



## **Combating discrimination of immigrant workers in Spain: from equal rights to equal opportunities**

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## Introduction

This paper analyzes the transposition and implementation of the two EU anti-discrimination Directives<sup>1</sup> in Spain, focusing on the combat against discrimination of immigrants in the labor market and at the workplace. Although these Directives are not specifically aimed at the discrimination of immigrants, discrimination by ethnicity, race and religion is often experienced by immigrant workers.<sup>2</sup> Our analysis is moreover limited to the discrimination of immigrants in the labor market and at the workplace.<sup>3</sup> Needless to mention, immigrants also face severe discrimination in other areas, especially in the access to housing and mortgages, social services and in encounters with the police (see for example the yearbooks of SOS Racismo, 2004-2007; Oficina per la No Discriminació, 2007; Intermóm Oxfam, 2007).

Immigrants' integration in the labor market is a fairly recent phenomenon in Spain. The number of immigrant workers has increased from less than 200.000 actives in 1996 to more than 3.000.000 in 2007 (MTAS, 2007a). Immigrants typically have occupied jobs that have been in need of labor urgently, like construction, agriculture, hotel business, domestic work and elderly care. Immigration is mainly perceived as economic necessity and the priority of politicians is on border control (Zapata-Barrero and De Witte, 2007). The most important efforts to fight discrimination of immigrant workers are related to the combat of "exploitation" of irregular immigrant workers in the underground economy. In order to keep this report close to the Spanish context, we will therefore not only look at "individual" discrimination at the workplace, but also at legal (or "institutional") discrimination and discrimination in the labor market (or "structural discrimination").

This paper is divided in five chapters. The first chapter will start with an introduction of the main characteristics of immigrant workers in the Spanish labor market. Chapter two will present some data on discrimination of immigrant workers, which due to a lack of official data, is based on available studies and results from interviews with stakeholders.<sup>4</sup> Chapter three will then summarize the main legislation on anti-discrimination in Spain and present stakeholders' criticism on the transposition of the EU Directives. Chapter four will go into the state of implementation of the EU

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<sup>1</sup> The Race Directive implements the principle of equal treatment between persons irrespective of Racial or Ethnic origin (2000/43 of 29 June 2000) and the Employment Directive establishes a general framework for equal treatment in employment and occupation (2000/78 of 27 November 2000). The legislation can be found at [http://ec.europa.eu/employment\\_social/fundamental\\_rights/](http://ec.europa.eu/employment_social/fundamental_rights/)

<sup>2</sup> Other groups that can suffer from these types of discrimination include gypsies, black Spaniards or Spanish Jews and Muslims.

<sup>3</sup> We only look here at foreign employees, and do not go into discriminatory practices related to foreign self-employed. Discrimination in the labor market however might give incentives for starting your own business, as it could provide immigrants more labor stability and possibilities for social mobility. Solé and Parella (2005) argue for example that one of the reasons for the increase of "ethnic businesses" in Catalonia stem from the ethnic stratification of the labor market.

<sup>4</sup> Interviews have been conducted with the most important stakeholders that are involved in the combat against discrimination of immigrant workers in Spain, including academic experts, state and regional policy makers, representatives of labor unions and employers organizations, and spokesman and women of civil society organizations. See also annex 1 for an overview of the stakeholders that have been interviewed. We would like to thank Jonathan Zaragoza, doctorate student at the Department of Political Science at UPF, for conducting some of the interviews. The interview quotes used in this text are translations of the original interview material in Spanish/Catalan.

Directives in policy-making at the state and regional level (Catalonia) and collective bargaining, drawing on information from policy documents and interviews with stakeholders. The fifth chapter finally will go into some good practices of and challenges for the legal fight against discrimination. The paper concludes with some final remarks and recommendations.

## **1. Immigrant workers in the Spanish labor market: an overview**

Immigrant workers in Spain include both workers with valid work (or in case of students - residence) permits and irregular immigrants working in the underground economy. Official numbers of irregular immigrants are not available, but it is estimated that at least 670.000 undocumented immigrants are working in the underground economy (see also Pajares, 2007). This number does not seem to have diminished in the last years, in spite of the “normalization” (instead of former regularization) process of 2004.<sup>5</sup> Due to a lack of official data on irregular workers, the remaining of this chapter will concentrate on regular immigrant workers in the Spanish labor market.

In October 2007 there were 3.740.956 foreigners with a legal residence permit, thereby representing 8,3% of the total population (Observatorio Permanente de Inmigración, 2007). Of this foreign population 54% was affiliated with the Social Security System. As a result, foreign workers make up 10,4% of the total workers affiliated with the Social Security System. The largest national groups of foreign workers are Ecuadorians (13,1%), Moroccans (13,1%), Romanians (11,1%) and Colombians (7,2%) (MTAS, 2007b). The importance of immigrants’ incorporation in the Spanish economy is also well reflected by the contracts signed from January to September 2007, of which 21,7% were with foreign workers (Observatorio Permanente de Inmigración, 2007). Immigrants have more often temporary contracts than Spanish nationals.<sup>6</sup>

The high activity rate of foreigners (76,2% compared to 57% for Spanish and dual nationals)<sup>7</sup> has raised the employment rate both directly and indirectly, by facilitating female participation through domestic services (see for example CES, 2006; 291). Nevertheless their higher activity rates, unemployment rates of foreigners are higher than Spaniards: 11,8% in the 3<sup>rd</sup> quarter of 2007, compared to 7,4% for Spanish (INE, 2007). Fernández and Ortega (2006) demonstrate that foreigners’ unemployment rates are relatively similar to that of natives, and that the most important differences are gender related.<sup>8</sup> Of the so-called Third Country Nationals (TNC’s), foreigners from Non-EU European and Latin American countries have the lowest unemployment rates, while the opposite result is found for African immigrants.

Most foreign workers are affiliated with the general Social Security System scheme (74%), but they have relatively more weight in special schemes, like the special agrarian and domestic service schemes, both of which occupy the lowest social positions and

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<sup>5</sup> Next to continued irregular immigration flows, some 600.000 immigrants working in Spain without legal status in 2004 could not fulfill the requirements (ECRI, 2006; 14), and of those who did some 15% were not able to renew their temporary permits in 2006 (SOS Racismo, 2007; 16).

<sup>6</sup> Some 58,0% of the foreign workers affiliated with the Social Security System have temporary contracts and of the contracts registered with foreign workers in 2006 88,4% were temporary (MTAS, 2006).

<sup>7</sup> Due to the elevated number of immigrants between 16 and 64.

<sup>8</sup> Foreign males have an unemployment rate 2,2% points higher than that of Spaniards, while for foreign females it is 3,5% points lower.

therefore salaries. An important indicator for salaries is the contribution group of the Social Security Scheme (see also Cachón, 2007; 64). One third of the total foreign workers (33,1%) is registered within the lowest contribution group, that of unskilled laborers (*peones*), while 76,3% is concentrated in the three lowest contribution groups (MTAS, 2006). It is important to point out the striking differences between EU immigrants and TCN's (see also table 1). Most of the TCN's are concentrated in specific (and one could say unwanted) branches of labor, like construction, hotel industry, real estate & rent agencies services, domestic services and agriculture. Moreover, the percentage of non-EU workers in unqualified occupations (40,3%) is much higher than that of EU workers (9,3%) (INE, 2006) and the yearly average income of most non-EU immigrants is between 30 and 40% lower than the average in Spain, except for immigrants from Asia, Oceania and North America (INE, 2002).

