



PUTTING DISCRIMINATION INTO CONTEXT



Putting discrimination into context

1. Creation of the Council for the Advancement of Equal Treatment

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In June and November of the year 2000 the European Union, pursuant to Article 13 of the Treaty of Amsterdam, adopted two Directives to combat discrimination: the so-called “Racial Equality Directive” (2000/43/EC) prohibiting discrimination based on racial or ethnic origin in any context (employment, education, social security, health-care, access to goods and services, etc.) and the “Employment Equality Directive” (2000/78/EC) laying down a framework to prevent discrimination in the workplace for reason of religion or belief, disability, age or sexual orientation.

Article 13 of Directive 2000/43 requires every Member State to designate “one or more bodies to take responsibility for the promotion of equal treatment of all persons irrespective of racial or ethnic origin.” In accordance with European law, since its approval each of the 27 EU Member Countries has been incorporating these regulations into its own national legislation.

In Spain, the Directives were transposed into the legal system at the end of 2003 through **the Fiscal, Administrative and Social Order Act, Law 62/2003 of 30 December 2003** whose Article 33 provides for the creation of a Council for the advancement of equal treatment and non-discrimination of persons for reasons of racial or ethnic origin.

This body was finally constituted in September 2009 following its creation by Royal Decree in September 2007. It is currently attached to the Directorate-General for Employment Equality and Anti-Discrimination of the Ministry of Equality. As a collegiate body of the General State Ad-

ministration, it has a *multi-stakeholder* composition, i.e. its members come from different national, regional and local public administrations as well as representatives of workers and employers and of the associative movement engaged in the promotion of equal treatment and non-discrimination of persons based on their racial or ethnic origin.

As stipulated in European law, its mission is to promote the principle of equal treatment and non-discrimination of persons irrespective of their racial or ethnic origin in all different walks of life (education, health-care, social benefits and services, housing, access to employment and training and, in general, in the offer and access to all goods and services).

The following are among the duties attributed to this Council:

1. To lend independent assistance to victims of discrimination in processing their claims.
2. To conduct analyses and studies of the situation of discrimination and the application of the principle of equal treatment in an autonomous and independent fashion, and to publish independent reports on draft legislation, plans, programmes and other initiatives related to the aim and purpose of the Council.
3. To promote measures which contribute to equal treatment and the elimination of discrimination and to formulate appropriate recommendations and proposals.

4. To draft and approve the Council's annual activity report and forward it to the Minister of Equality.

The creation of this Council is the final step in the transposition of Directive 2000/43 and took place at a key economic and social moment. Over the last several years and especially since the beginning of the current economic crisis, the rise in xenophobia and racism throughout society has become worrisome, especially in the context of sports, music concerts and Internet-based social networks. In fact, according to the December 2008 Barometer, study No 2 781, 17.3% of those polled claimed to have felt discriminated against in the last 12 months and 54% felt that discrimination based on ethnic or racial origin is very or quite frequent. Despite that, 58% of the Spanish population are unaware of the rights of victims of discrimination.

Furthermore, the "Special 2010 Raxen Report" conducted by the NGO Movimiento contra la Intolerancia revealed that there is an increasing number of "ultra right-wing groups, platforms and marginal political parties which seek conflict, organise demonstrations and systematically disseminate propaganda against immigration and diversity thus endangering cohesion and co-existence in a democratic society". This report also points out that "Internet has become the forum of choice to disseminate hate, discrimination and violence based on racism and intolerance".

It comes as no surprise that the economic crisis and its dire consequences for employment has left a large proportion of the immigrant population more vulnerable and in greater risk of suffering discrimination, especially in gaining access to the labour market. The events of 2010 arising in different municipalities having to do with residence registration of immigrants or the prohibition of the integral Islamic veil (burka or nikab) in public places are examples of how issues relating to identity, culture and integration find their way into the political arena as elections draw near.

The conflicts arising in different European countries revolving around Roma from Romania, Bulgaria or the ex-Yugoslavia and which give rise to violent behaviour, and the actions of governments which not only fail to comply with Community Directives but also with the Charter of Fundamental Rights, are contributing to exac-

erbate these prejudices and stereotypes of the Roma population in all of Europe and run the risk of becoming the norm.

The Council for the advancement of equal treatment and non-discrimination of persons for reasons of racial or ethnic origin was created late in Spain and was born with weaknesses such as its limited mission, independence and executive capacity. Nevertheless, it is an important step forward not only because it complies with a Community Directive but also because it means that Spain now has a public body whose mission is to combat discrimination and promote equal treatment irrespective of ethnicity and race. The variety of different groups represented on the Council makes agile and effective management difficult but has the advantage of involving the key players.

Taking account of the main problems related with discrimination and the Council's limited budget, a modest work plan was proposed for the first year which focused on four pillars of action with specific objectives:

1. Assistance for victims of discrimination based on racial or ethnic origin. To that end the aim was to create a network of aid offices for victims of discrimination and to cooperate in identifying and helping those suffering from racial or ethnic discrimination and to implement a network of experts specialised in cases of racial or ethnic discrimination.
2. Analysis and investigation in order to compile an annual study on discrimination and equal treatment focused on the perceptions, experiences and situations of people suffering racial or ethnic discrimination and an annual report on the status of discrimination in Spain and two further theme-based reports on racial or ethnic discrimination.
3. Communication and awareness-raising through the Council's web page and the drafting of awareness-raising and informative materials on racial and ethnic discrimination.
4. Training through courses and seminars on racial and ethnic discrimination targeting professionals working in the field of equal treatment.



The major step forward made by the Council since the approval of this Work Plan has undoubtedly been the creation of the network of Aid Offices for victims of racial and ethnic discrimination with the collaboration of ten organisations which were considered to play a major role in carrying out this task: The Red Cross, the CEPAIM Foundation, Acción Integral con Migrantes, Fundación Secretariado Gitano, Movimiento Contra la Intolerancia, Movimiento por la Paz, el Desarme y la Libertad, Red Acoge, Unión General de Trabajadores and Unión Romání.

