

# Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity

Spain

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Authors of the 2014 Update:  
Teresa Freixes Sanjuán (Senior Expert)  
Authors: Francisco Balaguer Callejón  
Yolanda Gómez Sánchez  
Joaquín Sarrión Esteve  
Ferran Rodríguez García  
Assistant: Cristina Elías Méndez  
Franet contractor: MPDL

Authors of the 2010 Update  
Teresa Freixes Sanjuán (Senior Expert)  
Author: Francisco Balaguer Callejón  
Assistant: Cristina Elías Méndez

Authors of the 2008 report  
Teresa Freixes Sanjuán  
Francisco Balaguer Callejón  
Cristina Elías Méndez

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# Executive summary

## Implementation of Employment Directive 2000/78/EC

The implementation of Directive 2000/78/EC was done through to a large number of laws that developed and adapted Spanish legislation to the Directive, including their provisions and mechanisms in Spanish legislation.

The first step consisted mainly of Act 62/2003 of 30 December 2003 on Fiscal, Administrative and Social Measures.<sup>1</sup> Specific legislation includes Act 7/2007 of 12 April on the Basic Statute of Public Employees,<sup>2</sup> Act 20/2007 of 11 July on the Statute of Self-Employed Workers,<sup>3</sup> Act 55/2003 of 16 December on the Framework Statute of Health Service Staff,<sup>4</sup> Act 31/2006 of 18 October on the Participation of Workers in European Public Limited Companies and Cooperatives,<sup>5</sup> Organic Act 11/2007 of 22 October on Rights and Duties of the Civil Guard (military police),<sup>6</sup> Organic Act 12/2007 of 22 October on the Disciplinary Regime for the Civil Guard concerning Military Careers,<sup>7</sup> Act 39/2007 of 19 November concerning Military Careers,<sup>8</sup> and Act 25/2009 of 22 December modifying certain laws for their adaptation to the Act on free access to service activities and their performance.<sup>9</sup> Some terminological precisions were also

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<sup>1</sup> Spain (2003), Act 62/2003 of 30 December 2003 on Fiscal, Administrative and Social Measures (*Ley 62/2003 de 30 de diciembre sobre Medidas fiscales, administrativas y del orden social*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2003-23936](http://www.boe.es/buscar/act.php?id=BOE-A-2003-23936) (All hyperlinks were accessed on 26 February 2013)

<sup>2</sup> Spain (2007), Act 7/2007 of 12 April on the Basic Statute of Public Employees (*Ley 7/2007 del Estatuto Básico del Empleado Público*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-7788](http://www.boe.es/buscar/act.php?id=BOE-A-2007-7788) (All hyperlinks were accessed on 26 February 2013)

<sup>3</sup> Spain (2007), Act 20/2007 of 11 July on the Statute of Self-Employed Workers (*Ley 20/2007, de 11 de julio, del Estatuto del trabajo autónomo*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-13409](http://www.boe.es/buscar/act.php?id=BOE-A-2007-13409) (All hyperlinks were accessed on 26 February 2013)

<sup>4</sup> Spain (2003), Act 55/2003 of 16 December on the Framework Statute of Health Service Staff (*Ley 55/2003, de 16 de diciembre, del Estatuto Marco del personal estatutario de los servicios de salud*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2003-23101](http://www.boe.es/buscar/act.php?id=BOE-A-2003-23101) (All hyperlinks were accessed on 26 February 2013)

<sup>5</sup> Spain (2006), Act 31/2006 of 18 October on Participation of Workers in European Public Limited Companies and Cooperatives (*Ley 31/2006, de 18 de octubre, sobre implicación de los trabajadores en las sociedades anónimas y cooperativas europeas*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2006-18204](http://www.boe.es/buscar/doc.php?id=BOE-A-2006-18204) (All hyperlinks were accessed on 26 February 2013)

<sup>6</sup> Spain (2007), Organic Act 11/2007 of 22 October on Rights and Duties of the Civil Guard (military police) (*Ley Orgánica 11/2007, de 22 octubre, reguladora de los derechos y deberes de los miembros de la Guardia Civil*) [www.boe.es/buscar/act.php?id=BOE-A-2007-18391](http://www.boe.es/buscar/act.php?id=BOE-A-2007-18391) (All hyperlinks were accessed on 26 February 2013)

<sup>7</sup> Spain (2007), Organic Act 12/2007 of 22 October on Disciplinary Regime for the Civil Guard concerning Military Careers (*Ley Orgánica 12/2007, de 22 de octubre, del régimen disciplinario de la Guardia Civil*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-18392](http://www.boe.es/buscar/act.php?id=BOE-A-2007-18392) (All hyperlinks were accessed on 26 February 2013)

<sup>8</sup> Spain (2007), Act 39/2007 of 19 November concerning Military Careers (*Ley 39/2007, de 19 de noviembre de la carrera militar*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-19880](http://www.boe.es/buscar/act.php?id=BOE-A-2007-19880) (All hyperlinks were accessed on 26 February 2013)

<sup>9</sup> Spain (2009), Act 25/2009 of 22 December modifying certain laws for their adaptation to the Act on free access to service activities and their performance (*Ley 25/2009, de 22 diciembre, de modificación de diversas leyes para su adaptación a la Ley sobre el libre acceso a las actividades de servicios y su ejercicio*) available at: [www.boe.es/buscar/doc.php?id=BOE-A-2009-20725](http://www.boe.es/buscar/doc.php?id=BOE-A-2009-20725) (All hyperlinks were accessed on 26 February 2014)

introduced by Organic Act 3/2007 of 22 March on the Effective Equality of Women and Men.<sup>10</sup> In addition to this, the reform of Article 314 of the Criminal Code carried through by Organic Act 15/2003 of 25 November, amending Organic Act 10/1995, of 23 November of the Criminal Code (*Código Penal*, CP) should be mentioned.<sup>11</sup>

Attention should be drawn to Act 13/2005 of 1 July, which modifies the Civil Code (*Código Civil*, CC) as regards the right to marry.<sup>12</sup> This Act allows people of the same sex to marry and thereby grants them all the legal benefits of marriage. It thus constitutes a major advance in the application of the principle of non-discrimination on the ground of sexual orientation, since it includes full equality in the access to goods and services. In this way certain inconsistencies in the previous case law have been removed. **This legislative progress in Spain has overcome the case law controversies that existed and still exist in other Member States.**

Important to mention is also the, not so recent, reform of the legislation on social jurisdiction, although it does not include a clear recognition of the right of LGBT-organisations and civil associations to act in support of complaints, because Spanish legislation grants the right to act in labour proceedings to trade unions and associations of economically dependent workers, companies, etc.

There is no an official opinion of LGBT-groups about the implementation of the Directive. But there is a 2013 Study about discrimination based on sexual orientation and/or gender identity in Spain (cited fully in the relevant section) indicating that the situation of discrimination based on sexual orientation and gender identity at the work place is changing because the affected persons are more aware of their rights.

There is no relevant recent case law or statistics on these issues from the last period. We consulted (in January and February of 2014) Spanish Ombudsperson reports, Autonomous Communities Ombudspersons reports, official website of the Spanish General Council of the Judiciary (*Consejo General del Poder Judicial*)<sup>13</sup> General State Prosecutor (*Fiscalía General del Estado*) annual reports, Ministry of Justice (*Ministerio de Justicia*)<sup>14</sup> and the Ministry of the Interior (*Ministerio del Interior*),<sup>15</sup> and LGBT associations websites as the State Federation of

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<sup>10</sup> Spain (2007), Organic Act 3/2007 of 22 March on Effective Equality of Women and Men (*Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-6115](http://www.boe.es/buscar/act.php?id=BOE-A-2007-6115) available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html) (All hyperlinks were accessed on 26 February 2014)

<sup>11</sup> Spain (2003), Organic Act 15/2003 of 25 November, amending CP available at: [www.boe.es/buscar/doc.php?id=BOE-A-2003-21538](http://www.boe.es/buscar/doc.php?id=BOE-A-2003-21538) (All hyperlinks were accessed on 26 February 2014)

<sup>12</sup> Spain (2005), Act 13/2005 of 1 July, which modifies the CC available at: [www.boe.es/buscar/doc.php?id=BOE-A-2005-11364](http://www.boe.es/buscar/doc.php?id=BOE-A-2005-11364) (All hyperlinks were accessed on 26 February 2014)

<sup>13</sup> Spain, General Council of the Judiciary (*Consejo General del Poder Judicial*), available at: [www.poderjudicial.es/eversuite/GetRecords?Template=cgpi/cgpi/principal.htm](http://www.poderjudicial.es/eversuite/GetRecords?Template=cgpi/cgpi/principal.htm) (All hyperlinks were accessed on 25 February 2014)

<sup>14</sup> Spain, Ministry of Justice (*Ministerio de Justicia*), [www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html](http://www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html) (All hyperlinks were accessed on 10 July 2014)

<sup>15</sup> Spain, Ministry of the Interior (*Ministerio del Interior*), [www.interior.gob.es/](http://www.interior.gob.es/), (All hyperlinks were accessed on 10 July 2014)

Lesbians, Gays, Transsexuals and Bisexuals (FELGTB)<sup>16</sup> or COGAM<sup>17</sup> and there is no information about this.

Although data are limited, the cited 2013 Study about discrimination based on sexual orientation and/or gender identity in Spain, and the above cited legislation reforms (which we explain detailed in the chapter) indicated that there is a clear positive trend toward an increased awareness of the problem of discrimination based on sexual orientation and identity among Spanish institutions. Taking into account all the legislative antecedents one can say that the implementation of the Directive is satisfactory, especially if one considers not only the aspects related to employment but also those related to access to goods and services, and according to the results and conclusions of the research study about discrimination based on sexual orientation and/or gender identity. Although this Study concluded that the Directive in practice is not effective because a third part of the respondents in the study suffered discrimination based on sexual orientation or gender identity, it acknowledges that the situation is changing and that the persons affected are seemingly more aware of their rights. Therefore, we think that the implementation is satisfactory, because the intense legislative activity in this respect has propelled Spain further towards full recognition in the legal system of the right to sexual orientation and gender identity.

## Freedom of movement

Directive 2004/38/EC was implemented by Royal Decree 240/2007 of 16 February on entry, free movement and residence in Spain of citizens of European Union Member States and of citizens of other States Party to the Agreement on the European Economic Area.<sup>18</sup> The Royal Decree includes in the definition of family members the partner with whom the citizen has a relationship equivalent to marriage registered in a European Union Member State or in a State Party to the European Economic Area. It also includes direct descendants and the descendants of the spouse or registered partner who are under the age of 21, or who are over 21 but still maintained by their parents, or are dependant persons, provided the registered partnership has not been dissolved. Finally, it also includes as family members the direct relatives in the ascending line and those of the spouse or partner who are maintained by them, provided the registered partnership has not been dissolved. This Royal Decree represents **important progress in the legal development of the principle of equal treatment**, if the restrictive character of the previous regulation is considered. Royal Decree 178/2003 of 14 February<sup>19</sup> did not include registered partners in the definition of family

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<sup>16</sup>Spain, FELGTB, [www.felgtb.org/](http://www.felgtb.org/) (All hyperlinks were accessed on 10 July 2014)

<sup>17</sup> Spain, COGAM, [www.cogam.es/](http://www.cogam.es/) (All hyperlinks were accessed on 10 July 2014)

<sup>18</sup> Spain (2007) Royal Decree 240/2007 of 16 February on entry, free movement and residence in Spain of citizens of European Union Member States and of citizens of other States Party to the Agreement on the European Economic Area (*Real Decreto 240/2007, de 16 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-4184](http://www.boe.es/buscar/act.php?id=BOE-A-2007-4184) (All hyperlinks were accessed on 26 February 2014)

<sup>19</sup> Spain (2007) Royal Decree 178/2003, of 14 February on entry, free movement and residence in Spain of citizens of European Union Member States and of citizens of other States Party to the Agreement on the European Economic Area (*Real Decreto 178/2003, de 14 de febrero, sobre entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo*

members. This restriction had been ignored in some judicial decisions, but there were also other judicial decisions which applied a strict interpretation, making this legal reform necessary.

Article 2 of Royal Decree 178/2003 established the scope of application of the Decree: to the family members of EU citizens of other EU Member States (excluding Spain) or citizens of another State Party to the Agreement on the European Economic Area, when they accompany or join him/her. The Spanish Supreme Court (*Tribunal Supremo*) in 2010 declared null several aspects of article 2 of Royal Decree 178/2003, particularly the provision referring to the application of article 2 to citizens of other EU Member States. Now, this article applies to any EU citizen.<sup>20</sup>

The legislation reform shows a trend in favour of equality principle and to avoid any type of discrimination, including discrimination to LGBT groups. There is no relevant recent case law to show any possible trends in jurisprudence.<sup>21</sup> Nevertheless, as the new regulation is more flexible, case law can be also more flexible in the future.

## Asylum and subsidiary protection

The asylum legislation in Spain guarantees non-discrimination based on grounds of sexual orientation or gender identity. There is a clear trend in the case law to guarantee asylum and protection in cases of persecution in the country of origin with some flexibility.

As for the legislation, Act 5/1984 of 26 March on the Right to Asylum and Refugee Status<sup>22</sup> (amended by Act 9/1994 of 19 May) incremented family beneficiaries including the partner with whom the individual has a similar relationship based on affection and cohabitation. Regarding the grounds for granting of asylum, the refugee status will be recognised to all foreigners who fulfil the requirements foreseen in international instruments ratified by Spain, specially the Convention on Refugees, done in Geneva on 28 July 1951, and in the Protocol on Refugees, done in New York on 31 January 1967. The case law of the Supreme Court has established that **discrimination and persecution on grounds of sexual orientation shall constitute one of the grounds for granting asylum.**

Therefore, it is important to note a clear trend in favour of protection of any person affected by persecution on grounds of sexual orientation.

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*sobre el Espacio Económico Europeo*), available at <http://www.boe.es/buscar/doc.php?id=BOE-A-2003-3708> (All hyperlinks were accessed on 26 February 2014)

<sup>20</sup> Spain (2010) Judgment of Supreme Court, Third Chamber, 1 June 2010 (*Sentencia de 1 de junio de 2010, de la Sala Tercera del Tribunal Supremo*), available at: [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2010-16822](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2010-16822) (All hyperlinks were accessed on 26 February 2014)

<sup>21</sup> Desk research. We consulted on January 2014 and after on 8 April 2014 Constitutional Court (*Tribunal Constitucional*) database, Judicial Power (*Poder Judicial*) official case law database, [www.poderjudicial.es/search/indexAN.jsp](http://www.poderjudicial.es/search/indexAN.jsp); Westlaw database, [www.westlaw.es/index\\_spa.html?brand=nwles](http://www.westlaw.es/index_spa.html?brand=nwles) and Tirant lo Blanch database, [www.tirantonline.com/tol/](http://www.tirantonline.com/tol/), and General State Prosecutor (*Fiscalía General del Estado*) annual reports. (All hyperlinks were accessed on 8 April 2014).

<sup>22</sup> Spain (1984), Act 5/1984 of 26 March on the Right to Asylum and the Refugee Status (*Ley 5/1984, de 26 de marzo, reguladora del derecho de asilo y de la condición de refugiado*) available at: [www.boe.es/buscar/doc.php?id=BOE-A-1984-7250](http://www.boe.es/buscar/doc.php?id=BOE-A-1984-7250) (All hyperlinks were accessed on 26 February 2014)

Act 12/2009 of 30 October concerning the right to asylum and subsidiary protection<sup>23</sup> derogates the previous regulation on this subject under Act 5/1984 of 26 March and implements Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted; Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status; and Chapter V of Council Directive 2003/86/CE of 22 September 2003 on the right to family reunification.

In the same sense as the Act of 1984, Article 40 of Act 12/2009 regulates the protection to any person with a similar affective relationship of coexistence, except in cases of divorce, legal or *de facto* separation, different nationality or concession of refugee status for gender reasons. In this case, the act itself recognises in its second final provision that it proceeds to transpose Directive 2003/86/EC.

Article 3 of Act 12/2009 defines the condition of refugee and expressly introduces the fear of being persecuted for reasons of sexual orientation among the possible causes for granting asylum under Spanish legislation, unlike the previous regulation contained in the already derogated Act 5/1984 which ignored this. As for the “phallometric testing” used in some countries during the asylum procedure, this is not foreseen in the Spanish legislation, there is no case law on this topic, and there are no signs that this type of testing or similar or comparable practices might be used or implemented in Spain to establish the credibility of asylum claims based on sexual orientation.

Regarding this Act 12/2009 in force since 20 November 2009, there is no relevant case law yet<sup>24</sup>. However, between January 2008 and January 2010, some relevant judicial decisions were issued based on the previous legislation. And taking into account these case law, we can consider that although a full proof it is not necessary, we need a sufficient (a minimum of) indications to prove the belonging to the group which is object of persecution to obtain the asylum in Spain.

## Family reunification

We can identify as a trend the adaptation of the legislation to guarantee rights and non-discrimination on grounds based on sexual orientation or gender identity. This is clearly shown by the reform carried out in 2009.

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<sup>23</sup> Spain (2009), Act 12/2009 of 30 October concerning the right to asylum and subsidiary protection (*Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2009-17242](http://www.boe.es/buscar/act.php?id=BOE-A-2009-17242) (All hyperlinks were accessed on 26 February 2014)

<sup>24</sup> Desk research. We consulted on January 2014 and after on 8 April 2014 Constitutional Court (*Tribunal Constitucional*) database, Judicial Power (*Poder Judicial*) official case law database, [www.poderjudicial.es/search/indexAN.jsp](http://www.poderjudicial.es/search/indexAN.jsp); Westlaw database, [www.westlaw.es/index\\_spa.html?brand=nwles](http://www.westlaw.es/index_spa.html?brand=nwles) and Tirant lo Blanch database, [www.tirantonline.com/tol/](http://www.tirantonline.com/tol/).

Organic Act 2/2009 of 11 December<sup>25</sup> once more reformed Organic Act 4/2000 of 11 January on the Rights and Freedoms of Aliens in Spain and their social integration,<sup>26</sup> establishing a new regulation of the right to family reunification. **One of the developments consists of including couples who have an affective relationship similar to that of matrimony in the category of family unit, a unit to which the right to family reunification is recognised,** although the new Act does not expressly mention that it is transposing Directive 2003/86/EC. As the referred partner will be considered a spouse, the descendant and ascendants of the partner are regroupable relatives in the terms provided by the act. It is also important to note that the act includes a definition of the affective relationship similar to that of matrimony including not only a relationship recorded in a public register, but also an unregistered relationship when it started in advance of the sponsor's residence in Spain.

And therefore, there is a clarification of rights of unmarried couples that can help to guarantee their rights because the previous legislation was not clear regarding them. In fact, as we see below, the courts extended the protection of family rights to unmarried couples in several cases. But it seems that their rights (under the previous legislation) depended excessively on the goodwill and extended interpretation of judges and courts, and therefore on the circumstances of the case.

In the Spanish case law judicial decisions can be found which use an extensive interpretation of the provisions of the former legislation in force by including registered partnerships or non-married couples with a stable relationship and their children in the concept of family. This judicial interpretation was done on different bases, for example, the humanitarian grounds in Article 31.2 (now Article 31.3) of Organic Act 4/2000. Furthermore, the exceptional circumstances also mentioned in Article 31.3 of Organic Act 4/2000, the analogy to marriage and the principle of equality were all used to extend the legal provisions to registered partnerships.

The reform brought about by Organic Act 2/2009, which implemented Article 4(3) of Council Directive 2003/86/EC on the right to family reunification, was developed through Royal Decree 557/2011 of 20 April approving the Regulation of Organic Act 4/2000 on the Rights and Freedoms of Aliens in Spain and their Social Integration after its reform by Organic Act 2/2009.<sup>27</sup> This regulation repealed the previously mentioned Royal Decree 2393/2004 of 30 December, which

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<sup>25</sup> Spain (2009), Organic Act 2/2009 of 11 December amending Organic Act 4/2000 of 11 January on the Rights and Freedoms of Aliens in Spain and their social integration (*Ley Orgánica 2/2009, de 11 de diciembre, de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2009-19949](http://www.boe.es/buscar/doc.php?id=BOE-A-2009-19949) (All hyperlinks were accessed on 26 February 2014)

<sup>26</sup> Spain (2000), Organic Act 4/2000 of 11 January on the Rights and Freedoms of Aliens in Spain and their social integration (*Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2000-544](http://www.boe.es/buscar/act.php?id=BOE-A-2000-544) (All hyperlinks were accessed on 26 February 2014)

<sup>27</sup> Royal Decree 557/2011 of 20 April approving the Regulation of Organic Act 4/2000, on Rights and Freedoms of Aliens in Spain and their Social Integration after its reform by Organic Act 2/2009 (*Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2011-7703](http://www.boe.es/buscar/act.php?id=BOE-A-2011-7703) (All hyperlinks were accessed on 26 February 2014)

enacts the Regulations developing Organic Act 4/2000 of 11 January on the Rights and Freedoms of Aliens in Spain and their Social Integration.<sup>28</sup>

Moreover, Royal Decree 557/2011 of 20 April approving the Regulation of the Organic Act 4/2000, on Rights and Freedoms of Aliens in Spain and their Social Integration after its reform by Organic Act 2/2009,<sup>29</sup> develops Organic Act 2/2009, and particularly, as we have seen, the right to the conditions for exercising the right of reunification and for proving the affective relationship which equals that of matrimony to these effects.

We can identify as a trend the adaptation of the legislation to guarantee rights and non-discrimination on grounds based on sexual orientation or gender identity. This is clearly shown by the reform carried out in 2009.

Spanish legislation is developing in favour of equality principle including new concepts of family in order to guarantee the right of reunification that can help LGBT groups and avoid any type of discrimination based on grounds of sexual orientation or sexual identity.

This new regulation can help to avoid any discrimination to LGBT persons in family reunification issues, and it shows a positive evolution in Spanish legislation.

## Freedom of assembly

Freedom of assembly is a fundamental right in Spain. Legislation and practice show that currently there is no discrimination based on grounds of sexual orientation or gender identity in Spain with regard to the freedom of assembly. In fact, in Spain several Gay Prides Celebrations are held in different cities, in general without any incidents.

No statistical data or case law has been found for this chapter. Consequently, this chapter and Chapter I - Miscellaneous use newspaper articles as the main source of information. On the basis of this information (links are provided in the report), it appears that **there are no practical obstacles** to the holding of demonstrations promoted by gay and lesbian associations.

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<sup>28</sup> Royal Decree 2393/2004 of 30 December, which enacts the Regulations developing the Organic Act 4/2000 of 11 January on the Rights and Freedoms of Aliens in Spain and their Social Integration (*Real Decreto 23/2004, de 30 de diciembre, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2005-323](http://www.boe.es/buscar/act.php?id=BOE-A-2005-323) (All hyperlinks were accessed on 26 February 2014)

<sup>29</sup> Royal Decree 557/2011 of 20 April approving the Regulation of Organic Act 4/2000, on Rights and Freedoms of Aliens in Spain and their Social Integration after its reform by Organic Act 2/2009 (*Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2011-7703](http://www.boe.es/buscar/act.php?id=BOE-A-2011-7703)

After investigating the information on this issues from the Ministry of Health, Social Services and Equality (*Ministerio de Sanidad, Servicios Sociales e Igualdad*),<sup>30</sup> the Ministry of Justice (*Ministerio de Justicia*),<sup>31</sup> the Ministry of the Interior (*Ministerio del Interior*)<sup>32</sup> and the National Institute of Statistics (*Instituto Nacional de Estadística*),<sup>33</sup> it can be said that there are no official statistics on these issues available in Spain. LGBT associations (such as the State Federation of Lesbians, Gays, Transsexuals and Bisexuals (*Federación Estatal de Lesbianas, Gays, Transexuales y Bisexuales*, FELGTB)<sup>34</sup> or the Madrid Lesbian, Gay, Transgender and Bisexual Community, (*Colectivo de lesbianas, gays, transexuales y bisexuales de Madrid*) COGAM<sup>35</sup> do not have data available either.

Recently, these LGBT associations, FELGTB<sup>36</sup> and COGAM<sup>37</sup> published a study entitled 2013 Research on discrimination on grounds of sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*).<sup>38</sup> However, there is no relevant information about the freedom of assembly in the document.

It is important to note as a conclusion that in Spain there is no obstacle to freedom of assembly, including LGBT groups. Certainly economic crisis can affect some activities because of the lower public funding, and it is the case of “*Orgullo Gay*” celebrations in cities like Madrid, but it is not an specific problem of LGBT activities, is a general situation in Spain.

## Hate speech and criminal law

In the Spanish legal system **both hate speech and hate crimes with homophobic motivation are penalised**. The Criminal Code<sup>39</sup> also penalises the denial of benefits on the basis of sexual orientation as well as illegal associations, including those which promote discrimination, hatred or violence on grounds of sexual orientation. In addition, the Criminal Code also considers **the homophobic motivation of crimes as an aggravating circumstance**

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<sup>30</sup> Spain, Ministry of Health, Social Services and Equality (*Ministerio de Sanidad, Servicios Sociales e Igualdad*), [www.msssi.gob.es/organizacion/ministerio/directorio/cont\\_directorio.htm](http://www.msssi.gob.es/organizacion/ministerio/directorio/cont_directorio.htm) (All hyperlinks were accessed on 26 February 2014)

<sup>31</sup> Spain, Ministry of Justice (*Ministerio de Justicia*), [www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html](http://www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html) (All hyperlinks were accessed on 26 February 2014)

<sup>32</sup> Spain, Ministry of the Interior (*Ministerio del Interior*), [www.interior.gob.es/](http://www.interior.gob.es/) (All hyperlinks were accessed on 26 February 2014)

<sup>33</sup> Spain, National Institute of Statistics (*Instituto Nacional de Estadística*), [www.ine.es/](http://www.ine.es/) (All hyperlinks were accessed on 26 February 2014)

<sup>34</sup> Spain, FELGTB [www.felgtb.org/](http://www.felgtb.org/)

<sup>35</sup> Spain, COGAM, [www.cogam.es/](http://www.cogam.es/)

<sup>36</sup> Spain, FELGTB [www.felgtb.org/](http://www.felgtb.org/)

<sup>37</sup> Spain, COGAM, [www.cogam.es/](http://www.cogam.es/)

<sup>38</sup> Spain, FELGTB and COGAM, 2013 Research on discrimination on grounds of sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*), available at: [www.felgtb.org/temas/laboral/documentacion/i/3773/359/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana](http://www.felgtb.org/temas/laboral/documentacion/i/3773/359/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana) (All hyperlinks were accessed on 26 February 2014)

<sup>39</sup> Spain (1995), Organic Act 10/1995, of 23 November on the CP available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-25444](http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444) Available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html) (All hyperlinks were accessed on 26 February 2014)

in the context of criminal liability, as illustrated by the case law examined. This type of aggravating circumstance can also be found in other laws on offences and sanctions relating to equal opportunities, non-discrimination and universal accessibility for disabled people. In addition to these regulations, the numerous provisions on harassment laid down in the Spanish legislation must be considered. Finally, it should be noted that the new Statutes of Autonomy of Andalusia (enacted in Organic Act 2/2007 of 19 March on the Reform of the Statute of Autonomy for Andalusia)<sup>40</sup> and Catalonia (enacted in Organic Act 6/2006 of 19 July on the Reform of the Statute of Autonomy of Catalonia)<sup>41</sup> include instructions for the public authorities which oblige them to combat homophobia.

Royal Legislative Decree 1/2013 of 29 November approving the Recast Text of the General Act on the rights of persons with disabilities and their social inclusion<sup>42</sup> repeals and replaces Act 49/2007 of 26 December, which establishes the offences and sanctions regarding equal opportunities, non-discrimination and universal accessibility for disabled people.<sup>43</sup>

This Royal Legislative Decree 1/2013 establishes as a very serious offence in article 95(4)(e): “conducts regarded as grave when their perpetrators have also been motivated by hatred, including racial or ethnic hatred, gender, sexual orientation, age, severe disability or incapacity of the victim to act on his/her own”.

It is very important to point out that currently the Ministry of Justice has prepared a proposal for the reform of the Spanish Criminal Code, which seeks to modify the institutional response to acts of hatred and incitement to violence on several grounds including sexual orientation.<sup>44</sup>

The decision of the Supreme Court of 30 October 2009 condemns a judge for a crime of judicial misconduct for having delayed purposefully and for reasons of homophobia the request of a woman to adopt the daughter born by artificial insemination of the woman with whom she had contracted matrimony.<sup>45</sup>

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<sup>40</sup> Spain (2007), Organic Act 2/2007 of 19 March on the Reform of the Statute of Autonomy of the Autonomous Community of Andalusia (*Ley Orgánica 1/2007, de Reforma del Estatuto de Autonomía para Andalucía*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-5825](http://www.boe.es/buscar/act.php?id=BOE-A-2007-5825) (All hyperlinks were accessed on 26 February 2014)

<sup>41</sup> Spain (2006), Organic Act 6/2006 of 19 July on the Reform of the Statute of Autonomy of Autonomous Community of Catalonia (*Ley Orgánica 6/2006, de 19 de julio, de reforma del Estatuto de Autonomía de Cataluña*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2006-13087](http://www.boe.es/buscar/act.php?id=BOE-A-2006-13087) (All hyperlinks were accessed on 26 February 2014)

<sup>42</sup> Royal Legislative Decree 1/2013 of 29 November approving Revised Text of the General Act on rights of persons with disabilities and their social inclusion (*Real Decreto Legislativo 1/2013, de 29 de noviembre, por el que se aprueba el Texto Refundido de la Ley General de derechos de las personas con discapacidad y de su inclusión social*), available at: [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2013-12632](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-12632) (All hyperlinks were accessed on 26 February 2014)

<sup>44</sup> Spain (2013), Ministry of Justice (*Ministerio de Justicia*), Draft Bill of the Reform of CP, 20 September 2013, pp. 143-144, available at: [www.mjusticia.gob.es/cs/Satellite/1292421471664?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DPLO\\_C%3C%93DIGO\\_PENAL\\_\\_CM\\_20-09-2013%2C0.PDF.PDF](http://www.mjusticia.gob.es/cs/Satellite/1292421471664?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DPLO_C%3C%93DIGO_PENAL__CM_20-09-2013%2C0.PDF.PDF) (26.08.2013) (All hyperlinks were accessed on accessed at 26 February 2014)

<sup>45</sup> Spain, Spanish Supreme Court (Criminal Chamber, first section) Judgment 1243/2009 of 30 October (*Sentencia del Tribunal Supremo (Sala de lo Penal, Sección primera) 1243/2009 de 30 de octubre*), available at: [www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=5009877&links=%22192/2009%22&optimize=20100121&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=5009877&links=%22192/2009%22&optimize=20100121&publicinterface=true) (All hyperlinks were accessed on 26 February 2014)

Spanish legislation, and particularly criminal one, is clear in the persecution of any type of criminal activity based on homophobic motivation. Nevertheless, there is this reform project of the Spanish Criminal Code cited above that includes a higher protection to LGTB groups in the sense of avoid acts of hatred and incitement to violence on several grounds including sexual orientation. This project, as we pointed out, seeks to modify the institutional response to acts of hatred and incitement to violence on several grounds including sexual orientation.<sup>46</sup> It includes for instance (we explain it detailed in the chapter) a reform of article 510 of Criminal Code, with a punishment from one to four years of imprisonment and fines of six to 12 months for persons who promote directly or indirectly promote or incite hatred, hostility, discrimination or violence against group, or a portion of a group, or against a person by reason of their membership, based on grounds of sexual orientation or identity, among others (article 510 (1)). And it also includes the same punishment for persons who facilitate access, distribute, disseminate or sell writings or other materials or media suitable for these purpose. Actually this project is in the amendments period until 2 September 2014.<sup>47</sup>

There are no relevant recent case law/ on crimes committed with a homophobic/transphobic motivation.<sup>48</sup> The Ministry of Interior (*Ministerio del Interior*) developed several statistical reports or yearbooks in 2010-2012. The last statistical report available is from 2012,<sup>49</sup> the Statistical Yearbook of the Ministry of Interior (*Anuario Estadístico del Ministerio del Interior 2012*).<sup>50</sup> But there is no disaggregated data regarding homophobic/transphobic motivation crimes in these reports. Nevertheless, the Ministry of Interior confirmed us on 14 July that the Ministry edited on 24 April 2014 an special report about hate crimes in Spain in 2013: Report on evolution of hate

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<sup>46</sup> Spain, (2013) Ministry of Justice (*Ministerio de Justicia*), Draft Bill of the Reform of the Organic Act 10/1995, of 23 of November, of the CP, 20 September 2013, pp. 143-144, available at: [www.mjjusticia.gob.es/cs/Satellite/1292421471664?blobheader=application%2Fpdf&blobheadname1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DPLO\\_C%3C%93DIGO\\_PENAL\\_\\_CM\\_20-09-2013%2C0.PDF.PDF](http://www.mjjusticia.gob.es/cs/Satellite/1292421471664?blobheader=application%2Fpdf&blobheadname1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DPLO_C%3C%93DIGO_PENAL__CM_20-09-2013%2C0.PDF.PDF)

<sup>47</sup> According to the information provided in the Spanish Congress, available at: [www.congreso.es/portal/page/portal/Congreso/PopUpCGI?CMD=VERLST&BASE=pu10&FMT=PUWTXDTS.fmt&DOCS=1-1&DOCORDER=LIFO&QUERY=%28BOCG-10-A-66-1.CODI.%29#\(Página1\)](http://www.congreso.es/portal/page/portal/Congreso/PopUpCGI?CMD=VERLST&BASE=pu10&FMT=PUWTXDTS.fmt&DOCS=1-1&DOCORDER=LIFO&QUERY=%28BOCG-10-A-66-1.CODI.%29#(Página1)) (Hyperlink was accessed on 12 July 2014)

<sup>48</sup> Desk research. We consulted on January 2014 and after on April Constitutional Court (*Tribunal Constitucional*) database, Judicial Power (*Poder Judicial*) official case law database, [www.poderjudicial.es/search/indexAN.jsp](http://www.poderjudicial.es/search/indexAN.jsp); Westlaw database, [www.westlaw.es/index\\_spa.html?brand=nwles](http://www.westlaw.es/index_spa.html?brand=nwles) and Tirant lo Blanch database, [www.tirantonline.com/tol/](http://www.tirantonline.com/tol/), and General State Prosecutor (*Fiscalía General del Estado*) annual reports.

We also consulted on January and April 2014 information available in Sociological Research Centre (*Centro de Investigaciones Sociológicas*, CIS), [www.cis.es/cis/openems/ES/index.html](http://www.cis.es/cis/openems/ES/index.html) and Statistics National Institute (*Instituto Nacional de Estadística*, INE), [www.ine.es/](http://www.ine.es/), LGBT associations (such as FELGTB or COGAM website sources, including the 2013 Study on discrimination based on sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*). This report refers to situations of discrimination regarding labour, education, relation with Administration but it not refers to any criminal case relevant to this report.

<sup>49</sup> Spain, Ministry of Interior (*Ministerio del Interior*), Statistical Yearbooks (*Anuarios Estadísticos*), available at: [www.interior.gob.es/web/archivos-y-documentacion/documentacion-y-publicaciones/anuarios-y-estadisticas/anuarios-estadisticos-antiores/anuario-2012](http://www.interior.gob.es/web/archivos-y-documentacion/documentacion-y-publicaciones/anuarios-y-estadisticas/anuarios-estadisticos-antiores/anuario-2012). (All Hyperlinks were accessed on 10 July 2014)

<sup>50</sup> Spain (2013) 2012 Statistical Yearbook of the Ministry of Interior (*Anuario Estadístico del Ministerio del Interior 2012*), available at: [www.interior.gob.es/documents/642317/1204854/Anuario\\_estadistico\\_2012\\_okkk.pdf/00ee01c7-3122-496a-a023-22829653e6c0](http://www.interior.gob.es/documents/642317/1204854/Anuario_estadistico_2012_okkk.pdf/00ee01c7-3122-496a-a023-22829653e6c0) (All Hyperlinks were accessed on 10 July 2014).

crimes in Spain 2013 (*Informe sobre la evolución de los delitos de odio en España 2013*). And in this report there are data related to hate crimes, including crimes based on anti-Semitic, poor-phobia (*aporofobia*), religion, disability, sexual orientation or sexual identity, racism and xenophobia with a total of 1172 of hate crimes committed in Spain in 2013. Regarding hate crimes based on sexual orientation or sexual identity there are 453 hate crimes, without no possibility of a major disaggregation.<sup>51</sup>

Hate Crimes in Spain in 2013, according to the mentioned report, and disaggregated:

Anti-Semitic: 3  
Poor-phobia (*aporofobia*):4  
Religion: 42  
Disability: 290  
Sexual orientation or sexual identity: 452  
Racism and xenophobia: 381.

Total of hate crimes: 1172.

It is important to highlight that the 2013 Study on discrimination based on sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*) refers to situations of discrimination regarding labour, education, relation with Administration and other situations of discrimination but it not refers to any criminal case relevant to this report. Nevertheless, it highlighted that only in 11.04% of situations of discrimination (in the most cases when it refers to a relation with Public Administration) LGBT people go to Justice to denounce the situation of discrimination

## Transgender issues

The general legislation on equal treatment and non-discrimination on grounds of sexual orientation is fully applicable to transsexual persons. In addition, with regard to transsexuals, there have been legislative changes which have clarified the legal framework applicable to the exercise of their rights. One example is **Act 3/2007 of 15 March** on the Rectification of the recording of gender in Registries.<sup>52</sup> This Act establishes the necessary requirements both for changing the gender entry in the Civil Registry for an individual if the entry does not

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<sup>51</sup> We consulted Ministry of Interior webpage resources on 24 May 2014, and we recheck them on 10 July 2014. Nevertheless, we have consulted the Ministry of Interior online on 10 July 2014 about the existence of any report on this matter. And they answered us on 14 July 2014 indicating that there is this recent Report edited on 24 April 2014, and available at: [www.interior.gob.es/documents/10180/1207668/Informe+sobre+los+delitos+de+odio+en+Espa%C3%B1a+2013.pdf/7eeb7e62-9117-47ab-bca0-bf3ed107d006](http://www.interior.gob.es/documents/10180/1207668/Informe+sobre+los+delitos+de+odio+en+Espa%C3%B1a+2013.pdf/7eeb7e62-9117-47ab-bca0-bf3ed107d006), page 7 (All hyperlinks were accessed on 14 July 2014). Not available in English.

<sup>52</sup> Spain (2007), Act 3/2007 of 15 March on the Rectification of the recording of gender in Registries (*Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-5585](http://www.boe.es/buscar/act.php?id=BOE-A-2007-5585) (All hyperlinks were accessed on 26 February 2014)

correspond to his/her true gender identity and for changing his/her name so that it corresponds to the individual's sex.

The Courts are already applying Act 3/2007, thus making it possible to grant requests made on the basis of the more favourable conditions established by that law, which **does not require medical treatment to include sexual reassignment surgery.**

Another example is Act 20/2011, of 21 July, on the Civil Registry<sup>53</sup> which introduced the current regulation of the Civil Registry and replaced the regulation of 1957 (Act on the Civil Registry).<sup>54</sup> This Act makes the administrative procedure to change names and surnames more systematic and easier. With regard to affiliation the act removes any reference to extramarital parentage, with a full equal treatment between marital and extramarital parentage.

At the regional level, the Autonomous Community of Navarre approved Act 12/2009 of 19 November concerning the Rights of transsexuals,<sup>55</sup> and the Basque Country Autonomous Community approved Act 14/2012 of 28 June, on non-discrimination on grounds of gender identity and the recognition of rights of transsexual persons.<sup>56</sup>

The Decision of the Constitutional Court 176/2008 of 22 December establishes that, although it is not expressly mentioned in Article 14 of the Spanish Constitution<sup>57</sup>, prohibiting discrimination of any Spaniard on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance, gender identity is included among the grounds of discrimination covered by this provision.<sup>58</sup>

Regarding data, according to Health National System (*Sistema Nacional de Salud, SNS*), there are different activities in the Spanish hospitals related “presumably” to sex change that show stability in change of sex in Spain. But, although it can be noted a significant increase in 2012, it will be important to compare it with data of 2013 and 2014, when available, to see whether the evolution is significant..

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<sup>53</sup>Spain (2011), Act 20/2011, of 21 July, on the Civil Registry (*Ley 20/2011, de 21 de julio, del Registro Civil*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2011-12628](http://www.boe.es/buscar/act.php?id=BOE-A-2011-12628) (All hyperlinks were accessed on 26 February 2014)

<sup>54</sup> Spain (1957), Act on the Civil Registry, 8 June (*Ley de 8 de junio sobre el Registro Civil*) available at: [www.boe.es/buscar/act.php?id=BOE-A-1957-7537](http://www.boe.es/buscar/act.php?id=BOE-A-1957-7537) (All hyperlinks were accessed on 26 February 2014)

<sup>55</sup> Spain (2009), Autonomous Community of Navarre Act 12/2009 of 19 November concerning the Rights of transsexuals (*Ley Foral 12/2009, de 19 de noviembre, de no discriminación por motivos de identidad de género de los derechos de las personas transexuales*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2009-20656](http://www.boe.es/buscar/doc.php?id=BOE-A-2009-20656) (All hyperlinks were accessed on 26 February 2014)

<sup>56</sup> Spain (2012), Basque Country Autonomous Community (*País Vasco*) Act 14/2012 of 28 June, on non-discrimination on grounds of gender identity and the recognition of rights of transsexual persons (*Ley 14/2012, de 28 de junio, de no discriminación por motivos de identidad de género y de reconocimiento de los derechos de las personas transexuales*), available at: [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2012-9664](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2012-9664) (All hyperlinks were accessed on 26 February 2014)

<sup>57</sup> Spain (1978), CE, available at: [www.boe.es/buscar/act.php?id=BOE-A-1978-31229](http://www.boe.es/buscar/act.php?id=BOE-A-1978-31229). Available in English at: [www.tribunalconstitucional.es/Lists/constPDF/ConstitucionINGLES.pdf](http://www.tribunalconstitucional.es/Lists/constPDF/ConstitucionINGLES.pdf) (All hyperlinks were accessed on 26 February 2014)

<sup>58</sup> Spain, Judgment of Spanish Constitutional Court 176/2008 of 22 December (*Sentencia del Tribunal Constitucional 176/2008, de 22 de diciembre*), available at: <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/6408> (All hyperlinks were accessed on 26 February 2014)

## Miscellaneous

This chapter includes institutional homophobia and references to issues which do not fit into the other chapters but which also have an impact, in a negative way in this case, on the progress towards respect for sexual orientation and gender identity.

In relation to institutional homophobia, it is important to note the prohibition to public powers and citizens from discriminating any person by reason of their sexual orientation or gender identity. There are no signs in the legislation or case law of any possible ban on materials that promote homosexual relations, nor any ban on such materials specifically conceived for the protection of minors.

Considering the principle of equality before the law established by the Spanish Constitution<sup>59</sup> in Article 14 and the multitude of Spanish rules in favour of non-discrimination of people by reason of their sexual orientation mentioned throughout this report, it does not seem possible or probable at the present time in Spain that the public authorities will promote a cutback in rights in the sense of prohibiting a manifestation of homosexual relations in public places.

Education for citizenship for the education in citizenship values has been enshrined in the Spanish legislation, also with a conservative government.

There is a positive evolution in the legislation in order to guarantee LGBT rights since there are new explicit sanctions for discrimination based on grounds of sexual orientation and gender identity in the reform of 2013.

Regarding same-sex marriage, the Constitutional Court decided recently on the constitutionality of Act 13/2005 of 1 July, on the modification of the Civil Code regarding the right to marriage.<sup>60</sup> Spanish Constitutional Judgment 198/2012 of 28 October declared the referred Act 13/2005 in accordance with Spanish Constitution.<sup>61</sup>

Reference is made to the significant number of same-sex marriages which have already taken place: 4,313 marriages in 2006, 3,193 in 2007, 3,194 in 2008, 3,082 in 2009, 3,193 in 2010, 3,540 in 2011 and 3,455 in 2012.<sup>62</sup> Finally, mention is made of the homophobic attitude of certain members of the church hierarchy which have been subject of public debate in Spain.

Nevertheless, it is also important to note the recent Supreme Court Judgment 835/2013, Civil Chamber, of 6 February 2014 (*Sentencia del Tribunal Supremo 835/2013, Sala de lo Civil, de 6 de*

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<sup>59</sup> Spain (1978), CE, available at: [www.boe.es/buscar/act.php?id=BOE-A-1978-31229](http://www.boe.es/buscar/act.php?id=BOE-A-1978-31229). Available in English at: [www.tribunalconstitucional.es/Lists/constPDF/ConstitucionINGLES.pdf](http://www.tribunalconstitucional.es/Lists/constPDF/ConstitucionINGLES.pdf)

<sup>60</sup> Spain (2005), Act 13/2005 of 1 July, on modification of CC, [www.boe.es/buscar/doc.php?id=BOE-A-2005-11364](http://www.boe.es/buscar/doc.php?id=BOE-A-2005-11364)

<sup>61</sup> Spain, Spanish Constitutional Judgment 198/2012 of 28 October (*Sentencia del Tribunal Constitucional 198/2012, de 28 de octubre*), <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23106> (All hyperlinks were accessed on 26 February 2014)

<sup>62</sup> Spain, National Statistics Institute (*Instituto Nacional de Estadística*), [www.ine.es/jaxi/menu.do?type=pcaxis&path=%2Ft20%2Fe302&file=inebase&L=0](http://www.ine.es/jaxi/menu.do?type=pcaxis&path=%2Ft20%2Fe302&file=inebase&L=0)

febrero de 2014)<sup>63</sup> that does not accept the registration of the filiations of two children in Spain after the conclusion of a surrogacy contract in California by a Spanish couple. This judgment is a negative step concerning the respect for sexual orientation and gender identity because it will make it more difficult for LGBT persons to have children under surrogacy in other States because they will not be able to register them in the Spanish Civil Registry.

## Good practices

Most of this chapter relates to the **legislative reforms** which have taken place in the last years (from 2004 onwards). At state level, the public authorities not only implemented the European directives by means of general measures (as in the case of Act 62/2003 of 30 December 2003 on Fiscal, Administrative and Social Measures<sup>64</sup> in connection with Directive 2000/78/EC) but also introduced a large number of provisions into a significant number of laws to promote equal treatment and respect for sexual orientation as well as the right to gender identity.

In this chapter, with regard to national law, special attention has been paid to Act 13/2005 of 1 July, which modifies the Civil Code,<sup>65</sup> as regards the right to marry and which introduces marriage between individuals of the same sex, granting them the legal benefits of matrimony. The option to fully integrate same-sex marriage into the traditional matrimonial institution, with fully identical legal effects, is liable to have the greatest impact on effective equal treatment and full respect for people's sexual orientation. This equal treatment makes all the laws from different sectors establishing social benefits, rights of spouses, possibility of adoption, etc. fully applicable to same-sex marriage. It is, therefore, a highly advisable option that makes possible a full application of the principle of non-discrimination in all sectors.

However, in order to have a complete overview of good practices in the Spanish legal system, in addition to national laws consideration must be given to the **decentralised structure of the State**. This decentralisation means that considerable competences are exercised by the Autonomous Communities. This is true of social policy, the promotion of social rights, social assistance, etc. The competences of the Autonomous Communities in relation to education, health care and housing, among others, imply that the majority of tasks with an impact on equality and the respect for sexual orientation and gender identity is nowadays exercised at the level of the autonomous communities and not at the state level.

Thus, a considerable proportion of the good practices of recent years were adopted at the level of the Autonomous Communities. The most recent **reforms of the Statutes of Autonomy**, which took place in six of Spain's 17 Autonomous Communities (including the two

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<sup>63</sup> Spain, Judgment no 835/2013 of Spanish Supreme Court, Civil Chamber, of 6 February 2014 (*Sentencia del Tribunal Supremo 835/2013, Sala de lo Civil, de 6 de febrero de 2014*), available at: [www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=6958977&links=&optimize=20140214&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=6958977&links=&optimize=20140214&publicinterface=true) (All hyperlinks were accessed on 26 May 2014).

<sup>64</sup> Spain (2003), Act 62/2003 of 30 December 2003 on Fiscal, Administrative and Social Measures (*Ley 62/2003 de 30 de diciembre sobre Medidas fiscales, administrativas y del orden social*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2003-23936](http://www.boe.es/buscar/act.php?id=BOE-A-2003-23936)

<sup>65</sup> Spain (2005), Act 13/2005 of 1 July, which modifies C C available at: [www.boe.es/buscar/doc.php?id=BOE-A-2005-11364](http://www.boe.es/buscar/doc.php?id=BOE-A-2005-11364)

Autonomous Cities, Ceuta and Melilla), are especially relevant here. These statutory reforms affect Autonomous Communities which jointly represent around half of the Spanish population (Andalusia and Catalonia alone represent a third of the total population) and these reforms are especially important because they incorporate new principles and rights which were not foreseen in the previous versions of these Statutes. Among these principles and rights those related to **sexual orientation and gender equality** must be highlighted. They include, in two of the Statutes (Catalonia and Andalusia), **combating homophobia** and in Andalusia and Aragon the recognition of the **right to gender identity**. It is necessary to keep in mind that the Statute of Autonomy is, from a functional point of view, the ‘Constitution’ of the Autonomous Community and that it is binding on the authorities of the Autonomous Communities (while respecting the constitutional framework), obliging them to formulate their policies in conformity with the statutory principles. This explains the importance of these statutory provisions and the progress they imply for the Spanish legal system.

Special mention should be given to the Autonomous Community of Navarre Act of 19 November concerning the rights of transsexuals.<sup>66</sup> In a composed state such as the Spanish one, where the majority of competencies of social assistance correspond to the Autonomous Communities. It would seem good practice that it should be they who, based on State legislation enabling the rectification of the sex registration of people (Act 3/2007 of 15 March on the Rectification of the recording of gender in Registries),<sup>67</sup> proceed to complement and develop it. And they should also be who reform the transsexual rights protection in a single autonomic act, in order to clarify the regulation and make their rights visible.. Mention should also be made of Basque Country Autonomous Community Act 14/2012 of 28 June, on non-discrimination on grounds of gender identity and the recognition of rights of transsexual persons.<sup>68</sup>

In short, both the most recent national legislation and the recent reforms of the Statutes of Autonomy of the Autonomous Communities have made progress in the last years towards promoting the rights to sexual orientation and gender identity, as well as towards prohibiting any discrimination contrary to those rights and specifically in combating homophobia. The fact that these principles have already reached the second constitutional level in Spain (that of the Statutes of Autonomy of the Autonomous Communities), as well as the great number of relevant rules that have been introduced into the legal system, prove the interest of the public authorities in promoting their effective implementation.

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<sup>66</sup> Spain (2009), Autonomous Community of Navarre Act 12/2009 of 19 November concerning the Rights of transsexuals (*Ley Foral 12/2009, de 19 de noviembre, de no discriminación por motivos de identidad de género de los derechos de las personas transexuales*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2009-20656](http://www.boe.es/buscar/doc.php?id=BOE-A-2009-20656)

<sup>67</sup> Sapin (2007), Act 3/2007 of 15 March on the Rectification of the recording of gender in Registries (*Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-5585](http://www.boe.es/buscar/act.php?id=BOE-A-2007-5585)

<sup>68</sup> Spain (2012), Basque Country Autonomous Community (*País Vasco*) Act 14/2012 of 28 June, on non-discrimination on grounds of gender identity and on the recognition of rights of transsexual persons (*Ley 14/2012, de 28 de junio, de no discriminación por motivos de identidad de género y de reconocimiento de los derechos de las personas transexuales*), available at: [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2012-9664](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2012-9664)

## Intersex

In Spain, discrimination on ground of ‘intersex’ is covered implicitly by the Spanish Constitution (*Constitución española*, CE) in article 14: “Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance”.<sup>69</sup>

To this we may add the multitude of regulations in favour of the non-discrimination of people on grounds of their sexual orientation or sexual identity mentioned in this report. As a matter of fact, general legislation on equal treatment and non-discrimination on the grounds of sexual orientation and sexual identity is fully applicable to intersex people, although we are speaking about different situations. Thus, the prohibition of discrimination and the violation of the principle of equal treatment on the grounds of sexual orientation and sexual identity includes all possible cases, including the discrimination of intersex people.

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<sup>69</sup> Spain (1978), CE, available at: [www.boe.es/buscar/act.php?id=BOE-A-1978-31229](http://www.boe.es/buscar/act.php?id=BOE-A-1978-31229). Available in English at: [www.tribunalconstitucional.es/Lists/constPDF/ConstitucionINGLES.pdf](http://www.tribunalconstitucional.es/Lists/constPDF/ConstitucionINGLES.pdf)

# 1 Implementation of Employment Directive 2000/78/EC

The implementation of Directive 2000/78/EC was done through to a large number of laws that developed and adapted Spanish legislation to the Directive, including their provisions and mechanisms in Spanish legislation.

The first step consisted mainly of Act 62/2003 of 30 December 2003 on Fiscal, Administrative and Social Measures.<sup>70</sup> Other legislation which has been adapted to the requirements of the directive are Act 7/2007 of 12 April on the (*Basic Statute of Public Employees*),<sup>71</sup> Act 20/2007 of 11 July on the Statute of Self-Employed Workers,<sup>72</sup> Act 55/2003 of 16 December on the Framework Statute of Health Service Staff,<sup>73</sup> Act 31/2006 of 18 October on Participation of Workers in European Public Limited Companies and Cooperatives,<sup>74</sup> Organic Act 11/2007 of 22 October on Rights and Duties of the Civil Guard (military police)<sup>75</sup> and Organic Act 12/2007 of 22 October on Disciplinary Regime for the Civil Guard concerning Military Careers.<sup>76</sup> Some terminological precisions were also introduced by Organic Act 3/2007 of 22 March on Effective Equality of Women and Men.<sup>77</sup> In addition to this, the reform of Article 314 of the Criminal Code<sup>78</sup> effected by Organic Act 15/2003 of 25 November, amending Criminal

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<sup>70</sup> Spain (2003), Act 62/2003 of 30 December 2003 on Fiscal, Administrative and Social Measures (*Ley 62/2003 de 30 de diciembre sobre Medidas fiscales, administrativas y del orden social*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2003-23936](http://www.boe.es/buscar/act.php?id=BOE-A-2003-23936)

<sup>71</sup> Spain (2007), Act 7/2007 of 12 April on the Basic Statute of Public Employees (*Ley 7/2007 del Estatuto Básico del Empleado Público*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-7788](http://www.boe.es/buscar/act.php?id=BOE-A-2007-7788)

<sup>72</sup> Spain (2007), Act 20/2007 of 11 July on the Statute of Self-Employed Workers (*Ley 20/2007, de 11 de julio, del Estatuto del trabajo autónomo*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-13409](http://www.boe.es/buscar/act.php?id=BOE-A-2007-13409)

<sup>73</sup> Spain (2003), Act 55/2003 of 16 December on the Framework Statute of Health Service Staff (*Ley 55/2003, de 16 de diciembre, del Estatuto Marco del personal estatutario de los servicios de salud*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2003-23101](http://www.boe.es/buscar/act.php?id=BOE-A-2003-23101)

<sup>74</sup> Spain (2006), Act 31/2006 of 18 October on Participation of Workers in European Public Limited Companies and Cooperatives (*Ley 31/2006, de 18 de octubre, sobre implicación de los trabajadores en las sociedades anónimas y cooperativas europeas*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2006-18204](http://www.boe.es/buscar/doc.php?id=BOE-A-2006-18204)

<sup>75</sup> Spain (2007), Organic Act 11/2007 of 22 October on Rights and Duties of the Civil Guard (military police) (*Ley Orgánica 11/2007, de 22 octubre, reguladora de los derechos y deberes de los miembros de la Guardia Civil*) [www.boe.es/buscar/act.php?id=BOE-A-2007-18391](http://www.boe.es/buscar/act.php?id=BOE-A-2007-18391)

<sup>76</sup> Spain (2007), Organic Act 12/2007 of 22 October on Disciplinary Regime for the Civil Guard concerning Military Careers (*Ley Orgánica 12/2007, de 22 de octubre, del régimen disciplinario de la Guardia Civil*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-18392](http://www.boe.es/buscar/act.php?id=BOE-A-2007-18392)

<sup>77</sup> Spain (2007), Organic Act 3/2007 of 22 March on Effective Equality of Women and Men (*Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-6115](http://www.boe.es/buscar/act.php?id=BOE-A-2007-6115) available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html)

<sup>78</sup> Spain (1995), Organic Act 10/1995, of 23 November on the Criminal Code (*Ley Orgánica 15/2003, de 35 de noviembre, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*) available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-25444](http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444) Available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html)

Code<sup>79</sup> should be mentioned. Finally, Act 13/2005 of 1 July, which modifies the Civil Code as regards the right to marry opens marriage to same-sex couples.<sup>80</sup>

Beyond these reforms which are directly relevant to this chapter, the right to sexual orientation and the principle of equal treatment were and are being incorporated into a great number of provisions in the Spanish legal system. These provisions will be explained in the chapter on good practices, a chapter which focuses on the legislative reforms, considering the significant changes which have taken place in recent years in this area.

The Preamble to Act 62/2003 makes specific reference both to Directive 2000/43/EC and to Directive 2000/78/EC in the third paragraph.

The measures included in this chapter reformed and adapted Spanish legislation in accordance with both Directives, thus implementing them into the country's legal system. In addition, Spain has developed a general legal framework to combat discrimination on the grounds of racial or ethnic origin in all areas of life. In addition It has tackled the legal definition of direct or indirect discrimination. Furthermore Spain has modernised the regulation of equal treatment and non-discrimination in the workplace , modifying, among others things, certain articles of the Workers' Statute (*Estatuto de los Trabajadores*),<sup>81</sup> the Act on Labour Proceedings (*Ley de Procedimiento Laboral*)<sup>82</sup>, the Act on Offences and Sanctions in the Social Order (*Ley sobre Infracciones y Sanciones en el Orden Social*) and the legislation on civil servants.

These reforms show a trend in Spanish legislation to grant equality and to avoid any type of discrimination that can help and can be applied to LGBT people.

Recently Royal Legislative Decree 1/2013, of 29 November, approving the Recast Text of the General Law of rights of persons with disabilities and their social inclusion<sup>83</sup> repealed and replaced the Act 13/1982 of 7 April on the Social Integration of Disabled People.<sup>84</sup> It is important for this report because it aims to guarantee the development of disabled persons with

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<sup>79</sup> Spain (2003), Organic Act 15/2003 of 25 November, amending Organic Act 10/1995, of 23 November on the Criminal Code (*Ley Orgánica 15/2003, de 35 de noviembre, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*) available at: [www.boe.es/buscar/doc.php?id=BOE-A-2003-21538](http://www.boe.es/buscar/doc.php?id=BOE-A-2003-21538)

<sup>80</sup> Spain (2005), Act 13/2005 of 1 July, which modifies CC available at: [www.boe.es/buscar/doc.php?id=BOE-A-2005-11364](http://www.boe.es/buscar/doc.php?id=BOE-A-2005-11364)

<sup>81</sup> Spain (1995) Royal Decree 1/1995 of 24 March approving the Workers' Statute (*Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores*), available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-7730](http://www.boe.es/buscar/act.php?id=BOE-A-1995-7730) (All hyperlinks were accessed on 26 February 2014)

<sup>82</sup> Spain (1995), Royal Legislative Decree 2/1995, of 7 April, approving the Revised Text of the Act on Labour Procedure (*Real Decreto Legislativo 2/1995, de 7 de abril, por el que se aprueba el texto refundido de la Ley de Procedimiento Laboral*), available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-8758](http://www.boe.es/buscar/act.php?id=BOE-A-1995-8758) (All hyperlinks were accessed on 26 February 2014)

<sup>83</sup> Royal Legislative Decree 1/2013, of 29 November, approving the Revised Text of the General Law of rights of persons with disabilities and their social inclusion (*Real Decreto Legislativo 1/2013, de 29 de noviembre, por el que se aprueba el Texto Refundido de la Ley General de derechos de las personas con discapacidad y de su inclusión social*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2013-12632](http://www.boe.es/buscar/act.php?id=BOE-A-2013-12632)

<sup>84</sup> Spain (1982) Act 13/1982 of 7 April on the Social Integration of Disabled People (*Ley 13/1982, de 7 de abril, de Integración Social de los Minusválidos*) available at: [www.boe.es/buscar/act.php?id=BOE-A-1982-9983](http://www.boe.es/buscar/act.php?id=BOE-A-1982-9983) (All hyperlinks were accessed on 26 February 2014)

respect to their identity (article 3(1)), and includes as a very serious administrative infringement the discrimination based on grounds of sexual orientation (article 95).

