



REPORT ON

SPAIN

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26 March 2010

human european consultancy in partnership with
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London Metropolitan University (CWASU, Child and Woman Abuse Studies Unit) and
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1. Overview of legal system and overall approach to interpersonal violence

1.1 Is there an overall approach to these forms of violence, have the legal measures with respect to VAW, VAC and SIV developed independently, in parallel or separate trajectories? Provide a brief historical context, and key actors in legal reforms and current responses, including the role of the state, state agencies and NGOs, historic and current relationships.

1. These three types of violence have been regulated progressively. Initially only in the Criminal Code and later on complementary acts were adopted for the protection of minors, against gender-based violence, etc. First of all, acts were adopted on the protection of children, including several measures until the prohibition of all kinds of corporal punishment by the last reform of the Civil Code in 2007. The regulation concerning violence against women has been extensively developed over the last years, among others through the regulation of the protection order (2003) and the Organic Act on Comprehensive Protection Measures against Gender-Based Violence (2004). Identity-based violence has been dealt with recently on the basis of case law.

These developments will be explained in detail further on. Besides, it should be considered too the impact of the Organic Act 3/2007, 22 March, on the Effective Equality of Women and Men on the development of the anti-violence legislation. All this legislation has enjoyed a wide political and social support and was demanded by social groups and women associations (European Women's Lobby, Federation of Progress Women, European Citizens Network) and NGOs dedicated to the defence of the human rights (Spanish Section of Amnesty International, the Women Institutes (at national level and those in the Autonomous Communities)) also supported and intervened within the enactment of these acts. Currently, the Spanish Presidency of the EU induces the enactment of a European order regarding the protection of the victims of gender violence.

Are approaches to law based on crime/human rights/protection of the family/gender equality – is interpersonal violence recognised and responded to through any or all of these lenses?

2. There is no exclusive conceptual basis for approaching the various forms of violence. For example, in the case of rape the protected legal interest is sexual freedom; in the case of gender-based violence protection is founded on the equality of women and men; the protection of children is founded on the overriding interest of the minor, which is prevalent over any other right or legal interest.

During the remainder of this study a detailed explanation will be given of the specific approach used regarding each specific kind of violence.

To what extent do approaches refer to, and seek to be in compliance with international norms?



3. In Spain, international treaties have binding legal value due to an express constitutional provision. Art. 96 of the Spanish Constitution establish that validly concluded international treaties are incorporated into the Spanish legal order with the force of law. It also provides that the interpretation of any rule related to fundamental rights shall be done in accordance with the Universal Declaration of Human Rights and the international treaties on these matters ratified by Spain (art. 10). In this way, the legislator, the administration and judges are bound as well by the relevant rules of international treaties. As we will see further on, many of the legal provisions examined in this study are derived from international rules.

2. Legal Measures on violence against women

2.1 Domestic/ intimate partner violence

FSJ: The Council of Europe Ad Hoc Committee on Combating Violence Against Women and Domestic Violence (CAHVIO) defines intimate partner abuse as:

Physical, sexual and psychological violence or threats of such acts, including rape and marital rape:

- perpetrated by regular or occasional partners or ex-partners, spouses or ex-spouses, cohabitant or non-cohabitant, same-sex or different-sex partners.
- perpetrated against regular or occasional partners or ex-partners, spouses or ex-spouses, cohabitant or non-cohabitant current or former partners, same-sex or different-sex partners.

2.1.1 Is this the definition used in national law and policy? If not how does the national definition differ? Is violence between same sex partners covered?

4. Article 1.1 of Organic Act 1/2004 (LO 1/2004) of December 28, 2004, states that the aim of this act is "to take action against violence against women which, as a manifestation of discrimination, inequality and the power that men exercise over women, is perpetrated against them by their present or former husbands or by anyone else with whom they maintain or maintained similar emotional ties, even without living together." According to art. 3, the concept of gender-based violence comprises "all forms of physical, psychological or sexual abuse, including threats, coercion or unlawful detention." Consequently, we may say that the definition used in national law and ensuing policies does not differ from the one used by CAHVIO, with the exception of violence between same-sex partners. This subject is not covered by LO 2004/1, nor is it specifically covered by any other law. The concept of the notion "with whom they maintain similar emotional ties, even without living together" covers civil partnership as well as partners, i.e. those persons with whom one has or had an emotional relationship during a certain period of time although not having lived together. However, we cannot say that this definition includes also occasional partners, i.e. partners with whom one has not had an emotional relationship of a certain durability.



2.1.2. Do the legal frameworks or policies recognize the connection between IPV and gender inequality? If so, how is this done?

5. Yes, art. 1 of LO 1/2004 specifically acknowledges that the aim of this act is "...to take action against violence against women which, as a manifestation of discrimination, inequality and the power that men exercise over women, is perpetrated against them ...". Both in the preamble and in the body of the act, this aspect is dealt with extensively. In this way, the act expresses the conviction that inequality between men and women must be acted against and that real and effective equality between men and women should be promoted. The act also links this obligation to campaigns promoting awareness in the field of education and through the media¹. Therefore, the act does indeed link IPV and gender inequality directly. Within this legal framework, raising awareness regarding gender inequality will no doubt be taken into account in defining any policies in this field (programmes, prevention schemes, publicity campaigns, etc.).

2.1.3. Is IPV dealt with primarily through criminal law, civil law or family law, or some combination of these? How does the use of the different domains of law in cases of IPV play out in practice? Address the issue of specific/generic law as set out in paragraph 49.

6. Rules regarding IPV are laid down in criminal law, civil law and family law. Organic Act 1/2004 introduces the "Court for Violence Against Women"², a specialised court within the criminal justice system, composed of examining magistrates. These courts conduct the inquest into cases of violence against women and, if applicable, pass sentence in criminal proceedings regarding violence against women as well as in related civil lawsuits. Cases are heard by the Court for Violence Against Women if they involve murder, abortion, bodily assault, harm to an unborn child, unlawful detention, offences against moral integrity, against freedom and sexual indemnity, or any other offence committed with violence or intimidation, or constituting an offence against the rights and duties of the family, where the victim is or was either the wife of the offender, or linked to the offender by a similar relationship. The same applies when the victims include the offender's own descendants, minors or incapable persons. The competence of the Courts for Violence Against Women extends to criminal law, civil law and family law.
7. Furthermore, within the Office of the Public Prosecutor there are now special prosecutors for cases of violence against women. These prosecutors appear in criminal proceedings regarding facts constituting a criminal offence that falls within the competence of the Courts for Violence Against Women. These special prosecutors also appear in civil procedures regarding annulment of marriages, separation or divorce or regarding the guardianship of under-age children, whenever wife battering or cruelty to children is alleged.
8. The preamble of LO 1/2004 makes it clear that the act complies with the recommendations of international bodies by defining a comprehensive approach to tackling violence against women. In

¹ To this effect, it modifies Organic Act 10/2002 of December 23, 2002, on the quality of education, adding a paragraph d to article 34.2 which stipulates the obligation "to promote real and effective equality between men and women and to critically evaluate inequality between the sexes." It also modifies Act 34/1988 of November 11, 1988, the General Act on Publicity, by adding a provision in art. 25.1 bis which makes it illegal to portray women in a derogative or discriminatory way in any kind of publicity.

² The act adds art. 87 bis to Organic Act 6/1985 of July 1, the Judiciary Act.



practical terms, this means that different aspects of such cases are being dealt with comprehensively by the Courts for Violence Against Women, which hear both the criminal and related civil cases brought before them.

2.1.4. Explore the issue of protection orders – are they available, who can apply, what protections are available, and what are the sanctions if such an order is broken? Are protection orders provided free of charge? In particular, please explain how far the wishes or decisions of the victim can influence the imposition or enforcement of protection measures.

9. Act 27/2003 of 31 July 2003, which regulates the protection order for victims of domestic violence³, enables the victims to obtain a protection order by means of a swift and simple judicial procedure. The court is able to provide the victim with complete protection in the form of a well-balanced mix of precautionary measures under civil and criminal law. The judicial protection order also implies that government bodies at the national, regional and local level immediately apply the social protection measures at their disposal within their respective legal systems.
10. This act also establishes a monitoring committee⁴ which sees to the implementation of the protection order. The committee consists of representatives of the General Council of the Judiciary, the National Public Prosecutor's Office, the legal professionals working in the Ministries of Justice, of the Interior and of Labour and Social Affairs. The autonomous regions and local administrations are also represented. The purpose of the Committee is to elaborate generally applicable protocols for the implementation of the protection order and the introduction of adequate coordination instruments in order to ensure the effectiveness of the protective and security measures taken by judges, courts and government bodies. The Committee has drawn up the Protocol for the implementation of the protection order for victims of domestic violence⁵, which establishes the characteristics of the request for a protection order: the procedure must be quick, comprehensive and simple.
11. A request for a protection order is made by means of a simple standard form that should be readily available to the public. For this reason the forms are provided by civil and criminal courts, the offices of the Public Prosecutor, branches of the Victim Support organization, municipal service centres, legal advice centres, police stations, social services or other public bodies providing services to the public. Moreover, these forms can also be downloaded via Internet from the web sites of all institutions and organizations concerned. The forms are also available in the principal languages spoken by foreign residents in Spain.
12. A protection order may be requested by the victim, by family members or by others who maintain emotional ties with the victim. Notwithstanding their general duty to report criminal facts, any private or public body or organization providing social services that comes across facts that may warrant a protection order, must report those facts immediately to an examining magistrate on duty at a Police

³ *Official State Gazette* 1, August 2003.

⁴ Additional provision no. 2 to Act 27/2003, dated July 31, 2003, which regulates the protection order for victims of domestic violence.

⁵ The Protocol explicitly refers to and is based on the guidelines established in Recommendation no. (2002)5 of the Committee of Ministers of the Council of Europe, dated April 30, 2002, on the protection of women against violence.



Court or a public prosecutor in order to start up the procedure to issue a protection order. The request may be submitted at any police station of the local, regional or national police forces, at a court house or public prosecutor's office, at branches of the Victim Support organization, social services or other government bodies providing services to the public or at legal advice centres. The procedure to issue a protection order may also be initiated by a Police Court or by the public prosecutor.

13. Once the request has been made, it is sent on to the Police Court, which can then order the Judicial Police to take the necessary steps to pave the way for a protection order. The Courts for Violence Against Women decide on protection orders for the victims, without prejudice to the authority of the Police Courts. Furthermore, when a judge hears a civil case in first instance and learns that a protection order has been requested, he must interrupt the procedure and forward the file as is to the competent Court for Violence Against Women.
14. Depending on the seriousness of the facts and the need for complete protection of the victim, the court may take one or more precautionary measures the law provides for (e.g. preventive custody, restraining order, no-contact order, injunction to enter and remain in the common residence, requisition of arms, etc.) Measures that may be imposed by civil law must either be requested by the victim or her legal representative or by the public prosecutor when the couple have under-age or incompetent children. Possible measures include awarding the use and occupancy of the family home, determining guardianship, parental visits and contact with the children, maintenance orders and any measure that is deemed useful to keep minors out of harm's way. These measures are provisional and must be ratified, adjusted or revoked by a judge within 30 days.
15. The parties are notified of the protection order and the judge will immediately inform both the victim and the competent government bodies by sending them the full text of the proceedings. The latter may then take protective measures, which may range from security measures to social services, legal aid, medical treatment or psychological support, or any other help. For these purposes, rules are in place to set up an integrated system of administrative coordination which ensures communication runs smoothly. The protection order also implies the obligation to maintain the victim informed of the legal situation of the accused and of the extent and validity of the precautionary measures that have been taken. In particular, the victim must be kept informed at all times about the detention status of the aggressor. For this reason, the Prison Service is notified of the protection order. The protection order must be entered into the Central Register for the Protection of Victims of Domestic Violence.
16. It should also be noted that a system of electronic surveillance of aggressors is being implemented by means of so-called (satellite controlled) "home links" in order to prevent them from getting close to victims of gender violence. This new method has only been used for a short period; no general evaluations of its use have been made as yet.
17. If it becomes clear that a protection order is violated, the police must report this forthwith to the judge or court that has issued the order in order to decide what action is to be taken against the offender and inform the public prosecutor about this. If the offender is detained for violating the restraining order or protection order, standard procedure for summary proceedings will be followed (preliminary investigation and placing the detainee at the disposal of the court). The detention will be registered into the PERPOL database (national police database containing alerts) as an offence known as "disobedience or disregard of the terms of a conviction or precautionary measure". This



does not imply in any way that the judicial order has been cancelled or expired: this can be decided only by the court that has issued the order.

18. If, once the offender is detained and put at the disposal of the courts, the judge or court involved should decide to issue a new restraining order or any other order including new restrictions on approaching or seeking contact with the protected person or persons, or if protection is extended to other people or places that were not included in the first order, either the existing order will be amended or the new order will be registered in the PERPOL database. A special statistical module will be used to collect information and to monitor and control data related to requests for protection orders, the issuing of restraining and protection orders, detention on the grounds of violating such an order, etcetera. It is worth noting that breaching a protection order is recognized as an aggravating factor in the Criminal Code⁶. Protection orders are free of charge.
19. In principle, the victim has no direct influence on the imposition or reinforcement of protective measures granted by a judge. However, the victim will be heard during the proceedings and their testimony will be taken into account.

2.1.5. Summarise and explain any barriers to the prosecution of IPV, any tensions between criminal and civil law, how the position of children living with IPV is dealt with.

20. Since the introduction of the Courts for Violence Against Women by Organic Act LO 1/2004, there are no explicit tensions between criminal and civil law, because these courts deal with both aspects.
21. As far as criminal law regarding minors is concerned, these courts hear cases concerning violent crimes committed against the perpetrator's own descendants or against the offspring of his wife or concubine. This also holds true when gender-based crimes were committed against minors or incapable persons the perpetrator used to live with or whom his wife or concubine has legal authority over as a legal or de facto guardian or as a foster parent. In the area of civil law, whenever gender-based violence has occurred, the Courts for Violence Against Women hear cases concerning the determination of parentage, maternity or paternity or regarding the relationship between parents and their children. Similarly, they also hear cases intended to take or modify measures that matter to the family as a whole. These may exclusively concern the guardianship of the under-age children or maintenance claims made by one of the parents against the other on behalf of under-age sons or daughters. Along the same lines, the courts decide if consent is required in case of adoption, and they hear cases of appeal against administrative decisions regarding the protection of minors⁷.
22. Amongst the possible judicial instruments laid down in LO 1/2004 that are designed to protect and ensure the safety of the victims, some are of special interest to minors, such as the possibility to suspend the parental rights or the custody of minors of someone who is charged with gender-based violence, or suspend his visiting rights⁸. LO 1/2004 distinguishes between acts committed against the wife or partner with whom the offender lives together and acts committed against own descendents or those of the wife or partner or against minors or incapacitated persons who live

⁶ Art. 153 of the Criminal Code.

⁷ Art. 44 of LO 1/2004 adds article 87 ter to LO 6/1985, of July 1, 1985, the Judiciary Act.

⁸ Art. 65 and 66 of LO 1/2004.



together with the offender or are placed under parental authority, custody or guardianship of the spouse or partner of the offender.

23. In the latter case, the judge may suspend the alleged perpetrator of acts of gender violence from exercising parental authority, custody or guardianship with regard to the minor victims and order the suspension of the child visiting rights in the case of persons accused of gender violence (Art. 65 and 66 Organic Act 1/2004). The judge may suspend the alleged perpetrator of acts of gender violence against his/her spouse from exercising parental authority, custody or guardianship with regard to the minors. In this case the interests of the minor will be taken into account and the judge will decide on a case-by-case basis. There is no legal provision establishing in which particular cases the parental rights of the offender shall be suspended, so that the judge should weight the interests concerned. Furthermore, it should be noted that these suspensions are provided for in the Chapter regarding Judicial measures of victim protection and security and are thus aimed at the protection of the minor.
24. With regard to minors, LO 1/2004 modifies the Criminal Code⁹ and establishes that when the judge or court deems it is in the best interest of the minor or incompetent person, the accused may be declared unfit to exercise parental rights or the physical or legal custody, or act as a guardian or foster parent. If the violence was perpetrated in the presence of minors, this is considered an aggravating circumstance.
25. Moreover, minors are entitled to complete social security benefits¹⁰. In cases where gender-based violence is alleged and a child maintenance order has been issued but no payments are made, the government guarantees payment of the allowance out of the social benefits guarantee fund¹¹.

2.1.6. Have any recent measures been evaluated? What were the main findings?

25. On the basis of Organic Act 1/2004 of December 28, on comprehensive protection measures against gender-based violence¹², a National Observatory on Violence Against Women¹³ has been set up. Its main goal is to give advice, carry out evaluations, promote institutional co-operation, write reports, undertake studies and draft proposals regarding gender-based violence. The Observatory submits an annual report to the central government and to the autonomous communities describing relevant developments concerning violence against women. The report describes the criminal sanctions that have been applied and evaluates the effectiveness of measures that were taken to protect the victims. The report will also go into the need for legal reform. The following bodies participate in the Observatory: the autonomous communities, local administrations, social partners, consumer organizations, nation-wide women's organizations and the main employers' organizations and trade unions.

⁹ Arts. 153, 171 and 172 of the Criminal Code.

¹⁰ Art. 19 of LO 1/2004.

¹¹ Additional Provision No. 19 of LO 1/2004.

¹² Art. 30 LO 1/2004, of December 28, on Comprehensive Protection Measures against Gender-based Violence.

¹³

http://www.migualdad.es/ss/Satellite?c=Page&cid=1193047246325&language=cas_ES&pagename=MinisterioIlgualdad%2FPage%2FMIGU_Subhome



26. Act LO 1/2004 also provides for a Committee against gender-based violence within the Interregional Council of the National Health Service, which is composed of representatives of all the autonomous communities that are competent in this field. The Committee publishes an annual report that is presented to the National Observatory on Violence Against Women and to the Plenary Assembly of the Interregional Council.
27. The measures introduced by act LO 1/2004 have been evaluated on a yearly basis¹⁴ and, after the act had been applied for three years, an executive report on this three-year period was published on November 17, 2009¹⁵. In the latter, it is observed that three years is too short to assess the impact of the act because of the complexity of the problem it aims to tackle, the cultural and other structural roots of the problem, as well as the comprehensive nature of the act. The complex administrative structure entailed by a comprehensive system of assistance and protection is another factor, as are the obstacles and resistance generated by the structural changes that have been introduced by the new act.
28. Nevertheless, the report indicates that the work already undertaken to ensure the application of LO 1/2004 has been intense. In 63 sessions of the Council of Ministers, implementation measures have been agreed upon to accompany this act. Several of those measures further develop the regulatory framework, such as the "Agreement on the introduction of urgent measures in the fight against gender-based violence" of December 15, 2006; the "Agreement on the introduction of additional measures in the fight against gender-based violence" of March 2, 2007 and the "Agreement on actions to implement the proposals concerning gender-based violence unanimously approved by the Congress of Deputies", dated June 22, 2007. Likewise, more than 20 general conferences and sectorial meetings have been dedicated exclusively to this topic. It is also worth noting that the implementation of the act has had a considerable impact on other rules and regulations. Gender-based violence has been included in three organic acts, thirteen ordinary acts and forty-four instances of subordinate legislation. The act has entailed an unprecedented institutional effort in taking measures and actions, and has had a considerable budgetary impact: since the introduction of the act, the Spanish government has spent almost 800 million Euros on different measures to prevent and push back gender-based violence. Important progress has been made, amongst other things by setting up information campaigns to raise awareness in different areas included in the National Prevention and Awareness Plan, and by setting up a help line providing legal advice and information ("call 016"). Special bodies have been established, such as an office of the public guardian, specialised courts and public prosecutors, specialised security forces, healthcare and forensic professionals specialised in cases of violence, all of them adequately trained.
29. Furthermore, an Advisory Committee on the Image of Women in Publicity and the Media has been established, as well as an Observatory on the Image of Women and specific working groups within the Observatory on Gender-based Violence of the Ministry of Health and Consumer Affairs.
30. The main problems that have been identified are: a lack of specially trained auxiliary staff at the competent courts (due to the fact that it is basically the same staff that handles cases in different areas), the complexity of a judicial reorganization that has to be dealt with, the limited number of

¹⁴ I Annual report of the National Observatory on Violence against Women. June 2007 (English version);

II Annual report of the National Observatory on Violence against Women. Executive report (English version).

¹⁵ Executive report on the Evaluation of the application of Organic Act 1/2004, three years after its introduction, of November 17, 2009.



foreign women reporting abuse (although there is an upward trend) and the –still– limited social conscience among some segments of the population.

2.1.7. What are the current debates about legal and procedural measures, include the key criticisms and limitations of current responses.