*Table X.* Basic characteristics of foreign workers (EU, TNC's and total) affiliated with the Social Security System

	Total	Special Agrarian Scheme (%)	Special Domestic Scheme (%)	Special Scheme Self-Empl.	General Scheme		
					Construction (%)	Hotel Industry (%)	Real Est. & Rent Ag (%)
<b>EU foreign workers</b>	680.400 <b>(100%)</b>	48.365 <b>(7,1%)</b>	25.175 <b>(3,7%)</b>	130.370 <b>(19,2%)</b>	120.935 <b>(17,8%)</b>	69.660 <b>(10,2%)</b>	68.558 <b>(10,1%)</b>
<b>Non- EU foreign workers</b>	1.340.766 <b>100%</b>	104.601 <b>(7,8%)</b>	125.673 <b>(9,4%)</b>	86.684 <b>(6,5%)</b>	275.983 <b>(20,6%)</b>	177.501 <b>(13,2%)</b>	163.889 <b>(12,2%)</b>
<b>Total foreign workers</b>	2.021.166 <b>100%</b>	152.966 <b>(7,6%)</b>	150.848 <b>(7,5%)</b>	217.054 <b>(10,7%)</b>	396.918 <b>(19,6%)</b>	247.161 <b>(12,2%)</b>	232.447 <b>(11,5%)</b>

*Source:* Own elaboration of data on affiliations to the Social Security System from MTAS at 31 of October 2007.

Finally within the immigrant labor force, female immigrant workers (the majority from Latin America) have the lowest scores on all indicators. Representing 38,4% of immigrants inscribed within the Social Security System, they have the highest unemployment rates, are mainly concentrated in domestic services and care for elderly, and therefore have the lowest average incomes and more temporal contracts than immigrant men and Spanish women (MTAS, 2007c; 106).

## 2. Discrimination of immigrant workers

### 2.1 How the discrimination of immigrant workers is contextualized in Spain

Taking a sociological approach, discrimination can be understood as a complex system of social relations that produce inter-group inequities in social outcomes.<sup>9</sup> The outcomes of immigrant workers in the Spanish labor market as described in the former chapter can be explained by various factors other than discrimination, like age, levels of education, language skills and work experience (or human capital more in general). Moreover, the

<sup>9</sup> See for example the definition of discrimination in the *Encyclopedia of Sociology* at <http://www.bookrags.com/research/discrimination-eos-01/>

extent to which immigrants are discriminated in the labor market and at the workplace depends on what is understood by discrimination. E. Rojo<sup>10</sup> (interview 26-11-2007) in this context emphasizes that:

“From a legal perspective, the situation of regular (legal) immigrant workers in Catalonia and Spain, legally there is no discrimination. In practice however it is possible that situations of discrimination do take place, or perhaps perceptions of discrimination by Third Country Nationals. First, because the jobs that they occupy do not correspond to their levels of education. Second, because the salaries that they obtain are in principle the same as other workers, but there are sometimes non-compliances and sometimes compliances that create these perceptions. A legal immigrant therefore should - according to the Constitution, the Labor Law, the Worker Statue Law, and the transposition of the EU Directives - not experience discrimination by race, ethnicity, nationality, religion, nationality, sex and gender. [...] In order to determine whether there is discrimination in Spain, you need to establish the legal situation of the immigrants you are talking about, the Third Country Nationals. When he/she is legal resident it should not exist, when he/she is irregular (illegal) it should neither exist, but there is more possibility in practice.”

Most of the stakeholders we interviewed relate discrimination of immigrant workers in Spain to their legal status. In the words of J. Admetlla<sup>11</sup> (interview 15-02-2008):

“The immigrants without work permits are those who are discriminated. Those who have papers, and have legal coverage, normally, normally (stressed) do not present different work conditions than others. On the contrary, yes we do detect exploitation of immigrants without papers.”

This rather limited vision on discrimination is also expressed by M. Mora i Radó<sup>12</sup> (interview 14-02-2008):

“I do not like very much discrimination, in the meaning that we as employers have seen that in reality there is a necessity to contract foreign workers [...] When the labor market in reality needs these workers, there is a need to design new mechanisms for contracting, in order to guarantee that these workers do not come here without papers and therefore political insecurity. They need to come here after being contracted in their country of origin. So they come here with a labor contract and then there is no discrimination and no political insecurity for these workers, apart from the fact that the receiving society can permit to let enter all those that are needed. Then there is no discrimination in any matter.”

C. Bertran<sup>13</sup> (interview 07-01-2008) also points out that there is no vision on discrimination beyond the discrimination of irregular workers in Spain:

“At the moment discrimination in Spain is very much related to having or not having papers, to have a contract, to work more or less hours etc. Bringing charges for discrimination at promotion because of origin I do not know. At the moment there is no culture for denouncing this. Important is therefore that discrimination depends on the perception that people have. I think the vision on immigration conditions very much the vision on discrimination at the workplace, in access and promotion in companies. In general, talking about women, or immigrants, there is not really a vision on what is discrimination. Or discrimination is only seen as something very big, but discrimination is not something big, but related to day to day practices.”

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<sup>10</sup> Professor in Labor and Social Security Law (*Catedrático de Derecho del Trabajo y de la Seguridad Social*).

<sup>11</sup> Head of labor relations of the Labor Inspectorate in Catalonia

<sup>12</sup> Representative of the Catalan business association *Foment del Treball*, Department of Labour Relations and Social Affairs.

<sup>13</sup> Coordinator of the Information Centre for foreign workers (*Centre d'Informació de Treballadors Estrangers – CITE*) of the labor union *Comisiones Obreras (CCOO)*.

Discrimination of immigrant workers in Spain is thus mainly understood as the inequality of access and employment conditions for irregular immigrant workers. Next to this institutional (or legal) discrimination of immigrant workers, there are also other types of discrimination possible. Following the usual typology, applied among Spanish scholars by Cachón (2006a; 68), we will look at *institutional*, *structural* and *personal* discrimination of immigrant workers in Spain.

## **2.2 Institutional discrimination: Foreigners Law and primacy for nationals**

Institutional discrimination corresponds to practices in where public norms discriminate directly or indirectly. The most well known example is the legal framework that determines the possibilities for immigrants' entry into the labor market. The Spanish Foreigners' Law is discriminatory because contracting TNC's is legally only possible in their country of origin and only for occupations that cannot be filled by unemployed Spanish (or EU workers) in the same sector and region. In the private sector discrimination in hiring is therefore enforced by the legal principle of primacy for (Spanish and EU) nationals. In order to channel immigration flows to those sector and jobs in the labor market that are unattractive to Spanish (and EU) nationals (generally in agriculture, domestic services and construction), the government has since 1993 establishes annual 'labor entry quotas' (*contingentes*) that bypass a check on the national employment situation. These yearly established quota define the need for temporary and permanent foreign workers by sector, autonomous community and nationality and have resulted in yet another type of institutional discrimination, as some countries of origin are favored over others.<sup>14</sup>

Other forms of institutional discrimination faced by TCN's that have managed to come to Spain with a work permit (or have obtained it later) are the limits put on sector and territorial mobility. Each time a foreign worker (without a permanent work permit) changes employer he/she must obtain a new work permit from the government and for the renewal he/she must show a social security card. C. Bertran (interview 01-01-2008):

"I think I am not mistaking to say that a large part of discrimination takes place at the legal level. I do not merely refer here to having papers or not. Having papers does not mean that you are not facing discrimination, or have the same rights. When policy makers say that they want everybody to have papers, because then all have the same rights. That is a lie. Having a work permit means for example that you are territorially and sector-wise constrained. Also you have to comply with some conditions that Spanish don't have, for example to renovate your permit you need to be inscribed a minimum of months in the Social Security System, which conditions you to claim better working conditions. You accept worse working conditions, because you know you need the work."

All those who fail to meet these legal requirements established in the Foreigners Law become irregular immigrants (without legal status) and often end up working in the

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<sup>14</sup> Since 2002 the government restricted the quota to foreign workers from countries that have signed bilateral agreements with Spain: Morocco, Colombia, Ecuador and the Dominican Republic. These bilateral agreements function not only as mechanism of control on immigration, but also enable repatriation of illegal immigrants, and channel labor into labor shortage sectors (Gil Araújo y Dahiri, 2003; 99-116).

underground economy without a contract, social security, labor rights or mechanism to defend themselves.<sup>15</sup> In the words of E. Ibarra<sup>16</sup> (interview 23-01-2008):

“The first discrimination is when they do not have a work permit, which results in accepting worse working conditions. As a result these immigrants face the most grave and cruel exploitation that you can imagine.”