Moreover, Act 36/2011 of 10 October on social jurisdiction<sup>85</sup> repealed and replaced the previous Act on Labour Proceedings.<sup>86</sup>

Article 28(1)(a) of Act 62/2003 of 30 December on Fiscal, Administrative and Social Measures defines the principle of equal treatment in conformity with the description contained in Article 2(1) of Directive 2000/78/EC: “The absence of any form of direct or indirect discrimination on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

In Chapter III there are measures on equal treatment and non-discrimination in the workplace. In accordance with Article 34(1), these are “measures to guarantee the principle of equal treatment and non-discrimination in access to employment, membership of, and involvement in, organisations of workers or employers, working conditions, professional promotion, vocational training and continuing professional development, as well as in access to self-employment and to the exercise of a profession and in the membership of, and involvement in, an organisation whose members exercise a particular profession”.

Positive action measures under Article 35 constitute an exception to the prohibition of discrimination (in conformity with Article 7 of Directive 2000/78/EC): “To ensure in practice full equality on grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation, the principle of equal treatment shall not prevent from maintaining or adopting specific measures in favour of certain groups, measures that are dedicated to prevent or to compensate the disadvantages that affect them and that are related to any of the grounds included in the scope of application of this section”. Furthermore, the last paragraph of Article 34(2) allows the exception for the reasons set out in Article 4(1) of Directive 2000/78/EC establishing that a difference of treatment in employment “shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate”.

The provision of the Directive on the burden of proof (Article 10 of Directive 2000/78/EC) is regulated in Article 36 of the Act 62/2003 with regard to civil and administrative dispute jurisdiction: “In the civil and administrative jurisdictional processes in which the plaintiff’s allegations establish facts from which it may be presumed that there has been discrimination on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation in connection with the subjects included in the scope of application of this chapter, it shall be for

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<sup>85</sup> Spain (2011), Act 36/2011 of 10 October on social jurisdiction (*Ley 36/2011, de 10 de octubre, reguladora de la jurisdicción social*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2011-15936](http://www.boe.es/buscar/act.php?id=BOE-A-2011-15936) (All hyperlinks were accessed on 26 February 2014)

<sup>86</sup> Spain (1995), Royal Legislative Decree 2/1995, of 7 April, approving the Revised Text of the Act on Labour Proceedings (*Real Decreto Legislativo 2/1995, de 7 de abril, por el que se aprueba el texto refundido de la Ley de Procedimiento Laboral*), available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-8758](http://www.boe.es/buscar/act.php?id=BOE-A-1995-8758)

the respondent to justify in an objective and reasonable way the adopted measures and their proportionality”.

Now, Act 36/2011 of 10 October on social jurisdiction<sup>87</sup> repealed and replaced the previous Act on Labour Proceedings.<sup>88</sup> Article 96(1) states that: “In the processes in which the plaintiff’s allegations establish facts from which it may be presumed that there has been discrimination on grounds of sex, sexual orientation or identity, racial or ethnic origin, religion or belief, disability, age, and in any other case of violation of a fundamental right or a fundamental freedom, it shall be for the respondent to justify in an objective and reasonable way the adopted measures and their proportionality”

Article 95(3) regulates that when the process is based on one of this keys including sexual orientation, the judge can request for a expert report. This provision can help the judge to obtain an expert opinion in cases of discrimination based on sexual orientation.

In addition, article 148 provides for the initiation of the social procedure ex officio in cases of “discrimination based on racial or ethnic origin, religion, belief, disability, age, sexual orientation or other provided by law”

In conformity with Article 4(2)(c) of the Workers’ Statute (*Estatuto de los Trabajadores*),<sup>89</sup> employees have the right “not to be discriminated against directly or indirectly in access to employment, or once employed, on the grounds of sex, marital status, age within the limits established by this law, racial or ethnic origin, social condition, religion or belief, political ideas, sexual orientation, membership or not of a union, as well as on the grounds of the use of any of the official languages of the Spanish State”. In addition to this, Article 4(2)(e) of the Workers’ Statute also establishes as a worker’s right the right “to respect for their private life and due consideration of their dignity, which also comprises protection against verbal and physical offences of a sexual nature and against harassment on grounds of racial or ethnic origin, religion or convictions, disability, age or sexual orientation”. Organic Act 3/2007 of 22 March on the Effective Equality of Women and Men<sup>90</sup> amended this provision, which in its current version establishes the right “to private life and due consideration of their dignity, including protection against harassment on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, and against sexual harassment and harassment on the grounds of sex”.

This last addition of the protection against sexual harassment and harassment on the grounds of sex in 2007 is a good evolution. There is a raise of the legislative protection yet existing in

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<sup>87</sup> Spain (2011), Act 36/2011 of 10 October on social jurisdiction (*Ley 36/2011, de 10 de octubre, reguladora de la jurisdicción social*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2011-15936](http://www.boe.es/buscar/act.php?id=BOE-A-2011-15936)

<sup>88</sup> Spain (1995), Royal Legislative Decree 2/1995, of 7 April, approving the Revised Text of the Act on Labour Proceedings (*Real Decreto Legislativo 2/1995, de 7 de abril, por el que se aprueba el texto refundido de la Ley de Procedimiento Laboral*), available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-8758](http://www.boe.es/buscar/act.php?id=BOE-A-1995-8758)

<sup>89</sup> Spain (1995), Royal Decree 1/1995 of 24 March approving the Workers’ Statute (*Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores*), available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-7730](http://www.boe.es/buscar/act.php?id=BOE-A-1995-7730)

<sup>90</sup> Spain (2007), Organic Act 3/2007 of 22 March on Effective Equality of Women and Men (*Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-6115](http://www.boe.es/buscar/act.php?id=BOE-A-2007-6115) available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html)

order to fight against gender discrimination in the context of the Act 3/2007 of Equality of Women and Men. It shows a positive evolution although there is no yet a expressly protection for sexual identity (it is included in the general protection against offences of sexual nature and harassment on grounds of sexual orientation)

It is necessary to keep in mind that this law distinguishes between sexual harassment and harassment on the grounds of gender in Article 7(1) and 7(2): “1. Without prejudice to the provisions of the Criminal Code, for the purposes of this Law sexual harassment consists of any verbal or physical behaviour of a sexual nature that has the purpose or produces the effect of violating the dignity of a person, in particular when an intimidating, degrading or offensive environment is created. 2. Harassment on the grounds of gender consists of any behaviour carried out on the grounds of the sex of a person, with the purpose or the effect of violating their dignity and of creating an intimidating, degrading or offensive environment”. This differentiation is coherent with that currently established by Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (which has repealed, among others, Directive 2002/73/EC). Article 2(1)(d) of the Directive provides the following definition of ‘sexual harassment’: “Where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment”. Article 2(1)(c) applies the following definition of ‘harassment’ (‘harassment on the ground of sex’ according to Spanish legislation): “Where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment”. Both formulations clearly protect lesbian, gay, bisexual and transgender (LGBT) people.

With regard to harassment, Act 62/2003 of 30 December 2003 on Fiscal, Administrative and Social Measures<sup>91</sup> introduced a new subsection into Article 54(2) of the Workers’ Statute.<sup>92</sup> By virtue of the regulation in the new subsection g), “Harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation of the employer or of the people working in the company” is regarded as a breach of contract. Also on this point, Organic Act 3/2007 of 22 March on the Effective Equality of Women and Men<sup>93</sup> broadens the concept of harassment, amending this provision in the following way: “Harassment on the grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation and sexual harassment or harassment on the grounds of sex of the employer or of the people working in the company”.

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<sup>91</sup> Spain (2003), Act 62/2003 of 30 December 2003 on Fiscal, Administrative and Social Measures (*Ley 62/2003 de 30 de diciembre sobre Medidas fiscales, administrativas y del orden social*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2003-23936](http://www.boe.es/buscar/act.php?id=BOE-A-2003-23936)

<sup>92</sup> Spain (1995) Royal Decree 1/1995 of 24 March approving the Workers’ Statute (*Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores*), available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-7730](http://www.boe.es/buscar/act.php?id=BOE-A-1995-7730)

<sup>93</sup> Spain (2007), Organic Act 3/2007 of 22 March on Effective Equality of Women and Men (*Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-6115](http://www.boe.es/buscar/act.php?id=BOE-A-2007-6115) available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html)

Furthermore, there is a new version of Article 16(2) of the Workers' Statute,<sup>94</sup> establishing with regard to recruitment agencies that "These agencies shall guarantee, in their scope of action, the principle of equality in access to employment, and shall not discriminate on the grounds of origin, including racial or ethnic origin, sex, age, marital status, religion or belief, political opinion, sexual orientation, union membership, social condition, use of any of the official languages of the Spanish State and disability, provided that the workers have the ability to carry out the work or occupation in question". Article 17 of the Workers' Statute<sup>95</sup> was amended in order to comply with Articles 11 and 15 of Directive 2000/78/EC. In connection with Article 15, the first paragraph of Article 17(1) of the Workers' Statute (*Estatuto de los Trabajadores*)<sup>96</sup> establishes that "regulations, clauses of collective agreements, individual pacts and employers' unilateral decisions which contain direct or indirect adverse discrimination on the grounds of age or disability, or favourable or adverse discrimination in employment, as well as regarding wages, working time and other working conditions on grounds of sex, origin, including racial or ethnic origin, marital status, social condition, religion or belief, political ideas, sexual orientation, membership or not of unions and union agreements, family links with other workers in the company and use of any of the official languages of the Spanish State, shall be null and without effect".

In addition, the second paragraph of Article 17(1) of the Workers' Statute (*Estatuto de los Trabajadores*),<sup>97</sup> incorporates Article 11 of the Directive, establishing that "Employers' decisions which impose adverse treatment of workers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination shall also be null".

The sanctions for violations of the principle of equal treatment (Article 17 of Directive 2000/78/EC), which includes protection against reprisals (Article 11 of Directive 2000/78/EC), is developed by amendments to the Act on Offences and Sanctions in the Social Order, enacted by Royal Legislative Decree 5/2000 of 4 August.<sup>98</sup> Thus, under the new version of Article 8(12) the following are regarded as very serious offences in the employment sector: "Employers' unilateral decisions that imply direct or indirect unfavourable discrimination on grounds of age or disability, or favourable or adverse discrimination regarding wages, working

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<sup>94</sup> Spain (1995) Royal Decree 1/1995 of 24 March approving the Workers' Statute (*Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores*), available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-7730](http://www.boe.es/buscar/act.php?id=BOE-A-1995-7730)

<sup>95</sup> Spain (1995) Royal Decree 1/1995 of 24 March approving the Workers' Statute (*Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores*), available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-7730](http://www.boe.es/buscar/act.php?id=BOE-A-1995-7730)

<sup>96</sup> Spain (1995) Royal Decree 1/1995 of 24 March approving the Workers' Statute (*Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores*), available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-7730](http://www.boe.es/buscar/act.php?id=BOE-A-1995-7730) ()

<sup>97</sup> Spain (1995) Royal Decree 1/1995 of 24 March approving the Workers' Statute (*Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores*), available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-7730](http://www.boe.es/buscar/act.php?id=BOE-A-1995-7730) (accessed at 26 February 2014)

<sup>98</sup> Spain (2000), Royal Legislative Decree 5/2000 of 4 August approving the Revised Text of Act on infringements and sanctions in social order (*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*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2000-15060](http://www.boe.es/buscar/act.php?id=BOE-A-2000-15060) (All hyperlinks were accessed on 26 February 2014)

time, vocational training, promotion and other working conditions, on grounds of sex, origin, including racial or ethnic origin, marital status, social condition, religion or belief, political ideas, sexual orientation, membership or not of unions and union agreements, family links with other workers in the company or the use of any of the official languages of the Spanish State, as well as employers' decisions that imply an adverse treatment of workers as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment and non-discrimination". In the new version in Organic Act 3/2007 of 22 March on the Effective Equality of Women and Men,<sup>99</sup> reference is made to the unilateral decisions "of the undertaking" instead of the "employer".

Similarly, the new section 13bis of Article 8 of the adapted text of the Act on Offences and Sanctions in the Social Order, enacted by Royal Legislative Decree 5/2000 of 4 August<sup>100</sup> regards as a very serious offence in the employment sector, "Harassment on grounds of racial or ethnic origin, religion or belief, disability, age and sexual orientation, when it takes place within the scope of influence of the undertaking's management, regardless of the person responsible for the act, provided that the employer was aware of it but did not adopt the necessary measures to prevent it". In the new version in Organic Act 3/2007, harassment "on grounds of sex" is added.

It is also important to note the content of Article 314 of the Criminal Code,<sup>101</sup> in the version in Organic Act 15/2003 of 25 November, amending the Criminal Code:<sup>102</sup> "Those who perpetrate serious discrimination in public or private employment against any person on grounds of ideology, religion or belief, ethnic, racial or national origin, sex, sexual orientation, family situation, illness or disability, legal or union representation of the workers, relationship with other workers of the company or use of any of the official languages of the Spanish State, and do not restore the situation of equality before the law after requirement or administrative sanction, repairing any economic damages arising, will be punished with a prison term of six months to two years or with a penalty from 12 to 24 months". The formulation of section 2 of Article 16 of the adapted text of the Act on Offences and Sanctions in the Social Order regards as a very serious offence in the labour field, "To establish conditions, by means of publicity, broadcasting or by any other means, that constitute favourable or adverse discrimination for the access to employment on grounds of sex, origin, including racial or

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<sup>99</sup> Spain (2007), Organic Act 3/2007 of 22 March on Effective Equality of Women and Men (*Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-6115](http://www.boe.es/buscar/act.php?id=BOE-A-2007-6115) available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html)

<sup>100</sup> Spain (2000), Royal Legislative Decree 5/2000 of 4 August approving the Revised Text of Act on infringements and sanctions in social order (*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*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2000-15060](http://www.boe.es/buscar/act.php?id=BOE-A-2000-15060)

<sup>101</sup> Spain (1995), Organic Act 10/1995, of 23 November on the Criminal Code (*Ley Orgánica 15/2003, de 35 de noviembre, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*) available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-25444](http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444) Available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html)

<sup>102</sup> Spain (2003), Organic Act 15/2003 of 25 November, amending Organic Act 10/1995, of 23 November on the Criminal Code (*Ley Orgánica 15/2003, de 35 de noviembre, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*) available at: [www.boe.es/buscar/doc.php?id=BOE-A-2003-21538](http://www.boe.es/buscar/doc.php?id=BOE-A-2003-21538)

ethnic origin, age, marital status, disability, religion or belief, political opinion, sexual orientation, union affiliation, social condition and use of any of the official languages of the Spanish State”.

Finally, the Act covers, in Article 42, the promotion of collective negotiation in the sphere of equal treatment (Article 13 of Directive 2000/78/EC): “Collective agreements may include measures directed to combat all forms of discrimination in the workplace, to promote equal opportunities and to prevent harassment on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation”.

We can say that the principle of equal treatment and respect for sexual orientation is granted in Workers Statute. In addition, many other laws have also incorporated these principles. Among them are Act 7/2007 of 12 April on the Basic Statute of Public Employees.<sup>103</sup> In this law, there are several provisions relating to this issue. Thus, Article 14(h) on the individual rights of civil servants establishes the right “to respect for private life, sexual orientation, one’s own appearance and dignity at work, especially against sexual harassment, harassment on grounds of sex, moral harassment and harassment at the work place”. In subsection i) of the same Article the right “to non-discrimination on grounds of birth, racial or ethnic origin, gender, sex or sexual orientation, religion or belief, opinion, disability, age or any other condition or personal or social circumstance” is recognised.

Article 53(4), with regard to the ethical principles that should govern the behaviour of the civil servants, stipulates that “Their behaviour shall be based on the respect for fundamental rights and public freedoms, avoiding all conduct leading to discrimination on grounds of birth, racial or ethnic origin, gender, sex, sexual orientation, religion or belief, opinion, disability, age or any other personal or social condition or circumstance”.

Finally, Article 95(2)(b) considers very serious misdemeanours (which can lead to the disciplinary sanctions foreseen in Article 96), “Any act that supposes discrimination on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, language, opinion, birthplace or place of residence, sex or any other personal or social condition or circumstance, as well as harassment on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation, and moral harassment, sexual harassment and harassment on grounds of sex”.

Similar principles are in Act 20/2007 of 11 July on the Statute of Self-Employed Workers.<sup>104</sup> Article 4(3)(a) on the individual rights of self-employed workers); Act 55/2003 of 16 December on the Framework Statute of Health Service Staff<sup>105</sup> (Article 17(1)(k) on the individual rights of statutory staff); Act 31/2006 of 18 October on Participation of Workers in European Public

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<sup>103</sup> Spain (2007), Act 7/2007 of 12 April on the Basic Statute of Public Employees (*Ley 7/2007 del Estatuto Básico del Empleado Público*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-7788](http://www.boe.es/buscar/act.php?id=BOE-A-2007-7788)

<sup>104</sup> Spain (2007), Act 20/2007 of 11 July on the Statute of Self-Employed Workers (*Ley 20/2007, de 11 de julio, del Estatuto del trabajo autónomo*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-13409](http://www.boe.es/buscar/act.php?id=BOE-A-2007-13409)

<sup>105</sup> Spain (2003), Act 55/2003 of 16 December on the Framework Statute of Health Service Staff (*Ley 55/2003, de 16 de diciembre, del Estatuto Marco del personal estatutario de los servicios de salud*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2003-23101](http://www.boe.es/buscar/act.php?id=BOE-A-2003-23101)

Limited Companies and Cooperatives,<sup>106</sup> (First Final Provision amending the Adapted Text of the Law on Offences and Sanctions in the Social Order, enacted by Royal Legislative Decree 5/2000 of 4 August); Organic Act 11/2007 of 22 October on Rights and Duties of the Civil Guard (military police),<sup>107</sup> Articles 3 and 18(2); and Organic Act 12/2007 of 22 October on the Disciplinary Regime for the Civil Guard concerning Military Careers (Article 7(4)).<sup>108</sup>

Act 39/2007 of 19 November concerning Military Careers,<sup>109</sup> established that “the military service file shall not include any details regarding race, religion, opinion or any other personal or social condition or circumstance which might be a cause of discrimination” (Article 79), and no kind of discrimination will affect the destination or working conditions (Articles 101 and 120). Royal Decree 96/2009 of 6 February has approved the Royal Ordinances for the Armed Forces,<sup>110</sup> and establishes that any military person in a position of command shall ensure coexistence among all subordinates without discrimination for any reason, including sexual orientation (article 73).

Act 25/2009 of 22 December modifying certain laws for their adaptation to the Act on free access to service activities and their performance<sup>111</sup> modified Act 2/1974 of 13 February, concerning Professional Associations,<sup>112</sup> by adding a new Article 15 on equal treatment and non-discrimination: “Access to and exercise of guild professions will be governed by the principle of equal treatment and non-discrimination, and particularly by reason of race or ethnic origin, religion or convictions, disability, age or sexual orientation, in the terms of Section III of Chapter III of Title II of Act 62/2003 of 30 December concerning Tax and Administrative Measures and Measures of Social Order.”

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<sup>106</sup> Spain (2006), Act 31/2006 of 18 October on Participation of Workers in European Public Limited Companies and Cooperatives (*Ley 31/2006, de 18 de octubre, sobre implicación de los trabajadores en las sociedades anónimas y cooperativas europeas*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2006-18204](http://www.boe.es/buscar/doc.php?id=BOE-A-2006-18204)

<sup>107</sup> Spain (2007), Organic Act 11/2007 of 22 October on Rights and Duties of the Civil Guard (military police) (*Ley Orgánica 11/2007, de 22 octubre, reguladora de los derechos y deberes de los miembros de la Guardia Civil*) [www.boe.es/buscar/act.php?id=BOE-A-2007-18391](http://www.boe.es/buscar/act.php?id=BOE-A-2007-18391)

<sup>108</sup> Spain (2007), Organic Act 12/2007 of 22 October on Disciplinary Regime for the Civil Guard concerning Military Careers (*Ley Orgánica 12/2007, de 22 de octubre, del régimen disciplinario de la Guardia Civil*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-18392](http://www.boe.es/buscar/act.php?id=BOE-A-2007-18392)

<sup>109</sup> Spain (2007), Act 39/2007 of 19 November concerning Military Careers (*Ley 39/2007, de 19 de noviembre de la carrera militar*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-19880](http://www.boe.es/buscar/act.php?id=BOE-A-2007-19880)

<sup>110</sup> Spain (2009), Royal Decree 96/2009 of 6 February approving the Royal Ordinances for the Armed Forces (*Real Decreto 96/2009, de 6 de febrero, por el que se aprueban las Reales Ordenanzas para las Fuerzas Armadas*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2009-2074](http://www.boe.es/buscar/act.php?id=BOE-A-2009-2074) (Hyperlink was accessed on 26 February 2014)

<sup>111</sup> Spain (2009), Act 25/2009 of 22 December modifying certain laws for their adaptation to the Act on free access to service activities and their performance (*Ley 25/2009, de 22 diciembre, de modificación de diversas leyes para su adaptación a la Ley sobre el libre acceso a las actividades de servicios y su ejercicio*) available at: [www.boe.es/buscar/doc.php?id=BOE-A-2009-20725](http://www.boe.es/buscar/doc.php?id=BOE-A-2009-20725)

<sup>112</sup> Spain (1974), Act 2/1974 of 13 February concerning Professional Associations (*Ley 2/1974, de 13 de febrero, sobre Colegios Profesionales*) available at: [www.boe.es/buscar/act.php?id=BOE-A-1974-289](http://www.boe.es/buscar/act.php?id=BOE-A-1974-289) (Hyperlink was accessed on 26 February 2014)

In the same line, without expressly mentioning discrimination as a result of sexual orientation, but mentioning the obligation to avoid discriminatory conducts, requirements or conditions, Act 25/2009 reforms Act 30/1992 of 26 November concerning the Legal System of Public Administrations and the Common Administrative Proceedings,<sup>113</sup> the Recast Text of the General Law for the Defence of Consumers and Users and other complementary laws, approved by Legislative Royal Decree 1/2007 of 16 November<sup>114</sup> or Act 21/1992 of 16 July, concerning Industry, amongst others.<sup>115</sup>

With regard to access to goods and services (healthcare, education and social security), is very important to mention the fundamental progress in Spain at the legislative level through Act 13/2005 of 1 July, which modifies the Civil Code as regards the right to marry.<sup>116</sup> Section II, third paragraph, of the Preamble to this Law stipulates that the marriage regulation that is now being established aims to provide a satisfactory response to an evident reality whose evolution has been assumed by Spanish society with the contribution of groups which have been campaigning for the full recognition of rights for everybody regardless of sexual orientation. This reality requires a framework establishing the rights and obligations of people who wish to formalise their relationship.

In addition to this, the fourth paragraph of the same section establishes a fundamental principle of equality facilitating reform by extending the effects of marriage between men and women to that between couples of the same sex, including all rights and social benefits. The law stipulates that marriage may be contracted by people of the same or different sex, with full recognition and equality of rights and obligations. As a consequence, the marriage's effects, which remain identical from the perspective of respect for the objective configuration of the institution, will be the same in all fields regardless of the sex of the contracting parties; among others, those referring to rights and social benefits, such as the possibility of taking part in adoption procedures.

Finally, section II, paragraph eight, of the Preamble already mentions the principle of equality which is incorporated into the articles of the Act. As a result of the first additional provision of the present law, all references to marriage contained in our legal system shall be considered applicable both to the marriage of two people of the same sex and to that formed by two people of different sex. Section I of the only article of the Law contains the main legislative reform, which adds a second paragraph to Article 44 of the Civil Code, with

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<sup>113</sup> Spain (1992), Act 30/1992 of 26 November concerning the Legal System of Public Administrations and the Common Administrative Proceedings (*Ley 30/1992, de 26 de noviembre, de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*) available at: [www.boe.es/buscar/act.php?id=BOE-A-1992-26318](http://www.boe.es/buscar/act.php?id=BOE-A-1992-26318) (Hyperlink was accessed on 26 February 2014)

<sup>114</sup> Spain (2007), Legislative Royal Decree 1/2007 of 16 November approving Revised Text of the General Law for the Defence of Consumers and Users and other complementary laws (*Real Decreto 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-20555](http://www.boe.es/buscar/act.php?id=BOE-A-2007-20555) (Hyperlink was accessed on 26 February 2013)

<sup>115</sup> Spain (1992), Act 21/1992 of 16 July, concerning Industry (*Ley 21/1992, de 16 de julio, de Industria*) available at: [www.boe.es/buscar/act.php?id=BOE-A-1992-17363](http://www.boe.es/buscar/act.php?id=BOE-A-1992-17363) (Hyperlink was accessed on 26 February 2014)

<sup>116</sup> Spain (2005), Act 13/2005 of 1 July, which modifies CC available at: [www.boe.es/buscar/doc.php?id=BOE-A-2005-11364](http://www.boe.es/buscar/doc.php?id=BOE-A-2005-11364)

the following wording: “Marriage will have the same requirements and effects when both contracting parties are of the same or of different sex”. In accordance with this provision, the first additional Provision of the Act establishes that “The legal and statutory provisions that contain any reference to marriage shall apply regardless of the sex of the partners in the marriage”.

The full equality achieved by the recognition of same-sex marriage implies the removal of any form of discrimination. Equality is guaranteed since there are no legal reasons for discrimination on grounds of sexual orientation regarding access to services (on the contrary, as we will see, protection against discrimination in this field is even guaranteed by the Criminal Code).<sup>117</sup> Protection against discrimination on the grounds of sexual orientation is ensured in education, housing, goods and services, health, social security etc. The only discriminatory treatment that remained in the legal system was an indirect discrimination, based on the impossibility of marriage among people of the same sex and the subsequent different legal regime of *de facto* couples and married couples with regard to access to goods and services of the partners. As we have already pointed out, the reform is based on a principle of absolute equality of all marriages, so that any reference to marriage in any rule in the Spanish legal system must be understood as applicable both to the marriage of two people of the same sex as to the marriage of people of different sex. This equal treatment makes all the rules in different sectors establishing social benefits, rights of the spouses, the possibility of adoption, etc. fully applicable to same-sex marriages.

In the Autonomous Communities, the concern for equal treatment has led the Autonomous Community of Catalonia to grant these accessory rights to partners in stable couples on the basis of equality with the widowed spouse, regardless of whether the couple is heterosexual or homosexual (previously only granted to homosexual couples as they were unable to marry). Therefore, in conformity with Act 10/2008 of 10 July on the Fourth Book of the Catalan Civil Code (*Código Civil de Cataluña*), “For the purpose of succession due to death, the relevant criterion is the existence of a stable living community and the affective bonds between those living as a couple, and not the institutional nature of the bond that joins them.”<sup>118</sup> Along the same lines, Act 13/2008 of 12 December, in Support of Families in the Basque Country<sup>119</sup> states in its preamble that it is the “function of emotional and affective support which is the basis for the social legitimation of family projects which voluntarily exclude descendants, and all kinds of couples in whatever way the sexual relationship or social orientation of their

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<sup>117</sup> Spain (1995), Organic Act 10/1995, of 23 November on the Criminal Code (*Ley Orgánica 15/2003, de 35 de noviembre, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*) available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-25444](http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444) Available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html)

<sup>118</sup> Spain (2008), Autonomous Community of Catalonia, Act 10/2008 of 10 July, on the Fourth Book of Civil Code of Catalonia relating to successions (*Ley 10/2008, de 10 de julio, del libro cuarto del Código Civil de Cataluña, relativo a las sucesiones*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2008-13533](http://www.boe.es/buscar/act.php?id=BOE-A-2008-13533) (Hyperlink was accessed on 26 February 2014)

<sup>119</sup> Spain (2008), Autonomous Community of Basque Country (*País Vasco*) Act 13/2008 of 12 December, in Support of Families in the Basque Country (*Ley 12/2008, de 12 de diciembre, de Apoyo a las Familias del País Vasco*) available at: [www.boe.es/boe/dias/2011/10/07/pdfs/BOE-A-2011-15726.pdf](http://www.boe.es/boe/dias/2011/10/07/pdfs/BOE-A-2011-15726.pdf) (Hyperlink was accessed on 26 February 2014)

members is made official or formalised. It is therefore the aim of this Law to contribute to the legitimation or social acceptance of different forms of relationships and different kinds of families, guaranteeing them the same treatment.”

Leaving aside the institution of marriage, Act 14/2006 of 26 May on techniques of assisted human reproduction,<sup>120</sup> in the Article 6(1) establishes that, “Any woman over 18 years of age and with full legal capacity shall be able to receive or use the techniques regulated by this Law, provided she has given her written consent in a free, conscious and express way. The woman shall be able to use or receive the techniques regulated in this Law regardless of her marital status and sexual orientation”.

Finally, it is also important to mention the provisions in the Criminal Code on the prohibition of discrimination on grounds of sexual orientation in the field of access to services. Articles 511 and 512 of the CP<sup>121</sup> are applicable. The first Article establishes that “1. Anyone in charge of a public service who denies a person a benefit to which s/he is entitled, on grounds of ideology, religion or belief, ethnic, racial or national origin, gender, sexual orientation, family situation, illness or disability, shall be sentenced to prison for a period of six months to two years and a penalty of 12 to 24 months and special disqualification from public employment or position for a period of one to three years. 2. The same legal sanctions shall be applicable when the facts are committed against an association, foundation, society or corporation or against their members on grounds of their ideology, religion or belief, ethnic, racial or national origin, gender, sexual orientation, family situation, illness or disability. 3. Civil servants who perpetrate any of the conducts described in this article shall be punished with sanctions at their upper level and with regard to the special disqualification from public employment or position for a period of two to four years”.

Article 512 of the CP<sup>122</sup> regulates and provides any type of discrimination in the sense that, “Those who, in the exercise of their professional or managerial activities, deny any individual a benefit to which s/he is entitled, on grounds of ideology, religion or belief, ethnic, racial or national origin, sex, sexual orientation, family situation, illness or disability, shall be sanctioned with special disqualification from the exercise of their profession, occupation, industry or trade, for a period of one to four years”.

With respect to autonomic legislation and the express development of the prohibition on discrimination in access to goods and services, Act 18/2007 of 28 December concerning the Right to Housing in Catalonia<sup>123</sup> must be mentioned, which in its introduction refers expressly

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<sup>120</sup> Spain (2006), Act 14/2006 of 26 May on techniques of assisted human reproduction (*Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2006-9292](http://www.boe.es/buscar/act.php?id=BOE-A-2006-9292) (All hyperlinks were accessed on 26 February 2014)

<sup>121</sup> Spain (1995), CP available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-25444](http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444). Available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html)

<sup>122</sup> Spain (1995), CP, available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-25444](http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444). Available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html)

<sup>123</sup> Spain (2007), Autonomous Community of Catalonia (*Cataluña*) Act 18/2007 of 28 December concerning the Right to Housing (*Ley 18/2007, de 28 de diciembre, del derecho a la vivienda*) available at: [www.boe.es/buscar/doc.php?id=BOE-A-2008-3657](http://www.boe.es/buscar/doc.php?id=BOE-A-2008-3657) (Hyperlink was accessed on 26 February 2014)

to Directive 2000/78/CE, as well as Directive 2000/43/CE. The act even includes the possibility of establishing measures of positive action in favour of vulnerable groups (Article 46) and the penalisation of discriminatory conduct in access to housing (Article 123). With regard to the procedural defence of these rights, the reversal of the burden of proof and the possibility of the defence of collective interests is recognised (Articles 47 and 48, respectively). The Act 8/2008 of 20 June on the Right to Health of Children and Adolescents in the Community of Valencia<sup>124</sup> guarantees “the necessary information and tools for all children and adolescents adapted to all sexual orientations” (Article 3.(6)). On their part, both Act 13/2008 of 3 December concerning the Social Services of Galicia<sup>125</sup>, and Act 4/2009 of 11 June concerning the Social Services of the Balearic Islands,<sup>126</sup> guarantee the right of all citizens to use the social service system under conditions of equality and non-discrimination, amongst other reasons, for sexual orientation (Articles 6.3.a) and 7.a) respectively). Also, Act 11/2009 of 6 July regarding public spectacles and recreational activities in Catalonia establishes the right to admission which “in no case may involve discrimination by right of birth, race, sex, religion, opinion, disability, sexual orientation, gender identity or other personal or social condition or circumstances of the users of the establishments and spaces open to the public, both relative to conditions of access and the time spent in the establishments and the use and enjoyment of the services given therein” (Article 10).<sup>127</sup>

With regard to Article 9(2) of Directive 2000/78/EC, which establishes that “Member States shall ensure that associations, organisations or other legal entities which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive”, it is necessary to take into account the content of Act 36/2011 of 10 October on social jurisdiction<sup>128</sup> that repealed and replaced the previous Act on Labour Proceedings<sup>129</sup> stipulates in article 154 that “Entitled to promote processes of collective disputes are: a) Trade unions whose scope is appropriate or wider than the conflict; b) Business associations whose scope is appropriate or wider than the conflict, provided that the conflict exceeded the company level; c) Employers and legal bodies or trade unions representing workers in the case of conflict at business or lower level; d) the

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<sup>124</sup> Spain (2008) Autonomous Community of Valencia (*Comunidad Valenciana*), Act 8/2008 of 20 June on the Right to Health of Children and Adolescents in the Community of Valencia (*Ley 8/2008 de 20 de junio de Derechos de Salud de Niños y Adolescentes de la Comunidad Valenciana*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2008-12147](http://www.boe.es/buscar/doc.php?id=BOE-A-2008-12147) (Hyperlink was accessed on 26 February 2014)

<sup>125</sup> Spain (2008), Autonomous Community of Galicia (*Galicia*), Act 13/2008 of 3 December concerning the Social Services of Galicia (*Ley 13/2008, de 3 de diciembre, de servicios sociales de Galicia*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2009-807](http://www.boe.es/buscar/doc.php?id=BOE-A-2009-807) (Hyperlink was accessed on 26 February 2014)

<sup>126</sup> Spain (2009), Autonomous Community of Balearic Islands (*Illes Balears*), Act 4/2009 of 11 June concerning the Social Services of the Balearic Islands (*Ley 4/2009, de 11 de junio, de servicios sociales de las Illes Balears*) available at: [www.boe.es/buscar/doc.php?id=BOE-A-2009-11186](http://www.boe.es/buscar/doc.php?id=BOE-A-2009-11186) (Hyperlink was accessed on 26 February 2014)

<sup>127</sup> Spain (2009), Autonomous Community of Catalonia (*Cataluña*), Act 11/2009 of 6 July regarding public shows and recreational activities (*Ley 11/2009, de 6 de julio, re regulación administrativa de los espectáculos públicos y actividades recreativas*) available at: [www.boe.es/buscar/doc.php?id=BOE-A-2009-12856](http://www.boe.es/buscar/doc.php?id=BOE-A-2009-12856) (Hyperlink was accessed on 26 February 2014)

<sup>128</sup> Spain (2011) Act 36/2011 of 10 October on social jurisdiction (*Ley 36/2011, de 10 de octubre, reguladora de la jurisdicción social*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2011-15936](http://www.boe.es/buscar/act.php?id=BOE-A-2011-15936)

<sup>129</sup> Spain (1995), Royal Legislative Decree 2/1995, of 7 April, approving the Revised Text of the Act on Labour Procedure (*Real Decreto Legislativo 2/1995, de 7 de abril, por el que se aprueba el texto refundido de la Ley de Procedimiento Laboral*), available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-8758](http://www.boe.es/buscar/act.php?id=BOE-A-1995-8758)

employing public administrations within the scope of the conflict and the representative bodies of the employees at the service of the above; e) the representative associations of economically dependent workers and unions representing these, for the exercise of collective action on their occupational arrangements provided that they meet the requirement of paragraph a) above, and the companies whose business activity they perform, as well as their associations provided their scope is at least equal to that of the conflict". There is also a regulation of the participation of trade unions in cases they did not initiate when their sphere activity is wider than that of the conflict (article 155).

Therefore there is no a clear right granted to LGBT organizations and civil association to act in support of complaints, because Spanish legislation grants the right to act in labour proceedings to trade unions and associations of economically dependent workers, companies, etc.

Finally, with regard to specific institutions for the protection of equal treatment and combating discrimination, the Spanish legal system has no specific institution for this purpose, since these functions correspond to the Ombudsperson at the state level and to the Ombudspersons of each of the Autonomous Communities within the framework of their competences. The mission of the Spanish Ombudsperson and of the Ombudsperson of the Autonomous Communities is to protect the rights and liberties of Title I of the Constitution (which includes Article 14 of the Constitution prohibiting any form of discrimination). Their task 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 in the cases they investigate, although they can make suggestions in this sense. Article 23 of Organic Act 3/1981, of 6 of April, on the Ombudsperson<sup>130</sup> establishes that when the complaint has been presumably caused by the abuse, arbitrary behaviour, discrimination, error, malpractice or omission of a civil servant, the Ombudsperson can contact the civil servant informing him of his opinion on the case. In addition to this, the Ombudsperson shall communicate these facts to the head of the department where the civil servant works, formulating the suggestions that he considers convenient. The *Defensor del Pueblo* is also entitled to lodge a constitutional appeal (*recurso de inconstitucionalidad*) with the Constitutional Court against laws that he considers contrary to the Constitution and to lodge an appeal to protect fundamental rights and liberties (*recurso de amparo*) with the Constitutional Court. With regard to the intervention in judicial procedures in defence of rights, this task corresponds, in general terms, to the Public Prosecutor (*Ministerio Fiscal*).

Taking into account all the legislative antecedents it can be said that the implementation of the Directive is mostly satisfactory, especially if both the aspects related to employment and those related to access to goods and services are considered, to which, in accordance with the instructions for this report, reference must be made (even though they fall outside the specific scope of this Directive). To Act 62/2003 of 30 December 2003 on Fiscal, Administrative

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<sup>130</sup> Spain (1981), Organic Act 3/1981, of 6 of April, on the Ombudsperson (*Ley Orgánica 3/1981, de 6 de abril, del Defensor del Pueblo*) available at: [www.boe.es/buscar/act.php?id=BOE-A-1981-10325](http://www.boe.es/buscar/act.php?id=BOE-A-1981-10325) (Hyperlink was accessed on 26 February 2014)

and Social Measures a great number of legislative reforms have been added which include specific references to equal treatment, non-discrimination on grounds of sexual orientation and the right to the freedom of sexual orientation.<sup>131</sup> Particularly noteworthy is the considerable qualitative progress brought by Act 13/2005 of 1 July, which modifies the CC, introducing same-sex marriage. It is also necessary to point out the intense legislative activity developed throughout 2007, which continued during the years 2008 and 2009, in connection with this matter, which seems to reflect a tendency towards full recognition of the right to sexual orientation in the Spanish legal system.<sup>132</sup>

The case law has clarified, in particular, the conditions under which the burden of proof may be reversed. In Constitutional Court Decision 41/2006 of 13 February (Second Chamber)<sup>133</sup> the plaintiff argues that the true reason for his dismissal was his homosexual orientation, showing facts from which discriminatory treatment could clearly be deduced. (The plaintiff had suffered criticism for his way of dressing, he was given an excessive workload and had a conflicting relationship with his boss). The Court considered that these indications were sufficient to shift the burden of proof and the presumption thus established was not rebutted by the company.

Other judicial decisions affect the right of associations to engage in judicial procedures, beyond the labour sphere. One example is Decision 222/2005 of 17 October issued by the Provincial Court (*Audiencia Provincial*) (First Section) of Ciudad Real.<sup>134</sup> In this Decision the right to engage in a lawsuit for damages and threats in defence of a homosexual individual is granted to a gay and lesbian association. The Court regards the bringing of collective legal action as a fundamental right and therefore deems it necessary to interpret and apply this right in a broad way. For this reason, only in cases where it is clear that the association concerned has no connection to the process, shall it be possible to deny access to the collective legal proceedings. Certainly, a detailed and complete test of the link between the procedural and the social or associative objectives of the entity which seeks to engage in the procedure is not required for this right to be recognised. It is sufficient, as is usually the case with regard to the right to bring legal action, to show that there is a link and that the judicial organ verifies that it is not possible to deny without any further inquiry the existence of that link. Thus, in this case it was clear for the Court that the appellant entity should be admitted

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<sup>131</sup> Spain (2003), Act 62/2003 of 30 December 2003 on Fiscal, Administrative and Social Measures (*Ley 62/2003 de 30 de diciembre sobre Medidas fiscales, administrativas y del orden social*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2003-23936](http://www.boe.es/buscar/act.php?id=BOE-A-2003-23936)

<sup>132</sup> Spain (2005), Act 13/2005 of 1 July, which modifies the CC regarding the right to marry (*Ley 13/2005, de 1 de julio, por la que se modifica el CC en materia de derecho a contraer matrimonio*) available at: [www.boe.es/buscar/doc.php?id=BOE-A-2005-11364](http://www.boe.es/buscar/doc.php?id=BOE-A-2005-11364)

<sup>133</sup> Spain, Spanish Constitutional Court (*Tribunal Constitucional*) (Second Chamber) Judgment 41/2006 13 February 2006 (*Sentencia 41/2006, de 13 de febrero*), available at: <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/5643> (All hyperlinks were accessed on 26 February 2014)

<sup>134</sup> Spain, Decision 222/2005 of Provincial Court Section 1 of Ciudad Real 17 October 2005 (*Auto núm. 222/2005 de 17 de octubre de 2005 de la Audiencia Provincial Ciudad Real (Sección 1)*) [www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=1041732&links=222/2005&optimize=20060105&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=1041732&links=222/2005&optimize=20060105&publicinterface=true) (All hyperlinks were accessed on 25 May 2014)

to the procedure, since its aims are related to the protection of the rights and interests of homosexual, transsexual and bisexual groups.

With regard to the access to benefits, a number of decisions may be mentioned which affect registered partnerships, for example, Judicial Decisions 580/2002 of 19 June and 680/2002 of 16 July of the High Court of Justice of the Community of Madrid (Social Chamber, Section 5).<sup>135</sup> These judicial decisions ruled as unlawful the different treatment of heterosexual and homosexual registered partnerships in relation to the extension of travel fare benefits to the partner of an employee of the railway company RENFE.

On 29 April 2009, the Supreme Court passed a decision unifying the doctrine regarding the widow's pension of homosexual cohabiting couples.<sup>136</sup>

On the appeal of the National Social Security Institute (*Instituto Nacional de la Seguridad Social*), the Court determined that there is no ground to grant a widow's pension to anyone who cohabited as a *de facto* couple with a person of the same sex whose death has occurred prior to the enforcement of Act 13/2005, which introduced same-sex marriage. The Court justifies its decision, which it does not consider discriminatory, by the non-existence of transitory regulations in the said Act. One dissenting vote was formulated on the Decision.

Another important Decision was issued by the Supreme Court on 30 October 2009. In this case a judge was condemned for a crime of judicial misconduct for having purposefully and for reasons of homophobia delayed an adoption requested by a woman with respect to the daughter born by artificial insemination of the woman with whom she had contracted matrimony.<sup>137</sup> (See the section “Criminal law” for further details on this judgment).

Although data have been requested in writing from both the Ministry of Justice (*Ministerio de Justicia*)<sup>138</sup> and the Ministry of the Interior (*Ministerio del Interior*),<sup>139</sup> there are no statistics available in Spain concerning the implementation of Employment Directive 2000/78/EC in

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<sup>135</sup> Spain, Decisions 580/2002 of 19 June and 680/2002 of 16 July of the High Court of Justice of the Community of Madrid, Social Chamber, section 5, 19 June and 16 July 2002 (*Sentencias del Tribunal Superior de Justicia de la Comunidad de Madrid, Sala de lo Social, sección 5, núms. 580/2002 de 19 de junio de 2002, y 680/2002 de 16 de julio de 2002*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=2732018&links=580/2002&optimize=20040214&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=2732018&links=580/2002&optimize=20040214&publicinterface=true) and [www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=2760532&links=680/2002&optimize=20040207&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=2760532&links=680/2002&optimize=20040207&publicinterface=true) (All hyperlinks were accessed on 25 May 2014)

<sup>136</sup> Spain, Decision of Supreme Court, Social Chamber, on 29 April 2009 (*Sentencia del Tribunal Supremo, Sala de lo Social, de 29 de abril de 2009*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=4625594&links=&optimize=20090702&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=4625594&links=&optimize=20090702&publicinterface=true) (All hyperlinks were accessed on 26 February 2013)

<sup>137</sup> Spain, Decision of Supreme Court, Criminal Chamber, on 30 October 2009 (*Sentencia del Tribunal Supremo de 30 de octubre de 2009*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=5009877&links=&optimize=20100121&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=5009877&links=&optimize=20100121&publicinterface=true) (Hyperlink was accessed on 25 February 2014)

<sup>138</sup> Spain, Ministry of Justice (*Ministerio de Justicia*), [www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html](http://www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html)

<sup>139</sup> Spain, Ministry of the Interior (*Ministerio del Interior*), [www.interior.gob.es/](http://www.interior.gob.es/)

relation to sexual orientation. Neither the official website of the Spanish General Council of the Judiciary (*Consejo General del Poder Judicial*) nor its Statistics Department have any statistics on this type of crimes.<sup>140</sup> On the official website of the Office of the General State Prosecutor (*Fiscalía General del Estado*) the annual reports for the last years can be consulted.<sup>141</sup> These reports include the numbers of different types of crimes. With regard to discrimination at the workplace, there were 13 criminal cases recorded in 2004, 28 in 2005, 12 in 2006, 10 in 2007 and 10 in 2008. The statistics do not disaggregate the facts according to the different grounds of discrimination. Thus, these data refer to all types of possible discrimination at the workplace (on grounds of ideology, religion or belief, ethnic, racial or national origin, sexual orientation, family situation, illness, disability, legal or union representative of employees, family relationship with other workmates, or language). There are no data regarding discrimination at the workplace regarding recent years (2009-2013).<sup>142</sup>

The Spanish Ombudsperson (*Defensor del Pueblo*) has not published any specific reports on discrimination on the ground of sexual orientation.<sup>143</sup> The annual reports of the Spanish Ombudsperson for the years 2000 to 2012 do not contain any references to complaints concerning discrimination on the ground of sexual orientation at the workplace. But there are a few references to the following issues: In the 2004 Annual Report 521 people presented complaints regarding the declarations of the General Coordinator of the United Left Party asking the Government to criticise the authorities of the Catholic Church in the public media for the opposition from the episcopacy to the Government's project of legalising homosexual marriage. 77 citizens showed their disconformities with the Government's decision of sending to Parliament (*Cortes Generales*) the reform bill of the Civil Code allowing marriage among people of the same sex. In the 2005 Annual Report we find 5 complaints of citizens expressing their opposition to the reform of the Civil Code introducing same-sex marriage. In the 2006 Annual Report there are two complaints on this matter: a restaurant refuses to host the wedding reception of a homosexual couple; an unoperated transsexual citizen complains about the problems in his everyday life caused by the divergence between his external appearance and his official data. There are no relevant references to this question in the 2007-2012 annual reports. There are no specific reports of the Ombudsperson of the Autonomous Community of Andalusia (*Defensor del Pueblo Andaluz*) and no references to discrimination on grounds of sexual orientation in the annual reports.<sup>144</sup>

The 2006 Annual Report of the Ombudsperson of the Autonomous Community of Catalonia (*Síndic de Greuges de Catalunya*) refers to obstacles to the registration of homosexual marriage

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<sup>140</sup> Spain, General Council of the Judiciary (*Consejo General del Poder Judicial*), available at: [www.poderjudicial.es/eversuite/GetRecords?Template=cgpi/cgpi/principal.htm](http://www.poderjudicial.es/eversuite/GetRecords?Template=cgpi/cgpi/principal.htm)

<sup>141</sup> Spain, Office of the General State Prosecutor (*Fiscalía General del Estado*), [www.fiscal.es/cs/Satellite?cid=1240559967365&language=es&pagename=PFiscal/Page/FGE\\_home](http://www.fiscal.es/cs/Satellite?cid=1240559967365&language=es&pagename=PFiscal/Page/FGE_home) (All hyperlinks were accessed on 25 May 2014)

<sup>142</sup> Spain, Office of the General State Prosecutor (*Ministerio Fiscal*) [www.fiscal.es/cs/Satellite?cid=1240559967365&language=es&pagename=PFiscal/Page/FGE\\_home](http://www.fiscal.es/cs/Satellite?cid=1240559967365&language=es&pagename=PFiscal/Page/FGE_home)

<sup>143</sup> Spain, Ombudsperson (*Defensor del Pueblo*), [www.defensordelpueblo.es/index.asp?destino=informes2.asp](http://www.defensordelpueblo.es/index.asp?destino=informes2.asp). (All hyperlinks were accessed on 25 February 2014)

<sup>144</sup> Spain, Ombudsperson of Autonomous Community of Andalusia (*Defensor del Pueblo Andaluz*) [www.defensor-and.es/index2.asp](http://www.defensor-and.es/index2.asp) (All hyperlinks were accessed on 25 February 2014)

(there is a complaint about the lack of proper documents available at the Registry to formalise the union. The *Síndic* wrote to the Registry requesting its staff to facilitate the complainant the necessary official registration form for the inscription of the homosexual marriage).<sup>145</sup> This report also refers to a complaint about the right to inherit due to unequal treatment of homosexual couples under legal provisions. The report contains a suggestion of the *Síndic* to change the law in this field. The 2005 Annual Report refers to the need to further improve the access of homosexual couples to social benefits. The report points out that the *Síndic* has been working to improve this situation. The 2004 Annual Report mentions a complaint from a homosexual teacher who, despite registering his partnership with the notary, was not given permission to marriage holidays. There is also mention of a complaint about the situation of homosexual couples, since children could not be adopted by both partners. In this report there is also a general recommendation by the Ombudsperson about the necessity of extending widow's/widower's pensions and subsidies to rent a house to the partners of homosexuals. On the website of the Catalan Ombudsperson there is a report on psychological harassment within the Catalan public administration of November 2007, with important references to discrimination on grounds of sexual orientation.<sup>48</sup> In this report there is a description of the legal framework, but no references to specific cases, individual complaints or statistics. There are no relevant references to this question in the 2007-2012 annual reports.<sup>146</sup>

As for the remaining regional Ombudsperson, they offer no relevant data or reference to these questions.<sup>147</sup>

There is no official opinion of LGBT groups about the implementation of the Directive. We consulted LGBT associations websites as the State Federation of Lesbians, Gays, Transsexuals and Bisexuals (FELGTB)<sup>148</sup> or COGAM<sup>149</sup> and there is no information about this. The unique exception is the 2013 Study on discrimination based on sexual orientation and/or gender identity in Spain

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<sup>145</sup> Spain, Ombudsperson of Autonomous Community of Catalonia (*Síndic de Greuges de Catalunya*). *El tratamiento del acoso psicológico en el marco de las administraciones públicas catalanas*, November 2007, [www.sindic.cat/cas/inform\\_estudis.asp](http://www.sindic.cat/cas/inform_estudis.asp). (All hyperlinks were accessed on 25 February 2014)

<sup>146</sup> Spain, Ombudsperson of Autonomous Community of Catalonia (*Síndic de Greuges de Catalunya*) Annual Reports (*Informes anuales*), [www.sindic.cat/es/page.asp?id=20](http://www.sindic.cat/es/page.asp?id=20)

<sup>147</sup> We also consulted during the revision the remaining Ombudsperson annual reports: Ombudsperson of Autonomous Community of Aragon (*Defensor del Pueblo de Aragón*) [www.eljusticiadearagon.com/index.php?zona=informes\\_anuales](http://www.eljusticiadearagon.com/index.php?zona=informes_anuales), Galicia [www.valedordopobo.com/index.php?s=112](http://www.valedordopobo.com/index.php?s=112), Ombudsperson of Autonomous Community of Canary Islands (*Defensor del Pueblo de Canarias*) , [www.diputadodelcomun.org/v6/documentos/buscador.php?dia\\_start=&mes\\_start=&anyo\\_start=&dia\\_end=&mes\\_end=&anyo\\_end=&title=&descripcion=&submit\\_search.x=29&submit\\_search.y=8&ID\\_tipo=02INFan&ID\\_tema=](http://www.diputadodelcomun.org/v6/documentos/buscador.php?dia_start=&mes_start=&anyo_start=&dia_end=&mes_end=&anyo_end=&title=&descripcion=&submit_search.x=29&submit_search.y=8&ID_tipo=02INFan&ID_tema=), Ombudsperson of Autonomous Community of Navarre (*Defensor del Pueblo de Navarra*), [www.defensonavarra.com/index.php/es/Informes-y-otras-publicaciones/Informes-anuales](http://www.defensonavarra.com/index.php/es/Informes-y-otras-publicaciones/Informes-anuales), Ombudsperson of Autonomous Community of Castilla y León (*Defensor del Pueblo de Castilla y León*) [www.procuradordelcomun.org/informes-anuales/1/](http://www.procuradordelcomun.org/informes-anuales/1/), Ombudsperson of Autonomous Community of Basque Country (*Defensor del Pueblo del País Vasco*) [www.ararteko.net/p\\_1\\_final\\_Home.jsp?seccion=s\\_ldoc\\_d4\\_v3.jsp&codbusqueda=6&language=es&codResi=1&codMenuPN=1&codMenuSN=376&codMenu=398](http://www.ararteko.net/p_1_final_Home.jsp?seccion=s_ldoc_d4_v3.jsp&codbusqueda=6&language=es&codResi=1&codMenuPN=1&codMenuSN=376&codMenu=398), and the Ombudsperson of Autonomous Community of Valencia (*Defensor del Pueblo de la Comunitat Valenciana*), [www.elsindic.com/va/informes-anuals.html](http://www.elsindic.com/va/informes-anuals.html) (All hyperlinks were accessed on 14 April 2014).

<sup>148</sup> Spain, FELGTB, [www.felgtb.org/](http://www.felgtb.org/)

<sup>149</sup> Spain, COGAM, [www.cogam.es/](http://www.cogam.es/)

(*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*) elaborated by FELGTB that indicates that the situation of discrimination based on sexual orientation and gender identity at work is changing because the persons affected are more aware of their rights. The study thinks this may be because the Directive has included them (sexual orientation and gender identity) as interests to be protected.<sup>150</sup>

LGBT and civil organizations can act in criminal proceedings thanks to the collective action based on article 125 of the Spanish Constitution and articles 101 and 270 of the Spanish Code of Criminal Procedure (*Ley de Enjuiciamiento Criminal*).<sup>151</sup> However, they can not act in labour proceedings as we have seen, because the legislation grants this right specifically to Trade Unions which can act as worker representatives defending the interests of workers who have suffered discrimination based on their sexual orientation and gender identity according to the Workers' Statute. The 2013 Study on discrimination based on sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*) elaborated by FELGTB indicates that currently trade unions are more aware of the defence of workers discriminated on these grounds.<sup>152</sup> This study indicates that a third part of the respondents suffered discrimination based on sexual orientation or gender identity, so it concludes that in practice the Directive is not effective, although it acknowledges that the situation is changing and that the persons affected are seemingly more aware of their rights.<sup>153</sup>

Although data are limited, they indicated that there is a clear positive trend toward an increased awareness of the problem of discrimination based on sexual orientation and identity among Spanish institutions. We consulted (in January and February of 2014) Spanish Ombudsperson reports, Autonomous Communities Ombudspersons reports, official website of the Spanish General Council of the Judiciary (*Consejo General del Poder Judicial*)<sup>154</sup> General State Prosecutor (*Fiscalía General del Estado*) annual reports, Ministry of Justice (*Ministerio de*

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<sup>150</sup> Spain, FELGTB, and COGAM 2013 Research on discrimination based on sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*), available at: [www.felgtb.org/rs/2447/d112d6ad-54ec-438b-9358-4483f9e98868/bd2/filename/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana.pdf](http://www.felgtb.org/rs/2447/d112d6ad-54ec-438b-9358-4483f9e98868/bd2/filename/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana.pdf), page 17 (All hyperlinks were accessed on 25 May 2014 ).

<sup>151</sup> Spain (1882), Spanish Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*), available at: [www.boe.es/buscar/act.php?id=BOE-A-1882-6036](http://www.boe.es/buscar/act.php?id=BOE-A-1882-6036). Not available in English. (Hyperlink was accessed on 14 April 2014).

<sup>152</sup> Spain, FELGTB and COGAM 2013 Research on discrimination based on sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*), available at: [rs/2447/d112d6ad-54ec-438b-9358-4483f9e98868/bd2/filename/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana.pdf](http://rs/2447/d112d6ad-54ec-438b-9358-4483f9e98868/bd2/filename/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana.pdf), page 17.

<sup>153</sup> Spain, State Federation of Lesbians, Gays, Transsexuals and Bisexuals (*Federación Estatal de Lesbianas, Gays, Transexuales y Bisexuales*), Research 2013 about discrimination based on sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*) available at: [www.felgtb.org/rs/2447/d112d6ad-54ec-438b-9358-4483f9e98868/bd2/filename/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana.pdf](http://www.felgtb.org/rs/2447/d112d6ad-54ec-438b-9358-4483f9e98868/bd2/filename/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana.pdf), pages 16 and 17.

<sup>154</sup> Spain, General Council of the Judiciary (*Consejo General del Poder Judicial*), available at: [www.poderjudicial.es/eversuite/GetRecords?Template=cgpi/cgpi/principal.htm](http://www.poderjudicial.es/eversuite/GetRecords?Template=cgpi/cgpi/principal.htm)

*Justicia*)<sup>155</sup> and the Ministry of the Interior (*Ministerio del Interior*),<sup>156</sup> and LGBT associations websites as the State Federation of Lesbians, Gays, Transsexuals and Bisexuals (FELGTB)<sup>157</sup> or COGAM<sup>158</sup> and there is no information about this. The Ministry of Interior has edited a 2012 Statistical Yearbook (*Anuario Estadístico del Ministerio del Interior 2012*)<sup>159</sup> but there is no disaggregated data regarding homophobic/transphobic motivation crimes in it.<sup>160</sup> As we said before, the unique exception is the 2013 Study on discrimination based on sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*) elaborated by FELGTB that indicates that the situation of discrimination based on sexual orientation and gender identity at work is changing because the persons affected are more aware of their rights. Taking into account all the legislative antecedents one can say that the implementation of the Directive is satisfactory, especially if one considers not only the aspects related to employment but also those related to access to goods and services, and according to the results and conclusions of the research study about discrimination based on sexual orientation and/or gender identity. Although this Study concluded that the Directive in practice is not effective because a third part of the respondents in the study suffered discrimination based on sexual orientation or gender identity, it acknowledges that the situation is changing and that the persons affected are seemingly more aware of their rights. Therefore, we think that the implementation is satisfactory, because the intense legislative activity in this respect has propelled Spain further towards full recognition in the legal system of the right to sexual orientation and gender identity.