31. At the moment, most debates are about the complex implementation of the measures introduced by LO 1/2004 (shortage of staff in the judiciary, insufficient training, etc.). For this reason training programmes continue to be offered in all fields and at every level (national, regional and local) and more Courts for Violence against Women are established. In addition, it is worth mentioning that the Royal Decree 432/2008 of April 12, which arranges the restructuring of ministries, stipulates in article 18 that it is the responsibility of the Ministry of Equality to propose and implement government policies regarding equality, the fight against all forms of discrimination and gender-based violence. This new Ministry joins all the measures taken to carry out LO 1/2004.
32. LO 1/2004 was challenged on the grounds of unconstitutionality before the Constitutional Court. In its ruling no. 59/2008 of May 14, 2008, the court ruled that article 153.1 of the Criminal Code is in conformity with the Constitution when it stipulates an aggravated punishment in case violence is used by a man against a woman. According to the court, the different treatment ensuing from this rule is not discriminatory and meets all the requirements because it does not provide for anyone to be punished more severely solely based on his gender and regardless of the circumstances. The article only sets a higher penalty on violent conduct of men if their actions are intended to submit women or to impose their will on them within the context of a relationship between partners. No such circumstances are present when men are assaulted by women.
33. As part of the programme for the Spanish presidency of the EU, the Spanish government has proposed to organize the first summit of EU-ministers against gender-based violence.
34. At the level of the autonomous regions, several regional parliaments have adopted acts introducing comprehensive preventive and protective measures against gender-based violence. The criminal legislation as well as legislation on the organization of the Judicial Power may be enacted only at national level. The Autonomous Communities have competences, amongst others, in the field of education, health, social affairs, employment and social-economic affairs. Some of the Autonomous Communities have specifically adopted within their Autonomous Statutes (legal norm regulating the competences of the Autonomous Community) the shared competence in the field of gender violence (e.g. art. 73.2 of the Autonomous Statute of Andalusia and art. 153 of the Autonomous Statute of Catalonia). In the field of gender violence the Autonomous Communities may adopt legislation within the framework of their territorial competences. Thus, as regards measures of no criminal character the legislative competences are shared by the National Parliament and the parliaments of the Autonomous Communities. Besides, the implementation of the national acts in the field of competence of the Autonomous Community falls under its competences. By these means, the acts of the Autonomous Communities complement the national legislation and establish its development and implementation by means of their own competences (education, health, social affairs, etc.). Some Autonomous Communities have not established any special acts so far and others have done so. This is the case of Andalusia, Catalonia, Galicia, Castile-La Mancha (that adopted an act regarding gender violence before the national one) and the Basque Country. Please see these acts in: Andalusia: Act 13/2007, of 26 of November on integral measures of prevention



and protection against gender violence (BOJA nº 247 of 18 December 2007); Catalonia: Act 5/2008, of 24th April, on the right of women to eradicate sexist violence (DOGC nº 5123 of 2 May 2008) http://www20.gencat.cat/docs/icdonos/01%20Institut/Documents/Arxius/lleiviolenca_ang.pdf; Galicia: Act 11/2007, on protection and integral treatment of gender violence (BOE nº 226 of 20 September 2007); Castile-La Mancha: Act 5/2001, of 17 May on prevention of abuse and protection of abused women (DOCM nº 61 of 22 May 2001). Basque Country: Act 4/2005, of 18 February on equality between women and men (Boletín Oficial 2005042 of 2 March 2005).

35. Many organizations have launched initiatives to improve the application of the act. One such initiative we would like to highlight is to press the government to introduce objective standards that make it possible to evaluate the seriousness of lesions and other consequences suffered by victims of gender-based violence, in line with the injury criteria developed by the World Health Organization¹⁶.

2.2 Rape and sexual violence

FSJ: Rape and sexual violence are usually not specifically defined as legal concepts, however, Council of Europe Recommendation Rec (2002)5 on the protection of women against violence calls on Member States to:

- a. penalize any sexual act committed against non-consenting persons, even if they do not show signs of resistance; and
- b. penalize sexual penetration of any nature whatsoever, or by any means whatsoever, of a non-consenting person.

2.2.1. Summarize the main framework for approaching sexual crime against adults – is there recognition of sexual autonomy/bodily integrity? Is the concept of ‘rape’ retained, are there other equivalent (in terms of sentencing/seriousness) offences and how are they named/defined? Does the legal definition take a force/consent based approach, and how has the definition of rape been extended in recent years. What is the rationale underpinning these changes?

36. Spanish law penalizes offences against sexual freedom and indemnity in Title VIII of the Criminal Code. The legal interest protected from the offences of sexual aggression, rape, sexual abuse and sexual harassment is the freedom of a person to accept sexual relations (sexual freedom). This definition of the lack of consent derives from the case-law established in Spain on this issue. All judgments relating to this offence consider the lack of consent of the victim as an element that is inherent of this type of criminal offence since what is intended in this offence is to bend the will of the victim. In addition, with reference to the prove of the lack of consent, according to the case-law of the Supreme Court, the founded and coherent declaration of the victim is sufficient in order to overcome the presumption of innocence, as stated below.

¹⁶ Women Lawyers Association Themis (in Spanish) <http://www.mepsyd.es/cesces/revista/n11-gonzalo-valganon.pdf>



37. Sexual freedom is to be understood as “a legal object of protection to be included in the sphere of personal freedom, the essential content of which comprises the faculties of sexual self-determination, existing or *“in fieri”*...”¹⁷. The concept of sexual indemnity was introduced by the reform of Organic Act 1/1999.

38. We should distinguish between:

- On the one hand, sexual aggressions: with violence or intimidation (art. 178: sexual aggression, art. 179: rape, and art. 180 with the aggravating circumstances of both offences).
- On the other hand, sexual abuses: offenses against the sexual freedom or indemnity without violence or intimidation, and without consent, art. 181, against adults without consent and in all cases when perpetrated against minors under 13, persons lacking judgment or abusing their mental disorder. Also when taking advantage of a situation of superiority. Art. 182: abuse consisting of bodily access without consent (vaginally, anally or orally) or the introduction into the vagina or anus of body parts or objects. Finally, art. 183, penalizing sexual abuse with deceit regarding a person over 13, yet under 16.

We will now give a brief description of the essential legal elements of these offences.

36. Sexual aggression: Sexual aggression is the basic offence defined by the existence of “violence or intimidation”. The term violence substituted the earlier requirement of “force” as a result of the reform of the Organic Act of 1989. The lack of consent is considered inherent to this requirement and does not appear explicitly in the definition of the offence. Sexual aggression is punishable by one to four years of prison. The penalized conduct is the attempt against the sexual freedom of another person. Anyone can be the active or passive subject of this offence.

37. Rape: The concept of “rape” was reintroduced by the reform of Organic Act 1/1999 to establish the offence of article 179. At present, with regard to this offence both men and women can be the active or passive subject, regardless of the sexual roll they assume in bodily access: vaginally, anally or orally, with violence or intimidation¹⁸. The Second Division of the Supreme Court has ruled that “to perform bodily access or to receive it is considered equivalent”¹⁹. This applies to both homosexual and heterosexual relationships. The reform of Organic Act 15/2003 introduced as a basic element of the offence the introduction of body parts into the vagina or anus. A decisive element to decide whether an act can be considered rape is that “in case of fingers of hands, the simple contact with the female sexual organs is not enough; it should be shown that they have been effectively introduced into the vagina or the rectum”²⁰. Rape is punishable by 6 to 12 years of prison. The Provincial Courts are competent to judge those offences which the Criminal Code penalizes with more than 5 years of prison, as in the case of rape. Rape is a sexual aggression which required the existence of violence and intimidation used to prevail over the will of the victim. Case law defines it as follows: “Transcendent is that it should be made clear that the victim denies to accede to the wishes of the offender, that violence or intimidation was required to prevail over the will of the victim and the violence or intimidation used was effective in the concrete case” (Judgment of Supreme Court 105/2005, of 29 January)²¹.

¹⁷ F.MORALES PRATS/ RAMON GARCÍA ALBERO in G.QUINTERO OLIVARES (Coord.): *Comentarios a la Parte Especial del Derecho Penal*, Ed. Aranzadi, Thomson Reuters, 8th edition, Navarra, 2009, p.286.

¹⁸ F. MORALES PRATS/ R.GARCÍA ALBERO in G. QUINTERO OLIVARES (Coord.) op. cit.: p. 296, 297.

¹⁹ Supreme Court (Criminal Section), 25 May 2005.

²⁰ F. MORALES PRATS/ R.GARCÍA ALBERO in G. QUINTERO (Coord): op. cit. p.299

²¹ Supreme Court Judgment, 24 November 2009.

38. With regard to the nature of “violence or intimidation” case law²² has established that: “Violence has been considered the use of physical force, and thus, as pointed out by Supreme Court Judgement 1546/2002 of 23 September, it is stated that it equals material coercion or imposition, and implies a more or less violent real aggression by either blows, pushes or tears, in other words, effective and sufficient force to prevail over the will of the victim (Supreme Court Judgments of 18 October 1993, 28 April 1998, 21 May 1998 and 1145/1998 of 7 October). While intimidation is of a psychological nature and requires the use of any coercion, threat or terror implying a rational and founded suffering (Supreme Court Judgement 1583/2002, of 3 October). In both cases they have to be appropriate for avoiding that the victim acts in accordance with his right to self-determination, appropriateness which will depend on the circumstances of the case”.
39. Finally, article 180 CC establishes the aggravating circumstances which make that sexual aggression is punished with four to ten years of prison and rape with twelve to fifteen years of prison. The aggravating circumstances are the following:
- When the violence or intimidation are especially degrading or vexing. The degrading or vexing character refers to the violent or intimidatory means used²³.
 - When the offence is committed by the joint action of two or more persons. In this case protection is sought of the increased defencelessness and the intensity of the intimidation of the victim. It is not required that all perpetrators personally commit the sexual acts, it is sufficient that they commit part of them.
 - When the victim is particularly vulnerable, because of his/her age, illness or situation, or in any case, when he/she is under 13. In the latter case the aggravating factor will always be applied. In the other cases it should be assessed whether they have effectively contributed to the defencelessness.
 - Abuse of superiority or parentage to the victim, being ascendant, descendent, brother or sister, natural or by adoption.
 - The use of arms or other equally dangerous means likely to lead to death or injuries. This aggravating factor is applied regardless of the punishment corresponding to the death or injuries caused. If two or more of these circumstances exist, the punishment will be applied in the highest grade.
41. Sexual abuses: Sexual abuse is an offence laid down in article 181, being an attempt against sexual freedom committed without violence or intimidation, but without the consent of the victim. It is punishable by one to three years of prison or a fine of eighteen to twenty-four months. Three cases can be distinguished²⁴:
- Sexual abuse without real consent
 - Sexual abuse without legal consent
 - Sexual abuse taking advantage of a situation of superiority
- In the first case there exists no bodily access. No consent is given, but unlike rape, the offence is committed without violence or intimidation.
42. The Criminal Code considers that sexual abuse is aggravated when it attempts against the sexual freedom of persons under 13, persons lacking judgment or when taking advantage of their mental disorder. In these cases it is considered that legally the consent of the victim cannot exist.
43. This is also the case when the offence is committed taking advantage of a situation of manifest superiority which restricts the freedom of the victim. Even if the offender in this case obtains the consent of the victim, it is considered to be legally flawed.

²² Supreme Court Judgment, 21 April 2009.

²³ F. MORALES, R. GARCÍA: op.cit., p. 300.

²⁴ F. MORALES, R. GARCÍA: op.cit., p. 309.



44. The aggravating circumstances of art. 180 regarding the particular vulnerability of the victim, e.g. because of his/her age, illness or situation, situations of superiority or family relationship to the victim, being ascendant, descendant, brother or sister, natural or by adoption, entail that the punishment will be applied in the highest grade.
45. The aggravated type of sexual abuse is laid down in art. 182, consisting of bodily access without consent (vaginally, anally or orally) or the introduction into the vagina or anus of body parts or objects.
46. Finally, there is sexual abuse with deceit regarding a person over 13, yet under 16. This is punishable by one to two years of prison, or a fine of twelve to sixteen months. If the abuse consists of bodily access (vaginally, anally or orally) or the introduction into the vagina or anus of body parts or objects the punishment is increased (two to six years). The decisive element in this case is that the abuse is committed based on flawed consent due to fraudulent elements which deceive the victim. The case law of the Supreme Court has related the concept of deceit mainly with the false promise of marriage²⁵.
47. In the case of children under 13 the specific rules on the sexual abuse of minors will be applied. The Criminal Code also considers that where the circumstances of particular vulnerability of the victim and superiority/parentage coincide, the punishment will be applied in the highest grade.

2.2.2. Is rape and sexual assault/coercion in marriage criminalized and, if so, is it dealt with in the same way, or differently to, other cases of rape and sexual assault/coercion.

48. Rape of a spouse is also penalized by art. 179; there is no specific article criminalizing this specific case. The case law of the Supreme Court considers that the rape of a spouse is also covered by this article²⁶.
49. Organic Act 1/2004, of 28 December, on Comprehensive Protection Measures against Gender Violence provides in art. 1.3 that gender violence "comprises all acts of physical or psychological violence, including aggressions against sexual freedom". Thus, this act modifies by art. 44 the Organic Act on the Judiciary including in art. 87 Ter the competencies of the Courts for Violence against Women. These Courts will investigate and judge among others offences against sexual freedom and indemnity "provided they have been committed against a person who is or has been their wife, or who has or has had a comparable relationship with the offender, even though they may not have lived together"²⁷. This measure is related to the development of a specialized case law regarding specific criminal or civil acts committed against spouses, ex-spouses or persons in a comparable relationship.
50. According to art. 87 Ter c) of the Organic Act on the Judiciary, the Courts for Violence against Women will also be competent to "adopt the necessary protection orders for the victims, without prejudice to the competences attributed to the Judge on duty".

²⁵ Supreme Court Judgment, 10 December 1983 [RJ 1983, 6514].

²⁶ Supreme Court Judgment of 25 October 2001.

²⁷ Art.87 Ter Organic Act on the Judiciary.



51. In accordance with the reform of the Organic Act on the Judiciary, introducing art. 82.1.4th based on art. 45 of Organic Act on Comprehensive Protection Measures against Gender Violence, the Provincial Courts will hear all appeals in criminal cases handled by the Courts for Violence against Women in their respective province. In order to do so, they must create specialized sections, even where “they are to judge in first instance cases that have been investigated by the Court for Violence against Women in the province”²⁸.

52. In case of sexual aggression or rape against the spouse or person in a comparable relationship, according to case law parentage may still be used as a mixed aggravating circumstance, as established by art. 23 CC²⁹.

Sexual abuse can also be committed against the spouse or the person in a comparable relationship. The Criminal Code does not provide for any distinction or exculpation in these cases.

2.2.3. Are there protective measures available to victims of rape during an investigation/prosecution, including if they give evidence in court. Are there measures such as civil protection orders that can be requested when prosecution is not instituted?

53. One of the first measures to be taken in cases of rape is to protect the victim. Protection measures are also provided for victims of other offences, as established by art. 13 of the Act on Criminal Procedure.

54. To this end, the provisional measures established by art. 544 bis of the Act on Criminal Procedure can be taken, or in case of domestic violence, the protection order established in art. 544 ter, which includes both criminal, civil and social protection measures.

55. This system of protection was introduced by Act 27/2003, of 31 July, regulating the protection order for victims of domestic violence.

56. The provisional measures of art. 544 bis are adopted by a reasoned decision when the Court considers them strictly necessary for the protection of the victims of the offences laid down in art. 57 of the Criminal Code: homicide, abortion, maltreatment, against freedom, torture and against physical integrity, privacy, the right to one's own image and the inviolability of the home, honour, etc. These measures are also applicable to victims of offences against sexual freedom and indemnity.

57. These provisional measures taken while the crime is being investigated may consist of:

- the prohibition to reside in a determined place, neighbourhood, municipality, province or other local entity, or Autonomous Community
- the prohibition to go to determined places, neighbourhoods, municipalities, provinces or other local entities, or Autonomous Communities, or get close to or communicate with determined persons, to the degree necessary.

²⁸ M. COBO DEL ROSAL *Tratado de Derecho Procesal Penal Español*, Centro de Estudios Superiores de Especialidades Jurídicas (CESEJ), Madrid, 2008, p. 169.

²⁹ As confirmed by Supreme Court Judgment 3036/2009.



58. For the adoption of these measures the financial situation of the defendant, as well as health requirements, family situation and professional activity will be taken into account. Especially the possibility to continue to perform the latter will be seen to, both during the application of the measures and afterwards.
59. In accordance with articles 502-505 of the Act on Criminal Procedure the possibility exists to decree preventive custody after hearing the Public Prosecutor and other accusing parties, who should request this measure. The measure can be decided by the examining judge or magistrate, as well as by the Court judging the case. The act considers the possibility of requesting preventive custody in order to "avoid that the defendant acts against the legal interests of the victim".
60. Preventive custody will only be decided when objectively necessary and when no less far-reaching measures are available which might be equally effective. In order to decide on this measure the repercussions on the defendant will taken into account, as well as his personal circumstances and the criminal facts under investigation.
61. When deciding on preventive custody for the protection of the legal interests of the victim (art. 503 Act on Criminal Procedure), account will be taken of the particular situation of the victim, when she is the spouse or comparable person that has or has had a relationship with the offender, even without living together.
62. In addition, the protection order of art. 544 Ter grants a specific and comprehensive protection status to victims of domestic violence. This status entails criminal, civil and social measures. These may be adopted when well-founded indications exist of rape within the domestic sphere of a woman by her husband or comparable life partner, even though they do not live together.
63. A protection order may be requested by the victim, by family members or by others who maintain emotional ties with the victim. Notwithstanding their general duty to report criminal facts, any private or public body or organization providing social services that comes across facts that may warrant a protection order, must report those facts immediately to an examining magistrate on duty at a Police Court or a public prosecutor in order to start up the procedure to issue a protection order.
64. The request may be submitted at any police station of the local, regional or national police forces, at a court house or public prosecutor's office, at branches of the Victim Support organization, social services or other government bodies providing services to the public or at legal advice centres. The procedure to issue a protection order may also be initiated by a Police Court or by the public prosecutor.
65. Once the request has been made, it is sent on to the Police Court, which can then order the Judicial Police to take the necessary steps to pave the way for a protection order. The Courts for Violence Against Women decide on protection orders for the victims, without prejudice to the authority of the Police Courts. Furthermore, when a judge hears a civil case in first instance and learns that a protection order has been requested, he must interrupt the procedure and forward the file as is to the competent Court for Violence Against Women.
66. Depending on the seriousness of the facts and the need for complete protection of the victim, the court may take one or more precautionary measures the act provides for (e.g. preventive custody,



restraining order, no-contact order, injunction to enter and remain in the common residence, requisition of arms, etc.) Measures that may be imposed by civil law must either be requested by the victim or her legal representative or by the public prosecutor when the couple has under-age or incompetent children.

67. Measures of a civil nature should be requested by the victim or her legal representative; in case of children who are under age or incapacitated this should be done by the Public Prosecutor. These measures will only be adopted if this has not already been done by a civil jurisdiction organ. The following measures may be taken:
- allocation of the use and enjoyment of the family residence
 - establishment of a custody arrangement, including visits, communication and longer stays with the children
 - maintenance allowance
 - any other measure considered adequate for the purpose of protecting the minor from danger or avoiding further harm
68. As established in the Act on Criminal Procedure, the Coordination Protocol regarding civil and criminal orders in cases of domestic violence provides that “The criminal organ that decrees a Protection Order may not alter related civil measures that have already been decided upon by a civil jurisdiction organ [...]”.
69. The criminal court may however adopt the complementary measures stated in art.158 CC, being:
- Measures to ensure the provision of alimentation and to provide for the future needs of the child in case the parents fail to do so
 - Measures to avoid negative effects on the child in case of a change in parental rights
 - Necessary measures to prevent the abduction of under age children by one of the parents or third persons
70. The civil protection measures are provisional and valid for a maximum of 30 days. If during this period a family law trial is initiated before the civil courts at the request of the victim or her legal representative, the provisionally adopted measures will remain in force for 30 days starting on the day the claim was presented. During this same period the civil measures should be ratified, modified or declared void by the competent court of first instance.
71. The protection order is to be served to the parties, the victim and the competent public authorities so that the required protection measures can be made effective.
72. The following social measures can be adopted for the protection of the victim³⁰:
- social benefits, including financial support in case of change in residence, provided by the Employment Services
 - financial aid established by art. 27 of Organic Act 1/2004, of 28 December, on Comprehensive Protection Measures against Gender Violence, provided by the competent organs of the Autonomous Communities
 - access to protected housing and public residencies for older persons
 - labour rights and social security
 - authorisation of residence because of exceptional circumstances in case of alien persons

³⁰http://www.migualdad.es/ss/Satellite?c=Page&cid=1193047406972&language=cas_ES&pagename=MinisterioIgualdad%2FPPage%2FMIGU_contenidoFinal



73. The protection order entails the duty to permanently inform the victim regarding the trial status of the defendant, and regarding the scope and validity of the adopted provisional measures. She will also be kept informed at all times regarding the penitentiary situation of the aggressor. The penitentiary administration will be given notice of the protection order.

