this special procedure. Of all the cases examined, very few claims were brought in this way. However, considering that these proceedings are followed before the Courts of First Instance combined with the fact that the cases examined in this report are rulings of the Supreme Court and the Constitutional Court makes it difficult to draw any exhaustive conclusions as to which procedures were used to lodge the original claim as the original proceedings are not systematically reflected in the full text of the examined judgments. In addition, no adequate statistics are available on the subject.

6. Is it possible to waive the right of access to a judicial body?

There is no possibility to waive the right of access to a judicial body by a clause in a work contract. Should the dispute relating to discrimination fall under the civil and not under the labour jurisdiction, a waiver of the right of access to a judicial body would be possible since there is no general legal provision prohibiting the waiver of the right of access in discrimination cases.

7. Access to non-judicial procedures

Regarding the possibility of access to non-judicial procedures in order to obtain redress it is worth mentioning that victims of discrimination may appeal to the Ombudsmen (at both national and regional level, whenever existing) when the issue concerns acts of the Public Administration. Although not empowered to modify or overrule the acts and decisions of the Public Administration, the Ombudsman may, in the course of his investigations, give advice and make recommendations to authorities and officials, remind them of their legal duties and make suggestions regarding the adoption of new measures.

The task of the *Defensor del Pueblo* (National Ombudsman) and the *Defensores del Pueblo Autonómicos* (Ombudsmen of the Autonomous Communities) is to protect the rights and liberties of Title I of the Constitution (what includes Article 14 of the Constitution that prohibits any form of discrimination). Their function is to supervise the activity of the public administrations. They can carry out the investigations they consider necessary, informing Parliament of the results. However, they do not decide for themselves the possible sanctions for the cases they investigate, although they can make suggestions in this sense. Article 23 of the Organic Act 3/1981, of 6 of April, of the *Defensor del Pueblo* establishes that when the complaint has been presumably caused by the abuse, outrage, discrimination, error, malpractice or omission of a civil servant, the Ombudsman can contact the civil servant informing him of his opinion on the case. In addition to this, the Ombudsman shall communicate these facts to the head of the department where the civil servant works, formulating the suggestions that he considers convenient.

The Ombudsman is entitled to lodge appeals on the grounds of unconstitutionality and individual constitutional complaints with the Constitutional Court also in cases regarding racial or ethnic discrimination. Since the creation of the Ombudsman by the Spanish Constitution, however, none of the 12 individual appeals for protection lodged with the Constitutional Court was motivated by racial or ethnic discrimination. Furthermore, none of the unconstitutionality complaints filed by the Ombudsman was related directly to this kind of discrimination.

According to Organic Act 3/1981 of the *Defensor del Pueblo*¹¹, the Ombudsman shall not investigate individually any complaints that are pending judicial resolution, and he shall suspend any investigation already commenced if a claim or appeal is lodged by the person concerned with the ordinary courts or the Constitutional Court. Accordingly, a complaint lodged with the

¹¹ Spain/ State Official Journal of 07/05/1981.

Ombudsman is not exclusive and does not prevent the applicant from taking legal action before the courts. However, both, proceedings before the Ombudsman and judicial proceedings, may not proceed concurrently.

Moreover, there is also the Council for the Promotion of Equal Treatment of All Persons without Discrimination on the Grounds of Racial or Ethnic Origin, which is responsible for providing assistance to victims of discrimination. Royal Decree 1262/2007¹², regulating composition, competencies and functioning of the Council adopts overall the wording of article 13 Para. 2 of the Directive 43/2000, establishing that competencies of the Council are: to provide independent assistance to victims of direct or indirect discrimination on the grounds of their racial or ethnic origin in pursuing their complaints; to conduct independent surveys, to publish independent reports on discrimination of persons on the grounds of racial or ethnic origin and generally on the observance of the principle of equality by which is meant the lack of all kind of direct or indirect discrimination on grounds of racial or ethnic origin; and to promote measures contributing to the equal treatment and the abolition of such discrimination amongst others making recommendations and proposals.