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<sup>155</sup> Spain, Ministry of Justice (*Ministerio de Justicia*), [www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html](http://www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html)

<sup>156</sup> Spain, Ministry of the Interior (*Ministerio del Interior*), [www.interior.gob.es/](http://www.interior.gob.es/)

<sup>157</sup> Spain, FELGTB, [www.felgtb.org/](http://www.felgtb.org/)

<sup>158</sup> Spain, COGAM, [www.cogam.es/](http://www.cogam.es/)

<sup>159</sup> Spain (2013) 2012 Statistical Yearbook of the Ministry of Interior (*Anuario Estadístico del Ministerio del Interior 2012*), available at: [www.interior.gob.es/documents/642317/1204854/Anuario\\_estadistico\\_2012\\_okkk.pdf/00ee01c7-3122-496a-a023-22829653e6c0](http://www.interior.gob.es/documents/642317/1204854/Anuario_estadistico_2012_okkk.pdf/00ee01c7-3122-496a-a023-22829653e6c0)

<sup>160</sup> Nevertheless, we have consulted the Ministry of Interior via e-mail on 10 July 2014 about the existence of any report on this matter with no response.

## 2 Freedom of movement

The relevant directive for this chapter is Directive 2004/38/EC of 29 April 2004 on the right of citizens of the European Union and their family members to move and reside freely within the territory of the Member States. This Directive is based on the need to grant family members of citizens of the European Union, whatever their nationality, the right to move and reside freely within the territory of the Member States, so that citizens of the European Union can exercise this right under objective conditions of freedom and dignity. A ‘family member’, in accordance with Article 2(2), is not only the spouse but also “the partner with whom the European Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State”.

The transposition of the Directive was done by Royal Decree 240/2007 of 16 February on Entry, Free Movement and Residence in Spain of Citizens of European Union Member States and Citizens of other States Party to the Agreement on the European Economic Area.<sup>161</sup> It represents an important progress in the legal development of the principle of equal treatment with the consecration (as indicates the Preamble of the Decree) of the principle of non-discrimination on grounds of gender, race, colour, ethnic or social origin, genetic characteristics, language, religion or belief, political or other opinions, belonging to a national minority, heritage, birth, disability, age or sexual orientation.

It is important to consider that the previous laws (Royal Decree 178/2003 of 14 February on Entry and Residence in Spain of Citizens of European Union Member States and Citizens of other States Party to the Agreement on the European Economic Area) did not include registered partnerships in the concept of family members.<sup>162</sup>

After the Spanish Supreme Court (*Tribunal Supremo*) judgment of 1 June 2010, the act applies to any EU citizen including Spanish citizens (before that it applied only to non-Spanish EU citizens).<sup>163</sup> In accordance with Article 2 of the Royal Decree, it also applies, whatever the nationality, to the family members of an EU citizen or citizen of another State Party to the Agreement on the European Economic Area, when they accompany or join him/her. Article 2 includes in the concept of family:

“a) The spouse, provided there has been no decision or declaration of nullity of the matrimonial bond, divorce or **legal separation**.”

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<sup>161</sup> Spain (2007), Royal Decree 240/2007 of 16 February on Entry, Free Movement and Residence in Spain of Citizens of European Union Member States and Citizens of other States Party to the Agreement on the European Economic Area (*Real Decreto 240/2007, de 16 de febrero, de entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-4184](http://www.boe.es/buscar/act.php?id=BOE-A-2007-4184)

<sup>162</sup> Spain (2003), Royal Decree 178/2003 of 14 February on Entry and Residence in Spain of Citizens of European Union Member States and Citizens of other States Party to the Agreement on the European Economic Area (*Real Decreto 178/2003, de 14 de febrero, de entrada y permanencia en España de nacionales de Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2003-3708](http://www.boe.es/buscar/doc.php?id=BOE-A-2003-3708)

<sup>163</sup> Spain (2010) Judgment of Supreme Court, Third Chamber, 1 June 2010 (*Sentencia de 1 de junio de 2010, de la Sala Tercera del Tribunal Supremo*), available at: [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2010-16822](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2010-16822)

The partner with whom the citizen has entered into a partnership equivalent to marriage registered in a European Union Member State or in a State Party to the European Economic Area, **in such a way that two simultaneous registrations in this State are not possible**, and provided that the partnership has not been dissolved, for which adequate proof must be supplied. A marriage and a registered partnership shall be, in any event, incompatible.

The direct descendants and the descendants of the spouse or registered partner, who are under the age of 21 or over 21 but still maintained by their parents, or are dependant persons, provided there is no decision or declaration of nullity of the matrimonial union, divorce or **legal separation**, or the registered partnership has been dissolved.

The direct relatives in the ascending line and those of the spouse or partner who are maintained by them, provided there is no decision or declaration of nullity of the matrimonial union, divorce or **legal separation**, or the registered partnership has been dissolved.”

In 2010, the Spanish Supreme Court (*Tribunal Supremo*) declared the mentioned provisions to be null. The provision referring to the application of the article to citizens of other EU Member State (with the implicit exclusion of Spanish citizens) now applies to any EU citizen.<sup>164</sup> This means that it also applies to Spanish citizens.

The third final disposition of Royal Decree 240/2007 introduces an important grant in the sense that Spanish authorities shall facilitate the granting of a visa to reside or, where applicable, the authorization to reside for exceptional circumstances to persons not included in Article 2 of Royal Decree 240/2007, who accompany a Union citizen or join him/her and meet, among others, the following condition: “b) being a citizen of a State which is neither a Member of the European Union nor a State Party to the European Economic Area and maintaining a stable and duly proved relationship as partner of a European Union citizen.”

This provision also establishes that the Spanish authorities will require sufficient proof of the existence of a stable relationship with the Union citizen. The authorities shall take into account the personal circumstances alleged in the application and shall justify the denial of entry, visa or authorization of residence.

The referred Royal Decree 240/2007 regulates the conditions for the exercise of the rights of entry and exit, free circulation, stay, residents, permanent residence and work in Spain by citizens of other Member States of the European Union and the remaining States in the Agreement on the European Economic Space, and the limitations on the above rights for reasons of public order, public safety or public health. However, the application of that established in Article 5.2 of Directive 2004/38/CE and Article 4.2, second paragraph, of Royal Decree 240/2007, has since its enforcement revealed the need to make a modification in relation to the citizens of the European Union who are nationals of a Member State in whose territory the Schengen Agreement is not applied. In fact, their relatives who are natives of other countries were not allowed to enter Spain by the border control authorities without previously obtaining an entry visa, despite holding a family residence card of a citizen of the Union. For this reason, Royal Decree 1161/2009 of 10

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<sup>164</sup> Spain (2010) Judgment of Supreme Court, Third Chamber, 1 June 2010 (*Sentencia de 1 de junio de 2010, de la Sala Tercera del Tribunal Supremo*), available at: [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2010-16822](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2010-16822)

July<sup>165</sup> has modified article 4.2 of Royal Decree 240/2007, to the effect that the possession of a family residence card of a citizen of the Union issued by any Member State of the European Union or another State which forms part of the Agreement on the European Economic Space relieves these relatives of the obligation of obtaining an entry visa. This legislative development is not of specific interest to homosexual couples, but it is naturally applicable to them.

The 20<sup>th</sup> Additional Provision introduced in the Statutory Regulation implementing Organic Act 4/2000 of 11 January on the Rights and Freedoms of Aliens in Spain and their social integration,<sup>166</sup> establishes the rules applicable to family members of a Spanish citizen. In this case “family members” refers to relatives who are not nationals of a European Union Member State or of a State Party to the European Economic Area Agreement. The same Royal Decree 240/2007 is applicable, regardless of their nationality and in the terms foreseen, to the relatives of a Spanish citizen when they accompany the Spanish citizen or join him/her, and provided that they are included in one of the categories mentioned in that provision. This provision includes (section b): “The partner with whom the citizen has a relationship equivalent to marriage entered in a public register established to this effect in a European Union Member State or in a State Party to the European Economic Area, **in such a way that two simultaneous registrations in this State are not possible**, and provided the registered partnership has not been dissolved, for which adequate proof must be supplied. A marriage and a registered partnership shall be, in any event, incompatible”, and also (section c): “The direct descendants and the descendants of the spouse or registered partner, who are under the age of 21 or over 21 but still maintained by their parents, or are dependant persons, provided there is no agreement or declaration of nullity of the matrimonial union, divorce or legal separation, or the registered partnership has been dissolved”.

In 2010, the Spanish Supreme Court (*Tribunal Supremo*) declared the indicated phrase to be null.<sup>167</sup> This means that in Spain it is not possible to have two simultaneous registrations (marriage and a registered partnership), thus being incompatible. The Spanish Supreme Court considered the expression “in such a way that two simultaneous registrations in this State are not possible” as referring to the State in the EU or the European Economic Area where the relationship equivalent to marriage is entered in a public register. However, the rest of the article is valid, and in this sense, a marriage and a registered partnership are incompatible in Spain with consequences for the application of the Royal Decree 240/2007 to relatives of a Spanish citizen as defined by the Royal Decree.

This Royal Decree represents important progress in the legal development of the principle of equal treatment, considering the restrictive character of the previous regulation ( Royal Decree 178/2003

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<sup>165</sup> Spain (2009), Royal Decree 1161/2009 of 10 July on Entry and Residence in Spain of Citizens of European Union Member States and Citizens of other States Party to the Agreement on the European Economic Area (*Real Decreto 1161/2009, de 10 de julio, por el que se modifica el Real Decreto 240/2007, de 16 de febrero, de entrada y permanencia en España de nacionales de Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo* ), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2009-12207](http://www.boe.es/buscar/doc.php?id=BOE-A-2009-12207) (Hyperlink was on 23 February 2014)

<sup>166</sup> Spain (2000), Organic Act 4/2000 of 11 January on the Rights and Freedoms of Aliens in Spain and their social integration (*Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2000-544](http://www.boe.es/buscar/act.php?id=BOE-A-2000-544)

<sup>167</sup> Spain (2010) Judgment of Supreme Court, Third Chamber, (*Sentencia de 1 de junio de 2010, de la Sala Tercera del Tribunal Supremo*), available at: [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2010-16822](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2010-16822)

of 14 February on Entry and Residence in Spain of Citizens of European Union Member States and Citizens of other States Party to the Agreement on the European Economic Area)<sup>168</sup> which did not include registered partnerships in the definition of family members. Therefore there is a trend in the Spanish legislation in favour of equality principle and against any type of discrimination that can affect to LGBT people

The restrictive character of the previous legislation was overcome in certain judicial decisions applying Royal Decree 178/2003 (this will be explained in more detail in the chapter on family reunification), for example by Decision 145/2006 of the High Court of Justice of Catalonia (Administrative Dispute Jurisdiction, Section 2) of 8 February,<sup>169</sup> or by Decision 83/2004 of the Administrative Court of Barcelona of 14 May.<sup>170</sup> However, there were also other judicial decisions which maintained a strict interpretation, for example Decision 842/2004 of 6 September of the High Court of Justice of Navarre (Administrative Dispute Jurisdiction, Section 1), which made the legal reform necessary.<sup>171</sup>

In this sense, the legal provision from 2007 superseded the previous, very restrictive, law, which had led to contradictory case law. Therefore, we have considered it important to include this case law in our report in order to show the necessity of a legal change as the one that came into effect in 2007. The current law is less restrictive, but there is no relevant recent case law to show any possible trends in jurisprudence.<sup>172</sup> Nevertheless, as the new regulation is more flexible, case law can be also more flexible in the future.

Regarding statistics linked to freedom of movement, and after requesting (on January 2014,) this information from the Ministry of Health, Social Services and Equality (*Ministerio de Sanidad,*

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<sup>168</sup> Spain (2003), Royal Decree 178/2003 of 14 February on Entry and Residence in Spain of Citizens of European Union Member States and Citizens of other States Party to the Agreement on the European Economic Area (*Real Decreto 178/2003, de 14 de febrero, de entrada y permanencia en España de nacionales de Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2003-3708](http://www.boe.es/buscar/doc.php?id=BOE-A-2003-3708)

<sup>169</sup> Spain, Decision 145/2006 of the High Court of Justice of Catalonia (Administrative Dispute Jurisdiction, Section 2) 8 February 2006 (*Sentencia no 145/2006 de 8 de febrero de 2006 del Tribunal Superior de Justicia de Cataluña (Sala de lo Contencioso-Administrativo, Sección 2ª)*), [www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=712225&links=145/2006&optimize=20060928&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=712225&links=145/2006&optimize=20060928&publicinterface=true) (All hyperlinks were accessed on 25 May 2014)

<sup>170</sup> Spain, Decision 83/2004 of the Administrative Dispute Jurisdiction Court of Barcelona, 14 May 2004 (*Sentencia 83/2004 de 14 de mayo de 2004 del Juzgado no13 de lo Contencioso-Administrativo de Barcelona*), [www.poderjudicial.es/search/index.jsp](http://www.poderjudicial.es/search/index.jsp) (All hyperlinks were accessed on 23 February 2014)

<sup>171</sup> Spain, Decision 842/2004 of High Court of Justice of Navarre (Administrative Dispute Jurisdiction, Section 1) 6 September (*Sentencia 842/2004 de 6 de septiembre del Tribunal Superior de Justicia de Navarra, Sala de Resolución de Conflictos, sección 1*), [www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=1817351&links=842/2004&optimize=20041204&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=1817351&links=842/2004&optimize=20041204&publicinterface=true) (All hyperlinks were accessed on 25 May 2014)

<sup>172</sup> Desk research. We consulted on January 2014 and after on 8 April 2014 Constitutional Court (*Tribunal Constitucional*) database, Judicial Power (*Poder Judicial*) official case law database, [www.poderjudicial.es/search/indexAN.jsp](http://www.poderjudicial.es/search/indexAN.jsp); Westlaw database, [www.westlaw.es/index\\_spa.html?brand=nwles](http://www.westlaw.es/index_spa.html?brand=nwles) and Tirant lo Blanch database, [www.tirantonline.com/tol/](http://www.tirantonline.com/tol/), and General State Prosecutor (*Fiscalía General del Estado*) annual reports.(All hyperlinks were accessed on 8 April 2014).

*Servicios Sociales e Igualdad*),<sup>173</sup> and on January and April 2014 the Ministry of the Interior (*Ministerio del Interior*)<sup>174</sup> and the National Institute of Statistics (*Instituto Nacional de Estadística*),<sup>175</sup> website sources, it can be said that there are no relevant official statistics available in Spain. LGBT associations (such as the State Federation of Lesbians, Gays, Transsexuals and Bisexuals (FELGTB)<sup>176</sup> or COGAM<sup>177</sup> do not have data available on these issues either. We consulted FELGTB and COGAM website resources on January 2014, and after on 8 April 2014.

Recently, these LGBT associations, the State Federation of Lesbians, Gays, Transsexuals and Bisexuals and COGAM, published a study entitled 2013 Research on discrimination on grounds of sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*).<sup>178</sup> However, it contains no relevant information about the freedom of movement.

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<sup>173</sup> Spain, Ministry of Health, Social Services and Equality (*Ministerio de Sanidad, Servicios Sociales e Igualdad*), [www.msssi.gob.es/organizacion/ministerio/directorio/cont\\_directorio.htm](http://www.msssi.gob.es/organizacion/ministerio/directorio/cont_directorio.htm)

<sup>174</sup> Spain, Ministry of the Interior (*Ministerio del Interior*), [www.interior.gob.es/](http://www.interior.gob.es/)

<sup>175</sup> Spain, National Institute of Statistics (*Instituto Nacional de Estadística*), [www.ine.es/](http://www.ine.es/)

<sup>176</sup> Spain, FELGTB, [www.felgtb.org/](http://www.felgtb.org/)

<sup>177</sup> Spain, COGAM, [www.cogam.es/](http://www.cogam.es/)

<sup>178</sup> Spain, FELGTB and COGAM, 2013 Research on discrimination on grounds of sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*), available at: [www.felgtb.org/temas/laboral/documentacion/i/3773/359/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana](http://www.felgtb.org/temas/laboral/documentacion/i/3773/359/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana)

### 3 Asylum and subsidiary protection

The asylum legislation in Spain guarantees non-discrimination based on grounds of sexual orientation or gender identity. There is a clear trend in the case law to guarantee asylum and protection in cases of persecution in the country of origin with some flexibility.

Act 5/1984 of 26 March on the Right to Asylum and the Refugee Status<sup>179</sup> (amended by Act 9/1994 of 19 May) established in Article 10 (1) that, “Asylum will also be extended to the direct relatives in the ascending line and direct descendants and to the refugee’s spouse, or to the partner with whom the individual has a similar relationship of affection and cohabitation, except in cases of legal or *de-facto* separation, divorce, majority of age or family independence, in which the status of each member of the family shall be separately assessed”. Thus, the Spanish legislation permitted to grant asylum not only to the spouse of the refugee, but also to the person with whom the individual is tied by a similar relationship of affection and cohabitation.

Regarding the grounds that justify the granting of asylum, Article 3(1) established that “Refugee status will be recognised and, therefore, asylum will be granted to all aliens who fulfil the requirements foreseen in the international instruments ratified by Spain, and especially in the Convention on Refugees, done in Geneva on 28 July 1951, and in the Protocol on Refugees, done in New York on 31 January 1967”.

Act 12/2009 of 30 October concerning the right to asylum and subsidiary protection<sup>180</sup> derogates the previous regulation on this subject in Act 5/1984 of 26 March concerning the right to asylum and the condition of a refugee. The main purpose of this new Act is to bring the European Union legislation on the subject into the Spanish legal system. And it transposed: Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted; Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status; and Chapter V of Council Directive 2003/86/CE of 22 September 2003 on the right to family reunification. The Law also aspired to suitably reflect the new interpretations and criteria arising in international doctrine and in the case law of supranational bodies such as the Court of Justice of the European Union or the European Court of Human Rights.

In the same sense as the Act of 1984, Article 40 of Act 12/2009 states: “[...] (B)y family extension the right to asylum or subsidiary protection of a refugee or beneficiary of this protection is applied to their spouse or person bound to them through a similar affective relationship of coexistence, except in case of divorce, legal separation, *de facto* separation,

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<sup>179</sup> Spain (1984), Act 5/1984 of 26 March on the Right to Asylum and the Refugee Status (*Ley 5/1984, de 26 de marzo, reguladora del derecho de asilo y de la condición de refugiado*) available at: [www.boe.es/buscar/doc.php?id=BOE-A-1984-7250](http://www.boe.es/buscar/doc.php?id=BOE-A-1984-7250)

<sup>180</sup> Spain (2009), Act 12/2009 of 30 October concerning the right to asylum and subsidiary protection (*Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2009-17242](http://www.boe.es/buscar/act.php?id=BOE-A-2009-17242)

different nationality or concession of status of refugee for reasons of gender [...]”. In this case, the Law itself recognises in its second final provision that it seeks to transpose Directive 2003/86/EC.

Article 3 of Act 12/2009 defines the condition of refugee and expressly introduces the fear of being pursued for reasons of sexual orientation among the possible grounds for granting asylum under Spanish legislation, unlike the previous regulation contained in the already derogated Act 5/1984 which ignored this.

Although it is not a specific aspect of the subject which concerns us, it is interesting to point out that the Act, for the first time in Spain, also deals with subsidiary protection (Article 4), defined as the right “given to people from other countries and nationless persons who, without meeting the requirements for achieving asylum status or being recognised as refugees, but with respect to which solid reasons are given for believing that if they returned to their country of origin, in the case of nationals, or to that of their habitual residence, in the case of nationless persons, they would face a real risk of suffering some serious harm [...], and who are unable or, due to the said risk, unwilling to receive protection from the country concerned, [...]” The protection awarded with the right of asylum and subsidiary protection consists, amongst other measures, of not returning or expelling the people to whom it has been recognised (Article 5).

Before the approval of the new Act, the case law of the Supreme Court had established that discrimination and persecution on grounds of sexual orientation shall constitute one of the reasons for granting asylum. However, a number of judicial decisions could be quoted which did not, however, focus on the heart of the matter. For example, the judicial decisions from the Supreme Court (Administrative Dispute Jurisdiction, Section 5) of 14 December 2006, 22 December 2006, 25 July 2007 and 4 October 2007 dealt with cases in which the appellants had alleged persecution on grounds of sexual orientation. These judicial decisions only dealt with the inadmissibility of the application as decided by the authorities and which was confirmed by a court decision. The Supreme Court accepted the applicant’s appeal arguing that possible doubts that might arise about the alleged causes of discrimination on grounds of sexual orientation invoked for the asylum application could not be dealt with at the admissibility stage, but had to be considered as part of the material examination of the asylum claim. Thus, the Supreme Court recognised the right of the appellants to have their asylum application examined in Spain. The conclusion is that the doubts regarding the existence of discrimination have to be revised after the admission of the application.

In the Decision of the Supreme Court of 13 December 2007 (Administrative Dispute Jurisdiction, Section 5),<sup>181</sup> the Court did go to the heart of the matter. The appellant had already stated in his asylum application of 20 August 2001 that he claimed asylum on grounds of his homosexual orientation, invoking the discriminatory situation and the persecution of homosexuals in Cuba. The Supreme Court decided in favour of the appellant, understanding that there were sufficient facts to fulfil the requirements for granting the right to asylum,

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<sup>181</sup> Spain, Judgment of Supreme Court (Administrative Dispute Jurisdiction Chamber, Section 5) of 13 December 2007 (*Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, Sección 5, de 13 de diciembre de 2007*), [www.poderjudicial.es/search/doAction?action=contentpdf&datasematch=TS&reference=305980&links=&optimize=20080110&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&datasematch=TS&reference=305980&links=&optimize=20080110&publicinterface=true) (All hyperlinks were accessed on 24 February 2014)

according to Article 8 of Act 5/1984 of 26 March on the Right to Asylum and Refugee Status. Once both the documents brought by the applicant and the facts deriving from them had been examined, the Court considered that they were, according to the nature of the case, sufficient to conclude that the applicant fulfilled the requirements of Article 3(1) of Act 5/1984 of 26 March. Thus, the right to asylum and refugee status in Spain was granted to the applicant. The relevant interpretation of the Spanish Supreme Court is that it is enough to claim asylum on grounds of sexual orientation and invoke a discriminatory situation in the country of origin to obtain the asylum and refugee status.

Regarding the Act 12/2009 of 30 October concerning the right to asylum and subsidiary protection,<sup>182</sup> in force since 20 November 2009, there is no relevant case law yet.<sup>183</sup>

However, between January 2008 and January 2010, some relevant judicial decisions were issued based on the previous legislation and the interpretation of Spanish Supreme Court thereof: In the Decision of the National Court (*Audiencia Nacional*) of 30 April 2008 (Contentious-Administrative Chamber, Section 8),<sup>184</sup> the Court considered that it is not enough to denounce persecution based on a common characteristic of sexual orientation. In fact, the applicant must direct or indirectly prove a persecution to justify the recognition of asylum. According to the sentence, there is no irrevocable proof of her belonging to a social, ethnic, political or religious group which is the object of persecution. And although full proof is not necessary, the Court considered that there was not sufficient indications of the facts..

In the same line, the Judgment of the Supreme Court of 28 November 2008 (Contentious-Administrative Chamber, Section 5)<sup>185</sup> also fails to recognise the requested right to asylum due to the lack of proof of persecution as a homosexual. It is necessary to provide indications of the persecution based on sexual orientation.

The Decision of the National Court of 2 December 2009 (Contentious-Administrative Chamber, Section 5)<sup>186</sup> referring to a citizen from Bangladesh who also invoked

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<sup>182</sup> Spain (2009), Act 12/2009 of 30 October concerning the right to asylum and subsidiary protection (*Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2009-17242](http://www.boe.es/buscar/act.php?id=BOE-A-2009-17242)

<sup>183</sup> Desk research. We consulted on January 2014 and after on 8 April 2014 Constitutional Court (*Tribunal Constitucional*) database, Judicial Power (*Poder Judicial*) official case law database, [www.poderjudicial.es/search/indexAN.jsp](http://www.poderjudicial.es/search/indexAN.jsp); Westlaw database, [www.westlaw.es/index\\_spa.html?brand=nwles](http://www.westlaw.es/index_spa.html?brand=nwles) and Tirant lo Blanch database, [www.tirantonline.com/tol/](http://www.tirantonline.com/tol/),

<sup>184</sup> Spain, Judgment of National Court (Contentious-Administrative Chamber, Section 8) 30 April 2008 (*Sentencia de la Audiencia Nacional, sala de lo Contencioso-Administrativo, sección 8, de 30 de abril de 2008*), [www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=105731&links=&optimize=20080605&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=105731&links=&optimize=20080605&publicinterface=true) (Hyperlink was accessed on 25 May 2014)

<sup>185</sup> Spain, Judgment of Supreme Court (Contentious- Administrative Chamber, Section 5) (*Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, sección 5, de 28 de noviembre de 2008*), [www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=3430650&links=%225265/2005%22&optimize=20081211&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=3430650&links=%225265/2005%22&optimize=20081211&publicinterface=true) (All hyperlinks were accessed on t 23 February 2014)

<sup>186</sup> Spain, Decision of National Court (Contentious- Administrative Chamber, Section 5) 2 December 2009 (*Decisión de la Audiencia Nacional, Sala de lo Contencioso-Administrativo, de 2 de diciembre de 2009*) available at:

discrimination due to his homosexual condition, refers to the reiterated doctrine established by the Supreme Court with respect to the necessary proof for obtaining asylum, in the sense that full or absolute proof of the alleged facts is not required. It is sufficient to provide indications of persecution.

Taking into account the case law, we can consider that although a full proof it is not necessary, we need a sufficient (a minimum of) indications to prove the belonging to the group which is object of persecution to obtain the asylum in Spain.

The information on asylum and subsidiary protection available from the General Subdirectorate on Asylum (*Subdirección General de Asilo*) of the Ministry of the Interior (*Ministerio del Interior*)<sup>187</sup> does not disaggregate data concerning the sexual orientation of the applicants. The annual reports contain disaggregate data on age, gender, education, economic activity or country of origin of the applicants, but not on the reasons for the asylum protection sought. There are also data on the number of appeals lodged against negative resolutions, but not on the reasons for the appeals. After requesting this information from the Ministry of the Interior (*Ministerio del Interior*),<sup>188</sup> the Ministry of Justice (*Ministerio de Justicia*),<sup>189</sup> and the Ministry of Employment and Social Security (*Ministerio de Empleo y Seguridad Social*), it can be said that there are no relevant official statistics available in Spain.

According to the Eighth Additional Provision of Act 12/2009 of 30 October concerning the right to asylum and subsidiary protection,<sup>190</sup> the Government must send Parliament (*Cortes Generales*) an annual report on: the number of people who have applied for asylum or subsidiary protection; the number of people to which this status has been granted or denied; the number of resettlements which have been carried out and the number of people benefiting from family reunification; terminations and revocations and the specific situation of minors and other vulnerable persons. This obligation will enhance data collection on the subject, although the Act does not oblige disaggregation of the data including discrimination for sexual orientation.

Although there are no data available in the reports that the Spanish Government must present every year to Parliament, it should be noted that as a result of this provision the Spanish Government publishes online annual statistical reports on asylum (*Asilo en cifras*). Actually

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[www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=4994808&links=&optimize=20091223&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=4994808&links=&optimize=20091223&publicinterface=true) (Hyperlink was accessed on 25 May 2014)

<sup>187</sup> Spain, Ministry of the Interior (*Ministerio del Interior*), [www.interior.gob.es/](http://www.interior.gob.es/)

<sup>188</sup> Spain, Ministry of the Interior (*Ministerio del Interior*), [www.interior.gob.es/](http://www.interior.gob.es/)

<sup>189</sup> Spain, Ministry of Justice (*Ministerio de Justicia*), [www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html](http://www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html)

<sup>190</sup> Spain (2009), Act 12/2009 of 30 October concerning the right to asylum and subsidiary protection (*Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2009-17242](http://www.boe.es/buscar/act.php?id=BOE-A-2009-17242)

there are available the annual reports of 2008,<sup>191</sup> 2009<sup>192</sup> 2010,<sup>193</sup> 2011,<sup>194</sup> and 2012.<sup>195</sup> However, they include no disaggregated data regarding sexual orientation or sexual identity.

According to Personal Data Protection Organic Act (*Ley Orgánica de Protección de Datos*), data referred to sexual life only can be collected and treated when a law provided it based on general interest reasons, or with an express consent of the person affected (article 7(3)).<sup>196</sup> The Asylum Act provides for a request of asylum based on a sexual orientation persecution. Although we think there is no a legal obstacle, actually there is no provision for collect disaggregated data in this sense. And there are no disaggregated data regarding this issue in the reports cited above.

Good practices under Act 12/2009, not specifically concerning discrimination due to sexual orientation, but in any case reinforcing the guarantee of rights in asylum and refugee proceedings, are: 1) the important role assigned to the High Commissioner of the United Nations for Refugees (UNHCR) in asylum procedures in Spain; 2) the provision of cooperation with Non- Governmental Organisations (Sixth Additional Provision); 3) training programmes for all actors intervening in the asylum procedure (Third Additional Provision).

Regarding the role assigned to the High Commissioner of UNHCR, Article 34 indicates that Spain shall communicate to UNHCR the presentation of applications for international protection. UNHCR can request information about the administrative procedure. It can also be present at the hearing of the applicant and present reports for their inclusion in the administrative procedure. Moreover, article 35 regulates the participation of the representative of UNHCR in Spain in the sessions of the Inter-ministerial Commission on Asylum and Refuge (*Comisión Interministerial de Asilo y Refugio*), who will be informed immediately about the presentation of asylum applications at the frontier and who may interview applicants. It also provides for UNHCR to be heard regarding asylum matters.

The cooperation with Non- Governmental Organisations is provided in the Sixth Additional Provision of Act 12/2009. It stipulates that Spanish Public Authorities shall promote the activity of the legally recognised nongovernmental organization with non profit purposes

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<sup>191</sup> Spain (2008), Asylum in numbers (*Asilo en cifras*) 2008, available at: [www.interior.gob.es/documents/642317/1201562/Asilo+en+cifras+2008+%28NIPO+126-09-105-8%29.pdf/1ad5491c-6e4e-41d8-94cd-f6f35c14db42](http://www.interior.gob.es/documents/642317/1201562/Asilo+en+cifras+2008+%28NIPO+126-09-105-8%29.pdf/1ad5491c-6e4e-41d8-94cd-f6f35c14db42) (All hyperlinks were accessed at 14 April 2014)

<sup>192</sup> Spain (2009), Asylum in numbers (*Asilo en cifras*) 2009, available at: [www.interior.gob.es/documents/642317/1201562/Asilo+en+cifras+2009+%28NIPO+126-10-001-8%29.pdf/d1fd4fc1-749f-4a25-b646-5b884ef890aa](http://www.interior.gob.es/documents/642317/1201562/Asilo+en+cifras+2009+%28NIPO+126-10-001-8%29.pdf/d1fd4fc1-749f-4a25-b646-5b884ef890aa)

<sup>193</sup> Spain (2010), Asylum in numbers (*Asilo en cifras*) 2010, available at: [www.interior.gob.es/documents/642317/1201562/Asilo+en+cifras+2010+%28NIPO+126-11-048-8%29.pdf/2c494c4c-672f-483b-9dbd-17e834aaa417](http://www.interior.gob.es/documents/642317/1201562/Asilo+en+cifras+2010+%28NIPO+126-11-048-8%29.pdf/2c494c4c-672f-483b-9dbd-17e834aaa417)

<sup>194</sup> Spain (2011), Asylum in numbers (*Asilo en cifras*) 2011, available at: [www.interior.gob.es/documents/642317/1201562/Asilo+en+cifras+2011+%28NIPO+126-12-011-9%29.pdf/aed61e93-988e-44c1-b6d0-4d83036805e7](http://www.interior.gob.es/documents/642317/1201562/Asilo+en+cifras+2011+%28NIPO+126-12-011-9%29.pdf/aed61e93-988e-44c1-b6d0-4d83036805e7)

<sup>195</sup> Spain (2012), Asylum in numbers (*Asilo en cifras*) 2012, available at: [www.interior.gob.es/documents/642317/1201562/Asilo+en+cifras+2012+126130552.pdf/9545a6b7-4f95-49a7-a28d-c0deafe35bfi](http://www.interior.gob.es/documents/642317/1201562/Asilo+en+cifras+2012+126130552.pdf/9545a6b7-4f95-49a7-a28d-c0deafe35bfi)

<sup>196</sup> Spain (1999), Organic Act 99, of 13 December, of Personal Data Protection (*Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal*), available at: [www.boe.es/buscar/act.php?id=BOE-A-1999-23750](http://www.boe.es/buscar/act.php?id=BOE-A-1999-23750) Accessed at 25 April 2014.

whose objectives included the advice and assistance to persons in need of international protection. In this sense, it provides that the reports of these Non Governmental Organizations will be included in the appropriate administrative procedures for international protection initiated by the Ministry of the Interior (*Ministerio del Interior*)

The Third Additional Provision of the Act 12/2009 indicates that the Spanish Government will ensure that civil servants and other persons intervening in the asylum procedure have the proper training. And to do it, the competent Ministries will develop training programmes to allow in order to perform the jobs skills.

In relation to the implementation of the law, it is important to note the approbation of a International Protection Plan in Catalonia (*Plan de Protección Internacional en Cataluña*) in order to guarantee help to persons affected of assistance to persons involved in situations of international conflicts asking for asylum and refuge, although it is not a explicitly reference to LGBT persons.<sup>197</sup>

Regarding the “phallometric testing” used in some countries during the asylum procedure: this is not foreseen in the Spanish legislation, there is no case law on this topic, and there are no , *for the purpose of this chapter*, signs that this type of testing or similar or comparable practices may have been used or implemented in Spain to establish the credibility of asylum applications based on reasons of sexual orientation.

There is no relevant case law/statistics to establish any possible trends on persecution of LGBT persons due to their sexual orientation and gender identity.<sup>198</sup> And there are no data about a change of situation of LGTB after the CJEU judgement of cases C-199/12, C-200/12 and C-201/12 and the enactment of the recast Qualification Directive 2011/95.<sup>199</sup>

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<sup>197</sup>Spain, Autonomous Community of Catalonia Government (*Gobierno de Cataluña*) (2014), International Protection Plan in Catalonia (*Plan de Protección Internacional en Cataluña*), [www20.gencat.cat/docs/bsf/03Ambits%20tematicas/05Immigracio/proteccio\\_internacional/PPIC\\_castella.pdf](http://www20.gencat.cat/docs/bsf/03Ambits%20tematicas/05Immigracio/proteccio_internacional/PPIC_castella.pdf) [Accessed at 25 May 2014]

<sup>198</sup>We consulted on January 2014 and after on April Constitutional Court (*Tribunal Constitucional*) database, Judicial Power (*Poder Judicial*) official case law database, [www.poderjudicial.es/search/indexAN.jsp](http://www.poderjudicial.es/search/indexAN.jsp); Westlaw database, [www.westlaw.es/index\\_spa.html?brand=nwlesand](http://www.westlaw.es/index_spa.html?brand=nwlesand) and Tirant lo Blanch database, [www.tirantonline.com/tol/](http://www.tirantonline.com/tol/), and General State Prosecutor (*Fiscalía General del Estado*) annual reports. And and information available in LGBT associations (such as the State Federation of Lesbians, Gays, Transsexuals and Bisexuals (FELGTB) [www.felgtb.org/](http://www.felgtb.org/) or COGAM) [www.cogam.es/](http://www.cogam.es/) website sources.

<sup>199</sup>Desk research on January 2014, and after for the revision on April 2014. We consulted the information on asylum and subsidiary protection available from the General Subdirectorate on Asylum (*Subdirección General de Asilo*) of the Ministry of the Interior (*Ministerio del Interior*) [www.interior.gob.es/](http://www.interior.gob.es/), Ministry of the Interior (*Ministerio del Interior*), the Ministry of Justice (*Ministerio de Justicia*), [www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html](http://www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html), and the Ministry of Employment and Social Security (*Ministerio de Empleo y Seguridad Social*), and information available in LGBT associations (such as the State Federation of Lesbians, Gays, Transsexuals and Bisexuals (FELGTB) [www.felgtb.org/](http://www.felgtb.org/) or COGAM) [www.cogam.es/](http://www.cogam.es/) website sources.

## 4 Family reunification

The Spanish legislation on this subject is to be found in Organic Act 4/2000 of 11 January on the Rights and Freedoms of Aliens in Spain and their social integration<sup>200</sup> amended by Organic Act 8/2000 of 22 December on the Reform of Organic Act 4/2000 of 11 January on the Rights and Freedoms of Aliens in Spain and their Social Integration,<sup>201</sup> as well as in Organic Act 11/2003 of 29 September on Concrete Measures regarding Civil Security, Domestic Violence and the Social Integration of Aliens,<sup>202</sup> and Organic Act 14/2003 of 20 November on the Reform of Organic Act 4/2000 of 11 January on the Rights and Freedoms of Aliens in Spain and their Social Integration.<sup>203</sup>

The particular problem regarding this issue is that the legislation has changed a lot, with several reforms (2000 and 2003, and finally 2009). However, the updated Organic Act 4/2000 is now in force.

Neither these laws nor the corresponding statutory regulations (Royal Decree 2393/2004 of 30 December, which enacts the Regulations implementing Organic Act 4/2000 of 11 January on the Rights and Freedoms of Aliens in Spain and their Social Integration)<sup>204</sup> implemented Article 4(3) of Council Directive 2003/86/EC on the right to family reunification, a provision that, in any case, is not compulsory for the Member States.

Organic Act 2/2009<sup>205</sup> of 11 December reformed Organic Act 4/2000 giving a different regulation on the right to family regrouping.<sup>206</sup> One of the developments consists of including couples who

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<sup>200</sup> Spain (2000), Organic Act 4/2000 of 11 January on the Rights and Freedoms of Aliens in Spain and their social integration (*Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2000-544](http://www.boe.es/buscar/act.php?id=BOE-A-2000-544)

<sup>201</sup> Spain (2000), Organic Act 8/2000 of 22 December on the Reform of Organic Act 4/2000 of 11 January on the Rights and Freedoms of Aliens in Spain and their Social Integration (*Ley Orgánica 8/2000, de 22 de diciembre, de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2000-23660](http://www.boe.es/buscar/act.php?id=BOE-A-2000-23660)

<sup>202</sup> Spain (2003), Organic Act 11/2003 of 29 September on Concrete Measures regarding Civil Security, Domestic Violence and the Social Integration of Aliens (*Ley Orgánica 11/2003, de 29 de septiembre, de medidas concretas en materia de seguridad ciudadana, violencia doméstica e integración social de los extranjeros*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2003-18088](http://www.boe.es/buscar/act.php?id=BOE-A-2003-18088) (Hyperlink was accessed on 24 February 2014)

<sup>203</sup> Spain (2003), Organic Act 14/2003 of 20 November on the Reform of Organic Act 4/2000 of 11 January on the Rights and Freedoms of Aliens in Spain and their Social Integration (*Ley Orgánica 14/2003 de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*) available at: [www.boe.es/buscar/doc.php?id=BOE-A-2003-21187](http://www.boe.es/buscar/doc.php?id=BOE-A-2003-21187) (Hyperlink was accessed on 24 February 2014)

<sup>204</sup> Spain (2004), Royal Decree 2393/2004 of 30 December, which enacts the Regulations developing the Organic Act 4/2000 of 11 January on the Rights and Freedoms of Aliens in Spain and their Social Integration (*Real Decreto 23/2004, de 30 de diciembre, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2005-323](http://www.boe.es/buscar/act.php?id=BOE-A-2005-323)

<sup>205</sup> Spain (2009), Organic Act 2/2009 of 11 December on the Reform of Organic Act 4/2000 of 11 January on the Rights and Freedoms of the Aliens in Spain and their Social Integration (*Ley Orgánica 2/2009, de 11 de diciembre, de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*) available at: [www.boe.es/buscar/doc.php?id=BOE-A-2009-19949](http://www.boe.es/buscar/doc.php?id=BOE-A-2009-19949)

<sup>206</sup> Spain (2009), Organic Act 2/2009 of 11 December on the Reform of Organic Act 4/2000 of 11 January on the Rights and Freedoms of the Aliens in Spain and their Social Integration (*Ley Orgánica 2/2009, de 11 de diciembre, de reforma*

have an affective relationship similar to that of matrimony in the category of the family, a unit to which the right to family regrouping is recognised, and that these regrouped people should be provided immediate access to the labour market (article 17(4)) although the new Act does not expressly mention that it is transposing Directive 2003/86/EC.

It is important to note the relevance of the protection of any partner in a similar affective relationship to matrimony as a family, because as the referred partner will be considered the spouse, the descendant and ascendants of the partner are regroupable relatives in the terms provided by the Act..

This new regulation can help to avoid any discrimination to LGBT persons in family reunification issues, and it shows a positive evolution in Spanish legislation.

The reform brought about by Organic Act 2/2009 has been developed through Royal Decree 557/2011 of 20 April approving the Regulation of Organic Act 4/2000, on the Rights and Freedoms of Aliens in Spain and their Social Integration after its reform by Organic Act 2/2009.<sup>207</sup> This regulation repealed the previously mentioned Royal Decree 2393/2004 of 30 December, which enacts the Regulations implementing Organic Act 4/2000 of 11 January on the Rights and Freedoms of Aliens in Spain and their Social Integration.<sup>208</sup>

This regulation details the right to family regrouping provided in Organic Act 2/2009<sup>209</sup>, and in particular the conditions for exercising the right of regrouping and for proving the affective relationship equivalent to matrimony to these effects (article 53(b)):

*The person with whom the applicant is in an affective relationship analogous to marriage. It is considered, for the purpose and application of this chapter, that an analogous relationship exists when:*

- 1. This relationship is recorded in a public register established for this purpose, and no such registration has been cancelled, or*
- 2. An unregistered relationship is proven, which started in advance of the sponsor's residence in Spain. For these purposes, without prejudice of the possible use of any means of proof allowed by law, documents issued by public authorities shall have prevalence. Applicable*

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de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social) available at: [www.boe.es/buscar/doc.php?id=BOE-A-2009-19949](http://www.boe.es/buscar/doc.php?id=BOE-A-2009-19949)

<sup>207</sup> Spain (2011), Royal Decree 557/2011 of 20 April approving the Regulation of Organic Act 4/2000, on Rights and Freedoms of Aliens in Spain and their Social Integration after its reform by Organic Act 2/2009 (*Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2011-7703](http://www.boe.es/buscar/act.php?id=BOE-A-2011-7703)

<sup>208</sup> Spain (2004), Royal Decree 2393/2004 of 30 December, which enacts the Regulations developing the Organic Act 4/2000 of 11 January on the Rights and Freedoms of Aliens in Spain and their Social Integration (*Real Decreto 23/2004, de 30 de diciembre, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2005-323](http://www.boe.es/buscar/act.php?id=BOE-A-2005-323)

<sup>209</sup> Spain (2009), Organic Act 2/2009 of 11 December on the Reform of Organic Act 4/2000 of 11 January on the Rights and Freedoms of the Aliens in Spain and their Social Integration (*Ley Orgánica 2/2009, de 11 de diciembre, de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*) available at: [www.boe.es/buscar/doc.php?id=BOE-A-2009-19949](http://www.boe.es/buscar/doc.php?id=BOE-A-2009-19949)

*to this situation are the provisions regarding the spouse from the preceding paragraphs. The situation of marriage and analogous affective relationships are incompatible for the purposes of this chapter.*

Furthermore, in section C), we mentioned Article 40 of the recent Act 12/2009 of 30 October concerning the right to asylum and subsidiary protection.<sup>210</sup> This new Act has not yet been developed in regulations.

Taking into account this reforms we can say that there is a clear evolution in Spanish legislation in favour of grant rights of analogous affective relationships to marriage for exercising the right of reunification. These reforms help LGTB partners although they are not expressly mentioned in the law.

We can conclude that the relevant effects of these legal measures are: 1) the inclusion of couples who have an affective relationship similar to that of matrimony in the category of the family, and therefore with the same rights as families. 2) the definition of the affective relationship similar to that of matrimony including not only a relationship recorded in a public register, but also an unregistered relationship when it started in advance of the sponsor's residence in Spain.

And therefore, there is a clarification of rights of unmarried couples that can help to guarantee their rights because the previous legislation was not clear regarding them. In fact, as we see below, the courts extended the protection of family rights to unmarried couples in several cases. But it seems that their rights (under the previous legislation) depended excessively on the goodwill and extended interpretation of judges and courts, and therefore on the circumstances of the case.

Due to the recent character of the acts and regulations, there is still not any relevant case law concerning the implementation of the new legislation.<sup>211</sup> Prior to the 2009 legislative reforms, there were judicial decisions which attempted to compensate the lack of regulation by an extensive interpretation of the provisions of the legislation in force. This judicial interpretation was carried out on different bases, for example, the humanitarian reasons of Article 31(2) (now Article 31(3)) of Organic Act 4/2000. In addition, the exceptional circumstances mentioned in Article 31(3) of Organic Act 4/2000, the analogy with marriage and the principle of equality were used to extend the legal provisions to registered partnerships.

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<sup>210</sup> Spain (2009), Act 12/2009 of 30 October concerning the right to asylum and subsidiary protection (*Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2009-17242](http://www.boe.es/buscar/act.php?id=BOE-A-2009-17242)

<sup>211</sup> We consulted several case law websites and case law reports, as well as databases. There are no relevant cases in the last period. . We consulted on January 2014 and after on April Constitutional Court [*Tribunal Constitucional*] database, Judicial Power [*Poder Judicial*] official case law database, [www.poderjudicial.es/search/indexAN.jsp](http://www.poderjudicial.es/search/indexAN.jsp); Westlaw database, [www.westlaw.es/index\\_spa.html?brand=nwles](http://www.westlaw.es/index_spa.html?brand=nwles) and Tirant lo Blanch database, [www.tirantonline.com/tol/](http://www.tirantonline.com/tol/), and General State Prosecutor (*Fiscalía General del Estado*) annual reports.

We also consulted on January and April 2014 information available in Sociological Research Centre (*Centro de Investigaciones Sociológicas*, CIS), [www.cis.es/cis/openscms/ES/index.html](http://www.cis.es/cis/openscms/ES/index.html) and Statistics National Institute (*Instituto Nacional de Estadística*, INE), [www.ine.es/](http://www.ine.es/), LGBT associations (such as the State Federation of Lesbians, Gays, Transsexuals and Bisexuals (FELGTB) or COGAM) website sources.

At this point mention can also be made of a number of judicial decisions already referred to in the chapter on the freedom of movement. Although the facts do not necessarily relate to the subject of this chapter, the doctrine established in these judicial decisions is nevertheless applicable to this subject. For example, Decision 145/2006 of the High Court of Justice of Catalonia (Administrative Dispute Jurisdiction, Section 2) of 8 February.<sup>212</sup> In this case of a foreign citizen who was the registered partner of a Spanish national, the Court did not consider him a spouse in the legal sense, but did acknowledge that there was a previous relationship of cohabitation and affection which was legally recognised as a stable relationship. This relationship, if proven, could be included, as foreseen in Article 31 of Act 4/2000, as an expression of a concrete humanitarian reason, considering the impossibility of maintaining a stable relationship under circumstances of geographical separation. Thus, the granting of a residence permit was acceptable.

In contrast, as previously mentioned, attention should be drawn to Decision 842/2004 of 6 September by the High Court of Justice of Navarre (Administrative Dispute Jurisdiction, Section 1), which made the legal reform necessary.<sup>213</sup> In this case, concerning a foreign citizen who was the partner of a Spanish national, the court considered that the provisions on the rights of aliens should be subject to a strict interpretation. There are certainly laws which grant registered partnerships treatment similar to marriage (e.g. as regards tenancy, criminal issues and pensions), and this because of the clearly stated intention of the legislator in the corresponding legal act. But since the law on aliens did not do so, the court considered that equal treatment of marriage and homosexual partnership was not possible.

As can be seen, all these judicial decisions concern relationships formed by a Spanish national and a foreign citizen. Fortunately, a normative regulation on this issue is already to be found in Royal Decree 240/2007 of 16 February on the Entry, Free Movement and Residence in Spain of Citizens of European Union Member States and Citizens of other States Party to the Agreement on the European Economic Area.

Since 2009, Spain also has a new legislation on aliens with the reform implemented by Organic Act 2/2009 of 11 December,<sup>214</sup> which is in accordance with Article 4(3) of Directive 2003/86/EC. This legal change clarifies the Spanish legal system with regard to this issue, avoiding contradictory case law. Certainly, Article 4(3) of Directive 2003/86/EC of 22 September 2003 on the right to family reunification does not contain an obligation for the Member States, since it clearly

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<sup>212</sup> Spain, Decision 145/2006 of the High Court of Justice of Catalonia (Administrative Dispute Jurisdiction, Section 2) 8 February 2006 (*Sentencia no 145/2006 de 8 de febrero de 2006 del Tribunal Superior de Justicia de Cataluña (Sala de lo Contencioso-Administrativo, Sección 2ª)*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=712225&links=145/2006&optimize=20060928&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=712225&links=145/2006&optimize=20060928&publicinterface=true)

<sup>213</sup> Spain, Decision 842/2004 of High Court of Justice of Navarre (Administrative Dispute Jurisdiction, Section 1) 6 September (*Sentencia 842/2004 de 6 de septiembre del Tribunal Superior de Justicia de Navarra, Sala de Resolución de Conflictos, sección 1*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=1817351&links=842/2004&optimize=20041204&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=1817351&links=842/2004&optimize=20041204&publicinterface=true)

<sup>214</sup> Spain (2009), Organic Act 2/2009 of 11 December amending Organic Act 4/2000 of 11 January on the Rights and Freedoms of Aliens in Spain and their social integration (*Ley Orgánica 2/2009, de 11 de diciembre, de reforma de la Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2009-19949](http://www.boe.es/buscar/doc.php?id=BOE-A-2009-19949)

establishes that the Member States “may” authorise the entry and residence “of the unmarried partner, being a third-country national, with whom the sponsor is in a duly attested stable long-term relationship, or of a third-country national who is bound to the sponsor by a registered partnership in accordance with Article 5(2), and of the unmarried minor children, including adopted children, as well as the adult unmarried children who are objectively unable to provide for their own needs on account of their state of health, of such persons”. Thus, prior to the 2009 reform, it could not be said that the Directive had not been implemented appropriately. However, taking into account the fact that there was contradictory case law, the recent amendment of the Spanish legislation has clarified this situation. In addition to this, the protection granted by the Directive covers descendants, but the Spanish regulation extends the protection to the direct relatives in the ascending line.

Moreover, Royal Decree 557/2011 of 20 April approving the Regulation of Organic Act 4/2000, on the Rights and Freedoms of Aliens in Spain and their Social Integration after its reform by Organic Act 2/2009,<sup>215</sup> develops Organic Act 2/2009, and particularly, as we have seen, the right to the conditions for exercising the right of regrouping and for proving the affective relationship equivalent to matrimony to these effects (article 53(b)):

*The person with whom the applicant is in an affective relationship analogous to marriage. It is considered, for the purpose and application of this chapter, that an analogous relationship exists when: 1. This relationship is recorded in a public register established for this purpose, and no such registration has been cancelled, or 2. An unregistered relationship is proven, which started in advance of the sponsor’s residence in Spain. For these purposes, without prejudice of the possible use of any means of proof allowed by law, documents issued by public authorities shall have prevalence. Applicable to this situation are the provisions regarding the spouse from the preceding paragraphs. The situation of marriage and analogous affective relationships are incompatible for the purposes of this chapter.*

After requesting this information from the Ministry of Health, Social Services and Equality (*Ministerio de Sanidad, Servicios Sociales e Igualdad*),<sup>216</sup> the Ministry of Justice (*Ministerio de Justicia*),<sup>217</sup> the Ministry of the Interior (*Ministerio del Interior*)<sup>218</sup> and the National Institute of Statistics (*Instituto Nacional de Estadística*)<sup>219</sup>, it can be said that there are no official statistics on these issues available in Spain. LGBT associations (such as the State Federation of Lesbians, Gays, Transsexuals and Bisexuals (*Federación Estatal de Lesbianas, Gays, Transexuales y Bisexuales*,

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<sup>215</sup> Spain (2011), Royal Decree 557/2011 of 20 April approving the Regulation of Organic Act 4/2000, on Rights and Freedoms of Aliens in Spain and their Social Integration after its reform by Organic Act 2/2009 (*Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2011-7703](http://www.boe.es/buscar/act.php?id=BOE-A-2011-7703)

<sup>216</sup> Spain, Ministry of Health, Social Services and Equality (*Ministerio de Sanidad, Servicios Sociales e Igualdad*), [www.msssi.gob.es/organizacion/ministerio/directorio/cont\\_directorio.htm](http://www.msssi.gob.es/organizacion/ministerio/directorio/cont_directorio.htm)

<sup>217</sup> Spain, Ministry of Justice (*Ministerio de Justicia*), [www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html](http://www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html)

<sup>218</sup> Spain, Ministry of the Interior (*Ministerio del Interior*), [www.interior.gob.es/](http://www.interior.gob.es/)

<sup>219</sup> Spain, National Institute of Statistics (*Instituto Nacional de Estadística*), [www.ine.es/](http://www.ine.es/)

FELGT)<sup>220</sup> or the Madrid Lesbian, Gay, Transgender and Bisexual Community (*Colectivo de lesbianas, gays, transexuales y bisexuales de Madrid - COGAM*),<sup>221</sup> do not have data available either.

Recently, these LGBT associations, the State Federation of Lesbians, Gays, Transsexuals and Bisexuals (*Federación Estatal de Lesbianas, Gays, Transexuales y Bisexuales*)<sup>222</sup> and COGAM,<sup>223</sup> published a study entitled 2013 Research on discrimination on grounds of sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*).<sup>224</sup> However, it contains no relevant information about family reunification.

However, we can identify as a trend the adaptation of the legislation to guarantee rights and non-discrimination on grounds based on sexual orientation or gender identity. This is clearly shown by the reform carried out in 2009.

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<sup>220</sup>Spain, FELGTB, [www.felgtb.org/](http://www.felgtb.org/)

<sup>221</sup> Spain, COGAM, [www.cogam.es/](http://www.cogam.es/)

<sup>222</sup>Spain, FELGTB , [www.felgtb.org/](http://www.felgtb.org/)

<sup>223</sup> Spain, COGAM, [www.cogam.es/](http://www.cogam.es/)

<sup>224</sup> Spain, FELGTB and COGAM, 2013 Research on discrimination on grounds of sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*), available at: [www.felgtb.org/temas/laboral/documentacion/i/3773/359/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana](http://www.felgtb.org/temas/laboral/documentacion/i/3773/359/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana)

## 5 Freedom of assembly

Freedom of assembly is a fundamental right in Spain. Legislation and practice show that currently there is no discrimination based on grounds of sexual orientation or gender identity in Spain with regard to the freedom of assembly. In fact, in Spain several Gay Prides Celebrations are held in different cities, in general without any incidents.

Regarding the legislation, and according to the provisions of Article 5, section a) of Organic Act 9/1983 of 15 July on the Right of Assembly,<sup>225</sup> the relevant authority suspends and, if necessary, dissolves an assembly or a demonstration considered illegal in accordance to the criminal law. It must be noted that the Spanish Criminal Code<sup>226</sup> provides in Article 510 that “those conducts likely to incite discrimination, hatred or violence against groups or associations for racist, anti-semitic or other motives, related to their ideology, religion or belief, family situation, the belonging of their members to a particular ethnic, racial, or national group, their sex, sexual orientation, illness or disability, will be fined with a penalty from six to twelve months or punished with a prison sentence of one to three years”. Article 513 (1) of the Criminal Code penalises assemblies and demonstrations the goal of which is the commitment of an offence. Therefore demonstrations etc. may be prohibited if they have a homophobic goal. On the other side, Article 515(4) of the Criminal Code<sup>227</sup> penalises associations which promote or incite discrimination, hatred or violence against persons, groups or associations for motives related to their ideology, religion or belief, the belonging of their members to a particular ethnic, racial, or national group, their sex, sexual orientation, family situation, illness or disability.

The assemblies for the defense of the rights of homosexuals are protected by the Constitution (Article 21) and by the law. Article 3(2) of Organic Act 9/1983<sup>228</sup> stipulates that “The authority shall protect the assemblies and demonstrations against those who intend to avoid, disturb or affect the legal exercise of this right”. Article 514(4) of the Criminal Code<sup>229</sup> provides that “Those who impede the legal exercise of the rights of assembly and demonstration, or gravely disturb the development of an assembly or a demonstration will be punished with a prison sentence from two to three years in the case of the use of force, and with a prison sentence of three to six months or a fine of six to twelve months if committed using a physical (not legal or psychological) obstacle.”

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<sup>225</sup> Spain (1983), Organic Act 9/1983 of 15 July on Right of Assembly (*Ley Orgánica 9/1983, de 15 de julio, reguladora del derecho de reunión*), available at: [www.boe.es/buscar/act.php?id=BOE-A-1983-19946](http://www.boe.es/buscar/act.php?id=BOE-A-1983-19946)

<sup>226</sup> Spain (1995), Organic Act 10/1995, of 23 November on the CP available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-25444](http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444) Available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html)

<sup>227</sup> Spain (1995), Organic Act 10/1995, of 23 November on the CP available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-25444](http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444) Available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html)

<sup>228</sup> Spain (1983), Organic Act 9/1983 of 15 July on Right of Assembly (*Ley Orgánica 9/1983, de 15 de julio, reguladora del derecho de reunión*), available at: [www.boe.es/buscar/act.php?id=BOE-A-1983-19946](http://www.boe.es/buscar/act.php?id=BOE-A-1983-19946) (accessed at 24 February 2014)

<sup>229</sup> Spain (1995), Organic Act 10/1995, of 23 November on the CP available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-25444](http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444) Available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html)

After investigating the information on this issues from the Ministry of Health, Social Services and Equality (*Ministerio de Sanidad, Servicios Sociales e Igualdad*),<sup>230</sup> the Ministry of Justice (*Ministerio de Justicia*)<sup>231</sup>, the Ministry of the Interior (*Ministerio del Interior*)<sup>232</sup> and the National Institute of Statistics (*Instituto Nacional de Estadística*)<sup>233</sup>, it can be said that there are no official statistics on these issues available in Spain. LGBT associations (such as FELGTB or COGAM) do not have data available either.<sup>234</sup>

Recently, these LGBT associations published a study entitled 2013 Research on discrimination on grounds of sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*)<sup>235</sup> However, it contains no relevant information on the freedom of assembly.

There are no relevant statistical data/case law available on these issues.<sup>236</sup> But based on the information provided in newspapers and other media, it can be said that there are no practical obstacles to the holding of demonstrations promoted by gay and lesbian associations. On the contrary, the public authorities not only contribute with all the usual facilities to this type of event, but also provide significant subsidies (€100,000 in Madrid in 2007 and similar amounts in the past years) for activities related to the celebration of Gay Pride. The Gay Pride in Madrid is an annual celebration with a lot of public support. As a matter of fact, Euro Pride 2007 took place in Madrid. Nevertheless, as we indicate below, recently the crisis affected the public subsidies to these celebrations... Moreover, there are other Gay Prides in other Spanish cities.