74. The order will further be registered in the Central Register for the Protection of Victims of Domestic Violence.

2.2.4. What is the legal status of a victim of rape – can they be a party to the case, do they have a right to legal advice/advocacy and/or to be represented during the trial? Is there any evidence that having a legal status beyond that of witness changes the experience of trials or their outcomes?

75. Offences against sexual freedom can be considered semi-private or semi-public offences. In these cases, the trial process is initiated by request through the complaint of the victim or his/her legal representative, unless the victim is a minor, incompetent or helpless. In the latter cases the complaint by the Public Prosecutor is sufficient.

76. The Prosecutor can also initiate proceedings taking into account all legitimate interests. In principle, in this case there should be a previous complaint by the parties concerned³¹. Case law has established that a formal complaint is a prerequisite for admissibility³².

77. The complaint is not simply notifying the authorities about the existence of a criminal fact; in filing a complaint one is already initiating criminal action and becoming a party in the trial process. The judge may issue provisional measures for the protection of the victim that are often adopted already during the preliminary investigation. As a general rule, and as explained as regards the previous question, those measures comprise the issuance of a contact restraining order (protection order), provisional custody, provision of alimantation for the victim and its children, protection of employment and social security rights, etc. These measures are not applicable to a witness.

78. The complaint can be filed with any (competent) Judicial Authority, the Public Prosecutor's Office or the Police.

79. In the case of these offences, pardoning by the victim or her legal representative does not invalidate the criminal action nor the criminal liability.

80. In any case, the victim of a sexual offence who proves to have insufficient means may receive free legal aid. When the victim collaborates as a witness, the specific protection measures for witnesses established by the Act on the protection of witnesses and experts in criminal proceedings can be applied, provided the Judge holds that there is serious danger for the person, freedom or property of the person to be protected, his/her spouse or a comparable person, his/her ascendants, descendants, brothers or sisters.

³¹ A. J. PÉREZ-CRUZ MARTÍN: op.cit. p. 210.

³² Supreme Court Judgment 891/2006, FJ 1º, 23 February 2006.



81. In that case, the necessary measures can be taken to preserve the identity of the witnesses, their place of residence, profession and place of work.
82. The incriminating testimony of the victim is accepted as evidence, which may be sufficient to refute the presumption of innocence³³. According to case law, in order to admit this testimony as proof the Court should appreciate:
- the absence of subjective incredibility
 - verisimilitude
 - persistence in the incrimination
- 2.2.5. Has there been any debate/changes recently with respect to sentencing? Is there any data on the actual sentences given, and the extent to which they cluster closer to the minimum/maximum.
83. The Congress of Deputies debated and prepared a reform of the Criminal Code.
84. The reform bill of the Criminal Code foresees the following modifications regarding offences against sexual freedom:
85. Introduction of controlled liberty, which will also be applied in the case of offences against sexual freedom. This measure consists of the judicial control of the convict and involves measures such as the obligation to be traceable through electronic devices, to report regularly at a specific location, inform about changes in work and address, the prohibition to travel, to get close to or contact the victim or other specific persons, the prohibition to go to particular places or carry out particular activities, the obligation to participate in training programmes, work programmes, cultural programmes, sexual education or similar programmes, or receive medical treatment.
86. Article 178 (sexual aggression) is modified. The punishment is raised to a maximum of five years of prison (in stead of four). Moreover, attempts against sexual freedom are no longer to be committed "with violence or intimidation", but "while using violence or intimidation". However, this modification has not lead to any change in the legal meaning. Rather, it is merely a change in the wording. Besides, the legislator, taking account of the increasing sensibility nowadays with regard to sexual offences, considered as appropriate to heighten the punishment. The amendment of the Criminal Code in course (it must be approved by the Senate) provides for to heighten the punishment to 5 years of imprisonment.
87. The aggravating circumstances of article 180 are also modified. When the aggravating circumstances of article 178 are applicable the punishment for sexual aggression is raised to five to ten years of prison.
88. The aggravating circumstance of vulnerability due to age, illness or situation preserves the provisions of article 183, dealing with deceit, as we will see below.
89. With regard to the sexual abuses of article 181 the following modifications exist:

³³ J. M. RIFÁ SOLER: *El proceso penal práctico*, Comentarios, Jurisprudencia, Formularios, La Ley, Madrid, 2003.

- Sexual abuse of persons who are senseless or mentally disturbed is considered to be sexual abuse without consent. The reference to children under 13 is eliminated from this article as this category is now regulated elsewhere.
- A new paragraph is introduced establishing that when sexual abuse consists of vaginal, anal or oral bodily access, or the vaginal or anal introduction of body parts or objects, the offender will be punished by four to ten years of prison.
- The aggravated type of sexual abuse laid down in article 182 is also modified. A reference is introduced regarding sexual abuse of persons over 13, yet under 16, which is punished by one to two years of prison, or a fine of twelve to twenty-four months.
- The same article criminalizes aggravated abuse with bodily access (vaginally, anally or orally) or the introduction into the vagina or anus of body parts or objects, which is punished by two to six years of prison.
- Finally, the existing regulation concerning the sexual abuse of persons over 13, but under 16 while using deceit is modified.

90. The following are aggravating circumstances which will lead to the application of the established punishments in their highest grade:

- Total defencelessness of the victim due to his/her limited intellectual or physical development, and in all cases where the victim is under 4 years old.
- Joint perpetration by two or more persons.
- Violence or intimidation of a particularly degrading or vexing nature.
- Relationship of superiority or parentage with the victim, be it ascendant, brother or sister, through a natural relationship or by adoption.
- When the offender has put in danger the life of the minor.
- When the offence has been committed inside a criminal organisation or group which dedicates itself to these activities.

91. In all these cases, if the offender has abused his position of authority, as a public agent or officer, the punishment will include disqualification from public office for six to twelve years.

92. Persons convicted for sexual offences may be subjected to the measure of controlled liberty, after having fulfilled their prison sentence. In case of a serious crime this measure may last five to ten years; in case of less serious crimes one to five years.

93. At present, there are no exact data available regarding the height of the punishments applied; this should be analyzed case by case.

2.2.6. Are there any specific provisions for sex offenders – treatment, particular conditions for release, sex offender registers? Is there any evidence that these are protective for past/potential victims?

94. The Penitentiary Regulations (Royal Decree 190/1996 of 9 February) establish in article 116.4 specialized action programmes for penitentiary treatment, which may also be directed to persons convicted for sexual offences, based on a previous diagnostic. The participation in these programmes is always voluntary and may not lead to the marginalization of the inmates concerned within the penitentiary centres.

95. In addition, Organic Act 1/2004, of 28 December, on Comprehensive Protection Measures against Gender Violence provides in article 42 that the penitentiary administration will create special



programmes for inmates convicted for crimes related to gender violence. The Spanish Constitution considers in art. 25 that penalties shall be aimed at the rehabilitation of the convicted persons. Art. 59 of the Organic Act on General Penitentiary develops this constitutional provision. Besides, taking into account the Organic Act of Effective Equality mentioned above, the judge may substitute a conviction of less than 2 years of imprisonment with alternative punishments, e.g. community work, suspension and substitute of penalties. In the latter cases, the participation of the offender in rehabilitation programs is mandatory. The Program for Actions for the Equality between Women and Men in the penitentiary Field (2009) provides for a Protocol for attention, a penitentiary treatment program and for the creation of programs of penitentiary treatment in a community for offenders who committed gender violence and have been convicted to alternative measures.

96. In Spain no registry exists for sexual aggressors. Neither do accessible data exist on the degree of recidivism in relation to the participation in these programmes.

2.2.7. Summarise and explain any barriers to the prosecution of rape and sexual assault/coercion.

97. The main difficulty regarding the prosecution of these offences lies in the required complaint/report by the victim. The victim has to cope with a situation of aggression as well as the fear of reporting the offence. Moreover, in many cases, once the facts are reported, the only evidence available is the declaration of the victim, which complicates proving the offence. In order to avoid this situation case law admits the single incriminatory declaration of the victim as proof, provided certain conditions of objectivity are met (see above), thus facilitating prosecution.

2.2.8. Have any recent measures been evaluated? What were the main findings?

98. Up to date, and due to the lack of data released by official institutions, no evaluations have been made.

2.2.9. What are the current debates about legal and procedural measures, include the key criticisms and limitations of current responses.

99. As commented earlier, the Congress of Deputies is currently debating a reform bill of the Criminal Code increasing the penalties on sexual offences and modifying the legal definitions to achieve a better, more concrete protection of minors. Also, the prosecution is provided for sexual offences in times of armed conflict, punishing those who attempt against the sexual freedom of a protected person by committing act of rape, sexual slavery, induced or forced prostitution, forced pregnancy, forced sterilisation or any other form of sexual aggression.



2.3 Trafficking for sexual exploitation

FSJ: The UN Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Article 3 defines trafficking as:

a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

b) the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

c) the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;

d) "Child" shall mean any person under eighteen years of age.

2.3.1. To what extent does national law comply with the above definition?

100. The UN Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, entered into force in Spain in September 2003 (Instrument of ratification of 21/02/02 published in the Official State Gazette on 11/12/03).

101. The international and European law currently in force in Spain regarding the traffic in persons is the following:

- The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, of 2 December 1948.
- The European Convention on Human Rights of 1950.
- The Convention on the Elimination of all Forms of Discrimination against Women, 1979.
- The United Nations Convention against Transnational Organised Crime done at New York on 5 November 2000 (instrument of ratification of 21/02/02 published in the Official State Gazette on 29/09/03).
- The Recommended Principles and Guidelines on Human Rights and Human Trafficking issued by the UN High Commissioner for Human Rights, 2002.
- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (Instrument of ratification of 21/02/02 published in the Official State Gazette on 11/12/03).



- The Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organised Crime (Instrument of ratification of 21/02/02 published in the Official State Gazette on 10/12/03).
- European Union Council Framework Decision of 19 July 2002 on combating trafficking in human beings.
- Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.
- Council of Europe Convention of 3 May 2005 on Action against Trafficking in Human Beings.
- EU Plan on Best Practices Standards and Procedures for Combating and Preventing Trafficking in Human Beings (2005/C 311/01).
- The 1989 Convention on the Rights of the Child and the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.
- The OSCE Action Plan to Combat Trafficking in Human Beings approved unanimously by all participating Member States including Spain at the Maastricht Council of Ministers, 2003.

102. As for the applicable national legislation, it should be noted that the current regulations are scattered among various legal instruments of different nature:

- The Criminal Code, which penalizes the trafficking in human beings.
- The Act on Criminal Procedure, which comprises all the procedural measures of a general nature to be applied to legal proceedings, some of which are related to victims.
- The Aliens Act, which establishes administrative sanctions in case the Criminal Code, cannot be applied.
- Organic Act 19/1994, of 23 December, on the protection of witnesses and experts in criminal proceedings.
- Act 35/1995, of 11 December, on aid and assistance to victims.
- Act 27/2003, of 31 July, regulating the protection order for victims of domestic violence.
- Organic Act 1/2004, of 28 December, on Comprehensive Protection Measures against Gender Violence.
- Organic Act 1/1996, of 15 January, on the legal protection of minors.

103. Mention should also be made of the Comprehensive plan to combat trafficking in human beings for the purpose of sexual exploitation, adopted in 2008 and which finds itself in the implementation phase.

104. It is very common to confuse the illegal traffic of migrants and the trafficking of persons. As a result of this, the victims of trafficking often are not identified as such, but as immigrants with an irregular administrative status³⁴.

105. A better dissemination of the Palermo Protocols could help to better define this conceptual framework. On the one hand, the illegal traffic of migrants should be regulated taking into consideration the definitions laid down in the Protocol against the Smuggling of Migrants by Land,

³⁴ This issue was raised by a report of the Federation of Progressive Women, published by the Ministry of Equality, entitled "The trafficking in women for the purpose of sexual exploitation in Spain". See:

<http://www.migualdad.es/ss/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadername1=Content-disposition&blobheadervalue1=inline&blobkey=id&blobtable=MungoBlobs&blobwhere=1244652300106&ssbinary=true>



Sea and Air supplementing the United Nations Convention against Transnational Organised Crime. On the other hand, the trafficking of human beings for the purpose of sexual exploitation should be regulated taking into consideration the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

106. Even though the 2008 Comprehensive plan to combat trafficking in human beings for the purpose of sexual exploitation is embedded in the correct conceptual framework and includes the definitions of the two Protocols mentioned, it continues to be a plan and not an act or regulation, meaning it only has interpretative value for the various legal agents. In order to guarantee a higher effectiveness in this respect, it would be necessary to review the way Spanish rules on the subject have been elaborated, especially for the purpose of improving the definition of these two forms of trafficking. As regards the prosecution of the illegal trafficking of employees, art. 312 of the Criminal Code punishes with a prison sentence of 2 up to 5 years those who traffic illegally with manpower (including those who recruit, offer false or delusive employment or employment conditions). Art. 313 punishes with the same punishment those who promote or facilitate illegal immigration irrespective of the means used. With regard to the trafficking in organs, it should be noted that the ongoing amendment of the Criminal Code (approved by the Congress of Deputies on 29 April 2010) contains a provision that penalizes the illegal trafficking of human organs as well as the illegal transplantation of organs. Currently, these acts are punished as bodily harm.

2.3.2. Is trafficking dealt with through specific law and/or other more general provisions? If a recent legal reform has been introduced does it comply with the TIP report standards? How effective is it considered to be in prosecuting cases, i.e. is there a requirement to prove recruitment/transportation and exploitation?

107. The Criminal Code penalizes the traffic in persons. Its description appears in art. 318 bis of the Criminal Code³⁵, which punishes those who promote, encourage or facilitate the illegal traffic in persons from, through or to Spain. This offence is punished by six months to three years of prison and a fine of six to twelve months. If the afore-mentioned acts are perpetrated in the pursuit of profit, or using violence, intimidation or deceit, or exploiting the state of distress of the victim, they are punished by two to four years of prison and a fine of twelve to twenty-four months. The punishment will be applied in the highest grade: 1) if the life, health or integrity of persons have been jeopardized, or the victim is a minor; 2) if the offender uses his position of authority, of representative of authority or public servant; 3) if the offender belongs to an organisation or association engaged in these activities, albeit temporarily.

108. Art. 515 classifies as illegal those associations which promote the illegal traffic in persons. Art. 517 punishes the founders, directors and presidents of these associations by two to four years of prison, a fine of twelve to twenty-four months and disqualification for public office and employment for a period of six to twelve years; and active members of the association by one to three years of prison and a fine of twelve to twenty-four months.

109. Art. 518 punishes by one to three years of prison, a fine of twelve to twenty-four months and disqualification for public office and employment for a period of one to four years those who, by

³⁵ Wording in accordance with Article 2, under 2º of Organic Act L.O. 13/2007, of 19 November, on the extraterritorial prosecution of the illegal traffic in persons and clandestine immigration (Official State Gazette, 20 November).



their financial or any other kind of cooperation, to the extent relevant, contribute to the foundation, organisation or activities of these associations.

110. The traffic in persons appears as a very serious administrative offence in the Aliens Act (art. 54.b), namely: to induce, promote, encourage or facilitate, while forming part of a profit seeking organisation, the clandestine immigration of persons passing through or heading for Spanish territory, in case this does not constitute a criminal offence (in which case art. 318 bis of the Criminal Code would apply).

111. In all these cases the problem is, on the one hand, obtaining evidence, as often it is difficult to prove that the criminal acts were perpetrated with intent, due to the nature of the facts. On the other hand, it should be noted that the Spanish Criminal Code does not consider freely exercised prostitution to be an offence, making it even harder to prosecute these activities, as trafficking networks cloak their activities in multiple forms³⁶.

2.3.3. How is internal trafficking addressed?

112. Spain is not a country of origin but is used as what is defined as a low level country of transit for victims of trafficking from Brazil, South America and Africa. However, according to this same report, Spain is considered an important country of destination receiving victims from Colombia, the Dominican Republic, Nigeria, Russia, the Ukraine, Romania, Bulgaria, Brazil, Croatia, the Czech Republic, Hungary, Morocco, Poland and other countries³⁷. When it is about internal trafficking of Spanish women, the criminal offence applied is not the offence against rights of foreign citizens which is applied in the case of trafficking of aliens. In the case of internal trafficking, art. 188 of the Criminal Code is applied relating to the offence of incitement to forced prostitution. This offence covers the transport of the persons who prostitute among different locations, being Spaniards or aliens.

113. According to police estimates, 90% of the women working in these establishments are aliens. A large percentage of these women are in the hands of networks trafficking in human beings.

2.3.4. Are there any protective measures available for victims before, during and after the trial process? How effective are they considered to be?

114. The victims of trafficking are protected during all procedural phases: before, during and after the trial process. The Act on Criminal Procedure is complemented by the application of the Organic Act 19/1994, of 23 December, on the protection of witnesses and experts in criminal proceedings, which may be used to guarantee the security of victims, taking into account their cooperation with the authorities for the purpose of fighting these crimes. Also applicable is Act 35/1995, of 11

³⁶ See: TRÁFICO E INMIGRACIÓN DE MUJERES EN ESPAÑA. COLOMBIANAS Y ECUATORIANAS EN LOS SERVICIOS DOMÉSTICOS Y SEXUALES. Report written with the support of ACSUR-Las Segovias and published by the Spanish Ministry of Equality. Website:

<http://www.migualdad.es/ss/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadername1=Content-disposition&blobheadervalue1=inline&blobkey=id&blobtable=MungoBlobs&blobwhere=1244652300123&ssbinary=true>

³⁷ Spanish Ministry of Equality, Comprehensive plan to combat trafficking in human beings for the purpose of sexual exploitation.



December, on aid and assistance to victims, which grants them the right to free legal aid. Moreover, in those cases where the offender is the spouse or the current or former life partner of the victim, Act 27/2003, of 31 July, regulating the protection order for victims of domestic violence can also be applied (which offers police protection against the aggressor to prevent recurrence), as well as Organic Act 1/2004, of 28 December, on Comprehensive Protection Measures against Gender Violence, including all the procedural measures applicable to victims in all the phases of the trial process (before, during and after).

115. On the other hand, when the victim is a minor the provisions are applied of the Organic Act 1/1996, of 15 January, on the legal protection of minors, which modified the Civil Code and the Act on Civil Procedure. According to art. 9.1 of this Act, the minor has the right to be heard both in family matters as well as in any administrative or judicial procedure in which he is directly involved and which may lead to a decision that affects his personal, family or social life. In the case of judicial procedures, the appearances will take place taking into account the personal situation and development of the child, seeking to preserve his intimacy.

2.3.5. What measures or programs exist to enable victims to remain in the country to which they were trafficked and to provide them support, recovery, and social protection, independent of whether or not a case is prosecuted, and of their cooperation in prosecution? Are these considered sufficient and effective?

116. The investigation and prosecution of offences related to prostitution, child grooming and the trafficking in human beings are handled by the Criminal Investigation Brigades through the Drugs and Organized Crime Units (UDYCO).

117. The Comprehensive plan to combat trafficking in human beings for the purpose of sexual exploitation was adopted in 2008³⁸, and entered into force on 12 December 2008. Based on this plan an Inter-ministerial Group was set up, composed of representatives from the following Departments: Ministry of Foreign Affairs and Cooperation, Ministry of Justice, Ministry of the Interior, Ministry of Education, Social Policy and Sports, Ministry of Health and Consumer Affairs, Ministry of Labour and Immigration and Ministry of Equality (chairing the Group). The Autonomous Communities and the Municipal authorities are also involved in the implementation of this Plan. The Plan will have a duration of 3 years (2009 – 2011), the term considered necessary to efficiently put into practice the required measures and evaluate their effectiveness.

118. In light of the foregoing, the problem must be approached from four different perspectives which have become the guidelines of all of the measures of this Plan:

- First of all, the gender perspective. As pointed out by the European Union, women "are more likely to become victims of trafficking due to a lack of education and professional opportunities." Over the last several decades we have witnessed the burgeoning of a sex business based on women's bodies being sold as a consumer commodity. We are up against a sex trade mostly affecting women and therefore constituting a problem related to discrimination by reason of gender.

³⁸ The English version can be found at:

<http://www.migualdad.es/ss/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadername1=Content-disposition&blobheadervalue1=inline&blobkey=id&blobtable=MungoBlobs&blobwhere=1244652363433&ssbinary=true>



- Secondly, it is a violation of fundamental rights. The phenomenon of trafficking cannot be disassociated from prostitution. The local or even individual nature that formerly characterized prostitution has been replaced by something much more complex and of a wider scope; a criminal activity based on the commercial sale of women violating their dignity and seriously compromising human rights.
- Thirdly, trafficking is a transnational act requiring international cooperation. We should be aware that more effective tools are needed to combat trafficking given its proportions; tools which, given our increasingly global world, must include effective international cooperation owing to the transnational implications of networks trafficking in human beings, and an increasingly firm commitment to the developing societies at origin given the close link between trafficking and situations of poverty and vulnerability.
- Fourthly, it is a crime urgently requiring police and judicial action. Trafficking is often controlled by perfectly organized international crime syndicates which trade and traffic in women just as they could trade in drugs, arms or any other commodity allowing dealers to earn huge sums of money in short periods of time. A firm stance must therefore be taken to combat these criminal networks and shut down their lucrative business.