Through this Network, the Council mostly hopes to detect cases of discrimination and counsel victims about how to cope with these situations both from a legal and psychological point of view. This Network will also provide for the undertaking of actions designed to prevent possible situations of discrimination and to inform those liable to suffer discrimination about their rights and the resources at their disposal to defend themselves.. Thanks to this Network, Spain now has specialised professionals working in favour of equality.

During the Network's first six months of operation the Council expects to deal with at least 160 cases of discrimination following a single protocol so that comparative information can be gathered on the usefulness and effectiveness of the service and the counselling provided. During the years to come we hope to broaden these services and improve the action protocol by learning from successful experiences and correcting weaknesses as they arise. In this way we hope to be able to adapt to the needs of (potential) victims.

We should also draw attention to the efforts being made by the Council to obtain reliable data on discrimination in Spain so that we can identify the origin of the main problems and provide the Council with the information it needs to prioritise its actions. By the beginning of 2011 we hope make the first research and analysis papers available to the public: the first study on discrimination and equal treatment focusing on the perceptions, experiences and situations of people liable to suffer from racial or ethnic discrimination and the first report on the status of discrimination in Spain 2009-2010. The members of the Council consider it very important to know how those

who are ethnically or racially different in Spain perceive their treatment and in what cases and under what circumstances they are discriminated against. This will be instrumental in guiding the Council's action over the next several years and in making recommendations at different public and private fora with a view to improving equal treatment and correcting discrimination.

Lastly, aware of the importance of publicising the Council and the relevance of digital communication today especially among young people, a Web page is under development whereby (potential) victims and equal treatment professionals have access to the latest information on how to deal with situations of discrimination, what to do, where to go, etc.

Despite these initial advances, the Council must progressively consolidate its system and be provided with greater resources and means so as to be able to carry out its mission, develop the lines of activity it has established and implement new actions to meet future needs.

The fight against discrimination and the promotion of equal treatment in Spain has a long way to go and progress must be made towards a new regulatory framework, i.e. a comprehensive equal treatment law which at least covers all of the areas established in the Treaty of the Union and reinforces policies in this connection.

Within the framework of a new law, greater emphasis could be put on the creation of an independent body to promote equal treatment and non-discrimination allowing for the consolidation of a structure capable of dealing with cases of discrimination which are not necessarily associated with racial or ethnic origin but with all sort of discrimination (age, religion or belief, sexual orientation, disability, etc.). To do that, the Government must fulfil its commitment to approve the comprehensive equal treatment law which would broaden protection of the right to equality and provide for the creation of a more independent Council with the power to deal with discrimination from a global perspective.

2. Special Hate and Discrimination Crime Service

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Introduction

Hate crimes are the fruit of racism, xenophobia, homophobia, aporophobia (hatred of the poor), religious, ideological or moral intolerance and other abominable forms of hatred which constitute direct violations of the principles of freedom, equality, democracy, respect for human rights and fundamental freedoms, principles on which the European Union is founded (Article 6 of the European Union Treaty, Article 13 of the Treaty establishing the European Union, Articles 10 and 11 of the European Convention on Human Rights and Fundamental Freedoms and the EU Charter of Fundamental Rights, Chapters I to III, particularly Articles 1, 6, 10 and 21), and those underpinning our Constitutional Order (Articles 1, 9(2), 10 and 14 et. seq. of the 1978 Constitution and Articles 4, 15, 40 and 41 of the 2006 Estatut de Catalunya).

The right to equality before the law and protection for all against discrimination is a universal right acknowledged in the Universal Declaration of Human Rights, the United Nations Convention on all forms of discrimination against women, the International Convention on the Elimination of all Forms of Racial Discrimination and the UN Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and also in the European Convention for the Protection of Human Rights and Fundamental Freedoms, all of which Spain is a signatory country.

The growing importance of criminal law as a tool to effectively combat discrimination and hatred of anyone who is different was recently the focus

of the European Union in its Framework Decision 2008/913 of 28 November handed down by the European Council on combating certain forms and manifestations of racism and xenophobia through criminal law, a regulation which is added to the already existing corpus of EU Directives on equality and non-discrimination such as Directive 2000/78 of 27 November 2000, 2000/43 of 29 June 2000 and the future draft Directive on equal treatment of all people irrespective of their religion, beliefs, disability, age or sexual orientation.

The European Council of 14 December 2007 held in Brussels and the European Parliament in its resolutions of 26/04/07 and 20/05/2008 have urged Member States of the European Union to make a concerted effort to prevent and combat discrimination and increase protection against it.

Community acquis in respect of equality and non-discrimination has been incorporated into the Spanish legal system through different laws such as the Fiscal, Administrative and Social Order Act, Law 62/2003 of 30 December 2003.

Also, new and powerful legal instruments at all judicial levels should be envisaged in the framework of a future comprehensive law in favour of equal treatment and against discrimination along the lines of the EU draft Directive on equal treatment currently pending approval.

The concept of hate and discrimination crimes.

From a doctrinal and purely scientific point of view, a distinction is drawn between:



a) **Hate crimes:** The term “**hate crimes**” can be traced back to one of the fundamental political-criminal lines in comparative law, in the Anglo-Saxon (United States and United Kingdom), Germanic (Germany, Austria and Switzerland) and Latin systems (Italy, France, Portugal): **the creation of sui generis hate crimes** (*hate crime, hate-motivated crime, bias crime, bias-motivated crime, ethnviolence, Haßverbrechen, etc.*) and occur when one person attacks another person and the selection of the victim is based on hatred, fear or irrational aversion on the basis of that person's belonging to a certain group or social collective depending on place of birth, racial or ethnic origin, sex, religion, beliefs or opinion, age, disability or gender orientation or identity.

These are crimes based on intolerance, i.e. prejudices or aversion to certain people simply because they are of a different race, ethnic group, origin, sexual orientation or identity, disability, disease, sex, religion or belief, age or any other social or personal condition or circumstance..

b) **Discrimination crimes:** all of those where a direct or indirect attack is perpetrated against the legal right to equal treatment.