The participation in this type of activities and demonstrations is considerable, reaching tens or hundreds of thousands in Madrid (in some cases, nearly a million people) and it is regarded as normal practice. This does not mean that there are no incidents, since isolated acts of aggression have been recorded at some of these events.<sup>237</sup> Taking into account the number of participants and the extremely isolated character of the incidents, they cannot be regarded as “statistically” relevant. Nevertheless, despite the small number of homophobic incidents, they demonstrate the need to continue with the efforts by the public authorities to achieve full normalisation.

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<sup>230</sup> Spain, Ministry of Health, Social Services and Equality (*Ministerio de Sanidad, Servicios Sociales e Igualdad*), [www.msssi.gob.es/organizacion/ministerio/directorio/cont\\_directorio.htm](http://www.msssi.gob.es/organizacion/ministerio/directorio/cont_directorio.htm)

<sup>231</sup> Spain, Ministry of Justice (*Ministerio de Justicia*), [www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html](http://www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html)

<sup>232</sup> Spain, Ministry of the Interior (*Ministerio del Interior*), [www.interior.gob.es/](http://www.interior.gob.es/)

<sup>233</sup> Spain, National Institute of Statistics (*Instituto Nacional de Estadística*), [www.ine.es/](http://www.ine.es/)

<sup>234</sup> We consulted on January 2014 and after on April information available in LGBT associations (such as the State Federation of Lesbians, Gays, Transsexuals and Bisexuals (FELGTB) [www.felgtb.org/](http://www.felgtb.org/) or COGAM) [www.cogam.es/](http://www.cogam.es/) website sources.

<sup>235</sup> Spain, FELGTB and COGAM, 2013 Research on discrimination on grounds of sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*), available at: [www.felgtb.org/temas/laboral/documentacion/i/3773/359/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana](http://www.felgtb.org/temas/laboral/documentacion/i/3773/359/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana)

<sup>236</sup>Desk research. We consulted on January 2014 and after on April Constitutional Court (*Tribunal Constitucional*) database, Judicial Power (*Poder Judicial*) official case law database, [www.poderjudicial.es/search/indexAN.jsp](http://www.poderjudicial.es/search/indexAN.jsp), Westlaw database, [www.westlaw.es/index\\_spa.html?brand=nwlesand](http://www.westlaw.es/index_spa.html?brand=nwlesand) Tirant lo Blanch database, [www.tirantonline.com/tol/](http://www.tirantonline.com/tol/), and General State Prosecutor (*Fiscalía General del Estado*) annual reports.

<sup>237</sup> Salas, J. (2009), ‘Agresión a un joven Gay el día de la homofobia’, *Público*, 5 May 2009.

The Madrid Gay Pride is celebrated every year in Madrid. The celebration in 2009 was headed by the Ministry of Equality, representatives of progressive political parties (PSOE, IU and UPyD) and union trade leaders.<sup>238</sup>

A Gay Pride was celebrated in Barcelona in 2009 for the first time with the support, among others, of the Government of the Autonomous Community of Catalonia and of the City Council of Barcelona.<sup>239</sup> Since then, a Gay Pride was celebrated in Barcelona every year (2010, 2011, 2012, 2013 and 2014).<sup>240</sup> Other gay pride celebrations that have taken place without incidents in several Spanish cities. For example, in Valencia in 2006.<sup>241</sup>

Regarding financial support, it is important to note that the City Council of Madrid provides financial support for the celebration of Gay Pride. For instance, in 2007 it contributed with €100,000,<sup>242</sup> and in 2004 with €80,000.<sup>243</sup>

Recently, the crisis affected the financial support of Gay Pride in Madrid. In 2012 the Municipal Council Grant to support the Pride was 20% lower than in 2011.<sup>244</sup> There is no information about 2013 and 2014 Prides.

It is important to note the attendance. In Madrid, more than half a million people attended Gay Pride in 2003,<sup>245</sup> one million people attended Gay Pride in 2004,<sup>246</sup> and thousands of people in 2006.<sup>247</sup> Although there were some incidents, they were episodic. For instance, one person was attacked in Madrid in 2007<sup>248</sup>, and three people were attacked in Madrid in 2006.<sup>249</sup>

No official or unofficial statistical data on this issue could be found. The above-mentioned annual reports of the Office of the General State Prosecutor only contain a general reference to the number of judicial proceedings on illegal demonstrations, without disaggregating data on illegal demonstrations against tolerance for LGBT people: four judicial proceedings on illegal demonstrations were recorded in 2004; two in 2005; 35 in 2006; four in 2007; and one in 2008. There are no data on these issues from recent years.<sup>250</sup>

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<sup>238</sup> EFE (2009), 'El 'Orgullo Gay' une a políticos, líderes sindicales y organizaciones juveniles', *El Mundo*, 5 July 2009.

<sup>239</sup> Spain, Pride Barcelona (2009), A Gay Pride was celebrated in Barcelona in 2009 for the first time with the support, among others, of the Government of the Autonomous Community of Catalonia and of the City Council of Barcelona, available at: [www.pridebarcelona.org/en/](http://www.pridebarcelona.org/en/) (accessed at 11 April, 2014)

<sup>240</sup> Spain, Pride Barcelona official web page, available at [www.pridebarcelona.org/](http://www.pridebarcelona.org/) (Hyperlink accessed on 25 April 2014).

<sup>241</sup> Ch, A (2006) 'Los Homosexuales defienden la diversidad familiar en la celebración del Orgullo Gay en Valencia', *Las Provincias*, 25 May 2006.

<sup>242</sup> González, J. S. (2007), 'El Ayuntamiento aporta 100.000 euros para la fiesta del Orgullo Gay', *El País*, 8 June 2007.

<sup>243</sup> De Benito, E. (2004), 'El Ayuntamiento aporta 100.000 euros para la fiesta del Orgullo Gay', *El País*, 25 June 2004.

<sup>244</sup> Villalba, E. (2012), 'La crisis llega al Orgullo Gay: tendrá un 20% menos de subvención en Madrid', *Diario Crítico*, 27 April 2012.

<sup>245</sup> EFE (2006), 'La marcha del Orgullo Gay reúne a más de medio millón de personas', *El País*, 28 June 2003.

<sup>246</sup> EFE (2004), 'Un millón de personas colapsan Madrid para celebrar el Día del Orgullo Gay', *El País*, 3 July 2004.

<sup>247</sup> De Cózar, A. (2004), 'El Orgullo Gay inunda Madrid' *El País*, 2 July 2006.

<sup>248</sup> Ortega, P. (2007), 'La otra cara del 'Orgullo' *El País*, 4 July 2007.

<sup>249</sup> De Benito, E. (2006), 'Seis chicos agreden a tres mujeres transexuales el día del Orgullo Gay', *El País*, 29 June 2006.

<sup>250</sup> Spain, Office of the General State Prosecutor (*Ministerio Fiscal*) available at: [www.fiscal.es/cs/Satellite?cid=1240559967365&language=es&pagename=PFiscal/Page/FGE\\_home](http://www.fiscal.es/cs/Satellite?cid=1240559967365&language=es&pagename=PFiscal/Page/FGE_home)

There is no data disaggregated regarding this issue in the statistic reports of the Ministry of Interior (*Ministerio del Interior*) 2010-2012. The last statistic report available is from 2012.<sup>251</sup>

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<sup>251</sup>Spain, Ministry of Interior (*Ministerio del Interior*), Statistical Yearbooks (*Anuarios Estadísticos*) , available at: [www.interior.gob.es/web/archivos-y-documentacion/documentacion-y-publicaciones/anuarios-y-estadisticas/anuarios-estadisticos-antiores/anuario-2012](http://www.interior.gob.es/web/archivos-y-documentacion/documentacion-y-publicaciones/anuarios-y-estadisticas/anuarios-estadisticos-antiores/anuario-2012).

## 6 Criminal law

In the Spanish legal system both hate speech and hate crimes with homophobic motivation are penalised.

On this point a distinction must be made between hate speech and hate crimes on homophobic grounds. Hate speech is regulated in Article 510 of the Criminal Code<sup>252</sup> which states:

- 1. Those who promote discrimination, hatred or violence against groups or associations, for racist or anti-Semitic reasons, or other reasons related to ideology, religion or beliefs, family situation, ethnic or racial origin, national origin, gender, sexual orientation, illness or disability, will be punished with a prison term of one to three years and a penalty of six to twelve months.*
- 2. Those who, knowing it to be false or in reckless disregard of the truth, spread injurious information on groups or associations in relation to their ideology, religion or beliefs, ethnic, racial or national origin, gender, sexual orientation, illness or disability, will be punished with the same penalties.*

With regard to the homophobic motivation for crimes, mention has already been made of the provisions of the Criminal Code on the prohibition of discrimination on grounds of sexual orientation in connection with access to public services. Article 511 of the Criminal Code<sup>253</sup> states:

- 1. Anyone in charge of a public service who denies an individual a benefit to which s/he is entitled, on grounds of ideology, religion or belief, ethnic, racial or national origin, gender, sexual orientation, family situation, illness or disability, shall be sentenced to prison for a period of six months to two years and a penalty of 12 to 24 months and special disqualification from public employment or position for a period of one to three years.*
- 2. The same legal sanctions shall be applicable when the facts are committed against an association, foundation, society or corporation or against their members on grounds of their ideology, religion or belief, ethnic, racial or national origin, gender, sexual orientation, family situation, illness or disability.*
- 3. Civil servants who perpetrate any of the conducts described in this article shall be punished with sanctions from the upper range of the penalty degree and with regard to the special disqualification from public employment or position for a period from two to four years.*

On the other hand, Article 512 of the Criminal Code<sup>254</sup> provides that “Those who, in the exercise of their professional or managerial activities, deny any individual a benefit to which s/he is entitled, on grounds of ideology, religion or belief, ethnic, racial or national origin, sex, sexual orientation, family situation, illness or disability, shall be sanctioned with special disqualification from the exercise of their profession, occupation, industry or trade, for a period of one to four years”.

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<sup>252</sup> Spain (1995), Organic Act 10/1995, of 23 November on the CP available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-25444](http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444) Available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html)

<sup>253</sup> Spain (1995), Organic Act 10/1995, of 23 November on the CP available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-25444](http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444) Available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html)

<sup>254</sup> Spain (1995), Organic Act 10/1995, of 23 November on the CP available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-25444](http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444) Available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html)

In addition, Article 515, paragraph 5, considers illegal associations to be “Those that promote or prompt discrimination, hatred or violence against people, groups or associations on grounds of their ideology, religion or beliefs, ethnic, racial or national origin, gender, sexual orientation, family situation, illness or disability”. Article 517 establishes the punishment for these cases: founders, directors and presidents of associations shall be punished with a prison term of two to four years, a fine of 12 to 24 months and special disqualification from public employment or position for a period of six to 12 years. The active members will be punished with a prison term of one to three years and a fine of 12 to 24 months. The subsequent articles establish other provisions for such cases, including provision for the judicial dissolution of illegal associations. With regard to the homophobic motivation for crimes account must also be taken of Article 22(4) of the Criminal Code,<sup>255</sup> which defines as an aggravating circumstance “to commit a crime for racist or anti-Semitic reasons or other types of discrimination on grounds of the victim’s ideology, religion or beliefs, ethnic, racial or national origin, gender or sexual orientation, or illness or disability”. This list of motives is exhaustive and does not admit other grounds.

Consideration should also be made of Royal Legislative Decree 1/2013 of 29 November approving the Recast Text of the General Act on the rights of persons with disabilities and their social inclusion,<sup>256</sup> which repeals and replaces Act 49/2007 of 26 December, which establishes the offences and sanctions regarding equal opportunities, non-discrimination and universal accessibility for disabled people.<sup>257</sup>

Royal Legislative Decree 1/2013 establishes as very serious offences in article 95(4)(e): “conducts regarded as grave when their perpetrators have also been motivated by hatred, including racial or ethnic hatred, gender, sexual orientation, age, severe disability or incapacity of the victim to act on his/her own”.

It is very important to point out that currently the Ministry of Justice has prepared a proposal for the reform of the Spanish Criminal Code, which seeks to modify the institutional response to acts of hatred and incitement to violence on several grounds including sexual orientation.<sup>258</sup> Actually this project is in amendments period until 2 September 2014.<sup>259</sup>

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<sup>255</sup> Spain (1995), Organic Act 10/1995, of 23 November on the CP available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-25444](http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444) Available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html)

<sup>256</sup> Spain (2013) Royal Legislative Decree 1/2013 of 29 November approving Revised Text of the General Act on rights of persons with disabilities and their social inclusion (*Real Decreto Legislativo 1/2013, de 29 de noviembre, por el que se aprueba el Texto Refundido de la Ley General de derechos de las personas con discapacidad y de su inclusión social*), available at: [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2013-12632](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-12632)

<sup>258</sup> Spain, (2013) Ministry of Justice (*Ministerio de Justicia*), Draft Bill of the Reform of the Organic Act 10/1995, of 23 of November, of the CP, 20 September 2013, pp. 143-144, available at: [www.mjusticia.gob.es/cs/Satellite/1292421471664?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DPLO\\_C%3C%93DIGO\\_PENAL\\_\\_CM\\_20-09-2013%2C0.PDF.PDF](http://www.mjusticia.gob.es/cs/Satellite/1292421471664?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DPLO_C%3C%93DIGO_PENAL__CM_20-09-2013%2C0.PDF.PDF)

<sup>259</sup> According to the information provided in the Spanish Congress, available at: [www.congreso.es/portal/page/portal/Congreso/PopUpCGI?CMD=VERLST&BASE=pu10&FMT=PUWTXDTS.fmt&DOCS=1-1&DOCORDER=LIFO&QUERY=%28BOCG-10-A-66-1.CODI.%29#\(Página1\)](http://www.congreso.es/portal/page/portal/Congreso/PopUpCGI?CMD=VERLST&BASE=pu10&FMT=PUWTXDTS.fmt&DOCS=1-1&DOCORDER=LIFO&QUERY=%28BOCG-10-A-66-1.CODI.%29#(Página1)) (Hyperlink was accessed on 12 July 2014)

In this regard, article 510 is under modification, and it will punish with prison sentences of one to four years and fines of six to 12 months those who:

- Promote or incite directly or indirectly to hatred, hostility, discrimination or violence on racist or anti-Semitic grounds or on grounds of ideology, religion or beliefs, family situation, the belonging to an ethnic group, race or nation, the national origin, the sex, the sexual orientation, the gender identity or the existence of an illness or disability.
- Produce, elaborate, disseminate or sell any sort of materials, or possess them with a view to dissemination, that can promote or incite directly or indirectly to hate, hostility, discrimination or violence on racist or anti-Semitic grounds or on grounds of ideology, religion or beliefs, family situation, the belonging to an ethnic group, race or nation, the national origin, the sex, the sexual orientation, the gender identity or the existence of an illness or disability.
- Deny, seriously trivialise or praise genocide crimes or crimes against mankind or praise their perpetrators when those crimes had been committed on racist or anti-Semitic grounds or on grounds of ideology, religion or beliefs, family situation, the belonging to an ethnic group, race or nation, the national origin, the sex, the sexual orientation, the gender identity or the existence of an illness or disability, provided that this attitude of denial, serious trivialisation or praise promote or favours a climate of violence, hostility, hate or discrimination.

Secondly, prison sentences of six months to two years and fines of six to 12 months will be imposed on those who:

- Harm a persons' dignity by means of actions that entail humiliation, scorn or discredit on racist or anti-Semitic grounds or on grounds of ideology, religion or beliefs, family situation, the belonging to an ethnic group, race or nation, the national origin, the sex, the sexual orientation, the gender identity or the existence of an illness or disability.
- Produce, elaborate, disseminate or sell any sort of materials, or possess them with a view to dissemination, that can harm a persons' dignity by means of actions that entail a serious humiliation, scorn or discredit on racist or anti-Semitic grounds or on grounds of ideology, religion or beliefs, family situation, the belonging to an ethnic group, race or nation, the national origin, the sex, the sexual orientation, the gender identity or the existence of an illness or disability.
- Those who praise or justify by any means of communication crimes committed on racist or anti-Semitic grounds or on grounds of ideology, religion or beliefs, family situation, the belonging to an ethnic group, race or nation, the national origin, the sex, the sexual orientation, the gender identity or the existence of an illness or disability, as well as those who take part in the commission of such crimes.

Moreover, a new article 510 bis is added, which states that the penalties described in the previous article will be applied in the highest degree when the offences are committed by members of a criminal organisation, particularly to those managing the organisation.

Another new article, 510 ter, is also added which states that when a legal entity is responsible for such offences, it will be punished with a fine of two to five years.

Finally, article 515 is modified, which punishes illegal associations, which it defines as:

- Those whose aim is to commit a crime or to promote its commission.
- Those which although pursuing a licit aim use violent means to achieve it.
- Paramilitary organisations.

- Those organisations promoting or inciting directly or indirectly to hate, hostility, discrimination or violence on grounds of ideology, religion or beliefs, the belonging to an ethnic group, race or nation, sex, sexual orientation, family situation or the existence of an illness or disability.

Finally, article 515 will punish illegal associations, considering as illegal those that “promote, prompt, or incite direct or indirectly to hatred, hostility, discrimination or violence against people, groups or associations on grounds of their ideology, religion or beliefs, the membership of their members or any of them to a ethnic belonging, race or nation, their gender, sexual orientation, family situation, illness or disability”

In addition, account should be taken of the numerous provisions which Spanish legislation dedicates to harassment, which have been mentioned in the chapter on the implementation of Employment Directive 2000/78/EC (see Chapter A above for details). It is also necessary to keep in mind the protection offered by Organic Act 1/1982 of 5 May 1982 on Civil Protection of the Right to Honour, Personal and Family Privacy and the right to control the use of one’s own image.<sup>260</sup>

Finally, it should be noted that the Statutes of Autonomy of Andalusia and Catalonia have established instructions for the public authorities which oblige them to combat homophobia. Thus, the Statute of Andalusia (enacted by Organic Act 2/2007 of 19 March on the Reform of the Statute of Autonomy of Andalusia)<sup>261</sup> includes in Article 37(1)(2) as leading principles for public policy, “The fight against sexism, xenophobia, homophobia and militarism, especially by means of teaching about values and providing education which promotes equality, tolerance, freedom and solidarity”. Similarly, the Statute of Catalonia (enacted by Organic Act 6/2006 of 19 July on the Reform of the Statute of Autonomy of Catalonia)<sup>262</sup> establishes in Article 40(8) that, “The public authorities should promote the equality of all individuals regardless of their origin, nationality, gender, race, religion, social condition or sexual orientation, and promote the eradication of racism, anti-Semitism, xenophobia, homophobia and any other expression that violates people’s equality and dignity”.

Other Statutes of Autonomy have included similar provisions, for instance: the Statute of the Balearic Islands (enacted by Organic Act 1/2007 of 28 February on the Reform of the Statute of Autonomy of the Balearic Islands (*Ley Orgánica 1/2007, de 28 de febrero, de Reforma del Estatuto*

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<sup>260</sup>Spain (1982), Organic Act 1/1982 of 5 May 1982 on Civil Protection of the Right to Honour, Personal and Family Privacy and the right to control the use of One’s Own Image (*Ley Orgánica 1/1982, de 5 de mayo, de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen*), available at: [www.boe.es/buscar/act.php?id=BOE-A-1982-11196](http://www.boe.es/buscar/act.php?id=BOE-A-1982-11196) (All hyperlinks were accessed on 25 February 2014)

<sup>261</sup> Spain (2007), Organic Act 2/2007 of 19 March on the Reform of the Statute of Autonomy of the Autonomous Community of Andalusia (*Ley Orgánica 1/2007, de Reforma del Estatuto de Autonomía para Andalucía*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-5825](http://www.boe.es/buscar/act.php?id=BOE-A-2007-5825)

<sup>262</sup> Spain (2006), Organic Act 6/2006 of 19 July on the Reform of the Statute of Autonomy of Autonomous Community of Catalonia (*Ley Orgánica 6/2006, de 19 de julio, de reforma del Estatuto de Autonomía de Cataluña*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2006-13087](http://www.boe.es/buscar/act.php?id=BOE-A-2006-13087)

*de Autonomía de las Illes Balears*)<sup>263</sup> proclaims in Article 27(3) that “Everybody is entitled not to be discriminated against on grounds of sexual orientation”. Similarly, the Statute of Castile and León (enacted by Organic Act 14/2007 of 30 November on the Reform of the Statute of Autonomy of Castile and León (*Ley Orgánica 14/2007, de 30 de noviembre, de Reforma del Estatuto de Autonomía de Castilla y León*))<sup>264</sup> states in Article 14(1) that “Any discrimination on grounds of gender or sexual orientation, either direct or indirect, is forbidden”. Finally, the Valencian Community’s Statute (enacted by Organic Act 1/2006 of 10 April on the Reform of Organic Act 5/1982 of 1 July on the Statute of Autonomy of the Valencian Community (*Ley Orgánica 1/2006, de 10 de abril, de Reforma de la Ley Orgánica 5/1982, de 1 de julio, de Estatuto de Autonomía de la Comunidad Valenciana*))<sup>265</sup> incorporates an Additional Provision (the Fourth) under which “The institutions and administrations of the Generalitat shall avoid the use in their public interventions of offensive or disrespectful expressions about any group or person for reason of gender or any other social condition whose different treatment is prohibited under our constitutional framework”. And the Statute of Autonomy of Aragon (enacted by Organic Act 5/2007 of 20 April on the Reform of the Statute of Autonomy of Aragon (*Ley Orgánica 5/2007, de 20 de abril, de Reforma del Estatuto de Autonomía de Aragón*)) guarantees in article 24(d) the right to non-discrimination on grounds of sexual orientation and gender identity.<sup>266</sup>

With regard to Spanish case law, mention can be made, in the first place, of the Decision of the Provincial Court of Cantabria no. 19/2001 (section 2) of 4 October.<sup>267</sup> The Court considered that the circumstance of increased criminal responsibility of Article 22(4) of the Criminal Code,<sup>268</sup> relating to the sexual orientation of the victim, should be applied to the offence of murder which was the subject of the Decision. This was also the case in Decision of 14 March 2000 of the Provincial Court of Barcelona.<sup>269</sup> In this Decision, the Court considered applicable the aggravating

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<sup>263</sup> Spain (2007), Organic Act 1/2007 of 28 February on Reform of the Statute of Autonomy of the Balearic Islands (*Ley Orgánica 1/2007, de 28 de febrero, de Reforma del Estatuto de Autonomía de las Illes Balears*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-4233](http://www.boe.es/buscar/act.php?id=BOE-A-2007-4233) (All hyperlinks were accessed on 15 April 2014).

<sup>264</sup> Spain (2007), Organic Act 14/2007 of 30 November on Reform of the Statute of Autonomy of Castile and León (*Ley Orgánica 14/2007, de 30 de noviembre, de Reforma del Estatuto de Autonomía de Castilla y León*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-20635](http://www.boe.es/buscar/act.php?id=BOE-A-2007-20635) (All hyperlinks were accessed on 15 April 2014).

<sup>265</sup> Spain (2006), Organic Act 1/2006 of 10 April on Reform of the Organic Law 5/1982 of 1 July on the Statute of Autonomy of the Valencian Community (*Ley Orgánica 1/2006, de 10 de abril, de Reforma de la Ley Orgánica 5/1982, de 1 de julio, de Estatuto de Autonomía de la Comunidad Valenciana*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2006-6472](http://www.boe.es/buscar/doc.php?id=BOE-A-2006-6472). (All hyperlinks were accessed on 15 April 2014).

<sup>266</sup> Spain (2007), Organic Act 5/2007 of 20 April on Reform of the Statute of Autonomy of Aragon (*Ley Orgánica 5/2007, de 20 de abril, de Reforma del Estatuto de Autonomía de Aragón*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-8444](http://www.boe.es/buscar/act.php?id=BOE-A-2007-8444) (All hyperlinks were accessed on 10 April 2014).

<sup>267</sup> Spain, Decision of the Provincial Court of Cantabria no. 19/2001 (section 2) of 4 October (*Sentencia de la Audiencia Provincial de Cantabria, Sección 2, nº 19/2001, de 4 de octubre*), [www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=2357640&links=19/2001&optimize=20040524&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=2357640&links=19/2001&optimize=20040524&publicinterface=true) (All hyperlinks were accessed on 25 May 2014).

<sup>268</sup> Spain (1995), Organic Act 10/1995, of 23 November on the CP available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-25444](http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444) Available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html)

<sup>269</sup> Spain, Decision of the Provincial Court of Barcelona (*Sentencia de la Audiencia Provincial de Barcelona, Sección 6, de 14 de marzo 2000*), [www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=1547017&links=%22%20187/2000%22&optimize=20050310&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=1547017&links=%22%20187/2000%22&optimize=20050310&publicinterface=true) (All hyperlinks were accessed on 25 May 2014).

circumstance of acts motivated by the sexual orientation of the victim in a case of threats (accompanied by harassment).

On the other hand, Decision number 195/2008 of 28 March of the Provincial Court of Zaragoza,<sup>270</sup> partially revokes the Decision passed on 6 February 2006 by Criminal Court number 6 of Zaragoza, as it considered that the aggravation of sexual or ideological discrimination of Article 22.4 of the Criminal Code should not be applied to the case as there was not sufficient proof for its application to the crime of threats. According to the ruling of the Court, "what is understood from the proven facts is the existence of a common confrontation in the early morning in a bar between two groups of 4 to 7 young people, respectively. This confrontation was above all verbal, accompanied by the brandishing of knives, sprays and chains and some broken bottles. There is no clear demonstration of the reasons that caused the confrontation. Some say that the others "looked down on them" when they came in, and that the threats were reciprocal; also from the others against those now appealing. And the others say that these insulted them, calling them "filthy and gay". One of those reporting the offence stated in court that this latter insult was caused because at the time "They had hugged each other". It was also indicated that the premises where the confrontation started was an "alternative bar".” Also, some of those accused wore clothes and signs which could be an indication of an extreme right-wing affinity. According to the judgment of the Court, with these elements it was not possible to apply the aggravation of acts motivated by reasons of ideological discrimination or the sexual orientation of the victims, as there were no signs or any proof that might allow the conclusion to be reached that the accused acted out of reasons of a certain ideology or sexual orientation.

The Decision of the Supreme Court of 30 October 2009,<sup>271</sup> (already mentioned in section A) condemns a judge for the crime of judicial misconduct provided in Article 446(3) of the Criminal Code, without general circumstances modifying criminal liability, to a 12-month fine and special disqualification for the post of Judge or Magistrate for a period of 10 years, and the obligation to compensate the claimant with six thousand euros. On 16 May 2006 the Court where the judge worked had registered the case for adoption filed by Mrs. Rosa regarding the girl Consuelo, born on 11 February 2006 by artificial insemination as the daughter of Mrs. Laura, with whom the applicant had contracted matrimony on 18 November 2005. The Criminal Chamber of the Supreme Court considered that the intention of the judge had been to prevent the application of the legally established solution, which admitted matrimony between people of the same sex and covered the case of the adopted person being a child of the adopter's partner. The Supreme Court considered that the decisions of the judge not only involved "unfair delaying of resolutions" but also an "attitude of active belligerent obstruction" to prevent the application of the law, especially, it adds, when he attempted to question their suitability for adoption due to the woman's sexual orientation. Although it recalls that the law establishes the prevailing interest of protecting the minor, for which

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<sup>270</sup> Spain, Decision number 195/2008 of the Provincial Court of Zaragoza of 28 March (*Sentencia de la Audiencia Provincial de Zaragoza número 185/2008, de 28 de marzo*), [www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=123124&links=%22159/2006%22&optimize=20080703&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=123124&links=%22159/2006%22&optimize=20080703&publicinterface=true)

(All hyperlinks were accessed on 25 May 2014)

<sup>271</sup> Spain, Judgment of Supreme Court of 30 October 2009 (*Sentencia del Tribunal Supremo de 30 de octubre de 2009*), [www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=5009877&links=&optimize=20100121&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=5009877&links=&optimize=20100121&publicinterface=true) (Hyperlink was accessed on 25 February 2014)

the suitability of the adopting parties must be considered, the Supreme Court sustains that in this case the adoption was "abnormally adjourned in time". The judge, the sentence highlights, whatever his legal or metalegal ideology, had "the duty of adapting his court work to the solution already established by law".

In other judicial decisions there was a negative evaluation of the facts by the court, although the facts were not considered illegal under criminal law. This was the case in the Decision of the Provincial Court of Barcelona (Section 3) of 20 June 2000.<sup>272</sup> The facts were the expulsion from a disco of two homosexuals who were kissing each other. The Court considered that this constituted a discriminatory act, although it was not considered illegal on the basis of criminal law. The Court considered that criminal law is governed by the principle of minimum intervention and that there were other means for the complainants to defend their right not to be discriminated against by reason of their sexual orientation.

The Provincial Court of Madrid (Section 21), in Decision number 403/2008 of 30 September,<sup>273</sup> recognised that an infringement of the right of honour had occurred by malicious unfounded opinions on the sexual orientation of the plaintiffs in a report by a television programme, one of whom was a public person and the other anonymous. The defending communication companies had broadcasted a report on a television channel on 8 November 2004 in which unfounded opinions were maliciously given on the sexual orientation of the two persons involved. The judgment stated that it could not be argued that it was done jokingly or as a comment on rumours of there having been caresses between the actresses, nor could it be an argument that the imputation of a certain sexual orientation has no such connotation, for this will depend on whether or not it is true and how it is done. In relation to the anonymous person, "the truth was not demonstrated, nor could it be considered a news item, and it was done in a clearly offensive disturbing tone which is not apparent from the transcription of the phrases, but in the expressions used, the form and the tone in which they were made". The judgment of the Provincial Court confirms the decision of the Court of First Instance, corroborating the illegitimate intromission in the right of honour, in application of Organic Act 1/1982 of 5 May 1982 on the Civil Protection of the Right to Honour, Personal and Family Privacy and the right to control the use of one's own image,<sup>274</sup> Articles 2 and 7.7.

Mention can also be made of Decision 455/2006 of the Provincial Court of Madrid (section 17) of 28 December.<sup>275</sup> The facts were the publication by the complainant's former boyfriend of an announcement, providing her telephone number on an internet portal whose purpose was to facilitate lesbian relationships. According to the Court, "Such conduct reflects a macho conception

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<sup>272</sup> Spain, Judgment of the Provincial Court of Barcelona (Section 3) of 20 June 2000 (*Sentencia de la Audiencia Provincial Barcelona, Sección 3*), [www.poderjudicial.es/search/indexAN.jsp](http://www.poderjudicial.es/search/indexAN.jsp) (All hyperlinks were accessed on 25 February 2014)

<sup>273</sup> Spain, Judgment of Provincial Court of Madrid (Section 21) no 403/2008 of 30 September (*Sentencia 403/2008 de la Audiencia Provincial de Madrid, Sección 21, de 30 de septiembre de 2008*), [www.poderjudicial.es/search/indexAN.jsp](http://www.poderjudicial.es/search/indexAN.jsp) (Hyperlink was accessed on 25 February 2014)

<sup>274</sup> Spain (1982), Organic Act 1/1982 of 5 May 1982 on Civil Protection of the Right to Honour, Personal and Family Privacy and the right to control the use of One's Own Image (*Ley Orgánica 1/1982, de 5 de mayo, de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen*), available at: [www.boe.es/buscar/act.php?id=BOE-A-1982-11196](http://www.boe.es/buscar/act.php?id=BOE-A-1982-11196)

<sup>275</sup> Spain, Decision of the Provincial Court of Madrid no 455/2006 (section 17) of 28 December (*Auto de la Audiencia Provincial de Madrid no 455/2006, Sección 17, de 28 diciembre*) [www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=444248&links=455/2006&optimize=20070709&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=444248&links=455/2006&optimize=20070709&publicinterface=true) (All Hyperlinks were accessed on 25 May 2014)

of sexuality that implies radical homophobia; so, from such a perspective, the public imputation of lesbianism would pursue a double purpose: to produce an effect of social repulsion and to hinder the complainant's possible future relationships with other men, in the conviction that all men would abstain from undertaking even short relationships with a lesbian (...). The perpetrator of this absurdity appears to ignore the fact that homosexual relationships have been accepted without problems by a growing majority in Spanish society as a respectable option, to the point of being accepted as the basis for a marriage or similar relationships, with the same legal effects as traditional heterosexual marriage".

The annual reports of the Office of the General State Prosecutor contain figures on judicial proceedings regarding discrimination offences, without further disaggregation. This type of crime includes incitement to discrimination, hatred or violence against groups, unequal treatment in access to public services and the denial of professional benefits. In 2004 there were seven judicial proceedings regarding discrimination offences; in 2005 there were 26; in 2006 the figure was 27; in 2007 there were four cases and in 2008 there were five cases. More recently, in 2011, 9 judicial proceedings regarding discrimination offences were recorded and in 2012 a total of 28.<sup>276</sup> The annual reports also include data on judicial proceedings regarding illegal associations which promote discrimination, hatred or violence against individuals, groups or associations, but without specifying the number of associations promoting discrimination, hatred or violence on the grounds of sexual orientation. In 2004, there were 13 criminal cases involving illegal associations; in 2005 there were 30; in 2006 the figure was 50; in 2007 there were 44 cases and in 2008 there were 75 cases. There are no data on these issues from recent years.<sup>277</sup> There are no statistical data on homophobic motivation as an aggravating factor in crimes.

There are no relevant recent case law/statistics on crimes committed with a homophobic/transphobic motivation.<sup>278</sup> The Ministry of Interior (*Ministerio del Interior*) developed several statistical reports or yearbooks in 2010-2012. The last statistical report available is from 2012,<sup>279</sup> the Statistical Yearbook of the Ministry of Interior (*Anuario Estadístico del Ministerio del*

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<sup>276</sup> Spain, Office of the General State Prosecutor (*Ministerio Fiscal*) available at: [www.fiscal.es/cs/Satellite?cid=1240559967365&language=es&pagename=PFiscal/Page/FGE\\_home](http://www.fiscal.es/cs/Satellite?cid=1240559967365&language=es&pagename=PFiscal/Page/FGE_home)

<sup>277</sup> Spain, Office of the General State Prosecutor (*Ministerio Fiscal*), available at: [www.fiscal.es/cs/Satellite?cid=1240559967365&language=es&pagename=PFiscal/Page/FGE\\_home](http://www.fiscal.es/cs/Satellite?cid=1240559967365&language=es&pagename=PFiscal/Page/FGE_home)

<sup>278</sup> Desk research. We consulted on January 2014 and after on April Constitutional Court [*Tribunal Constitucional*] database, Judicial Power [*Poder Judicial*] official case law database, [www.poderjudicial.es/search/indexAN.jsp](http://www.poderjudicial.es/search/indexAN.jsp); Westlaw database, [www.westlaw.es/index\\_spa.html?brand=nwles](http://www.westlaw.es/index_spa.html?brand=nwles) and Tirant lo Blanch database, [www.tirantonline.com/tol/](http://www.tirantonline.com/tol/), and General State Prosecutor (*Fiscalía General del Estado*) annual reports.

We also consulted on January and April 2014 information available in Sociological Research Centre (*Centro de Investigaciones Sociológicas*, CIS), [www.cis.es/cis/opencms/ES/index.html](http://www.cis.es/cis/opencms/ES/index.html) and Statistics National Institute (*Instituto Nacional de Estadística*, INE), [www.ine.es/](http://www.ine.es/), LGBT associations (such as FELGTB or COGAM website sources, including the 2013 Study on discrimination based on sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*)). This report refers to situations of discrimination regarding labour, education, relation with Administration but it not refers to any criminal case relevant to this report.

<sup>279</sup> Spain, Ministry of Interior (*Ministerio del Interior*), Statistical Yearbooks (*Anuarios Estadísticos*), available at: [www.interior.gob.es/web/archivos-y-documentacion/documentacion-y-publicaciones/anuarios-y-estadisticas/anuarios-estadisticos-antiores/anuario-2012](http://www.interior.gob.es/web/archivos-y-documentacion/documentacion-y-publicaciones/anuarios-y-estadisticas/anuarios-estadisticos-antiores/anuario-2012).

*Interior 2012*).<sup>280</sup> But there is no disaggregated data regarding homophobic/transphobic motivation crimes in these reports. And there are no data available in the public statistical resources in the webpage on this. Nevertheless, the Ministry of Interior confirmed us that the Ministry edited on 24 April 2014 an special report about hate crimes in Spain in 2013: Report on evolution of hate crimes in Spain 2013 (*Informe sobre la evolución de los delitos de odio en España 2013*). And in this report there are data related to hate crimes, including crimes based on anti-Semitic, poor-phobia (*aporofobia*), religion, disability, sexual orientation or sexual identity, racism and xenophobia with a total of 1172 of hate crimes committed in Spain in 2013. Regarding hate crimes based on sexual orientation or sexual identity there are 453 hate crimes, without no possibility of a major disaggregation.<sup>281</sup>

Hate crimes in Spain in 2013, according to the mentioned report, and disaggregated:

Anti-Semitic: 3

Poor-phobia (*aporofobia*):4

Religion: 42

Disability: 290

Sexual orientation or sexual identity: 452

Racism and xenophobia: 381.

Total of hate crimes: 1172.

The 2013 Study on discrimination based on sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*) refers to situations of discrimination regarding labour, education, relation with Administration and other situations of discrimination but it not refers to any criminal case relevant to this report. Nevertheless, it is important to note that it highlighted that only in 11,04% of situations of discrimination (in the most cases when it refers to a relation with Public Administration) LGBT people go to Justice to denounce the situation of discrimination.<sup>282</sup>

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<sup>280</sup> Spain (2013) 2012 Statistical Yearbook of the Ministry of Interior (*Anuario Estadístico del Ministerio del Interior 2012*), available at: [www.interior.gob.es/documents/642317/1204854/Anuario\\_estadistico\\_2012\\_okkk.pdf/00ee01c7-3122-496a-a023-22829653e6c0](http://www.interior.gob.es/documents/642317/1204854/Anuario_estadistico_2012_okkk.pdf/00ee01c7-3122-496a-a023-22829653e6c0).

<sup>281</sup> We consulted Ministry of Interior webpage resources on 24 May 2014, and we recheck them on 10 July 2014. Nevertheless, we have consulted the Ministry of Interior online on 10 July 2014 about the existence of any report on this matter. And they answered us on 14 July 2014 indicating that there is this recent Report edited on 24 April 2014, and available at: [www.interior.gob.es/documents/10180/1207668/Informe+sobre+los+delitos+de+odio+en+Espa%C3%B1a+2013.pdf/7eeb7e62-9117-47ab-bca0-bf3ed107d006](http://www.interior.gob.es/documents/10180/1207668/Informe+sobre+los+delitos+de+odio+en+Espa%C3%B1a+2013.pdf/7eeb7e62-9117-47ab-bca0-bf3ed107d006), page 7 (All hyperlinks were accessed on 14 July 2014). Not available in English.

<sup>282</sup> Spain, State Federation of Lesbians, Gays, Transsexuals and Bisexuals (*Federación Estatal de Lesbianas, Gays, Transexuales y Bisexuales*), 2013 Research on discrimination based on sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*), available at: [www.felgtb.org/rs/2447/d112d6ad-54ec-438b-9358-4483f9e98868/bd2/filename/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana.pdf](http://www.felgtb.org/rs/2447/d112d6ad-54ec-438b-9358-4483f9e98868/bd2/filename/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana.pdf), page 38.

## 7 Transgender issues

The general legislation on equal treatment and non-discrimination on the grounds of sexual orientation is fully applicable to transsexual people, although gender identity cannot be identified with the right to freedom of sexual orientation and the right not to be discriminated against on the grounds of that sexual orientation. Transsexuality does not imply a specific sexual orientation. However, discrimination and the violation of the principle of equal treatment on the grounds of sexual orientation include all possible cases, including discrimination of homosexual transsexuals. Considering that homosexual transsexuals can also be affected by homophobia, the right not to be discriminated against on the grounds of sexual orientation is obviously also applicable to protect homosexual transsexuals.

With regard to transsexuals, there have been recent legislative changes which have enabled the previous case law to be superseded and a stable legal framework to be established which fully respects the rights of transsexual people, for example, Act 3/2007 of 15 March on the Rectification of the recording of gender in Registries.<sup>283</sup> The Preamble to this law defines its two main purposes: “This Law seeks to establish the necessary requirements for changing the recorded sex of a person in the Civil Register where the existing entry does not correspond to his/her true gender identity. This Law also regulates the change of name so that it is coherent with the sex”.

Both the rectification of the recorded sex and the change of name in the Register are a consequence of a prior change of gender identity: “In accordance with the regulation under this Act, the rectification of the recorded sex and the change of name in the Register certify as an objective fact the prior change of gender identity, so that legal certainty and the protection of general interests are guaranteed. To this end, adequate evidence of the change of identity shall be provided and the rectification of the register shall be done in accordance with the administrative files of the Civil Registry”.

Article 1(1) of the Act establishes that “Any person of Spanish nationality who is over 18 years of age and has the required legal capacity may request the rectification of the sex entry in the Register. The rectification of the sex will entail the change of the individual’s name, so that it is coherent with the registered sex”.

Article 4 determines the conditions to which the rectification of recorded sex in the register is subjected:

1. *The rectification of the sex recorded in the register shall be accepted provided the applicant proves:*
  - a) *A diagnosis of gender dysphoria.*

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<sup>283</sup> Spain (2007), Act 3/2007 of 15 March on the Rectification of the recording of gender in Registries (*Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-5585](http://www.boe.es/buscar/act.php?id=BOE-A-2007-5585)

*To prove this requirement a report must be submitted from a doctor or clinical psychologist who is a member of a Spanish professional association and whose qualifications have been recognised or accredited in Spain. The report shall refer to:*

- 1. The existence of a discrepancy between the morphological sex or the initially registered physiological gender and the gender identity or psychosocial sex felt by the applicant, as well as the stability and persistence of this dissonance.*
- 2. The absence of personality dysfunctions that could decisively influence the existence of the dissonance referred to in the previous point.*
- b) That s/he has been medically treated for at least two years to adapt his/her physical characteristics to those corresponding to the claimed sex. The proof of this requirement shall be made by means of the practicing doctor's report under whose direction the treatment has been carried out or, in its absence, by means of a report by a forensic surgeon.*
- 2. It shall not be necessary for the rectification of the Register for the medical treatment to include sex reassignment surgery. The medical treatment referred to in 1(b) above shall not be a necessary requirement for the rectification of the register if reasons of health or age, certified by a doctor, hinder that treatment.*

Act 20/2011, of 21 July, on the Civil Registry<sup>284</sup> introduces a new regulation of the Civil Registry and replaces the regulation of 1957 (Act on the Civil Registry)<sup>285</sup>. This Act 20/2011 is important because it makes the administrative procedure to change names and surnames more systematic and easier, and regarding the affiliation the act removes any reference to extramarital affiliation, with a full equal treatment between marital and extramarital affiliation. There is now freedom to elect the order of surnames in Spain, and it is also easier to change names and surnames. These facilities are important for LGTB individuals when they want to change their names on grounds of gender identity, or the order of their surnames.

Article 4 regulates that the facts and events that can be entered into the Civil Registry are:

- 1. Birth*
- 2. Filiation*
- 3. The name and surnames and their changes.*
- 4. Sex and gender reassignment*

In addition to these important legislative reforms, it is also necessary to point out that some Statutes of Autonomy (which are, functionally, the 'Constitutions' of each of the Autonomous Communities) have incorporated gender identity into their new charters of rights when the recent amendments to the Statutes were made. This is the case for the Statute of Andalusia

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<sup>284</sup> Spain (2011), Act 20/2011, of 21 July, on the Civil Registry (*Ley 20/2011, de 21 de julio, del Registro Civil*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2011-12628](http://www.boe.es/buscar/act.php?id=BOE-A-2011-12628)

<sup>285</sup> Spain (1957), Act on the Civil Registry, 8 June (*Ley de 8 de junio sobre el Registro Civil*) available at: [www.boe.es/buscar/act.php?id=BOE-A-1957-7537](http://www.boe.es/buscar/act.php?id=BOE-A-1957-7537)

(by Organic Act 2/2007 of 19 March on the Reform of the Statute of Autonomy for Andalusia)<sup>286</sup> in which Article 35 states: “Everybody has a right to be respected in his/her sexual orientation and his/her gender identity. The public authorities shall promote policies to guarantee the free exercise of this right”. Similarly, the Statute of Aragon (Organic Act 5/2007 of 20 April on Reform of the Statute of Autonomy of Aragon)<sup>287</sup> in which Article 24(d) establishes that Aragon’s public authorities shall conduct their policies in accordance with the following objective: “To guarantee the right of everyone not to be discriminated against on grounds of sexual orientation and gender identity”.

The Autonomous Community of Navarre recently approved Act 12/2009 of 19 November concerning the rights of transsexuals.<sup>288</sup>

As a result of Act 3/2007 of 15 March on the Rectification of the mentions of the sex in Registries,<sup>289</sup> as it is indicated in the reasons of the Act 12/2009 itself, this autonomous act is not intended to define the cases for a registered change of name, which is competence of the State, but to define what the legislator considers a transsexual person and how such a condition is proven, so that the laws defined in this autonomous act may be effective in the area of competence of the Autonomous Community of Navarre. Specifically, Article 3 provides:

1. *People benefiting from the services specified in this autonomous act are generally all people residing in any of the municipalities of Navarra, regardless of their legal or administrative situation, under conditions of effective equality, who are transsexual in nature.*
2. *For the effects of this autonomous act, transsexual people are any people who have proceeded to rectify the recording of their sex in the Civil Register, in accordance with the provisions of Act 3/2007 of 15 March.*
3. *The services provided in this autonomous act, under the conditions in which they are established in regulations, may benefit people who, having started the procedure for changing the entry relative to their sex, require protection to eliminate the discrimination which might occur as a result of their situation on the way to their new gender identity.*

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<sup>286</sup>Spain (2007), Organic Act 2/2007 of 19 March on the Reform of the Statute of Autonomy of the Autonomous Community of Andalusia (*Ley Orgánica 1/2007, de Reforma del Estatuto de Autonomía para Andalucía*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-5825](http://www.boe.es/buscar/act.php?id=BOE-A-2007-5825)

<sup>287</sup> Spain (2007), Organic Act 5/2007 of 20 April on Reform of the Statute of Autonomy of Aragon (*Ley Orgánica 5/2007, de 20 de abril, de Reforma del Estatuto de Autonomía de Aragón*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-8444](http://www.boe.es/buscar/act.php?id=BOE-A-2007-8444)

<sup>288</sup> Spain (2009), Autonomous Community of Navarre Act 12/2009 of 19 November concerning the Rights of transsexuals (*Ley Foral 12/2009, de 19 de noviembre, de no discriminación por motivos de identidad de género de los derechos de las personas transexuales*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2009-20656](http://www.boe.es/buscar/doc.php?id=BOE-A-2009-20656)

<sup>289</sup> Spain (2007), Act 3/2007 of 15 March on the Rectification of the recording of gender in Registries (*Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-5585](http://www.boe.es/buscar/act.php?id=BOE-A-2007-5585)

Furthermore, this Autonomous Act is intended to be comprehensive, precisely because its aim is that the group of transsexual people should have the same conditions of life as the rest of citizens in Navarre. It therefore considers necessary not only measures in the medical area but also measures of positive discrimination in the area of work, and that the educational and civil service areas should be sensitive to the diversity invoked in this Act.”

Act 5/2008 of 24 April of the Autonomous Community of Catalonia on the Right of women to eradicate male violence,<sup>290</sup> provides in Article 70 on “Transsexuality” that: “1. All measures and the recognition of rights that this act indicates must respect transsexual diversity. 2. Transsexuals who suffer male violence will be comparable to women who have suffered the same violence for the effects of the right established by this act, provided they have been diagnosed with sexual dysphoria, certified by medical or psychological report prepared by a registered professional, or have been treated medically for at least two years to adapt their physical characteristics to those which correspond to the claimed sex, certified by a medical report prepared by a registered person under whose direction the treatment has been carried out.” Article 74, referring to centres of criminal execution, adds, “3. The government must guarantee transsexual people spaces suitable for them to preserve their rights.”

In terms of case law, mention should be made of two judicial decisions which apply Act 3/2007 of 15 March on the Rectification of the recording of gender in Registries,<sup>291</sup> thus enabling the granting of requests to change names under the more favourable conditions established by that law and not making the change conditional upon medical treatment including gender reassignment surgery. One of these rulings is Decision 121/2007 of the Provincial Court of Cádiz of 15 May.<sup>292</sup> The decision by a first (lower) court refused the plaintiff's request for a declaration of a gender change from woman to man and the request to change the female name Sofía to the male name Alfonso. The Provincial Court decision highlights the importance of the change introduced by the entry into force of Act 3/2007 of 15 March on the Rectification of the recording of gender in Registries, which makes possible, in accordance with the standards of the Act on the Civil Registry, the rectification of the sex entry in the register, provided that the requirements established by the Act are fulfilled. Specifically, Article 4(2) removes the requirement that medical treatment must include sex reassignment surgery (as required by the Decision of the first instance court). By considering as proven in this case the requirements demanded by the new law (the plaintiff had received

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<sup>290</sup> Spain (2008), Autonomous Community of Catalonia Act 5/2008 of 24 April, on the Right of women to eradicate macho violence (*Ley 5/2008, de 24 de abril, del derecho de las mujeres a erradicar la violencia machista*), [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2008-9294](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2008-9294) (Hyperlink was accessed on 25 February 2014)

<sup>291</sup> Spain (2007), Act 3/2007 of 15 March on the Rectification of the recording of gender in Registries (*Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-5585](http://www.boe.es/buscar/act.php?id=BOE-A-2007-5585)

<sup>292</sup> Spain, Decision 121/2007 of the Provincial Court of Cádiz of 15 May (*Sentencia 121/2007 de la Audiencia Provincial de Cádiz, de 15 de mayo*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=282190&links=121/2007&optimize=20071213&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=282190&links=121/2007&optimize=20071213&publicinterface=true) (All hyperlinks were accessed on 25 May 2014)

treatment and been operated on over several years and was waiting for a sex-change operation; there was a clinical report on her female-male transgender condition; she did not present any personality disorders), the Court ruled that the application should be granted. The judgment allowed the applicant to register the change from female to male and ordered that it appear in the margin of the registration of the plaintiff's birth in the Civil Register, in conformity with the Act on the Civil Registry of 1957<sup>293</sup> and its Statutory Regulation (*Reglamento*)<sup>294</sup> with all the legal effects that the change implies.

It is important to point out, as we said above, that the recent Act 20/2011, of 21 July, of Civil Registry<sup>295</sup> introduces a new regulation of the Civil Registry and replaces the regulation of 1957.

Similarly, Judgment 929/2007 of 17 September of the Supreme Court (Civil Chamber, Plenary)<sup>296</sup> deals with an application for a sex and name change in the register. The application, which was made prior to apply Act 3/2007 of 15 March on the Rectification of the recording of gender in Registries,<sup>297</sup> was refused successively by two different Courts (Decision of 3 September 2001 of the Court of First Instance no. 1 of Sant Feliu de Llobregat and Decision of 7 April 2003 of the Provincial Court of Barcelona (First Section), both of which were also handed down before Act 3/2007 of 15 March on the Rectification of the recording of gender in Registries, entered into force.

Both earlier decisions had adopted the view that, since there had been no sex reassignment surgery, the name change could not be allowed, as this was regarded as a necessary requirement, at least under Spanish case law, until the entry into force of Act 3/2007. The Spanish case law was, on the other hand, coherent with the doctrine of the European Court of Human Rights. The Supreme Court considered that, from the entry into force of Act 3/2007 of 15 March, transsexuals can obtain, by fulfilling the requirements established by the Law and by the means foreseen by the same Act, a change of the recorded sex and name, and be considered as a person of the desired sex, without requiring any surgical intervention which, in accordance with the case law previous to Act 3/2007, was a *conditio sine qua non* for the change. The Supreme Court admitted the appeal and declared that the record of the name and

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<sup>293</sup> Spain (1957), Act on the Civil Registry, 8 June (*Ley de 8 de junio sobre el Registro Civil*) available at: [www.boe.es/buscar/act.php?id=BOE-A-1957-7537](http://www.boe.es/buscar/act.php?id=BOE-A-1957-7537)

<sup>294</sup> Spain (1958), Decree approving Statutory regulation of the Act on the Civil Registry (*Decreto de 14 de noviembre de 1958 por el que se aprueba el Reglamento de la Ley del Registro Civil*), available at: [www.boe.es/buscar/act.php?id=BOE-A-1958-18486](http://www.boe.es/buscar/act.php?id=BOE-A-1958-18486) (All hyperlinks were accessed on 25 February 2014)

<sup>295</sup> Spain (2011), Act 20/2011, of 21 July, on the Civil Registry (*Ley 20/2011, de 21 de julio, del Registro Civil*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2011-12628](http://www.boe.es/buscar/act.php?id=BOE-A-2011-12628)

<sup>296</sup> Spain, Decision 929/2007 of the Supreme Court (Civil Chamber, Plenary), of 17 September (*Sentencia 929/2007 del Tribunal Supremo, Sala de lo Civil, Pleno, de 17 de septiembre*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=342648&links=&optimize=20071004&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=342648&links=&optimize=20071004&publicinterface=true) (All hyperlinks were accessed on 25 February 2014)

<sup>297</sup> Spain (2007), Act 3/2007 of 15 March on the Rectification of the recording of gender in Registries (*Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-5585](http://www.boe.es/buscar/act.php?id=BOE-A-2007-5585)

the sex change should be rectified in the Register, so that the plaintiff should be named O.C.F. and her registered sex should be female.

This doctrine, which appears in the Judgment of the Court Plenary of 17 September 2007,<sup>298</sup> was applied in later sentences passed by the Supreme Court on 28 February, 6 March, 18 July and 6 September 2008, bearing in mind factors such as submission to hormonal medical treatment, the behaviour of the plaintiff as a man/woman in his/her habits and even psychological and social factors which influence the determination of the sex, and their failure to adapt to the masculine/feminine sex, to accept claims for changing sex and name in the Civil Register, even though the sex change operation might not have occurred. In relation to discrimination for reasons of gender identity, Constitutional Court Sentence 176/2008 of 22 December<sup>299</sup> includes transsexuality in Article 14 of the Constitution, which proclaims the equality of Spaniards before the law, “without any prevailing discrimination by reason of the birth, race, sex, religion, opinion or any other personal or social condition or circumstance”. The judgment refers to broad European case law and goes further on the line initiated by Constitutional Court Sentence on the dismissal of a person because they were homosexual (Constitutional Court Decision 41/2006 of 13 February 2006, mentioned in section A).

Sentence 176/2008 deals with the rights of parental visits of children, where there was an important precedent (dealt with from the perspective of religious freedom in Constitutional Court Sentence 141/2000 of 29 May). In this case an analysis is made of the restriction of a programme of visits of a father with his youngest son. The modification of the definitive measures asked by the mother was based on the transsexuality of the father and his pretended lack of interest in the child. The appellant considers that it has actually been his condition as a feminine transsexual that has determined the restricted terms of the new visiting arrangements, which is an infringement of his right to non-discrimination for reason of sexual orientation, recognised in Article 14 of the Constitution. The Court establishes that, although it is not expressly mentioned in Article 14 of the Constitution, the gender identity is included among the grounds of discrimination provided by this provision. However, the Constitutional Court considers that the reasoning of the challenged sentences allow the conclusion to be reached that the decision to restrict the system of visits initially agreed was taken by the judicial bodies bearing in mind the genuine, prevalent interest of the minor, comparing his interest with that of the parents. Therefore, Spanish Constitutional Court considers there is no an influence of the father's transsexuality in the judicial decision: “In short, it is not the transsexuality of the appellant which has caused the restriction of the visiting arrangements agreed in the challenged judgments, but rather his emotional instability, according to the psychological determination assumed by the court bodies, and which supposes the existence of a considerable risk of effective alteration of the emotional health and development of the character of the minor, given his age (six years old at the time of the judicial exploration)

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<sup>298</sup> Spain, Decision 929/2007 of the Supreme Court (Civil Chamber, Plenary), of 17 September (*Sentencia 929/2007 del Tribunal Supremo, Sala de lo Civil, Pleno, de 17 de septiembre*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=342648&links=&optimize=20071004&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=342648&links=&optimize=20071004&publicinterface=true)

<sup>299</sup> Spain, Spanish Constitutional Court Judgment 176/2008 of 22 December (*Sentencia del Tribunal Constitucional 176/2008, de 22 de diciembre*), available at: <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/6408>

and his evolution.” The Court concludes that the challenged decisions have not given the appellant unfavourable legal treatment within the framework of his father-son relationship by reason of his gender identity, established by Article 14 of the Spanish Constitution, and therefore rejects the individual appeal for protection of fundamental rights.

Regarding change of name, data were requested on numbers of name changes and numbers of people who changed their sex under the applicable legislation from the State Office of Registries and Notaries (*Dirección General de Registros y Notariado*).<sup>300</sup> Period 2004- 2009: 211 inscriptions of name changes carried out due to change of gender. Period 2010-2013: 969 inscriptions of name changes carried out due to change of gender.

2008	2009	2010	2011	2012	2013
46	143	211	223	274	261

We have consulted the statistics system of the Institute of Health Information of the Ministry of Health, Social Services and Equality (*Instituto de Información Sanitaria, Ministerio de Sanidad, Servicios Sociales e Igualdad*), in order to obtain data of sex reassignment operations. Although there are no disaggregated data regarding this issue for recent years<sup>301</sup> we request the information and finally we have received some data that can be referred to this issue.

According to data of Health National System (*Sistema Nacional de Salud, SNS*), there are different activities in the Spanish hospitals related “presumably” to sex change, with the procedure code 64.5 that can be considered specific to that purpose, and other activities related to vaginal constructions (codes 70.61 and 70..63) regarding sexual disorders and sexual identity:

**Number of procedures registered in hospitalization likely related to sex change. Years 2008 - 2012**

	Tipo de procedimiento realizado			Total number of procedures
	64.5 Operations to sex transformation ]	70.61 Vaginal construction (creation of a vagine)	70.63 Vaginal construction with graft or prosthesis	

<sup>300</sup> Spain, State Office of Registries and Notaries (*Dirección General de Registros y Notariado*), [www.mjusticia.gob.es/cs/Satellite/es/1215197982464/Estructura\\_P/1215198295156/Detalle.html](http://www.mjusticia.gob.es/cs/Satellite/es/1215197982464/Estructura_P/1215198295156/Detalle.html) (Hyperlink was accessed on 26 February 2014) We request the data on January 2014, and after by using mail on 10 April 2014. We received the data on 6 May 2014.

<sup>301</sup> Spain, Institute of Health Information of the Ministry of Health (*Instituto de Información Sanitaria, Ministerio de Sanidad*), <http://icmbd.es/login-success.do> <http://icmbd.es/login-success.do> (All hyperlinks were accessed on 26 February 2014)

2.008	SNS	9	6	...	15
	Private	2	...	...	2
2.009	SNS	21	8	...	29
	Private	3	...	...	3
2.010	SNS	19	9	...	28
	Private	5	...	...	5
2.011	SNS	10	11	1	22
	Private	1	...	...	1
2.012	SNS	33	11	...	44
	Private	3	1	...	4
Total	SNS	92	45	1	138
	Private	14	1	...	15
Total number of procedures		106	46	1	153

**Note 1:** SNS refers to hospitals of Health National System (*Sistema Nacional de Salud, SNS* which includes public hospitals of public utilization red, and concerted substitute hospitals),

**Note 2:** The coverage of private hospitals increased from 2005. In 2012 there were 195 informant hospitals covering 90% of the activity of acute (agudos)

**Source:** Ministry of Health, Social Services and Equality (*Ministerio de Sanidad, Servicios Sociales e Igualdad*) General Division of Health Information and Innovation (*Subdirección General de Información Sanitaria e Innovación*)<sup>302</sup>

Although these numbers show stability in change of sex in Spain, it can be noted a significant increase in 2012. But it will be important to compare it with data of 2013 and 2014, when available, to see whether the evolution is significant..