119. The Plan contains measures which, in a comprehensive way, seeks to address all the aspects of the problem. These measures are divided among the following areas: raising awareness, prevention and investigation; education and training; assistance to, and protection of victims; legislative measures, both procedural and aimed at coordination and cooperation. The Comprehensive Plan of 2008 provide for a minimum 30-day grace period to give victims the chance to re-establish themselves and get out from under the influence of traffickers and/or decide whether to collaborate with government, police and judicial authorities. Also dispose that earmark funds guaranteeing the subsistence of victims during the grace period or their possible return to their country of origin if they so request. The Plan furnishes victims with an immediate legal assistance system and an interpreter. The Plan also establishes that the victims may be benefices of employment training programmes. Besides, the Plan establishes the creation of reception centres providing specific comprehensive care.

2.3.6. Are there the same protections and services available for identified/designated victims of trafficking who are EU nationals, and non-EU nationals.

120. Yes. Protection is not differentiated depending on the nationality of the victims. The Comprehensive Plan to combat trafficking in human beings for the purpose of sexual exploitation adopted in 2008 includes all categories of victims, including non-EU nationals. The measures of protection provided to alien victims are provided without distinction between EU and non-EU nationals.

2.3.7. Summarise and explain any barriers to the prosecution of trafficking offences.

121. The Ministry of Equality³⁹ considered that sexual exploitation typically requires an organizational structure for the capture, transport and room and board of the women working as prostitutes, especially alien women. As a result, sexual exploitation is an especially attractive activity for organized crime groups which are generally very eager to directly or indirectly control the women

³⁹ Introduction to the Comprehensive plan to combat trafficking in human beings for the purpose of sexual exploitation.



engaging in prostitution. The organization usually provides the captured women with travel tickets and the documentation needed to enter Spain (passports, Schengen visas, letters of invitation, etc.) for which victims accrue a debt which subsequently is used as the pretext for exploitation. This debt is arbitrarily increased and becomes enormously difficult to pay back. Sometimes women are accompanied on their trip to Spain by members of the organization who help them get through border checks; in other cases they are met upon arrival to Spain and their travel documents and money are immediately confiscated and they are taken to the night club or other premises where they are expected to work as prostitutes. There they are subjected to different degrees of control which, in the most serious cases, can include being locked in rooms, surveillance by closed-circuit television, not being allowed any contact with people outside of this environment, threats and even aggression and beatings. In the specific case of networks targeting Sub-Saharan African women (especially Nigerians), coercion also takes advantage of their superstitious nature using voodoo rites or black magic whereby non-payment of their debt is linked with misfortunes for the victim or her family members.

122. The way in which these gangs and trafficking networks operate complicates the prosecution of these offences, as the investigation to be carried out must be very meticulous and provide sufficient evidence regarding the criminal activities. It should be taken into consideration that these acts have been classified in the Criminal Code and as such must be proven, since the procedural rights of the offenders are also to be fully observed.

123. There is a prevailing social tendency in recipient countries to consider prostituted women as responsible for their situation, overestimating their capacity to choose this form of subsistence. As a result, exploited women suffer a dual burden: their own situation as exploited persons and the stigmatization and social rejection they suffer. They are sometimes mistakenly associated with a life of leisure, entertainment and a high standard of living when the most likely truth is just the opposite. Social stigmatization, a feeling of isolation in the recipient society, language barriers, fear and the impossibility of finding solutions to their problems, all contribute to maintaining a situation of clandestine exploitation and hinder the subsequent social-labour market integration of the victim.

124. The Plan also gives an impulse to judicial cooperation in the fight against human trafficking on a European level, through EUROJUST, as well as on an Ibero-American level, through IBER-RED.

2.3.8. Have any recent measures been evaluated? What were the main findings?

125. The Comprehensive plan to combat trafficking in human beings for the purpose of sexual exploitation, will be evaluated as of 2012, given the fact that it will be implemented between 2009 and 2011. The Ministry of Equality considers that this period is necessary in order to be able to evaluate its effectiveness.

2.3.9. What are the current debates about legal and procedural measures include the key criticisms and limitations of current responses.

126. The most criticized aspect in relation to the rules aimed at addressing this problem is that insufficient personal and financial resources are available to guarantee their effective application. Although special police units have been created, as well as a Women's Observatory within the



State's Security Forces and Bodies (created in 2007), the number of staff that can be deployed for the prevention and suppression of human trafficking is still limited.

127. As a positive measure, it should be noted that the Comprehensive plan to combat trafficking in human beings for the purpose of sexual exploitation contemplates a modification of the Act on Criminal Procedure in order to explicitly include the victims of trafficking in the application of provisional and protective measures, such as provisional evidence, that can be decided by the Court, but also to deprive the organisations responsible for trafficking of their financial gains. This is an "anticipated evidence" so that expert opinions, declarations of witnesses and other procedural acts carried out before the hearing may be valid also therefore without the need to be repeated.

128. The Congress of Deputies is currently debating a reform bill of the Criminal Code increasing the penalties of trafficking for sexual exploitation. The bill specifically penalizes legal persons involved in the traffic of human beings. In addition, a new title is added on "The Trafficking in Human Beings" (Title VII bis). Thus, article 177 defines a complex offence carried out in several clearly delimited stages or phases; the article aims primarily to protect the dignity and freedom of the victims. It should also be stressed that the legal definition is not only directed against traffic involving aliens, but all kinds of trafficking, be it national or transnational, related with organized crime or not.

2.4 Stalking

FSJ: The Council of Europe CAHVIO defines stalking as follows:

Any form of harassment that causes the person being harassed to have a reasonable fear for his or her safety (repeated phone calls, phone messages, or emails that annoy or threaten the individual, attempts at contact through other communication tools, sending the individual unwanted things, following the individual, or his or her friends, family, or anyone else close to them, showing up uninvited at work or home, trying to get private information about the individual from other people, entering the individual's home, vandalism, harming pets, threats or assaults).

2.4.1. Is there a specific law on stalking, when and why was it introduced? If there is not have existing provisions been sufficient to address the issue and provide protection? Are there arguments for specific laws?

129. At present, the Spanish legal system does not contain any act dealing with stalking, as defined by the Council of Europe. Therefore, in order to proceed against the various forms of stalking regulation is used that refers to other offences.

130. As illustrated by case law, these other offences are the following :

- Misdemeanour of article 620.2 of the Criminal Code: To exert threats or coercion against someone, to slander someone or to unfairly humiliate someone, in a moderate degree. Punishable by a fine of ten to twenty days. When these moderate threats or coercions take place in the context of domestic violence and are exerted against the person who is or has been

the offender's spouse or comparable life partner, even though they do not live together, the offence is punished by permanent house arrest of four to eight days, to be carried out at all times at a location away from the victim, or by community work during five to ten days.

- Threatening to commit an offence (art. 169 Criminal Code): In this case, stalking is punished indirectly when as part of a methodical and persistent persecution which creates a climate of harassment, the offender threatens the victim to cause injury to her/him, her/his family or other close persons which may constitute the offence of homicide, maltreatment, abortion, torture or an offence against her/his freedom, moral integrity, sexual freedom, privacy, honour or property. In these cases, when the offender demands an amount of money or imposes any other condition, even if not illegal, and the demand is successful, the offence is punished by one to five years. If the demand is not successful, the punishment is six months to three years. According to the same article, the punishments will be applied in the highest degree if the threats are made in writing, by phone or by any other means of communication or reproduction, or if they are made on behalf of real or supposed entities or groups.
- Threatening to inflict injuries that do not constitute an offence (art. 171 Criminal Code): Criminalized are also threats to inflict injury that do not constitute an offence, depending on the gravity and circumstances of the facts, provided the threat is conditional and the condition does not constitute an act already duly required. An example of this offence is the threat to reveal information about the private life or family relations of the victim which is not publicly known and which may affect his/her reputation, credit or interests. In case of a moderate threat against the person who is or has been the offender's spouse or comparable life partner, even though they do not live together, the offence is punishable by six months to one year of prison or thirty-one to eighty days of community labour, and in any case, by deprivation of the right to possess and carry arms during a period between one year plus one day and three years. Also, measures may be adopted to protect any minors involved, including disqualification of the offender for the exercise of parental authority, protective custody, or with regard to the minor, guardianship, tutelage or placement in a foster family until the age of five.
- Coercion (art. 172 Criminal Code): Coercion is an offence applicable to those cases where "the harassment does not take place in the typical context of domestic violence, given that between the stalker and the victim no kind of partner relationship exists (yet)"⁴⁰. Essential element of these offences is the imposition of certain conduct, to prevent another person from doing what the act does not prohibit or compel someone to do something he/she does not want to do, be it legitimate or not. This is the standard type of the offence, which is aggravated if it entails depriving the victim of exercising a fundamental right. The Criminal Code also regulates a specific type of coercion within the context of domestic violence, where the offender exerts moderate coercions against the person who is or has been his/her spouse or comparable life partner, even though they do not live together. In these cases measures can also be adopted to protect any minors involved.
- Degrading treatment or habitual physical or psychological violence in the family sphere (art. 173 Criminal Code): This offence is considered to exist when a degrading treatment leads to serious harm to the moral integrity of the victim. Paragraph 2 of the same article criminalizes habitual physical or psychological violence against the person who is or has been his/her spouse or comparable life partner, even though they do not live together, as well as violence in the family sphere against family members (natural or adopted) of the offender or his/her spouse or life partner, or against minors or incapacitated persons who live with them or find themselves

⁴⁰ Please see VILLACAMPA ESTIARTE, C., *Stalking y Derecho Penal. Relevancia jurídico-penal de una nueva forma de acoso*. Iustel, 2009.



subject to the guardianship, tutelage or care of the spouse or life partner or who form part of the family unit for any other reason, as well as those persons who because of their particular vulnerability are subject to the guardianship or care of public or private centres. The established punishment will be applied in the highest degree if the offence is committed in the presence of minors or with arms, if it is committed in the common home or the home of the victim, or if committed in breach of a restraining order. Article 620 CP refers to a misdemeanour: threat, coercion, defamation or unjust harassment are punishable by a fine of 10 to 20 days. It is not a crime, so the penalty is less than in other reported cases. Even so, in case when the misdemeanour is committed against a spouse or person who is or has been linked to him by similar emotional relationship even without living together has a different and higher penalty. In all other cases (Art. 169, 171, 172, 173) we are dealing with crimes, not misdemeanours, and therefore are punished with a greater penalty. If committed against a spouse or person who has been linked by cohabitation relationship, the offence may have a specific penalty since the same Criminal Code includes measures arising from the need for comprehensive protection for women victims of domestic violence. The general punishment is imprisonment of three months to a year or a fine of 6 to 24 months, account being taken of the gravity and circumstances of the act⁴¹.

2.4.2. Are there protection orders available for harassment/stalking? If so do they parallel those for IPV? Is it recognised that the majority of stalking is by ex-partners, what is sometimes termed 'post-separation violence'?

131. In case of violence against the (former) spouse or comparable life partner, the protection order can also be used for these offences. As we have seen, there also exists a series of specific provisions regarding the legal definitions which are indirectly applied to stalking. In general, the possibility exists to apply protection measures if there are reliable indications that one of the mentioned offences has been committed. These protection measures are of a general nature, such as preventive custody, to be applied on the terms established by the Criminal Code. Applicable are also the preventive measures of article 544 bis:

- the prohibition to reside in a determined place, neighbourhood, municipality, province or other local entity, or Autonomous Community
- the prohibition to go to determined places, neighbourhoods, municipalities, provinces or other local entities, or Autonomous Communities, or get close to or communicate with determined persons, to the degree necessary.

2.4.3. Summarise and explain any barriers to the prosecution of stalking.

132. The main difficulty in prosecuting stalking is the fact that the Spanish legal system lacks specific regulation of this offence. Consequently, the legal definitions of other offences are indirectly applied to stalking giving rise to the problems described above, providing a protection that does not fully cover the legal interests of the victims of stalking.

⁴¹ The information relating to stalking refers to the aforementioned book of Carolina Villacampa.



2.4.4. Have any recent measures been evaluated? What were the main findings?

133. There has been no evaluation of measures regarding stalking. Stalking is still not regulated by the Criminal Code and there are no debates on this issue going beyond its inclusion into the ongoing amendment of the Criminal Code.

2.4.5. What are the current debates about legal and procedural measures, include the key criticisms and limitations of current responses.

134. It should be noted that the reform bill of the Criminal Code currently debated in the Congress of Deputies does not regulate stalking either, although it seeks to penalize moral harassment at the work place, as well as real estate harassment/mobbing. On April 29, 2010 the Congress of Deputies approved the reform of the Penal Code, and, following the constitutionally established procedure, the text now goes to Senate for discussion and final approval by means of the procedure applicable to the Organic Act. In the text adopted by the Congress harassment at the workplace and real estate harassment/mobbing are criminalized under the Title relating to torture and crimes against the person, considering that this is the appropriate framework to establish this type of crime. There is still to be seen if the Senate approves the text as proposed by the Congress or if it introduces amendments that would need to be accepted the Congress in its turn (because the Congress has to vote on the final version of the bill with of the entire reform absolute majority of the Plenum). Link: http://www.congreso.es/public_oficiales/L9/CONG/BOCG/A/A_052-12.PDF#page=1.

2.5 Sexual harassment

FSJ: The definition of sexual harassment in the EU directive is:

... any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occur[ring], with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment. It refers to harassment as behaviour that is related to the sex of the victim (usually the female sex and expectations re. femininity). Sexual harassment often is, but need not be identical to harassment of an explicit sexual nature.

2.5.1. Is this definition recognised/used in any legal measures? If not how, if at all, is sexual harassment defined? What forms of law is it addressed through and how?

135. Organic Act 3/2007, 22 March, on the Effective Equality of Women and Men uses the definition adopted by the European Directive, namely: "any conduct, be it verbal or physical, which seeks to, or results in an attempt against the dignity of a person, in particular when it creates an intimidating, degrading or offensive environment".

136. The Criminal Code (art. 184) uses a different definition, but establishes that harassment exists when "a situation is created which is objectively and seriously intimidating, hostile or humiliating" to



the victim. Harassment is defined as taking place in the context of a work, teaching or service relationship. Art. 184.1 of the Penal Code punishes with imprisonment of 3-5 months or a fine of 6-10 months the basic type of sexual harassment. Art. 184.2 punishes with imprisonment of 5-7 months or a fine between 10 and 14 months if there is situation of employment, teaching or hierarchical superiority between the perpetrator and the victim or if the harassment is related to the expectations arisen within the scope of this relationship. Art. 184.3 punishes with imprisonment of 5-7 months or a fine of 10 to 14 months harassment of a particularly vulnerable victims; if additionally one of the situations described in the art. 184.2 exists, the penalty will be imprisonment of 6 months up to a year.

137. The Workers' Statute (Legislative Royal Decree 1/1995, of 24 March) establishes the right to be protected against sexual harassment and harassment on the grounds of gender (art. 4), as an expression of the basic right of workers to respect for their intimacy and personal dignity. In spite of this provision, no explicit definition of harassment is given in the Workers' Statute. It does however provide that when sexual harassment or harassment on the grounds of gender occurs, this constitutes a breach of contract which may give rise to disciplinary dismissal (art. 54).

138. The Act on Labour Procedure (Legislative Royal Decree 2/1995, of 7 April) does not define harassment, but establishes that harassment claims will be handled using the special procedure for the protection of fundamental rights within the social jurisdiction (art. 181).

139. The Act on Infringements and Sanctions in the Social Sphere (Legislative Royal Decree 5/2000, of 4 August) considers sexual harassment as a very serious infringement, regardless of the active subject.

140. At a procedural level, the Act on the Effective Equality of Women and Men (art. 12.3) establishes that the harassed person will be the only one having standing in trials regarding against sexual harassment and harassment on the grounds of gender. Consequently, it is provided in the same terms by the Act on Civil Procedure (art. 11 bis), and also by Act 29/1998, of 13 July, on contentious administrative jurisdiction (art. 19.1 i)). At the criminal procedural level, the same system is applied as that used for offences against sexual freedom.

141. Finally, the General Act on Healthcare establishes that the Public Administrations will take action to protect the occupational health of workers, paying particular attention to sexual harassment and harassment on the grounds of gender.

2.5.2. Is there a general definition of 'harassment' in law? Are there overlaps here with stalking? Is harassment linked in any way to equality legislation, and if so are LGBT people protected under these measures?

142. There exists no general definition of harassment in the Spanish legal system, only the specific provision regarding sexual harassment we have described in the previous paragraph. In other cases, protection is extended by the Workers' Statute to harassment on the grounds of racial or ethnic origin, religion or beliefs, disability, age or sexual orientation. The Workers' Statute expressly establishes the protection against harassment on the grounds of sexual orientation (art. 4.2.e of the Statute). Furthermore, Act 3/2007 on Effective Equality between Women and Men, taking into account the provisions of Directive 2006/54/EC, distinguishes between sexual harassment and



harassment on the grounds of sexual orientation, providing by these means protection also to the LGBT people.

143. Stalking is not regulated in the Spanish legal system, but is subsumed under other offences. Therefore, it does not overlap with sexual harassment.

144. Sexual harassment is dealt with extensively in the Act on the Effective Equality of Women and Men. It gives the definition mentioned above and provides (art. 7.3) that sexual harassment and harassment on the grounds of gender is always discriminatory. Act 3/2007 on Effective Equality between Women and Men, taking into account the provisions of Directive 2006/54/EC, distinguishes between sexual harassment and harassment on the grounds of sexual orientation, providing by these means protection also to the LGBT people.

145. Apart from a definition of sexual harassment the Act on Equality also offers a definition of harassment on the grounds of gender: "Harassment on the grounds of gender is any conduct related to the gender of another person which seeks to, or results in, an attempt against the other person's dignity, in particular when it creates an intimidating, degrading or offensive environment".

146. Based on the Act on Equality it has been established that the public authorities as a general rule will adopt measures to eradicate all forms of sexual harassment and harassment on the grounds of gender. Moreover, owing to this act the protection against sexual harassment has been extended to the rest of the legal system, including new provisions in the above-mentioned acts.

147. The legislation on equality specifically aims to protect women from discrimination. The protection measures regarding sexual harassment in criminal and labour law, however, are applicable to everyone. As stated above, the protection against sexual harassment covers also the LGBT population.

2.5.3. How has labour and/or equality law prohibited sexual harassment. Are these provisions used regularly? Has case law contributed anything significant to the understanding of this issue?

148. The Workers' Statute considers harassment on the grounds of sexual orientation, sexual harassment and harassment on the grounds of gender of the employer or the persons working in the company as a ground for dismissal (art. 54.2 g)).

149. The Workers' Statute establishes as grounds for disciplinary dismissal harassment on the grounds of sexual orientation, sexual harassment and harassment on the grounds of gender of the employer or the persons working in the company (art. 54.2.g)

150. The Workers' Statute establishes as a basic right of workers (art. 4.2 e)): "The respect for his/her privacy and due consideration for his/her dignity, which includes protection against harassment on the grounds of racial or ethnic origin, religion or beliefs, disability, age or sexual orientation, and against sexual harassment and harassment on the grounds of gender".

151. The Act on Infringements and Sanctions in the Social Sphere considers as a very serious infringement (art. 8.13): "Sexual harassment, when it occurs within the sphere of competence of the



company's management, whoever is the active subject". In this case, it is qualified as an administrative infringement which is sanctioned by the Labour Inspection.

152. Art. 13 bis of the same Act sanctions as a very serious infringement "harassment on the grounds of sexual orientation and harassment on the grounds of gender, when they occur within the sphere of competence of the company's management and while the employer had knowledge of it, did not adopt the necessary measures to prevent it".

153. Apart from financial sanctions, in these cases accessory sanctions are applied: "Automatic loss of aid, relief measures and, in general, benefits derived from the application of employment programmes, effective from the date the infringement was committed, as well as automatic exclusion from access to these benefits for six months".

154. According to the Act on Labour Procedure (RD 2/1995), harassment claims in the labour field will be handled using the special procedure for the protection of fundamental rights, where the judge will determine the compensation to be paid. The same act provides that when discrimination is alleged on the grounds of gender or sexual orientation and there are well-founded indications that this discrimination exists, it is the defendant's obligation to provide an objective and reasonable justification, sufficiently proven, of the adopted measures and their proportionality (art. 96). The same reversal of the burden of proof applies to cases of discrimination related to violations of fundamental rights.

155. The Act on Equality also provides for a series of measures, such as:

- the integration of the principle of equality into health policies, meaning that sexual harassment and harassment on the grounds of gender will have to be taken into account with regard to the protection, promotion and improvement of occupational health (art. 27.3 c));
- the negotiation and adoption of equality plans in companies with more than 250 employees; these plans may contemplate the prevention of sexual harassment and harassment on the grounds of gender (art. 45-46).