The first one of the powers of the Council (to provide independent assistance to victims of direct or indirect discrimination on the grounds of their racial or ethnic origin in pursuing their complaints) corresponds to the wording of article 13 Para. 2 of the Directive 43/2000. Nevertheless, while the Royal Decree contains detailed description of the concrete activities comprised by the other powers of the Council, the power of the Council to provide assistance to victims of discrimination is not mentioned anymore along the provisions of the Royal Decree. The Royal Decree contains no provisions on the exact configuration of that power, for instance, whether the assistance shall comprise legal advice (on if a person is likely to have a case and how to proceed with it) and mediation activities such as attempts to settle cases out-of-court, or through assistance and representation when a case is taken to court. It remains further unclear if such assistance can have preventive character as e.g. for organisations and employers who may seek advice on how to interpret legislation or how to establish policies for the various grounds. Moreover, the Royal Decree contains no provision on if complaints shall be received by the Council or if problems shall be identified in another manner. In this context, the Royal Decree

¹² Spain/ REAL DECRETO 1262/2007, de 21 de septiembre, por el que se regula la composición, competencias y régimen de funcionamiento del Consejo para la Promoción de la Igualdad de Trato y no Discriminación de las Personas por el Origen Racial o Étnico (BOE of 3/10/07).

does not contain any reference to complaints lodged before the Council, neither are there provisions on procedure or requirements of such complaints.

In order to achieve a more effective protection from such kind of discrimination, the power of the Council to provide independent assistance to victims of discrimination in pursuing their complaints should be extended. Thus, this power should comprise assistance in legal processes which could include either legal advice and attempts to resolve cases out-of-court, or legal advice and representation when a case is taken to court. Neither of those possibilities is expressly provided for by the Royal Decree on the composition, competences and functioning of the Council. Certainly, the wording of the Royal Decree does not admit the configuration of the Council as formal decision-making body which could have contributed to a more effective protection from racial or ethnic discrimination.

Furthermore, victims of discrimination in the employment field may address their complaints to the Employment and Social Security Inspectorate which is attached to the Ministry of Migration and Employment Affairs. According to Act on Infringements and Sanctions within the Social Order¹³, amended by Act 62/2003, which transposed Directives 2000/43 and 2000/78, “unilateral decisions of the employer entailing adverse direct or indirect discrimination on the grounds of age and disability, or favorable or adverse direct or indirect discrimination regarding remuneration, work time, vocational training, promotion and other work conditions on grounds of gender, racial or ethnic origin, social status, religion or beliefs, political ideology, sexual orientation...” as well as “decisions of the employer constituting an adverse treatment of the employee as a reaction to a complaint within the undertaking or to any other legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination” and harassment on any of the abovementioned grounds constitute a “very grave labour infringement”. The Employment and Social Security Inspectorate (or the correspondent competent authority within the territory of an Autonomous Community) may impose an administrative sanction instituting an administrative procedure against the employer ex officio or upon complaint of the person affected. A complaint lodged with the Employment and Social Security Inspectorate does not prevent the applicant from taking legal action against the employer (social jurisdiction).

To conclude, the complaints lodged with the Ombudsman and the Employment Inspectorate are not comparable with judicial proceedings. These procedures are not adversarial in nature and the

¹³ *Real Decreto Legislativo 5/2000, de 4 de agosto, por el que se aprueba el texto refundido de la Ley sobre Infracciones y Sanciones en el Orden Social* [Legislative Royal Decree 5/2000 on the Act on Infringements and Sanctions within the Social Order (recast)]. Spain/ State Official Journal of 08/08/2000.

complainant is not a party in the strictest sense. The Ombudsman is an independent authority who issues no resolutions but he shall inform the complainant of the results of his investigations and actions taken. The Employment Inspectorate may institute an administrative proceeding against a discriminating employer. The person affected is no party of the procedure but may participate as witness.