There is no relevant case law to analyse.<sup>303</sup>

<sup>302</sup>Spain, Ministry of Health, Social Services and Equality (*Ministerio de Sanidad, Servicios Sociales e Igualdad*) General Division of Health Information and Innovation (*Subdirección General de Información Sanitaria e Innovación*), [informacionsanitaria@msssi.es](mailto:informacionsanitaria@msssi.es), [www.msssi.es/gob.es](http://www.msssi.es/gob.es)

<sup>303</sup> Desk research. We consulted on January 2014 and after on April Constitutional Court (*Tribunal Constitucional*) database, Judicial Power (*Poder Judicial*) official case law database, [www.poderjudicial.es/search/indexAN.jsp](http://www.poderjudicial.es/search/indexAN.jsp); Westlaw database, [www.westlaw.es/index\\_spa.html?brand=nwles](http://www.westlaw.es/index_spa.html?brand=nwles) and Tirant lo Blanch database, [www.tirantonline.com/tol/](http://www.tirantonline.com/tol/), and General State Prosecutor (*Fiscalía General del Estado*) annual reports. We also consulted on January and April 2014 information available in LGBT associations (such as FELGTB or COGAM website sources, including the 2013 Study on discrimination based on sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*).

## 8 Miscellaneous

### a) Institutional homophobia

#### a.1) On the possibility of a ban on materials that agitate for homosexual relations

In Spain, in accordance with the tenor of the legislation and case law described and analysed in the previous sections of this report, which prohibits the public powers and citizens from discriminating any person by reason of their sexual orientation or gender identity, there are no signs in the legislation or case law of any possible ban on materials that agitate for homosexual relations; nor any ban on such materials specifically conceived for the protection of minors.

With respect to this subject, first of all Article 27(2) of the Spanish Constitution<sup>304</sup> must be cited, which provides: “Education shall aim at the full development of human personality with due respect for the democratic principles of coexistence and for basic rights and freedoms.” Act 27/2005 of 30 November on Education and Peace Culture,<sup>305</sup> inspired in point a.2 of the Action Programme on a Culture of Peace, approved by the United Nations General Assembly in 1999, in its Article 2 establishes that the government is responsible, in developing the culture of peace, amongst other things, for (Article 4.1):

1. *Ensuring that on all levels of the educational system, the subjects are given in accordance with the values of a culture of peace, and the creation of specialised subjects in questions concerning education for peace and democratic values.*
2. *To stimulate, from the side of peace, the incorporation of the values of non-violence, tolerance, democracy, solidarity and justice in the contents of textbooks, didactic and educational materials, and the audiovisual programmes intended for pupils.” Likewise, the Act establishes the government obligation, “To promote all necessary action to develop the contents of the international agreement on eliminating all kinds of racial discrimination, discrimination against women and discrimination derived from sexual orientation.*

Organic Act 2/2006 of 3 May on Education<sup>306</sup> indicates among the principles of the Spanish educational system established in accordance with the values of the Constitution and based on respect for the rights and freedoms recognised therein, “(t)he transmission and application of values which enhance personal freedom, responsibility, democratic citizenship, solidarity,

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<sup>304</sup> Spain (1978), CE, available at: [www.boe.es/buscar/act.php?id=BOE-A-1978-31229](http://www.boe.es/buscar/act.php?id=BOE-A-1978-31229) Available in English at: [www.tribunalconstitucional.es/Lists/constPDF/ConstitucionINGLES.pdf](http://www.tribunalconstitucional.es/Lists/constPDF/ConstitucionINGLES.pdf)

<sup>305</sup> Spain (2005), Act 27/2005 of 30 November on Education and the Culture of Peace (*Ley 27/2005, de 30 de noviembre, de fomento de la educación y la cultura de la paz*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2005-19785](http://www.boe.es/buscar/act.php?id=BOE-A-2005-19785) (Hyperlink was accessed on 26 February 2014)

<sup>306</sup> Spain (2006), Organic Act 2/2006 of 3 May on Education (*Ley Orgánica 2/2006, de 3 de mayo, de Educación*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2006-7899](http://www.boe.es/buscar/act.php?id=BOE-A-2006-7899) (All hyperlinks were accessed on 26 February 2014)

tolerance, equality, respect and justice, and which help to overcome all kinds of discrimination” (Article 1.c). Furthermore, it is established that the Spanish educational system will be geared towards achieving the following ends, amongst others, “Education in respect of fundamental rights and freedoms, on the equality of rights and opportunities between men and women and on equal treatment and non-discrimination of the disabled”, “education in the exercise of tolerance and freedom within the democratic principles of coexistence, and in preventing conflicts and their peaceful resolution” (Article 2.b and c). And among the objectives of compulsory secondary education (which includes four consecutive years normally between the age of twelve and sixteen) it states “to know and appreciate the human dimension of sexuality in its full diversity” (Article 23.k).

Specifically with respect to the school curriculum, one of the novelties of Organic Act 2/2006 on Education consists of the new subject “Education for citizenship” which consists in different educational activities and implies the introduction of new contents referring to this education which, under different names in accordance with the nature of the contents and the ages of the pupils, will be given in some courses of primary education, compulsory secondary education and baccalaureate. Its purpose consists of offering all students a basis for reflection, analysis and study of the different fundamental characteristics and the operation of a democratic regime, of the principles and rights established in the Spanish Constitution and in the treaties and universal declarations of human rights, and the common values of constituting the substrate of democratic citizenship in a global context. This is a new subject that is intended to go further into certain aspects of life in society, contributing to forming new citizens. The Royal Decrees regulating minimal education (Royal Decree 1513/2006 of 7 December,<sup>307</sup> Royal Decree 1631/2006 of 29 December<sup>308</sup> and Royal Decree 1467/2007 of 2 November)<sup>309</sup> developed the content of the new subject, though leaving a margin for later application. For example, in Annex II of Royal Decree 1631/2006 one of the contents of the subject is established: “aspects relative to human relations from respect of personal dignity and equality of individual rights, the recognition of differences, the rejection of discrimination and the nurturing of solidarity.” Also “critical assessment of the social and sexual division of work and social, racist, xenophobic, anti-Semitic, sexist and homophobic prejudices”. Amongst the background of the new subject, the regulations invoke Recommendation (2002)12 of the Council of Ministers of the Council of Europe. Other bases of the subject were the document drawn up on 14 March 2006 by the ad hoc Committee for Education for Citizenship and Human Rights, also of the Council of Europe, and the Joint Recommendation of the European Parliament and Council on key competences for lifelong learning of 18 December 2006.

The subject “Education for citizenship” however received a critical reaction from some parents, who considered that schools could indoctrinate their children, thus infringing

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<sup>307</sup> Spain (2006), Royal Decree 1513/2006 of 7 December (*Real Decreto 1513/2006*), [www.boe.es/buscar/act.php?id=BOE-A-2006-21409](http://www.boe.es/buscar/act.php?id=BOE-A-2006-21409) (Hyperlink was accessed on 26 February 2014)

<sup>308</sup> Spain (2006), Royal Decree 1631/2006 of 29 December (*Real Decreto 1631/2006*), [www.boe.es/buscar/doc.php?id=BOE-A-2007-238](http://www.boe.es/buscar/doc.php?id=BOE-A-2007-238) (Hyperlink was accessed on 26 February 2014)

<sup>309</sup> Spain (2007), Royal Decree 1467/2007 of 2 November (*Real Decreto 1467/2007*), [www.boe.es/buscar/act.php?id=BOE-A-2007-19184](http://www.boe.es/buscar/act.php?id=BOE-A-2007-19184) (Hyperlink was accessed on 26 February 2014)

Article 27(3) (“Education shall aim at the full development of human personality with due respect for the democratic principles of coexistence and for basic rights and freedoms”) and Article 16(1) of the Spanish Constitution (“Freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law.”). The parents alleged several risks in the content of the subject, specifically, “One of the objectives of the subject is “to recognise the rights of women, to assess the difference between sexes and equal rights between them and to reject the stereotypes and prejudices which suppose discrimination between men and women” or references to sexism and homophobia, which anticipate negative value judgments on conceptions concerning the person and which may be based on legitimate convictions, but which are immediately classified as prejudices and discriminations” (Supreme Court Decision of 11 February 2009).<sup>310</sup> Following numerous contradictory decisions from different Spanish judicial bodies, a series of sentences from the Supreme Court in 2009 have clarified the question, rejecting the pretended conscientious objection of some citizens with respect to the subject “Education for citizenship”. The first Sentence of the Supreme Court that establishes this doctrine, reproduced in later sentences, is the Sentence of 11 February 2009, which resolves appeal for annulment number 905/2008. Amongst other arguments, the Sentence draws from Articles 27(2) and 27(5) of the Spanish Constitution (“Education shall aim at the full development of human personality with due respect for the democratic principles of coexistence and for basic rights and freedoms”; “The public authorities guarantee the right of all to education, through general education programming, with the effective participation of all sectors concerned and the setting-up of educational centres”) the statement that the State’s obligation is to intervene in education to ensure not only that knowledge is transmitted but also that information and instruction is given on the necessary values for the correct operation of the democratic system both in public and private teaching. The right of parents to choose a moral and religious orientation which must be present in their children's training (Article 27(3) of the Constitution) refers, in the opinion of the Court, to the world of beliefs and models of individual conduct that, regardless of the duty to respect the underlining common moral as underlying the fundamental rights, each person is free to choose for themselves and to transmit to their children.

The State legislation on education was developed by the Autonomous Communities. Particular mention must be made of Act 17/2007 of 10 December, concerning Education in Andalusia (*Educación en Andalucía*). Amongst the principles of the Andalusian educational system, Article 4.1.f) provides: “coexistence as an objective and necessary condition for the correct development of the work of the pupils and teachers, and respect for diversity through mutual awareness, guaranteeing that there is no segregation of pupils for reasons of belief, sex, sexual orientation, ethnic group or economic and social situation.” We remember the already mentioned (in section F) Article 37(1)(2) of the same Act on the leading principles for public policy: “The fight against sexism, xenophobia, homophobia and militarism, especially by means of teaching about values and providing education which promotes equality, tolerance,

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<sup>310</sup> Spain, Judgment of Supreme Court of 11 February 2009 (*Sentencia del Tribunal Supremo de 11 de febrero de 2009*), [www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=4434312&links=&optimize=20090226&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=4434312&links=&optimize=20090226&publicinterface=true) (Hyperlink was accessed on 25 May 2014)

freedom and solidarity”. It is also worth remembering the already mentioned (in section A) Act of Rights of Health of Children and Adolescents of the Community of Valencia, Act 8/2008 of 20 June, which guarantees “the necessary information and tools for all children and adolescents adequate for all sexual orientations” (Article 3.6).

Recently Organic Act 8/2013, of 9 December, for improving the education quality modifies Organic Act 2/2006 of 3 May on Education,<sup>311</sup> and approves a new curriculum with a long implementation calendar. The new regulation maintains the subject of Education for citizenship. Therefore we can say that this subject of Education for citizenship for the education in citizenship values has been enshrined in the Spanish legislation, also with a conservative government. In relation to sexual orientation and gender identity the reform explicitly introduces sanctions for discrimination based on grounds of sexual orientation and gender identity, as it is outlined in the new article 124 (2) of Education Act:

*The rules and regulations and conduct of the centres will be mandatory, and must specify the duties of the students and remedial measures in case of default by taking into account their personal situation and conditions.*

*The corrective measures will have an educational and restoring nature, they must ensure the respect for the rights of other students and seek improved relations with all the members of the educational community.*

*Corrective measures should be proportionate to the misconduct. Behaviour that violates the personal dignity of other members of the educational community, arising or resulting in discrimination or harassment based on gender, sexual orientation or identity, or a religious, ethnic, racial origin, belief or disability, or carried out against the most vulnerable students in their personal, social or educational qualification characteristics will be considered as very serious offense, punishable with corrective action as expulsion, temporarily or permanently of the centre.*

*Decisions for corrective action for committing minor offenses will immediately enforceable.*

Therefore there is a positive evolution in the legislation in order to guarantee LGBT rights since there are new explicit sanctions for discrimination based on grounds of sexual orientation and gender identity in the reform of 2013.

As it might be deduced, in accordance with the constitutional and legislative framework currently in force and the case law on this subject, it is not probable at the present time in Spain that there will be a possible general ban on materials that agitate for homosexual relations, not even with the argument of protecting minors, although it is obvious that one must always be alert to avoid a cutback in the protection of rights and freedoms or any retreat in prohibiting discriminations.

In fact, as 2013 Study on discrimination based on sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en*

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<sup>311</sup>Spain (2006), Organic Act 2/2006 of 3 May on Education (*Ley Orgánica 2/2006, de 3 de mayo, de Educación*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2006-7899](http://www.boe.es/buscar/act.php?id=BOE-A-2006-7899)

*España*) highlights there are a lot of situations of discrimination, but LGBT persons affected generally do not want to report them.

Nevertheless, there is a recent Judgment of Supreme Court 835/2013, Civil Chamber, of 6 February 2014<sup>312</sup> denying the registration in the Civil Registry of the affiliation of surrogate births based on the prohibition in Spain of the surrogate births, and which may involve a discrimination on grounds of sexual orientation and sexual identity because the majority of the persons that use it are homosexual persons. In this sense it is a negative step towards respect for sexual orientation and gender identity because it makes it more difficult for LGBT persons to have children under surrogacy in other States because they will not be able to register them in the Spanish Civil Registry.

#### **a.2) On the possibility of a ban on promotion of homosexual relations in public places**

As has been said, Article 14 of the Constitution<sup>313</sup> establishes the principle of equality before the law: “Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance.” To this we may add the multitude of regulations in favour of non-discrimination of people by reason of their sexual orientation which we have mentioned throughout this report, which must be related to the obligation of respect by the public powers and by the citizens to the Constitution and the rest of legal ordinances (Article 9(1) of the Constitution). For this reason it does not seem possible or probable at the present time in Spain that the public powers will promote a cutback of rights in the sense of prohibiting a manifestation of homosexual relations in public places. In any case, as we said in the previous subsection, we must always be alert on these particularly sensitive subjects to any institutional initiative which might be proposed in this sense and of which there is no sign at the present time beyond the occasional homophobe declarations, especially from sectors of the catholic church, as can be seen in the following parts of the section. It would be necessary to go back to the time of the Franco dictatorship, before the democratic regime was established in 1978, to find legislation which prohibited open homosexual relationships in public. The approval of the Constitution in 1978, which introduces a wide range of rights and freedoms, and particularly the referred Article 14, makes any regulation which limits the rights and freedoms of homosexuals in this way unconstitutional and therefore a regulation not allowed under the Spanish legal order.

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<sup>312</sup> Spain, Judgment no 835/2013 of Spanish Supreme Court, Civil Chamber, of 6 February 2014 (*Sentencia del Tribunal Supremo 835/2013, Sala de lo Civil, de 6 de febrero de 2014*), available at: [www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=6958977&links=&optimize=20140214&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=6958977&links=&optimize=20140214&publicinterface=true)

<sup>313</sup> Spain (1978), CE, available at: [www.boe.es/buscar/act.php?id=BOE-A-1978-31229](http://www.boe.es/buscar/act.php?id=BOE-A-1978-31229) Available in English at: [www.tribunalconstitucional.es/Lists/constPDF/ConstitucionINGLES.pdf](http://www.tribunalconstitucional.es/Lists/constPDF/ConstitucionINGLES.pdf)

## b) Miscellaneous

This chapter covers aspects which do not fit into the other sections but which also have an impact, in a negative way in this case, on progress towards respect for sexual orientation and gender identity. Attention should first be drawn to the significant resistance from conservative sectors, supported by the Catholic Church, to some of the legislative measures promoting equality. A number of these measures have been appealed before the Spanish Constitutional Court (*Tribunal Constitucional*).

Regarding same-sex marriage, the Constitutional Court decided in 2012 on the constitutionality of Act 13/2005 of 1 July, on modification of the Civil Code regarding the right to marriage.<sup>314</sup> Spanish Constitutional Judgment 198/2012 of 28 October declared the referred Act 13/2005 to be in accordance with the Spanish Constitution.<sup>315</sup>

The constitutionality of this legislation is a great step to guarantee the rights of LGBT groups in order to access to the institution of matrimony. There is a large number of people who have made use of this new right. According to figures from 2006, 4,313 marriages formed by people of the same sex took place that year. Of these, 3,000 were between men and 1,313 between women.<sup>84</sup> In 2007, 3,193 marriages between people of the same sex took place in Spain. Of these, 2,141 were between men and 1,052 between women. In 2008, 3,194 marriages between people of the same sex took place. Of these, 2,051 between men and 1,143 between women. In 2009, 3082 same-sex marriages took place. Of these, 1,984 between men and 1,098 between women. In 2010, 3,193 same-sex marriages took place in that year. Of these 1955 between males and 1238 between women. In 2011, 3,540 same-sex marriages took place. Of these, 2073 between males, and 1467 between women. In 2012, 3,455 same-sex marriages took place. Of these, 1,935 between men and 1,520 between women. Actually is not information available about data of 2013.<sup>316</sup>

In addition to the critical attitude of the Catholic Church as an institution, there have also been homophobic statements by some members of the ecclesiastical hierarchy which have sparked public debate. For example, on 24 December 2007, the Bishop of Tenerife said in an interview to the newspaper *La Opinión de Tenerife* that, “Only six per cent of homosexuals can be justified for biological reasons. One should not confuse homosexuality as a person’s

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<sup>314</sup> Spain (2005), Act 13/2005 of 1 July, on modification of the CC regarding the right to marriage (*Ley 13/2005, de 1 de julio, por la que se modifica el CC en materia de derecho a contraer matrimonio*), [www.boe.es/buscar/doc.php?id=BOE-A-2005-11364](http://www.boe.es/buscar/doc.php?id=BOE-A-2005-11364)

<sup>315</sup> Spain, Spanish Constitutional Judgment 198/2012 of 28 October (*Sentencia del Tribunal Constitucional 198/2012, de 28 de octubre*), <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/4734>

<sup>316</sup> The information of the number of marriages is updated until 2012. There is no information actually regarding 2013 marriages according to National Statistics Institute (*Instituto Nacional de Estadística*), [www.ine.es/jaxi/menu.do?type=pcaxis&path=%2Ft20%2Ffe302&file=inebase&L=0](http://www.ine.es/jaxi/menu.do?type=pcaxis&path=%2Ft20%2Ffe302&file=inebase&L=0). We consulted the information on April 2014, and after we checked it on 25 May 2014.

existential need with homosexuality practised as a bad habit. Some people practise homosexuality as they might practise child abuse. They do it because they are attracted by the novelty of a different form of sexuality”. This comparison between homosexuality and child abuse caused a great scandal in Spain.<sup>317</sup>

On 27 January 2008, the Bishop of Orihuela-Alicante, speaking to the newspaper *La Opinión de Málaga* regarding homosexuality, declared that, “Biology says that it is usually an illness, but in certain cases there can be a concrete situation that has another explanation, but usually nobody wants to be homosexual”.<sup>318</sup>

Recently, on January 2014, Cardinal Sebastián considered that homosexuality “is a poor sexuality that can be normalised with treatment”.<sup>319</sup>

There is no additional relevant data available for this chapter.<sup>320</sup>

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<sup>317</sup> La Opinión de Tenerife, (2007), ‘La homosexualidad perjudica personas sociedad’, 24 December 2007.

<sup>318</sup> La Opinión de Málaga, (2008), 27 January 2008. 7/01/2008 (This is a news item from the previous report of 2010, we do not have access to the title)

<sup>319</sup> El Mundo (2014), ‘*El nuevo cadenal español: ‘La homosexualidad es una deficiencia que se puede normalizar’*’ 19 January 2014.

<sup>320</sup> Desk research. We consulted on January and April 2014 information available in Spanish Media (El Mundo [www.elmundo.es](http://www.elmundo.es), El País [www.elpais.com](http://www.elpais.com)) and LGBT associations (such as FELGTB or COGAM website sources,

## 9 Good practices

The majority of good practices covered by this chapter refer to legislative reforms. At state level the public authorities have implemented the European anti-discrimination directives by means of general measures (such as Act 62/2003 of 30 December 2003 on Fiscal, Administrative and Social Measures (*Ley 62/2003 de 30 de diciembre sobre Medidas fiscales, administrativas y del orden social*)<sup>321</sup> in connection with Directive 2000/78/EC). They have also incorporated into the legal system a large number of provisions on equal treatment and respect for sexual orientation as well as on the right to freedom of gender identity.

Among the many laws which implement these principles, some have already been the subject of specific reference in this report, so they are simply listed here: Act 7/2007 of 12 April on the Basic Statute of Public Employees,<sup>322</sup> Act 20/2007 of 11 July on the Statute of Self-Employed Workers;<sup>323</sup> Act 55/2003 of 16 December on the Framework Statute of Health Service Staff;<sup>324</sup> Act 31/2006 of 18 October on Participation of Workers in European Public Limited Companies and Cooperatives;<sup>325</sup> Organic Act 11/2007 of 22 October on Rights and Duties of the Civil Guard (military police),<sup>326</sup> and Organic Act 12/2007 of 22 October on Disciplinary Regime for the Civil Guard concerning Military Careers.<sup>327</sup> Also, Organic Act 3/2007 of 22 March on the Effective Equality of Women and Men,<sup>328</sup> the reform of Article 314 of the Criminal Code carried through by Organic Act 15/2003 of 25 November, amending Organic Act 10/1995, of 23 November on the Criminal Code.<sup>329</sup>

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<sup>321</sup> Spain (2003), Act 62/2003 of 30 December 2003 on Fiscal, Administrative and Social Measures (*Ley 62/2003 de 30 de diciembre sobre Medidas fiscales, administrativas y del orden social*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2003-23936](http://www.boe.es/buscar/act.php?id=BOE-A-2003-23936)

<sup>322</sup> Spain (2007), Act 7/2007 of 12 April on the Basic Statute of Public Employees (*Ley 7/2007 del Estatuto Básico del Empleado Público*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-7788](http://www.boe.es/buscar/act.php?id=BOE-A-2007-7788)

<sup>323</sup> Spain (2007), Act 20/2007 of 11 July on the Statute of Self-Employed Workers (*Ley 20/2007, de 11 de julio, del Estatuto del trabajo autónomo*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-13409](http://www.boe.es/buscar/act.php?id=BOE-A-2007-13409)

<sup>324</sup> Spain (2003), Act 55/2003 of 16 December on the Framework Statute of Health Service Staff (*Ley 55/2003, de 16 de diciembre, del Estatuto Marco del personal estatutario de los servicios de salud*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2003-23101](http://www.boe.es/buscar/act.php?id=BOE-A-2003-23101)

<sup>325</sup> Spain (2006), Act 31/2006 of 18 October on Participation of Workers in European Public Limited Companies and Cooperatives (*Ley 31/2006, de 18 de octubre, sobre implicación de los trabajadores en las sociedades anónimas y cooperativas europeas*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2006-18204](http://www.boe.es/buscar/doc.php?id=BOE-A-2006-18204)

<sup>326</sup> Spain (2007), Organic Act 11/2007 of 22 October on Rights and Duties of the Civil Guard (military police) (*Ley Orgánica 11/2007, de 22 octubre, reguladora de los derechos y deberes de los miembros de la Guardia Civil*) [www.boe.es/buscar/act.php?id=BOE-A-2007-18391](http://www.boe.es/buscar/act.php?id=BOE-A-2007-18391)

<sup>327</sup> Spain (2007), Organic Act 12/2007 of 22 October on Disciplinary Regime for the Civil Guard concerning Military Careers (*Ley Orgánica 12/2007, de 22 de octubre, del régimen disciplinario de la Guardia Civil*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-18392](http://www.boe.es/buscar/act.php?id=BOE-A-2007-18392)

<sup>328</sup> Spain (2007), Organic Act 3/2007 of 22 March on Effective Equality of Women and Men (*Ley Orgánica 3/2007, de 22 de marzo, para la igualdad efectiva de mujeres y hombres*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-6115](http://www.boe.es/buscar/act.php?id=BOE-A-2007-6115) available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html)

<sup>329</sup> Spain (2003), Organic Act 15/2003 of 25 November, amending Organic Act 10/1995, of 23 November on the CP available at: [www.boe.es/buscar/doc.php?id=BOE-A-2003-21538](http://www.boe.es/buscar/doc.php?id=BOE-A-2003-21538)

Act 14/2006 of 26 May on techniques of assisted human reproduction<sup>330</sup> has also been cited above. Special mention should be made of Act 3/2007 of 15 March on the Rectification of the recording of gender in Registries,<sup>331</sup> also referred to above, which creates a stable legal framework for the full respect of the rights of transsexuals. Reference should also be made to Act 49/2007 of 26 December, which establishes the regime of offences and sanctions as regards equal opportunities, non-discrimination and universal accessibility for disabled people.

This provision does not go beyond EU standards but was really innovative in Spain, with a long-term impact.

These changes to the legal system are also reflected in other laws that have not previously been mentioned, as is the case of Act 10/2007 of 22 June on Reading, Books and Libraries.<sup>332</sup> In Article 12(2)(b) of this law, among the principles which should inspire the activity of libraries, is the following: “Equality for all users in access to the materials, facilities and services of the library, without discrimination on grounds of origin, ethnicity, religion, ideology, gender or sexual orientation, age, disability, economic resources or any other personal or social circumstance”.

Note should also be made of Act 19/2007 of 11 July against Violence, Racism, Xenophobia and Intolerance in Sport.<sup>333</sup> This law makes a considerable number of direct or indirect references to respect for sexual orientation and the prevention and repression of illegal behaviours: Article 2(2)(a), (b), (c) and (d) on definitions; Article 6(1)(b) and (c); Article 23(1)(c) and (d); Article 34(1)(b), (c) and (d); and Article 35(a) and (b).

These provisions do not go beyond EU standards but it were really innovative in Spain, with a long-term impact..

Among the state legislation is Act 52/2007 of 26 December which acknowledges and extends rights and sets down measures in favour of those who suffered persecution or violence during the civil war and the dictatorship.<sup>334</sup> Article 2(1) provides the following general recognition: “As an

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<sup>330</sup> Spain (2006), Act 14/2006 of 26 May on techniques of assisted human reproduction (*Ley 14/2006, de 26 de mayo, sobre técnicas de reproducción humana asistida*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2006-9292](http://www.boe.es/buscar/act.php?id=BOE-A-2006-9292)

<sup>331</sup> Spain (2007), Act 3/2007 of 15 March on the Rectification of the recording of gender in Registries (*Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-5585](http://www.boe.es/buscar/act.php?id=BOE-A-2007-5585)

<sup>332</sup> Spain (2007), Act 10/2007 of 22 June on Reading, Books and Libraries (*Ley 10/2007, de 22 de junio, de la lectura, del libro y de las bibliotecas*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-12351](http://www.boe.es/buscar/act.php?id=BOE-A-2007-12351) (Hyperlink was accessed on 26 February 2014)

<sup>333</sup> Spain (2007), Act 19/2007 of 11 July against Violence, Racism, Xenophobia and Intolerance in Sport (*Ley 19/2007, de 11 de julio, contra la violencia, el racismo, la xenofobia y la intolerancia en el deporte*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-13408](http://www.boe.es/buscar/act.php?id=BOE-A-2007-13408)

<sup>334</sup> Spain (2007), Act 52/2007 of 26 December which acknowledges and extends rights and sets down measures in favour of those who suffered persecution or violence during the civil war and the dictatorship (*Ley 52/2007, de 26 de diciembre,*

expression of the right of all citizens to moral compensation and to regaining their personal and family memory, the radically unjust character is recognised and declared of all condemnations, sanctions and any forms of personal violence perpetrated for political, ideological or religious reasons during the Civil War, as well as those suffered for the same reasons during the Dictatorship”. Article 2(2) includes a specific reference to sexual orientation.

This provision goes beyond EU standards and was really innovative, with a long-term impact. It can be transferred to other Member States, we know that other EU Member States are adopting similar legal measures.

The most outstanding law among the state legislation is, without a doubt, Act 13/2005 of 1 July, which modifies the Civil Code as regards the right to marry<sup>335</sup> and which introduces same-sex marriage, granting them the legal effects of the institution of matrimony. The option of this law for the full integration of same-sex marriage into the traditional matrimonial institution, with identical legal effects, may have the greatest impact on effective equal treatment and full respect for people’s sexual orientation. This equal treatment makes fully applicable to same-sex marriage all the laws from different sectors establishing social benefits, rights of spouses, possibility of adoption, etc. It is, therefore, a highly advisable option that makes possible a full application of the non-discrimination principle in all sectors.

This provision goes beyond EU standards and was really innovative, with a long-term impact. It can be transferred to other Member States, we know that other EU member States are adopting similar legal measures.

It is important to note that in the preface of these legal acts cited above there is no an explicit mention of a consultation to beneficiaries or other stakeholders in their planning and design (when it is usual to mention these types of consultation in the preface of legal acts in Spain), and there is no information referring to such consultation in the LGBT associations as FELGTB<sup>336</sup> or COGAM<sup>337</sup> websites. However, we consulted them, and COGAM pointed out that under Socialist Government in Spain (2004-2011) the LGBT associations, and in particular FELGTB and COGAM were consulted on the develop of the legislation regarding their rights, and particularly the introduction of the equal marriage in Spain (Act 13/2005 of 1 July which introduces same-sex marriage).<sup>338</sup>

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*por la que se reconocen y amplían derechos y se establecen medidas en favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-22296](http://www.boe.es/buscar/act.php?id=BOE-A-2007-22296) (Hyperlink was accessed on 26 February 2014)

<sup>335</sup> Spain (2005), Act 13/2005 of 1 July, which modifies the CC regarding the right to marry (*Ley 13/2005, de 1 de julio, por la que se modifica el CC en materia de derecho a contraer matrimonio*) available at: [www.boe.es/buscar/doc.php?id=BOE-A-2005-11364](http://www.boe.es/buscar/doc.php?id=BOE-A-2005-11364)

<sup>336</sup> Spain, State Federation of Lesbians, Gays, Transsexuals and Bisexuals (*Federación Estatal de Lesbianas, Gays, Transexuales y Bisexuales*), [www.felgtb.org/](http://www.felgtb.org/)

<sup>337</sup> Spain, Madrid Lesbian, Gay, Transgender and Bisexual Community, (*Colectivo de lesbianas, gays, transexuales y bisexuales de Madrid*) COGAM, [www.cogam.es/](http://www.cogam.es/)

<sup>338</sup> Desk research. We consulted FELGTB and COGAM websites information on April and May 2014. We checked them on 10 July 2014, and we also contacted them via email on 10 July 2014 with no response of FELGTB. COGAM answer

However, in order to have a complete overview of good practices in the Spanish legal system, it is important to point out the decentralised structure of the State. This decentralisation means that considerable competences are exercised by the Autonomous Communities. This is true regarding social policy, the promotion of social rights, social assistance, etc. The competences of the Autonomous Communities in relation to education, health care and housing, among others, imply that the majority of the public administration activities with an impact on equality and respect for sexual orientation and gender identity are exercised nowadays at the level of the autonomous communities and not at state level.

Thus, a considerable proportion of the good practices of recent years were adopted at the level of the Autonomous Communities. The most recent reforms of the Statutes, which took place in six of Spain's 17 Autonomous Communities (including the two Autonomous Cities, Ceuta and Melilla), are especially relevant here. These statutory reforms affect Autonomous Communities which jointly represent around half of the Spanish population (Andalusia and Catalonia alone represent a third of the total population) and these reforms are especially important because they incorporate new principles and rights which were not foreseen in the previous versions of these Statutes.

Among these principles and rights, it is relevant to note those related to sexual orientation and gender equality. They include, in two of the Statutes (Catalonia and Andalusia), combating homophobia. It should be kept in mind that the Statute of Autonomy is, from a functional point of view, the 'Constitution' of the Autonomous Community and that it is binding on the autonomous public authorities (always with respect to the constitutional framework), compelling them to formulate their policies in conformity with the statutory principles. This explains the importance of these statutory provisions and the progress they imply for the Spanish legal system.

The Statute that devotes most attention to these questions is that of Andalusia (reformed in the Organic Act 2/2007 of 19 March on the Reform of the Statute of Autonomy for Andalusia Autonomous Community)<sup>339</sup> in which Article 14 incorporates prohibition of discrimination on grounds of sexual orientation.

In addition to this, Article 35 of the Statute of Andalusia recognises both the right to freedom of sexual orientation and the right to freedom of gender identity.

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us and we spoke with them via phone on 11 and 14 July 2014. COGAM pointed out that under Socialist Government in Spain (2004-2011) the LGBT associations, and in particular FELGTB and COGAM were consulted in general on the develop of the legislation regarding their rights, and particularly the introduction of the equal marriage in Spain thanks to the intermediation of Pedro Cerolo, who was member of FELGTB and COGAM, and at that time occupied the Secretary of Social Movements and Relations with NGOs of the Spanish Socialist Party (*Partido Socialista Obrero Español*) with was the Party of the Government.

<sup>339</sup>Spain (2007), Organic Act 2/2007 of 19 March on the Reform of the Statute of Autonomy of the Autonomous Community of Andalusia (*Ley Orgánica 1/2007, de Reforma del Estatuto de Autonomía para Andalucía*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-5825](http://www.boe.es/buscar/act.php?id=BOE-A-2007-5825)

The Statute of Catalonia (Act 6/2006 of 19 July on the Reform of the Statute of Autonomy of Catalonia)<sup>340</sup> also contains most of these principles and rights.

The other Statutes of Autonomy also contain important, though fewer, references to this subject. Thus, Article 24(d) of the Statute of Aragon (enacted in the Organic Act 5/2007 of 20 April on Reform of the Statute of Autonomy of Aragon)<sup>341</sup> establishes that Aragon's public authorities shall formulate their policies in accordance with the objective of guarantee the right of everyone not to be discriminated against on grounds of sexual orientation and gender identity.

In addition to this, the Statute of the Balearic Islands (enacted by Organic Act 1/2007 of 28 February on Reform of the Statute of Autonomy of the Balearic Islands)<sup>342</sup> proclaims in Article 27(3) that, "Everybody is entitled not to be discriminated against on grounds of sexual orientation". Similarly, the Statute of Castile and León (enacted by Organic Act 14/2007 of 30 November on Reform of the Statute of Autonomy of Castile and León)<sup>343</sup> in Article 14(1) Finally, the Valencian Community's Statute (enacted by Organic Act 1/2006 of 10 April on Reform of the Organic Law 5/1982 of 1 July on the Statute of Autonomy of the Valencian Community)<sup>344</sup> incorporates an Additional Provision (the Fourth) under which "The institutions and administrations of the Generalitat shall avoid the use in their public interventions of offensive or disrespectful expressions about any group or person for reason of gender or any other social condition whose different treatment is prohibited under our constitutional framework".

These provisions in several Autonomous Community Statutes are important because they underline the rights of persons to sexual orientation and gender identity in basic rules of the Spanish Autonomous Communities, with a quasi-constitutional relevance. In this sense, these measures go beyond EU standards and are really innovative in Spain, with a long-term impact. The beneficiaries or other stakeholders were not involved in the design, planning, evaluation, or review and implementation of these measures.

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<sup>340</sup> Spain (2006), Organic Act 6/2006 of 19 July on the Reform of the Statute of Autonomy of Autonomous Community of Catalonia (*Ley Orgánica 6/2006, de 19 de julio, de reforma del Estatuto de Autonomía de Cataluña*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2006-13087](http://www.boe.es/buscar/act.php?id=BOE-A-2006-13087)

<sup>341</sup> Spain (2007), Organic Act 5/2007 of 20 April on Reform of the Statute of Autonomy of Aragon (*Ley Orgánica 5/2007, de 20 de abril, de Reforma del Estatuto de Autonomía de Aragón*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-8444](http://www.boe.es/buscar/act.php?id=BOE-A-2007-8444)

<sup>342</sup> Spain (2007), Organic Act 1/2007 of 28 February on Reform of the Statute of Autonomy of the Balearic Islands (*Ley Orgánica 1/2007, de 28 de febrero, de Reforma del Estatuto de Autonomía de las Illes Balears*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-4233](http://www.boe.es/buscar/act.php?id=BOE-A-2007-4233)

<sup>343</sup> Spain (2007), Organic Act 14/2007 of 30 November on Reform of the Statute of Autonomy of Castile and León (*Ley Orgánica 14/2007, de 30 de noviembre, de Reforma del Estatuto de Autonomía de Castilla y León*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-20635](http://www.boe.es/buscar/act.php?id=BOE-A-2007-20635)

<sup>344</sup> Spain (2006), Organic Act 1/2006 of 10 April on Reform of the Organic Law 5/1982 of 1 July on the Statute of Autonomy of the Valencian Community (*Ley Orgánica 1/2006, de 10 de abril, de Reforma de la Ley Orgánica 5/1982, de 1 de julio, de Estatuto de Autonomía de la Comunidad Valenciana*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2006-6472](http://www.boe.es/buscar/doc.php?id=BOE-A-2006-6472)

Protection against discrimination, amongst others on grounds of sexual orientation, has been implemented in different autonomic laws: for example in Act 2/2008 of 28 May, of the General Canary Police Force;<sup>345</sup> in Act 3/2008 of 16 June, regulating the Public Corporation “Corporation of Audiovisual Means of Extremadura”,<sup>346</sup> in Act 3/2009 of 11 May, concerning the Rights and Duties of Users of the Health System in Murcia;<sup>347</sup> or in Act 4/2009 of 28 May, concerning institutional advertising in Castile and León.<sup>348</sup>

It is important to highlight the already mentioned Autonomous Community of Navarre Act of 19 November concerning the rights of transsexuals (*Ley Foral 12/2009, de 19 de noviembre, de no discriminación por motivos de identidad de género de los derechos de las personas transexuales*).<sup>349</sup> In a composed state such as the Spanish one, where the majority of competencies of social assistance correspond to the Autonomous Communities, it would seem good practice that it should be they who, based on State legislation enabling the registry rectification of gender (Act 3/2007 of 15 March on the Rectification of the recording of gender in Registries (*Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas*))<sup>350</sup>, proceed to complement and develop it. And they should also be who reform the transsexual rights protection in a single autonomic act, in order to clarify the regulation and make their rights visible.

Another relevant law at regional level to point out is Basque Country Autonomous Community (*País Vasco*) Act 14/2012 of 28 June, on non-discrimination on grounds of gender identity and the recognition of the rights of transsexual persons.<sup>351</sup>

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<sup>345</sup> Spain (2008), Act 2/2008 of 28 May, of the General Canary Police Force (*Ley 2/2008, de 28 de mayo, del Cuerpo General de la Policía Canaria*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2008-12494](http://www.boe.es/buscar/doc.php?id=BOE-A-2008-12494) (All hyperlinks were accessed on 26 February 2014)

<sup>346</sup> Spain (2008), Act 3/2008 of 16 June, regulating the Public Corporation “Extremadura Corporation of Audiovisual Means” (*Ley 3/2008, de 16 de junio, reguladora de la Empresa Pública “Corporación Extremeña de Medios Audiovisuales*) available at: [www.canalextramadura.es/sites/default/files/DOE\\_116.pdf](http://www.canalextramadura.es/sites/default/files/DOE_116.pdf) (All hyperlinks were accessed on 26 February 2014)

<sup>347</sup> Spain (2009), Act 3/2009 of 11 May, concerning the Rights and Duties of Users of the Health System in Murcia (*Ley 3/2009, de 11 de mayo, de los Derechos y deberes de los Usuarios del Sistema Sanitario de Murcia*), available at: [www.boe.es/boe/dias/2011/02/09/pdfs/BOE-A-2011-2493.pdf](http://www.boe.es/boe/dias/2011/02/09/pdfs/BOE-A-2011-2493.pdf)

<sup>348</sup> Spain (2009), Act 4/2009 of 28 May, concerning Institutional advertising in Castilla y León (*Ley 4/2009, de 28 de mayo, de Publicidad institucional de Castilla y León*), available at: [www.ccyL.es/export/sites/ccyl/docs/7/leyes/Ley4-2009PublicidadInstitucionalCYL.pdf](http://www.ccyL.es/export/sites/ccyl/docs/7/leyes/Ley4-2009PublicidadInstitucionalCYL.pdf) (All hyperlinks were accessed on 26 February 2014)

<sup>349</sup> Spain (2009), Autonomous Community of Navarre Act 12/2009 of 19 November concerning the rights of transsexuals (*Ley Foral 12/2009, de 19 de noviembre, de no discriminación por motivos de identidad de género de los derechos de las personas transexuales*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2009-20656](http://www.boe.es/buscar/doc.php?id=BOE-A-2009-20656)

<sup>350</sup> Spain (2007), Act 3/2007 of 15 March on the Rectification of the recording of gender in Registries (*Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-5585](http://www.boe.es/buscar/act.php?id=BOE-A-2007-5585)

<sup>351</sup> Spain (2012), Basque Country Autonomous Community (*País Vasco*) Act 14/2012 of 28 June, on no discrimination on grounds of gender identity and on the recognition of rights of transsexual persons (*Ley 14/2012, de 28 de junio, de no discriminación por motivos de identidad de género y de reconocimiento de los derechos de las personas transexuales*), available at: [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2012-9664](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2012-9664)

These regional laws really are important because they underline the rights of persons to sexual orientation and gender identity although do not go beyond EU standards, but they are really innovative in Spain, with a long-term impact. The beneficiaries or other stakeholders were not involved in the design, planning, evaluation, or review and implementation of the measure.

Both the most recent national legislation and the recent reforms of the Statutes of Autonomy of the Autonomous Communities and of the autonomous community legislation show a growing interest in the promotion of the right to freedom of sexual orientation and gender identity, as well as in the prohibition of any discrimination contrary to those rights and specifically in combating homophobia. The fact that these principles have already reached the second constitutional level in Spain (that of the Statutes of Autonomy of the Autonomous Communities), as well as the large number of laws which have been devoted in recent years to incorporating them into the legal system, prove the interest of the public authorities in promoting their effective implementation. After several searches, the statistical information on these issues could not be retrieved.<sup>352</sup>

In addition, other good practices are:

-The Handbook for diversity management by the police (*Guía para la gestión policial de la diversidad*).<sup>353</sup> It is a Guide of the Platform for Diversity Management. This Guide was published in 2013 while the platform was created in 2010 with the aim of promoting changes in the Spanish police forces and improving their action procedures to ensure for everyone, and particularly the most vulnerable minority populations, a respectful and equal treatment.

The Handbook goes beyond EU standards and is really innovative, with a long-term impact. The beneficiaries or other stakeholders were involved in the design, planning, evaluation of the measure. In fact the Platform for Diversity Management is formed by several civil organisations including FELGTB, and police organisations as the National Union of Chiefs and Directives of the Municipal Police (*Unión Nacional de Jefes y Directivos de Policía Local*).<sup>354</sup>

- The Discrimination Map (*Mapa de la Discriminación*) of Ministry of Health, Social Services and Equality (*Ministerio de Sanidad, Servicios Sociales e Igualdad*).<sup>355</sup> The Discrimination Map is a

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<sup>352</sup> Desk research. We consulted on January and April 2014 information available in Sociological Research Centre (*Centro de Investigaciones Sociológicas*, CIS), [www.cis.es/cis/opencms/ES/index.html](http://www.cis.es/cis/opencms/ES/index.html) and Statistics National Institute (*Instituto Nacional de Estadística*, INE), [www.ine.es/](http://www.ine.es/), LGBT associations such as FELGTB, [www.felgtb.org/](http://www.felgtb.org/), and COGAM, [www.cogam.es/](http://www.cogam.es/) website sources.

<sup>353</sup> Spain, Platform for Diversity Management (2013), The Handbook for diversity management by the police (*Guía para la gestión policial de la diversidad*), [http://gestionpolicialdiversidad.org/PDFactividades/guia\\_gestion\\_policial\\_diversidad.pdf](http://gestionpolicialdiversidad.org/PDFactividades/guia_gestion_policial_diversidad.pdf) (Hyperlink was accessed on 24 February 2014)

<sup>354</sup> Spain, National Union of Chiefs and Directives of Municipal Police (*Unión Nacional de Jefes y Directivos de Policía Local*), available at: [www.unijepol.eu](http://www.unijepol.eu) (Hyperlink was accessed on 11 April 2014)

<sup>355</sup> Spain (2013), Health, Social Services and Equality Ministry (*Ministerio de Salud, Servicios Sociales e Igualdad*), Diagnostic study of secondary sources about discrimination in Spain, There is no online reference yet for this initiative

state instrument which aims to understand the social perceptions and the perceptions of potential victims of discrimination and to ascertain the specific discriminatory practices and the main empirical data on discrimination in Spain in order to enable a better design of anti-discrimination policies. In order to do so, in the framework of the Map studies on the perception of discrimination will be conducted, in accordance with the research and knowledge gaps detected. In addition to studies, data will be systematically collected on the implementation of anti-discrimination legislation. The project will cover the following discriminatory grounds: sex, race or ethnicity, age, disability, religion or belief, sexual orientation and gender identity; and others, and also encompass multiple discrimination.

Certainly, there is no a lot of information about the project, which points to one of the problems in Spain, i.e. the absence of official statistics on discrimination and the lack of studies in a systematic and comprehensive way. This first step in 2013 aims to analyse the available secondary data sources in this field of study and to understand the social perceptions and the perceptions of potential victims of discrimination in order to enable a better design of anti-discrimination policies in Spain.<sup>356</sup>

The Discrimination Map goes beyond EU standards and is really innovative, with a long-term impact that we will see in the next years. There is no information on the relevant organisations being consulted regarding this Map, after having consulted LGBT associations as FELGTB<sup>357</sup> or COGAM<sup>358</sup> available information referring to such consultation.<sup>359</sup>

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but only for its first step, the executive summary of a report identifying and analysing the available secondary data sources on this issue, available in English at:

[www.msssi.gob.es/ssi/igualdadOportunidades/noDiscriminacion/documentos/r\\_Ingles\\_vf..pdf](http://www.msssi.gob.es/ssi/igualdadOportunidades/noDiscriminacion/documentos/r_Ingles_vf..pdf) (All hyperlinks were accessed on 24 February 2014)

<sup>356</sup> Spain (2013), Health, Social Services and Equality Ministry (*Ministerio de Salud, Servicios Sociales e Igualdad*), Diagnostic study of secondary sources about discrimination in Spain, available in English at: [www.msssi.gob.es/ssi/igualdadOportunidades/noDiscriminacion/documentos/r\\_Ingles\\_vf..pdf](http://www.msssi.gob.es/ssi/igualdadOportunidades/noDiscriminacion/documentos/r_Ingles_vf..pdf)

<sup>357</sup> Spain, State Federation of Lesbians, Gays, Transsexuals and Bisexuals (*Federación Estatal de Lesbianas, Gays, Transexuales y Bisexuales*), [www.felgtb.org/](http://www.felgtb.org/)

<sup>358</sup> Spain, Madrid Lesbian, Gay, Transgender and Bisexual Community, (*Colectivo de lesbianas, gays, transexuales y bisexuales de Madrid*) COGAM, [www.cogam.es/](http://www.cogam.es/)

<sup>359</sup> Desk research. We consulted FELGTB and COGAM websites information on April and May 2014. We checked them on 10 July 2014, and we also contacted them via email on 10 July 2014 with no response of FELGTB. We spoke with COGAM via phone on 10 and 14 July 2014, and they confirmed us that in the actual Popular Party (*Partido Popular*) Government period (2011-2014) they were not consulted regarding the develop of any legal act, and neither regarding this Discrimination Map.

## 10 Intersex

In Spain, discrimination on grounds of ‘intersex’ is covered implicitly in the Spanish Constitution in article 14: “Spaniards are equal before the law and may not in any way be discriminated against on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance”.<sup>360</sup>

To this we may add the multitude of regulations in favour of non-discrimination of people by reason of their sexual orientation or sexual identity mentioned in this report. But it is important to stress the invisibility of intersex in legislation. The legislation refers in general to discrimination based on grounds of sexual orientation or gender identity, and does not refer explicitly to intersex persons, with one exception: Act 14/2012 of 28 June, on non-discrimination based on gender identity and the recognition of the rights of transgender people in the Basque Country, which includes references to ‘intersex persons’.<sup>361</sup>

Therefore we can say that really, with the exception mentioned above, there is no in the Spanish legislation an explicit regulation in order to avoid discrimination of intersex persons, and therefore to protect them. Nevertheless, general legislation on equal treatment and non-discrimination on the grounds of sexual orientation and sexual identity is fully applicable to intersex people, although we are speaking about different situations. Because discrimination and the violation of the principle of equal treatment on the grounds of sexual orientation and sexual identity include all possible cases, including discrimination of intersex people.

Regarding Education, Article 27(2) of the Spanish Constitution<sup>362</sup> provides that: “Education shall aim at the full development of human personality with due respect for the democratic principles of coexistence and for basic rights and freedoms.”

Organic Act 2/2006 of 3 May on Education (*Ley Orgánica 2/2006, de 3 de mayo, de Educación*)<sup>363</sup> indicates among the principles of the Spanish educational system established in accordance with the values of the Constitution and based on respect for the rights and freedoms recognised therein, including tolerance, equality, respect and justice “and which help to overcome all kinds of discrimination” (Article 1.c).

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<sup>360</sup> Spain (1978), CE, available at: [www.boe.es/buscar/act.php?id=BOE-A-1978-31229](http://www.boe.es/buscar/act.php?id=BOE-A-1978-31229). Available in English at: [www.tribunalconstitucional.es/Lists/constPDF/ConstitucionINGLES.pdf](http://www.tribunalconstitucional.es/Lists/constPDF/ConstitucionINGLES.pdf).

<sup>361</sup> Spain (2012), Act 14/2012, 28 of June, non-discrimination based on gender identity and recognition of the rights of transgender people in the Basque Country (*Ley 14/2012, de 28 de junio, de no discriminación por motivos de identidad de género y de reconocimiento de los derechos de las personas transexuales*). Available at: <https://www.boe.es/boe/dias/2012/07/19/pdfs/BOE-A-2012-9664.pdf>.

<sup>362</sup> Spain (1978), CE, available at: [www.boe.es/buscar/act.php?id=BOE-A-1978-31229](http://www.boe.es/buscar/act.php?id=BOE-A-1978-31229). Available in English at: [www.tribunalconstitucional.es/Lists/constPDF/ConstitucionINGLES.pdf](http://www.tribunalconstitucional.es/Lists/constPDF/ConstitucionINGLES.pdf).

<sup>363</sup> Spain (2006), Organic Act 2/2006 of 3 May on Education (*Ley Orgánica 2/2006, de 3 de mayo, de Educación*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2006-7899](http://www.boe.es/buscar/act.php?id=BOE-A-2006-7899)

Furthermore, the Spanish educational system will be geared towards achieving the following ends, amongst others, “Education in respect of fundamental rights and freedoms, **on the equality of rights and opportunities between men and women and on equal treatment** and non-discrimination of the disabled”, “education in the exercise of tolerance and freedom within the democratic principles of coexistence, and in preventing conflicts and their peaceful resolution” (Article 2.b and c). Organic Act 2/2006 on Education, among the objectives of compulsory secondary education (which includes four consecutive years normally between the ages of twelve and sixteen) states “**to know and appreciate the human dimension of sexuality in its full diversity**” (Article 23.k).

Recently Organic Act 8/2013, of 9 December, for improving education quality (*Ley Orgánica 8/2013, de 9 de diciembre, para la mejora de la calidad educativa*) modifies the Organic Act 2/2006 of 3 May on Education (*Ley Orgánica 2/2006, de 3 de mayo, de Educación*)<sup>364</sup>, and approves **a new curriculum with a long implementation calendar. In relation to sexual orientation and gender identity the reform explicitly introduces sanctions for discrimination based on grounds of sexual orientation and gender identity**, as outlined in the new article 124 (2) of the Education Act: “The rules and regulations and conduct of the centres will be mandatory, and must specify the duties of the students and remedial measures in case of default by taking into account their personal situation and conditions.

The corrective measures will have educational and restoring nature, they must ensure the respect for the rights of other students and seek improved relations with all the members of the educational community.

Corrective measures should be proportionate to the misconduct. Behaviour that violates the personal dignity of other members of the educational community, arising or resulting in discrimination or harassment based on gender, sexual orientation or identity, or a religious, ethnic, racial origin, belief or disability, or carried out against the most vulnerable students in their personal, social or educational qualification characteristics will be considered as very serious offense, punishable with corrective action as expulsion, temporarily or permanently from the centre.

Decisions for corrective action regarding the commitment of minor offenses will be immediately enforceable."

It is important to highlight these provisions because they may apply to discrimination of ‘intersex persons’ and show a regulation that forbids any type of discrimination in educational community.

From a health point of view, Section 10 of Health Act 14/1986, 25 of April (*Ley 14/1986, de 25 de*

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<sup>364</sup> Spain (2006), Organic Act 2/2006 of 3 May on Education (*Ley Orgánica 2/2006, de 3 de mayo, de Educación*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2006-7899](http://www.boe.es/buscar/act.php?id=BOE-A-2006-7899).

*abril, General de Sanidad*)<sup>365</sup> establishes that public health administrations must respect the patients' personality, human dignity and privacy, and shall not be discriminated on grounds of racial or ethnic origin, gender and sexual orientation, disability or any other personal or social circumstance.

From a criminal perspective, Section 22(4) of the CP <sup>366</sup> considers an aggravating circumstance committing an offence for discrimination related to ideology, religion or belief of the victim, ethnicity, race or nation to which he belongs, his gender, sexual orientation or identity, illness suffered or disability. Furthermore, it penalises the denial of benefits on the basis of sexual orientation as well as illegal associations, including those promoting discrimination, hatred or violence on grounds of sexual orientation. Currently, the Ministry of Justice has prepared a proposal for the reform of the Spanish Criminal Code, which seeks to modify the institutional response to acts of hatred and incitement to violence on several grounds including sexual orientation.<sup>367</sup>

Regarding the labour and industrial relations framework, Section 4 of the Workers' Statute (*Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores*)<sup>368</sup> establishes that in labour relations workers have, among others, the right to not to be directly or indirectly discriminated in employment, or, once employed, discriminated by reasons of sex, sexual orientation, and right to respect for their privacy and consideration for their dignity, including protection against harassment by reason of sexual orientation, and against sexual and sexist harassment. Dismissals on those grounds will be deemed as void and null. Also within the labour and industrial relations framework, Section 8(12) of the Act on Offences and Penalties in the Social Order, approved by Royal Legislative Decree 5/2000 (*Ley sobre Infracciones y Sanciones en el Orden Social, aprobado por Real Decreto Legislativo 5/2000, de 4 de agosto*)<sup>369</sup> establishes that unilateral business decisions involving direct or indirect discrimination with unfavourable effects with respect to remuneration, working hours, training, promotion and other conditions of work, for, among others, reasons of sex or sexual orientation, are contrary to the principle of equal treatment and non-discrimination and shall be deemed as

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<sup>365</sup> Spain (1986), Health Act 14/1986, 25 of April (*Ley 14/1986, de 25 de abril, General de Sanidad*). Available at: [www.boe.es/buscar/pdf/1986/BOE-A-1986-10499-consolidado.pdf](http://www.boe.es/buscar/pdf/1986/BOE-A-1986-10499-consolidado.pdf) (Hyperlink was accessed on 26 February 2014).

<sup>366</sup> Spain (1995), Organic Act 10/1995 of 23 November on the CP, available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-25444](http://www.boe.es/buscar/act.php?id=BOE-A-1995-25444). Available in English at: [www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html](http://www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html)

<sup>367</sup> Spain (2013), Ministry of Justice (*Ministerio de Justicia*), Draft Bill of the Reform of the Organic Act 10/1995, of 23 of November, of the CP, 20 September 2013, pp. 143-144, available at: [www.mjusticia.gob.es/cs/Satellite/1292421471664?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DPLO\\_C%C3%93DIGO\\_PENAL\\_CM\\_20-09-2013%2C0.PDF.PDF](http://www.mjusticia.gob.es/cs/Satellite/1292421471664?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DPLO_C%C3%93DIGO_PENAL_CM_20-09-2013%2C0.PDF.PDF)

<sup>368</sup> Spain (1995), Royal Decree 1/1995 of 24 March approving the Workers' Statute (*Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores*), available at: [www.boe.es/buscar/act.php?id=BOE-A-1995-7730](http://www.boe.es/buscar/act.php?id=BOE-A-1995-7730)

<sup>369</sup> Spain (2000), Act on Offences and Penalties in the Social Order, approved by Royal Legislative Decree 5/2000 (*Ley sobre Infracciones y Sanciones en el Orden Social, aprobado por Real Decreto Legislativo 5/2000, de 4 de agosto*). Available at: [www.boe.es/buscar/act.php?id=BOE-A-2000-15060&p=20120211&tn=1](http://www.boe.es/buscar/act.php?id=BOE-A-2000-15060&p=20120211&tn=1).

illegal, prosecuted and sanctioned by the Labour Inspection.

The principle of equal treatment and non-discrimination on grounds of sexual orientation and sexual identity is also present in the Statutes of the Autonomous Communities. The Statute that devotes most attention to these questions is that of Andalusia (reformed by Organic Act 2/2007 of 19 March on the Reform of the Statute of Autonomy of Andalusia (*Ley Orgánica 1/2007, de Reforma del Estatuto de Autonomía para Andalucía*))<sup>370</sup> in which Article 14 incorporates a prohibition of discrimination on grounds of sexual orientation: “All forms of discrimination in the exercise of rights, the accomplishment of duties and access to services listed in this Title, particularly discrimination on grounds of gender, ethnic or social origin, language, culture, religion, ideology, genetic characteristics, birth, wealth, disability, age, sexual orientation or any other condition or personal or social circumstance are forbidden. The prohibition of discrimination shall not hinder positive action in favour of disadvantaged sectors, groups or persons”.

In addition to this, Article 35 of the Statute of Andalusia recognises both the right to freedom of sexual orientation and the right to freedom of gender identity: “Everybody is entitled to respect for his/her sexual orientation and his/her gender identity. The public authorities shall promote policies to guarantee the exercise of this right”. Article 37, which deals with the guiding principles for public policy, states in section (1)(2): “The fight against sexism, xenophobia, homophobia and militarism, especially by means of teaching about values and providing education which promotes equality, tolerance, freedom and solidarity”.

The Statute of Catalonia (Act 6/2006 of 19 July on the Reform of the Statute of Autonomy of Catalonia (*Ley Orgánica 6/2006, de 19 de julio, de reforma del Estatuto de Autonomía de Cataluña*))<sup>371</sup> also contains most of these principles and rights. Article 40(7) of the Statute establishes that, “The public authorities shall promote the equality of different forms of stable relationships between couples, taking into account their particularities regardless of the sexual orientation of the partners. The law shall regulate these unions and other forms of coexistence and their effects”. In addition to this, Article 40(8) establishes that, “The public authorities shall promote the equality of all individuals regardless of their origin, nationality, gender, race, religion, social condition or sexual orientation, and promote the eradication of racism, anti-Semitism, xenophobia, homophobia and any other expression that violates people’s equality and dignity”.

The other Statutes of Autonomy also contain important, though fewer, references to this subject.