- Direct discrimination is when a person has been or could have been treated in a less favourable manner than another in a similar or comparable situation for reason of *birth, racial or ethnic origin, sex, religion, belief or opinion, age, disability, sexual orientation or identity*.
- Indirect discrimination is when an apparently neutral disposition, criterion or practice causes or could cause a specific disadvantage to other individuals for the reasons expressed above.
- A situation where the disposition, criterion or practice can be objectively justified by a legitimate objective and as a suitable, necessary and proportionate means by which to reach that objective shall not be considered discrimination.

Hate and discrimination crimes occur, to a greater or lesser extent, in all countries ¹.

Hate and Discrimination Crimes in the Spanish criminal code:

The 1995 criminal code describes a number of crimes which fit the international concept of “hate and discrimination crimes” but are dispersed throughout a number of sections. Following is a summary of the most important:

- a) All acts constituting a crime or misdemeanour committed with racist or anti-Semitic motivation or any other type of discrimination related to the creed, religion or beliefs of the victim, the ethnic group, race or nation to which he belongs, his sex or sexual orientation, disease or disability, in short, for the reasons laid down in Article 22(4) of the criminal code and other reasons not provided for therein such as age, situation of poverty of the victim, gender identity, language or any other circumstance or social or cultural condition of the victim.
- b) Criminal threatening for the purpose instilling fear in a an ethnic, cultural or religious group, social or professional organisation or any other group of people.
- c) The crime of incitement to hatred, violence or discrimination as described in Article 510(1) of the criminal code and the crime of dissemination of slanderous information as described in paragraph 2 of that Article.
- d) Discrimination in the context of work described in Article 314 of the criminal code.
- e) The crime of illicit association to promote hatred, violence or discrimination as described in Article 515(5) of the criminal code.
- f) Crimes against freedom of conscience and religious belief as described in Articles 522 to 525 of the criminal code.

¹ See “Hate Crimes in the OSCE Region: incidents and responses. Annual Report 2007 - 2008” (OSCE/ODIHR 2008-2009 <http://tandis.odhir.pl>, and individual follow-up reports of each country drawn up by the European Commission against Racism and Intolerance (ECRI) http://coe.int/t/ehuman_rights/ecri/1-ECRI/2-Country-ycountry_approach/default.asp#TopOfpage

- g) The crime of refusal to provide a service by an individual responsible for a public service or by a civil servant as described in Article 511 of the criminal code.
- h) The crime of refusing to provide services in the exercise of business or professional activities as described in Article 512 of the criminal code.
- i) The crimes of genocide and crimes against humanity described in Articles 607 and 607 bis.

Hate and discrimination crime service of the Barcelona Provincial Public Prosecutor

The experience gained at the Catalonia Public Prosecutor's Office, especially the Barcelona branch, has shed light on a series of common problems affecting all victims of discrimination, i.e. the irrational aversion and hatred of people simply because they are different in terms of their place of birth, racial or ethnic origin, sex, religion, beliefs or opinions, socio-economic status, age, disability or illness.

These criminal acts, an expression of racism, xenophobia, religious intolerance, etc., feature particularities which call for specialised attention and response from Public Prosecution Offices, particularly during times of economic crisis where the social and economic conditions can spark greater social dissemination of the doctrine of hatred and rejection of those who are different.

It was within this context that in the month of October 2009 the Special Hate and Discrimination Crime Service was created within Barcelona's Provincial Public Prosecution Office with the aim of coordinating the efforts of all public prosecutors composing that Prosecution Office when dealing with criminal acts related to discrimination, with a view to ensuring the necessary unity of action when interpreting and enforcing the law.

This specific and specialised action of the Public Prosecution Service, solicited by different associations and organisations working in the area of prevention and combating discrimination in all of its forms, was fruit of the need to address these shared problems affecting all victims of discrimination in a professional manner and to contribute to unification of criteria in the enforcement

of the provisions of the criminal code and overcoming the technical difficulties arising from the deficient and out-of-date wording of such provisions as well as the lack of systematic coordination in the list of causes of discrimination envisaged in the different precepts of the Code and to address the dysfunctions which may occur due to the lack of unified action by law enforcement officials and the Public Prosecution Service when investigating these types of crimes, providing care for victims and determining criminal liability.

Another circumstance calling for a specialised response from the Public Prosecutor through the creation of specialised services throughout all of Spain is the growing complexity of the investigation of so-called hate crimes resulting from the proliferation of Internet pages, personal blogs and social network groups devoted to instigating hate crimes, violence and discrimination, without losing sight of the fact that an important breeding ground for racism, xenophobia and homophobia is the activity of truly violent groups or urban tribes which tend to rally around a particular type music, appearance, sport, etc. such as the "skinhead" movement, a violent and racist subculture whose aggressiveness has been denounced by the Commission on Racism and Xenophobia of the European Parliament and numerous prestigious organisations devoted to the battle against discrimination such as "The European Network of Legal Experts in the Non-Discrimination Field"², "Migration Policy Group", "el Movimiento contra la Intolerancia"³, "SOS Racismo"⁴ etc.

Following are the most prevalent problems which we have observed and which affect victims of discriminatory crimes in a similar way:

Ignorance as to the number of crimes.

One of the important problems identified is the complete lack of data on criminal acts involving discrimination committed within the territorial limits of Catalonia. This same problem affects the rest of Spain with the sole exception of criminal acts involving discrimination based on sexual orientation or identity which are reported at regional police stations (Mossos d'Esquadra). These data have been made available since the approval of a specific protocol followed by the

² See "European Anti-discrimination Law Review, July 2009".

³ See "2009 Raxen Report, Movement against Intolerance".

⁴ See "2008 Report of the Complaints Office of SOS Racisme".



regional police force regarding this type of act. Very recently, at the beginning of April 2010, the Mossos d'Esquadra regional police force passed a new protocol allowing for the classification and quantification of complaints filed relating to crimes or misdemeanours related to any form of discrimination envisaged in the criminal code.

The problem has two components:

1. Acts not reported: There is good reason to believe that many of the crimes committed are never reported meaning that there is an unknown number of criminal acts which victims, for any number of reasons, decide not to report or are not even aware that they can report.

The reasons are varied and range from victims of discrimination who are unaware of their rights (for example, some people do not know that it is a crime for someone to refuse to serve them in an establishment because of the colour of their skin), to those who do not trust the police or the justice system because they do not think they will be listened to or believed, and those who are afraid to report the crime because of possible personal repercussions.