Moreover, in the field of employment, articles 63-68 of the Act on Labour Procedure provide for a compulsory conciliation procedure to be followed before any judicial appeal is lodged. The conciliation procedure does not prevent the applicant from taking legal action if it does not end with an arbitral award. However, the compulsory conciliation is no requirement in order to take legal action in the case of complaints regarding violation of the right to freedom of association. The legal doctrine assumes that this exception applies also to complaints related to other fundamental rights (such as the right to non-discrimination) although this is not expressly provided for by the Act.

Furthermore, in cases, falling under the civil (and not labour¹⁴) jurisdiction, arbitration proceedings may be initiated. According to the Act on Arbitration the arbitral tribunal may be made up of one or more arbitrators (depending on the agreement of the parties). The arbitral tribunal may render one or more awards. The procedural rules are very flexible and may be determined by the parties or, as regards those aspects not agreed by the parties, by the arbitral tribunal. If the parties have submitted their dispute to an arbitral institution, the procedural rules of the institution will automatically apply. The award is immediately enforceable, even if an action for its annulment has been filed before the courts. Courts of First Instance may intervene in the arbitration proceedings in order to support the functions of the arbitral tribunal, for the following purposes: to appoint the members of the arbitral tribunal, if the parties do not reach an agreement; to assist the arbitral tribunal in obtaining evidence; to decide on and enforce interim measures; and to enforce the arbitration award. Provincial Courts will deal with the actions for annulment of arbitration awards. These actions may only be based on certain specific grounds: because the matter the arbiters decided on cannot be subjected to arbitration, because the arbiters decided on a matter which had not been subjected to their judgment, or because the award goes against public order. No further appeal is possible against the decision of the Court.

Finally, in cases of racial or ethnic discrimination mediation is carried out by organizations (both public and private) specialized in this subject. Mediation efforts are made both before the start of

¹⁴ Arbitral proceedings are available only in the case of collective labour disputes.

judicial proceedings and once they have been initiated. A distinction must be made between mediation in administrative, labour, civil and criminal procedures. Mediation is always voluntary, meaning that also in cases of racial or ethnic discrimination parties are under no obligation to make use of this kind of conflict resolution.

In general terms, mediation is used more frequently in administrative, labour and civil procedures and less in criminal cases. Nonetheless, in recent years various autonomous communities (Basque Country, Navarra, Catalonia) have created criminal mediation services which belong to the Justice Department of each community and which are active within the criminal courts. The city councils of major Spanish cities such as Madrid and Barcelona have also set up criminal mediation services. Statistically speaking, this has led to a significant increase in criminal mediation over the past years.

The goal of these services is to offer the possibility of mediation during the different phases of the criminal process – investigation, trial and enforcement – in order to give both the victim of a crime or misdemeanour and the accused the chance to participate voluntarily in alternative methods of conflict resolution. Mediation does not substitute the criminal process, but constitutes an additional phase in the entire process.

In case mediation is successfully applied during the preliminary phase of the criminal procedure, the accused may see his sentence reduced by the application of the mitigating circumstance of redress of the damages caused. If the parties reach an agreement through mediation during the trial phase, the case may be dismissed or the public prosecutor may decide to drop the charges. In other cases, the court may, with the mutual agreement of the parties involved, pronounce a judgment which includes the terms of the agreement reached by way of mediation. These mediation services are carried out by specialized organizations on the basis of special agreements with the department of justice.

In general, all NGOs and organizations specialized in racial or ethnic discrimination offer to victims information about the possibilities of mediation, both before and during the judicial procedure, whenever the circumstances of the case suggest that it may be beneficial. Mediation in these cases may be carried out with the support of specialists in this field belonging to NGOs or by services specialized in providing assistance to victims of racial or ethnic discrimination. Various NGOs offer mediation services.

There are no specific aggregate data available on all mediation done in cases of racial and ethnic discrimination. However, some NGOs (e.g. *SOS Racismo*) include in their annual reports some cases solved by way of mediation¹⁵.

There is no customized mediation procedure which is applied in cases of racial or ethnic discrimination; the usual standard methods of mediation are used.