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<sup>370</sup> Spain (2007), Organic Act 2/2007 of 19 March on the Reform of the Statute of Autonomy of the Autonomous Community of Andalusia (*Ley Orgánica 1/2007, de Reforma del Estatuto de Autonomía para Andalucía*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-5825](http://www.boe.es/buscar/act.php?id=BOE-A-2007-5825)

<sup>371</sup> Spain (2006), Organic Act 6/2006 of 19 July on the Reform of the Statute of Autonomy of Autonomous Community of Catalonia (*Ley Orgánica 6/2006, de 19 de julio, de reforma del Estatuto de Autonomía de Cataluña*) available at: [www.boe.es/buscar/act.php?id=BOE-A-2006-13087](http://www.boe.es/buscar/act.php?id=BOE-A-2006-13087)

Thus, Article 24(d) of the Statute of Aragon (enacted by Organic Act 5/2007 of 20 April on Reform of the Statute of Autonomy of Aragon (*Ley Orgánica 5/2007, de 20 de abril, de Reforma del Estatuto de Autonomía de Aragón*))<sup>372</sup> establishes that Aragon's public authorities shall formulate their policies in accordance with the following objective: "To guarantee the right of everyone not to be discriminated against on grounds of sexual orientation and gender identity".

In addition to this, the Statute of the Balearic Islands (enacted by Organic Act 1/2007 of 28 February on Reform of the Statute of Autonomy of the Balearic Islands (*Ley Orgánica 1/2007, de 28 de febrero, de Reforma del Estatuto de Autonomía de las Illes Balears*))<sup>373</sup> proclaims in Article 27(3) that, "Everybody is entitled not to be discriminated against on grounds of sexual orientation". Similarly, the Statute of Castile and León (enacted by Organic Act 14/2007 of 30 November on Reform of the Statute of Autonomy of Castile and León (*Ley Orgánica 14/2007, de 30 de noviembre, de Reforma del Estatuto de Autonomía de Castilla y León*))<sup>374</sup> states in Article 14(1) that, "Any discrimination on grounds of gender or sexual orientation, either direct or indirect, is forbidden". Finally, the Valencian Community's Statute (enacted by Organic Act 1/2006 of 10 April on Reform of the Organic Law 5/1982 of 1 July on the Statute of Autonomy of the Valencian Community (*Ley Orgánica 1/2006, de 10 de abril, de Reforma de la Ley Orgánica 5/1982, de 1 de julio, de Estatuto de Autonomía de la Comunidad Valenciana*))<sup>375</sup> incorporates an Additional Provision (the Fourth) under which the institutions and administrations of the Community shall avoid offensive or disrespectful expressions about any group of persons for reason of gender or any other social condition "

Certainly, there is no specific regulation against discrimination based on intersexuality (with the exception mentioned), but protection against discrimination, amongst others on grounds of sexual orientation and gender identity, has been developed in different autonomic laws. This is also applicable to 'intersex' persons. For example in Act 2/2008 of 28 May, of the General Canary

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<sup>372</sup> Spain (2007), Organic Act 5/2007 of 20 April on Reform of the Statute of Autonomy of Aragon (*Ley Orgánica 5/2007, de 20 de abril, de Reforma del Estatuto de Autonomía de Aragón*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-8444](http://www.boe.es/buscar/act.php?id=BOE-A-2007-8444) .

<sup>373</sup> Spain (2007), Organic Act 1/2007 of 28 February on Reform of the Statute of Autonomy of the Balearic Islands (*Ley Orgánica 1/2007, de 28 de febrero, de Reforma del Estatuto de Autonomía de las Illes Balears*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-4233](http://www.boe.es/buscar/act.php?id=BOE-A-2007-4233).

<sup>374</sup> Spain (2007), Organic Act 14/2007 of 30 November on Reform of the Statute of Autonomy of Castile and León (*Ley Orgánica 14/2007, de 30 de noviembre, de Reforma del Estatuto de Autonomía de Castilla y León*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-20635](http://www.boe.es/buscar/act.php?id=BOE-A-2007-20635) .

<sup>375</sup> Spain (2006), Organic Act 1/2006 of 10 April on Reform of the Organic Law 5/1982 of 1 July on the Statute of Autonomy of the Valencian Community (*Ley Orgánica 1/2006, de 10 de abril, de Reforma de la Ley Orgánica 5/1982, de 1 de julio, de Estatuto de Autonomía de la Comunidad Valenciana*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2006-6472](http://www.boe.es/buscar/doc.php?id=BOE-A-2006-6472) .

Police Force (*Ley 2/2008, de 28 de mayo, del Cuerpo General de la Policía Canaria*);<sup>376</sup> in Act 3/2008 of 16 June, regulating the Public Corporation “Extremadura Corporation of Audiovisual Means” (*Ley 3/2008, de 16 de junio, reguladora de la Empresa Pública “Corporación Extremeña de Medios Audiovisuales*);<sup>377</sup> in Act 3/2009 of 11 May, concerning the Rights and Duties of Users of the Health System in Murcia (*Ley 3/2009, de 11 de mayo, de los Derechos y deberes de los Usuarios del Sistema Sanitario de Murcia*);<sup>378</sup> in Act 4/2009 of 28 May, concerning institutional advertising in Castilla y León (*Ley 4/2009, de 28 de mayo, de Publicidad institucional de Castilla y León*);<sup>379</sup> or in Act 1/2010 on Equality between women and men on the Canary Islands (*Ley 1/2010, de 26 de febrero, canaria de igualdad entre mujeres y hombres*).<sup>380</sup>

Special mention should be made of Act 12/2009 for gender identity and acknowledgment of transsexual people in Navarra (*Ley Foral 12/2009, de 19 de noviembre, de no discriminación por motivos de identidad de género y de reconocimiento de los derechos de las personas transexuales.- Navarra*).<sup>381</sup> Currently, Andalusian Parliament is discussing a project to pass an Act against discrimination on grounds of gender identity (*Proposición de Ley integral para la no discriminación por motivos de identidad*).<sup>382</sup> The contents of the proposal make no reference to intersex.

The sole Autonomous Community Act making express reference to intersex is Act 14/2012 of 28

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<sup>376</sup> Spain (2008), Act 2/2008 of 28 May, of the General Canary Police Force (*Ley 2/2008, de 28 de mayo, del Cuerpo General de la Policía Canaria*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2008-12494](http://www.boe.es/buscar/doc.php?id=BOE-A-2008-12494).

<sup>377</sup> Spain (2008), Act 3/2008 of 16 June, regulating the Public Corporation “Extremadura Corporation of Audiovisual Means” (*Ley 3/2008, de 16 de junio, reguladora de la Empresa Pública “Corporación Extremeña de Medios Audiovisuales*) available at: [www.canalextramadura.es/sites/default/files/DOE\\_116.pdf](http://www.canalextramadura.es/sites/default/files/DOE_116.pdf).

<sup>378</sup> Spain (2009), Act 3/2009 of 11 May, concerning the Rights and Duties of Users of the Health System in Murcia (*Ley 3/2009, de 11 de mayo, de los Derechos y deberes de los Usuarios del Sistema Sanitario de Murcia*), available at: [www.boe.es/boe/dias/2011/02/09/pdfs/BOE-A-2011-2493.pdf](http://www.boe.es/boe/dias/2011/02/09/pdfs/BOE-A-2011-2493.pdf) (accessed at 26 February 2014).

<sup>379</sup> Spain (2009), Act 4/2009 of 28 May, concerning institutional advertising in Castilla y León (*Ley 4/2009, de 28 de mayo, de Publicidad institucional de Castilla y León*), available at: [www.ccyll.es/export/sites/ccyl/docs/7/leyes/Ley4-2009PublicidadInstitucionalCYL.pdf](http://www.ccyll.es/export/sites/ccyl/docs/7/leyes/Ley4-2009PublicidadInstitucionalCYL.pdf).

<sup>380</sup> Spain (2010), Act 1/2010 Equality Act between women and men on the Canary Islands (*Ley 1/2010, de 26 de febrero, canaria de igualdad entre mujeres y hombres*). Available at: [www.boe.es/boe/dias/2010/03/18/pdfs/BOE-A-2010-4518.pdf](http://www.boe.es/boe/dias/2010/03/18/pdfs/BOE-A-2010-4518.pdf) (Hyperlink was accessed on 25 February 2014).

<sup>381</sup> Spain (2009), Act 12/2009 for gender identity and acknowledgment of transsexual people in Navarra (*Ley Foral 12/2009, de 19 de noviembre, de no discriminación por motivos de identidad de género y de reconocimiento de los derechos de las personas transexuales.- Navarra*). Available at: <https://www.boe.es/boe/dias/2009/12/22/pdfs/BOE-A-2009-20656.pdf>

<sup>382</sup> Spain, Autonomous Community of Andalusia (2014), Proposal at the Andalusian Parliament aiming to pass an Act against discrimination for gender issues (*Proposición de Ley integral para la no discriminación por motivos de identidad*), Available at: [www.parlamentodeandalucia.es/webdinamica/portal-web-parlamento/pdf.do?tipodoc=bopa&id=88773](http://www.parlamentodeandalucia.es/webdinamica/portal-web-parlamento/pdf.do?tipodoc=bopa&id=88773) (Hyperlink was accessed on 25 February 2014).

June, on non-discrimination based on gender identity and recognition of the rights of transgender people in the Basque Country.<sup>383</sup> It aims to ensure the right of transsexual people to receive from the Basque administration a comprehensive and appropriate attention to their medical, psychological, legal and otherwise needs, on equal terms with other citizens. Even though the Act is specifically addressed to transsexual people, Section 6(4) establishes that intersex individuals will be entitled to access the following services:

a) Information, guidance and advice, including legal assessment, to intersex individuals and their families in order to provide for needs specifically related to their status.

b) To promote the defence of their rights and fighting all sorts of discrimination suffered within the social, cultural, labour or educational scope.

Furthermore, and according to this same Section, participation in public services of associations of intersex people, and organisations working in the field of gender identity, will be promoted. Finally, it establishes that a person whose gender identity is female and who is a victim of male violence, will have access, on equal terms to the existing healthcare resources.

Nonetheless, even though national and regional regulations do not explicitly forbid discrimination on ground of ‘intersex’, the existing common framework on equal treatment, as set by the Spanish Constitution and other regulations, shall be applicable to intersex individuals, as those concepts have been defined broadly. Although, according to the data contained in the official database of the Ministry of Justice (CENDOJ) and the Constitutional Court, no decisions issued by the Constitutional Court, the Supreme Court, or any of the Regional Supreme Courts have so far been published regarding discrimination on ground of intersex, the Courts have ruled out that general legislation on equal treatment and non-discrimination is fully applicable before any sort of discrimination due to gender or sexual orientation in previous cases.

Therefore, even though discrimination on ground of ‘intersex’ is not explicitly covered by the law, the State laws and Court Decisions quoted, among others, implicitly provide sufficient ground to protect an intersex individual against discrimination due to his/her condition.

**B) Is intersex discrimination covered under national non-discrimination policies? If so, how? Please provide evidence, links and references to policies in this area.**

The Spanish Ministry of Health, Social Services and Equality, among other competences, is the national body in charge of proposing and implementing government policies on equality, and to

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<sup>383</sup> Spain (2012), Act 14/2012, 28 of June, non-discrimination based on gender identity and recognition of the rights of transgender people in the Basque Country (*Ley 14/2012, de 28 de junio, de no discriminación por motivos de identidad de género y de reconocimiento de los derechos de las personas transexuales*). Available at: [www.boe.es/boe/dias/2012/07/19/pdfs/BOE-A-2012-9664.pdf](http://www.boe.es/boe/dias/2012/07/19/pdfs/BOE-A-2012-9664.pdf).

combat all forms of discrimination and gender violence. Policies are implemented by the Ministry itself, or by several autonomous bodies such as the Women's Institute.

Regarding those policies, in 2008 the Ministry of Health created the Anti-discrimination Resources Centre - CREADI (*Centro de Recursos Antidiscriminación*),<sup>384</sup> where several reports and sources of information are available. The main non-discrimination documents issued by the Ministry or its relevant autonomous bodies are the following:

- 2013-2016 National Strategy for the Eradication of Violence against Women (*Estrategia nacional para la erradicación de la violencia contra las mujeres*);<sup>385</sup>
- 2013 Diagnostic study of secondary sources on discrimination in Spain (*Estudio diagnóstico de fuentes secundarias sobre la discriminación en España*);<sup>386</sup>
- 2011 Comprehensive Strategy against Racism, Racial Discrimination, Xenophobia and related Intolerance (*Estrategia integral contra el racismo, discriminación racial, xenofobia y otras formas conexas de intolerancia*);<sup>387</sup>
- 2011 Report on the National Strategy for Sexual and Reproductive Health (*Estrategia Nacional de Salud Sexual y Reproductiva*);<sup>388</sup>
- 2007 Strategy on normal birth care in the National Health System (*Estrategia de atención al*

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<sup>384</sup> Spain, Ministry of Health, Anti-discrimination Resources Centre - CREADI (*Centro de Recursos Antidiscriminación*). Available at: <http://explotacion.mtin.gob.es/oberaxe/inicio> (Hyperlink was accessed on 24 February 2014).

<sup>385</sup> Spain, Ministry of Health, Anti-discrimination Resources Centre - CREADI (*Centro de Recursos Antidiscriminación*). (2013), 2013-2016 National Strategy for the Eradication of Violence against Women (*Estrategia nacional para la erradicación de la violencia contra las mujeres*) Available at: [www.msssi.gob.es/ssi/violenciaGenero/EstrategiaNacional/pdf/EstrategiaNacionalCastellano.pdf](http://www.msssi.gob.es/ssi/violenciaGenero/EstrategiaNacional/pdf/EstrategiaNacionalCastellano.pdf) English version: [www.msssi.gob.es/ssi/violenciaGenero/EstrategiaNacional/pdf/Estrategia\\_Nacional\\_Ingles.pdf](http://www.msssi.gob.es/ssi/violenciaGenero/EstrategiaNacional/pdf/Estrategia_Nacional_Ingles.pdf) (All hyperlinks were accessed on 24 February 2014).

<sup>386</sup> Spain, Ministry of Health, Anti-discrimination Resources Centre - CREADI (*Centro de Recursos Antidiscriminación*). (2013), 2013 Diagnostic study of secondary sources about discrimination in Spain (*Estudio diagnóstico de fuentes secundarias sobre la discriminación en España*). Available at: [www.msssi.gob.es/ssi/igualdadOportunidades/noDiscriminacion/documentos/r\\_Ingles\\_vf.pdf](http://www.msssi.gob.es/ssi/igualdadOportunidades/noDiscriminacion/documentos/r_Ingles_vf.pdf) English version: [www.msssi.gob.es/ssi/igualdadOportunidades/noDiscriminacion/documentos/resum\\_ingles\\_discrim.pdf](http://www.msssi.gob.es/ssi/igualdadOportunidades/noDiscriminacion/documentos/resum_ingles_discrim.pdf) (All hyperlinks were accessed on 24 February 2014).

<sup>387</sup> Spain, Ministry of Health, Anti-discrimination Resources Centre - CREADI (*Centro de Recursos Antidiscriminación*). (2011), 2011 Comprehensive Strategy against Racism, Racial Discrimination, Xenophobia and related Intolerance (*Estrategia integral contra el racismo, discriminación racial, xenofobia y otras formas conexas de intolerancia*) Available at: [http://explotacion.mtin.gob.es/oberaxe/inicio\\_descargaFichero.action?bibliotecaDatoId=211](http://explotacion.mtin.gob.es/oberaxe/inicio_descargaFichero.action?bibliotecaDatoId=211) (Hyperlink was accessed on 24 February 2014).

<sup>388</sup> Spain, Ministry of Health, Anti-discrimination Resources Centre - CREADI (*Centro de Recursos Antidiscriminación*). (2011), 2011 Sexual and reproductive National Strategy report (*Estrategia Nacional de Salud Sexual y Reproductiva*). Available at: [www.msssi.gob.es/organizacion/sns/planCalidadSNS/pdf/equidad/ENSSR.pdf](http://www.msssi.gob.es/organizacion/sns/planCalidadSNS/pdf/equidad/ENSSR.pdf) (Hyperlink was accessed on 24 February 2014).

*parto normal en el Sistema Nacional de Salud*);<sup>389</sup>

None of them contain any reference to intersex. Thus, there are no data regarding intersex discrimination under national non-discrimination policies.<sup>390</sup>

**C) Is it allowed in the respective EUMS that children remain without a gender marker/identification on their birth certificates, and if so, until which age and under which conditions? Please provide detailed information and references.**

According to Section 43 of the Civil Registry Act into force,<sup>391</sup> doctors or midwives attending birth have to immediately communicate it in writing to the Civil Registry. Section 41 of this Act, as well as Sections 167 and 170 of the Decree of 14 November 1958, passing Regulations on the Civil Registry Act,<sup>392</sup> establish that birth registration must contain the first name and name according to its filiation, place, date and hour of birth, and the sex of the new-born. Inscription in the Registry has to be performed within 24 hours after birth, up to a maximum delay of 8 days pursuant to Section 42 of the Civil Registry Act,<sup>393</sup> by their parents, relatives or fostering home. Thus, there is no possibility of leaving a period to determine the sex.

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<sup>389</sup> Spain, Ministry of Health, Anti-discrimination Resources Centre - CREADI (*Centro de Recursos Antidiscriminación*). (2007), 2007 Strategy of normal birth care in the National Health System (*Estrategia de atención al parto normal en el Sistema Nacional de Salud*) Available at: [www.msssi.gob.es/organizacion/sns/planCalidadSNS/pdf/equidad/estrategiaPartoEnero2008.pdf](http://www.msssi.gob.es/organizacion/sns/planCalidadSNS/pdf/equidad/estrategiaPartoEnero2008.pdf) (Hyperlink was accessed on 24 February 2014).

<sup>390</sup> We have consulted: Report on measures to combat discrimination, country report 2012, Spain, [www.accem.es/ficheros/documentos/pdf\\_noticias/2013\\_pdf/Noticias%20Igualdad%20y%20No%20Discriminaci%C3%B3n/2012-ES-Country%20Report%20LN\\_final.pdf](http://www.accem.es/ficheros/documentos/pdf_noticias/2013_pdf/Noticias%20Igualdad%20y%20No%20Discriminaci%C3%B3n/2012-ES-Country%20Report%20LN_final.pdf); Commission against Racism and Intolerance Fourth Report about Spain (*Cuarto Informe sobre España*) [www.coe.int/t/dghl/monitoring/ecri/country-by-country/spain/ESP-CBC-IV-2011-004-ESP.pdf](http://www.coe.int/t/dghl/monitoring/ecri/country-by-country/spain/ESP-CBC-IV-2011-004-ESP.pdf); United Nations (2013), Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/144/78/PDF/G1314478.pdf?OpenElement>; Spain, Ministry of Health, Social Services and Equality (*Ministerio de Sanidad, Servicios Sociales e Igualdad*), [www.msssi.gob.es/organizacion/ministerio/directorio/cont\\_directorio.htm](http://www.msssi.gob.es/organizacion/ministerio/directorio/cont_directorio.htm); Spain, State Federation of Lesbians, Gays, Transsexuals and Bisexuals (*Federación Estatal de Lesbianas, Gays, Transexuales y Bisexuales*) and Madrid Lesbian, Gay, Transgender and Bisexual Community, (*Colectivo de lesbianas, gays, transexuales y bisexuales de Madrid*) COGAM, 2013 Research on discrimination on grounds of sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*), available at: [www.felgtb.org/temas/laboral/documentacion/i/3773/359/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana](http://www.felgtb.org/temas/laboral/documentacion/i/3773/359/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana)

<sup>391</sup> Spain, (1957) Civil Registry Act (*Ley de 8 de junio de 1957 sobre el Registro Civil*). Available at: [www.boe.es/buscar/pdf/1957/BOE-A-1957-7537-consolidado.pdf](http://www.boe.es/buscar/pdf/1957/BOE-A-1957-7537-consolidado.pdf) (All hyperlinks were accessed on 26 February 2014).

<sup>392</sup> Spain, (1958) Decree of 14 November 1958, approving Regulations on the Civil Registry Act (*Decreto de 14 de noviembre de 1958 por el que se aprueba el Reglamento de la Ley del Registro Civil*). Available at: <https://www.boe.es/buscar/act.php?id=BOE-A-1958-18486>

<sup>393</sup> Spain, (1957) Civil Registry Act (*Ley de 8 de junio de 1957 sobre el Registro Civil*). Available at: [www.boe.es/buscar/pdf/1957/BOE-A-1957-7537-consolidado.pdf](http://www.boe.es/buscar/pdf/1957/BOE-A-1957-7537-consolidado.pdf)

On July 2011, a new Civil Registry Act<sup>394</sup> was passed by Parliament, which shall enter into force on July 2014. Sections 44.2 and 49 of the above said Act equally establish that birth registration must contain the first name and name according to its filiation, place, date and hour of birth, and sex of the new-born. This Act contains no special provision regarding intersex individuals and, thus, the birth certificate must still contain a timely sex assignment.

Regarding this question, Section 4 of Act 3/2007, of 15 March 2007, regulating the gender rectification of registration<sup>395</sup> specifically establishes that any Spanish citizen of age is entitled to modify his/her entitled sex as far as the following conditions are met:

- a) The applicant has been diagnosed with gender dysphoria, and shall demonstrate: 1. The existence of dissonance between morphological or physiological gender sex initially registered, and gender identity felt by the applicant or psychosocial sex, as well as the stability and persistence of this dissonance; 2. the absence of personality disorders that could influence, in a decisive way, the existence of dissonance.
- b) The applicant has been medically treated for, at least, two years to accommodate the corresponding physical sex characteristics as claimed. It shall not be necessary that, in order to modify the registered sex, the applicant must have received sexual reassignment surgery when certain health or age conditions preclude it.

This provision implies that two requirements are necessary: a) the gender dysphoria diagnostic, and b) a medical treatment for at least two years

Regarding the second requirement, it implies that 'intersex' persons need a medical treatment for at least two years to obtain a legal change of their sex in the Civil Registry, although having undergone surgery is not necessary in every case. In this sense, they can obtain the change without a sexual reassignment surgery when certain health or age conditions preclude it. Nevertheless, in the two cases (with or without reassignment surgery) it is necessary to follow the medical treatment for at least two years. Therefore a 'intersex' person in order to obtain legal change of the sex in the Civil Registry without a sexual reassignment surgery (when health or age conditions preclude it) also needs a medical treatment of at least two years.

## **2) Are surgical and medical interventions performed on intersex people in your country?**

### **A) If so, please specify:**

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<sup>394</sup> Spain, (2011) Act 20/2011, of 21 July, on the Civil Registry (*Ley 20/2011, de 21 de julio, del Registro Civil*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2011-12628](http://www.boe.es/buscar/act.php?id=BOE-A-2011-12628)

<sup>395</sup> Spain, (2007) Act 3/2007, of 15 March 2007, regulating the rectification of gender registration (*Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas*). Available at: [www.boe.es/buscar/pdf/2007/BOE-A-2007-5585-consolidado.pdf](http://www.boe.es/buscar/pdf/2007/BOE-A-2007-5585-consolidado.pdf) (Hyperlink was accessed on 26 February 2014).

**(a) the legal basis (or: legal grounds) for such interventions**

Even though there are no specific provisions regarding surgical and medical interventions on intersex people, according to the existing legal framework, those shall be performed in Spain, both by private hospitals or by the National Health System.

Regarding both public and private hospitals, the legal requirement to be met is to obtain the full and valid consent of a patient of age, as established by the Basic Act on the autonomy of the patient and on the rights and obligations regarding clinical information and documentation, Act 41/2002 of 14 November 2002.<sup>396</sup> Pursuant to Section 17 of the Health Act 14/1986, 25 of April,<sup>397</sup> expenses incurred by attending a private hospital or different health services than those assigned, shall not be covered by the National Health Service and, thus, must be paid by the patient.

Moreover, regarding Public Services, it must be stressed that interventions on Gender Identity Disorders (specifically, on transsexual individuals) are performed by the Autonomous Communities Health Services and that conditions to access those interventions may vary. Usually those are, among others previously quoted, to have legal residence within its territory during a minimum period of time. Services provided may vary, as Autonomous Communities Governments define and decide which benefits are granted in these cases. Pursuant to Royal Decree 1302/2006 of 10 November 2006, that establishes the basis of the procedure to designate and accredit centres, departments and units of reference of the National Health Service<sup>398</sup> those operations shall be performed within the National Health System by certain Designated Centres, Departments and Units of reference (*CSUR - Centros, Servicios y Unidades de Referencia*). Currently in Spain there are several Autonomous Communities with specific gender units (among others, Andalusia, Catalonia, Madrid, Aragón, Asturias, Basque Country, Valencian Community, Canary Islands, and Navarre), staffed by psychiatrists and psychologists, endocrinologists and surgeons. Requirements in order to become a CSUR gender unit are set by the National Health Services.<sup>399</sup>

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<sup>396</sup> Spain (2002), Basic Act on the autonomy of the patient and the rights and obligations regarding clinical information and documentation, Act 41/2002 of 14 November 2002 (*Ley 41/2002, de 14 de noviembre, básica reguladora de la autonomía del paciente y de derechos y obligaciones en materia de información y documentación clínica*). Available at: [www.boe.es/buscar/pdf/2002/BOE-A-2002-22188-consolidado.pdf](http://www.boe.es/buscar/pdf/2002/BOE-A-2002-22188-consolidado.pdf) (All hyperlinks were accessed on 24 February 2014).

<sup>397</sup> Spain, (1986) Health Act 14/1986, 25 of April (*Ley 14/1986, de 25 de abril, General de Sanidad*). Available at: [www.boe.es/buscar/pdf/1986/BOE-A-1986-10499-consolidado.pdf](http://www.boe.es/buscar/pdf/1986/BOE-A-1986-10499-consolidado.pdf)

<sup>398</sup> Spain, (2006) Royal Decree 1302/2006 of 10 November 2006, that establishes the foundations of the procedure to designate and accredit centres, departments and units of reference of the National Health Service (*Real Decreto 1302/2006, de 10 de noviembre, por el que se establecen las bases del procedimiento para la designación y acreditación de los centros, servicios y unidades de referencia del Sistema Nacional de Salud*). Available at: [www.boe.es/boe/dias/2006/11/11/pdfs/A39503-39505.pdf](http://www.boe.es/boe/dias/2006/11/11/pdfs/A39503-39505.pdf) (Hyperlink was accessed on 26 February 2014). English version: [www.msssi.gob.es/profesionales/CentrosDeReferencia/docs/RD\\_CSUR\\_EV.pdf](http://www.msssi.gob.es/profesionales/CentrosDeReferencia/docs/RD_CSUR_EV.pdf) (accessed at 26 February 2014).

<sup>399</sup> Spain, National Health Service, Inter-territorial Council, Criteria adopted by Inter-territorial Council which must be respected by CSUR to be a reference centre in the National Health System (*Criterios acordados por el Consejo*

Regarding the payment of the interventions, Section 4 and Addendum 3 of the Royal Decree 63/1995, on health benefits of the National Health System,<sup>400</sup> established that sex change surgery was not to be funded or performed by the National Health System, unless it was reconstructive surgery for intersex pathological states. Thus, interventions on intersex people had legal grounds to be performed. Royal Decree 63/1995 was superseded, in September 2006, by Act 1030/2006 of 15 September 2006 on National Health Common Services and its updated procedures.<sup>401</sup>

Even though this last Act does not contain a similar literal provision, according to the interpretation of the Supreme Court Order 5933/2013, 23 May 2013, Social Court,<sup>402</sup> intersex surgical interventions are covered by the general provisions laid down in Annex 3, section 7, section 5.5, under “Mental health care: mental disorders, mental health care, including organic psychoses, other psychoses, neurotic disorders, personality disorders and other nonpsychotic mental disorders and mental retardation.”

**(b) the medical protocols or procedures applicable in such situations. On what medical ground(s)<sup>403</sup> could such interventions take place?**

There is no common medical protocol established by the Ministry of Health to be applied in such situations to intersex individuals, even though there are several medical protocols with procedures regarding such situations, such as the protocol of the Spanish Association of Paediatrics (*Asociación Española de Pediatría*)<sup>404</sup> or the protocol of the European Association of Urology.<sup>405</sup>

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*Interterritorial que deben cumplir los CSUR para ser designados como referencia del Sistema Nacional de Salud*). Available at: [www.msssi.gob.es/gl/profesionales/CentrosDeReferencia/docs/Fesp/Fesp24.pdf](http://www.msssi.gob.es/gl/profesionales/CentrosDeReferencia/docs/Fesp/Fesp24.pdf). English version at: [www.msssi.gob.es/en/profesionales/CentrosDeReferencia/docs/Fenglish/Fenglish24.pdf](http://www.msssi.gob.es/en/profesionales/CentrosDeReferencia/docs/Fenglish/Fenglish24.pdf) (Hyperlink was accessed on 26 February 2014)

<sup>400</sup> Spain, (1995) Royal Decree 63/1995, on health benefits of the National Health System (*Real Decreto 63/1995, de 20 de enero, sobre ordenación de prestaciones sanitarias del Sistema Nacional de Salud*). Available at: [www.boe.es/boe/dias/1995/02/10/pdfs/A04538-04543.pdf](http://www.boe.es/boe/dias/1995/02/10/pdfs/A04538-04543.pdf) (Hyperlink was accessed on 26 February 2014).

<sup>401</sup> Spain, (2006) Act 1030/2006 of 15 September 2006 on National Health Common Services and its update procedures (*Real Decreto 1030/2006, de 15 de septiembre, por el que se establece la cartera de servicios comunes del Sistema Nacional de Salud y el procedimiento para su actualización*). Available at: [www.boe.es/buscar/pdf/2006/BOE-A-2006-16212-consolidado.pdf](http://www.boe.es/buscar/pdf/2006/BOE-A-2006-16212-consolidado.pdf) (Hyperlink was accessed on 26 February 2014).

<sup>402</sup> Supreme Court Order 5933/2013, 23 May 2013, Social Court. Available at: [www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=6772771&links=intersexualidad&optimize=20130701&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=6772771&links=intersexualidad&optimize=20130701&publicinterface=true) (Hyperlink was accessed on 26 February 2014).

<sup>403</sup> Other than those necessary to sustain the physical health of the person, for example in a life threatening situation at birth.

<sup>404</sup> Spanish Association of Pediatrics (*Asociación Española de Pediatría*) (2011), *Anomalies of sexual differentiation, (Anomalías de la diferenciación sexual)* [www.aeped.es/sites/default/files/documentos/01\\_anomalias\\_de\\_la\\_diferenciacion\\_sexual.pdf](http://www.aeped.es/sites/default/files/documentos/01_anomalias_de_la_diferenciacion_sexual.pdf) (Hyperlink was accessed on 26 February 2014).

<sup>405</sup> European Association of Urology (2010), (*Guía clínica sobre urología pediátrica*), available at: [www.uroweb.org/gls/pdf/spanish/14-%20GUIA%20CLINICA%20SOBRE%20UROLOGIA%20PEDIATRICA.pdf](http://www.uroweb.org/gls/pdf/spanish/14-%20GUIA%20CLINICA%20SOBRE%20UROLOGIA%20PEDIATRICA.pdf) (Hyperlink was accessed on 26 February 2014).

However, it has to be stressed that the common framework set for transsexual operations shall apply and interventions shall be performed at the National Health System by the Designated Centres, Departments and Units of reference (*CSUR- Centros, Servicios y Unidades de Referencia*). Most of the doctors performing services within those units agreed to establish, in 2002, within the framework of the Spanish Society of Endocrinology, a Clinical Guide on gender identity disorders (*Trastornos de identidad de género: guía clínica para el diagnóstico y tratamiento*).<sup>406</sup> According to this guide, the following conditions have to be met in order to be eligible for surgery:

- A year of continuous hormonal treatment, if there are no medical contraindications.
- A year of real life experience with continuous success.
- If mental health professionals (psychologist, psychiatrist) so require, responsible regular participation in a psychotherapy programme for real life experience.
- The candidate must demonstrate knowledge of the different types of interventions, costs, duration of hospitalization, complications and postoperative rehabilitation after intervention.
- Informed consent.
- To meet different surgical teams capable of performing the interventions.

Moreover, the candidate will have to:

- Demonstrate progress in consolidating his/her sexual identity.
- Demonstrate improvement in his/her way of facing personal problems (lack of sociopathies, substance abuse, psychosis, suicide attempts etc.) and interest in improving his/her family and work relationships.

Finally, it must be stressed that, on 2011, the Autonomous Community of Canary Islands released a Transsexual Healthcare Protocol (*Protocolo de Atención sanitaria a personas transexuales*),<sup>407</sup> based on most of the contents of the above-mentioned guide.

**B) If the aforementioned surgeries or medical interventions are carried out in the respective EUMS, is the fully informed consent of the parties concerned required by law or by protocol – and who are those interested parties considered to be (parents/guardians etcetera)?**

There is no specific regulation regarding legal consent on surgery or medical interventions on intersex people.

Therefore, if an intervention to an intersex individual has to be performed, the general legislation

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<sup>406</sup> Spanish Society of Endocrinology (2002), Clinical guide on gender identity disorders (*Trastornos de identidad de género: guía clínica para el diagnóstico y tratamiento*). Available at: [http://apps.elsevier.es/watermark/ctl\\_servlet?f=10&pident\\_articulo=13042311&pident\\_usuario=0&pcontactid=&pident\\_revista=12&ty=141&accion=L&origen=zonadelectura&web=zl.elsevier.es&lan=es&fichero=12v50n01a13042311p df001.pdf](http://apps.elsevier.es/watermark/ctl_servlet?f=10&pident_articulo=13042311&pident_usuario=0&pcontactid=&pident_revista=12&ty=141&accion=L&origen=zonadelectura&web=zl.elsevier.es&lan=es&fichero=12v50n01a13042311p df001.pdf) (Hyperlink was accessed on t 26 February 2014).

<sup>407</sup> Spain, Community of Canary Islands (2011), Transsexual Healthcare Protocol (*Protocolo de Atención sanitaria a personas transexuales*) Available at: [www2.gobiernodecanarias.org/sanidad/scs/content/4ada6ae2-5a01-11e0-ad52-6f89eca32045/ProtocoloAtencionTransexuales.pdf](http://www2.gobiernodecanarias.org/sanidad/scs/content/4ada6ae2-5a01-11e0-ad52-6f89eca32045/ProtocoloAtencionTransexuales.pdf) (Hyperlink was accessed on 26 February 2014).

established by the Basic Act on the autonomy of the patient and on the rights and obligations regarding clinical information and documentation, Act 41/2002 of 14 November 2002,<sup>408</sup> shall apply.

Section 8 of the Basic Act on the autonomy of the patient and the rights and obligations regarding clinical information and documentation, Act 41/2002 of 14 November 2002,<sup>409</sup> establishes that all actions regarding the health of a patient need the free and voluntary consent of the affected party once he or she has assessed the available options after having received proper information from his/her doctor. Even though the consent shall be verbal as general rule, it must be given in writing in the following cases: surgical operation, invasive diagnostic and therapeutic procedures and, in general, application of procedures involving risks and inconveniences having notable and foreseeable negative repercussions on the health of the patient. Written consent from the patient shall be necessary for each of the actions specified. The patient shall be freely able to revoke his/her consent in writing at any moment. In order to obtain the consent in writing, pursuant to Section 10, the doctor shall, before obtaining it, provide the patient with the following basic information: a) the relevant or important consequences of the intervention with regards to safety; b) the risks related to the personal or professional circumstances of the patient; c) the probable risks under normal conditions, in accordance with experience and the state of science, directly related to the type of intervention; and d) the contraindications.

Pursuant to Section 9 of the Basic Act on the autonomy of the patient and the rights and obligations regarding clinical information and documentation, Act 41/2002 of 14 November 2002,<sup>410</sup> doctors shall be able to carry out essential clinical interventions in favour of the patient's health without any need to have his or her consent when there exists a risk for public health on account of the health reasons set by the Law, or when there exists an immediate serious risk for the physical or mental integrity of the patient and it is not possible to obtain his or her authorisation, in which case, and when circumstances so permit, his or her relatives or persons with *de facto* ties to the patient shall be consulted.

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<sup>408</sup> Spain (2002), Basic Act on the autonomy of the patient and on the rights and obligations regarding clinical information and documentation, Act 41/2002 of 14 November 2002 (*Ley 41/2002, de 14 de noviembre, básica reguladora de la autonomía del paciente y de derechos y obligaciones en materia de información y documentación clínica*). Available at: [www.boe.es/buscar/pdf/2002/BOE-A-2002-22188-consolidado.pdf](http://www.boe.es/buscar/pdf/2002/BOE-A-2002-22188-consolidado.pdf)

<sup>409</sup> Spain (2002), Basic Act on the autonomy of the patient and on the rights and obligations regarding clinical information and documentation, Act 41/2002 of 14 November 2002 (*Ley 41/2002, de 14 de noviembre, básica reguladora de la autonomía del paciente y de derechos y obligaciones en materia de información y documentación clínica*). Available at: [www.boe.es/buscar/pdf/2002/BOE-A-2002-22188-consolidado.pdf](http://www.boe.es/buscar/pdf/2002/BOE-A-2002-22188-consolidado.pdf).

<sup>410</sup> Spain (2002), Basic Act on the autonomy of the patient and on the rights and obligations regarding clinical information and documentation, Act 41/2002 of 14 November 2002 (*Ley 41/2002, de 14 de noviembre, básica reguladora de la autonomía del paciente y de derechos y obligaciones en materia de información y documentación clínica*). Available at: [www.boe.es/buscar/pdf/2002/BOE-A-2002-22188-consolidado.pdf](http://www.boe.es/buscar/pdf/2002/BOE-A-2002-22188-consolidado.pdf).

If operations are performed without valid consent, Section 156 of the CP<sup>411</sup> establishes that, “valid free, conscious and specifically expressed consent shall exempt from criminal accountability in cases of organ transplants carried out pursuant to the terms of the Law, sterilisations and transsexual surgery carried out by a surgeon, except if the consent obtained is flawed, or obtained by price or reward, or when the person consenting is a minor or incapacitated person, in which case the consent provided by these or their legal representatives shall not be valid”.

**(a) if this fully informed consent is required, is any explicit reference made to a certain age of consent? (under national law and/or medical protocol)?**

There is no specific legal provision regarding consent issued by an intersex individual and, accordingly, general provisions apply. Section 9.3 of the Basic Act on the autonomy of the patient and the rights and obligations regarding clinical information and documentation, Act 41/2002 of 14 November 2002<sup>412</sup> determines that minors who are neither incapable nor disqualified, but emancipated or over the age of sixteen shall be able to issue the consent themselves. Nevertheless, in the case of action entailing serious risk, in the opinion of the doctor, the parents shall be informed and their opinion shall be taken into account for taking the appropriate decision.

**(b) is the fully informed consent sought from the intersex person him/herself or are parents/guardians/legal representatives of the intersex person granted the right to consent on the persons’ behalf?**

As previously stated, there is no specific provision regarding consent issued by an intersex person and, thus, general provisions apply in which when the patient is over 16 he/she is entitled to freely issue fully informed consent.

Nonetheless, pursuant to Section 9.3 of the Basic Act on the autonomy of the patient and on the rights and obligations in matters of clinical information and documentation, Act 41/2002 of 14 November 2002,<sup>413</sup> consent by representation shall be granted in the following situations: a) when the patient is not capable of taking decisions in the opinion of the doctor in charge of the case, or his or her physical or mental state does not permit the patient to take charge of the situation. If the patient lacks a legal representative, the consent shall be granted by virtue of relationship or *de facto* reasons; b) when the patient is legally disqualified; and c) when the patient is under 16 and is neither

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<sup>411</sup> Spain, (1995), CP, available at: [www.boe.es/buscar/pdf/1995/BOE-A-1995-25444-consolidado.pdf](http://www.boe.es/buscar/pdf/1995/BOE-A-1995-25444-consolidado.pdf). English version: [www.mjusticia.gob.es/cs/Satellite/1292417756327?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DCriminal\\_Code\\_%28Codigo\\_Penal%29.PDF](http://www.mjusticia.gob.es/cs/Satellite/1292417756327?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DCriminal_Code_%28Codigo_Penal%29.PDF)

<sup>412</sup> Spain (2002), Basic Act on the autonomy of the patient and the rights and obligations regarding clinical information and documentation, Act 41/2002 of 14 November 2002 (*Ley 41/2002, de 14 de noviembre, básica reguladora de la autonomía del paciente y de derechos y obligaciones en materia de información y documentación clínica*). Available at: [www.boe.es/buscar/pdf/2002/BOE-A-2002-22188-consolidado.pdf](http://www.boe.es/buscar/pdf/2002/BOE-A-2002-22188-consolidado.pdf)

<sup>413</sup> Spain (2002), Basic Act on the autonomy of the patient and the rights and obligations regarding clinical information and documentation, Act 41/2002 of 14 November 2002 (*Ley 41/2002, de 14 de noviembre, básica reguladora de la autonomía del paciente y de derechos y obligaciones en materia de información y documentación clínica*). Available at: [www.boe.es/buscar/pdf/2002/BOE-A-2002-22188-consolidado.pdf](http://www.boe.es/buscar/pdf/2002/BOE-A-2002-22188-consolidado.pdf).

intellectually nor emotionally capable of understanding the scope of the intervention.

## Annex 1 – Case law

Chapter A, the interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 1

Case title	Spanish Constitutional Court, (Second Chamber) Judgment 41/2006 13 February 2006 ( <i>Sentencia Tribunal Constitucional núm. 41/2006 (Sala Segunda ), de 13 de febrero</i> ) <sup>414</sup>
Decision date	13 February 2006
Reference details (type and title of court/body; in original language and English (official	Tribunal Constitucional ( <i>Constitutional Court</i> ) Constitutional jurisdiction, Appeal no. 5038/2003, Rapporteur: Mrs Elisa Pérez Vera
Key facts of the case (max. 500 chars)	The appellant suffered insults because of his way of dressing and was overburdened with duties as a consequence of how the distribution of tasks was planned. He even needed medical treatment as a result of the anxiety he suffered after his dismissal. The appellant alleged violation of the fundamental right to equality, having been dismissed for several reasons (such as poor discipline, criticism of the management, mistakes at work with electronic mail, etc.) which, in his opinion, concealed a discharge based on discrimination because of his homosexuality. The High Court of Justice of Catalonia did not protect his rights.

<sup>414</sup> Spain, Spanish Constitutional Court (*Tribunal Constitucional*) (Second Chamber) Judgment 41/2006 13 February 2006 (*Sentencia 41/2006, de 13 de febrero*), available at: <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/5643>

<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>Referring to abundant constitutional case law, the Court determined that the appellant had been the victim of conduct on the part of his employer which was contrary to the fundamental right to non-discrimination (Article 14 of the Spanish Constitution). The Court made the following points:</p> <p>The applicant established facts from which it could be deduced that there was discriminatory treatment, which was the true reason for the dismissal (conflicting relationship with his bosses, deliberate overburdening of the plaintiff in terms of duties).</p> <p>These indications were enough to shift the burden of proof. In addition, they were not sufficiently refuted by the company either in the dismissal letter or through the evidence brought in the procedure (not able to prove that the dismissal had nothing to do with discrimination).</p> <p>The arguments used to justify the decision appealed ignored the consolidated doctrine of the Court concerning the reversal of the burden of proof in a labour lawsuit.</p> <p>On the basis of all these reasons, the Court ruled in favour of the appellant, confirming the violation of the right of the complainant, declaring the dismissal to be null and overruling the appealed decision.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>DISCRIMINATION. Specific discrimination concerning any personal, family or social circumstance; sexual orientation; unlawful dismissal of homosexual employee, based on several reasons; proof by indications and reversal of the burden of proof; proven indications that the company was not able to refute; unproven contractual breaches; lack of proof to show that the real reasons for the dismissal were not related to a discriminatory motivation: existence of discrimination.</p> <p>Violation of the Fundamental right to equality: yes: claim admitted.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The Court upheld the appeal.</p> <p>The Court acknowledged the violation of the right of the appellant not to be discriminated against because of his homosexuality (Article 14 of the Spanish Constitution).</p> <p>The right of the appellant was protected, overruling the appealed decision.</p> <p>The dismissal was declared null and void. Therefore, the consequence was the obligation to reinstate the employee in his/her original employment position and the payment of the missing salary amounts from dismissal to reemployment.</p>

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 2

Case title	Decision 222/2005 of Provincial Court of Ciudad Real Section 1 17 October 2005 ( <i>Auto no. 222/2005 de la Audiencia Provincial de Ciudad Real (Sección 1), de 17 de octubre</i> ) <sup>415</sup>
Decision date	17 October 2005
Reference details (type and title of court/body; in original language and English (official))	Provincial Court of Ciudad Real ( <i>Audiencia Provincial de Ciudad Real</i> ) Criminal Jurisdiction, Appeal no. 208/2005 Rapporteur: Mr José María Torres Fernández de Sevilla
Key facts of the case (max. 500 chars)	The Court did not admit the Lesbian, Gay, Transsexual and Bisexual Group of Madrid (COGAM) as an actor in a judicial procedure for damages and threats caused to a homosexual citizen. The Court considered that the facts established by the organisation did not prove any links between the homophobic nature of the aggression and the facts investigated. COGAM appealed the decision.
Main reasoning/argumentation (max. 500 chars)	Use of a collective action ( <i>actio popularis</i> ) is a fundamental right. In the case of legal persons, two kinds of requirements are essential to engage in collective action: the traditional requirement of capacity and a link between the aims of the organisation and the criminal facts that constitute the subject of the case. In these cases, the general rule shall be as follows: to claim that there is a link and that the judicial organ verifies that it is not possible to deny the existence of this link. The Court established that in this case the appellant entity should be admitted as an actor. Its aims have a connection with the protection of the rights and interests of homosexual, transsexual and bisexual groups, which of course implies the protection of individuals belonging to these groups in case of incidents related to their sexual orientation.

<sup>415</sup> Spain, Decision 222/2005 of Provincial Court Section 1 of Ciudad Real, 17 October 2005 (*Auto núm. 222/2005 de 17 de octubre de 2005 de la Audiencia Provincial Ciudad Real (Sección 1)*)  
[www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=1041732&links=222/2005&optimize=20060105&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=1041732&links=222/2005&optimize=20060105&publicinterface=true)

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Requirements for the recognition of the right of gay and lesbian associations to participate in judicial procedures in defence of a homosexual individual concerning damages and threats.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Court allowed the appeal lodged by COGAM. Annulment of the appealed decision: COGAM should have taken part in the process as a popular prosecutor.

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 3

Case title	Decision 680/2002 of 16 July of the High Court of Justice of the Community of Madrid, Social Chamber, section 5, 16 July 2002 ( <i>Sentencia del Tribunal Superior de Justicia de la Comunidad de Madrid, Sala de lo Social, sección 5ª, 580/2002, de 16 de julio</i> ) <sup>416</sup>
Decision date	16 July 2002
Reference details (type and title of court/body; in original language and English (official	High Court of Justice of Madrid ( <i>Tribunal Superior de Justicia de la Comunidad de Madrid</i> ) Social Jurisdiction Appeal no. 552/2002 Rapporteur: Mr José Hersilio Ruiz Lanzuela

<sup>416</sup> Spain, Decision 680/2002 of 16 July of the High Court of Justice of the Community of Madrid, Social Chamber, section 5, 16 July 2002 (*Sentencia del Tribunal Superior de Justicia de la Comunidad de Madrid, Sala de lo Social, sección 5, nº 680/2002 de 16 de julio de 2002*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=2760532&links=680/2002&optimize=20040207&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=2760532&links=680/2002&optimize=20040207&publicinterface=true)

Key facts of the case (max. 500 chars)	<p>An employee of RENFE (railway company) requested travel fare benefits (granted to spouses) for his homosexual partner since 1996 (providing the documents required under the 9<sup>th</sup> clause of the Collective Agreement that grants this benefit to the employees).</p> <p>The application was initially refused on the grounds that the individual did not have a ‘spouse’ and was not part of a ‘stable heterosexual couple’.</p> <p>The decision was challenged stating discrimination on grounds of sexual orientation. The Decision of 26 October 2001 of the Social Court of Justice no. 12 of Madrid granted the benefit which had been refused by the company. RENFE appealed the decision.</p>
Main reasoning/argumentation (max. 500 chars)	<p>The High Court came to the same conclusions as the appealed Decision: homosexual couples (in the same way as heterosexual <i>de facto</i> couples) must be included among the potential beneficiaries of the ‘kilometre card’ which allows price reductions to be enjoyed, in accordance with the Collective Agreement.</p> <p>The Decision is based on the following arguments:</p> <p>Laws and regulations shall be interpreted according to the sense of the wording, taking into account the context, the historical and legislative precedents and the current social reality, according to their spirit and purpose (Article 3 of the Civil Code).</p> <p>The fundamental character of the principle of equality, which is binding for the courts when resolving litigations.</p> <p>The open and tolerant character of Spanish democracy, which willingly accepts any type of cohabitation, even without formal bonds (civil or religious), including – although with some reluctance – for people of the same sex, when there is evidence of consistency and stability similar to a heterosexual relationship.</p>
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<p>The interpretation is in accordance with the constitutional case law on the subject of non-discrimination on grounds of sexual orientation. It imposes that <i>de facto</i> couples also include those of the same sex (to the effect that they are entitled to the benefits which are foreseen in the Agreement for <i>de facto</i> couples).</p>

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The appeal was dismissed. or The Court confirmed the previous Decision which agreed with the employee's claims. The defendant, the railway company RENFE, was ordered to pay the costs of the process (€300.51).
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Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 4

Case title	Decision 580/2002 of 19 June of the High Court of Justice of the Community of Madrid, Social Chamber, section 5, 19 June 2002 ( <i>Sentencia del Tribunal Superior de Justicia de la Comunidad de Madrid (Sala de lo Social, sección 5ª), no 580/2002, de 19 de junio</i> ) <sup>417</sup>
Decision date	19 June 2002
Reference details (type and title of court/body; in original language and English (official))	High Court of Justice of Madrid ( <i>Tribunal Superior de Justicia de la Comunidad de Madrid</i> ) Social Jurisdiction Appeal no. 1272/2002. Rapporteur: Mr José Malpartida Morano
Key facts of the case (max. 500 chars)	An employee of RENFE (rail company) requested travel fare benefits (granted to spouses) for his homosexual partner (providing the documents required under the 9 <sup>th</sup> clause of the Collective Agreement which grants this benefit to the employees). The application was refused by the company, which considered that the regulations did not cover such a case (a homosexual couple). After taking legal action alleging discrimination on grounds of sex, the Decision of 15.01.2002 of Social Court no. 15 of Madrid recognised the right which had been refused by the company. RENFE appealed the decision.

<sup>417</sup> Spain, Decision 580/2002 of 19 June of the High Court of Justice of the Community of Madrid, Social Chamber, section 5, 19 June 2002 (*Sentencia del Tribunal Superior de Justicia de la Comunidad de Madrid, Sala de lo Social, sección 5, no. 580/2002 de 19 de junio de 2002*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=2732018&links=580/2002&optimize=20040214&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=2732018&links=580/2002&optimize=20040214&publicinterface=true)

<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>The Court came to the same conclusions as the appealed Decision. Taking into account constitutional case law and the following criteria, homosexual <i>de facto</i> couples must be included in the benefits: Laws and regulations shall be interpreted according to the sense of the wording, taking into account the context, the historical and legislative precedents and the current social reality, according to their spirit and purpose (Article 3 of the Civil Code). The fundamental character of the principle of equality, which is binding for the courts when resolving litigations. The open and tolerant character of Spanish democracy, which willingly accepts any type of cohabitation. Even without formal bonds (civil or religious), and including people of the same sex when there is evidence of consistency and stability similar to a heterosexual relationship.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The main question in this process consisted of deciding whether the reference by the XIII Collective Agreement of RENFE to registered partnerships includes homosexual couples in that legal concept. Interpretation according to the constitutional case law on the subject of non-discrimination on grounds of sexual orientation includes <i>de facto</i> couples, and therefore those of the same sex (to the effect that they are entitled to the benefits foreseen in the Agreement for <i>de facto</i> couples).</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The appeal was dismissed. The Court confirmed the previous Decision which agreed with the employee's claims. The defendant, the railway company RENFE, was ordered to pay the costs of the process (€300.51).</p>

Chapter A, interpretation and/or implementation of Employment Equality Directive 2000/78/EC, case 5

Case title	Decision of Supreme Court, Social Chamber, on 29 April 2009 ( <i>Sentencia del Tribunal Supremo (Sala de lo Social), de 29 de abril de 2009</i> ) <sup>418</sup>
Decision date	29 April 2009
Reference details (type and title of court/body; in original language and English (official))	Supreme Court ( <i>Tribunal Supremo</i> ) Constitutional Jurisdiction Appeal no. 577/2008 Rapporteur: Mr Víctor Fuentes López
Key facts of the case (max. 500 chars)	Mr Anibal and Mr Domingo lived as a <i>de facto</i> couple for 15 years until the death of Mr Domingo in 2003. They were registered as a couple in the <i>Registro Municipal de Uniones de Hecho (Local Registry of De Facto Couples)</i> since 1996. In 2005, Act 13/2005 of 1 July modified the Civil Code as regards the right to marry, introducing same-sex marriage, granting same-sex couples the legal effects of the institution of matrimony. In 2006, Mr Anibal asked the National Social Security Institute for a widow's pension due to Mr Domingo's death. National Social Security does not agree, and Mr. Anibal went to the Justice. The Decision of the High Court of Justice of Asturias acknowledged the widow's pension. The National Institute appealed against this Decision.

<sup>418</sup> Spain, Decision of Supreme Court, Social Chamber, 29 April 2009 (*Sentencia del Tribunal Supremo, Sala de lo Social, de 29 de abril 2009*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=4625594&links=&optimize=20090702&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=4625594&links=&optimize=20090702&publicinterface=true)

<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>Act 13/2005 has legal effects only from the date of its publication onwards. The act does not contain any provision on possible retroactive legal effects. Besides, the Act does not contain any transitory regulations.</p> <p>The Court does not consider discriminatory that before Act 13/2005, the Spanish legal system required marriage to acknowledge the right to a widow's pension.</p> <p>Act 13/2005 reflects a new perception of a social reality, but it does not imply that the previous regulation was discriminatory.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The Court determines that it is not required to acknowledge a widow's pension to anyone who has lived as a <i>de facto</i> couple with a person of the same sex whose death occurred prior to the entry into force of Act 13/2005. The Court justifies its decision, which it does not consider discriminatory, by the non-existence of transitory regulations in the said Act.</p> <p>This Decision was necessary because there were contradictory judicial decisions on this issue. However, an individual vote is formulated on the Sentence.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The Court allows the appeal, overruling the appealed Decision.</p> <p>The Court established that the National Social Security Institute does not have to pay widows' pensions to homosexual <i>de facto</i> couples registered before the approval of Act 13/2005.</p>

Chapter B, Freedom of movement, case law relevant to Directive 2004/38/EC, case 1

Case title	Judgment 145/2006 of the High Court of Justice of Catalonia (Administrative Dispute Jurisdiction, Section 2) 8 February 2006 ( <i>Sentencia núm. 145/2006 del Tribunal Superior de Justicia de Cataluña, Sala de lo Contencioso-Administrativo, Sección 2ª, de 8 febrero</i> ) <sup>419</sup>
Decision date	8 February 2006
Reference details (type and title of court/body; in original language and English (official	High Court of Justice of Catalonia ( <i>Tribunal Superior de Justicia de Cataluña</i> ) Administrative Dispute Jurisdiction Appeal no. 90/2004 Rapporteur: Ms Fernanda Navarro de Zuloaga
Key facts of the case (max. 500 chars)	The Decision refers to the appeal by the Office of the Government Delegate in Barcelona against the Decision of 14 May 2004 of Administrative Dispute Jurisdiction Court no. 13 of Barcelona, which annulled a resolution of the Office denying a residence permit to a foreign citizen who was in a stable relationship with a Spanish national of the same sex. The Office expressed doubts about the stability of the homosexual relationship (which it deemed hardly comparable to a marriage or a heterosexual <i>de facto</i> relationship), considering that none of the circumstances foreseen in Article 41 of the Royal Decree 864/01 (concerning the granting of a temporary residence permit) applied in this case.

<sup>419</sup> Spain, Decision 145/2006 of the High Court of Justice of Catalonia (Administrative Dispute Jurisdiction, Section 2), 8 February 2006 (*Sentencia no 145/2006 de 8 de febrero de 2006 del Tribunal Superior de Justicia de Cataluña (Sala de lo Contencioso-Administrativo, Sección 2ª)*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=712225&links=145/2006&optimize=20060928&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=712225&links=145/2006&optimize=20060928&publicinterface=true)

<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>Discrimination concerning the homosexual or heterosexual character of a couple is not admissible when assessing the existence of a union of a stable character according to Act 10/1998 of 15 July 1998. There was no evidence of legal fraud (the couple was questioned by the judge of the court of first instance) in the case of this relationship.</p> <p>Although the individual was not a 'spouse' in a legal sense, the fact of the couple's cohabitation and their relationship could be legally recognised as a stable union. This situation, if proven, might be considered as one of the situations foreseen in Article 31(4) of Law 4/2000, as an expression of a concrete humanitarian reason, bearing in mind the difficulty of a couple to maintain a stable relationship under circumstances of 'considerable geographical separation'.</p> <p>Considering that Spanish society currently accepts relationships between people of the same sex, the term 'spouse' included in Royal Decree 178/2003 shall not be interpreted in a legal, but in a social sense. According to Article 46 of Royal Decree 864/2001, it should be understood that it is not necessary in the present case to obtain an entry visa to apply for a residence permit.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>Permanent residence in national territory; residence visa and residence permit; requirement of visa to obtain the permit: no; special connection to the territory; stable sentimental relationship with Spanish citizen; situation similar to marriage; granting of the residence permit is reasonable.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The appeal by the Government Office was dismissed.</p> <p>The Decision contains a dissenting opinion by Judge Ms Pilar Rovira del Canto. Judge Rovira understands that the term 'spouse' used by the law requires without question the existence of a matrimonial union. Considering the fact that legal marriage is not possible for homosexual couples, they shall not be assimilated to married couples (as happens in the case of other legal impediments which are not specific to homosexual couples).</p>

Chapter B, Freedom of movement, case law relevant to Directive 2004/38/EC, case 2

Case title	Decision 842/2004 of High Court of Justice of Navarre (Administrative Dispute Jurisdiction, Section 1) of 6 September ( <i>Sentencia del Tribunal Superior de Justicia de Navarra, Sala de lo Contencioso-Administrativo, Sección 1 núm.842/2004, de 6 septiembre</i> ) <sup>420</sup>
Decision date	6 September 2004
Reference details (type and title of court/body; in original language and English (official translation if available))	High Court of Justice of Navarre ( <i>Tribunal Superior de Justicia de Navarra</i> ) Administrative Dispute Jurisdiction Administrative Dispute Jurisdiction appeal no. 84/2004 Rapporteur: Mr Ignacio Merino Zalba
Key facts of the case (max. 500 chars)	The Decision deals with the appeal presented by a foreign citizen whose application for a residence permit had been rejected (decision confirmed by Decision of 26 April 2004 of the Administrative Dispute Jurisdiction Court No. 3 of Pamplona). The appellant, who was in a stable relationship with a Spanish national of the same sex, insisted that the rules of interpretation of Article 3(1) of the Civil Code had not been properly applied by the Court, disregarding the current prevailing social reality concerning the accepted assimilation of <i>de facto</i> couples and married couples.