156. Concretely, companies are obliged to promote working conditions that prevent sexual harassment and harassment on the grounds of gender. For this reason, specific procedures should be established to help prevent them and allow for complaints and claims to be presented. Also, measures may be established through negotiation with the workers' representatives, such as codes of good practices, information campaigns and training programmes.

157. According to art. 48 of the Act on Equality, the workers' representatives should contribute to the prevention of sexual harassment and harassment on the grounds of gender by raising the awareness among workers and providing the company's management all the information they have regarding facts that might lead to harassment.

158. The public administrations must adopt, within their respective spheres of competence, effective protection measures against sexual harassment and harassment on the grounds of gender (art. 51 Act on Equality).

159. Article 62 of the same Act establishes that with regard to the General State Administration and its related public organs an Action Protocol against sexual harassment and harassment on the grounds of gender shall be created, based on the following principles:

- to prevent and not to tolerate sexual harassment and harassment on the grounds of gender



- to train staff to respect dignity, privacy and equal treatment of men and women
- confidential treatment of complaints
- appointment of persons responsible for hearing persons presenting a complaint or a claim. Para. 160. As regards the case-law: the paradigmatic sentence is the sentence of the Constitutional Court 224/1999, of 13 December, where the TC held that sexual harassment violates human dignity: sexual harassment is unilateral and undesirable, it creates a hostile employment environment and has due to its intensity and reiteration negative effects for the mental health of the victim.

2.5.4. Where the issues of dealt with in labour law, is the employer and/or harasser considered liable for the conduct? What remedies are available to victims of sexual harassment, and are there any legal sanctions available against perpetrators of sexual harassment?

160. The Act on Infringements and Sanctions in the Social Sphere (Legislative Royal Decree 5/2000, of 4 August) considers sexual harassment a very serious infringement. The employer may be liable when it occurs within the sphere of competence of the company's management, whoever is the active subject (art. 8.13). In this case, it is qualified as a serious infringement which is sanctioned administratively, giving rise to compensation.

161. Art. 13 bis of the same Act sanctions as a very serious infringement leading to the employer's liability "harassment on the grounds of sexual orientation and harassment on the grounds of gender, when they occur within the sphere of competence of the company's management and while the employer had knowledge of it, did not adopt the necessary measures to prevent it".

162. Apart from financial sanctions, in these cases accessory sanctions are applied: "Automatic loss of aid, relief measures and, in general, benefits derived from the application of employment programmes, effective from the date the infringement was committed, as well as automatic exclusion from access to these benefits for six months" (art. 46 bis).

163. According to labour law, the worker can also request the extinction of the labour contract due to a grave breach of the employer's obligations, giving rise to the kind of compensation which is paid in the case of unfair dismissal (art. 50 Workers' Statute).

164. The worker can also present a claim to the Labour Court, which will be handled as a violation of the fundamental rights of the worker (Art. 4 Workers' Statute and art. 181 Act on Labour Procedure). In case the Court concludes that such violation exists, a compensation will be awarded compatible with the compensation receivable for termination of contract.

165. Finally, as explained, sexual harassment is criminalized by the Criminal Code. These criminal sanctions may also give rise to related civil compensations.

2.5.5. Summarise and explain any barriers to the procedures against sexual harassment.

166. The problems faced by victims of harassment are caused to a large extent by the fact that these situations are kept hidden and that no action is taken when harassment is not formally reported. Only part of harassment cases is brought to trial.



167. When harassment is reported to the police, the legal protection mechanisms are activated and these tend to be effective. However, a number of victims does not report the harassment they suffer. There are various reasons for not doing so: the fear of losing one's job with the corresponding financial insecurity, a position of inferiority of the victim in relation to the offender, etc. As stated above, the victims of sexual harassment are protected by the criminal, labour and equality legislations, including also transversal fields as e.g. health care and education. The notion "legal protection mechanisms" refers to the legal measures described in the previous paragraphs.

168. In this respect, the support provided by social workers, union representatives and other professionals of confidence is important in order to give security to the victim, allowing for these cases to be known and be investigated.

169. Apart from the protection measures offered in the criminal and labour sphere, better social assistance should therefore be provided to victims.

2.5.6. Have any recent measures been evaluated? What were the main findings?

170. At present, training campaigns are directed towards the social partners as the criminalisation of sexual harassment has only been recently introduced through Organic Act 3/2007, 22 March, on the Effective Equality of Women and Men.

2.5.7. What are the current debates about legal and procedural measures, include the key criticisms and limitations of current responses.

171. There is no current debate about legal or procedural measures regarding sexual harassment.

2.6 Harmful traditional practices

FGM, forced marriage and honour based violence are dealt with separately, but indicate whether there is recognition in law or policy of the concept of harmful traditional practices, and if so are they located in human rights/equality laws. How is the issue of culture dealt with?

172. The general and specific rules within the Spanish legal system that apply to these offences do not contain any reference whatsoever to culture or customs of the countries of origin or ethnic groups where these practices occur. The prohibition of FGM, forced marriage and honour based violence is not effectuated by means of acts on human rights or equality acts. Instead, the prohibition is regulated in the Criminal Code. Forced marriage is not expressly prohibited by the Criminal Code but is indirectly prohibited by the Civil Code. Besides, the concept of "honour based violence" does not exist in Spanish law, the Criminal Code is applied, depending on the specific offence that has been committed (maltreatment, homicide, murder, parricide).



2.6.1 Female genital mutilation

FSJ: The World Health Organisation defines female genital mutilation (FGM) as comprising all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons.

2.6.1.2. Is there specific prohibition of FGM, or has it been dealt with, if at all, through general criminal law/code and/or child protection measures? How have these approaches evolved?

173. The Spanish legal system contains a specific prohibition of FGM. Organic act 11/2003 of September 29, amending the Criminal Code, specifically typifies genital mutilation or ablation as a criminal offence: "He who causes another person to suffer any form of genital mutilation shall be punishable by imprisonment between six and twelve years." Moreover, it is provided that "if the victim is either a minor or incompetent, the offender shall be divested of parental authority, physical and legal guardianship or foster care for a period from four to ten years, if the court deems this to be in the best interest of the minor". The Organic act 11/2003 on concrete measures in the field of citizens' security, domestic violence and social integration of aliens declares in its Preamble that there are new types of crime deriving from practices contrary to the Spanish legal order. Therefore, based on the recognition of the fact that the integration of the aliens in Spain leads to new realities that should be met, the ongoing reform of the Criminal Code including the offence of FGM has been induced.

174. Furthermore, Organic Act 3/2005 of July 8, modifying Organic Act 6/1985 of July 1, on the Judiciary, adds a new letter g to paragraph 4 of art. 23 of the Judiciary Act which clears the way for extraterritorial prosecution of feminine genital mutilation by establishing that the Spanish judiciary has the competence to hear such cases if the facts were committed by Spanish or foreign nationals outside the national territory, as long as the suspects are in Spain. Although since 2003 genital mutilation has been specifically punished by the Spanish Criminal Code, there was no conviction on these grounds. Essentially the problem to prosecute these offences has been the fact that the offences occurred often during holiday trips to countries of origin of immigrants and therefore the judges faced the obstacle of the principle of territoriality. Therefore, a bill has been enacted which amended article 23 of the LOPJ in order to make genital mutilation a crime of universal jurisdiction and to allow to pursue ablations conducted overseas over people who live in Spain. This reform was adopted unanimously by the Parliament.

2.6.1.3. What protective measures are available where there are reasons to suspect a person is at risk of FGM? Are there, for example, provisions within child protection procedures? Is there any evidence of these being used?



175. At the national level, there is no applicable protocol or procedure, although the General Protocol for the Health Care Sector regarding Gender-based Violence⁴² does qualify FGM as a form of gender-based violence. At the regional level, some autonomous regions – such as Catalonia⁴³ and Aragon⁴⁴, where the biggest high-risk groups of immigrants exposed to these practices reside – do have a prevention scenario or handbook, and most regions have published information guides or leaflets intended for professionals, high-risk groups or the general population. The health care sector has the protocols for the prevention, detection and treatment of FGM.
176. When suspicion arises that someone might be at risk of suffering FGM, this will normally be reported to the public prosecutor. Most of the times, it will be health care professionals or teaching staff who are able to do so because they know the person at risk belongs to a certain ethnic group that practices FGM, a vacation in the country of origin is coming up, the family is openly in favour of FGM or sisters of the girl at risk were subjected to FGM. Although the Criminal Code does not provide any precautionary measures in case FGM is suspected to be inflicted, Spanish law does allow government bodies to intervene when minors are at risk and have no adequate protection (Organic Act 1/1996, on the Legal Protection of Minors). On these grounds, the public prosecutor for juveniles may take the following precautionary measures: summon the parents to find out what their intentions are and inform them of the consequences of FGM both to the health of the girl and from a legal point of view; the obligation to take the girl to a doctor for regular check-ups and the obligation to inform a judge in advance of any intention to take the girl abroad. If the parents are planning a trip to their country of origin and do not appear to intend to submit the girl to FGM, they may be ordered to have the girl examined before and after the trip in order to verify her condition. Conversely, if their attitude should raise suspicion, they may be forbidden to leave the country and ordered to give up their passports (or passports will be denied to them) and present the girl to a judge for verification. In Spain the standard practice is the protection in the sense of providing information to the parents on the risks of FGM and that this is a criminal offence in Spain and that it can be prosecuted even if committed abroad and that the minor can may be submitted to medical supervision. The precautionary measures are adopted only if there is a grave risk for the minor and founded suspicion that a FGM could occur. The prohibition to leave the national territory and the withdrawal of the passport are not common measures but they can be applied.
177. If one of the parents intends to submit their daughter to FGM without consent of the other parent, art. 158 of the Spanish Criminal Code enables the minor or any relative to request a judge to take the necessary measures to “remove the child from danger”, including the possibility to partially or completely divest the parent who poses the risk of custody or parental authority.
178. It is also worth mentioning that there is a children's helpline, which both children and adults can call to prevent or report cases of FGM.

⁴²General Protocol for the Health Care Sector regarding Gender-based Violence. Committee against Gender-based Violence. Interregional Council of the National Health Service. Spanish Ministry of Health and Consumer Affairs. December 2006 (in Spanish).

⁴³Prevention Handbook on feminine genital mutilation. Catalan Parliament. Working Party on Domestic Violence, July 2002 (updated 2007).

<http://www.gencat.cat/benestar/immi/pdf/ANGLESdefi.pdf>

⁴⁴Comprehensive plan for the prevention and eradication of violence against women in Aragón and the establishment of an interdepartmental committee for the prevention of female genital mutilation of the Government of Aragón (in Spanish).

http://www.hera2001.com/violenciasporhonor/Upload%5CDOC91_Guia_Mutilacion_Aragon.pdf



179. As a preventive measure to protect girls at risk, the Catalan Institute of Health (the Catalan public health service) uses medical certificates as a means to ascertain that a girl's genitals are intact and do not present any lesion. The Institute also uses letters of commitment in which the parents declare they have been informed about the risks of FGM and about its legal implications in Spain, and in which they pledge to take proper care of the girl and avoid submitting her to FGM. They also promise to take the girl to the doctor after she returns from a vacation in her country of origin. Similarly, the Catalan Midwives Association⁴⁵ proposes to carry out periodic genital examinations (every two years) as a preventive instrument to protect girls from high-risk groups. These exams are usually performed at one of the paediatric health centres of the Catalan Health Service. Currently, the autonomous regional police force of Catalonia applies the Protocol for the prevention of female genital mutilation throughout Catalonia. About 300 officers working at public service centres or in victim support groups are specialised in obtaining as much information as possible through their permanent links with schools, NGOs and immigrant associations. When a girl appears to be at risk, they will advise the public prosecutor. In this way, about 40 instances of FGM were avoided last year.

180. The Ministry of Equality has organised various nation-wide campaigns to promote the fight against this brutal form of violence against women.

2.6.1.4. Summarise and explain any barriers to the procedures against FGM.

181. There are no barriers to procedures against FGM. However, it must be said that it is not always possible to prevent this type of offence, and the family of the victim will not usually report the facts because they are involved. Generally, when it becomes clear that a minor has been submitted to FGM, the facts will either be reported by the police in order to summon the parents, by health care workers or by teaching staff. If the victim is a minor, the public prosecutor will always intervene. There are no statistical data neither on the number of judgments nor on provisional measures issued.

2.6.1.5. Have any recent measures been evaluated? What were the main findings?

182. The precautionary measures that were introduced in several autonomous regions, such as Catalonia, have been evaluated repeatedly. It becomes clear from these evaluations that prevention is the best way to fight FGM. For this reason, preventive measures are now widely applied, especially in the health care sector and by specialised police departments.

2.6.1.6. What are the current debates about legal and procedural measures, include the key criticisms and limitations of current responses.

183. Currently, there is no debate about legal and procedural rules on the subject. It should be noted that this type of offence does not occur frequently in Spain and that the specific legal definition

⁴⁵Female genital mutilation: prevention and treatment. A handbook for professionals (In Spanish). Kaplan Marcusán A. and Martínez Bueno C. (Coordinators). Catalan Midwives Association.



contained in the Criminal Code already makes criminal prosecution of FGM possible, with all corresponding guarantees.

2.6.2. Forced marriage

FSJ: The Council of Europe CAHVIO defines forced marriage in the following terms:

- Marriage conducted without the full consent of at least one of the parties
- Involving duress (emotional pressure and/or physical abuse)
- Perpetrated by family members (mostly parents)
- Perpetrated against children, adolescents and young adults, mainly female.

2.6.2.1. Is a clear distinction made in law or policy between forced and arranged marriage? How are these distinguished?

184. The Spanish legal system does not make a clear distinction between forced and voluntary marriages. Some autonomous regions that have adopted prevention protocols, such as Catalonia⁴⁶, define a forced marriage as a marriage that is concluded without the valid consent of at least one or both partners and resulting from the intervention of third persons within the family circle, usually the parents, who are in a position to impose their own choice and push the marriage through. If a forced marriage is concluded when either one or both partners are still under 18, this is also known as a premature marriage. Marriages of convenience or arranged marriages are all marriages that are used as a pretext or that use the institute of marriage as an instrument serving other purposes that are not made explicit, such as economic interests, a fast track to obtaining citizenship, etcetera. However, such marriages are all concluded with the complicity of the marriage partners, who seek to serve their own interest.

2.6.2.2. Is there specific prohibition of forced marriage, or has it been dealt with, if at all, through general criminal law/code and/or child protection measures? How have these approaches evolved?

185. The Spanish legal system does not contain any provision that specifically forbids forced marriages. According to the Civil Code, there can be no marriage without free and valid consent⁴⁷. Only emancipated minors can marry, except if they are at least 14 years old and have a marriage license issued by a court of first instance⁴⁸. Moreover, any marriage entered into as a result of coercion or grave fear is null and void, regardless of the form in which the marriage was celebrated⁴⁹. The Criminal Code does not typify forced marriage as a criminal offence, but it does contain provisions for offences that may be linked to a case of forced marriage, such as illegal detention, kidnapping, threats or coercion exercised by anyone who compels someone else to act against their will, in the

⁴⁶Procedure concerning the prevention of forced marriages and police response in such cases. (In Spanish) June 2009. http://www.observatoriovioencia.org/upload_images/File/DOC1261477108_PROCEDIMIENTO_mf_def_espanol.pdf

⁴⁷ Art. 45 Civil Code.

⁴⁸ Art. 46 and 48 Civil Code.

⁴⁹ Art. 73 Civil Code.



absence of legal authority do so⁵⁰. Consequently, it is possible to prosecute forced marriages under criminal law, even though they are not prohibited as such. Moreover, Organic Act 1/1996 on the Legal Protection of Minors, allows government bodies to intervene whenever a minor is at risk and has no adequate protection, or when the rights of a minor are being violated in any way. It is also worth noting there is a provision contained in immigration law which stipulates that a woman who has obtained her residence permit through family reunion, is entitled to a residence permit independent from her husband in case she has fallen victim to gender-based violence⁵¹.

186. In some of the Autonomous Communities, such as Catalonia, acts have been promulgated to eradicate male sexist violence. This act establishes that forced marriage constitutes a serious violation of human rights which may include all forms of gender violence. Therefore, preventive measures and care measures are established for women victim of forced marriages⁵².

2.6.2.3. Are there any protective measures where there are reasons to suspect a person is at risk of forced marriage? Are there, for example, provisions within child protection procedures or in immigration law? Is there any evidence that these have been used?

187. There are no specific protective measures with regard to forced marriage at the national level. However, there are general preventive measures that can be applied in case it is suspected someone may be forced to get married. This may be reported to the police by the person at risk, by others who know what is going on, by social services, teaching staff, etcetera. Even if the victim or third persons do not want to press charges, the police may still record the facts and decide to report them to a court and public prosecutor if they feel the situation is urgent. The judiciary may then decide if precautionary measures are warranted.

188. Furthermore, as we have mentioned before, Organic Act 1/1996 on the Legal Protection of Minors, enables the authorities to intervene in case a minor is at risk and has no adequate protection.

189. The autonomous region of Catalonia has established a Procedure concerning the prevention of forced marriages and police response in such cases. This procedure distinguishes between cases that are urgent and those that are not. The former are reported to a police court and public prosecutor, the latter are dealt with by activating a network of several parties in order to neutralise the risk. Even so, a police court and/or public prosecutor will be informed as well. Since this protocol was put into practice, a number of girls were preserved from entering into a forced marriage, at least in 12 cases since June 2009.

2.6.2.4. Do the current legal provisions result in inequities with respect to rights to marry for different communities/persons? For example, are there different ages of marriage for citizens and prospective spouses from outside the country?

⁵⁰ Art. 172 Criminal Code.

⁵¹ Royal Decree 2393/2004, of December 30, approving the Regulation emanating from Organic Act 4/2000 of January 11, on the rights and liberties of foreign nationals in Spain, and their social integration.

⁵² Act 5/2008, of April 24, of the Catalan Parliament, on the right of women to the eradication of male sexist violence.



190. Current legal provisions do not result in any inequities with respect to rights to marry for different communities or persons. As mentioned before, only adults or emancipated minors can marry minors over 14 if they have a marriage license issued by a court. These rules apply everywhere on Spanish soil and are applicable to Spanish and foreign nationals alike.

2.6.2.5. Summarise and explain any barriers to the procedures against forced marriage.

191. There are no barriers to establishing procedures against forced marriage. The main problem with this offence is that it takes place in the family circle. Generally speaking, it is the parents who force their children to marry and the victims do not report this to the authorities because of the heavy family burden they experience and the considerable damage to family relations that is to be expected, specially when the bonds with the country of origin and its customs are still close. That is why it is important to have a policy focused on prevention and information in the educational field and for third persons related to the victim to report forced marriages.

2.6.2.6. Have any recent measures been evaluated? What were the main findings?

192. There has been no evaluation of measures regarding forced marriage.

2.6.2.7. What are the current debates about legal and procedural measures, include the key criticisms and limitations of current responses.

193. There is no current debate about legal or procedural measures regarding forced marriage.

2.6.3. Honour based violence

FSJ: Council of Europe Resolution 1327 (2003) refers to honour crimes as crimes committed against women in the name of honour and based on archaic and unjust cultures and traditions.

CAHVIO defines honour-based violence as:

Psychological and physical violence, including homicide

- *Perpetrated by members of the family or the community (instigated

 - mostly by adult males but often carried out by boys below the age of
 - criminal responsibility)*
- *Perpetrated against female members of the family or the community.*

2.6.3.1. Is the concept of 'honour based violence' (or something similar) recognised in law or policy? Is it understood primarily with respect to 'honour killings' or a wider concept?

194. This concept does not exist in Spanish law. In these cases the Criminal Code is applied, depending on the specific offence that has been committed (maltreatment, homicide, murder, parricide) and



the aggravating circumstances applicable to the case (abuse of authority, parentage, victim under age). The offence "honour based violence" however cannot be found in the Criminal Code.

2.6.3.2. Are there specific legal provisions against 'honour based violence' or is it addressed through the general criminal law/code? Are these provisions considered sufficient and effective?

195. Not applicable for lack of criminal provision. Within the Spanish legal system, the *nulla poena sine lege* principle (established in Article 25.1 of the Spanish Constitution) is strictly applied and, thus, Judges are not entitled to apply "practices" if there is no criminal provision.

2.6.3.3. Can, under criminal law 'honour' aggravate or mitigate an offence? If so please explain how this affects the court's sentencing options.

196. Not applicable for lack of criminal provision.

2.6.3.4. What protective measures are available to victims of honour-based violence before, during and after criminal proceedings?

197. Not applicable for lack of criminal provision.

2.6.3.5. Summarize and explain any barriers to the procedures against honour-based violence.

198. No specific barriers exist, nor has any legal or social debate taken place on the subject. The media and press rarely draw attention to the commitment of so-called "crimes of honour", as a result of which there is very little social awareness regarding this issue.

2.6.3.6. Have any recent measures been evaluated? What were the main findings?

199. Not applicable for lack of criminal provision.

2.6.3.7. What are the current debates about legal and procedural measures, include the key criticisms and limitations of current responses.