In the public sector EU citizens and TCN's are discriminated to access jobs, because of requirements of “nationality” for jobs that “directly or indirectly imply the participation in the exercise of the authority or functions that are considered object of state and public security”.<sup>17</sup> The nationality law in Spain in this context also results in indirect discrimination, as for certain national groups it is far easier to obtain Spanish nationality than for others.<sup>18</sup> In some of these “more sensitive” public jobs the integration of TCN's has recently been promoted, like in the Catalan police force and the Spanish armed forces. However, in the latter only a selected group of immigrants with historical ties (i.e. Latin American countries and Equatorial Guinea) are accepted since 2003 (up to 7%), and they can only occupy low ranked positions.

Finally, another example of institutional discrimination (among EU immigrants) is faced by workers from the new member states Romania and Bulgaria, who are subject to a transition period before having the same rights as other EU citizens.

### ***2.3 Structural discrimination: underground economy and segmented labor market***

Structural discrimination is found in societal structures, like the duality and segmentation of the labor market in Spain. We first need to mention the underground economy in Spain, where many irregular immigrants work under severe working conditions, and obtain substantial lower payments. Outside the underground economy, the segmentation of the Spanish labor market and (continued) concentration of immigrant workers in specific unwanted labor sectors has resulted in (on average) lower wages and worse working conditions than nationals. Cachón (2007; 66) in this context describes the jobs immigrants fulfill in Spain as “dirty, dangerous<sup>19</sup> and demanding”. Unfortunately, there is no evidence that migrants' employment conditions and patterns improve and converge towards natives over time, and this is especially the case for women (see also Iglesias and Llorente, 2006; Pajares, 2007).

The combination of a relatively quick employment integration of recently-arrived immigrants in Spain (see also Amuedo-Dorantes and de la Rica, 2006) in sectors and

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<sup>15</sup> Although irregular foreign workers were denied the right to meet, associate, form labor unions and protest in the context of the former 8/2000 Foreigners Law, claims of unconstitutionality against this law have resulted in legal changes so that these rights also apply to irregular workers. The Constitutional Tribunal has even gone further, by granting irregular workers also social security rights in cases of discharge or work accidents (Ibars, 2004).

<sup>16</sup> Spokesman of the Madrid based social movement against intolerance (*Movimiento contra la Intolerancia – MCI*).

<sup>17</sup> See also article 57 of Law 7/2007, available at <http://www.boe.es/boe/dias/2007/04/13/pdfs/A16270-16299.pdf> and article 10.2 of the Law on the Rights and Freedoms of Aliens (4/2000)

<sup>18</sup> See also WP1.

<sup>19</sup> Foreign workers also have a higher fatal accident rate (8,4 cases per 100,000 workers) than Spanish workers (6,3 cases per 100,000 workers). The high accident rate in the construction sector is the main explanation of this situation. Among migrants, Moroccans are the group with the highest percentage of work accidents (Instituto Nacional de Seguridad e Higiene en el Trabajo, 2006).

occupations with relatively low payments has resulted in a situation of insignificant employment gaps (though existing for certain collectives!), but significant wage gaps (OECD, 2007; 19, 20). Several studies have concluded that these wage gaps are not (only) due to lower education levels and/or prior work experience (see for example Solé and Parella, 2003; Pajares, 2006; Isusi and Coral, 2007). Partly, the lower wages of TCN's can be explained by the sectors and jobs in which they are concentrated, often with temporary contracts<sup>20</sup> and few changes for promotion (see also Carrasco et.al, 2006). This ethno-stratification of the labor market is an outcome of immigrants being forced to accept jobs natives no longer wish to do, in combination with positive discrimination of employers, who favor immigrant workers because they accept harsher working conditions, especially in the underground economy (Solé and Parella, 2003; 124).

#### ***2.4 Individual discrimination by employers, co-workers and labor unions***

In this last sphere, individuals are discriminated by employers, co-workers or labor unions. Studies conducted on individual discrimination have mainly focused on discrimination conducted by employers towards specific immigrant groups at the moment of access and in terms of employment conditions in specific sectors and jobs (for an overview see Solé and Parella, 2003; 125-126). While some employers tend to avoid contracting immigrant workers from certain ethnic minorities (especially for specialized jobs), others (small enterprises in sectors such as hotel and catering, agriculture, construction etc.) prefer contracting them because of the possibility to exploit their differences in race and origin to lower wages and working conditions (Solé, 1995; 163). Irregular workers are especially vulnerable to the latter type of discrimination, while in the regular labor market this type of discrimination is most likely practiced by small subcontractors and agricultural employers that are less controlled by the government (Cornelius, 2004; 400).

While individual discrimination of employers is often based on origin (race, ethnicity and nationality), the EUCM report (2006; 46) suggests that also religion plays a role in individual employment discrimination in Spain (EUCM, 2006). ECRI (2006) points out that Muslim immigrants and mainly Moroccans are vulnerability to individual discrimination by private employers. A report carried out by Colectivo Ioé (1996) that 35% of the Moroccan immigrants suffer from discrimination at the point of hiring, especially in the service sector. Also a comparative study by Colectivo Ioé (2003) on the labor integration of Ecuadorian, Colombian and Moroccan immigrants (and gypsies) points out that discrimination in the access to work is reported especially by Moroccan and Ecuadorian men in metropolitan areas and Moroccan women in rural areas.

At the labor union in Barcelona (CITE-CCOO), denunciations of individual discrimination are often related to immigrants legal status and have been made especially after the “normalization” process in 2005, when many regularized workers complained of having to pay the costs of inscription with the Social Security System themselves. Other examples of individual discrimination reported at CITE include unequal treatment in terms of working conditions and salaries (C. Bertran, interview 07-

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<sup>20</sup> The high percentage of foreign workers with a temporal and/or fixed contract makes the situation of immigrant workers more precarious; as it denies workers unemployment and/or welfare benefits (See also OECD, 2003).



01-2008). The individual discrimination of immigrant workers is also reported by the Office for Non-Discrimination in Barcelona and the NGO *SOS Racismo* (SOS Racismo, 2004 and 2005). I. Martinez<sup>21</sup> (interview 10-01-2008):

“A part of the cases reported here are related to irregular domestic work (*by female immigrants*), because in this type of work it is very difficult to obtain a contract. Here we encounter many cases of non-payment, or firing without payment. Other examples are insults to foreigners at the workplace, which are denounced by the foreigner in question or by co-workers. Finally there are also examples of people who are fired without payment after a test period.”

These findings are supported by a report from Intermóm Oxfam, where is claimed that more than 10% of the salary differences of non-EU immigrants (which are estimated between 30 and 40% lower than the average income) in Spain are directly related to the discrimination of employers. “The abuses in some sectors, like that of employees in domestic service, are flagrant and permanent.” (Intermóm Oxfam, 2007; 72-73)

Although labor unions have been criticized of lacking representation of non-EU workers in the most precarious segments of the labor market, their collaboration with employers’ organizations to create conditions that concentrate immigrants in the worse-paid occupations and in protecting legal from illegal immigrants (see for example Solé, 1995), during our fieldwork we did not encounter complaints against individual discriminatory practices of labor unions. This is probably due to the fact that immigrant workers (regardless of their legal status) can become member and labor unions were among the first actors in Spain to get involved in the fight against immigrants’ institutional discrimination.<sup>22</sup> According to C. Bertran (interview 07-2008) both the number of foreign workers affiliated and the number of foreigners working for the labor union should be improved, next to changing the gap that sometimes exists between the anti-discrimination discourse of union leaders and union delegates:

“What cannot happen is that I have heard in certain sectors that a union delegate says: *this negro is only here for 4 days and now wants the same rights as the rest*. This is unthinkable and implicates that the labor union needs to work internally to the fight against discrimination. [...] To prevent these discriminatory practices you need to work on the internal discourse, not only the external discourse.”