Aliens are the most vulnerable victims, especially those living illegally in Spain. They often are not aware of their rights and fear that by filing a complaint they could be deported. In some cases they fail to report a crime because they feel that their testimony will carry less weight than that of their aggressor if the latter is a Spanish national. Some even refuse to file complaints because they do not trust law enforcement officials due to the traumatic experiences some have suffered at the hands of the police in their countries of origin.

In the case of victims of discrimination based on sexual orientation or identity, failure to report a crime often has to do with a founded fear that filing a complaint would reveal their sexual orientation to their family, their employer or their social circle, especially in small or rural towns. Sometimes, a crime committed in very intimate circumstances is a factor keeping victims from reporting and often times perpetrators take advantage of this sense of impunity.

The Roma population often has the feeling that it is useless to report crimes. Roma victims are often quoted as saying “nothing good ever comes of this; this won't change anything” and this is reflected in the Fundación Secretariado Gitano's 2009 Annual Report.

In this connection, the prestigious Fundamental Rights Agency (FRA) of the European Union conducted a survey involving 23 500 European Union citizens belonging to ethnic or racial minorities and immigrants which was presented to the public in Stockholm in December 2009⁵, and revealed the following:

- 12% of those surveyed claim to have been victims of a crime of discrimination in the last twelve months and 37% of being involved in a discriminatory situation.
- Of these, nearly half (46%) were unaware that there were laws prohibiting all forms of discrimination against persons for reason of race or ethnic background in restaurants, bars or clubs.
- 82% of those who had been victims of discrimination in the last twelve months had not reported the crime and the main reason (given by 64%) was that it “would not have done any good”.
- 80% did not know of any organisation which could help or counsel victims of discrimination. This shows that there is an urgent need to provide better information.

The most blatant discrimination is against the Roma population where one out of every two people interviewed claimed to have suffered discrimination during the last 12 months. Discrimination figures were also high among North Africans (36%) and Sub-Saharan Africans (41%).

Morten Kjaerum: «The study shows that the overwhelming majority of those surveyed do not report cases of discrimination or racist crimes to any official body. Thousands of cases of racist crime and discrimination are never made public. This means that the perpetrators of these crimes go unpunished, victims

⁵ http://fra.europa.eu/fraWebsite/home/pub_eu-midis_en.htm

receive no justice and policy-makers are unable to take the appropriate steps to prevent these infractions from happening over and over again. It is our hope that the data from this new survey raise awareness with regard to the need to develop political responses with more concrete objectives to deal with this social menace.»

Morten Kjaerum further affirmed that «the situation raises important issues such as how to raise awareness of people's rights and reinforce trust in existing protection mechanisms.» «It is important to encourage victims of discrimination or harassment to report these experiences and assure them that they will be taken seriously».

2. Incomplete IT systems: The second component has to do with the organisation of the statistical systems of law enforcement officials of the justice administration itself. Police IT systems at the Public Prosecutor's Office and Courts of Justice do not have specific labels to first of all classify and secondly to quantify criminal infractions which could be motivated by discrimination.

This means that the public authorities have no idea as to the real number of *hate crimes* or crimes which have some discriminatory component and this implies an added difficulty when it comes to designing suitable policies to combat these crimes.

The exception is crimes committed against individuals on the basis of their sexual orientation or identity which have been registered and quantified as from July 2008 in accordance with the approval of the Protocol of the Mossos d'Esquadra Regional Police Force on police intervention in crimes against persons motivated by their sexual orientation or gender identity by the Regional Ministry of the Interior of the Generalitat de Catalunya at the initiative of the Prosecution Service. This was the first time in all of Spain that specific information was gathered and saved in computer systems regarding crimes of discrimination based on a person's sexual orientation or gender identity. As already mentioned, this protocol was replaced by the April 2010 protocol which covers all discrimination crimes envisaged in the criminal code and at the beginning of 2011

will provide the first set of statistics on criminal discrimination reported.

In order to gain insight into the real breadth of discrimination crimes, all national, regional and local police and security forces would have to make arrangements for the registration of every complaint according to the type of discrimination (racism, xenophobia, disability, age, sex, beliefs, religion, etc.).

Random assault for the sole purpose of humiliating the victim.

It is not uncommon to encounter acts of violence which are based exclusively on the rejection of those who are different with the aim of undermining their dignity. In some cases there is a trend on the part of judges and prosecutors to minimise the importance of certain acts such as threats, slander or attacks not requiring extended medical care which often are reduced to simple minor infractions with no further investigation.

According to Instruction 6/07 of the Prosecution Office of Catalonia, physical aggression characterised as random violence for the purpose of humiliating the victim and instilling a sense of terror, fear or inferiority in the latter due to the very randomness of the attack suffered, is deemed to not only damage the physical integrity of the victim but is also considered an attack against his or her dignity as a person. The Instruction orders these cases be considered not only as crimes or misdemeanours involving bodily injury but also as crimes against one's moral integrity as described in Article 173(1) of the Criminal Code and the concurrence of crimes described in Article 77 of the Criminal Code along with the aforementioned crime of inflicting bodily injury.

This Instruction has brought about a change in the way the Prosecutor's Office approaches physical aggressions committed as acts of discrimination. Even if such aggression does not require extended medical attention it does have an especially damaging effect on the dignity of individuals and therefore must also be described as a crime against moral integrity.

In this connection, the case of an aggression perpetrated against an Ecuadorian minor on a train run by the company "Ferrocarriles Catalanes" in the Province of Barcelona was especially significant. This was a high-profile case because it was



filmed by the train's cameras but the initial charges filed were nothing more than a simple misdemeanour. The Public Prosecutor filed an appeal arguing that in addition to bodily damage the act was an affront to the moral integrity of the victim. This appeal resulted in a conviction for a crime against moral integrity described in Article 173 of the criminal code. The judgement was delivered on 16/03/2009 by criminal court 16 of Barcelona and later upheld by a judgement from Section 6 of the Provincial Court on 8/02/2010.

Police reports.