<sup>420</sup> Spain, Decision 842/2004 of High Court of Justice of Navarre (Administrative Dispute Jurisdiction, Section 1), of 6 September (*Sentencia 842/2004 de 6 de septiembre del Tribunal Superior de Justicia de Navarra, Sala de Resolución de Conflictos, sección 1*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=1817351&links=842/2004&optimize=20041204&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=1817351&links=842/2004&optimize=20041204&publicinterface=true)

<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>Statutory Regulation 864/2001 of 20 July 2001 (which develops Organic Act 4/2000, amended by Organic Act 8/2000) grants in Article 49(1)(2)(b) the exemption of visa requirements for “foreign citizens who are spouses of Spanish citizens or of legally residing foreign citizens”. It mentions ‘spouses’ but not other couples or <i>de facto</i> couples (as in the present case).</p> <p>The appellant requested exemption from visa requirements, in accordance with Article 17 of Organic Act 4/2000. Section 1(a) of this provision, making reference to family reunification (requested by the appellant), mentions the recognition of the right of “the resident’s spouse...”. The Court declared that this wording does not allow any distinction or interpretation.</p> <p>The Court did not appear to accept the interpretation of the rule in accordance with the prevailing social reality and it decided not to consider all types of <i>de facto</i> unions in the same way, alleging that the provisions concerning foreign citizens should be strictly interpreted.</p> <p>The Court considered that there was neither a lack of regulation nor a possibility of an analogical interpretation based on Article 4(1) of the Civil Code.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>Permanent residence in national territory; visa; residence visa; exemption of the requirement; denial; origin; current rules do not even refer to <i>de facto</i> unions, but only to aliens married to Spanish citizens or to legally resident foreign citizens.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The appeal was dismissed.</p> <p>The decision confirmed Decision 52/2004 of 26 April 2004 of the Administrative Dispute Jurisdiction Court no. 3 of Pamplona.</p> <p>The appellant was expressly ordered to pay the cost of the proceedings.</p>

Chapter B, Freedom of movement, case law relevant to Directive 2004/38/EC, case 3

Case title	Judgment of Supreme Court, Third Chamber, 1 June 2010 ( <i>Sentencia de 1 de junio de 2010, de la Sala Tercera del Tribunal Supremo</i> ) <sup>421</sup>
Decision date	1 June 2010
Reference details (type and title of court/body; in original language and English (official translation, if available))	Supreme Court ( <i>Tribunal Supremo</i> ) Contentious-administrative jurisdiction Contentious-administrative appeal no. 114/2007 Rapporteur: Mr Rafael Fernández Valverde
Key facts of the case (max. 500 chars)	Appeal against Royal Decree 240/2007 of 16 February on Entry, Free Movement and Residence in Spain of Citizens of European Union Member States and Citizens of other States Party to the Agreement on the European Economic Area ( <i>Entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo</i> ). <sup>422</sup> In relation to several articles of the act because it is considered contrary to the Directive 2004/178/EC.

<sup>421</sup> Spain (2010) Judgment of Supreme Court, Third Chamber, 1 June 2010 (*Sentencia de 1 de junio de 2010, de la Sala Tercera del Tribunal Supremo*), available at: [www.boe.es/diario\\_boe/txt.php?id=BOE-A-2010-16822](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2010-16822)

<sup>422</sup> Spain (2007), Royal Decree 240/2007 of 16 February on Entry, Free Movement and Residence in Spain of Citizens of European Union Member States and Citizens of other States Party to the Agreement on the European Economic Area (*Real Decreto 240/2007, de 16 de febrero, de entrada, libre circulación y residencia en España de ciudadanos de los Estados miembros de la Unión Europea y de otros Estados parte en el Acuerdo sobre el Espacio Económico Europeo*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2007-4184](http://www.boe.es/buscar/act.php?id=BOE-A-2007-4184)

<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>The Decision deals with the control of the compatibility of the national Royal Decree with the Directive, because article 2, applying its terms and whatever the nationality, to the family members of a EU citizen “<b>of another European Union Member State</b>”, but not of any EU citizen; and because the concept of family included “the spouse, provided there has been no decision or declaration of nullity of the matrimonial bond, divorce or <b>legal separation</b>” and “The partner with whom the citizen has entered into a partnership equivalent to marriage registered in a European Union Member State or in a State Party to the European Economic Area, <b>in such a way that two simultaneous registrations in this State are not possible</b>, provided that the partnership has not been dissolved, for which adequate proof must be supplied. A marriage and a registered partnership shall, in any event, be incompatible”</p> <p>The Supreme Court argued that the phrases and words “of another European Union Member State”, legal separation” and “in such a way that two simultaneous registrations in this State are not possible” were illegal.</p> <p>The direct descendants and the descendants of the spouse or registered partner, who are under the age of 21 or over 21 but still maintained by their parents, or are dependants, provided there is no agreement or</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>Article 3 of the Directive 2004/178/EC regulates the situation of any EU citizen, phrase that does not exclude the family of a Spaniard. The ‘legal separation’ is not founded on article 17 of the Directive because it does not have as a result the termination of the family link. Finally, the requirement of only one registration exceeds the provisions of the Directive.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>Annulment of the appealed phrases and words. No legal costs.</p>

Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 1

Case title	Judgment of Supreme Court (Administrative Dispute Jurisdiction Chamber, Section 5) of 13 December 2007 ( <i>Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, Sección 5, de 13 de diciembre de 2007</i> ) <sup>423</sup>
Decision date	13 December 2007
Reference details (type and title of court/body; in original language and English (official translation if available))	Supreme Court ( <i>Tribunal Supremo</i> ) Appeal no. 4529/2004 Rapporteur: Mr Enrique Cancer Lalanne

<sup>423</sup> Spain, Judgment of Supreme Court (Administrative Dispute Jurisdiction Chamber, Section 5) of 13 December 2007 (*Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, Sección 5, de 13 de diciembre de 2007,*) [www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=305980&links=&optimize=20080110&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=305980&links=&optimize=20080110&publicinterface=true)

<p>Key facts of the case (max. 500 chars)</p>	<p>The appellant applied for asylum on 20 August 2001 alleging his homosexuality and arguing that “in Cuba homosexuals have neither freedom nor rights”. He also argued that he had suffered arrest and 24 hours in detention for visiting private gay parties, house searches and general harassment by Castro’s regime because of his homosexuality and that he had no possibility of obtaining employment.</p> <p>The application was submitted and the applicant attended but, in spite of the favourable report from UNHCR (The UN Refugee Agency) (21 August 2001), in the end the application received no resolution from the Administration, which has the legal effect of a rejection.</p> <p>The applicant lodged a Contentious-administrative appeal against the (presumed) application rejection, providing new evidence (certificate of being excluded from military service because of his homosexuality).</p> <p>The National Court rejected the appeal (14 January 2004) with the following arguments: 1. Absence of evidence of the alleged harassment: the alleged facts are considered insufficient due to their low impact; 2. The Cuban authorities did not block his exit from the country; 3. The Court referred to case law in the same way as for other contentious-administrative appeals lodged by Cuban citizens in similar circumstances.</p> <p>The appellant appealed against the Decision, alleging only violation of Article 3 of the Asylum Act and of Article 1-2 of the Geneva Convention.</p>
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<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>The Court allowed the appeal with the following arguments:</p> <p>1. The negligence of the Administration dealing with asylum applications, since there is an important lack of solid arguments both in the administrative file and in the court proceedings; lack of reports examining the appellant's application, both in the file and in the contentious-administrative procedure (the response to the application was written on a single sheet of paper and merely denies that the alleged facts constitute harassment).</p> <p>The appellant had proved his homosexuality and exclusion from Cuban military service for this reason (facts not challenged by the Administration).</p> <p>These facts cannot be disregarded in the social and political context of a dictatorial and strongly militarised regime as that in Cuba.</p> <p>Homosexuality is punished in Cuba as a crime (as stated by UNHCR).</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The Supreme Court considered that there was "sufficient evidence" in the present case, being the only requirement for granting the right to asylum according to Article 8 of Act 5/1984 of 26 March which regulates the right to asylum and refugee status.</p> <p>Taking into account both the documents provided by the appellant and the facts resulting from them, the Court considered that they were, according to the nature of the case, sufficient to conclude that the appellant fulfils the requirements established in Article 3.1 of Act 5/1984.</p> <p>Despite the fact that the burden of proof falls on the asylum applicant to give evidence of harassment (to establish facts is sufficient), the Administration must provide solid reasons to justify the denial of the right.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The appealed Decision was overruled.</p> <p>Contentious-administrative appeal no. 723/2002 was allowed.</p> <p>The administrative resolution rejecting the asylum application in Spain by not responding was annulled.</p> <p>The right to asylum and refugee status in Spain was granted to the appellant.</p>

Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 2

Case title	Judgment of the Spanish Supreme Court, Administrative Dispute Jurisdiction Chamber, Section 5 of 25 July 2007 ( <i>Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, Sección</i> ), <i>de 25 de julio de 2007</i> ) <sup>424</sup>
Decision date	25 July 2007
Reference details (type and title of court/body; in original language and English (official translation, if available))	Supreme Court ( <i>Tribunal Supremo</i> ) Appeal no. 1447/2004 Rapporteur: Mr Mariano de Oro-Pulido y López.

<sup>424</sup> Spain, Judgment of Spanish Supreme Court, Administrative Dispute Jurisdiction Chamber, Section 5, of 25 July 2007 (*Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, Sección* ), *de 25 de julio de 2007*), [www.poderjudicial.es/search/doAction?action=contentpdf&datasematch=TS&reference=359350&links=%221447/2004%22&optimize=20070920&publicinterfa ce=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&datasematch=TS&reference=359350&links=%221447/2004%22&optimize=20070920&publicinterfa ce=true) (Hyperlink was accessed on 25 May 2014).

<p>Key facts of the case (max. 500 chars)</p>	<p>The appeal deals with an asylum application made by a Cuban citizen who alleged harassment on the grounds of sexual orientation (discriminatory treatment, conflicts at the workplace, loss of his job and his decision not to declare his paternity of a child in an effort to prevent negative treatment of his son). The application was refused by resolution of the Ministry of the Interior of 13.03.2002, on the basis of Article 5.6 of Act 5/1984: the applicant did not allege in his application any of the grounds foreseen in the Geneva Convention on Refugees (1951) or Act 5/1984. The application for a review of the case was also rejected in spite of new evidence provided by the appellant. The contentious-administrative appeal against the first administrative resolution (appeal no. 602/2002), examined by the <i>Audiencia Nacional</i> (<i>National Court</i>) in its Decision of 11 November 2003 was also rejected. The National Court argued the lack of evidence provided by the applicant and the vagueness of the imputation made against the Cuban authorities. The Court concluded that, “the logical and lawful result is the non-admission of an application founded on an objectively inappropriate reason”.</p>
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<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>The Supreme Court considered the appeal, reasoning that the potential questions which might arise from the facts in the case concerning discrimination on the ground of sexual orientation (basis of the asylum request) should not be a reason for the non-acceptance of the lawsuit, which must be accepted and thoroughly examined in a judicial procedure, ending with a decision by the court on the granting or rejection of the asylum claim.</p> <p>The Court regarded this approach as “obvious”, according to Articles 17 and 18 of Royal Decree 203/1995 enough evidence in the particular case to rule on the fulfilment of the requirements established by Article 3 of the Act on Asylum.</p> <p>If there are no objective and clear reasons established by the law for not accepting the case, the applicant shall be given the chance to prove his statements in the course of the proceedings.</p> <p>(Statutory Regulation developing Act 5/1984) which demand very clear reasons for not accepting the examination of a lawsuit.</p> <p>Only at the end of the procedure, after the analysis of all the information, documents, inquiries and pertinent tests about potential harassment on the ground of sexual orientation, shall it be possible to deduce whether or not there is</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The Decision clarified the question of how to apply Articles 17 and 18 of Royal Decree 203/1995 (Statutory Regulation developing Act 5/1984) with regard to the acceptance of an asylum application for consideration. The asylum application submission phase is not the appropriate procedural moment to assess whether there is enough evidence of harassment on the ground of sexual orientation alleged in the case. Following the case law doctrine, the Supreme Court established that it was “sufficient that the asylum application alleges harassment susceptible of legal protection (as in this case with regard to sexual orientation) to admit the procedure, so that the applicant has the opportunity to prove his statements”.</p>

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	<p>The appeal was allowed.</p> <p>or</p> <p>The appealed Decision was overruled.</p> <p>Both the resolution from the Ministry of the Interior of 13 March 2002 which did not accept the asylum application and the resolution from the same Ministry of 15 March 2002 which did not accept the application for review, were declared null and void.</p> <p>The appellant's right to the examination of his asylum application in a procedure in Spain was acknowledged.</p>
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Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 3

Case title	Judgment of Supreme Court, Administrative Dispute Jurisdiction, Section 5, of 4 October 2007 ( <i>Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, sección 5, de 4 de octubre de 2007</i> ) <sup>425</sup>
Decision date	4 October 2007
Reference details (type and title of court/body; in original language and English (official translation, if available))	<p>Supreme Court (<i>Tribunal Supremo</i>)</p> <p>Appeal no. 1981/2004</p> <p>Rapporteur: Mr Enrique Cancer Lalanne</p>

<sup>425</sup>Spain, Judgment of Supreme Court, Administrative Dispute Jurisdiction, Section 5, of 4 October 2007 (*Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, sección 5, de 4 de octubre de 2007*), [www.poderjudicial.es/search/doAction?action=contentpdf&datasematch=TS&reference=233208&links=%221981/2004%22&optimize=20071108&publicinterfa ce=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&datasematch=TS&reference=233208&links=%221981/2004%22&optimize=20071108&publicinterfa ce=true) (Hyperlink was accessed on 26 February 2013)

<p>Key facts of the case (max. 500 chars)</p>	<p>Refusal to accept for consideration a Russian citizen's asylum application based on harassment on the grounds of his sexual orientation (non-admission confirmed by a decision of the Ministry of the Interior of 22 March 2002). The decision was appealed at the National Court (Third Section). The Court rejected the appeal in its Decision of 29 December 2003.</p> <p>The applicant argued that he had been at risk due to his homosexuality from the moment he was called to the Russian army (with threats to his physical and psychological integrity and to his freedom of speech). He also argued that he was a proscribed citizen (hiding from the Military Administration and the Police, avoiding the citations sent to him by the army and seeking refuge at the homes of friends).</p> <p>The Administration did not accept the application for consideration, as it argued that there was no evidence of harassment on the grounds of the individual's sexual orientation.</p> <p>The National Court, in charge of the contentious-administrative appeal, considered that the established facts referred to the applicant's fear of being discriminated against in the army because of his sexual orientation, without providing any evidence to demonstrate any existence of harassment. The applicant's obligation to "establish true facts of the harassment suffered, by means of sufficient proof or evidence of the circumstances which would justify the granting of the asylum claim" was considered to be unfulfilled.</p>
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<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>The Supreme Court recalled that the acceptance of an application for consideration only requires the allegation of harassment and that the application was not based on clearly false facts, data or allegations. It is “a positive requirement (description of the circumstances of harassment) together with a negative requirement (that there are no clear false facts) which opens the process”.</p> <p>“The Administration – including the judges and courts – should not judge, at the admission phase, whether there are sufficient indications of the alleged persecution. If the facts alleged describe a persecution and the facts are not clearly false, the application deserves to be accepted for consideration”.</p> <p>A further consideration is that the Administration did not provide data or documents which could justify the unacceptability of the claim of persecution related to his homosexual orientation alleged by the applicant.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The Decision clarified the requirements for not accepting an asylum application for consideration. The asylum application submission phase is not the suitable procedural point to assess whether there is sufficient proof of the harassment on the ground of the sexual orientation invoked in the case.</p> <p>The reasons alleged by both the Administration and the National Court to justify the non-acceptance of the application referred to the core substance of the case (the existence of harassment on the grounds of sexual orientation) which could only be assessed once the asylum application had been admitted and processed and after allowing the applicant the chance to provide evidence of the truthfulness of his story.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The appeal was upheld.</p> <p>The Contentious-administrative appeal 605/02 lodged by the applicant must be accepted for consideration.</p> <p>The Decision of the Ministry of the Interior of 22.03.2002 was declared null and void.</p> <p>The appellant’s right to the examination of his asylum application in a procedure in Spain was acknowledged.</p>

Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 4

Case title	Judgment of the Supreme Court, Administrative Dispute Jurisdiction Chamber, Section 5, of 22 December 2006 ( <i>Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, sección 5, de 22 de diciembre de 2006</i> ) <sup>426</sup>
Decision date	22 December 2006
Reference details (type and title of court/body; in original language and	Supreme Court ( <i>Tribunal Supremo</i> ) Appeal no. 9012/2003 Rapporteur: Mr Enrique Cancer Lalanne

<sup>426</sup>Spain, Judgment of Supreme Court, Administrative Dispute Jurisdiction Chamber, Section 5, of 22 December 2006 (*Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, sección 5, de 22 de diciembre de 2006*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=613820&links=%229012/2003%22&optimize=20070118&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=613820&links=%229012/2003%22&optimize=20070118&publicinterface=true) (Hyperlink was accessed on 25 May 2014)

<p>Key facts of the case (max. 500 chars)</p>	<p>A Cuban citizen alleged discriminatory treatment and persecution in her country because of her lesbianism (in her application she alleged discriminatory treatment at school, loss of job and social discrimination). Neither the application nor the review of the application were accepted, with the argument that the applicant did not refer in her asylum application to any grounds foreseen in the Geneva Convention on Refugees (1951) or Act 5/1984 as a determining factor for granting the requested protection.</p> <p>The contentious-administrative appeal was dismissed by the National Court in its Decision of 11 June 2003, where it argued that “the facts established by the appellant do not allow the existence of persecution to be confirmed (...) even recognising the ‘notorious harshness of the political system of Cuba’ (Supreme Court Decision of 28.02.1989)”. According to the National Court, the fact that the applicant left her country with her passport and without any difficulty was a clear indication that persecution did not exist in the terms required to grant the asylum claim.</p>
<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>The rule contained in Article 5(6)(b) of Act 5/84 allows for an asylum application not to be accepted when the application does not mention any of the grounds which allow the recognition of refugee status.</p> <p>In this case, the applicant alleged persecution on the grounds of her sexual orientation, which constitutes one of the reasons to grant asylum under Article 1.A.2 of the Geneva Convention (1951), Article 1 of the Protocol of New York (1967) and Article 3.1 of Act 5/1984. Moreover, this circumstance affected the political, educational and union field (at school she could no longer be a class representative; in the union she was persecuted by the local union secretary).</p>

<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The Decision clarified the requirements for not accepting an asylum application for consideration. The asylum application admission phase is not the suitable procedural moment to assess whether there is sufficient proof of the harassment on the ground of the sexual orientation invoked in the case. “The vagueness of the application and the doubts concerning the existence of a persecution shall not be settled with a decision to refuse to consider the asylum application, but rather, on the contrary, they should be settled during the procedure, deciding finally if the requested asylum is to be granted”.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The appeal was upheld.  or  The previous judicial decisions were declared null and void.  The previous contentious-administrative appeal should be accepted for consideration.  Both administrative resolutions were declared null and void.  The appellant’s right to the examination of her asylum application in a procedure in Spain was acknowledged.</p>

Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 5

Case title	Judgment of the Supreme Court, Administrative Dispute Jurisdiction Chamber, Section 5, of 14 December 2006 ( <i>Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, sección 5, de 14 de diciembre de 2006</i> ) <sup>427</sup>
Decision date	14 December 2006
Reference details (type and title of court/body; in original language and English (official	Supreme Court ( <i>Tribunal Supremo</i> ) Appeal no. 8638/2003 Rapporteur: Mr Pedro José Yagüe Gil
Key facts of the case (max. 500 chars)	A Cuban citizen alleged that homosexuality is treated as a crime in his country, declaring that he had suffered persecution for his sexual orientation (his company was closed down and he was forced to move to another town, suffering constant surveillance) and was also unable to get a job in Cuba. His asylum application was not accepted for consideration by the Spanish Administration because it did not allege any of the grounds foreseen in the Geneva Convention (1951). His later revised application was not accepted either. In response to the contentious-administrative appeal presented by the applicant, the National Court issued a decision (on 16 September 2003) rejecting the appeal because of the generic nature of his allegations.

<sup>427</sup> Judgment of Supreme Court, Administrative Dispute Jurisdiction Chamber, Section 5 of 14 December 2006 (*Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, sección 5, de 14 de diciembre de 2006*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=577216&links=%228638/2003%22&optimize=20070215&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=577216&links=%228638/2003%22&optimize=20070215&publicinterface=true) (Hyperink was accessed on 26 February 2013)

<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>In this case, the appellant alleged persecution by reason of his sexual orientation, one of the reasons covered by the Geneva Convention (1951) and Asylum Act 5/1984. This is considered sufficient to accept the application for consideration (even if the facts are uncertain, because they must be proven during the procedure).</p> <p>It is “a positive requirement (description of the circumstances of harassment) together with a negative requirement (that there are no clear false facts) which opens the process”.</p> <p>“The Administration – including the judges and courts – should not judge, at the admission phase, whether there is sufficient indication of the alleged persecution. If the facts alleged describe a persecution and the facts are not clearly false, the application deserves to be accepted for consideration”.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The Decision clarified the requirements for not accepting an asylum application for consideration. The asylum application admission phase is not the suitable procedural moment to assess whether there is sufficient proof of the harassment on the ground of the sexual orientation invoked in the case. The acceptance of the application for consideration only requires (1) persecution to be alleged (Article 5(6)(b) of Act 5/1984) and (2) that the application is not based on clearly false facts, data or allegations (Article 5(6)(d) of Act 5/1984).</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The appeal was upheld.</p> <p>The administrative resolutions were declared null and void.</p> <p>The appealed decision was overruled.</p> <p>The appellant’s right to the examination of his asylum application in a procedure in Spain was acknowledged.</p>

Chapter C, Asylum and subsidiary protection, case law relevant to art 10/1/d of Council Directive 2004/83/EC, case 6

Case title	Judgment of the Supreme Court, Administrative Dispute Jurisdiction Chamber, Section 5 of 28 November 2008 ( <i>Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, Sección 5, de 28 de noviembre de 2008</i> ) <sup>428</sup>
Decision date	28 November 2008
Reference details (type and title of court/body; in original language and English (official	Supreme Court ( <i>Tribunal Supremo</i> ) Appeal no. 5265/2005 Rapporteur: Mr Mariano de Oro-Pulido López
Key facts of the case (max. 500 chars)	The appellant applied for asylum, but he did not allege his homosexuality in his first application. The appellant alleged only economical reasons in his first application. When the asylum procedure had already started, the appellant alleged his homosexuality.

<sup>428</sup> Judgment of Supreme Court, Administrative Dispute Jurisdiction Chamber, Section 5, of 28 November 2008 (*Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, Sección 5, de 28 de noviembre de 2008*), [www.poderjudicial.es/search/doAction?action=contentpdf&datasmatch=TS&reference=3430650&links=%225265/2005%22&optimize=20081211&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&datasmatch=TS&reference=3430650&links=%225265/2005%22&optimize=20081211&publicinterface=true)

<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>The Sentence of the Supreme Court of 28 November 2008 (Contentious-Administrative Chamber, Section 5) fails to recognise the requested right to asylum due to the lack of proof of persecution as a homosexual: “The actor insists that Cuban legislation punishes homosexual conducts, but by contrast the dossier includes a report from the examining phase which says that there is currently a greater tolerance of such practice, so it is not possible to consider that the mere fact of having this tendency might generate a persecution giving rise to the granting of refugee protection. In response to these these considerations, the truth is that the actor explained no detention or sanction derived from his sexual orientation nor exposed any other kind of specific harmful consequence which might have been derived from this, and only generally explained that he was fearful of being persecuted as a homosexual; and still further, he has not presented the slightest proof to challenge the considerations on which the refusal of asylum was based.”</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The Supreme Court, contrary to its former decisions, considers that there is currently a greater tolerance of homosexuality in Cuba. Therefore, it is not possible to consider that the mere fact of having this tendency might generate a persecution giving rise to the granting of refugee protection.</p> <p>The burden of proof falls on the asylum applicant to give evidence of harassment.</p> <p>The Supreme Court considered that there was not “sufficient evidence” in the present case, being the only requirement for the granting of the right to asylum according to Article 8 of Law 5/1984 of 26 March, which regulates the right to asylum and refugee status.</p>

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The appealed decision was confirmed. or Contentious-administrative appeal no. 5265/2005 was rejected. The administrative resolution which rejected the asylum application in Spain was confirmed. The right to asylum and refugee status in Spain was not granted to the appellant.
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Chapter D, Family reunification, case law relevant to art 4/3 of the Council Directive 2003/86/EC, case 1

Case title	Judgment 145/2006 of the High Court of Justice of Catalonia (Administrative Dispute Jurisdiction, Section 2), 8 February 2006 (Sentencia núm. 145/2006 del Tribunal Superior de Justicia de Cataluña, Sala de lo Contencioso-Administrativo, Sección 2ª, de 8 febrero) <sup>429</sup> Decision 842/2004 of the High Court of Justice of Navarre (Administrative Dispute Jurisdiction, Section 1), 6 September (Sentencia del Tribunal Superior de Justicia de Navarra, Sala de lo Contencioso-Administrativo, Sección 1, núm. 842/2004, de 6 septiembre) <sup>430</sup>
Decision date	8 February 2006

<sup>429</sup> Spain, Decision 145/2006 of the High Court of Justice of Catalonia (Administrative Dispute Jurisdiction, Section 2), 8 February 2006 (*Sentencia no 145/2006 de 8 de febrero de 2006 del Tribunal Superior de Justicia de Cataluña (Sala de lo Contencioso-Administrativo, Sección 2ª)*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=712225&links=145/2006&optimize=20060928&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=712225&links=145/2006&optimize=20060928&publicinterface=true)

<sup>430</sup> Spain, Decision 842/2004 of High Court of Justice of Navarre (Administrative Dispute Jurisdiction, Section 1), 6 September (*Sentencia 842/2004 de 6 de septiembre del Tribunal Superior de Justicia de Navarra, Sala de Resolución de Conflictos, sección 1*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=1817351&links=842/2004&optimize=20041204&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=1817351&links=842/2004&optimize=20041204&publicinterface=true)

Reference details (type and title of court/body; in original language and English (official translation, if available))	See details in Chapter B (These judicial decisions refer to issues which relate to both Chapters B and D.)
Key facts of the case (max. 500 chars)	
Main reasoning/argumentation (max. 500 chars)	
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	

#### Chapter F, Hate speech, case 1

Case title	Decision of the Provincial Court of Madrid no 455/2006 (section 17) of 28 December ( <i>Auto de la Audiencia Provincial de Madrid no 455/2006, Sección 17, de 28 diciembre</i> ) <sup>431</sup>
Decision date	28 February 2006

<sup>431</sup> Spain, Decision of the Provincial Court of Madrid no 455/2006 (section 17) of 28 December (*Auto de la Audiencia Provincial de Madrid no 455/2006, Sección 17, de 28 diciembre*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=444248&links=455/2006&optimize=20070709&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=444248&links=455/2006&optimize=20070709&publicinterface=true)

Reference details (type and title of court/body; in original language and English (official translation, if available))	Provincial Court of Madrid ( <i>Audiencia Provincial de Madrid</i> ) Criminal jurisdiction Question of competence no. 19/2006 Rapporteur: Mr Jesús Fernández Entralgo
Key facts of the case (max. 500 chars)	The case refers to a question of competence between a Court in charge of the preliminary investigation and a Court specialised in gender violence. The case refers to the publication by the complainant's former boyfriend of an announcement, giving her telephone number, on an internet portal, the purpose of which is to facilitate lesbian relationships.
Main reasoning/argumentation (max. 500 chars)	<p>The following considerations and reasoning of the Court must be considered to classify, from a legal perspective, the conduct which is the subject of the case. (Either the Criminal Code or the specific measures introduced by Organic Act 1/2004 of 28 December on <i>Medidas de Protección Integral contra la Violencia de Género</i> (Comprehensive Protection Measures against Gender Violence) may be applied).</p> <p>Among other factors, the macho profile and the vengeful reaction of a man who was not able to accept the end of a relationship with a former girlfriend (trying to discredit her by presenting her openly as lesbian) shall be decisive to classify the case within the regulation framework of gender violence.</p> <p>With regard to the criminal punishment of expressions or actions which promote hatred towards homosexuals, the following extracts of the considerations of the judicial organ should be highlighted in particular:</p> <p>“Such conduct reflects a macho concept of sexuality which implies a radical homophobia; so, from such a perspective, the public imputation of lesbianism would pursue a double purpose: to produce an effect of social repulsion and to hinder the complainant's possible future relationships with other men, in the conviction that all men would abstain from undertaking even short relationships with a lesbian (...) The perpetrator of this absurdity appears to ignore the fact that homosexual relationships have been accepted without problem by a growing majority in Spanish society as a respectable option, to the point of being accepted as the basis for a marriage or similar relationship, with the same legal effects as traditional heterosexual marriage.”</p>

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The Court highlighted the fact that conduct in question reflects a macho concept of sexuality which implies a radical homophobia. The public imputation of a homosexual orientation aims in such a case to produce an effect of social repulsion and to hinder the possible future relationships of the victim. This is sufficient to regard the case as a criminal case.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The competence of the Court on Gender Violence was acknowledged in the present case. The Provincial Court found the conduct of the defendant to be an offence motivated by a macho mentality.

#### Chapter F, Hate crimes, case 2

Case title	Judgment no 1341/2002 of the Supreme Court, Criminal Chamber, of 17 July 2002 ( <i>Sentencia del Tribunal Supremo, Sala de lo Penal, no. 1341/2002, de 17 de julio</i> ) <sup>432</sup>
Decision date	17 July 2002
Reference details (type and title of court/body; in original language and English (official	Supreme Court ( <i>Tribunal Supremo</i> ) Criminal jurisdiction Appeal no. 2494/2000 Rapporteur: Mr Joaquín Martín Canivell

<sup>432</sup>Spain, Judgment no 1341/2002 of Supreme Court, Criminal Chamber, of 17 July 2002 (*Sentencia del Tribunal Supremo, Sala de lo Penal, no. 1341/2002, de 17 de julio*), [www.poderjudicial.es/search/doAction?action=contentpdf&datasmatch=TS&reference=3149741&links=%222494/2000%22&optimize=20030912&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&datasmatch=TS&reference=3149741&links=%222494/2000%22&optimize=20030912&publicinterface=true) (Hyperlink was accessed on 26 February 2013)

<p>Key facts of the case (max. 500 chars)</p>	<p>A group of teenagers (some of them under 18 years old) entered an area of gay bars. Once there, they demonstrated a provocative and scornful verbal attitude towards homosexuals. An individual asked them the reasons for their attitude. The teenagers pushed him to the floor and beat him, one of them expressing his disgust and repulsion towards homosexuals as justification for their acts. The aggressors left the place and were later arrested and charged. The victim had to be hospitalised due to his injuries.</p> <p>Section 10 of the Provincial Court of Barcelona (Decision of 13 March 2000) condemned the aggressors as perpetrators of a crime of assault and battering, with the application of both the aggravating circumstances of abuse of superiority and discrimination on the grounds of the victim's sexual orientation and, on the other hand, the mitigating circumstance of juvenile age.</p> <p>The defendants appealed against the decision, alleging errors in the appreciation of the facts.</p>
<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>With regard to the application of the aggravating circumstance of discrimination on grounds of the victim's sexual orientation, the Court considered that there were no errors in the appreciation of the evidence.</p> <p>The defendants came into an area that they knew was frequented by homosexuals. In addition, the verbal expressions used by the defendants left no doubt about their hatred towards homosexuals. In the opinion of the Court, it was unequivocal that the aggression which followed was against a person who was presumed to be homosexual and for the reason of his presumed sexual orientation.</p>

<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>Appeal: Factual errors in the evaluation of the evidence: No. Abuse of superiority: Yes. Attack by four teenagers against a single person.</p> <p>Racist, anti-semitic grounds or another type of discrimination: Yes. The accused went to an area that they knew was frequented by homosexuals and one of them told the victim about his repulsion towards homosexuals.</p> <p>Injuries: affecting the physical integrity or physical or mental health, requiring medical or surgical treatment: Yes. The defendant only administered the first blow to the victim, after which the other defendants continued the attack together, sharing the same intention, which determines their responsibility for the result.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The appeal was rejected.</p> <p>Confirmation of the appealed decision.</p> <p>The Decision condemned the appellants to pay the costs of the proceedings.</p>

Chapter F, Hate crimes, case 3

Case title	Decision no 19/2001 of the Provincial Court of Cantabria, Section 2, of 4 October ( <i>Sentencia Audiencia Provincial Cantabria núm. 19/2001, Sección 2, de 4 octubre</i> ) <sup>433</sup>
Decision date	4 October 2001
Reference details (type and title of court/body; in original language and English (official))	Provincial Court of Cantabria ( <i>Audiencia Provincial Cantabria</i> ) Criminal jurisdiction Jury Tribunal no. 1/2001 Rapporteur: Mr Esteban Campelo Iglesias
Key facts of the case (max. 500 chars)	Surprise attack without apparent reason on someone walking in the street. The aggressor, convinced of the victim's homosexuality, kicked him, knocking him to the ground and, once he was there, beat him brutally on the head with a large plank.
Main reasoning/argumentation (max. 500 chars)	In the present case of murder the fourth aggravating circumstance of Article 22 of the Criminal Code must be applied: to commit a crime because of sexual discrimination or sexual orientation discrimination. The Jury Tribunal considered as proven the fact that the appellant carried out the crime because he thought the victim was "queer and gay" (the defendant admitted that the previous day he had attacked another person in Reinosa because he was homosexual too). At the first judicial hearing he claimed he attacked the victim "because he thought that he was a queer". At the trial, although with hesitations, he admitted – or at least he did not deny – that it was the victim's homosexual orientation which motivated his aggression.

<sup>433</sup> Spain, Decision no 19/2001 of the Provincial Court of Cantabria, Section 2, of 4 October (*Sentencia Audiencia Provincial Cantabria núm. 19/2001, Sección 2, de 4 octubre*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=2357640&links=19/2001&optimize=20040524&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=2357640&links=19/2001&optimize=20040524&publicinterface=true)

<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>MURDER: Circumstances; premeditation: YES.  Example of how to prove the applicability of the fourth aggravating circumstance of Article 22 of the Criminal Code (to commit a crime because of sexual discrimination or sexual orientation discrimination), according to the verbal testimony of the defendants.  ANOMALY OR PSYCHOLOGICAL ALTERATION: mitigating circumstance; personality problem, serious family problem and abuse of addictive substances, with xenophobic and homophobic fixations.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The accused was convicted as the perpetrator of a murder, with the application of the aggravating circumstance of Article 22.4 and the 6th mitigating circumstance of Article 21 of the Criminal Code (fifteen years of prison, deprivation of the ability to hold a public position during the period of the sentence, payment of procedural costs, compensation of 15,000,000 pesetas to the deceased's heirs and 3,299,731 pesetas to the Hospital Marqués de Valdecilla.  The minimum sentence was applied: the aggravating circumstance of discrimination based on sexual orientation was compensated by the presence of the mitigating circumstance of personality dysfunction.</p>

Chapter F, Hate crimes, case 4

Case title	Decision of the Provincial Court of Barcelona, Section 3, of 20 June 2000 ( <i>Sentencia Audiencia Provincial Barcelona, Sección 3, de 20 junio 2000</i> ) <sup>434</sup>
Decision date	20 June 2000
Reference details (type and title of court/body; in original language and English (official translation, if available))	Provincial Court of Barcelona ( <i>Audiencia Provincial Barcelona</i> ) Criminal Jurisdiction Appeal no. 238/2000 Rapporteur: Mrs Ana Ingelmo Fernández
Key facts of the case (max. 500 chars)	A homosexual couple was expelled from a disco because they were kissing each other: discriminatory conduct.

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<sup>434</sup> Spain, Decision of the Provincial Court of Barcelona, Section 3, of 20 June 2000 (*Sentencia Audiencia Provincial Barcelona, Sección 3, de 20 junio 2000*), [www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=1857904&links=%22238/2000%22&optimize=20041125&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=1857904&links=%22238/2000%22&optimize=20041125&publicinterface=true) (Hyperlink last accessed on 25 May 2014).

<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>There were no errors in the evaluation of the evidence: the facts were not disputed. The facts had been clear since the first report to the police. The plaintiffs presented the case because they were discriminated against on the grounds of their sexual orientation. This was the real reason which motivated their expulsion from the disco, after a discussion. These facts are socially reprehensible and constitute discrimination based on sexual orientation which is contrary to Article 14 of the Spanish Constitution, but do not constitute a criminal offence. As stated in the Decision, there was neither violence nor intimidation, nor a violation of dignity. In the present case, the appellants' feelings of discrimination and offence were a logical reaction, since the only reason that motivated their expulsion from the disco was the fact of a kiss between two men (something that heterosexual couples were doing as well); the conduct of the security guards was discriminatory and contrary to Article 14 of the Constitution, but it did not constitute a criminal offence. Criminal law is governed by the principle of minimum intervention and there were other means for the complainants to defend their right not to be discriminated against on grounds of their sexual orientation.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>OFFENCES AGAINST PERSONS: Coercion or humiliation: NO  Explanation of the necessary requirements for a criminal offence based on discriminatory treatment which violates Article 14 of the Constitution.  Absence of violence or intimidation, no violation of the individual's dignity.  The behaviour is discriminatory but does not have a criminal character.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The appeal was rejected.  The appealed decision was confirmed in its entirety.</p>

Chapter F, Hate crimes, case 5

Case title	Decision of Provincial Court of Barcelona, Section 6, of 14 March 2000 ( <i>Sentencia de la Audiencia Provincial Barcelona, Sección 6, de 14 marzo 2000</i> ) <sup>435</sup>
Decision date	14 March 2000
Reference details (type and title of court/body; in original language and English (official))	Provincial Court of Barcelona ( <i>Audiencia Provincial Barcelona</i> ) Criminal jurisdiction Appeal no. 187/2000 Rapporteur: Mr Francisco Javier Béjar García
Key facts of the case (max. 500 chars)	The minor accused, who had been threatening the victim (also a minor) for the last two years because of his sexual orientation, told the victim that he would douse him with gasoline because of his homosexuality. Then he administered several blows to the victim (injuring him) and insulted him with regard to his homosexual orientation (in this action he was accompanied by another minor).
Main reasoning/argumentation (max. 500 chars)	There was no error in the evaluation of the evidence. The defendant's declaration expressed his distaste about the victim's homosexual orientation and this was the motivation for the aggression and all the threats; The victim's declaration was sufficient to counteract the presumption of innocence; Clarity of the facts, corroborated by the Judge Declarations of the other appellants. Absence of sufficient reasons to overrule the conclusion reached by the Judge <i>a quo</i> . The Decision appealed was soundly founded.

<sup>435</sup>Spain, Decision of Provincial Court of Barcelona, Section 6, of 14 March 2000 (*Sentencia de la Audiencia Provincial Barcelona, Sección 6, de 14 marzo 2000*), [www.poderjudicial.es/search/doAction?action=contentpdf&datasematch=AN&reference=1547017&links=%22%20187/2000%22&optimize=20050310&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&datasematch=AN&reference=1547017&links=%22%20187/2000%22&optimize=20050310&publicinterface=true)

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	THREATS: Without conditions YES OFFENCES AGAINST PERSONS: Coercion or unjustified disturbance: existence Aggravating circumstance of acting on the grounds of sexual orientation in an offence of issuing threats: proved. Error in the evaluation of the evidence: NO
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The appeal was rejected. The appealed decision was confirmed. Perpetrator sent to a remand home and freedom under supervision.

#### Chapter F, Hate crimes, case 6

Case title	Decision number 195/2008 of the Provincial Court of Zaragoza of 28 March ( <i>Sentencia de la Audiencia Provincial de Zaragoza número 185/2008, de 28 de marzo</i> ) <sup>436</sup>
Decision date	28 March 2008
Reference details (type and title of court/body; in original language and English (official	Provincial Court ( <i>Audiencia Provincial</i> ) Criminal Jurisdiction Appeal no. 159/2006 Rapporteur: Mrs María Begoña Guardo Laso

<sup>436</sup> Spain, Decision number 195/2008 of the Provincial Court of Zaragoza of 28 March (*Sentencia de la Audiencia Provincial de Zaragoza número 185/2008, de 28 de marzo*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=123124&links=%22159/2006%22&optimize=20080703&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=123124&links=%22159/2006%22&optimize=20080703&publicinterface=true)

<p>Key facts of the case (max. 500 chars)</p>	<p>There was a confrontation in the early morning in a bar between two groups of 4 to 7 young people, respectively.</p> <p>This confrontation was above all verbal, accompanied by the brandishing of knives, sprays and chains and some broken bottles.</p> <p>Some say that the others "looked down on them" when they came in, and that the threats were reciprocal; also from the others against those now appealing. And the others say that these insulted them, calling them "filthy and gay". One of those reporting stated in court explained the last insults because at the time "They had hugged each other". It was also indicated that the premises where the confrontation started was an "alternative bar".</p> <p>Some of those accused also wore clothes and signs which could be an indication of an extreme right-wing affinity. The decision in first instance (Decision of Criminal Court number 6 of Zaragoza of 6 February 2006) considered that the circumstance of increased criminal responsibility of Article 22(4) of the Criminal Code, relating to the sexual orientation of the victims, should be applied to the offences of threats and assault and battering which were the subject of the decision.</p> <p>The defendants appealed against the decision.</p>
<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>According to the judgment of the Provincial Court, on the basis of these elements it was not possible to apply the aggravating circumstance of acting for reasons of ideological discrimination or the sexual orientation of the victims, as there were no signs or any proof that might allow the conclusion of the accused having acted for reasons of a certain ideology or sexual orientation.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>The Provincial Court of Zaragoza considers that the aggravating circumstance of sexual or ideological discrimination of Article 22(4) of the Criminal Code should not be applied to the case as there is no sufficient proof for its application to the established crime of threats.</p>

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Judgment no. 195/2008 of 28 March, of the Provincial Court of Zaragoza, partially revokes the decision issued on 6 February 2006 by Criminal Court number 6 of Zaragoza. The appeal was partially upheld.
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Chapter F, Hate crimes, case 7

Case title	Spanish Supreme Court (Criminal Chamber, first section) Judgment 1243/2009 of 30 October ( <i>Sentencia del Tribunal Supremo, Sala de lo Penal, Sección primera, no 1243/2009 de 30 de octubre</i> ) <sup>437</sup>
Decision date	30 October 2009
Reference details (type and title of court/body; in original language and English (official	Supreme Court ( <i>Tribunal Supremo</i> ) Criminal Jurisdiction Appeal no. 192/2009 Rapporteur: Mr Siro Francisco García Pérez

<sup>437</sup> Spain, Spanish Supreme Court, Criminal Chamber, first section, Judgment 1243/2009 of 30 October (*Sentencia del Tribunal Supremo, Sala de lo Penal, Sección primera, 1243/2009 de 30 de octubre*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=5009877&links=%22192/2009%22&optimize=20100121&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=5009877&links=%22192/2009%22&optimize=20100121&publicinterface=true)

<p>Key facts of the case (max. 500 chars)</p>	<p>On 16 May 2006 the Court of First Instance of Murcia registered the case for adoption brought by Doña Rosa regarding the girl Consuelo, born on 11-2-06 by artificial insemination of Doña Laura, with whom the person filing the application had contracted matrimony on 18 November 2005.</p> <p>The High Court of Justice of Murcia considered the complaint of Doña Rosa alleging that the judge was intentionally and 'in a malicious way' delaying her application for the adoption of her female partner's biological daughter.</p> <p>The Decision of the High Court of Justice number 5/2008 of 23 December 2008 condemned the judge for a malicious delay in the administration of justice with the aggravating factor of sexual orientation discrimination of Article 22(4) of the Criminal Code, with the special disqualification for the post of Judge or Magistrate for a period of 2 years, 3 months and 1 day, and the obligation to compensate the claimant with 6,000 euros.</p> <p>Both Doña Rosa and the judge appealed the Decision.</p>
<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>The Supreme Criminal Chamber considers that the intention of the judge had been to prevent the application of the solution established by law, which admitted matrimony between people of the same sex and covered the case of the adopted person being a child of the adopter's partner. The Supreme Court considers that the decisions reached by the judge do not only involve "unfairly delaying resolutions" but also an "attitude of active belligerent obstruction" to prevent the application of the law, especially, it adds, when he attempted to question their suitability for adoption due to the woman's sexual orientation. Although it recalls that the law establishes the superior interest of protecting the minor, for which the suitability of the adopting parties must also be considered, the Supreme Court sustains that in this case the adoption was "abnormally adjourned in time". The judge, the sentence highlights, whatever his legal or metalegal ideology, had "the duty of adapting his court work to the solution already established by law".</p>

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	A judge is condemned for a crime of judicial misconduct for having purposefully and for reasons of homophobia delayed an adoption requested by a woman with respect to the daughter born by artificial insemination of the woman with whom she had contracted matrimony.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The Sentence of the Supreme Court of 30 October 2009 partially revokes the Decision of the High Court of Justice of Murcia. The Sentence of the Supreme Court condemns a judge for a crime of judicial misconduct provided in article 446.3 of the Criminal Code, without general circumstances modifying criminal liability, to a 12-month fine and special disqualification for the post of Judge or Magistrate for a period of 10 years, and the obligation to compensate the claimant with 6,000 Euros.

#### Chapter G, Applicability of legislation on transgender issues, case 1

Case title	Decision of Social Jurisdiction Court nº 18 of Barcelona ( <i>Sentencia del Juzgado de lo Social no 18 de Barcelona</i> ) <sup>438</sup>
Decision date	26 March 2007
Reference details (type and title of court/body; in original language and	Social Jurisdiction Court nº 18 of Barcelona ( <i>Juzgado de lo Social n0 18 de Barcelona</i> ) Social Jurisdiction Procedure no. 104/2007 Rapporteur: Mrs Amparo Illán Teba

<sup>438</sup> Decision of Social Jurisdiction Court nº 18 of Barcelona (*Sentencia del Juzgado de lo Social no 18 de Barcelona*), [www.poderjudicial.es/search/doAction?action=contentpdf&datasematch=AN&reference=506168&links=142/2007&optimize=20070524&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&datasematch=AN&reference=506168&links=142/2007&optimize=20070524&publicinterface=true) (Hyperlink accessed on 25 May 2014).

<p>Key facts of the case (max. 500 chars)</p>	<p>The plaintiff was a transsexual woman, who appeared on her identity card with a male name and sex. The plaintiff had been hired on 17 January 2007 by the company Euro-residences Management, INC, which managed homes for the elderly, for the post of Auxiliary Carer. The individual gave a female name both for the job application and for the job interview, but mentioned her transsexual condition in her curriculum vitae. After nine days in the workplace, she was informed of a managerial decision to terminate her contract, which was justified by a claim that her probationary period had been unsatisfactory. Later, the company would itself recognise the unfounded character of the dismissal.</p> <p>The plaintiff brought legal action against the company. She alleged that the dismissal was void because it was based on discrimination on the grounds of her transsexual condition. In this sense there was a violation of Articles 14 of the Spanish Constitution and 17(1) of the Workers' Statute. However, the company responded that the reasons for the dismissal were the employee's lack of adaptation to the job, inappropriate treatment of patients and a conflicting relationship with colleagues.</p>
<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>The Court considered that the plaintiff was able to establish enough facts from which a discriminatory motivation for the dismissal could be at least presumed, taking into account, among other aspects: the short period worked (nine days); the fact that she was not given the opportunity to sign a work contract during this period, when this usually takes place within three days after the start of employment; the testimony of her colleagues had not been sufficiently complete; non-relevance of the claim of lack of experience (known and accepted by the company at the beginning the work relationship).</p> <p>Since the legal requirements were fulfilled, the burden of proof fell to the respondent, as is the case for discriminatory dismissals. The Court considered that the company did not sufficiently prove the existence of reasons other than the discriminatory treatment.</p>

Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	<b>Application of the reversal of the burden of proof in proceedings related to discriminatory dismissals on grounds of gender</b> (applied to the case of a transsexual). <b>Requirement of establishing enough facts from which a discriminatory motivation</b> may be at least presumed to shift the burden of proof (enough facts had been established in this case).
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	Consideration of the legal action taken by Mr Oscar against Euro-residences Management, INC, the Salary Guarantee Fund and the Public Prosecutor. The Court declared the dismissal to be unlawful. By application of Articles 55(5) and (6) of the Workers' Statute, the dismissal was considered as being directly related to the transsexual condition of the worker, which supposed a violation of the right to equality and non-discrimination on grounds of sex of Article 14 of the Spanish Constitution and Article 17(1) of the Workers' Statute. Immediate readmission of the plaintiff to the workplace under the same conditions which were applied before the dismissal. Payment of the unpaid salaries from the date of the dismissal until the date of readmission to the workplace.

Chapter G, Name change and/or sex change of transgender people, relevant case law, case 2

Case title	Spain, Decision 121/2007 of the Provincial Court of Cádiz of 15 May ( <i>Sentencia 121/2007 de la Audiencia Provincial de Cádiz, de 15 de mayo</i> ) <sup>439</sup>
Decision date	15 May 2007

<sup>439</sup> Spain, Decision 121/2007 of the Provincial Court of Cádiz of 15 May (*Sentencia 121/2007 de la Audiencia Provincial de Cádiz, de 15 de mayo*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=282190&links=121/2007&optimize=20071213&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=AN&reference=282190&links=121/2007&optimize=20071213&publicinterface=true)

Reference details (type and title of court/body; in original language and English (official translation, if available))	Provincial Court of Cádiz ( <i>Audiencia Provincial de Cádiz</i> ) Civil Jurisdiction Appeal no. 125/2007 Rapporteur: Ms Margarita Alvarez-Ossorio Benítez
Key facts of the case (max. 500 chars)	Decision of 31.07.2006. The Court of First Instance of Puerto Real (Cádiz) refused the plaintiff's request for a declaration of gender change from woman to man and the request to change the female name Sofía to the male name Alfonso, and the rectification of both facts in the plaintiff's birth registration in the Civil Register. The Court considered that the surgical treatments undergone by the plaintiff were not sufficient because the requirement was not only for the suppression of secondary sexual characteristics. Also necessary was a change of the primary ones and the provision of sex organs, at least similar in aspect, to those of the gender emotionally felt. Since the plaintiff had not undergone a hysterectomy with bilateral adnexectomy (removal of ovaries, Fallopian tubes and uterus) to suppress any reproductive option, and since the social aspect was not enough to prove the male role, the Court rejected the claim. The plaintiff appealed the Court's decision, requesting its annulment and a new decision accepting the request.

<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>The Decision regarded as correct the reasoning of the appealed decision considering its date and its coherency with the case-law criteria used in the decision, customary at that time.</p> <p>However, the Provincial Court highlighted the importance of the change introduced by the entry into force of Act 3/2007 of 15 March on the Rectification in the Civil Register of the Recorded Gender. This act makes it possible, in accordance with the rules of the Act on the Civil Registry, to rectify the gender entry in the Civil Registry, provided the requirements established by the Act are fulfilled. Specifically, Article 4(2) removes to this effect the requirement that the medical treatment must include gender reassignment surgery. The choice of the new name was in accordance with this Act (Article 2(1)).</p>
	<p>In the opinion of the Court, the case must be solved by applying the new Act, which is less strict in its requirements than the preceding case law.</p> <p>Since the requirements of the new Act (the plaintiff had been treated and operated for several years; she was waiting for a sex change operation; there was a clinical report on her transgender condition from woman to man; she did not present any personality disorders) were considered fulfilled in this case, the application should be granted.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>In order to rectify the gender from woman to man and to change the name, it is not necessary for the required medical treatment to include a gender reassignment surgery.</p> <p>Accomplishment of the requirements to rectify the gender entry in the registry according to Act 3/2007 of 15 March.</p>

Results (sanctions) and key consequences or implications of the case (max. 500 chars)	<p>Partial acceptance of the appeal.</p> <p>Annulment of Decision of 31 July 2006 of the Court of First Instance (<i>Juzgado de Primera Instancia e Instrucción</i>) number 1 of Puerto Real, in procedure no. 425/05.</p> <p>Declaration on the rectification of the gender of the appellant from woman to man, authorisation of the change of name from Sofía to Alfonso, and court order that these declarations be registered in the margin of the birth registration of the plaintiff in the Civil Registry, in conformity with the Act on the Civil Registry and its Statutory Regulation, with all the legal effects that the change implies.</p>
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Chapter G, Name change and/or sex change of transgender people, relevant case law, case 3

Case title	Decision 929/2007 of the Supreme Court (Civil Chamber, Plenary), of 17 September ( <i>Sentencia 929/2007 del Tribunal Supremo, Sala de lo Civil, Pleno, de 17 de septiembre</i> ) <sup>440</sup>
Decision date	17 September 2007
Reference details (type and title of court/body; in original language and English (official	<p>Supreme Court (<i>Tribunal Supremo</i>)</p> <p>Civil Jurisdiction Appeal no. 1506/2003.</p> <p>Rapporteur: Mr Vicente Luis Montes Penades</p>

<sup>440</sup> Spain, Decision 929/2007 of the Supreme Court (Civil Chamber, Plenary), of 17 September (*Sentencia 929/2007 del Tribunal Supremo, Sala de lo Civil, Pleno, de 17 de septiembre*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=342648&links=&optimize=20071004&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=342648&links=&optimize=20071004&publicinterface=true)

<p>Key facts of the case (max. 500 chars)</p>	<p>In the present case, the appellant stated his wish to change his male name for a female one, in accordance with the sex he really felt to be his own. He argued that he had identified himself as a girl from the age of seven or eight; he had suffered rejection from the other children; childhood in solitude; social rejection which increased in adolescence; at age 12 started to think about a sex-change intervention, and decided to assume a female identity completely at 28. Once he had made the decision that he wished to be treated as a woman, he chose the name 'O.C.F.', abandoning the name entered in the Registry. She took legal action in order to be able to develop her work with respect and dignity and to have her gender identity respected.</p> <p>The case was based on a request for a change in the sex and name entries, which was made prior to Act 3/2007 of 15 March and which had been refused successively by two different Courts (Decision of 03.09.2001 of the Court of First Instance no. 1 of Sant Feliu de Llobregat and Decision of 7 April 2003 of the Provincial Court of Barcelona (First Section), both also issued before the Act 3/2007 of 15 March on the Rectification of the recording of gender in Registries entered into force. Both judicial decisions argued that no gender reassignment surgery had taken place, which was regarded as a necessary requirement, according to Spanish case law and the case law of the European Court of Human Rights, until the entry into force of the above- mentioned Act.</p>
<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>First, the Court analysed in detail (in its second and third paragraphs) the positions of the preceding case law, which demanded surgical intervention to justify change of gender and name in the Registry. After that, the Supreme Court showed how this prevailing conception for the recognition of the sex change – though mainly based on psychological and social elements – was still anchored in a somatic criterion, i.e. the sex reassignment surgery, which seems to lose weight in the context of the most recent social and legal changes.</p>

Accordingly, we can highlight the following arguments of the Supreme Court:

A violation of the fundamental rights to privacy and to control the use of one's own image (Articles 18(1) and 10(1) of the Constitution) shall not be automatically deduced from the imposition of the surgical intervention as an obligatory requirement. It is necessary (especially in the light of the recent Act 3/2007) to apply the principle of freedom of personal development to the right to control the use of one's own image, allowing its normal development in a context of privacy, without invasion or interference.

Under Act 3/2007 of 15 March, transsexuals shall be entitled (once the sex change has been accomplished in accordance with the requirements that the Act establishes, and following the established process) to change their sex and name entries without requiring surgical treatment (*conditio sine qua non* of the change in accordance with the case law prior to Act 3/2007).

With regard to cases started in the past but still in process: it is not a question of the validity or effectiveness of a certain act or behaviour. The essence is the exercise of a right whose viability was impeded by an obstacle that the new Act has removed (application of the first Transitory Provision of the Civil Code). The right created *ex novo* as a consequence of the legislative change (right to modify gender due to sex change, but without reassignment surgery), once requested from the Courts (according to the old case law), is now obtainable through an administrative decision.

<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>Sex; ‘dysphoria’; possibility for those who suffer from it to form their gender identity according to their feelings and convictions; protection of the freedom of personal development without external interference; change of sex and name; upheld; absence of surgical sexual reassignment intervention shall not be a legal obstacle; the psycho-social factors shall prevail over phenotypical or chromosomal ones for the purposes of sex determination; application formulated in ordinary judicial procedure before the entry into force of Act 3/2007; now the law constitutes a possibility to decide thereon in the process without need to commence the administrative procedure established by the law; application to the case of the common or general transitory provisions of the Civil Code. Fundamental rights; right to privacy and to control the use of one’s own image; consideration of their impact on the sex change for those who suffer gender dysphoria.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The Supreme Court upheld the appeal.  or  Annulment of the appealed decision.  The name and sex rectification requested by the party was granted: the appellant acquired the new name (O.C.F.) and female sex recognition, which were recorded in the Civil Registry rectifying the previous entry.</p>

Chapter G, Name change and/or sex change of transgender people, relevant case law, case 4

Case title	Spanish Constitutional Court Judgment 176/2008 of 22 December ( <i>Sentencia del Tribunal Constitucional 176/2008, de 22 de diciembre</i> ) <sup>441</sup>
Decision date	22 December 2008
Reference details (type and title of court/body; in original language and English (official))	Constitutional Court ( <i>Tribunal Constitucional</i> ) First Section Appeal no. 4595/2005 Rapporteur: Mr Manuel Aragón Reyes
Key facts of the case (max. 500 chars)	The visiting programme of a father to his youngest son was restricted by Decision of the Provincial Court (First Section) of Lugo of 19 May 2005 as a result of a claim for modification of definitive measures brought by the mother, based on the transsexuality of the father and his supposed lack of interest in the child. The father lodged an individual appeal for protection alleging his right not to be discriminated against on grounds of sexual orientation. The appellant considered that it has actually been his condition as a female transsexual that determined the restricted terms of the new visiting arrangements. He considered it an infringement of his right to non-discrimination for reason of sexual orientation, recognised in Article 14 of the Constitution.