### **3. The development of anti-discrimination legislation**

#### ***3.1 Legal incorporation of equal treatment and non-discrimination before the EU Directives***

The Spanish constitution of 1978 laid down a legal framework of democratic principles and made equal treatment and non-discrimination (next to liberty, justice and political pluralism) basic pillars of the non-confessional state.<sup>23</sup> Spain signed the most important

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<sup>21</sup> Spokeswomen of the non-governmental association *SOS Racisme Catalunya*

<sup>22</sup> The two principal labor unions in Spain, *Comisiones Obreras* (CCOO) and the *Union General de Trabajadores* (UGT) have welcomed both legal and illegal migrants as their members (Cornelius, 2004). They also have made organizational efforts to represent immigrant workers, by setting up information centers for foreign workers, which have played a crucial role in processes of regularization in Spain. At the same time, unions have been active to encourage non-discrimination, to denounce racist and xenophobic behavior and to protect the rights of immigrant workers as a group (Cachón, 2000).

<sup>23</sup> Especially relevant are article 13, 14 and 16 of the Constitution. See also [http://extranjeros.mtas.es/es/normativa\\_jurisprudencia/Nacional/Constitucion.pdf](http://extranjeros.mtas.es/es/normativa_jurisprudencia/Nacional/Constitucion.pdf)

international treaties (from the United Nations, ILO and European council) and ratified practically all of the international instruments to combat discrimination. The Universal Declaration of Human Rights is mentioned explicitly in article 10.2 of the Constitution as a source of interpretation of provisions relating to human rights (Cachón, 2003; 2005). The principle of equal treatment is included in Criminal Law (racial or ethnic motives are aggravating circumstances in various offences)<sup>24</sup>, Labor Law and there are also several anti-discriminatory measures in the administrative, civil and educational spheres (Cachón, 2006b; 2).

As far as the discrimination of immigrants is concerned, the Law on the Rights and Duties of Foreigners (LO 4/2000) has two articles (23.1 and 23.2) devoted to “anti-discrimination measures” and one article (24) that establishes the applicability of judicial proceedings against any discriminatory practice that involves the infringing of fundamental rights and freedoms. Discrimination is defined as “any act which, directly or indirectly, entails a distinction, exclusion, restriction or preference in relation to a foreigner on the grounds of race, color, ascendance or national or ethnic origin, or religious beliefs and practices, and whose purpose or effect is to negate or limit the recognition or exercise, in equal conditions, of human rights and fundamental freedoms in the political, economic, social or cultural spheres.” In addition, indirect discrimination is defined as “any treatment stemming from criteria having an adverse effect on workers on account of their being foreigners or members of a particular race, religion, ethnic group or nationality.” The law however makes no reference to provisions or practices and only refers to foreign workers (Cachón, 2003; 2-3).

With regard to discrimination by belief, the Organic Law 7/1980 on Religious Freedom establishes that “religious beliefs shall not constitute a reason for inequality or discrimination before the law. Religious reasons may not be a ground for preventing anyone from performing any work, activity, responsibility or public office” (see also Cachón, 2003). E. Rojo (interview 26-11-2007) explains that while religious rights are guaranteed in the Constitution, the application of such rights are not similarly applied in all policy fields. For example, while the Agreement of the state with different religious communities in 1992 has established the right for students to apply for a different exam date in case of a religious holiday, the same right does not exist for workers.

### ***3.2 The legal transposition of the EU Directives***

To transpose the EU Directives 2000/43 and 2000/78, the *Partido Popular* (PP) Parliamentary Group set up 32 amendments to the Bill of fiscal, administrative and social measures, which is known as “the accompanying Law” (*Ley de Acompañamiento*). As a result, the two EU Directives were transposed jointly in the 62/2003 Bill of 30 December in chapter III of Title II containing three sections.<sup>25</sup> The first section (art. 27-28) contains the transposition of the object of the legislation and includes the definitions of direct and indirect discrimination, harassment and instructions to discriminate. The second section (art. 29-33) transposes some of the measures to provide for equality of treatment and non-discrimination on the base of

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<sup>24</sup> Article 510 of the 1995 Spanish Penal Code penalizes those conducts likely to incite discrimination, hatred or violence for racist, anti-Semitic or other motives, as well as penalizing the dissemination of information of a nature that is prejudicial to groups or associations. See also [http://noticias.juridicas.com/base\\_datos/Penal/lo10-1995.12t21.html](http://noticias.juridicas.com/base_datos/Penal/lo10-1995.12t21.html)

<sup>25</sup> See also <http://www.derecho.com/legislacion/boe/69459>

racial or ethnic origin (Directive 2000/43) within education, health, public services, housing and in general access to social services. This includes affirmative actions for specific groups, the entitlement of legal entities to engage in proceedings and the reversal of the burden proof. It also provides the legal basis for the creation of “the Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin”. Section 3 transposes the measures for equal treatment and non-discrimination at work, on the basis racial or ethnic origin, religion or belief, disability, age and sexual orientation.

The 62/2004 Bill transposes fully what is provided in relation to employment and training in Directive 2000/43 and Directive 2000/78, including the possibility of adopting positive action measures and the reversal of the “burden of proof”. It also adapts several labor laws to the Directives and provides for the promotion of equality on various grounds in collective bargaining (Cachón, 2006b). Important to mention in this context is article 4.2 of the Workers’ Statute that establishes the right of all workers not be discriminated against at the moment of being employed, nor during the period of employment, on the grounds of race, social status, religion, political opinion or language and article 17.1 that declares void any discriminatory clauses of collective agreements, individual pacts, and unilateral decisions of discriminatory employers (see also Cachón, 2005; 99). In the field of employment discrimination is therefore explicitly prohibited by current law, but this is not the case in other areas, like education, housing and social protection. According to Cachón (2006b; 4) here “the applicable regulations do not always contain explicit anti-discrimination clauses, but are rather subject to the general principles of the Constitution.”

### ***3.3 Stakeholders’ critique on the transposition***

The transposition of the anti-discrimination Directives in Spain is criticized by most stakeholders both in terms of the lack of political and public debate and the lack of measures to make the new legislation effective, especially the Council for Equal Treatment.<sup>26</sup> The absence of parliamentary debate or consultation with stakeholders highlights the marginal importance of the issue for Spanish politicians.<sup>27</sup> The transposition has been criticized for being “hidden, lacking consultation and parliamentary debate, the absence of a government statement and by-passing of the Council of State and the Economic and Social Council” (Bell et.al., 2007; 73).

E. Ibarra (interview 23-01-2008) points out that as a result not only “the people”<sup>28</sup>, but also judges are not aware of the new legislation:

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<sup>26</sup> Other points of critique related mentioned by Cachón (2006b) is the lack of rules or plans for including multiple discrimination and the lack of application of situation testing.

<sup>27</sup> It needs to be mentioned that recently discrimination has been introduced on the political agenda by the Socialists. In December 2007 the Parliamentary Group of the Socialists proposed to create a public prosecutor specialized in crimes/offences related to immigration, racism and xenophobia, as part of a larger plan against Racism and Xenophobia (*Europa Press*, 04-12-2007) and in January 2008 the Socialist prime minister Zapatero proposed the creation of an integral law for Equal treatment and non-discrimination (*El País*, 17-01-2008).

<sup>28</sup> Results from the Migration Integration Policy Index claim that only 30% of the respondents in Spain knew that a law punished ethnic discrimination in the labor market (Niessen et.al., 2006; 169). Results from the special Eurobarometer 263 on discrimination in the European Union demonstrates that in Spain only 23% feel they know their rights should they be the victim of discrimination or harassment, compared to 32% of the average European Union citizen. See also

“Even the judges do not know the Directives. If you would ask a judge now if they know the EU Directives, they will know less than a voluntary of our association. [...] In practice the Directives are transposed, but they do not exist for the legal order” [...] The profound reason behind this lack of diffusion I would say is that there is a lack of sensitivity in Spain to combat racism and even less discrimination in Spain.”

Similar critique comes from the Non-Discrimination Office in Barcelona, where G. Pulido<sup>29</sup> and M. Montesinos<sup>30</sup> emphasize that there is not only a lack of knowledge about the Directives among victims of discrimination, but also among stakeholders (like labor union delegates, and immigrant associations) and the judiciary (including lawyers).