With the exception of reports filed by the regional Mossos d'Esquadra police force regarding crimes against persons for reason of their sexual orientation or gender identity, fruit of the Protocol in force since July 2008 and extended in April 2010 to all discrimination-related crimes, in a large proportion of reports drawn up by law enforcement officials there is no reference made to the discriminatory motivation of the perpetrator in carrying out the criminal act. Reports generally refer to the aggression, insult, coercion, etc. with no further details.

Description of the motivation through data obtained from victims' statements or from others involved and proper on-the-scene inspection by the police accompanied in due form by photographic reporters or graphic video to collect details such as symbols, anagrams, clothing or tattoos worn by the alleged perpetrators, are extremely important for the proper legal-criminal classification of the acts, especially for the aggravating circumstance laid down in Article 22(4) of the criminal code. Moreover, this has important repercussions for the possible adoption of precautionary measures such as pre-trial incarceration or a restraining order.

Inclusion of the motivation of the perpetrators in the police report was decisive in achieving an important conviction from Criminal Court No 22 of Barcelona on 29/10/2009 and later upheld in the 23/02/2010 judgement delivered by the Provincial Court of Barcelona for a crime of bodily injury with the aggravating circumstance of xenophobia and racism in the case of an attack suffered by football players from South America instigated by players of the opposing team linked to radical groups. The police report description not only included the unfortunate racial slurs used at the match but also the neo-Nazi symbols worn

by some of those sanctioned which was instrumental in proving the aggravating circumstance of racism and xenophobia.

It is also very important for police reports to address whether **the alleged perpetrators belong to organised groups** whose aim is to commit acts of violence, hatred and discrimination against persons on the basis of their personal or social circumstances or conditions insofar as this could lead to charges of illegal association **described in Article 515(5)** of the criminal code.

Despite what was just stated, it would be unfair not to acknowledge the brilliant police work which enabled the dismantling of the network of people linked to the neo-Nazi bookstore known as "Librería Kalki" and "Centro de Estudios Indoeuropeos" which culminated in important prison sentences in the judgement handed down by Section Ten of the Provincial Court of Barcelona on 28/09/09 for the crime of engendering hatred, violence and discrimination described in Article 510 of the criminal code, for the crime of dissemination of propaganda justifying genocide described in Article 607(2) of the criminal code and for the crime of illegal association described in Article 515(5). This was the second judgement delivered in Spain convicting groups of this nature for the crime of illegal association, the first just months earlier by the Provincial Court of Madrid on 16/07/2009 in the "hammerskins" case.

The appointment by the Head Prosecutor of the National High Court of a Special Public Prosecutor to combat these types of groups within the purview of that judicial body is an important step forward in the fight against organised groups whose aim is to subvert the constitutional order and seriously alter the peace or instil fear in social, political or professional groups.

Groups and organisations.

Another reason for concern on the part of the Prosecution Office is the slow but sure growth of **groups and organisations which use information society services, especially the Internet, to disseminate their discourse of hatred, violence and discrimination**, taking advantage of the mass dissemination of their ideas and trusting in the difficulties encountered in investigating and prosecuting their crimes when the perpetrators are located in countries where these acts are not criminal offences. There are relatively few police

investigations conducted despite the exponential growth in the number of Web pages set up for the purpose of propagating their doctrine of hatred of certain people just because of their different race, religion, beliefs or sexual orientation.

In this connection, very important investigation was conducted by the Barcelona Prosecutor's Office based on a complaint filed by the "Front d'Alliberament Gai de Catalunya" and the "Asociación de Familias Gais i Lesbianes" against a group of people participating in the social network "Facebook" whose Web page clearly engendered hatred and violence against homosexuals.

The work done by the police and the Prosecutor's Office in combating Web pages which incite violence, hatred and discrimination against individuals or groups for reason of their race, sexual orientation, religion or beliefs (Article 510 of the criminal code) often runs into obstacles placed in the way by some criminal court judges who minimise the seriousness of the acts or justify them with the misguided concept of ideological freedom or freedom of expression laid down in Articles 16 and 20 of the Constitution. In this connection, it is important to note the success story of the Public Prosecutor in the Sabadell Area which, by appealing to the Provincial Court of Barcelona, managed to overturn the ruling to dismiss preliminary investigative proceedings under way at the local criminal court of Cerdanyola del Vallés against the person responsible for a Web page disseminating propaganda justifying Nazi genocide of the Jewish people and engendering hate and violence based on discrimination.

Public acts.

Public events **such as** meetings, conferences and music concerts **organised deliberately to propagate hatred and violence** against individuals or groups based on discrimination are also quite common.

The Public Prosecutor's Office of Barcelona has opened an enquiry into music concerts featuring songs which incite listeners to hatred, violence and discrimination against people based on their sexual orientation and into conferences organised by the bookstore "Librería Europa" such as the one given by Richard Edmons, writer and member of the Advisory Board of the ultra right-wing National British Party known for his racist and xenophobic views and his revisionist teach-

ings with regard to the Nazi Holocaust against the Jewish people, and the conferences organised featuring David Duke, a known member of the Ku Klux Klan.

Training deficit.

Lastly, an important **training deficit is observed as regards knowledge of the principle of equality and non-discrimination** affecting, to a varying degree, judges, prosecutors, judicial clerks, forensic experts, law enforcement officials, prison workers and members of private security companies. In some cases, this deficit prevents these professionals from detecting cases of discrimination with the rigour required and from providing a suitable response. It is relatively frequent to find cases where referrals were made to consumer information services for acts such as refusing a person entry into an establishment based on his race, when the correct practice would have been to initiate a criminal proceeding for a crime against fundamental rights laid down in Article 512 of the criminal code.