200. No social, political or legal debate on the subject can be appreciated. Some NGOs have warned about the possible existence of "crimes of honour", but this has not led to a clear social awareness of its existence. Due to the current lack of legal regulation of "crimes of honour", it would be desirable its inclusion as a crime within forthcoming Criminal Code reforms.



2.7 Integrated policies/ plans of action

2.7.1. The UN and COE require integrated measures to address VAW, preferably within a national plan of action. Is there such a policy/NAP and what forms of violence does it cover? Is there a single policy on all forms of violence against women or are specific forms of violence against women are addressed in separate policies? How has policy developed over the last decade, how far are they framed in terms of human rights and/or equality?

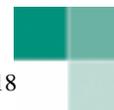
201. The Spanish Parliament unanimously approved Organic Act 1/2004, of 28 December, on Comprehensive Protection Measures against Gender Violence. This integrated act obliges (art. 3.1) to adopt a National Plan for the Raising of Awareness regarding, and the Prevention of Gender Violence "in order to introduce in society new sets of values based on the respect for fundamental rights and freedoms and the equality of men and women, as well as based on the exercise of tolerance and freedom within the framework of democratic social relations, all this from a gender perspective". The Plan should further be directed "to both men and women through community and intercultural activities". The First Plan was adopted on 15 December 2006, when it was approved by the Council of Ministers⁵³.

202. In addition, being an Integrated Act affecting various fields, it also contemplates the adoption of several sector plans. Such as: Plans for initial and permanent training of professors, which include training in the field of gender violence (art. 7); National Health Plans, also including measures regarding gender violence (art. 15.4); the Employment Plan for the Kingdom of Spain, including a specific programme for the victims of this type of violence (art. 22); and Plans for Collaboration, involving the health authorities, the judicial authorities, the security forces and bodies, as well as the social services and equality organisms, for the purpose of prevention, assistance and prosecution of cases of gender violence (art. 32). Furthermore, on 9 January 2009 the Council of Ministers adopted the "Plan for the Care and Prevention of Gender Violence under the Immigrant Population" (2009-2012). The objective of this Plan is to extend resources to the immigrant population and create adequate conditions for the prevention of this type of violence and the provision of care from a global perspective, given the fact that the higher dependence of these women on their aggressors, due to the lack of social support and family networks, leads to an increased insecurity when they have to end a violent relationship.

203. The basic goals of the National Plan for the Raising of Awareness regarding, and the Prevention of Gender Violence are, as its name indicates, prevention and the raising of awareness. It defines as strategic objectives an improved response to gender violence as well as attaining a change of model in social relationships based on citizenship, autonomy and the empowerment of women. The action fields of the Plan are: justice, security, health, social services, information, education and communication. The transversal lines of action that seek to guarantee the effectiveness of the Plan are: study and research, training and specialisation of professionals, mobilisation of agents, coordination, follow-up and evaluation.

⁵³ Website regarding the Plan (only Spanish):

<http://www.migualdad.es/ss/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadername1=Content-disposition&blobheadervalue1=inline&blobkey=id&blobtable=MungoBlobs&blobwhere=1244651908207&ssbinary=true>



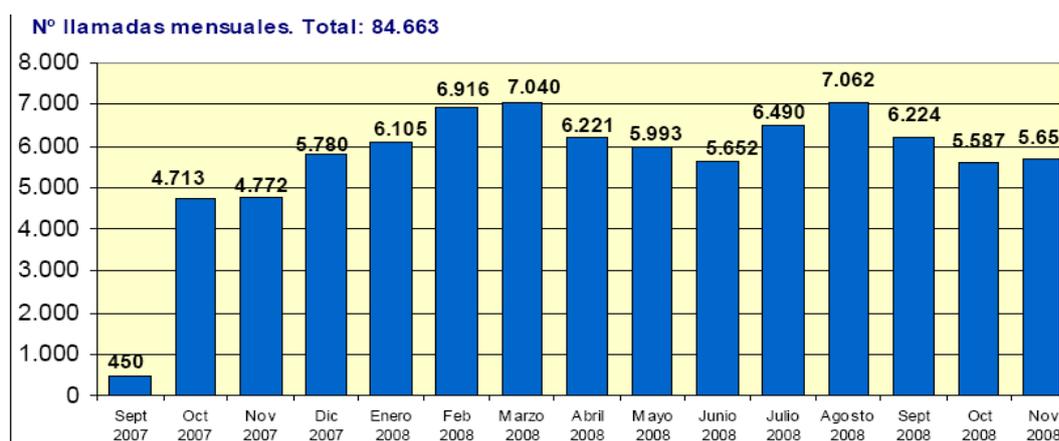
204. In the framework of the National Plan a permanent alert phone number has been created (016), which can be reached 24x365, offering personal and professional help in Spanish, Catalan, Galician, Basque, English, French, German, Arab, Bulgarian, Chinese, Portuguese, Rumanian and Russian. Persons with auditive handicaps can call the number 900 116 016, which connects directly with the emergency services or the administrative agencies involved in the fight against gender violence and which have national coverage.

205. It should also be pointed out that the Autonomous Communities, within their sphere of competence, have also elaborated plans to combat gender violence.

2.7.2. Are there monitoring mechanisms in respect of implementation of national policy/policies and/or NAP/s, and what resources are allocated for its implementation? Have NAP's been renewed in the last decade, and if so how have to priorities for action changed?

206. Within the framework of the Plan a Commission has been created that should annually review the level of accomplishment of the measures taken under the Plan and the progress made in attaining its strategic objectives, taking into consideration that the effects of some of these are long-term. This evaluation will also allow to identify good practices which should lead to the consolidation of effective intervention methods, the analysis of obstacles to its implementation and the formulation of new action proposals. The annual reports will be presented to the Council of Ministers through the Special Government Delegation of Gender Violence.

207. The 24x365 phone number are also monitored. The last available report⁵⁴ provides the following data (number of monthly calls):



⁵⁴ Website (only in Spanish) offering multiple analyses on victims, profiles, circumstances, etc.:

<http://www.migualdad.es/ss/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobheadername1=Content-disposition&blobheadervalue1=inline&blobkey=id&blobtable=MungoBlobs&blobwhere=1244651907929&ssbinary=true>



208. In addition, the State Observatory on Violence against Women has been created⁵⁵, a collegiate inter-ministerial body attached to the Ministry of Equality through the Government Delegation on Gender Violence, which is responsible for providing advice, evaluations, institutional collaboration, elaboration of reports and studies, and formulating action proposals in the field of gender violence. The observatory offers statistical information (including the monthly and yearly reports drafted since its creation) as well as the text of the reports that have been elaborated in Spanish, French and English (the reports are published annually and on certain issues executive reports are available). Some Autonomous Communities have created similar bodies.
209. Moreover, the General Council of the Judiciary (governing body of the judiciary) has created the Observatory on Domestic and Gender Violence⁵⁶. The constitutive act of the Observatory was signed on 26 September 2002. At present, it is composed of the following institutions: the General Council of the Judiciary (CGPJ), which holds the presidency, the Ministry of Justice, the Ministry of Equality, the Government Prosecutor's Office, the Autonomous Communities with competences in the field of justice, by annual rotation, and the General Council of Spanish Lawyers. Amongst the different objectives that justified the creation of the Observatory the following should be mentioned: increase the effectiveness of actions in the judicial field for the eradication of these types of violence; enhancing the coordination between the participating institutions by elaborating action protocols; performing studies and analyses of judicial rulings and proposing legislative reforms; statistical monitoring of the phenomenon in the judicial field; design and promote a plan for the specialized training of judges, prosecutors and supporting staff of the judiciary. The Observatory elaborates quarterly reports on domestic and gender violence, with data arranged by judicial districts. It also offers statistical data on the application of judicial protection orders for the victims of gender violence; these data originate from the creation of the Monitoring Committee for the implementation of the Act regulating the protection order for victims of domestic violence, established by the Second additional provision of Act 27/2003, of 31 July. The latest statistical data published by the Observatory of the Council refer to the year 2009.
210. Are there monitoring mechanisms in respect of implementation of national policy/policies and/or NAP/s, and what resources are allocated for its implementation? Have NAP's been renewed in the last decade, and if so how have to priorities for action changed?
211. Within the framework of the Plan a Commission has been created that should annually review the level of accomplishment of the measures taken under the Plan and the progress made in attaining its strategic objectives, taking into consideration that the effects of some of these are long-term. This evaluation will also allow to identify good practices which should lead to the consolidation of effective intervention methods, the analysis of obstacles to its implementation and the formulation of new action proposals. The annual reports will be presented to the Council of Ministers through the Special Government Delegation of Gender Violence.

⁵⁵ Created by Royal Decree 253/2006, of 3 March. Website:

http://www.migualdad.es/ss/Satellite?c=Page&cid=1193047406913&language=en_GB&pagename=MinisterioIgualdad%2FFP age%2FMIGU_contenidoFinal

⁵⁶ Website: <http://www.poderjudicial.es/eversuite/GetRecords?Template=cgpj/cgpi/principal.htm> (only in Spanish).



212. In addition, the State Observatory on Violence against Women has been created⁵⁷, a collegiate inter-ministerial body attached to the Ministry of Equality through the Government Delegation on Gender Violence, which is responsible for providing advice, evaluations, institutional collaboration, elaboration of reports and studies, and formulating action proposals in the field of gender violence. The observatory offers statistical information (including the monthly and yearly reports drafted since its creation) as well as the text of the reports that have been elaborated in Spanish, French and English (the reports are published annually and on certain issues executive reports are available). Some Autonomous Communities have created similar bodies.

213. Moreover, the General Council of the Judiciary (governing body of the judiciary) has created the Observatory on Domestic and Gender Violence⁵⁸. The constitutive act of the Observatory was signed on 26 September 2002. At present, it is composed of the following institutions: the General Council of the Judiciary (CGPJ), which holds the presidency, the Ministry of Justice, the Ministry of Equality, the Government Prosecutor's Office, the Autonomous Communities with competences in the field of justice, by annual rotation, and the General Council of Spanish Lawyers. Amongst the different objectives that justified the creation of the Observatory the following should be mentioned: increase the effectiveness of actions in the judicial field for the eradication of these types of violence; enhancing the coordination between the participating institutions by elaborating action protocols; performing studies and analyses of judicial rulings and proposing legislative reforms; statistical monitoring of the phenomenon in the judicial field; design and promote a plan for the specialized training of judges, prosecutors and supporting staff of the judiciary. The Observatory elaborates quarterly reports on domestic and gender violence, with data arranged by judicial districts. It also offers statistical data on the application of judicial protection orders for the victims of gender violence; these data originate from the creation of the Monitoring Committee for the implementation of the Act regulating the protection order for victims of domestic violence, established by the Second additional provision of Act 27/2003, of 31 July. The latest statistical data published by the Observatory of the Council refer to the year 2009.

2.8 New directions, proposals for reform and current debates

2.8.1. Please address here any recent legislative or policy changes affecting measures and strategies to combat violence against women, current debates, pending legal reforms.

214. As explained, the main Spanish legislation on gender violence is fairly recent. The protection order is created in 2003 and the Integrated Act in 2004. These acts lead to the creation of Plans regarding different areas, and of different Observatories. It should be noted that the Constitutional Court repeatedly declared the Integrated Act of 2004 to be constitutional; the act was challenged by different sectors using different legal techniques for establishing higher sanctions for male perpetrators of gender violence. Constitutional Court Decisions had their origin in several unconstitutionality questions raised by several judges. Those aimed to state that imposing higher

⁵⁷ Created by Royal Decree 253/2006, of 3 March. Website:

http://www.migualdad.es/ss/Satellite?c=Page&cid=1193047406913&language=en_GB&pagename=MinisterioIguadad%2FFP age%2FMIGU_contenidoFinal

⁵⁸ Website: <http://www.poderjudicial.es/eversuite/GetRecords?Template=cgpj/cgpj/principal.htm> (only in Spanish).



penalties to male offenders for gender crimes was not against Article 14 of the Spanish Constitution, which prohibits any discrimination due to gender.

2.8.2. Has the trend in national thinking on issues of violence against women changed in the last decade and if so how.

215. The reply to the previous question also covers this question.



3. Legal measures on violence against children

3.1 Child sexual abuse

FSJ: The CRC calls on states “to protect the child from all forms of... sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child”. The Council of Europe draft guidelines refer to the Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, and define sexual abuse as “engaging in sexual activities with a child” under any of number of conditions (child not having reached the age of consent, using coercion, abusing a position of trust, etc.)

For the purpose of this study, child sexual abuse means

- a) Forcing or enticing a child to take part in, or to be present at, sexual activities, including:
- (i) penetrative and non-penetrative sexual acts, and
 - (ii) contact and non-contact sexual activities.

Consensual sexual activities between minors do not fall under this definition.

3.1.1 How have legal measures developed to address sexual violence against children? Are cases involving family members treated differently from those with perpetrators who are not family members? For example, are non-family cases dealt with primarily through criminal law, whilst ‘incest’ is not. [128 a] Please also describe in detail what happens when youth welfare authorities have reasonable grounds to suspect child sexual abuse.

216. Offences related to sexual abuse are punishable under Title VIII of the Spanish Criminal Code, on “Offences against sexual indemnity and the right to sexual self-determination”. In case of sexual assault or abuse, punishment is aggravated if the victim is under 13 years of age⁵⁹. The Criminal Code contains another aggravating circumstance, namely if the offence was committed by someone who is either in a position of authority or control over the victim or a relative, be it in ascending or descending line or as a brother or sister, either by birth, by adoption or as an in-law⁶⁰. Sexual abuse of a person over 13 but under 16 is also considered an offence if the victim was deceived⁶¹.

217. In addition, the Civil Code establishes that parents can be completely or partially divested of their parental authority following a criminal conviction⁶². The same applies to legal or natural guardians.

218. When there is reason to believe that some sort of child abuse is or may be going on, it is possible to apply the measures contained in Organic Act 1/1996, of January 15, on the Legal Protection of

⁵⁹Arts. 180.3, 181.2 Criminal Code.

⁶⁰ Art. 180.4 Criminal Code.

⁶¹ Art. 183 Criminal Code.

⁶² Art. 170 Civil Code.



Minors. This act partially modifies the Civil Code and the Civil Procedure Act. It lays down the general principles of legal intervention in cases where minors are not properly cared for, including the responsibility of the government to investigate facts that come to their attention so that corrective action may be taken through social services or, if need be, by assuming legal guardianship. The competence to apply protective measures in favour of minors is attributed to the autonomous communities, which is why they have their own acts on child protection. However, local authorities also have some possibilities to take action, for example by assessing situations where minors may be at risk and by intervening in cases where it is not necessary to acquire legal guardianship.

3.1.2. How have procedures for investigation and prosecution developed? Are there specialist police officers/prosecutors/judges, and if so is there any evidence that this is more effective?

219. The formal investigation of sexual offences against children begins when the facts are reported to the nearest police officer. The offence may be reported by the victim or by any other person who knows what happened because they are close to the victim. Most of the time, these will be family members, social or health care services or teachers. The police may also start an investigation by itself if they know about the offence. All national police forces have specialised branches, and when a police officer learns about cases of child abuse, not only will the police take any action that is urgently required, they will also immediately hand over the investigation to specialised branches of the judicial police, which are the Juvenile Branches (Spanish acronym: GRUMEs) of the National Police Force and the Special Investigators for Women and Juveniles (Spanish acronym: EMUMEs) of the Guardia Civil.

220. The autonomous communities that have their own police forces (Catalonia and the Basque Country) also have teams of specialised investigators, who were specially trained to deal with this sort of offences. Their main tasks are to see to all the aspects of the criminal investigation, to follow the case until it is completely solved and take care of all the necessary formalities, offering personal assistance to the victims. Moreover, they give advice about the procedures that are to be followed and the resources that are available to assist other territorial units and maintain contact with government bodies at all levels (national, autonomic and local) and with other organizations that are active in this field, in order to further prevention and support. The special investigators will train others, write abstracts of their operations and elaborate protocols containing generally applicable guidelines. Furthermore, if procedures and techniques are to be used that are common to the investigation of any other crime (verify the veracity of the facts, take the necessary steps to ensure the safety of the victims, collect evidence, identify and track down the alleged offenders so they can be brought before the law, hear witnesses, etc.), in the case of sexual offences against minors it is imperative that the medical examination of the victim and police interviews with the victim are carried out in accordance with the instructions of specialists, doctors, psychologists or educators. Paragraph 221 continues developing Paragraph 220 contents.

221. The Office of the Public Prosecutor has a specialised juvenile section. The juvenile prosecutors have several specific competences, such as to receive reports on offences, bring them before the court or dismiss them, take the necessary steps to clarify the facts that were reported to or by the police. They also intervene directly or by instructing the juvenile sections of the courts in criminal or



civil procedures concerning the protection of minors that are deemed to be of special importance by the Prosecutor-General.

222. Besides their other duties, juvenile prosecutors draw up annual reports about the procedures that were followed and the actions taken by the Office of the Public Prosecutor with regard to the protection of minors and related reforms. The prosecutors propose reforms in order to facilitate an active and efficient role of the public prosecutor in relation to the protection of minors. Juvenile prosecutors also elaborate action protocols and handbooks that can be used in this field. Naturally, the juvenile prosecutors will protect the rights of minors throughout legal procedures.

223. Although there are no specialised courts for the protection of minors affected by sexual offences, in the main cities of Spain there are judges who have developed a de facto specialisation in offences committed against minors. These judges have received special training to this effect.

224. Typically, specialised units of the judicial police and the juvenile prosecutor will always intervene in these cases, but some courts do not have judges that are specialised in offences against minors. Generally speaking, however, most courts in the main cities of Spain do employ specialised staff and this has proved to be effective. As it can be examined in previous paragraphs, the difference between ordinary criminal proceedings and criminal proceedings involving minors is that in those last proceedings all professionals involved (police officers/prosecutors/judges) are specialized in topics regarding minors. Thus, as previously stated, during all actions performed in these proceedings, especially regarding testifying and entry in appearance, intrinsic characteristics of minors are taken into account.

3.1.3. Summarize the main framework for approaching sexual crime against children. Is the concept of 'rape' used, are there other equivalent (in terms of sentencing/seriousness) offences and how are they named/defined? Is there any way in which the concepts of force or consent come into play? Has the legal definition of child sexual abuse been extended in recent years. What is the rationale underpinning these changes?

225. There are no separately typified offences concerning sexual delinquency against children.

226. The Criminal Code makes a distinction between sexual assault and sexual abuse. Sexual assault consists in violating another person's right to sexual self-determination by means of force or intimidation. Sexual abuse is defined as acts that consist in violating another person's right to sexual self-determination or indemnity without the use of force or intimidation but without consent, or directed against minors under the age of 13. When the victim is between 13 and 16 years old and was deceived by the offender, this is also considered a form of sexual abuse. The basic penalty for sexual assault is higher than for sexual abuse. Aggravated sexual assault is presumed when the victim is under 13, when the offender and the victim are related or when the offender holds a position of authority or control over the victim.

227. There is no specific legal definition of sexual abuse of minors. Even though, currently, there is no legal definition to sexual abuse of minors, crimes against minors have attached aggravated and



specific penalties. Furthermore, as previously stated, the new Criminal Code reform in process (Organic Act Project to amend Organic Act 10/1995, of November 23, of the Criminal Code) contains a specific chapter named "Of abuses and sexual aggressions of minors under thirteen years old", where sexual aggressions and sexual abuse are separately categorized.

3.1.4. Are there protective measures available to child victims during an investigation/prosecution, including if they give evidence in court – for example, video recorded evidence, giving evidence by video link or behind a screen. Are there measures such as civil protection orders that can be requested when prosecution is not instituted?

228. Yes, there are protective measures specifically for minors who are victims of sexual offences, from the moment the facts are reported on and throughout legal proceedings.

229. When facts are reported to the police concerning sexual offences against minors, the specialised judicial police units at the national or autonomic level that handle such cases will, as a matter of course, make sure that the victim receives a medical examination and that the victim is interviewed in accordance with the instructions of specialists, doctors, psychologists or educators. When child victims are interviewed, not only will the police always respect the rights of the child, but also take into account the limited comprehension and attention span of a child. The police will try to work with the child and conduct the interviews in an appropriate, neutral setting. Normally, interviews will be videotaped because this provides a clear record of the child's deposition and because use of the video recording may prevent the child from being exposed to further interviews. The interviews are conducted by specialised police investigators (the child may choose a man or a woman) and if the child is still of preschool age, specialists such as psychologists, educators or social workers are available and adults known and trusted by the child may be present to put the child at ease. All police forces have internal handbooks containing recommendations from various sources.

230. Article 9.1 of Organic Act 1/1996 of January 15, on the Legal Protection of Minors, which applies to any kind of judicial procedure, stipulates that all court appearances of a minor shall take place in a manner that is compatible with the personal situation and the level of development of the child and respectful of its privacy.