There is also critique on the Council for Equal Treatment and Non-Discrimination by race and ethnicity, which composition, competences and functions are established by Royal Degree (1262/2007)<sup>31</sup>, but which has not started its work yet. According to the European Network Against Racism (in Manso, 2007): “neither the previous government nor the present one has done anything to develop them [the Directives]. Many promises were made, but to this day we are lacking bodies specialized in combating racism, and important measures need to be taken.” According to the responsible policy-makers at the Ministry of Labor and Social Affairs (E. Rodriguez<sup>32</sup> and A. Blasco<sup>33</sup>, interview 23-01-2008) the Council is expected to start working this year, but its practices will depend on the outcomes of March 2008 elections. The lack of political will is stressed among others by G. Pulido (interview 19-02-2008):

“In 2007 they have approved the royal decree that establishes the composition [stressed], 7 years later the composition of the organ that in theory should guard that the law is complied with. Therefore there also is no political will at the state level, neither at the Autonomous or local level.”

Another point of critique mentioned by both academic experts and social actors is the lack of independence granted to the Equality Body (that is designed as internal consultative body within the Spanish government) (see for example Foro para la integración social de los inmigrantes, 2007; ECRI, 2006; 12). In an interview with the responsible policy-makers at the Ministry of Labor we asked whether they shared this criticism. E. Rodriguez (interview 23-01-2007):

“Basically yes. The transposition is not well done. What happens is that we had no chance to do a new transposition [...] We are waiting for the possibility of an integral law on Discrimination, and in the meanwhile we start with the Council to do some pedagogy, because it is a very limited organ and not what we wanted it to be. [...] At the moment there is a proposal from the socialist party (PSOE) to establish a law for equal treatment and non-discrimination, which would give us much more ground/ we could go much further. At the moment we are planning the Council of Equal Treatment and Non discrimination, which is a consulting organ

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[http://ec.europa.eu/employment\\_social/eyeq/uploaded\\_files/documents/Eurobarometer\\_report\\_en\\_2007.pdf](http://ec.europa.eu/employment_social/eyeq/uploaded_files/documents/Eurobarometer_report_en_2007.pdf)

<sup>29</sup> Director of the Barcelona municipality Office of Non-Discrimination

<sup>30</sup> Representative of the Catalan Association for the Defense of Human Rights (*Associació Catalana per a la Defensa dels Drets Humans*).

<sup>31</sup> See also <http://www.boe.es/boe/dias/2007/10/03/pdfs/A40190-40195.pdf>

<sup>32</sup> Director of the Department of Integration of Immigrants of the Ministry of Labor and Social Affairs (MTAS)

<sup>33</sup> Director of the Spanish Observatory for Racism and Xenophobia at the Ministry of Labor and Social Affairs (MTAS)

when it comes down to it. We thought that in order to start and to launch messages and to attend victims, but there is need to tackle this problem more profound, and this law would help with that, including knowing the state of the situation. We know where they are occupied, what kind of jobs they do, but we do not have information, a systemic database or something about who feels discriminated, and a window for people to say something about it.”

Although the policy-makers admit that a lot has to be done in Spain in terms of the combat against discrimination, it is also argued that Spain cannot be compared to European countries with a longer immigration history. A. Blasco (interview, 23-01-2007):

“In those countries where they have an independent Council, policy on discrimination has a history of 15-20 years. It is not a comparable situation. [...] Ten years ago we did not have this necessity, because there were no immigrants. Most of the critique on the Council comes from a comparison with the situation in the European context. In Belgium yes, in the UK and Germany, because there has been an immigrant population since the 60, 70s. Sometimes you lose this perspective, and you are being compared with an organ that already exists for 10 or 20 years.”

#### **4. The implementation of the EU Directives in policies and collective bargaining**

##### ***4.1 Developing anti-discrimination policy***

As the regulation of immigration flows and first reception of immigrants have most priority for politicians and policymakers in Spain, anti-discrimination policy and the promotion of equal treatment is rather perceived as an objective for the future. According to E. Rodriguez (interview 23-01-2007) the fight against discrimination in Spain starts with a fight against the irregular labor market:

“What is a priority first is that their work is legal and that they work under descent conditions. [...] By doing this you have done 50% on the road of the combat against discrimination, because this is truly discrimination, a real abuse, to have people working for you without a contract, without social or salary guarantees.”

According to this policy-maker the normalization process of 2005 had therefore probably most impact in terms of government policies fighting discrimination of immigrant workers.

In daily practice, the fight against the exploitation of foreign workers in the underground economy is largely a matter of workplace inspections that focus on the law incompliance of companies. These inspections are not limited to immigration law enforcement, but focus on all kinds of violations, including non-payments, health and safety violations, working hours etc. Only a small fraction of violations detected through these inspections are infractions of the Foreigners Law, and it is well-known that these inspections are not sufficient to combat irregular contracting in the underground economy. In practice, inspectors visit certain workplaces (that are suspected of incompliance) and check whether the workers have papers and if work place is in accordance with labor standards (J. Admetlla, interview 15-02-2008). Although labor inspectors are also responsible to control equal treatment conditions of workers, their priority is to detect irregular workers.<sup>34</sup> In spite of these critical remarks on the scope and effectiveness of work inspections, labor inspections are probably the

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<sup>34</sup> The few specific actions aimed at control of equal treatment focus on gender equality (MTAS, 2006).

most important mechanism of control the Spanish and Catalan governments have to fight the discrimination of immigrant workers by employers.

Beyond policies that aim at regularization or detection of irregular workers, the most important implementation of anti-discrimination policies at the state level are found in the Strategic Plan for Citizenship and Integration 2007-2010.<sup>35</sup> Combating discrimination and the promotion of equal treatment is one of the three main principles of the plan, next to citizenship and interculturality (*interculturalidad*). E. Rodriguez (interview 23-01-2007):

“The Strategic Plan has designed several programs. We have created a space for exchange of ideas and practices, for example in meetings with local governments we look at possibilities to do something, we have used the European Year of Equal Opportunities to raise awareness on the importance of discrimination, we have signed covenants with Autonomous Communities in the context of the management of the Fund for integration, in where discrimination plays an important part in the area of labor and especially in the area of equal treatment. It is like we are to warm up the motor and start to generate the necessity to work on this issue.”

Next to this general awareness raising campaign in the context of the coordination of the European Year for Equal Opportunities<sup>36</sup>, three chapters of the plan include objectives and policies related to the combat of discrimination of immigrant workers. First, in a special chapter on equal treatment, the development of an integral program for the attention of victims of discrimination is envisioned, next to the creation of a Council for the promotion of equal treatment (Secretaría de Estado de Inmigración y Emigración, 2007; 294; 299). It also includes several programs co-financed by the EU (like “Combat Discrimination” and “Eurequality”) and the creation of the Spanish Observatory for Racism and Xenophobia.<sup>37</sup> Second, within the chapter on labor, the plan envisions to fight discrimination of immigrants at the workplace, by awareness raising programs and the promotion of diversity management in companies (Secretaría de Estado de Inmigración y Emigración, 2007; 165-166).<sup>38</sup> Finally, in the education chapter, one important objective is the improvement of procedures for the validation of degrees and certificates of foreigners, and to update covenants on academic degree equivalences between Spain and immigrants countries of origin.

Fieldwork in Catalonia gives some additional insight in the implementation of state policy objectives at the regional and local level. Policies of anti-discrimination from the Catalan government (*Generalitat*) can be found in the Citizenship and Immigration Plan

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<sup>35</sup> This *Plan Estratégico de Ciudadanía e Integración 2006-2009* is available at: <http://www.mtas.es/migraciones/Integracion/PlanEstrategico/Docs/PECIDEF180407.pdf>

<sup>36</sup> See also [www.igualdadoportunidades2007.mtas.es](http://www.igualdadoportunidades2007.mtas.es)

<sup>37</sup> The body was created with the 4/2000 Foreigners Law, as part of the General Direction of the Integration of Immigrants. It started working in March 2006 and is aimed at analyzing data on racism and xenophobia in Spain and develops proposals to fight against racism and xenophobia (see also Observatorio Español del Racismo y la Xenofobia, 2006).