Legislative reform and financing

The problems described require legislative reform and adequate human and material resources so that the Justice Administration can be equipped with the best tools to prosecute hate crimes rooted in discrimination. We would highlight the following needs:

a) Criminal Code Reforms: although the 1995 criminal code approved by Organic Law 10/95 of 23 November was an historic milestone and was revolutionary in its approach to the phenomenon of discrimination insofar as it expressly described crimes and aggravating circumstances leading to the sanctioning of certain behaviours involving discrimination as a motive, the constant changes taking place in Spanish society and the lack of enforcement of some of the criminal code's articles mentioned in the foregoing, underscore the need to update it in order to correct its omissions, deficiencies or lacunae. A reform is needed to update Articles 22(4), 129, 173, 314, 510 to 512, 607 and 607 bis, all of the criminal code.

b) A Specialised Public Prosecution Service through the creation of a network of specialised prosecutors throughout all of Spain focused exclusively or preferentially on pros-



- ecuting hate crimes and crimes rooted in discrimination. Specialised response from the Public Prosecution Service in other fields such as crimes related to corruption, the environment or labour accidents has proven beyond all doubt that they are highly effective in the prosecution of crime and in guaranteeing the standardisation needed which should characterise Public Prosecution. It goes without saying that to accomplish this the prosecution service needs the necessary job posts to be able to effectively discharge these duties.
- c) Reform of legislation governing police and security forces allowing for the formation of **specialised police units** to investigate these crimes and to be more effective in determining the membership of many of their perpetrators in organised groups or gangs devoted to sowing and disseminating hatred against people based on their social or personal conditions. Expressed provision in the **criminal procedure law** permitting the provisional blockage of web pages, blogs, massive e-mail dispatch, etc. where hatred and discrimination are encouraged. The occasion should likewise be seized to solve the problems and contradictions which, in this connection, are raised by the solutions envisaged in the Information Society (Services) Act, Law 34/2002 of 11 July 2002 and Law 25/2007 of 18 October 2007 on the conservation of electronic communication data and public communication networks. All of the foregoing is without prejudice to provision in the criminal code for the application of the said measures as a sentence or accessory penalty in the criminal code.
- d) The law should specifically see to it that **police IT systems** and the different bodies of the justice administration (courts, tribunals and prosecution services) are organised in such a way that they can count all hate crimes and those rooted in discrimination which are reported because this is currently not the case and the result is that we do not have true and reliable figures in Spain. Unless we know the real size and scope of the problem, the public authorities will be unable to design an effective and minimally serious criminal policy.
- e) The huge issue which we face in our daily work and which constitutes a major challenge is that of knowing the number of crimes committed which victims fail to report for any number of reasons. Public awareness-raising **and incentive campaigns are essential** if we are to get victims to report crimes, as are sociological studies through which we can gain insight into that **“unknown number”** of crimes committed but never reported..
- f) Compulsory **training in equality, hate crimes and other crimes rooted in discrimination** must be included in all curricula of law enforcement officials, the General Council of the Judiciary, the Office of the Prosecutor General and of Civil Servants at Penitentiary Institutions, both as part of basic and ongoing training.
- g) Strict measures should also be taken with **private security companies** as concerns the minimum level of training in equality, hate crimes and crimes rooted in discrimination, especially as an entry requirement.

3. Gender equality

Introduction to gender equality

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The term “sex” is typically used to refer to social inequalities and unwarranted differential treatment of men and women. However, just a little over a decade ago it became commonplace to see the term “gender” used in equality studies. It is interesting to take a look at exactly what gender equality actually is and to trace the origin and meaning of the term⁶.

In the 1970s the term gender came into vogue. Once equality between men and women was acknowledged in legal systems throughout the western world, the real concern was on the reality of the situation and the social constructs passed down over the centuries under the figure of the patriarch or male dominance. A need arose to explain that inequalities between men and women were deeper, more complex and difficult to eliminate than the mere distinction between sexes and this called for a new approach using different terms and led to the appearance of the expression “gender” along with others such as “gender equality”, “gender perspective”, “transversality” and “gender mainstreaming”. All of these imply strategies designed to systematically integrate the gender dimension when developing policies and at all stages of their implementation to contribute to increasing equality between men and women and to break with the traditional roles assigned to the feminine and masculine genders and establish an equal assessment of each in law and in fact.

⁶ In light of its daring and concise nature an example could be, STÖLLER, R. *Sex and Gender*, New York, Science House, 1968; RUBIN G., “The Traffic in Women: Notes and the Political Economy of sex”, *Toward an Anthropology of women*, Rayna Reiter ed., New York. Monthly Review Press, 1975, pp. 157 – 210. The version in Spanish is from 1986 and is entitled, “El tráfico de mujeres: notas sobre la economía política del sexo”, *Nueva Antropología*, Revista de Ciencias Sociales, Vol. VIII, núm. 30, México, 1986; LAMAS, M., “La antropología feminista y la categoría de género”, *Nueva Antropología. Revista de Ciencias Sociales*, Vol. VIII, núm. 30, México, 1986; SCOTT, J. W., “El género: una categoría útil para el análisis histórico”, Amelang/Nash (comp.) *Historia y género: las mujeres en la Europa moderna y contemporánea*, Alfons, El Magnanim, Valencia, 1990; FRAISSE, G., *La Différence des sexes*, Puf, Paris, 1996.

Hence, as from the Fourth UN World Conference on Women held in Beijing in 1995, special importance was placed on the concept of “transversality” which implies that governments adopt a global and standardised vision of the different areas of interest from the point of view of gender at all levels. This shift of focus from the exclusive mention of women to the concept of gender was one of the most important achievements of the Fourth Conference at Beijing where an effort was made to make sense of this issue by bringing about the necessary structural changes in society and in relations between men and women in all spheres. This would mean that reaffirming the rights of women on an equal footing with the rights of men would be of general interest and benefit for the inclusion of both genders⁷.

The expression “gender” is, first and foremost, a concept or notion of great importance which was destined to bring about a change in the very aims of the struggle for equality between men and women. The idea was no longer to seek simple formal and legal equality applicable to situations, acts or rights between men and women. Nor was it a matter of simply compensating for past discrimination by granting exclusive rights to women. The idea was to seek out the social factor responsible for persisting inequality but not so much on the basis of sex, i.e. woman or man, but rather on the basis of gender: feminine or masculine. In this connection, it is not enough to declare and recognise equal treatment if real equal opportunity does not exist.