There are not enough data available in Spain to establish whether mediation in these cases is effective, proportionate and dissuasive

The system of mediation is still underdeveloped due to the fact that the Spanish legal system is configured on the basis of detailed written rules and procedures which only exceptionally allow for mediation or transactions regarding the sanctions to be imposed. Only in recent years alternative measures have been developed which in certain cases may be imposed by judges in order to substitute criminal punishment, taking into account the nature of the offence, the

8. Legal aid

According to Article 119 of the Spanish Constitution, Justice shall be free of charge when the law so provides and in any case for those who have insufficient means to litigate. In Spain there are no court fees. However, lawsuits usually entail certain costs such as costs for lawyers, experts etc. These costs normally have to be pre-paid by the party concerned. At the end of the trial the court has to decide which party is ultimately to bear the costs.

According to the Legal Aid Act persons (Spaniards, EU citizens and even illegally residing aliens) without sufficient financial means to litigate have the right to receive legal advice before to take legal action or legal representation within a lawsuit by an assigned counsel. The person concerned shall file an application for the appointment of an assigned counsel and submit it to the local Bar Association. Even in cases where the representation by a lawyer is not mandatory, the Court may order the appointment of an assigned counsel in order to guarantee the equality of the parties.

¹⁵ See e.g. http://www.sosracisme.org/denuncia/estadistiques_%20generals_07.pdf.

Besides of the legal representation, legal aid is provided to persons without sufficient funds by releasing them from certain costs (costs of publishing announcements in official journals, deposits required for lodging certain appeals and experts' fees).

In addition, and solely for cross-border disputes, following the reform of the Legal Aid Act by Act 16/2005 of 18 July 2005 to adapt it to Directive 2002/8/EC, recipients of legal aid do not have to pay the following costs: interpretation services, translation of documents, travel expenses if the applicant has to appear in person.

In order to qualify as having insufficient funds, the total monthly income of the person concerned and his/her “family unit” (husband or wife and minor children living in the same household) must not exceed the double of the National Minimum Wage set annually by the Government. In 2009 the minimum wage is €624 per month. For cross-border disputes, even if the applicant earns more than this amount he/she may be eligible for legal aid if he/she is unable to meet the costs of the proceeding owing to the differences between the cost of living in his/her Member State of residence and Spain.

These requirements apply to all kind of disputes regardless the jurisdiction (civil, penal, social-labour, administrative).

There are no specific public organs in Spain responsible for the assistance to and representation of the victims of discrimination. Although the competencies of the Council for the Promotion of Equal Treatment of all Persons without Discrimination on the Grounds of Racial or Ethnic Origin include “to provide independent assistance to the victims of direct or indirect discrimination on the grounds of racial or ethnic origin, when filing their complaints” (art. 3 of the Royal Decree on composition, competencies and functioning of the Council), it is not clear if this assistance also refers to legal assistance.

However, in discrimination cases legal aid is also provided by NGOs. Spanish NGOs, which are constituted on the basis of *Ley Orgánica 1/2002, de 22 de marzo, reguladora del Derecho de Asociación* (BOE of 26/03/2002) [Organic Act on the Right to Association], participate in discrimination procedures at all levels. First of all, they receive, register and report complaints regarding discrimination on racial or ethnic grounds. Secondly, they offer information, guidance and legal advice to victims. Thirdly, they participate in legal procedures in cases of discrimination in support of, and on behalf of the victims. This right of standing is based on article 162 para.1.b of the Spanish Constitution, which states that all physical or legal persons invoking a legitimate

interest may lodge an individual constitutional complaint (*recurso de amparo*) with the Constitutional Court regarding the violation of the principle of equal treatment as a result of racial or ethnic discrimination. As for the specific procedural role of NGOs there exists no specific regulation on the subject.