<sup>38</sup> Examples of good practices of diversity management in companies can be found in the report prepared by the European Commission in the context of the European Community Action Program to combat discrimination (European Commission, 2005). Examples of initiatives developed by NGO's in Spain include a special seal for companies and products that realize good practices in terms of contracting immigrants introduced by the NGO *Red Acoge*; the catalogue “immigration and companies, recommendations for a tandem that is economically efficient and social responsible” developed by *Comisión de Ayuda al Refugiado en Euskadi* (CEAR-Euskadi, 2006); and the anti-discrimination guide distributed among small and medium-sized companies by *Asociación Española del Pacto Mundial de Naciones Unidas* (ASEPAM, 2006).

(*Pla de Ciutadania i Immigració 2005-2008*) developed and coordinated by the Immigration State Department (*Secretaria d'Immigració*). The plan develops several reception policies that promote equal treatment and opportunities of immigrant workers, like the provision of (optional) free courses to learn the official languages (Spanish and Catalan)<sup>39</sup>, some basic knowledge about the country, the labor market, and workers' rights for all recently arrived immigrants and special reception programs for companies. Next to reception policies, specific equality policies in the area of the workplace include training professionals working for the Catalan Employment Agency and the development of professional mobility policies of the same agency (Generalitat de Catalunya, 2005; 85-86). In addition to these reception and equality policies, X. Alonso<sup>40</sup> explains that the State Secretary for Immigration promotes the management of (all kinds of) diversity in companies, labor unions and employers' organizations.

It needs to be mentioned that the new competences of the Catalan government after the approval of the "Statute of Autonomy" (*Estatut*) in 2006 has given incentives to the development of new integration policies, including the fight against discrimination.<sup>41</sup> One important outcome has been the Law for the Reception of Immigrants (*Llei de acollida*)<sup>42</sup> which establishes the norms for reception of immigrants in Catalonia. Another initiative is the preparation of a National Immigration Pact (*Pacto Nacional de la inmigración*)<sup>43</sup>, which includes policies that aim to give work permits to immigrants that enter through family reunification and immigrants who have studied in Spain (X. Alonso, interview 14-03-2009).

More important than creating new policies and instruments according to this policy-maker from the Catalan government is the improvement of the implementation of existing norms, including normal labor legislation (like the Workers' statute and Sanction law), the Foreigners' Law and Penal Code; and the functioning of existing institutions, like Labor Inspectorates and the Judiciary. X. Alonso (interview 14-03-2009):

"I think there is an overload of norms, and institutions are created by norms. Now for example we have Observatories that analyze the situation of anti-discrimination. What we should consider is to reutilize organs, and regenerate processes and decisions. I do not know if we need a new organ. What the State has done [to create a Council for Equal Treatment], it has done because the EU had a process of infringement for the no-transposition of the Directives, but probable in reality the Spanish legislation was already sufficient and has enough instruments for the

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<sup>39</sup> In spite of article 32 which states that "there shall be no discrimination on the basis of use of either of the two languages", the lack of knowledge of Catalan is mentioned explicitly as reducing equal opportunity and provoking discrimination (Generalitat de Catalunya, 2005; 32).

<sup>40</sup> Head of the Area of Institutional Relations from the Immigration State department of the Catalan government (*Cap de l'Àrea de Relacions Institucionals, Secretaria per a la Immigració*).

<sup>41</sup> See article 138 of the *Estatut* for the new competences Article 42.6 more explicitly states that "the public authorities shall take the necessary measures to establish a system for receiving immigrants, and shall promote policies to guarantee recognition and effectiveness of their rights and obligations, equality of opportunity and the services and assistance that will facilitate their social and economic accommodation and their participation in public affairs" (see also Parlament de Catalunya, 2006).

<sup>42</sup> The Reception Law has established norms for the reception of newly arrived immigrants. See also <http://www.gencat.cat/benestar/societat/convivencia/immigracio/acollida/index.htm>.

<sup>43</sup> The National Immigration Pact (which is still in the consultation process) is an agreement between governmental and non-governmental stakeholders in Catalonia on how to manage migration related diversity. See also: <http://www.gencat.net/benestar/societat/convivencia/immigracio/pni/consultiva/index.htm>

combat against discrimination. [...] I do not think it is necessary here [in Catalonia], as the institutional map is very dense.”

The Non-Discrimination Office in Barcelona, which is part of the city hall and was established in 1998 as observatory for violations of rights in the city<sup>44</sup>, is the only governmental institution we encountered in Catalonia providing assistance to victims of discrimination, but there are also several non-governmental organizations active in this field (see also chapter 5).

## **4.2 Collective bargaining**

The social partners involved in collective bargaining have different perspectives on the fight against discrimination. First, with regard to institutional discrimination, employers' organizations emphasize the need to recruit more immigrant workers in sectors where shortages exist and to speed up procedures for companies to contract foreign labor in countries of origin.<sup>45</sup> Employers are thus in favor of liberalizing immigration policies, not because of their concern for institutional discrimination, but because of the need for (cheap and flexible) labor. Labor unions on the other hand demand restrictions of entry of foreign workers, which they see as putting a downwards pressure on wages and social protection of workers. Where labor is extracted from abroad, they pressure the government for more transparency and involvement in companies' practices of hiring immigrant workers from abroad. C. Bertran (interview 07-01-2008) for example explains that:

“Not long ago we reported against Mc Donalds, because of some Peruvians who were contracted in the country of origin, but when they arrived the contract was changed and the salary and working conditions were cut back, etc.”<sup>46</sup>

In spite of these contrasting positions, combating discrimination of immigrant workers has become a common objective of both social partners, as is manifested in the Strategic Agreement of 2005 to “Promote the Internationalisation, Job Quality and

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<sup>44</sup> The Charter for the Safeguarding of Human Rights in the City, signed by the City of Barcelona, establishes in its article II the principles of equality of rights, and of no discrimination for all those who live in the signatory cities, irrespective of their nationality. It states that "these rights are guaranteed by the municipal authorities, without any discrimination on the grounds of color, age, sex or sexual orientation, language, religion, political opinion, national or social origin, or level of income." The charter can be found at <http://www.oficinadiscriminacio.com>

<sup>45</sup> Spanish employers seeking foreign workers have to prepare generic job offers and make their requests to the Spanish Employment Agency (INEM). When this agency does not find any legal resident in Spain available for the job *or* the offer falls within the so-called “catalogue of difficult coverage” (*catalogos de dificil cobertura*), they send a recommendation to the Ministry of Labor about the preferred number of work permits for foreigners. The Ministry transmits this to the Spanish embassies in Morocco, the Republic of Cape Verde, the Dominican Republic, Colombia, Ecuador, Romania, Poland and Hungary, where workers are recruited in the context of bilateral agreements. Initiatives to improve mechanisms for contracting foreign workers include the creation of a service for orientation and advice to companies (*El Servicio de Orientación y Asesoramiento de Fomento del Trabajo Nacional en materia de Inmigración dirigido a las empresas (SOAFI)*) in cooperation with the Immigration Department, and the establishment of two service offices (*Servicio de Intermediación Laboral en Origen, SILO*), one in Morocco and one in Colombia.

<sup>46</sup> In a press release the labor union claims an investigation by the Ministry of Labor in the hiring practices of the company, a better control of the Ministry on contracts signed in countries of origin, the presence of labor unions in these processes and a penalty for “labor traffic” for the company (Oficina de Prensa de CCOO de Catalunya, 10-05-2007).