<sup>441</sup> Spain, Spanish Constitutional Court Judgment 176/2008 of 22 December (*Sentencia del Tribunal Constitucional 176/2008, de 22 de diciembre*), available at: <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/6408>

<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>The Court establishes that, although it is not expressly mentioned in Article 14 of the Constitution, gender identity is included among the grounds of discrimination provided by this provision. However, the Constitutional Court considers that the reasoning of the challenged Sentences allows the conclusion that the decision to restrict the visiting arrangements initially agreed was taken by the judicial bodies bearing in mind the genuine, prevalent interest of the minor, comparing his interest with that of the parents, and without there being indications that this decision has been influenced, as the appellant states, by supposed prejudice of the court bodies with respect to the detail of the father's transsexuality.</p> <p>“In short, it is not the transsexuality of the appellant which has caused the restriction of the visiting arrangements agreed in the challenged Sentences, but rather his emotional instability, according to the psychological determination assumed by the court bodies, and which supposes the existence of a considerable risk of effective alteration of the emotional health and development of the character of the minor, given his age (six years old at the time of the judicial exploration) and his evolution.”</p>
	<p>The Court concludes that the challenged Sentences have not given the appellant unfavourable legal treatment within the framework of his father-son relationship by reason of his gender identity, established by Article 14 of the Constitution.</p>

<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>In relation to discrimination for reasons of gender identity, the Constitutional Court Sentence includes transsexuality in Article 14 of the Constitution, which proclaims the equality of Spaniards before the law, “without any prevailing discrimination by reason of the birth, race, sex, religion, opinion or any other personal or social condition or circumstance”.</p> <p>The Sentence refers to broad European case law and continues the line initiated by the Constitutional Court Sentence on the dismissal of persons because they were homosexual (Constitutional Court Sentence 41/2006 of 13 February, mentioned in section A). Sentence 176/2008 deals with the rights of parental visits to children, where there was an important precedent (dealt with from the perspective of religious freedom in Constitutional Court Sentence 141/2000 of 29 May).</p> <p>The Constitutional Court establishes that, although it is not expressly mentioned in Article 14 of the Constitution, gender identity is included among the grounds of discrimination provided by this provision.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The Constitutional Court rejects the individual appeal of fundamental rights. Confirmation of the appealed decision.</p>

Chapter H, Case law relevant to institutional homophobia

Case title	Judgment of Supreme Court, Administrative Dispute Jurisdiction Chamber, of 11 February 2009 ( <i>Sentencia del Tribunal Supremo, Sala de lo Contencioso Administrativo, de 11 de febrero de 2009</i> ) <sup>442</sup>
Decision date	11 February 2009
Reference details (type and title of court/body; in original language and	Supreme Court ( <i>Tribunal Supremo</i> ) Contentious-administrative jurisdiction Appeal no. 905/2008 Rapporteur: Mr Juan José González Rivas

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<sup>442</sup> Spain, Judgment of Supreme Court, Administrative Dispute Jurisdiction Chamber, of 11 February 2009 (*Sentencia del Tribunal Supremo, Sala de lo Contencioso-Administrativo, de 11 de febrero de 2009*), [www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=4434312&links=&optimize=20090226&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=4434312&links=&optimize=20090226&publicinterface=true)

<p>Key facts of the case (max. 500 chars)</p>	<p>With respect to the school curriculum, one of the novelties of Organic Act 2/2006 on Education consists of the new subject “Education for citizenship” which consists in different educational activities and implies the introduction of new contents referring to this education which, under different names in accordance with the nature of the contents and the ages of the pupils, will be taught in some courses of primary education, compulsory secondary education and baccalaureate.</p> <p>Its purpose consists of offering all students a basis for reflection, analysis and study of the different fundamental characteristics and the operation of a democratic regime, of the principles and rights established in the Spanish Constitution, as well as the rights established in treaties and the universal declaration of human rights, and the common values of constituting the substrate of democratic citizenship in a global context.</p> <p>This is a new subject that is intended to go further into certain aspects of life in society, contributing to forming the new citizens. The Royal Decrees regulating minimum education (Royal Decree 1513/2006 of 7 December, Royal Decree 1631/2006 of 29 December and Royal Decree 1467/2007 of 2 November) developed the content of the new subject, though leaving a margin for later application.</p>
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	<p>The new subject “Education for citizenship” however received a critical reaction from some parents, who considered that schools might indoctrinate their children, thus infringing Article 27(3) (“The public authorities guarantee the right of parents to ensure that their children receive religious and moral instruction in accordance with their own convictions”) and Article 16(1) of the Spanish Constitution (“Freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law.”).</p> <p>The parents alleged several risks in the content of the subject, specifically “One of the objectives of the subject is "to recognise the rights of women, to assess the difference between sexes and equal rights between them and to reject the stereotypes and prejudices which suppose discrimination between men and women" or references are contained to sexism and homophobia, which anticipate negative value judgments on conceptions concerning the person and which may be based on legitimate convictions, but which are immediately classified as prejudices and discriminations”.</p> <p>The Decision of the High Court of Justice of Andalusia of 4 March 2008 acknowledged the right of conscientious objection of some citizens with respect to the subject “Education for citizenship”.</p>
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<p>Main reasoning/argumentation (max. 500 chars)</p>	<p>Amongst other arguments, the Sentence draws from articles 27.2 and 27.5 of the Spanish Constitution (“Education shall aim at the full development of human personality with due respect for the democratic principles of coexistence and for basic rights and freedoms”; “The public authorities guarantee the right of all to education, through general education programming, with the effective participation of all sectors concerned and the setting-up of educational centres”) the conclusion that the State’s obligation is to intervene in education to ensure not only that knowledge is transmitted but also that information and instruction is given on the necessary values for the correct operation of the democratic system both in public and private teaching.</p> <p>The right of parents to choose a moral and religious orientation which must be present in their children’s training (Article 27.3 of the Constitution) refers to the world of beliefs and models of individual conduct that all persons are free to choose for themselves and to transmit to their children.</p>
<p>Key issues (concepts, interpretations) clarified by the case (max. 500 chars)</p>	<p>Following numerous contradictory decisions from different Spanish judicial bodies, a series of sentences from the Supreme Court in 2009 have clarified the question, rejecting the pretended conscientious objection of some citizens with respect to the subject “Education for citizenship”. The first Sentence of the Supreme Court that establishes this doctrine, reproduced in later sentences, is the Sentence of 11 February 2009, which resolves appeal for annulment number 905/2008.</p>
<p>Results (sanctions) and key consequences or implications of the case (max. 500 chars)</p>	<p>The Decision of the Supreme Court annulled the Decision of the High Court of Justice of Andalusia of 4 March 2008 acknowledging the right of conscientious objection of some citizens with respect to the subject “Education for citizenship”.</p> <p>There are five dissenting opinions to the Sentence.</p>

Case title	Supreme Court 835/2013, Civil Chamber, of 6 February 2014 ( <i>Sentencia del Tribunal Supremo 835/2013, Sala de lo Civil, de 6 de febrero de 2014</i> ) <sup>443</sup>
Decision date	6 February 2014
Reference details (type and title of court/body; in original language and English (official))	Supreme Court ( <i>Tribunal Supremo</i> ) Contentious-administrative jurisdiction Appeal no. 835/2013 Rapporteur: Mr Rafael Saraza Jimena
Key facts of the case (max. 500 chars)	A Spanish couple requests the registration of the filiation of two children in Spain after concluding a surrogacy contract in California based on the law of that State. The Spanish Civil Registry resolution agreed and registered the filiation considering that it was in accordance with international Spanish public order and respectful with the non-discrimination principle and in favour of the minor principle. The Spanish Public Prosecutor appealed the decision of the Civil Registry Direction because in Spain births by surrogacy are forbidden. In first instance the appeal was accepted and the registration annulled. In second instance the Provincial Court of Valencia confirmed the decision of the first instance. After that, the parents appealed to the Supreme Court, which was asked to decide the possibility of registering the affiliation of children born by surrogacy in the Civil Registry.

<sup>443</sup> Spain, Judgment no 835/2013 of Spanish Supreme Court, Civil Chamber, of 6 February 2014 (*Sentencia del Tribunal Supremo 835/2013, Sala de lo Civil, de 6 de febrero de 2014*), available at: [www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=6958977&links=&optimize=20140214&publicinterface=true](http://www.poderjudicial.es/search/doAction?action=contentpdf&database=TS&reference=6958977&links=&optimize=20140214&publicinterface=true)

Main reasoning/argumentation (max. 500 chars)	Among other arguments, the Sentence argues that the registration in the Civil Registry based on a foreign law cannot be contrary to the Spanish public order, in this case based on article 10 of Act 14/2006 on Assisted Human Reproduction Techniques ( <i>Ley 14/2006 de Técnicas de Reproducción Humana Asistida</i> ). In addition, the Supreme Court concludes that the impossibility to register the filiation does not constitute discrimination based on sexual orientation or sexual identity, and is not contrary to the prevailing interest of the minor.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	The registration in the Civil Registry based on a surrogacy contract that is forbidden under Spanish legislation is contrary to international Spanish public order, and therefore is illegal. The impossibility to register the filiation does not constitute discrimination based on sexual orientation or sexual identity, and is not contrary to the prevailing interest of the minor..
Results (sanctions)	Impossibility to register the filiation of minors in the Civil Registry.

Chapter J, Case law relevant to the impact of good practices/ miscellaneous on homophobia and/or discrimination on the ground of sexual orientation, case 1

Case title	Spanish Constitutional Judgment 198/2012 of 28 October (Sentencia del Tribunal Constitucional 198/2012, de 28 de octubre) <sup>444</sup>
Decision date	28 October 2012

<sup>444</sup> Spanish Constitutional Judgment 198/2012 of 28 October (*Sentencia del Tribunal Constitucional 198/2012, de 28 de octubre*), <http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/23106>

Reference details (type and title of court/body; in original language and English (official translation, if available))	Constitutional Court ( <i>Tribunal Constitucional</i> ) Constitutional jurisdiction
Key facts of the case (max. 500 chars)	Act 13/2005 of 1 July, on modification of the Civil Code regarding the right to marriage ( <i>Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio</i> ) <sup>445</sup> recognised the right of same-sex marriage. A Spanish conservative group lodged a constitutional appeal in order to establish the constitutionality of the reform.
Main reasoning/argumentation (max. 500 chars)	Act 13/2005 is in accordance to article 32 of Spanish Constitution ( <i>Constitución española</i> ). Although article 32 refers to the right of men and women to get married in equal conditions, this article can be read in the sense that the Constitution identifies the holders of the right, and not the form of the marriage.
Key issues (concepts, interpretations) clarified by the case (max. 500 chars)	Article 32 of Spanish Constitution does not exclude same-sex marriage, and can be interpreted in the sense that same-sex marriage is constitutional.
Results (sanctions) and key consequences or implications of the case (max. 500 chars)	The constitutionality of Act 13/2005 of 1 July, on modification of Civil Code regarding the right to marriage ( <i>Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio</i> ). <sup>446</sup>

<sup>445</sup> Spain (2005), Act 13/2005 of 1 July, on modification of the CC regarding the right to marriage (*Ley 13/2005, de 1 de julio, por la que se modifica el CC en materia de derecho a contraer matrimonio*), [www.boe.es/buscar/doc.php?id=BOE-A-2005-11364](http://www.boe.es/buscar/doc.php?id=BOE-A-2005-11364)

<sup>446</sup> Spain (2005), Act 13/2005 of 1 July, on modification of CC regarding the right to marriage (*Ley 13/2005, de 1 de julio, por la que se modifica el CC en materia de derecho a contraer matrimonio*), [www.boe.es/buscar/doc.php?id=BOE-A-2005-11364](http://www.boe.es/buscar/doc.php?id=BOE-A-2005-11364)

## Annex 2 – Statistics

NOTE: It is necessary to consult the explanations in the report to interpret the statistics. Chapter A, Implementation of Employment Directive 2000/78/EC in relation to sexual orientation

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009-2013
Total complaints of discrimination on the ground of sexual orientation (equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)					Discrimination at the workplace: 13	Discrimination at the workplace: 28	Discrimination at the workplace: 12	Discrimination at the workplace: 10	Discrimination at the workplace: 10	No data available
Total finding of Discrimination confirmed (by equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing,										

goods and services etc.)										
National Number of sanctions/compensation payments issued (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)										
National range of sanctions/compensation payments (by courts, tribunals, equality bodies etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services etc.)										

There is no data regarding discrimination at the workplace from recent years (2009-2013) in the General State Prosecutor's (*Ministerio Fiscal*) annual reports.<sup>447</sup>

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<sup>447</sup> Spain, Office of the General State Prosecutor (*Ministerio Fiscal*) available at: [www.fiscal.es/cs/Satellite?cid=1240559967365&language=es&pagename=PFiscal/Page/FGE\\_home\\_e%2FFGE\\_sinContenido](http://www.fiscal.es/cs/Satellite?cid=1240559967365&language=es&pagename=PFiscal/Page/FGE_home_e%2FFGE_sinContenido)

The Spanish Ombudsman (*Defensor del Pueblo*) has not published any specific reports on discrimination on the ground of sexual orientation. The annual reports of the Spanish Ombudsman for the years 2000-2012 do not contain any references to complaints of discrimination on the ground of sexual orientation at the workplace.<sup>448</sup>

There are no specific reports of the Ombudsman of the Autonomous Community of Andalusia (*Defensor del Pueblo Andaluz*) and no references to discrimination on grounds of sexual orientation in the annual reports.<sup>449</sup>

There are no relevant references to this issue in the 2007-2012 annual reports of the Catalan Ombudsman (*Sindic de Greuges de Catalunya*).<sup>450</sup> Although there are 17 Autonomous Communities in Spain, there are 11 regional ombudsperson. We consulted principal Ombudspersons reports (Catalonia and Andalusia ones) for update the report, in line with the previous report of 2010, and after that we checked the reports of the other 9 ombudspersons, and there are no information of these issues<sup>451</sup>.

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<sup>448</sup> Spain, Ombudsman (*Defensor del Pueblo*) [www.defensordelpueblo.es/index.asp?destino=informes2.asp](http://www.defensordelpueblo.es/index.asp?destino=informes2.asp).

<sup>449</sup> Spain, Ombudsman of the Autonomous Community of Andalusia (*Defensor del Pueblo Andaluz*) [www.defensor-and.es/index2.asp](http://www.defensor-and.es/index2.asp)

<sup>450</sup> Spain, Ombudsman of the Autonomous Community of Catalonia (*Sindic de Greuges de Catalunya*) Annual Reports (*Informes anuals*), [www.sindic.cat/es/page.asp?id=20](http://www.sindic.cat/es/page.asp?id=20)

<sup>451</sup> Spain, Ombudsman of the Autonomous Community of Aragon (*Defensor del Pueblo de Aragón*), [www.eljusticiadearagon.com/index.php?zona=informes\\_anuales-](http://www.eljusticiadearagon.com/index.php?zona=informes_anuales-); Ombudsman of the Autonomous Community of Galicia (*Defensor del Pueblo de Galicia*) [www.valedordopobo.com/index.php?s=112](http://www.valedordopobo.com/index.php?s=112); Ombudsman of the Autonomous Community of Canary Islands (*Defensor del Pueblo de las Islas Canarias*) [www.diputadodelcomun.org/v6/documentos/buscador.php?dia\\_start=&mes\\_start=&anyo\\_start=&dia\\_end=&mes\\_end=&anyo\\_end=&title=&descripcion=&submit\\_search.x=29&submit\\_search.y=8&ID\\_tipo=02INFan&ID\\_tema=](http://www.diputadodelcomun.org/v6/documentos/buscador.php?dia_start=&mes_start=&anyo_start=&dia_end=&mes_end=&anyo_end=&title=&descripcion=&submit_search.x=29&submit_search.y=8&ID_tipo=02INFan&ID_tema=) Ombudsman of Autonomous Community of Navarre (*Defensor del Pueblo de Navarra*) [www.defensornavarra.com/index.php/es/Informes-y-otras-publicaciones/Informes-anuales](http://www.defensornavarra.com/index.php/es/Informes-y-otras-publicaciones/Informes-anuales), Ombudsman of Autonomous Community of Castilla y León (*Defensor del Pueblo de Castilla y León*) [www.procuradordelcomun.org/informes-anuales/1/](http://www.procuradordelcomun.org/informes-anuales/1/), Basque Country [www.ararteko.net/p\\_1\\_final\\_Home.jsp?seccion=s\\_ldoc\\_d4\\_v3.jsp&codbusqueda=6&language=es&codResi=1&codMenuPN=1&codMenuSN=376&codMenu=398](http://www.ararteko.net/p_1_final_Home.jsp?seccion=s_ldoc_d4_v3.jsp&codbusqueda=6&language=es&codResi=1&codMenuPN=1&codMenuSN=376&codMenu=398), Ombudsman of Valencian Autonomous Community (*Sindic de Greuges*) [www.elsindic.com/va/informes-anuals.html](http://www.elsindic.com/va/informes-anuals.html)) and there are no information of these issues. All hyperlinks were accessed on 14 April 2014.

## Chapter B, Freedom of movement of LGBT partners

	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT partners of EU citizens residing in your country falling under Directive 2004/38/EC (i.e., LGBT partners having exercised their freedom of movement as granted to family members of EU citizens, whether under Directive 2004/38/EC or under previous instruments)								
Number of LGBT partners who claimed their right to residence but were denied this right								

After requesting this information from the Ministry of Health, Social Services and Equality (*Ministerio de Sanidad, Servicios Sociales e Igualdad*),<sup>452</sup> the Ministry of the Interior (*Ministerio del Interior*)<sup>453</sup> and the National Institute of Statistics (*Instituto Nacional de Estadística*),<sup>454</sup> it can be said that there are no relevant official statistics available in Spain. LGBT associations (such as the State Federation of Lesbians, Gays, Transsexuals and Bisexuals (*Federación Estatal de Lesbianas, Gays, Transexuales y Bisexuales*, FELGTB)<sup>455</sup> or the Madrid Lesbian, Gay, Transgender and Bisexual Community, (*Colectivo de lesbianas, gays, transexuales y bisexuales de Madrid*, COGAM)<sup>456</sup> do not have data available on these issues either.

Recently, FELGTB and COGAM<sup>457</sup> published a study entitled 2013 Research on discrimination on grounds of sexual orientation and/or gender identity in Spain.<sup>458</sup> However, it contains no relevant information about the freedom of movement.

## Chapter C, Asylum and subsidiary protection, protection due to persecution on the grounds of sexual orientation

	2000	2001	2002	2003	2004	2005	2006	2007

<sup>452</sup> Spain, Ministry of Health, Social Services and Equality (*Ministerio de Sanidad, Servicios Sociales e Igualdad*), [www.msssi.gob.es/organizacion/ministerio/directorio/cont\\_directorio.htm](http://www.msssi.gob.es/organizacion/ministerio/directorio/cont_directorio.htm)

<sup>453</sup> Spain, Ministry of the Interior (*Ministerio del Interior*), [www.interior.gob.es/](http://www.interior.gob.es/)

<sup>454</sup> Spain, National Institute of Statistics (*Instituto Nacional de Estadística*), [www.ine.es/](http://www.ine.es/)

<sup>455</sup> Spain, FELGTB, [www.felgtb.org/](http://www.felgtb.org/)

<sup>456</sup> Spain, COGAM, [www.cogam.es/](http://www.cogam.es/)

<sup>457</sup> Spain, [www.cogam.es/](http://www.cogam.es/)

<sup>458</sup> Spain, FELGTB and COGAM, 2013 Research on discrimination on grounds of sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*), available at: [www.felgtb.org/temas/laboral/documentacion/i/3773/359/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana](http://www.felgtb.org/temas/laboral/documentacion/i/3773/359/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana)

Number of LGBT individuals benefiting from asylum/ subsidiary protection due to persecution on the ground of sexual orientation.								
Number of LGBT individuals who were denied the right to asylum or to subsidiary protection despite having invoked the fear of persecution on grounds of sexual orientation								

#### Chapter C, Asylum and subsidiary protection, protection of LGBT partners

	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT partners of persons enjoying refugee/ subsidiary protection status residing in your country falling under Art 2/h Directive 2004/83/EC								
Number of LGBT partners of persons enjoying refugee/subsidiary protection status who were denied the possibility to stay with their partner								

There is no disaggregated data available regarding LGBT individuals benefiting from asylum/subsidiary protection due to persecution on the ground of sexual orientation. And there are no disaggregated data available regarding the number of LGBT partners of persons enjoying refugee/subsidiary protection status residing in Spain. As we point out in the report, the information on asylum and subsidiary protection available from the General Subdirectorate on Asylum (*Subdirección General de Asilo*) of the Ministry of the Interior (*Ministerio del Interior*)<sup>459</sup> does not disaggregate data concerning the sexual orientation of the applicants. The annual reports disaggregate data according to age, gender, education, economic activity or country of origin of the applicants, but not according to reasons for the asylum protection sought. There are also data on the number of appeals lodged against negative resolutions, but not on the reasons for the appeals. After requesting this information from the Ministry of the Interior (*Ministerio del Interior*),<sup>460</sup> the Ministry of Justice (*Ministerio de Justicia*)<sup>461</sup>, and the Ministry of Employment and Social Security (*Ministerio de Empleo y Seguridad Social*), it can be said that there are no relevant official statistics available in Spain.

<sup>459</sup> Spain, Ministry of the Interior (*Ministerio del Interior*), [www.interior.gob.es/](http://www.interior.gob.es/)

<sup>460</sup> Spain, Ministry of the Interior (*Ministerio del Interior*), [www.interior.gob.es/](http://www.interior.gob.es/)

<sup>461</sup> Spain, Ministry of Justice (*Ministerio de Justicia*), [www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html](http://www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html)

## Chapter D, LGBT partners benefiting family reunification

	2000	2001	2002	2003	2004	2005	2006	2007
Number of LGBT partners of third country nationals residing in your country benefiting from family reunification.								
Number of LGBT partners of third country nationals residing in your country who were denied the right to benefit from family reunification								

As we point out in the report, there are no official statistics on these issues in Spain. We have consulted data from the Ministry of Health, Social Services and Equality (*Ministerio de Sanidad, Servicios Sociales e Igualdad*),<sup>462</sup> from the Ministry of Justice (*Ministerio de Justicia*)<sup>463</sup>, from the Ministry of the Interior (*Ministerio del Interior*)<sup>464</sup> and from the National Institute of Statistics (*Instituto Nacional de Estadística*).<sup>465</sup> LGBT associations (such as the State Federation of Lesbians, Gays, Transsexuals and Bisexuals (*Federación Estatal de Lesbianas, Gays, Transexuales y Bisexuales*, FELGTB)<sup>466</sup> or Madrid Lesbian, Gay, Transgender and Bisexual Community, (*Colectivo de lesbianas, gays, transexuales y bisexuales de Madrid*) COGAM<sup>467</sup>) do not have data available either. Recently, FELGTB and COGAM published a study entitled 2013 Research on discrimination on grounds of sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*).<sup>468</sup> However, it contains no relevant information about family reunification. Although there are 17 Autonomous Communities in Spain, there are 11 regional ombudsperson. We consulted principal Ombudpersons reports (Catalonia and Andalusia ones) for update the report, in line with the previous report of 2010.

<sup>462</sup> Spain, Ministry of Health, Social Services and Equality (*Ministerio de Sanidad, Servicios Sociales e Igualdad*), [www.msssi.gob.es/organizacion/ministerio/directorio/cont\\_directorio.htm](http://www.msssi.gob.es/organizacion/ministerio/directorio/cont_directorio.htm)

<sup>463</sup> Spain, Ministry of Justice (*Ministerio de Justicia*), [www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html](http://www.mjusticia.gob.es/cs/Satellite/es/1200666550194/DetalleInicio.html)

<sup>464</sup> Spain, Ministry of the Interior (*Ministerio del Interior*), [www.interior.gob.es/](http://www.interior.gob.es/)

<sup>465</sup> Spain, National Institute of Statistics (*Instituto Nacional de Estadística*), [www.ine.es/](http://www.ine.es/)

<sup>466</sup> Spain, FELGTB, [www.felgtb.org/](http://www.felgtb.org/)

<sup>467</sup> Spain, COGAM, [www.cogam.es/](http://www.cogam.es/)

<sup>468</sup> Spain, FELGTB and, 2013 Research on discrimination on grounds of sexual orientation and/or gender identity in Spain (*Estudio 2013 sobre discriminación por orientación sexual y/o identidad de género en España*), available at: [www.felgtb.org/temas/laboral/documentacion/i/3773/359/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana](http://www.felgtb.org/temas/laboral/documentacion/i/3773/359/estudio-2013-sobre-discriminacion-por-orientacion-sexual-y-o-identidad-de-genero-en-espana)

Anyway, in the revision we have checked the reports of the other 9 ombudspersons (Aragon [www.eljusticiadearagon.com/index.php?zona=informes\\_anuales](http://www.eljusticiadearagon.com/index.php?zona=informes_anuales) , Galicia [www.valedordopobo.com/index.php?s=112](http://www.valedordopobo.com/index.php?s=112) , Canary Islands, [www.diputadodelcomun.org/v6/documentos/buscador.php?dia\\_start=&mes\\_start=&anyo\\_start=&dia\\_end=&mes\\_end=&anyo\\_end=&titl e=&descripcion=&submit\\_search.x=29&submit\\_search.y=8&ID\\_tipo=02INFan&ID\\_tema=Navarre](http://www.diputadodelcomun.org/v6/documentos/buscador.php?dia_start=&mes_start=&anyo_start=&dia_end=&mes_end=&anyo_end=&titl e=&descripcion=&submit_search.x=29&submit_search.y=8&ID_tipo=02INFan&ID_tema=Navarre) [www.defensornavarra.com/index.php/es/Informes-y-otras-publicaciones/Informes-anuales](http://www.defensornavarra.com/index.php/es/Informes-y-otras-publicaciones/Informes-anuales), Castilla y León [www.procuradordelcomun.org/informes-anuales/1/](http://www.procuradordelcomun.org/informes-anuales/1/), Basque Country [www.ararteko.net/p\\_1\\_final\\_Home.jsp?seccion=s\\_ldoc\\_d4\\_v3.jsp&codbusqueda=6&language=es&codResi=1&codMenuPN=1&codMenuS N=376&codMenu=398](http://www.ararteko.net/p_1_final_Home.jsp?seccion=s_ldoc_d4_v3.jsp&codbusqueda=6&language=es&codResi=1&codMenuPN=1&codMenuS N=376&codMenu=398), Valencian Autonomous Community [www.elsindic.com/va/informes-anuals.html](http://www.elsindic.com/va/informes-anuals.html)) and there is no information of these issues.

Chapter E, LGBT people enjoyment of freedom of assembly

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009-2013
Number of demonstrations in favour of tolerance of LGBT people, gay pride parades, etc										
Number of demonstrations against tolerance of LGBT people.					Number of judicial proceedings on illegal demonstrations (general): 4	Number of judicial proceedings on illegal demonstrations (general): 2	Number of judicial proceedings on illegal demonstrations (general): 35	Number of judicial proceedings on illegal demonstrations (general): 4	Number of judicial proceedings on illegal demonstrations (general): 1	No data available.

No official or unofficial statistical data on this issue could be found. The annual reports of the Office of the General State Prosecutor (*Ministerio Fiscal*) only contain a general reference to the number of judicial proceedings on illegal demonstrations, without disaggregating data on illegal

demonstrations against tolerance towards LGBT people: four judicial proceedings on illegal demonstrations in 2004; two in 2005; 35 in 2006; four in 2007; and one in 2008. There are no data on these issues in recent years' reports (2009-2013).<sup>469</sup>

Chapter F, Homophobic hate speech

	2000	2001	2002	2003	2004	2005	2006	2007	2008	
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<sup>469</sup> Spain, Office of the General State Prosecutor (*Ministerio Fiscal*), available at: [www.fiscal.es/cs/Satellite?cid=1240559967365&language=es&pagename=PFiscal/Page/FGE\\_home](http://www.fiscal.es/cs/Satellite?cid=1240559967365&language=es&pagename=PFiscal/Page/FGE_home)

Number of criminal court cases regarding homophobic hate speech initiated (number of prosecutions)					Number of judicial proceedings on discrimination offences, including incitement of discrimination, hatred or violence against groups, unequal treatment in access to public services and the denial of a professional benefit: 7	Number of judicial proceedings on discrimination offences, including incitement of discrimination, hatred or violence against groups, unequal treatment in access to public services and the denial of a professional benefit: 26	Number of judicial proceedings on discrimination offences, including incitement of discrimination, hatred or violence against groups, unequal treatment in access to public services and the denial of a professional benefit: 27	Number of judicial proceedings on discrimination offences, including incitement of discrimination, hatred or violence against groups, unequal treatment in access to public services and the denial of a professional benefit: 4	Number of judicial proceedings on discrimination offences, including incitement of discrimination, hatred or violence against groups, unequal treatment in access to public services and the denial of a professional benefit: 5	
					Criminal cases involving illegal associations which promote discrimination, hatred or violence against individuals, groups or associations:	Criminal cases involving illegal associations which promote discrimination, hatred or violence against individuals, groups or associations:	Criminal cases involving illegal associations which promote discrimination, hatred or violence against individuals, groups or associations:	Criminal cases involving illegal associations which promote discrimination, hatred or violence against individuals, groups or associations:	Criminal cases involving illegal associations which promote discrimination, hatred or violence against individuals, groups or associations:	

					13	30	50	44	75	
Number of convictions regarding homophobic hate speech (please indicate range of sanctions ordered)										
Range of sanctions issued for homophobic hate speech										
Number of non-criminal court cases initiated for homophobic statements										
Number of non-criminal court cases initiated for homophobic statements which were successfully										

completed (leading to a decision in favour of the plaintiff, even if no sanctions other than symbolic were imposed)										
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	2009	2010	2011	2012	2013
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Number of criminal court cases regarding homophobic hate speech initiated (number of prosecutions)	Number of judicial proceedings on discrimination offences, including incitement of discrimination, hatred or violence against groups, unequal treatment in access to public services and the denial of a professional benefit: There are no data  Criminal cases involving illegal associations which promote discrimination, hatred or violence against individuals, groups or associations: There are no data	Number of judicial proceedings on discrimination offences, including incitement of discrimination, hatred or violence against groups, unequal treatment in access to public services and the denial of a professional benefit: There are no data  Criminal cases involving illegal associations which promote discrimination, hatred or violence against individuals, groups or associations: There are no data	Number of judicial proceedings on discrimination offences, including incitement of discrimination, hatred or violence against groups, unequal treatment in access to public services and the denial of a professional benefit: 9  Criminal cases involving illegal associations which promote discrimination, hatred or violence against individuals, groups or associations: There are no data	Number of judicial proceedings on discrimination offences, including incitement of discrimination, hatred or violence against groups, unequal treatment in access to public services and the denial of a professional benefit: 28  Criminal cases involving illegal associations which promote discrimination, hatred or violence against individuals, groups or associations: There are no data	Number of judicial proceedings on discrimination offences, including incitement of discrimination, hatred or violence against groups, unequal treatment in access to public services and the denial of a professional benefit: There are no data  Criminal cases involving illegal associations which promote discrimination, hatred or violence against individuals, groups or associations: There are no data
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Chapter F, Homophobic motivation of crimes as aggravating factor

	2000	2001	2002	2003	2004	2005	2006	2007
Number of criminal court decisions in which homophobic motivation was used as an aggravating factor in sentencing								

There are no statistical data on homophobic motivation as an aggravating factor in crimes.<sup>470</sup>

The Ministry of Interior confirmed us on 14 July 2014 that the Ministry edited on 24 April 2014 an special report about hate crimes in Spain in 2013: Report on evolution of hate crimes in Spain 2013 (*Informe sobre la evolución de los delitos de odio en España 2013*). And in this report there are data related to hate crimes, including crimes based on anti-Semitic, poor-phobia (*aporofobia*), religion, disability, sexual orientation or sexual identity, racism and xenophobia with a total of 1172 of hate crimes committed in Spain in 2013. Regarding hate crimes based on sexual orientation or sexual identity there are 453 hate crimes, without no possibility of a major disaggregation.<sup>471</sup>

Hate crimes in Spain in 2013, according to the mentioned report, and disaggregated:

Anti-Semitic: 3

Poor-phobia (*aporofobia*):4

Religion: 42

Disability: 290

Sexual orientation or sexual identity: 452

Racism and xenophobia: 381.

Total of hate crimes: 1172.

<sup>470</sup> Spain, Office of the General State Prosecutor (*Ministerio Fiscal*) available at: [www.fiscal.es/cs/Satellite?cid=1240559967365&language=es&pagename=PFiscal/Page/FGE\\_home](http://www.fiscal.es/cs/Satellite?cid=1240559967365&language=es&pagename=PFiscal/Page/FGE_home)

<sup>471</sup> We consulted Ministry of Interior webpage resources on 24 May 2014, and we recheck them on 10 July 2014. Nevertheless, we have consulted the Ministry of Interior online on 10 July 2014 about the existence of any report on this matter. And they answered us on 14 July 2014 indicating that there is this recent Report edited on 24 April 2014, and available at: [www.interior.gob.es/documents/10180/1207668/Informe+sobre+los+delitos+de+odio+en+Espa%C3%B1a+2013.pdf/7eeb7e62-9117-47ab-bca0-bf3ed107d006](http://www.interior.gob.es/documents/10180/1207668/Informe+sobre+los+delitos+de+odio+en+Espa%C3%B1a+2013.pdf/7eeb7e62-9117-47ab-bca0-bf3ed107d006), page 7 (All hyperlinks were accessed on 14 July 2014). Not available in English.

Chapter G, Transgender issues

		2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Number of name changes effected due to change of gender	Period 2004-2010: 222					3	3	1	15	46	143	11
Number of persons who changed their gender/sex in your country under the applicable legislation	Period 2000-2007: 14											
Number of persons who changed their gender/sex in your country under the applicable legislation	Gender reassignment operations in the Autonomous Community of Andalusia	9	14	31	32	26	28	24				

We have consulted the statistics system of the Institute of Health Information of the Ministry of Health, Social Services and Equality (*Instituto de Información Sanitaria, Ministerio de Sanidad, Servicios Sociales e Igualdad*), in order to obtain data of gender reassignment operations. There are no disaggregated data regarding this issue from recent years.<sup>472</sup>

<sup>472</sup> Spain, Institute of Health Information of the Ministry of Health (*Instituto de Información Sanitaria, Ministerio de Sanidad*), <http://icmbd.es/login-success.do>

Chapter I, Statistics relevant to the impact of good practices on homophobia and/or discrimination on the ground of sexual orientation (presentation according to the templates above)

Number of persons who changed their gender/sex in your country under the applicable legislation.

**Table 1: Requirements for rectification of the recorded sex or name on official documents**

	Intention to live in the opposite gender	Real life test	Gender dysphoria diagnosis	Hormonal treatment/ physical adaptation	Court order	Medical opinion	Genital surgery leading to sterilisation	Forced/ automatic divorce	Unchangeable	Notes
AT	✓	✓	✓	✓		✓	✗ court decision	✗ court decision		Legal changes expected to confirm court decisions
BE	✓			✓		✓	✓			Rectification of recorded sex
BE	✓			✓		✓				Change of name
BG				?	✓	✓	?	✓	✓ (birth certificate)	Only changes of identity documents are possible (gap in legislation)
CY						✓	✓	?		
CZ	✓	✓	✓	✓		✓	✓	✓		These requirements are not laid down by law, but are use by medical committees established under the Law on Health Care
DE	✓		✓		✓	✓				Small solution: only name change
DE	✓		✓	✓	✓	✓	✓	✗ court decision and law		Big solution: rectification of recorded sex
DK	✓	✓				✓	✓	?		Rectification of recorded sex
DK			✓			✓				Change of name
EE	✓	✓				✓	✓	?		
EL					✓	✓	✓	?		
ES			✓	✓		✓				
FI	✓	✓	✓			✓	✓	✓		Name change possible upon simple notification, also before legal recognition of gender reassignment
FR			✓	✓	✓	✓	✓	✓		Requirements set by case law, legal and medical procedures uneven throughout the country
HU						✓		✓		No explicit rules in place. Requirements descend from praxis, but unclear what is necessary in order to obtain a medical opinion. After 1 January 2011 a marriage can be transformed into a registered partnership
IE									✓ (name change possible by Deed Poll)	Further changes expected following court case <i>Lydia Foy</i> (2007)

									and under Passports Act 2008)	
IT			✓	✓	✓	✓	✓	✓		
LT									✓ (personal code)	Legal vacuum due to lack of implementing legislation, courts decide on an ad hoc basis.
LU										No provisions in force, praxis varies.
LV						✓	✓ Change of name is possible after gender reassignment			Medical opinion is based on an intention to live in the opposite gender and on a diagnosis of gender dysphoria. For rectification of the recorded sex, currently the Ministry of Health decides case-by-case (parameters not specified). Amendments to the law were proposed but not adopted.
MT	✓	✓	✓	✓	✓	✓	✓	(only unmarried, divorce not possible)		Requirements unclear, decided by Courts on an ad hoc basis
NL	✓	✓	✓	✓	✓	✓	✓			According to Article 28a of the civil code, the requirement of physical adaptation does not apply if it would not be possible or sensible from a medical or psychological point of view. Changes are underway, forced sterilisation might be removed.
PL				✓	✓	✓	✓	✓		No legislation in place, requirements set by court practice
PT	✓		✓	✓	✓	✓	✓			Case-by-case decisions by courts, new act expected
RO				✓	✓	✓	✓			
SE	✓	✓			?	✓	✓	✓		Decision issued by forensic board
SI										No formalities for change of name
SK							✓	?		Change of name granted simply upon application accompanied by a confirmation by the medical facility.
UK										Change of name requires no formalities
UK	✓	✓	✓				✓	✓		Rectification of the recorded sex

Notes: This is not a table about the requirements for accessing gender reassignment treatment. This means, in particular, that gender dysphoria diagnosis might be in practice required by medical specialists as a pre-condition for a positive opinion. This situation is not captured by this table, which illustrates the conditions for legal recognition of gender reassignment.

✓= applies; ?=doubt; ✕=removed; change since 2008

**Table 2: Discrimination on grounds of sexual orientation in legislation: material scope and enforcement bodies**

Country Codes	Material scope			Equality body	Comments
	Employment only	Some areas of RED <sup>473</sup>	All areas of RED*		
AT		✓		✓	Two of nine provinces have not extended protection to all areas covered by RED: Vorarlberg and Lower Austria. Vorarlberg extended protection to goods and services in 2008.
BE			✓	✓	
BG			✓	✓	
CY	✓			✓	
CZ			✓		New anti-discrimination legislation adopted
DE			✓	✓	
DK	✓			✓	New equality body set up
EE	✓			✓	New anti-discrimination legislation adopted
EL	✓			✓	
ES			✓		Organic Act 8/2013, of 9 December, for improving the education quality modifies the Organic Act 2/2006 of 3 May on Education [ <i>Ley Orgánica 2/2006, de 3 de mayo, de Educación</i> ] <sup>474</sup> and introduces explicitly sanctions for discrimination based on grounds of sexual orientation and gender identity.

<sup>473</sup> Employment discrimination is prohibited in all EU Member States as a result of Directive 2000/78/EC. Directive 2000/43/EC (Racial Equality Directive) covers, in addition to employment and occupation, also social protection (including social security and healthcare), social advantages, education and access to and supply of goods and services which are available to the public, including housing.

<sup>474</sup> Spain (2006), Organic Act 2/2006 of 3 May on Education (*Ley Orgánica 2/2006, de 3 de mayo, de Educación*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2006-7899](http://www.boe.es/buscar/act.php?id=BOE-A-2006-7899) (accessed at 26 February 2014).

Country Codes	Material scope			Equality body	Comments
	Employment only	Some areas of RED <sup>473</sup>	All areas of RED*		
					<p>Act 25/2009 of 22 December modifying certain laws for their adaptation to the Act on free access to service activities and their performance<sup>475</sup> modified Act 2/1974 of 13 February, concerning Professional Associations, by adding a new Article 15 on equal treatment and non-discrimination: "Access to and exercise of guild professions will be governed by the principle of equal treatment and non-discrimination, and particularly by reason of race or ethnic origin, religion or convictions, disability, age or sexual orientation, in the terms of Section III of Chapter III of Title II of Act 62/2003 of 30 December concerning Tax and Administrative Measures and Measures of Social Order."</p> <p>Royal Legislative Decree 1/2013 of 29 November approving the Recast Text of the General Act on rights of persons with disabilities and their social inclusion,<sup>476</sup> establishes in article 95 (4)(e) as very serious offences to be punished by the Administration: "conducts regarded as grave when their perpetrators have also been motivated by hatred, including racial or ethnic hatred, gender, sexual orientation, age, severe disability or incapacity of the victim to act on his/her own".</p> <p>Spanish Constitutional Court Decision 41/2013, February 14, 2013, deemed that a provision requiring common children in order to grant a widow allowance (Act 40/ 2007 of 4 December, Disp. Ad. 3a) was discriminatory and thus, unconstitutional, as it is an almost impossible requirement to fulfil for same sex couples. Based on this Decision, Spanish Constitutional Court Decision 77/2013, April 8, 2013, ruled that denial of an allowance to a widow transsexual for not having children in common with his late couple was discriminatory and, thus, against the equal treatment principle.</p> <p>There is a trend on Autonomous Communities legislation in order to guarantee the right of all citizens to use the social service system under conditions of equality and non-discrimination, amongst other reasons, for sexual orientation,</p>

<sup>475</sup> Spain (2009), Act 25/2009 of 22 December modifying certain laws for their adaptation to the Act on free access to service activities and their performance (*Ley 25/2009, de 22 diciembre, de modificación de diversas leyes para su adaptación a la Ley sobre el libre acceso a las actividades de servicios y su ejercicio*) available at: [www.boe.es/buscar/doc.php?id=BOE-A-2009-20725](http://www.boe.es/buscar/doc.php?id=BOE-A-2009-20725)

<sup>476</sup> Spain (2013) Royal Legislative Decree 1/2013 of 29 November approving the Recast Text of the General Act on rights of persons with disabilities and their social inclusion (*Real Decreto Legislativo 1/2013, de 29 de noviembre, por el que se aprueba el Texto Refundido de la Ley General de derechos de las personas con discapacidad y su inclusión social*), available at: [http://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2013-12632](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-12632)

Country Codes	Material scope			Equality body	Comments
	Employment only	Some areas of RED <sup>473</sup>	All areas of RED*		
					i.e.: Act 13/2008 of 3 December concerning the Social Services of Galicia <sup>477</sup> , and Act 4/2009 of 11 June concerning the Social Services of the Balearic Islands <sup>478</sup> .
FI		✓			
FR	✓			✓	
HU			✓	✓	
IE		✓		✓	
IT	✓				
LT		✓		✓	
LU		✓		✓	
LV		✓		✓	
MT	✓				
NL		✓		✓	
PL	✓				
PT	✓				

<sup>477</sup> Spain (2008), Autonomous Community of Galicia (*Galicia*), Act 13/2008 of 3 December concerning the Social Services of Galicia (*Ley 13/2008, de 3 de diciembre, de servicios sociales de Galicia*), available at: [www.boe.es/buscar/doc.php?id=BOE-A-2009-807](http://www.boe.es/buscar/doc.php?id=BOE-A-2009-807) (Hyperlink was accessed on 26 February 2014).

<sup>478</sup> Spain (2009), Autonomous Community of Balearic Islands (*Illes Balears*), Act 4/2009 of 11 June concerning the Social Services of the Balearic Islands (*Ley 4/2009, de 11 de junio, de servicios sociales de las Illes Balears*) available at: [www.boe.es/buscar/doc.php?id=BOE-A-2009-11186](http://www.boe.es/buscar/doc.php?id=BOE-A-2009-11186) (Hyperlink was accessed on 26 February 2014).

Country Codes	Material scope			Equality body	Comments
	Employment only	Some areas of RED <sup>473</sup>	All areas of RED*		
RO			✓	✓	
SE			✓	✓	
SI			✓	✓	
SK			✓	✓	
UK			✓	✓	The Equality Act 2010 replicates the sexual orientation protection offered in the Equality Act (Sexual Orientation) Regulations 2007 and the Employment Equality (Sexual Orientation) Regulations 2003 and expands protection in a number of ways. The new Equality Act is expected to enter into force October 2010.
<b>TOTAL</b>	<b>9</b>	<b>7</b>	<b>11</b>	<b>20</b>	

Note: ✓ = Applies; ? = doubt; x = removed; **change since 2008**

**Table 3: Discrimination on grounds of gender reassignment or identity in national legislation**

Country Codes	Form of “sex” discrimination	Autonomous ground	Dubious/unclear	Comments
AT	✓			Legal interpretation and explanatory memorandum
BE	✓			Explicit provision in legislation or <i>travaux préparatoires</i>
BG			✓	
CY			✓	
CZ	✓			The new Antidiscrimination Act makes reference to ‘gender identification’.
DE			✓	Constitutional amendment proposal by opposition (‘sexual identity’)
DK	✓			Decisions by the Gender Equality Board
EE			✓	The Gender Equality and Equal Treatment Commissioner has dealt with one application and took the view that the Gender Equality Act could apply to ‘other issues related to gender’.
EL			✓	
ES			✓	<p>The Constitutional Court held that gender identity is to be read in among the prohibited grounds of discrimination in Article 14 of the Constitution. Together with the adoption of several regional laws, a trend can be noted towards the protection of gender identity. Organic Act 8/2013, of 9 December, for improving the education quality modifies the Organic Act 2/2006 of 3 May on Education [<i>Ley Orgánica 2/2006, de 3 de mayo, de Educación</i>]<sup>479</sup> and introduces explicitly sanctions for discrimination based on grounds of sexual orientation and gender identity.</p> <p>On its Decision 77/2013,<sup>480</sup> April 8 2013, the Spanish Constitutional Court examined the appeal submitted by a married transsexual individual who had been denied a widow pension because the law required children in common in the couple. The Court ruled out that a provision of that sort was discriminatory and, thus, against the equal treatment principle, as <i>it obeys no objective reason, related to the very essence, foundation or</i></p>

<sup>479</sup> Spain (2006), Organic Act 2/2006 of 3 May on Education (*Ley Orgánica 2/2006, de 3 de mayo, de Educación*), available at: [www.boe.es/buscar/act.php?id=BOE-A-2006-7899](http://www.boe.es/buscar/act.php?id=BOE-A-2006-7899) (accessed at 26 February 2014).

<sup>480</sup> Available at: [http://hj.tribunalconstitucional.es/HJ/en/Resolucion/Show/23390#complete\\_resolucion&completa](http://hj.tribunalconstitucional.es/HJ/en/Resolucion/Show/23390#complete_resolucion&completa) (accessed at 25 February 2014).

Country Codes	Form of “sex” discrimination	Autonomous ground	Dubious/unclear	Comments
				<i>purpose of the special widow pension governed by that provision, but also leads to a disproportionate result, to unreasonably prevent certain survivors of domestic partners access to protection dispensed by said board, to be unenforceable the requirement of having common children.</i> Accordingly, the allowance was granted to the applicant and the legal provision deemed as unconstitutional.
FI	✓			Committee for law reform proposes to explicitly cover transgender discrimination in equality legislation.
FR	✓			Case law and decisions by the equality body
HU		✓		
IE	✓			The Employment Equality Act 1998-2004 is interpreted in accordance with the case law of the Court of Justice of the EU.
IT			✓	
LT			✓	
LU			✓	
LV			✓	
MT			✓	
NL	✓			Case law and opinions of the Equal Treatment Commission
PL			✓	
PT			✓	
RO			✓	
SE	✓	✓		Discrimination on grounds of gender reassignment is still considered ‘sex’ discrimination. The new ground ‘transgender identity or expression’ now covers other forms of gender variance, regardless of gender reassignment.
SI			✓	The Act Implementing the Principle of Equal Treatment contains an open clause of grounds of discrimination.
SK	✓			Explicit provision in legislation
UK		✓		The Equality Act 2010 replicates the ‘gender reassignment’ protection offered in the Sex Discrimination Act since 1999, but removes the requirement to be under “medical supervision” and expands protection in several ways. The new Equality Act is expected to enter into force in October 2010.

Country Codes	Form of "sex" discrimination	Autonomous ground	Dubious/unclear	Comments
<b>TOTAL</b>	<b>10</b>	<b>3</b>	<b>15</b>	

Note: ✓ = applicable; positive development since 2008

**Table 4: Criminal law provisions on ‘incitement to hatred’ and ‘aggravating circumstances’ covering explicitly sexual orientation**

Country Codes	Criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation	Aggravating circumstance	Comments
AT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
BE	✓	✓	
BG			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
CY			General provisions could extend to LGBT people.
CZ			New Criminal Code in 2009 contains no explicit recognition of homophobic hate crimes. LGBT could fall under the category ‘group of people’, but as the law entered into force in January 2010 there is no case law yet. The explanatory report of the law also does not define the term.
DE			Hate speech legislation does not explicitly extend to homophobic motive, but extensive interpretation has been confirmed by courts.
DK	✓	✓	
EE	✓		
EL		✓	Article 23 of Law 3719/2008 provides for an aggravating circumstance in cases of hate crime based on sexual orientation.
ES	✓	✓	The proposal of Ministry of Justice [ <i>Ministerio de Justicia</i> ], Draft Bill of the Reform of the Organic Act 10/1995, of 23 of November, of the Penal Code [ <i>Anteproyecto de Ley Orgánica por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal</i> ] <sup>481</sup> aims to modify Sections 510 and 515 of the Penal Code. It is expected to entry into force during 2014.  The proposal increases penalties for offenses committed on incitement to hatred from one to three years up to from one to 4 years and a fine of six to twelve months including, explicitly

<sup>481</sup> Spain (2014), proposal of Ministry of Justice [*Ministerio de Justicia*], Draft Bill of the Reform of the Organic Act 10/1995, of 23 of November, of the Penal Code [*Anteproyecto de Ley Orgánica por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*], pages 84-86. Available at: [http://www.congreso.es/public\\_oficiales/L10/CONG/BOCG/A/BOCG-10-A-66-1.PDF](http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-66-1.PDF) (accessed at 27 February 2014).

			<p>for the first time, gender identity as well as sexual orientation. Furthermore, it establishes the same penalties for:</p> <ul style="list-style-type: none"> <li>a) those who produce, develop, possess in order to distribute, provide access to third parties, distribute, disseminate or sell writings or any other material or media for its content able to encourage, promote, or encourage, directly or indirectly hatred, hostility, discrimination or violence against a group, part thereof, or against a person by reason of their membership in that, on grounds of racist, anti-Semitic or other grounds relating to ideology, religion or beliefs, family status, membership of members of an ethnic group, race or nation, national origin, sex, sexual orientation or identity, illness or disability.</li> <li>b) Those who deny, trivialize or exalt seriously the crimes of genocide, crimes against humanity or against persons protected in the event of armed conflict, or exalt their authors goods when committed against a group or a part thereof, or against a person determined by reason of their membership in the same racially motivated, anti-Semitic or other related to ideology, religion or beliefs, family status or membership of members of an ethnic group, race or nation, national origin, sex, orientation or gender identity, illness or disability, when in this way promote or encourage a climate of violence, hostility, hatred or discrimination against them.</li> </ul> <p>The proposal also creates a brand new article 510.2 establishing that shall be punished with imprisonment of six months to two years and a fine of six to twelve months those:</p> <ul style="list-style-type: none"> <li>a) Who injuring the dignity of people through actions involving humiliation, contempt or disrepute of any of the groups to which the preceding paragraph, or part thereof or any particular person because of their membership to them, racist, anti-Semitic or other related to ideology, religion or beliefs, family status, membership of members of an ethnic group, race or nation, national origin , sex, sexual orientation or identity, illness or disability reasons, or producing, processing , possession for the purpose of distributing , facilitate access to another , distribute, disseminate or sell writings or any other material or media for its content shall be able to injure the dignity and presented a serious humiliation , disrespect or discredit any of the above groups , a part of them, or any particular person by reason of his membership thereof.</li> <li>b) Who exalt or justify by any means of public expression or distribution offenses were committed against a group, part thereof, or against a person by reason of their membership in that racially motivated, anti-Semitic or other related ideology, religion or beliefs, family status, membership of members of an ethnic grou , race or nation, national origin , sex, sexual orientation or identity , illness or disability, or who have participated in its execution. Facts shall be punished with imprisonment of one to four years in prison and a fine of six to twelve months when this would promote or encourage a climate of violence, hostility, hatred or discrimination against groups mentioned.</li> </ul>
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			<p>Penalties provided shall be imposed in the upper half: when the facts had been carried out by means of social communication, via Internet, or by using information technology, so that it is made accessible to a large number of people; when the facts in the light of their circumstances, are suitable for disturbing public peace or create a serious sense of insecurity or fear among group members. When the crime was committed through information technology and communication, the withdrawal of the contents shall be established by the Courts.</p> <p>Brand new article 510 bis establishes that higher level penalties shall be imposed when facts described therein were committed by those belonged to a criminal organization even if it was on a temporary basis. The bosses, managers or directors of the organization are imposed higher penalties in degree to those provided.</p> <p>Brand new article 510 ter establishes that when a legal entity is responsible for the offenses covered by the two preceding articles shall be liable to a fine of two to five years.</p> <p>Modification of article 515 establishes that it will be deemed as an illegal association, among others, those who promote, directly or indirectly promote or incite hatred, hostility, discrimination or violence against persons, groups or associations because of their ideology, religion or beliefs, membership of its members or any of them to an ethnic group , race or nation , gender , sexual orientation, family situation , illness or disability.</p>
FI		✓	According to the pertinent preparatory works, LGBT people could fall under the category 'comparable group'. A working group has proposed that the provision on incitement be amended to explicitly cover sexual minorities (2010).
FR	✓	✓	
HU			LGBT people could fall under the category 'groups of society'. Penal Code was amended to include hate motivated crimes against 'certain groups of society'. Case law has shown this includes the LGBT community.
IE	✓		Homophobic motivation might be taken into consideration at the sentencing stage, but this is left to the discretion of the courts.
IT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
LT	✓	✓	Homophobic motivation was included in the list of aggravating circumstances in June 2009.
LU			General provisions could extend to LGBT people.
LV			Homophobic motivation might be taken into consideration at the sentencing stage, but this is left to the discretion of the courts.
MT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
NL	✓	✓	The 2009 Public Prosecution Service's Bos/Polaris Guidelines for Sentencing recommend a 50% higher sentence for crimes committed with discriminatory aspects.
PL			General provisions could extend to LGBT people

PT	✓	✓	
RO	✓	✓	Art. 317 of the Criminal Code sanctions only hate speech as 'incitement to discrimination', but includes sexual orientation. Article 369 on incitement to hatred does not mention sexual orientation explicitly, but covers incitement against a 'category of persons', without further specification. The new Criminal Code will enter into force on 1 October 2011.
SE	✓	✓	
SI	✓		Article 297 of the new Penal Code concerning provoking or stirring up hatred, strife or violence, or provoking other inequality explicitly includes sexual orientation. Homophobic intent is only considered an aggravating circumstance in the case of murder.
SK			LGBT people could fall under the category 'group of people'
UK (N-Ireland)	✓	✓	
UK (England & Wales.)	✓	✓	The Criminal Justice and Immigration Act 2008, extending provisions on incitement to racial or religious hatred to cover the ground of sexual orientation, came into force on 23.03.2010. It applies to Scotland as well.
UK (Scotland)	✓	✓	In June 2009, the Offences (Aggravation by Prejudice) (Scotland) Act was passed, entry into force on 24 March 2010, also indicating homo- and transphobic motive as an aggravating circumstance.

Note: ✓= applicable; positive development since 2008

**Table 5 - Definition of ‘family member’ for the purposes of free movement, asylum and family reunification**

Country Codes	Free movement <sup>482</sup>		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
AT		✓		✓		✓	Article 59 of the Registered Partnership Act (BGBl. I, No. 135/2009) modifies Article 9 of the Settlement and Residence Act, which now stipulates that the definition of ‘family member’ includes a registered partner. Article 57 of the Registered Partnership Act modifies Article 2/1 of the Asylum Act [Asylgesetz], which now stipulates that the definition of ‘family member’ includes a registered partner, provided that the registered partnership had already existed in the country of origin. Same-sex spouses are likely to be treated as registered partners.
BE	✓	✓	✓	✓	✓	✓	
BG							Article 7 of the new Family Code (01.10.2009) confirms that marriage is a mutual agreement between a man and a woman.
CY							
CZ		✓		✓		✓	Same-sex spouses are likely to be treated as registered partners. Rights concerning family reunification and asylum are restricted to registered partnerships.
DE		✓		✓		✓	Same-sex spouses are likely to be treated as registered partners. Rights concerning family reunification and asylum are restricted to registered partnerships.
DK	✓	✓	✓	✓	✓	✓	
EE							The new Family Law Act (entry into force 01.07.2010) defines marriage as a different-sex institution only and considers marriage between persons of the same sex invalid. Family reunification possible when the partner can prove that he/she is economically or socially dependent.
EL							

<sup>482</sup> In the vast majority of the Member States, no clear guidelines are available concerning the means by which the existence either of a common household or of a ‘durable relationship’ may be proven for the purposes of Art. 3 (2) of the Free Movement Directive.

Country Codes	Free movement <sup>482</sup>		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
ES	✓	✓	✓	✓	✓	✓	Organic Law 2/2009 of 11 December (Spain/Ley Orgánica 2/2009 (11.12.2009)) has modified Organic Law 4/2000 in order to grant couples who have an affective relationship similar to marriage the right to family reunification. Implementing regulations have been adopted, by means of the pass of Royal Decree 557/2011 of 20 April, Regulation of Organic Law 4/2000 on the rights and freedoms of foreigners in Spain and their social integration is approved, after reforming Organic Law 2/2009 [Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009] <sup>483</sup> . Its Article 56.3.B.2. requires to submit with the application a Copy of documentation of family ties or kinship or the existence of de facto unions and, where appropriate, legal and economic dependence.. Article 40 of the Law 12/2009 of 30 October on the right to asylum and subsidiary protection [ <i>del derecho de asilo y de la protección subsidiaria</i> ] replaces Law 5/1984 of 26.03.1984 and, by transposing the EU acquis, confirms the notion that a family member includes the de facto partner having an affective relationship similar to marriage.
FI	✓	✓	✓	✓	✓	✓	
FR	?	?	?	?	?	?	As a result of the entry into force on 14.05.2009 of a new Article 515-7-1 of the French Civil Code, inserted by law 2009-526 of 12.05.2009, foreign registered partnerships are recognised in France; the repercussions of this change for the purposes of free movement of EU citizens are still unclear. Family reunification of third country nationals depends upon the authorities' discretion, which may require additional conditions. No information available on refugees.
HU		✓		✓		?	Entry and residence rights for free movement are also granted for the unmarried <i>de facto</i> partner, subject to conditions.
IE		✓		✓		✓	Adoption of Civil Partnership Act in 2010. Immigration, Residence and Protection Bill not yet enacted, but the government intends to treat registered partners in the same way as spouses.
IT							
LT							
LU		✓		✓		✓	The new law on free movement and immigration (29.08.2008) recognises as a family member a spouse or registered partner provided the conditions set forth in article 4 of the partnership law (09.07.2004) are fulfilled. Rights concerning family reunification and asylum are restricted to registered partnerships. Same-sex spouses are likely to be treated as registered partners.
LV		✓					Article 3.4 of the Cabinet of Ministers Regulation No. 586 on Entry and Residence includes in its definition of family member a person who is a dependant of a Union citizen or his or her spouse and who has shared a household with a Union citizen in their previous country of domicile.
MT							
NL	✓	✓	✓	✓	✓	✓	

<sup>483</sup> Spain (2011), Royal Decree 557/2011 of 20 April, Regulation of Organic Law 4/2000 on the rights and freedoms of foreigners in Spain and their social integration is approved, after reforming Organic Law 2/2009 [Real Decreto 557/2011, de 20 de abril, por el que se aprueba el Reglamento de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social, tras su reforma por Ley Orgánica 2/2009], available at: <http://www.boe.es/buscar/act.php?id=BOE-A-2011-7703> (accessed at 27 February 2014).

Country Codes	Free movement <sup>482</sup>		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
PL							
PT	✓	✓	✓		✓		Allows same-sex couples to enter into a marriage since June 2010.
RO		?					The new Civil Code (2009) includes a prohibition of same-sex partnership and marriage, including denial of recognition of partnerships and marriages concluded in other countries.
SE	✓	✓	✓	✓	✓	✓	Allows same-sex couples to enter into a marriage since May 2009.
SI							Provides a legal scheme for registered partnership in domestic law, but without granting entry and residence rights to registered partners
SK							Family reunification possible when the partner can prove economic or social dependence.
UK	✓	✓	✓	✓	✓	✓	
<b>TOTAL</b>	<b>8</b>	<b>15</b>	<b>8</b>	<b>13</b>	<b>8</b>	<b>12</b>	

Note: ✓ = applicable; ? = doubtful/unclear; positive changes since 2008; other developments since 2008.