⁷ Although the term “gender” was already being used ten years before the Third United Nations World Conference on Women held in Nairobi in 1985. In any case, the concept actually dates back several centuries. FRANÇOIS POUILLAIN DE LA BARRE stated in 1673 that the subordination of women was not rooted in nature but rather in society and that the difference is not a basis for inequality. POUILLAIN DE LA BARRE, F., *De l'égalité des sexes*, Paris, 1673. And in 1792 MARY WOLLSTONECRAFT declared that the subjugation of women was not the result of a nature inferior to that of men but rather of prejudices and traditions dating back to the dawn of time. WOLLSTONECRAFT, M., *Vindicación de los derechos de la mujer*, Debate, Madrid, 1977.



Hence, the term “sex” refers to the set of organic or biological characteristics which distinguish males from females among all species and are universal. In contrast, the term “gender” refers to the social differences between men and women which have been learned and passed down from generation to generation which change over time and which exhibit many intra- and inter-cultural variations based on the playing of certain stereotyped roles. In this connection, stereotypes can be understood as the idea or the set of practices or the distribution of tasks and duties defined by society which predetermine the behaviours and attitudes expected of men and women⁸.

Therefore, the sex difference between a man and a woman is biological and permanent, this is self evident and, in any case, in principle should not have any negative effect on relations between the two. In this sense the Universe is dual, formed by men and women whose sexual differentiation is perfectly understandable and does not imply the superiority of one sex over the other. In this connection, the concept of gender equality also includes the right of all human beings to be different without having to endure unjustified unequal treatment at all levels and in all spheres⁹. Therefore, this biological difference has no direct relation with social inequality and discrimination

⁸ Concepts extracted from the Journal *Femenino Plural*, Instituto Aragonés de la Mujer, Issue No 55 – December 2003, p. 3. Also in “Guía para la evaluación del impacto en función del género”, *Aequalitas*, Issue No. 15, July-December, 2004, p. 19.

⁹ In this context the idea of the “mixed Universe” and the “right to be different” is defended so that to say “men and women are equal does not mean that they are identical: the principle of equality does not exclude recognition of differences”. That is the view of AGACINSKI, S., *Parity of the Sexes*, ob. cit., p. 15 and 141. Also, FRAISSE G., “Le genre”, *Vocabulaire Européen des Philosophies*, (red. CASSIN, B.), Editions du Seuil, Paris, 2002. This work can be found translated into Spanish by Isabel Carvajal at http://www.europarl.eu.int/transl_es/plataforma/pagina/celter/art2fraissee.htm (consulted in June 2004). And RUBIO CASTRO, A., “El feminismo de la diferencia: los argumentos de una igualdad compleja”, *Revista de Estudios Políticos* (Nueva Época), Issue No 70, October-December, 1990, pp. 193 et. seq. The author uses the term *complex equality* to refer to a new social contract based on the idea of underscoring the difference and a new citizenship. Also, FERNÁNDEZ RUIZ-GÁLVEZ, E., *Igualdad y derechos humanos*, ob. cit., p. 20 et. seq and 147 et. seq.; FERRAJOLI, L., *Derechos y Garantías. La ley del más débil*, ob. cit., p. 73 – 76 and YOUNG, I. M., *La justicia y la política de la diferencia*, Colección Feminismos, Issue No. 59, Ediciones Cátedra, Madrid, 2000, pp. 283 – 290. The author is right on the mark in stating that we must do away with the exclusionary connotation of difference and focus on its positive aspects with regard to the wealth obtained from the diversity of values.

against women. Maybe, the anatomical differences between men and women were used as the perfect excuse to initiate a complex, negative and real social difference.

It is, precisely, the concept of gender which allows us to understand that many of the differences between men and women which are considered to be “natural” and related to sexual or biological differences, are really nothing more than social constructs and therefore have nothing to do with sex but rather with the assignment of roles on the basis of a patriarchal structure which drew a clear dividing line between the public and private spheres¹⁰. Having regard to this assignment, the private sphere was reserved for women thus entailing a series of family responsibilities.

The fact is that it is very difficult to find a case where social discrimination is the result of sex differences. Even discrimination against pregnant women which is clearly rooted in a biological difference (insofar as women are the only human beings able to perform that function), has a strong and overriding social component based on structures which lack shared family responsibilities or, better yet, assumed completely and individually by both the mother and the father. Discrimination does not arise by reason of the biological pregnancy but rather as a consequence of the social concept which places the responsibility on the pregnant woman (and not on the father) both before and after giving birth. In the light of these assigned responsibilities, traditional circumstances associated with the mother arise such as maternity leave and, as a result, absence from work or reduced working hours, to name but a few. In my opinion, this is gender discrimination or, to state it in another way, it is a lack of gender perspective reflected in a lack of suitable solid public policy and educational structures to make gender equality a reality, which is really what is meant by equality between men and women.

¹⁰ In general, STÖLLER, R., *Sex and Gender*, ob. cit. Also, V.V.A.A., *Feminismo y Filosofía*, ob. cit., p. 255 et. seq. Here, sex is identified with nature and gender with culture. RUBIO CASTRO, A., “El feminismo de la diferencia: los argumentos de una igualdad compleja”, cit., pp. 186 – 187. The author claims that in accordance with the assignment of roles, society has set up a sort of caste system of “first class and second class citizens” and calls for a universal and neutral model for use by all people which, in reality, responds to a model of masculine social order.

In these cases, discrimination is rooted in sex but the reason that it manifests itself lies in gender or the social difference between the feminine and masculine genders. The struggle for equality requires the participation of both genders because gender equality is not a concept associated with women. In the framework of equality, gender is an issue which affects men and women alike. For instance, gender is the reason that more than half of the human race, i.e. women, are shunned when it comes to taking political decisions. However, refusing day-care services to men because they have a wife at home or because they do not belong to the preferred group (women), is also a gender issue because this tends to perpetuate the stereotype which has been passed down throughout history whereby women have been and still are the ones who have taken on family responsibilities and raised the children thus limiting them once again exclusively to the private sphere. Social inequality is apparent in both cases as is the perpetuation of stereotypes and the assignment of socially constructed roles¹¹.