Competitiveness of the Catalan Economy”.<sup>47</sup> Among the 24 proposals agreed on by the social partners is the need to ensure equal opportunities and prevent discrimination of immigrants in the educational, social and professional spheres. The actions proposed in the last sphere include active labor market policies<sup>48</sup>, a model of responsible business (including non-discrimination) and the promotion of compliance with labor regulations in relation to discriminatory behavior. In the practice of collective bargaining however, the incorporation of non-discrimination clauses is scarce, and if incorporated often related to gender equality.<sup>49</sup>

Rather than incorporating clauses of non-discrimination on the base of race, ethnicity, religion etc., there has started a debate about whether the management of diversity in the workplace should be incorporated within collective agreements.<sup>50</sup> Generally speaking labor unions and employers’ organization have different visions on diversity management. While the first argues for inclusion of personal (instead of cultural group related) diversity management in collective agreements in fear of losing immigrant workers (and therefore bargaining power) to ethnic or religious unions (C. Bertran, interview 07-01-2008), the latter prefers to give a free hand to companies (M. Mora i Radó, interview 14-02-2008). Debates about diversity management in companies has mainly been driven by Muslim workers claims for flexible working hours, holidays (especially Ramadan) or dress codes and are often not discussed in the parameters of discrimination, but perceived as practical problems that should be dealt with in a pragmatic manner. E. Rojo (interview 26-11-2007):

“The debate about whether this is discriminatory or not, is not easy, but there are more and more examples of pacts in where diversity is managed at the level of the company. [...] Recently in Murcia the labor union made an agreement with a company (where a large majority of women working proceed from North African countries, Muslims) so that the women working there who want to, can wear a veil, but adopted to the safety and health rules. This is an example of the pragmatic way in which such issues are dealt with in Spain. Until now conflicts in the workplace have been solved by pacts, agreements, normally with the interference of labor unions, in order to prevent situations that can be qualified as discriminatory. [...] Another example is a company in the north of Catalonia, where 20 Muslim women are working, where an agreement has been reached on a change of working hours during the Ramadan.”

## **5. Good practices and challenges in the legal fight against discrimination in Catalonia**

### **5.1 Legal actions against discriminatory job advertisements**

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<sup>47</sup> This agreement reflects the consensus of the government, labor unions and business associations in Catalonia to adapt the Catalan economy to new realities and needs of a competitive international and social cohesive economy. See also <http://www.acordestrategic.org/docs/AcordEstrategicAN.pdf>

<sup>48</sup> Examples are the creation of an Immigration Committee in the framework of the Board of Directors of the Employment Service for Catalonia (*the Servei d’Ocupació de Catalunya - SOC*), which will study how best to organize migratory flows and guarantee the rights of immigrant workers; and the responsibility of the newly created Catalan Council on Social Dialogue and Participation to propose actions to ensure equality and non-discrimination.

<sup>49</sup> In 2006 for example 21% of the collective agreements in Spain included a clause on equality and non-discrimination between sexes (CES, 2006; 416)

<sup>50</sup> X. Alonso (interview 14-03-2008), points out two recent examples of collective agreements in where the management of diversity is included: *Danone* and *Eroski* (a Spanish supermarket chain).

There are few initiatives that aim to prevent discrimination in the labor market and at the workplace. In order to improve (or guarantee) immigrants equal access to the labor market for example, *SOS Racisme* in Catalonia screens job advertisements. B. Aviñoa<sup>51</sup> (interview 10-01-2007):

“At the moment we do not go as far as in France, but we look at advertisements and contact with the company in charge and try to prevent it. But we cannot yet enter in the debate of human resources, who decide about who is fit for the job, because this is impossible. At least we try to prevent that a Moroccan for example cannot enter the selection process, because of his origin/nationality. So we send a letter to the responsible employer and normally they change it, because they know it is a crime, for which there is a sentence between 3 months and 4 years.”

The Ombudsman in Catalonia is aware that this type of discrimination is also found in public job advertisements in Spain. The justification of differential treatment of national and non-nationals in the constitution however make it difficult to fight this type of discrimination. L. Diez<sup>52</sup> (interview 27-02-2008) however comments that:

“I think that there is a contradiction however in terms of the access to public employment for EU nationals and Third Country Nationals. While EU nationals have access to certain public administrative jobs, this is not the case for Third Country Nationals. [...] What we try to do is pedagogy, to make clear that there is a contradiction [...] and that the application of access to these jobs should be amplified to include also Third Country Nationals.”

## ***5.2 The assistance to victims of discrimination***

The assistance to victims of discrimination is not centrally organized by the government and therefore depends on availability and capacities of local governmental and non-governmental organizations. A good practice is found in the Office for Non-Discrimination in Barcelona, which acts upon complaints of (all kinds of) discrimination, next to the diffusion of information on human rights. G. Pulido (interview 19-02-2008) explains that in cases of labor discrimination (which are only few), almost always the legal denunciation instruments is used (instead of mediation) and a positive resolution is derived. Labor unions in Catalonia also play an important role in assisting victims of discrimination, especially irregular workers who hope to obtain a work permit.<sup>53</sup> C. Bertran (interview 07-01-2008):

“A lot of denouncements are related to *arraigo laboral*. For example there is the case of a woman for who we try to arrange *arraigo laboral*, who is working 5 years illegal for the same company, under bad working conditions. In this case we have claimed an inspection and are waiting for a sentence. We expect that the company has to pay the women for 5 years of suffering.”

Finally, *SOS Racisme* in Catalonia also provides assistance to victims of discrimination, but complaints of immigrant workers are scarce<sup>54</sup> and limited to cases of discrimination

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<sup>51</sup> Employee at the NGO *SOS Racisme* in Barcelona.

<sup>52</sup> Deputy Ombudsman in Catalonia (*Sindic de Greuges de Catalunya*).

<sup>53</sup> Immigrants who can demonstrate their continued residence in Spain for at least three years, family links with other resident foreigners or report social insertion emitted by the City Hall, next to a labor contract for minimal a year can apply for social *arraigo*. Labor *arraigo* on the other hand requires demonstration of labor relations for at least a year and continued residence for a minimum of two years.

<sup>54</sup> For example in 2006 a total of 158 denouncements were made at *SOS Racisme* in Catalonia, of which only 24 in the related to labor.

of irregular workers, and sometimes discrimination by co-workers. B. Aviñoa (interview 10-01-2007):

“Most common are cases of undocumented female workers working in domestic services that experience economic mistreatment, for example monthly salary is not paid, fraud which is hard to demonstrate by legal procedures. Therefore what we do is to find a mediator, which can be the social service, local police or a social agent to intervene and make sure that the money is paid and that we do not have to start a legal procedure, which moreover is easy to lose. Because the employer can easily say that he/she does not know the person and the case is over. As in domestic services, foreign workers often have no contract, no ways to demonstrate the work they have performed and there are only few changes to win.”

### ***5.3 The challenge of legal enforcement***

Striking in the Spanish case is the lack of cases brought before court and legal sentences that might test the new legislation introduced by the Directives. Most cases of discrimination at the workplace brought before courts are gender or disability related. Cases related to immigrants discrimination by race and ethnicity are only found outside the labor field (like race discrimination by police forces).<sup>55</sup>

In a report on racism and xenophobia in the EU members states, the FRA (2007; 39) concludes that in Spain “there is no evidence that an effective, proportionate and dissuasive sanction was imposed in a single case of ethnic discrimination”. These findings are supported by the results of the Migration Integration Policy Index of 2006, where Spain scores only 50% on the anti-discrimination indicator and therefore ranks 17 among the 28 countries included in the study. This low result is argued to be due to “limited punishment, lengthy court cases and the lack of implementation of the specialized equality body, which mandate, powers, and legal standing are still ill-defined”.<sup>56</sup> Cachón (2006b) points out that the fragmentation of anti-discrimination legislation, combined with a lack of sensibility among the judiciary, results in courts usually treating cases as violations of other types of legal rights, without taking discrimination into account. M. Montesinos (interview 19-02-2008) has a similar opinion:

“The problem is the lack of transposition and the lack of juridical sensibility of the magistracy in general, because there is no application. [...] As a result, because the Directives are not well regulated. In the day to day use they are not commonly used, because there does not exist a regulation from before and neither a juridical sensibility.”

Apart from these institutional constraints to use the Directives in the legal fight against discrimination, the stakeholders we interviewed also emphasized the lack of consciousness among victims (and their representatives), which results in few denunciations of discrimination. Those immigrant workers that do denounce discrimination in most cases are irregular workers for whom it is more difficult to find proof and a legal procedure is risky. Others might fear for losing their job or work permit. Most immigrants however do simply not feel discriminated, because they earn more than in their country of origin and accept severe work conditions as a price they have to pay for migrating and obtaining a work permit from their employer (C. Bertran, interview 07-01-2008). The other labor union with weight in Catalonia has a similar

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<sup>55</sup> See for example the sentence of the Constitutional Court [http://extranjeros.mtas.es/es/normativa\\_jurisprudencia/Jurisprudencia/tribunalConst/STC\\_13\\_01.pdf](http://extranjeros.mtas.es/es/normativa_jurisprudencia/Jurisprudencia/tribunalConst/STC_13_01.pdf)

<sup>56</sup> See also <http://www.integrationindex.eu/integrationindex/2538.html>

opinion. E. Granados from UGT (in Fuentes, 2006): “There is a lack of basic information, like the obligation to work with a contract, that you should get paid every month and not every week or day”. Both labor unions have edited leaflets in several languages in order to inform foreign workers about their rights.