231. With regard to the stage at which preliminary hearings take place, it is worth noting that Organic Act 8/2006, which reforms the Criminal Procedure Act, establishes that "all depositions by minors may be given in the presence of experts and always in the presence of a public prosecutor. Whoever exercises parental authority, legal guardianship or care of the child may be present, except if they are indicted for a criminal offence or, exceptionally, if the acting judge takes a duly motivated decision to the contrary. The judge may grant permission to record the deposition⁶³." Consequently, depositions by a minor at the stage of preliminary investigation will inevitably be given in the presence of the examining magistrate, the court registrar and the public prosecutor. In this type of cases, the Office of the Public Prosecutor is guided by Circular (official guideline) 3/2009 of November 10, on the protection of minors who are victims or witnesses⁶⁴. This administrative instruction is based on international principles governing this subject and on several

⁶³Art. 433.3 Act on Criminal Procedure.

⁶⁴Circular 3/2009 of November 10, on the protection of minors who are victims or witnesses (in Spanish) (PDF: 332 Kb).



rulings of the ECHR. In an extensive and detailed manner, it specifies how minors who are either victims or witnesses to a crime should be interviewed and treated.

232. During the trial, the Public Prosecutor may agree to accept as evidence statements made by a minor before the formal trial, in case the child is so young or particularly vulnerable that it may suffer serious psychological damage if it is compelled to appear in court to give oral testimony. Moreover, in case essential evidence is supplied by children under six years of age, these must be interviewed with the help of specialists and in an appropriate environment. The defence must be enabled to ask them questions through third persons. Such interviews will always be recorded in the presence of the court registrar.

233. Furthermore, when minors testify, a visual confrontation with the accused will be avoided by using whatever technical means necessary to enable the witness to give evidence without being seen, for example by putting up a screen or by seating the child where it cannot be seen by the accused, the use of video conferencing, one-way mirrors, etc.).

234. We note that each autonomous community has its own acts with regard to minors, so practical guidelines and the interaction with minors may vary according to these acts.

235. When it comes to the protection of minors under civil law, Organic Act 1/1996 of January 15, on the Legal Protection of Minors, provides that when a minor is at risk or lacks proper care, the responsible government body shall take the appropriate protective measures. When a child is at risk, the authorities will see to it that its parents, legal guardians or caretakers fulfil their responsibilities and they will facilitate access to any services in every area relevant to the child's development. Lack of proper care is assumed either when the duty of care as elaborated in the legislation regarding the care for minors cannot be or is not (adequately) performed, or when minors do not receive the moral or material support they need. This may lead to the administration assuming legal guardianship or care⁶⁵.

236. In case a minor is submitted to violence that may be characterised as gender-based violence, Organic Act 1/2004 of December 28, on comprehensive protection measures against gender-based violence, provides that minors are entitled to comprehensive support by social services, who must employ staff specially trained to take care of minors. In such cases, the Courts for Violence against Women are competent to hear both the criminal and civil aspects of the case.

3.1.5. What is the legal status of a child victim of sexual abuse/violence? Are there any ways in which they can participate in the case, other than by giving evidence? Are there any age restrictions for children giving evidence?

237. There is no specific legal status for child victims of violence or sexual abuse. In such cases, minors are considered as victims from the moment it becomes clear an offence may have been committed against them. This triggers all protection measures that are available to the legal system (social services, opening a special protection dossier if need be, etc.) When the victim is under-age, his image and privacy will also be protected.

⁶⁵Arts. 172 and further of the Civil Code.



238. Generally speaking, minors may participate in a court case only if they have been victims of a crime and, consequently, witnessed the offence. Although a minor may report an offence, particular charges will be filed by their legal representative through the compulsory intervention of the public prosecutor.

239. As mentioned before, Article 9.1 of Organic Act 1/1996 of January 15, on the Legal Protection of Minors, which applies to any kind of judicial procedure, stipulates that all court appearances of a minor shall take place in a manner that is compatible with the personal situation and the level of development of the child and is respectful of its privacy.

240. There is no specific legal restriction on testimony given by minors. However, according to the guidelines contained in Circular 3/2009 of November 10, on the protection of minors who are victims or witnesses, the juvenile branch of the Office of the Public Prosecutor distinguishes between different age groups.

241. The lower age limit for children to be allowed to give evidence is about three. At this age, the proof provided by expert psychologists is of overriding importance because of the limited cognitive and reading skills of the child. Children between the ages of 2 to 3 and 6 to 7 years old are limited in their capacity to give evidence and should therefore be involved in the proceedings as little as possible. The cognitive faculties of children between the ages of 6 to 7 and 10 to 11 are already more developed, and adolescents up to 16 have the same verbal skills and cognitive development as an adult, but may be affected by what they have endured.

242. As explained above, with regard to the application of all kinds of judicial procedures, Organic Act 1/1996, of 15 January, on the legal protection of minors states in art. 9.1 that the judicial appearances of minors will take place taking into account the personal situation and development of the child, seeking to preserve his intimacy.

243. No legal restriction exists regarding minors acting as witnesses.

244. However, as can be deduced from the guidelines contained in Circular 3/2009, of 10 November, of the Juvenile Prosecutor regarding minors who are victims and witnesses, there is an age limit for child witnesses, which is fixed at around three years, where the psychological evidence provided by experts is prevalent due to the limited cognitive-lexic capacity of the minor; children between 2/3 and 6/7 years old who show limitations as witnesses and whose participation in trial proceedings should be limited as much as possible; children between 6/7 and 10/11 years old whose cognitive capacities are more developed and adolescents up to 16 years whose verbal capacities and cognitive development do not differ from that of adults, but who may present alterations do to victimization.

3.1.6. Has there been any debate/changes recently with respect to sentencing? Is there any data on the actual sentences given, and the extent to which they cluster closer to the minimum/maximum.

245. There is no debate about recent changes with respect to sentencing. However, the Houses of Parliament are currently debating a bill to modify Organic Act 10/1995 of November 23, on the Criminal Code, which establishes that, if someone is sentenced to imprisonment for five years or



more for committing a sexual offence against a minor under 13, the open penitentiary regime intended for prisoners classified as “third-degree” may not be granted under any circumstance until half of the prison term has been served. This means that it is made impossible for convicts that have good prospects of social reintegration to advance the moment in which they are granted the benefits of an open prison regime. This proposal would make the situation of sexual offenders comparable to the position of terrorists and members of criminal organizations.

246. There are no complete statistics on the sentences given for this type of offences, nor about the actual duration of the corresponding prison terms.

3.1.7. Summarise and explain any barriers to the prosecution of child sexual abuse. [134 a] Does the principle of the “best interest of the child” enter into decisions on whether to pursue criminal investigation or prosecution?

247. Generally speaking, there are no barriers to the prosecution of child sexual abuse. Nevertheless, prosecution is hampered by the fact that these offences are not easily reported because they are often committed within the family circle. Besides this, proof in these cases generally depends on the evidence given by the affected minors, and if no clear and reliable testimony is given, an alleged offender may sometimes be acquitted for lack of evidence. In any legal procedure in which a minor is involved, the best interest of the child will be taken into account, both when taking protective measures and later on, in case measures with regard to the minor's parents or guardians are called for. In the context of legal proceedings, the “best interest of the child” is taken into account mainly when it comes to minors giving evidence, because sometimes having to recall the sexual abuse may affect them adversely. For this reason, the need for them to give evidence is reduced as much as possible.

3.1.8. Have any recent measures been evaluated? What were the main findings?

248. In some cases, specific measures have been evaluated concerning the specialisation of professionals who deal with this kind of offences (national and autonomous police, Guardia civil, public prosecutor). These evaluations consider that special training is of utmost importance and contributes to improving both the prosecution of the offence and the protection of the victim. Since 1999, Spain has a national Youth Observatory. Its goal is to monitor the current situation of children in Spain and to propose social policies to develop improvements in all areas that are important to children. The evaluation of specific measures is made by each specialized sector professional in a national and in an Autonomous Community range (Autonomous Communities hold Childhood competences, and have Childhood observatories). The Youth Observatory, in a national range, joins and holds relationships with Autonomous Communities, local Councils and international institutions, and receives information about measures and activities implemented by Public Administrations in this subject matter, but it does not evaluate the implementation of any of those specific measures.

3.1.9. What are the current debates about legal and procedural measures, include the key criticisms and limitations of current responses.



249. The criticisms voiced by political opposition parties and social actors (specialised NGOs, social services etc.), generally boil down to the lack of social reintegration of offenders who were convicted for offences against minors. Therefore the idea is promoted to make it mandatory for these offenders to serve the entire duration of their sentence and to set up a paedophile register to which police and security forces should have unrestricted access. It is also being proposed that the judiciary should be reformed so as to enhance its possibilities to avoid proceedings being delayed and to improve the enforcement of judicial orders issued in relation to sexual offences against minors.
250. Currently, the Senate is discussing a bill that has recently been approved by the Congress of Deputies, which modifies Organic Act 10/1995 of November 23, on the Criminal Code. As we have mentioned before, this bill makes it possible to compel sexual offenders convicted to a prison sentence of five years or more to serve at least half of their jail term.
251. Furthermore, a new probationary measure called "supervised release" is being introduced. A probation period is imposed together with the jail sentence and starts when imprisonment ends. Generally, the probation period amounts to a maximum of five years and may be revised annually, but it can be extended up to ten years. This accompanying measure is intended essentially for sexual offences. In crimes against sexual freedom and sexual identity, supervised release is a security measure (not a confinement measure) imposed by Courts (the length of the measure will vary from five to ten years, if any of the crimes committed were deemed as serious, or from one to five years if any of the crimes committed were deemed as less serious; in this case, provided that the offender has committed just one offense and it is his/her first offense, the Court shall impose a supervised release measure depending on the minor dangerousness of the offender). The supervised release measure is imposed by means of a Court decision jointly with a confinement penalty. It will be executed once the confinement is over, and it shall be made effective, when the confinement is reaching to its end, depending on the dangerousness forecast. Within the process in order to determine the supervised release measure contents, and its possible substitution, modification, suspension or cease, the Parole Board judge (informed by the penitentiary services' specialists and professionals of the situation, offender's progress, its rehabilitation degree, and the possible re-offense and crime reiteration forecast) and the Court or Judge issuing the Decision in charge of executing it participate. It will be reviewed on a yearly basis. It will be determined in one or several measures implying an amount of limitations, obligations, prohibitions, or behaviour rules; such as i.e.: the obligation to be always traceable by the use of electronic devices allowing permanent localization, the obligation to stand periodically before the Judge, the obligation to communicate any change of residence or job or to be absent from a certain territory without the Court's authorization, the prohibition to approach or contact the victim or the persons determined by the Judge, the prohibition to develop certain activities that shall offer or provide the chance to commit crimes of the same type, the obligation to participate in learning programs and to follow medical treatments.
252. In view of the particular vulnerability of minors in relation to sexual offences, it was deemed necessary to reform the classification of sexual offences by typifying sexual offences against minors apart from the articles that apply to adult victims. This has been done by adding a Chapter II bis to Title VIII of Book II of the Criminal Code. This chapter is entitled "On sexual abuse and sexual assault of minors". Moreover, the government wanted to incorporate Council Framework Decision 2004/68/JHA of 22 December 2003 "on combating the sexual exploitation of children and child



pornography" into the Spanish legal system. In this Decision, a child is defined as anyone under 18, which does not coincide with the age of sexual consent laid down in the Spanish Criminal Code. For this reason, and in order to safeguard adequate protection for youngsters between the age of 13 and 18, the prison terms for sexual assault have been raised and now stand at 5 to 10 years imprisonment or 12 to 15 years if the victim is deemed to be particularly vulnerable because of their age. Several new offences have been defined, such as soliciting children to participate in pornographic performances (art. 189 Criminal Code) and gaining financial benefit involving the participation of children. Finally, divestment of parental authority is introduced as a criminal sanction (within the catalogue of sanctions that deprive offenders of certain rights).

3.1.10. Include a section on sexual exploitation of children – pornography, prostitution and trafficking addressing the above questions, to the extent that laws and procedures are different.

253. The acts regulating these offences are the same; the Criminal Code and the procedures applied are not different either.

3.2 Physical abuse and neglect

FSJ: The Committee on the Rights of the Child has made explicit that the duty to "protect the child from all forms of physical and mental violence, injury or abuse" includes "all forms of corporal punishment, however light", defined as "the deliberate and punitive use of force to cause some degree of pain, discomfort or humiliation to children". More generally, physical abuse is subsumed under the broader category of "neglect".

3.2.1. How are the relations between agencies offering help and support on the one hand and the criminal justice system on the other legally framed? Are there legal provisions, regulations or procedural rules defining the authority and responsibility of each institution to act? Are there provisions to ensure their cooperation, does the interaction depend on the discretion and decisions of regional actors? Do the two systems of intervention operate independently for the most part? How does this differ depending on the type of violence which is identified as a threat to the child?

254. In Spain several children's Observatories exist. On a national level, the Children's Observatory forms part of the Ministry for Health and Social Policies. It is composed of representatives of various ministries, the Autonomous Communities, some local entities and various social organisations. Several Autonomous Communities have created similar observatories (Catalonia, Andalusia and Asturias; Basque Country and Valencia have created a combined family and children's observatory) as the competencies in this area are shared between the State and the Autonomous Communities. There exist various organisations recognized by public entities which, by virtue of agreements and subsidies, manage programmes set up by the public authorities. There



is also a Spanish Observatory, which is more of a centre offering resources and legal information and which is specialized in educational issues⁶⁶.

255. In addition, there are ombudsmen specialized in the protection of children (e.g. the Children's Ombudsman of the Community of Madrid, the Community of Andalusia, Navarra and the Balearic Islands). The general Ombudsman in Catalonia is assisted by a deputy ombudsman for the protection of children's rights. In the case of the Spanish Ombudsman the protection of children forms part of his general competencies.

256. The Spanish judiciary, on the other hand, has created a specialized jurisdiction for minors, which maintains contacts with the public entities responsible for the protection of minors (e.g. the Directorate-General for the Protection of Children in Catalonia - DGAI). The Public Prosecutor's Office, being the institution responsible for defending citizens' rights, also holds competencies regarding the protection of children's rights. Judges and prosecutors act both in civil and criminal cases; in civil cases in order to protect minors as long as no offence has been committed; in criminal cases where a crime or misdemeanour has been committed against a minor or when a minor commits acts penalized by the Criminal Code.

257. In civil cases (family law, children with special problems, abandonment, etc.) the acts applied are the Spanish Civil Code, Organic Act 1/1996, of 15 January, on the legal protection of minors, and/or the civil regulations of the Autonomous Communities with legislative competencies in this area. In criminal cases (crimes and misdemeanours) the Criminal Code is applied and/or Organic Act 1/1996, of 15 January, on the legal protection of minors. The regulations concerning the various Observatories and Ombudsmen are of an administrative nature.

258. Each of these institutions acts within the scope of its competencies established by law, both at the State level and at the level of the Autonomous Communities.

3.2.2. To what extent and how are child protection and intervention strongly encouraged or legally obligated to follow centralised or decentralised guidelines? Are these publicly available guidelines or internal instructions?

259. The entities for the protection of children operate at the level of the Autonomous Communities. They are public entities which operate in coordination with municipal entities (generally only in larger towns and cities) and specialized NGOs. Most Autonomous Communities have adopted acts for the protection of children within their own spheres of competence. However, not all Autonomous Communities have the same competencies, as some of them (e.g. Catalonia) have their own Civil Code and their own acts on the protection of children, giving rise to autonomous models of children's protection. Most Autonomous Communities apply the State regulations, as well as the Spanish Civil Code; they have their own entities implementing the protection of children, but without using a model of their own. These different levels of competency imply that while, on the hand, all Autonomous Communities have to ensure a minimum level of protection based on State regulations, the complementary standards of protection depend on the collaboration between the

⁶⁶ Access through www.orientaeduc.com, though (free) registration is required to consult the contents.



State and each particular Autonomous Community and the additional protection each community can offer based on its own legislation.

260. In cases concerning violence against children on the grounds of gender Organic Act 1/2004, of 28 December, on Comprehensive Protection Measures against Gender Violence is also applied.

261. In addition, various action protocols exist, both on a national level and on the level of the Autonomous Communities. These protocols are rules of an internal nature, normally circulars or ministerial orders (or the equivalent in the Autonomous Communities), which do not have independent legal value (they are subordinated to the law and normally their adoption is provided for in legal texts) and which regulate the administrative practice in the relevant territory. These protocols coordinate the various administrative levels that must act in different areas for the protection of children (health, education, etc.), as well as their relations with the specialized organisations active in civil society.

3.2.3. Are the same or different state agencies responsible for child protection and social services for families and children? What is the (legal) relationship between statutory agencies of child and youth welfare and/or child protection agencies on the one hand and NGOs with special competence concerning violence against children on the other?

262. As indicated in the previous answers, the Spanish autonomic system organizes the protection of minors on different levels. Each level (State, autonomic) has its own legally established competencies. NGOs can act on both the State and the autonomic level (or even municipal). These NGOs conclude agreements with different public entities depending on their scope of action (Spain, an Autonomous Community or a municipality). They also participate in public tenders to obtain subsidies to finance their activities; these subsidies may be granted by State ministries, ministries of the Autonomous Communities or by municipalities. The budgets of the State, the Autonomous Communities and local governments each year establish budget lines in order to finance the activities for the protection of minors, be they executed by public entities or by private entities or NGOs (which participate in public tenders to obtain these funds).

263. On the other hand, it should be pointed out that the protection of minors in some cases constitutes a separate policy area; in other cases the protection of the family and children constitutes one common policy area. The division of competencies between the State and the Autonomous Communities has made that on the first level the two areas are separate, while in the case of the Autonomous Communities each decides whether to integrate both areas or to keep them separate.

264. Consequently, cooperation is the principle which must preside over the execution of shared competences and over those which are executed in one single physical space.

3.2.4. Is the medical system and/or the field of protection against domestic violence involved in a structured cooperation with the child and youth welfare system? When and how does this take place?



265. In the framework of the National strategic plan for childhood and adolescence 2006-2009⁶⁷ (passed by Cabinet Resolution on 16 June 2006), the Ministry of Labour and Social Affairs received the collaboration of the Autonomous Regions, the Spanish Federation of Municipalities and Provinces (FEMP) and the non-profit sector. The work of adaptation and legislative development contains, amongst others, the following provisions:

- Act 51/2003, of 2 December, on equal opportunities, non-discrimination and universal accessibility of the disabled.
- Organic Act 1/2004, of 28 December, on Integrated Protection Measures against gender-based violence.
- Organic Act 3/2005, of 8 July, on the modification of Organic Act 6/1985, of 1 July, on the Judiciary, to prosecute the practice of female genital mutilation outside territorial boundaries.
- Organic Act 2/2006, of 3 May, on Education.
- Bill on the promotion of personal independence and the care of persons in dependency situations. Protocols in force oblige health care, educational, and social assistance staff to denounce any well founded suspicions of childhood abuses.

266. The document that describes the Plan considered that child healthcare has made obvious progress in recent decades. The development of the National Health System, in conjunction with other basically socio-economic factors, has had a positive impact on the health system, which has been reflected in standard indicators: a gradual reduction in child and prenatal mortality, a rapid change in morbidity patterns and reasons for doctor's visits, an increase in life expectancy, etc. The consolidation of the Public Health System, of the children's hospital network and primary health care centres has meant, amongst other things, that there has been a change in the pattern of illnesses treated, with infectious diseases being replaced by non-transmissible-

267. Collaboration among health care professionals, staff working against gender violence and childhood protection system, is regulated by means of several collaboration instruments established by the different Ministries working within these fields (including Autonomous Communities). I.e.: Ministry of Labour and Social Affairs, etc. Ministry of Labour and Social Affairs processes amongst which we must stress accidents as the main cause of illness and death during childhood. In the challenges section, we must mention the worrying increase in pregnancies and voluntary interruptions of pregnancies among adolescents, which indicates a need to rethink the sexual education which is being received by teenage boys and girls, thus preventing possible situations of subjection and/or gender-based violence, and risk situations of unwanted pregnancies, infection by HIV/AIDS and other sexually-transmitted diseases. Furthermore, the low perception of risk related to drug consumption is highly worrying, whereas the perception of drug accessibility by adolescents has increased and there has been a significant rise in consumption, especially of alcohol and cannabis, consumptions which are taking place at increasingly early ages. Furthermore, serious health risks are appearing at ever-younger ages, for example, eating disorders such as anorexia, bulimia and unhealthy diets. Moreover, given that child obesity figures are calculated to stand at approximately 14% of under 18s, education which promotes the positive valuation of one's own body and that of others must be fostered. In this brief reference to challenges, we must also place on record mental health problems which, according to some estimates, affect 20% of under 18s, and to whom the public network must offer answers, above all in aspects such as service accessibility and treatment continuity, especially for the adolescent population.

⁶⁷ Text in English: <http://www.observatoriodelainfancia.msps.es/documentos/PlanEstra2006Ingl.pdf>



268. In order to fight against all these situations and to protect children's rights, in addition to the effort made by all public and private entities involved in child protection, it is necessary to improve the legislative framework in order to adapt it to new social needs, in a continuation of the path established in the Organic Act against gender-based violence. Furthermore, we must increase the awareness of society as a whole in order to bring to an end all forms of child abuse and exploitation (in keeping with the provisions of the 2nd Action Plan against sexual exploitation of children and adolescents 2006–2009, amongst others), mainly involving men. A form of education is needed which questions violence against women and children.