NGOs which assist victims of discrimination do not specifically receive public funding. All Spanish NGOs may receive public funding through State subsidies and aid. The legal instrument regulating the granting of public funding is General Act 38/2003, of 17 November, on Subsidies. According to this Act the competent public authorities will initiate on their own initiative the proceedings for the concession of subsidies in accordance with the principles of established by Act 30/1992, of 26 November, on Public Administrations and Common Administrative Procedures, proceedings which are to be published in the Spanish State Gazette. Any NGO which uses the funds for specific objectives and the activities of which serve public or social interests may apply for these subsidies. They may be paid from State funds or autonomic public funds. If the geographical scope of the subsidies is limited to a specific Autonomous Community only NGOs active in this community can apply. Moreover in Spain, based on Royal Decree 825/1988, of 15 July, on Income Taxes regulating the social causes to which fiscal allocations may be dedicated¹⁶, natural persons may indicate on their tax forms the desire to reserve the specific percentage corresponding to that fiscal year for the support of either the Catholic Church or other social causes, being NGOs. If no preference is indicated, the contribution is taken to be reserved for other social causes. In 2006 the Spanish Government and NGOs signed an agreement raising this voluntary tax quota of natural persons to 0,7%. In addition, NGOs can participate in public tenders on a local, autonomic, national or international level in order to obtain funding for specific activities or projects.

In Spain numerous associations exist which offer support to victims of racial or ethnic discrimination (in this field around 300 organisations can be found). The website of the Spanish Observatory on Racism and Xenophobia (Oberaxe) contains an Anti-Discrimination Resource Centre (CREADI) which offers a data base including all Spanish NGOs providing support in this field¹⁷.

Most NGOs dedicated to this kind of support are members of the European Network Against Racism (ENAR), such as Asamblea de Cooperación Por la Paz (ACPP), ACULCO, Asociación

¹⁶ BOE of 28 July 1988. Number 180/1988.

¹⁷ See www.oberaxe.es/creadi.

por los Derechos de las Mujeres de Afganistán (ADMAF), Asociación América España Solidaridad y Cooperación (AESCO), Asociación pro Derechos Humanos de Andalucía (APDHA), ARI-PERU, Asociación Solidaria para la Integración Sociolaboral del Inmigrante (ASISI), Asociación de Mujeres E'waiso Ipola, Asociación Nacional Presencia Gitana (ANPREGIT), Comisión Española de Ayuda al Refugiado (CEAR), Coordinadora Nacional de Ecuatorianos en España (CONADEE), CONIBERO, Federación de Derechos Humanos, Federación de Mujeres Progresistas (FMP), Instituto de Estudios Políticos para América Latina y África (IEPALA), Movimiento por la Paz, el Desarme y la Libertad (MPDL), Pro Infancia, Red ACOGE, Federación de Asociaciones pro Inmigrantes, SOS Racismo, Unión Sindical Obrera (USO), Unió des Pobles Solidaris, Asociación Madrid Puerta Abierta, Voluntariado Madres Dominicana (VOMADE), Movimiento contra la Intolerancia y Colegas Madrid.

Generally speaking, due to the large number of NGOs offering information and support to the victims of racial or ethnic discrimination, it is easy for these victims to find and obtain assistance. Moreover, considering the wide range of NGOs representing various groups of possible victims (immigrants, religious groups, ethnic groups, etc.) it would be fair to say that it is highly unlikely that there exists a group of possible victims of racial or ethnic discrimination in Spain which presently is not represented by an NGO. In cases where victims do not find an organization which specifically protects the group they belong to, they can always turn to NGOs which are dedicated to fighting racial and ethnic discrimination on a more general level.

The activities of NGOs essentially have a considerable social impact. The importance of their role mainly derives from the fact that NGOs specialized in racial or ethnic discrimination offer a wide spectrum of services, such as legal support, orientation and guidance in cases where racist aggression or discriminatory or xenophobic attitudes are reported, psychological support in cases of aggression or discrimination if so requested by the victim, mediation in conflicts where these are liable to be solved by means of dialogue, and information and advice on the basic rights of all citizens, regardless of their ethnic origin or race.