At the Non-Discrimination Office in Barcelona it is argued that next to a lack of consciousness of victims, also actors and collectives defending the rights of vulnerable groups lack information and knowledge about legal instruments to combat discrimination. In order to raise awareness among these actors the Non-Discrimination Office in Barcelona organized two seminars: one with the lawyers association in Barcelona in 2005 to make the Directives known among the judiciary, and one in 2008 directed at union delegates and immigrant associations (G. Pulido and M. Montesinos, interview 19-02-2008).

### **Final reflections and recommendations**

Discrimination of immigrant workers in Spain primarily refers to those working in the underground economy facing harsh working conditions, without basic rights and protection. In that sense the EU Directives have arrived in Spain before there was a social and political debate on equal treatment and opportunity of immigrant workers. The transposition of the anti-discrimination Directives in Spain is characterized by a lack political debate, and a marginal implementation of instruments to make the new legislation effective, especially in terms of the legal (but not operational) Council for equal treatment. The Directives have stimulated the (first) developments of anti-discrimination policies and anti-discrimination considerations in collective bargaining. However, the fragmentary anti-discrimination legislation, low sensitivity among the judiciary, and lack social consciousness of the issue of discrimination in the society at large has resulted in poor results in terms of cases and sentences that should test the new legislation. In practice, the legal fight against discrimination of immigrant workers remains largely confined to the combat against the exploitation of irregular workers, and is highly dependent on local initiatives and non-governmental actors.

The reception and implementation of the EU Directives in Spain can be understood in the context of immigration and the stage of development of integration policies. Although immigration has become a consolidated fact of Spanish society, policies that try to manage migration related diversity are in the first phase of what Zapata (2004) calls “the process of multiculturalism in Spain” (*proceso de multiculturalidad*). In this first phase there is mainly concern for equality of access to rights, while only in the second phase (when equality of rights are guaranteed) discrimination - understood as equal opportunities and treatment - is taken into account.<sup>57</sup> The fight against discrimination in Spain is determined by a language of equal rights (both in terms of access and conditions) related to immigrants’ legal status. Such a finalist discourse is an indicator that Spain is in the first phase of the “process of multiculturalism”. The lack of concern for equal treatment and opportunity (which are assumed under conditions of equal rights) goes along with an increasing concern for diversity management in companies. Diversity claims from (mainly Muslim) workers however are not approached from a perspective of non-discrimination and equal opportunities, but rather

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<sup>57</sup> While equality of rights is based on the logic of inclusion and exclusion, discrimination use the logic of majority and minority is used (Zapata, 2004; 127-140).

seen as practical problems that need to be dealt with in pragmatic way by individual companies (and often not within collective bargaining agreements).

These results are in contrast with earlier findings on migration challenges and policy developments in the education sector (see also WP3). The entrance of immigrant children in Spanish classrooms have made educational challenges a recent topic of social and political debate and both equal rights and opportunities have become part of the policy discourse in this sector. The combat of discrimination at the workplace (in terms of equal opportunities) on the other hand is rather perceived as future challenge by policy-makers and stakeholders. It remains to be seen how labor market policies will change in the future when the children of immigrants will enter the labor market in larger numbers. The challenge for policymakers to improve immigrant workers equality of rights, treatment and opportunities is crucial for the future of a multicultural Spanish society, as discrimination existing in the labor market and at the workplace strongly influences social discrimination in other areas of life.

The stakeholders we interviewed had different ideas how to improve the fight against discrimination in the labor market and at the workplace. First there are recommendations that aim to prevent institutional discrimination of immigrant workers. In this category we find suggestions that aim to improve legal access to the labor market and the security of immigrants' legal status. Some in this context point out the contradiction between the Foreigners Law (allowing institutional discrimination) and the Directives (fighting social discrimination). Others emphasize the need for more flexible mechanisms to contract foreign workers in their countries of origin (employers' organizations). Still others argue for more flexibility to renovate work permits and access to the Social Security System (especially labor unions). An important instrument to improve the conditions of equal access to the labor market shared by most stakeholders is the need to speed up the validation of foreign diploma's and degrees.

Other recommendations are aimed at improving the use of control mechanism and existing legal instruments to fight discrimination. In this category some recommendations point towards improving the work (plans and activities) of labor inspections and other mechanisms of control, like compliance with the Penal Code and the Foreigners' Law. Others argue that there is a need for an integral anti-discrimination law, which would have more leverage to introduce the principle of equal treatment and non-discrimination horizontally in all policy fields. Such a law would moreover provide policy-makers with the possibility to develop a national Plan of non-discrimination and create institutions responsible for enacting this law, like a Council for Equal Treatment that is more effective. Finally, an integral law could also give important incentives to the judiciary to use legal instruments in the fight against discrimination.

Some stakeholders correctly point out that the Penal Code should already provide a minimum legal base to fight discrimination. A third sphere of recommendations therefore is not aimed at the legal or institutional sphere, but rather at the need for awareness raising in the society at large, including the judiciary, employers, labor unions, immigrants and the associations representing them. Here the dominant argument is that society should not only be better informed about their rights, but also about the instruments available to fight discrimination.

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## Annex 1. Interview respondents

Interview with	Type of Actor	Date & Place
1. Eduardo Rojo	Academic expert in Labor and Social Security Law (Profesor de la Universidad Autónoma de Barcelona)	26-11-2007 Barcelona
2. Lorenzo Cachón	Academic expert & social actor ( <i>Profesor titular de Sociología de la Universidad Complutense de Madrid &amp; Presidente del Foro para la integración social de los Inmigrantes</i> )	05-12-2007 by phone
3. Carles Bertran	Coordinator of the Information Centre for foreign workers of the labor union <i>Comisiones Obreras (Coordinador de CITE-CC.OO)</i>	07-01-2008 Barcelona
4. Isabel Martínez & Bernat Aviñoa	Spokeswomen of the non-governmental association <i>SOS Racisme Catalunya</i>	10-01-2008 Barcelona
5. Estrella Rodríguez & Amapola Blasco	Policy-makers at the state level, within the Ministry of Labor and Social Affairs (Directora General de Integración de los inmigrantes & Observatorio Español del Racismo y la Xenofobia)	23-01-2008 Madrid
6. Esteban Ibarra	Spokesman of the anti-racist organization <i>Movimiento contra la Intolerancia</i> .	23-01-2008 Madrid
7. Maria Mora i Radó	Representative of the Catalan business association <i>Foment del Treball</i> , Department of Labour Relations and Social Affairs.	14-02-2008 Barcelona
8. Jaime Admetlla	Head of labor relations of the Labor Inspectorate in Catalonia ( <i>Cap de la unitat de la relacions laborals de Inspecció de Trabajo</i> ).	15-02-2008 Barcelona
9. Guadalupe Pulido & Mirreia Montesinos	Director of the Barcelona municipality Office of Non-Discrimination ( <i>Oficina per la No Discriminació del Ajuntament de Barcelona</i> ) and representative of the Catalan Association for the Defense of Human Rights ( <i>Associació Catalana per a la Defensa dels Drets Humans</i> ).	19-02-2008 Barcelona
10. Laura Díez	Deputy Ombudsman in Catalonia ( <i>Síndic de Greuges de Catalunya</i> )	28-02-2008 by phone
11. Xavier Alonso	Head of the Area of Institutional Relations from the Immigration State department of the Catalan government ( <i>Cap de l'Àrea de Relacions Institutionals, Secretaria per a la Immigració</i> ).	14-03-2008 Barcelona