Hence, an examination and assessment is needed to try to identify the sociocultural factors which put women in a situation of permanent disadvantage vis-à-vis men in many different spheres, especially in public life, with a view to correcting or eliminating obstacles if necessary through affirmative action measures. Note be taken, however, that these obstacles are often hidden and continue to expose women to an under-estimation of their skills and capacities.¹² All of this means observing the world from the perspective of gender. Only through this transversal vision of equality can this dual Universe be achieved, not only from the point of view of sex but especially from the perspective of gender making a concerted effort for the full inclusion of men and women on an equal footing in all

spheres and at all levels of public and private life. This is what so-called gender equality really is¹³.

In conclusion, if one looks beneath the surface of the sex motive, one always finds the motive of gender but, in my view, not the other way around. Therefore, at the end of the day, all discrimination for reason of sex is really related to gender but not all gender-based discrimination is rooted in one's sex. Thus, the concept of gender includes sex but the concept of sex does not cover that of gender because the notion of sex (biological) cannot provide a response to the complex reality surrounding the problem of discrimination against women perpetuating the subordination of a group of people (in this case, women) vis-à-vis others who benefit from that relationship (in this case, men)¹⁴ and this concept does not respond to the paradigm of equality.

Therefore, the word "gender" can be considered accurate because it constitutes a concept representing a symbolic construct alluding to the set of sociocultural attributes assigned to a person based on the sex to which s/he belongs converting sexual difference into social inequality.

Limiting oneself to a single legal concept of equal treatment in the absence of real equality between men and women is tantamount to ignoring the weight and importance of the concept of gender and, as a result, the perspective of gender. If we are to close the circle of effective equality between men and women we must conduct an in-depth study of the social structure which prevents real and effective equality. Both genders must receive the impact and benefits of applying gender equality if the objective pursued is truly factual equality and the inclusion of men and women in all aspects of public and private life.

¹¹ Also other topics such as prostitution, violence, part-time contracts, lower pay for the same work, harassment, business administration and political leadership are issues which women have suffered and continue to suffer because of their gender - and not their sex - according to what BARRERÉ UNZUETA calls "social subordination" and the "hierarchy of social status." BARRERÉ UNZUETA, M. A., "Problemas del Derecho Antidiscriminatorio: subordinación versus discriminación y acción positiva versus igualdad de oportunidades", cit., pp. 152 – 153.

¹² In a general sense, "Affirmative action" refers to any practice whose aim is to eliminate de facto inequalities between men and women.

¹³ On gender equality see *Gender Mainstreaming. Marco conceptual, metodología y presentación de buenas prácticas*, Women's Institute (Ministry of Labour and Social Affairs), Serie Documentos, No. 28, Madrid, 2001, p. 11.

¹⁴ As a reference see the concept of subordination used by BARRERÉ UNZUETA, M. A., "Problemas del Derecho Antidiscriminatorio: subordinación versus discriminación y acción positiva versus igualdad de oportunidades", cit., p. 152 – 153.



Gender Equality and the Roma community

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1. Equality between women and men is one of the most relevant transformations of our time. Overall, there is no denying the progress made in this field but we also know that there is resistance and difficulty and grey areas especially within the sphere of education, employment, decision-taking, the media and violence. However, regarding women, less is known about the situation of Roma women. The first point is that we have very few data or analyses about the current situation facing Roma women in Spain. This is an area which has yet to be the focus of attention. It goes without saying that this reality should be the first step of any specific future public policy.
2. An additional problem arising with regard to the gender equality issue within the Roma community is the risk of using this objective, even if not intentional, to reinforce the negative stereotypes affecting the entire Roma community. Indeed, it would not be advisable to raise the gender equality issue within a context which would lend further credence to the idea of Roma men as being “deeply sexist” and Roma women as “especially weak and victimised.” Stressing the sexism of men and the victimisation of women would only reinforce rather than weaken the deeply-rooted prejudices against the Roma community. And it would have another perverse consequence: the Roma community itself, which should clearly lead any change process, would not look kindly on an outside imposition of a new model for co-existence which pits women against men within the family unit. This is totally alien to the Roma culture. Therefore, the struggle for gender equality within the Roma community must come, first and foremost, from Roma women but also from Roma men. Here there is some very important awareness-raising work to be done which is vital if change is to be achieved.
3. Gender Equality within the Roma community can and should be approached from two different perspectives: gender equality “of” the

Roma community and gender equality “in” the Roma community.

– **Gender Equality “of” the Roma community.**

Here it is worth looking at the relationship of the Roma community, especially of Roma women, with feminist movements and general institutions, plans and policies to fight against gender discrimination. The first conclusion appears to be self-evident: that relationship has been practically non-existent. The feminist movement does not exist within the Spanish Roma community (although it goes without saying that many Roma women are becoming increasingly aware of their new role as an equal partner alongside Roma men); nor have the concerns and interests of Roma women been traditionally taken seriously in public planning (often Roma women have been pigeon-holed discriminately and indiscriminately in the category of “women in risk of social exclusion” alongside immigrant women, prison inmates or prostitutes); and the concept of multi-discrimination which is so appropriate for ethnic minority women, Roma women being no exception, has barely made its way into public policy and regulations. This has got to change: bridges must be built between the feminist movement, i.e. institutional feminism in our country, and Roma women. I feel that higher education, the media and politics are particularly important areas. There are scarcely any Roma women in politics nor have there been in the past. This represents a significant democratic deficit.

– **Gender equality “in” the Roma community.**

Here we focus on the question of gender equality within the Roma community itself. Roma women are an invisible group which is particularly discriminated against within the Roma community (the latter, in turn, also being the object of discrimination). They are a minority within a minority. They are a group which suffers multiple or inter-sectoral discrimination. I referred earlier to

the danger of addressing this problem from a racist standpoint which would demonise Roma men (and also underestimate Roma women, considering them as people incapable of taking their own decisions, permanent victims, a sort of perpetual adolescent). However, it is equally true that the Roma community, just as the majority population, needs to do its homework with re-

gard to the fight against discrimination and this means all types of discrimination within the community. This would also prevent any sort of paternalistic policy and would reinforce the legitimacy of measures, even the most forceful, in favour of ethnic equality. We must all fight discrimination and that includes the Roma community.