Several specialized NGOs, besides giving judicial support to individual victims, use “strategic litigation” as an instrument to ensure that key anti-discrimination legislation is observed. Strategic litigation has demonstrated its value as a pressure tool, as it uses the judicial system to induce general social change. The primary objective of strategic litigation is to achieve legislative or political adjustments, meaning legal action is not limited to obtaining individual compensation, although naturally both objectives are not mutually exclusive. This kind of lawsuits seeks to lift

individual cases to a more general level and achieve favourable case law leading to a wider protection of possible victims of discrimination. Obviously, changing existing legislation or generating new laws has a far greater impact than individual legal action. In this respect, specialized NGOs tend to select the cases they handle, give special attention to representative cases and verify afterwards whether the positive results of lawsuits have been implemented.

Trade unions are authorized to take the appropriate procedural actions directly or in support of the persons affected by discrimination. This authorization can be based on different legal provisions:

Ley Orgánica 11/1985, de 2 de agosto, de Libertad Sindical (BOE of 8/08/1985) [Organic Act on Freedom of Association] stipulates in article 12 that regulations, clauses in collective agreements, individual contracts and unilateral decisions of the employer containing or supposing any type of discrimination regarding employment or working conditions are null and void, irrespective of being favourable or unfavourable, the membership of a trade union or the accession to its collective agreements or its activities in general. In addition, article 13 grants the right to sue to any employee and trade union who consider that their freedom of association has been violated (in this context, the right to watch over the lack of discrimination of the employees is one of the trade unions' powers) by the employer, an employers' association, the Public Administration or by any other person, public or private entity. In these cases, the trade union is entitled to invoke before the competent courts the protection of the right concerned by means of the proceedings of jurisdictional protection of fundamental rights, which have priority over other proceedings and which are summary proceedings so that judgment is delivered faster than in ordinary proceedings. Moreover, according to article 14, the trade union, to which the allegedly affected employee belongs, as well as any trade union considered to be the most representative may join the proceedings in support of the plaintiff directly affected by the alleged discrimination. In this case, it is to be pointed out that trade unions considered to be the most representative (the Act on Freedom of Association awards this characteristic taking into account the number union members in Spain or in an Autonomous Community depending on its territorial scope of activities) may join such proceedings even if the employee concerned is not an union member (**objective action**).

Furthermore, *Real Decreto Legislativo 2/1995, de 7 de abril, por el que se aprueba el Texto Refundido de la Ley de Procedimiento Laboral 1444/1995* (BOE of 11/04/1995) [Royal Legislative Decree on the consolidated version of the Act on Labour Procedure] recognizes the legal capacity of trade unions to take an action in defence of the employees' rights comprising also the right not to be discriminated on the grounds of racial or ethnic origin. Article 17 para. 2

stipulates that trade unions and employer associations are authorized to defend their economic and social interests, amongst others the protection against all types of discrimination, including on the grounds of racial or ethnic origin. This authorization is limited to the employees affiliated to a trade union (subjective action), since article 20 establishes that trade unions may take an action on behalf of their members and only with their authorization, in defence of their personal rights. The trade union shall certify the affiliation of the employee concerned to the trade union as well as the notification to the employee regarding the intent of the trade union to file a lawsuit. However, the trade union shall be deemed to have been authorized by the employee unless the latter declares the contrary in any of the stages of the proceedings. In this case, the court will close the proceedings. Should the employee not have authorized the trade union, he may enforce his claims against the trade union by separate labour proceedings.

9. Forms of satisfaction available to a vindicated party

All judicial procedures available under the bellowed mentioned legislation provide for the awarding of compensation, either according to the general provisions of civil or social (labour) law, or according to special rules included in these instruments.

Article 18.1 of Act on equal opportunities, non-discrimination and universal accessibility of persons with disabilities ¹⁸ provides that: “The judicial protection of the right to equal opportunities of persons with disabilities will comprise the adoption of all necessary measures to stop the infringement of this right and to prevent future infringements, as well as to return the injured party the full enjoyment of his/her right”. According to Art. 18.1 para.2 of the Act: “The compensation or redress to which the claim may give rise will not be limited a priori by any maximum amount. Compensation for immaterial damages may be awarded even where no financial damage has been caused; this compensation will be established taking into account the circumstances of the infringement and the gravity of the violation.” Compensation for immaterial damages may be awarded even where no financial damage has been caused; this compensation will be established taking into account the circumstances of the infringement and the gravity of the violation”.

¹⁸ Spain/State Official Journal nº 289 of 03/12/2003.

Claims based on Act 51/2003 can be filed through an ordinary procedure with the regular Courts¹⁹.

Under Article 181 of the Act on Labour Procedure claims can be filed under a special urgent procedure regarding violations of fundamental rights and public freedoms, including the prohibition of discriminatory treatment and harassment. In case the alleged violation is found to exist, the Court will order the reported acts to cease immediately, as well as the reestablishment of the situation previous to the violation. The Court will further order redress of the consequences deriving from the reported acts, including the pertinent compensation, which is considered compatible with any compensation awarded to the worker due to the modification or termination of his/her contract.

Besides, the available (non-judicial) administrative procedures provide for considerable monetary sanctions to be imposed on the infringing party. For example, victims of discrimination on the grounds of disability can claim for sanctions to be imposed on both public and private entities through the (non-judicial) administrative procedure created by the Act on the rules regarding infringements and sanctions in the field of equal opportunities, non-discrimination and universal accessibility of persons with disabilities²⁰, which to a certain extent further develops Act 51/2003. The monetary sanctions which may be imposed on private entities range from € 301 to € 1.000.000 (art. 4), depending on various factors, such as the number of persons affected, the turnover of the company or entity responsible for the infringement or whether the infringing party has ignored earlier warnings (art. 5). As an accessory sanction in case of very serious infringements the competent organs may propose, in addition to the corresponding sanction, to suspend or cancel any public financial support that the infringing party may have requested regarding activities in the field where the violation has taken place. In case of violations committed by the public administration, the monetary sanctions which may be imposed also range from €301 to €1.000.000 (art. 17).

With regard to court rulings considering that dismissal has been unlawful, the employer has the possibility to choose, within five days, between readmitting the worker while paying arrears of wages, or compensating the dismissed person with 45 days of pay for each year of service (apportioning periods of less than a year according to the number of months worked), up to a

¹⁹ A first lawsuit based on this law was filed in 2005 by the Spanish Committee of Representatives of Persons with Disabilities and the National Confederation of Deaf Persons against the airlines Iberia and Air Nostrum. On 31 October 2008 the Court of First Instance in Madrid ruled against the claim. However, in appeal the Provincial Court of Madrid finally accepted the claim (Judgment 211/2009 of 6 May 2009).

²⁰ Spain/State Official Journal n° 310 of 27/12/2007.

maximum of forty-two months of wages, plus a sum equal to the unpaid wages from the moment of dismissal until the moment the ruling was notified or until the dismissed worker found new employment. The compensations awarded in the cases examined range from €1.000 to €15.000 (depending on the circumstances and the judicial assessment in each case; there are no pre-established rules for the determination of the height of compensation to be awarded). The median compensation was €5.182.

In the cases involving the discrimination of workers, until 2006 the Supreme Court considered that no separate compensation could be awarded for discrimination, as it deemed that the compensations in these cases were comprehensive compensations, including all kinds of damages²¹. Starting with its ruling of 17 May 2006, the Supreme Court recognizes the compatibility of awarding separate compensation for undue severance and discrimination. Moreover, the Thirteenth Additional Provision of Act 3/2007 on the Effective Equality between Women and Men (which, as indicated previously, transposes Directive 2006/54) modifies the Act on Labour Procedure (articles 180 and 181), expressly including in all cases of discrimination the possibility to claim separate compensation for non-material damages due to discrimination. It may be assumed that this recent change will lead to a more widespread application of non-material damages in discrimination cases and in general to an increase in the compensations awarded.

As for the complaints lodged to the Ombudsman it should be highlighted that the Ombudsman may make recommendations to public authorities or lodge an unconstitutionality complaint etc. with the Constitutional Court. However, the Ombudsman is not entitled to grant compensations to the complainant.

10. Adequacy of compensation

The redress for damages caused to individuals due to breaches in the area of discrimination is adequate. In particular it should be pointed out that the cases examined have showed that applicants usually apply not for a pecuniary compensation for any incumbents going along with the act of discrimination. The claimants rather apply for reintegration in their job after a dismissal based on discrimination or they petition that a discriminatory decision of the employer is declared null and void. In this regard it should be noted that within the civil, labour and administrative

²¹ Spain/ Judgment of the Supreme Court of 11 March 2004.

jurisdiction the Court is not allowed to award the parties something they have not applied for. Accordingly, since in the cases examined the Courts usually accepted the motions of the applicants, it can be assumed that in practice adequate redress is provided.

11. Rules relating to the payment of legal costs

As a general rule, it is up to the Court to decide by which of the parties these expenses should eventually be borne based on the principal of “loser- pays”²². It is the judge or court who decides whether the losing party must pay the legal fees and lawyer’s expenses in full or whether these are to be divided among the parties. Nevertheless, in civil matters article 241 of the Law on Civil Litigation states that each party shall bear its own expenses unless the Court decides otherwise.

However, under the Act on Legal Aid persons with insufficient financial resources can request free legal aid, which includes pre-trial legal advice, solicitors' and barristers' fees, experts' fees, the costs of publishing announcements in official journals and deposits required for lodging certain appeals. Spanish citizens, community citizens and all other aliens legally resident in Spain can apply for legal aid. Article 36 of Act 1/1996, of 10 January, on Free Legal Aid provides that in cases where one of the parties benefits (natural persons or NGOs) from free legal aid and the sentence is favourable to this party, the other party will be obliged to pay the cost of the free legal aid awarded. In case the Court decides against the party who received free legal aid, this party is obliged to pay the cost of the free legal aid plus the lawyer’s expenses of the other party if within the three years following the lawsuit his financial situation improves. If the beneficiary of free legal aid wins the case and the sentence does not contain any explicit decision on legal costs, he must pay the legal expenses of his defence, provided they do not exceed a third part of the compensation obtained as a result of the procedure.

12. Rules on burden of proof

As far as the shift of the burden of proof is concerned, Articles 32 and 36 of Act 62/2003 (transposing the Racial Equality Directive) establish the shift of the burden of proof as foreseen in

²² Principle laid down in Article 394 of the Spanish Civil Procedure Act. In case the Court recognizes a claim only in part, each party will have to bear his own part of litigation expenses and half of the common legal expenses.

article 8 of the Directive. This shift of the burden of proof existed already in the Spanish labour procedure legislation regarding gender discrimination²³ and infringement of the right to the freedom of association²⁴.

Article 32 of Act 62/2003, applying to fields other than employment, establishes that “in those civil and administrative procedures in which from the facts alleged by the plaintiff the existence of founded indications for discrimination on the grounds of racial or ethnic origin may be concluded, it shall be for the respondent to provide an objective, reasonable and sufficiently proved justification of the measures adopted and their proportionality”.

Article 36, applying to discrimination in employment, has the same wording as article 32 (including also discrimination on grounds of religion or belief, disability, age or sexual orientation).

Furthermore, article 40 of Act 62/2003 amends the above mentioned article 96 of the Labour Procedure Act. The new article 96 states that “in those lawsuits in which allegations of the plaintiff from which founded indications for discrimination on the grounds of gender, racial or ethnic origin, religion or beliefs or sexual orientation may be concluded, it shall be for the respondent to provide an objective, reasonable and sufficiently proved justification of the measures adopted and their proportionality”.

Act 62/2003 generally states that the anti discrimination provisions (transposing the Racial Equality Directive) apply both to the private and public sector.

²³ Article 96 of the Act of Labour Procedure published in its amended version in *BOE of 11/04/95*.

²⁴ Article 179 of the Act of Labour Procedure.