269. Another important aspect is that related to an increase in international adoption in Spain. A rise in the number of countries which have ratified the Hague Convention, combined with a dramatic increase in applications for international adoption, represents a challenge for child protection services and evidences a need for the implementation of some post adoption programmes which facilitate the correct integration of these children into our society and the support needed by the adoptive parents. They also need to guarantee greater collaboration and participation of the affected sectors in order to improve International Adoption processes, as is favoured, for example, in the recently-created Advisory Council on International Adoption.

270. And, of course, we cannot forget children who find themselves in a situation of risk and abandonment. Social awareness of abandonment and child abuse has increased in tandem with an improvement in the systems of detection, notification and intervention against all forms of violence against boys and girls and adolescents. Nevertheless, it is necessary to drive new actions geared towards improving child abuse awareness, prevention and intervention. There are countless risk situations which affect childhood and adolescence, which are coupled with those already mentioned above deriving from child labour, those related to a family environment conditioned by domestic violence, membership of ethnic minorities, migratory processes of unaccompanied minors, prostitution, child abuse and exploitation, etc.

3.2.5. Please describe in more detail the conditions under which statutory agencies or courts can intervene in the rights of parents, including immediate, medium-term and long-term interventions.

271. On the one hand, we should explain the intervention of the administrative bodies, which tends to precede action by the Courts (unless it is the Public Prosecutor who has warned about a situation of risk which might constitute a crime or misdemeanour). On the other hand, we should explain the judicial actions, both civil and criminal, which can take the form of protective or provisional measures (before giving judgment) and judgments *strictu sensu*.

272. Organic Act 1/1996, of 15 January, on the legal protection of minors, partially modifying the Civil Code and the Act on Civil Procedure, establishes that in applying the Law the interest of the minor will take precedence over any other legitimate interest involved⁶⁸. Moreover, the same Act provides that the following will be the leading principles of administrative action: the pre-eminence of the interest of the minor, the minor will not be removed from the family environment unless this is not in his interest; the integration of the child into the family and the social environment; the avoidance of

⁶⁸ Art. 2 of Organic Act 1/1996.



all situations which may harm his personal development; raising the awareness of the population regarding situations of defencelessness of minors; promoting social participation and solidarity; objectivity, impartiality and legal security should govern any protective action, while guaranteeing collegiate and interdisciplinary decision making⁶⁹.

273. Administratively speaking, immediate measures can be taken to protect minors, both those in a situation of risk (risk of abuse, maltreatment, gender violence or violence on the grounds of sexual orientation, etc) and those in a situation of abandonment (negligence of parents or guardians, orphans in danger of social exclusion, etc). Article 17: Actions in situations of risk. In situations of risk⁷⁰ of any kind which may harm the personal or social development of the child and where the imposition of legal tutelage is not required, public action should guarantee in any case the rights of the child and be directed towards reducing the factors of risk and social problems affecting his personal situation and promoting the factors contributing to the protection of the child and his family; once the situation of risk has been evaluated, the public entity competent on children's protection will undertake the necessary steps to reduce the risks and will monitor the evolution of the child within the family. On the other hand, when the competent public entity considers that the child finds himself in a situation of abandonment⁷¹, it will act in the way provided by article 172 of the Civil Code, assuming his tutelage, adopting the adequate protection measures and informing the Public Prosecutor's Office; in these cases, taking into account the distribution of competencies between the State and the Autonomous Communities, each public entity will designate the organ which will exercise the tutelage in accordance with the organic operational structures. As any judiciary decision, those affecting childhood protection may be appealed before Higher Courts and, provided the case, before the Supreme Court in cassation.

274. Provisional and/or protective judicial measures can be applied taking into account the provisions of the Criminal Code and Organic Act 5/2000, of 12 January, regulating the criminal responsibility of minors. In accordance with this Organic Act, the minor is removed from the family environment when he is declared responsible for acts that are qualified as offences in the Criminal Code. These measures may consist of: placement in a closed, semi-open or open institution; placement in centres under public tutelage; therapeutic placement in a specialized institution under a closed, semi-open or open regime; ambulatory treatment, with a regularity determined by the Court; assistance in a day centre; weekend stays (from Friday to Sunday) in a specialized centre; placement with another family or an educational group. In certain cases, the Court may establish measures that do not entail leaving the family: provisional freedom supervised by the Court, including concrete obligations such as going or not going to specific places; the prohibition of approaching or communicating with the victim; performing community activities; performing socio-educational activities; reprimand; deprivation of the licence to drive any vehicle that may be driven by a minor; complete disqualification to hold any kind of public office or position. The duration of these measures, which are regulated by law on the basis of minimums and maximums, is to be determined by the Court, taking into consideration the pre-eminence of the minor's interest and the circumstances of the case⁷². If considered necessary, you may suppress it, even though the team considers that it is important to include those regulations as parents are liable for illicit actions performed by their minor sons.

⁶⁹ Art. 11.2 of Organic Act 1/1996.

⁷⁰ Art. 17 of Organic Act 1/1996.

⁷¹ Art. 18 of Organic Act 1/1996.

⁷² See art. 7 of Organic Act 5/2000.



3.2.6. How are the rights of the children and of the parents guaranteed, and how can individuals affected by child protection decisions appeal to the courts for review and redress?

275. The rights of children and parents are guaranteed under the Spanish Constitution of 1978. Art. 39 of the Constitution provides that the public authorities will guarantee the social, economic and legal protection of the family; it also states that the public authorities will guarantee the comprehensive protection of children regardless of their filiation; as well as that parents shall provide all kinds of assistance to their children, whether these were born out of marriage or not, as long as they are under age and in the other legally established cases. The same article provides that children shall enjoy the protection established by international agreements on children's rights.

276. The Constitution (art. 53) also guarantees these rights by proclaiming the constitutional obligation of statutory regulation (*reserva de ley*), in other words, these rights can only be regulated by rules elaborated and approved by Parliament, be it the Spanish Parliament or the autonomic Parliaments, depending on the distribution of competencies between them. Art. 54 establishes their protection by the National Ombudsman in relation to the public administrations, meaning the referred rights can be claimed before the Ombudsman. Moreover, art. 24 of the Constitution guarantees the effective judicial protection of legitimate rights and interests, which includes procedural guarantees in all trial proceedings.

277. It should be observed that in the case of Spain the protection of children's rights through legislation and international organisations is very important. On the one hand, because art. 39 of the Constitution guarantees that children have the rights granted to them under international agreements. On the other hand, because art. 96 establishes that validly concluded international treaties are incorporated into the Spanish legal order with statutory status and that the interpretation of any rule concerning these rights should be done in accordance with the Universal Declaration of Human Rights and the international treaties on these matters ratified by Spain (art. 10 Spanish Constitution). Thus, the protection offered by international bodies has legal value in Spain.

278. In addition, as concrete guarantees applicable to trial proceedings involving minors we should mention those included in the Act on Civil Procedure and the Act on Criminal Procedure, both modified by Organic Act 1/1996, of 15 January, on the legal protection of minors and Organic Act 5/2000, of 12 January, regulating the criminal responsibility of minors, respectively. In the following section the procedural aspects of these guarantees are explained. It is considered necessary to include those measures as they also deal with childhood protection (in this case, minors are the authors of punishable actions).

3.2.7. What are the procedural guarantees to ensure that the best interest of the child have been considered, both in the administrative procedure and in court proceedings?

279. The Act on the legal protection of minors provides in art. 9 that the child has the right to be heard, both in family cases and in any administrative or judicial procedure in which he is directly involved and which may lead to a decision that affects his personal, family or social life. In judicial proceedings, the appearances of the child will be held in a way adapted to his personal situation

and development, while preserving his privacy. It will be ensured that the child will be able to exercise this right personally or through the person designated by him as his representative, as long as he has sufficient judgment. However, when this is not possible or is not in the interest of the child, his opinion may be heard through his legal representatives (provided these are not an interested party or have interests contrary to those of the child), or through other persons who due to their profession or special relation of trust with the child are able to communicate his opinion objectively. If the minor requests to be heard directly or through the persons who represent him, the hearing may only be denied by a reasoned decision notified to them and the Public Prosecutor's Office. The Act on Civil Procedure was modified to include these procedural rights.

280. The Act regulating the criminal responsibility of minors in its turn provides that the authorities and officers participating in the detention of a minor should carry out the detention in a way that causes him the least possible harm. They are also obliged to immediately inform him, in clear and understandable terms, what he is accused of, why he is arrested and what his rights are; they are also obliged to guarantee these rights. They must further immediately notify the legal representatives and the Public Prosecutor's Office of his detention and the place of custody. In case the arrested minor is a foreigner, this information will be communicated to the relevant consular authorities if the child's usual residence is outside Spain or if the child or his legal representatives thus request (art. 17). The same article provides that any statement by the detainee will be made in the presence of his lawyer and those exercising the paternal authority, tutelage or guardianship – legally or de facto – over the child, unless the circumstances recommend that the latter not be present. In the absence of the latter, the statement will be attended by the Public Prosecutor, represented by someone who is not involved in the investigation of the case. It also provides that, while the detention lasts, minors should be kept in custody in adequate, separate facilities from those used for adults, and shall receive the care, protection and physical, medical, psychological and social assistance required, considering their age, gender and individual characteristics. The detention of a minor by police officers may only last as long as is strictly required in order to carry out the necessary investigations concerning the facts; in any case, the detained minor must be released or put at the disposal of the Public Prosecutor's Office within maximum twenty-four hours⁷³. The Juvenile Courts may decree the proceedings to be secret to protect the minor, although his lawyer will be entitled to be fully informed (art. 24). It is compulsory to present to the Court an expert report on the psychological, educational and family situation of the minor, which should also refer to his social environment and in general to any circumstances relevant for the adoption of any of the measures established in Act 5/2000 (art. 27). The Court may adopt provisional measures for the custody and defence of the accused minor or for the protection of the victim. For this purpose, the judge will take into account the gravity of the facts, the personal and social situation of the minor, the risk of escape and particularly whether the same minor previously committed any other serious offences. The maximum duration of these measures will be 6 months, to be extended by a maximum of 3 months (art. 28). The minor will be present during the production of evidence, unless the judge considers, based on a reasoned decision, that this is not in the interest of the minor; for the same reasons, he can decide that the trial will not be public (art. 35). The Court ruling should be delivered in terms comprehensible to the minor (art. 39). It is considered necessary to include those measures as they also deal with childhood protection (in this case, minors are the authors of punishable actions).

⁷³ The Public Prosecutor's Office is not simply a prosecuting organ in Spain: it has the constitutional obligation of safeguarding the law and the rights of citizens; the legislation on minors attributes the Public Prosecutor the function of protecting their rights and interests.



281. It should be noted that the general procedural guarantees of art. 24 of the Spanish Constitution are also applicable to juvenile proceedings.

3.2.8. What are the key differences in how child sexual abuse and physical abuse/neglect are dealt with legally?

282. The legal figure of "neglect" in Spain is called "abandonment" (*desamparo*). In these cases, the act establishes that the minor is placed under "legal guardianship"⁷⁴. By virtue of this legal guardianship, it is the administration or a person appointed by the administration who has authority over the minor in stead of his parents or legal representatives (regulated by art. 172 and following of the Civil Code). In most cases, the minor is placed in a special centre for the protection of minors, which are the competence of the Autonomous Communities and may be managed by specialized organisations. However, in certain cases where the person responsible for the minor has not taken due care of him, allowing him, for instance, to be subjected to prostitution, grooming, abuse or pornography-related activities, this person may be punished with 4 to 8 years of prison (art. 189 Criminal Code).

283. In cases of sexual abuse, maltreatment or physical abuse, the Criminal Code is applied to punish the offenders, as well as Act 35/1995, of 11 December, on aid and assistance to the victims of violent crimes and crimes against sexual freedom, in order to calculate the appropriate compensations and to determine the assistance measures to be taken. Whenever these cases imply gender violence the measures established in Organic Act 1/2004, of 28 December, on Integrated Protection Measures against gender-based violence will be applied. Where relevant, Organic Act 3/2005, of 8 July, on the modification of Organic Act 6/1985, of 1 July, on the Judiciary, will be applied to prosecute the practice of female genital mutilation outside territorial boundaries.

3.2.9. What is the current legal position on corporal punishment – by parents and other authorities? Are there debates about these issues?

284. Corporal punishment of children or minors by their parents or other authorities is absolutely prohibited in Spain.

285. Corporal punishment at home was prohibited in 2007 by a amendment of the Civil Code. Previously, the Code recognized the "right" of parents and guardians to use "reasonable and moderate" correction methods, but these provisions were removed from the act. Art. 154 now states that "Parental authority shall always be exercised in the best interest of children [...] with respect for their physical and psychological integrity". On 28 December 2007, the Spanish State Gazette published Act 54/2007 on International Adoption, which in its First Final Provision expressly prohibits any kind of corporal punishment of any degree, thereby modifying art. 154 of the Civil Code. Since then no kind of corporal punishment has been permitted in Spain, being criminalized by the Criminal Code in any of its forms.

286. Corporal punishment at schools has been illegal in Spain since 1985 under art. 6 of Act 8/1985 on the Right to Education. Art. 17 of Royal Decree 732/1995, which constitutes the legal framework

⁷⁴ Art. 12 of Organic Act 1/1996.



regulating social relations at school, establishes that “the physical and moral integrity of all pupils must be respected; under no circumstances may they be submitted to a humiliating or degrading treatment”. Art. 43.2 prohibits “punishments which are incompatible with the physical integrity and the personal dignity of pupils”.

287. The reform of the Civil Code to prohibit any form of corporal punishment was intensely debated in Spain, given the fact that 63,5% of parents, according to the National Institute of Statistics, is in favour of slapping their children in critical situations. The NGOs for children’s protection, in particular Save the Children, have been very active in promoting the abolition of this form of punishment.

3.2.10. Explore the specific protections available for children who are either victims in a criminal case, or who will be affected by decisions in civil/family proceedings.

288. The measures for the protection of children are laid down in Organic Act 1/1996, of 15 January, on the legal protection of minors, partially modifying the Civil Code and the Act on Civil Procedure, and are also applied when the minor is victim of an offence (the Criminal Code, with the corresponding punishments, will be applied to the offenders). In this respect, the acts provides:

- Protective action (art. 12): prevention and redress of situations of risk, as well as the establishment of legal guardianship in case of abandonment (*desamparo*).
- Obligation of citizens to notify the authorities whenever they discover that minors are not duly sent to school (art. 13).
- Immediate action by the authorities whenever necessary (art. 14).
- Collaboration between the authorities, the family and the minor in order to interfere as little as possible in his social, educational and family life (art. 15).

289. A report by the Spanish Security Forces and Bodies⁷⁵ stresses that, in spite of the downward trend in child abuse, we should never become complacent as “the mere existence of a single child victim is cause for serious concern”. During the past year the Spanish Security Forces and Bodies registered a total of 3,006 minors, victims of abuse within the family environment. Of these minors, 68% were girls. The statistical data show that many abused minors suffer more than one type of aggression; there is no age group which clearly suffers more abuse than others. Differentiating between types of offence, physical abuse is more common among children under 2 years old, while sexual abuse is more common among children over 9 years old, in particular between 12 and 15.

3.2.11. Summarise and explain any barriers to the procedures against child abuse.

290. Around 200,000 minors are children of women subject to a protection order for reasons of gender violence in Spain, where an estimated 800,000 women are victims of this social affliction. However, “only” 4 per cent of them receive specialized care, according to data published by Save the Children on the occasion of the International Day for the Elimination of Violence against Women (2009).

291. The silence of the victims is one of the main obstacles to its detection. An adequate training of specialists is required to obtain correct diagnostics. The majority of aggressors are members of the

⁷⁵ Ministry of the Interior. Website: http://www.mir.es/DGRIS/Notas_Prensa/Policial/2007/np111407.html



family or know the victim. It has also been shown that poverty and social exclusion contribute to the existence of abuse. In this respect, it has been essential that several action protocols have been adopted to organize in a coordinated way the care for children victims of abuse, like the Basic Intervention Protocol against Child Abuse, promoted by the Children's Observatory of the Ministry of Employment and Social Affairs⁷⁶. Moreover, the creation of the Unified Register of Child Abuse (RUMI) facilitates the detection of the abuse of minors (the RUMI is a database allowing doctors of the public health system to consult the medical history of a child in case they suspect it has been abused).

292. The most important problem is really that a considerable part of child abuse is hard to detect, due to the fact that it is not easy for the victims to explain their situation, either because of their youthful age or because they find themselves in a situation of emotional paralysis considering that the abusers tend to be apparently normal, socially integrated males, who often display important interpersonal skills and maintain a normal sex life. It is estimated⁷⁷ that one out of four girls and one out of seven boys suffers this type of abuse before reaching the age of 17. The abuse takes place at all social levels. In the majority of cases the abuse is committed repetitively by family members and relatives. This is the main reason why these cases are kept silent so often (in around 86% of cases).

3.2.12. Have any recent measures been evaluated? What were the main findings?

293. The first Plan against the commercial sexual exploitation of children and adolescents (2002-2003) was evaluated by the Ministry of Social Affairs in collaboration with the Faculty of Psychology of the University of Valencia in a report published in October 2004⁷⁸. It is both an empirical and a qualitative evaluation. The conclusions show that thanks to this plan a series of objectives was achieved:

- an increased awareness on the subject, mainly in certain professional sectors
- the creation of specific plans to carry out the plan's objective
- better and increased support to programmes that were being developed
- improved coordination between different institutions (State, Autonomous Communities, local entities) and professional groups (civil society organisations) related with child protection, motivated by the need for joint action in specific areas
- better response to acquired international obligations in the fight against the sexual exploitation of children
- changes made in national legislation.

294. The report also observes the progress made based on the Programme against sexual exploitation of children in tourism (set up by UNICEF and coordinated among various NGOs - Save the Children, ECPAT, FAPMI – the Public Administration and tourism-related companies), programmes for the protection against new technologies (PROTEGELES) and information campaigns to raise

⁷⁶ Website: http://www.observatoriodelainfancia.msps.es/documentos/Protocolo_contra_Maltrato_Infantil.pdf. The protocol has been elaborated with the participation of the Autonomous Communities, the State Prosecutor's Office and various civil society organisations (in particular Save the Children). It creates the basis for the coordinated action of all organisations active in the fight against child abuse.

⁷⁷ Association for the cure and prevention of sexual abuse of children (ASPASI). Website: <http://www.aspasi.org>.

⁷⁸ See the evaluation report:

http://www.observatoriodelainfancia.msps.es/documentos/Evaluacion_Plan_Exploit_Sexual_Infancia.pdf



awareness (National Campaign for Security on the Internet by the Association of Cybernauts; the Safe Surfing Campaign promoted by the Ministry of Social Affairs; the programme "Capitannet" promoted by the Ministry of Social Affairs and Save the Children; the programme "Safe Internet" of the Catalan Research Foundation; the programme "Protect Children On-Line" adapted by ECPAT and UNICEF, among others).

3.2.13. What are the current debates about legal and procedural measures, include the key criticisms and limitations of current responses.

295. These have already been discussed above and refer above all to the difficult detection of child abuse. As far as procedural measures are concerned, these offer all guarantees. After the reform of the Civil Code, which prohibited all kinds of corporal punishment, the debate focuses on the measures to be taken to allow victims to report abuse. In this respect, the action protocols directed towards the professionals who can detect abuse and intervene to correct it, have been of great use. Those are Action protocols held by health, education, social care, policy and other, professionals. Within those protocols, actions and information are coordinated. There is a large amount of those protocols, especially within the range of Autonomous Communities and Local Councils.

296. A shortcoming that affects all these cases is the lack of general official data. All the data we have referred to have been provided by civil society organisations which elaborate them with regard to their specific area of responsibility. It would be greatly recommendable that the various Children's Observatories, both on a national and autonomic level, would be able to offer reliable official data.

3.2.14. The final issues of this section ask you to comment on whether the intersections between criminal/civil/family law are problematic in cases, or whether measures/procedures have emerged to integrate responses.

297. It is fair to say that at this point in time no contradictions exist in Spain between the various legislative areas regulating child protection. The recent legislation presents an important coherence, both in the criminal and in the civil and/or administrative sphere, in spite of the fact that the competence to adopt legislation belongs to the State and the Autonomous Communities, and the rules to be applied jointly in every case are many, including international rules which have legal value in Spain. The only problem to be observed is that a full and detailed legal training is required in order to apply and interpret all these regulations in such a way that the response given is not only legally correct, but also effective.

298. It should also be noted that the State protocols, regulating in detail the operational mechanisms available to the different public institutions and private organisations, have been complemented on an autonomic level on several occasions without giving rise to contradictions or dysfunctions.

3.2.15. Similarly are there legal measures or policy frameworks which deal with the intersections between IPV and child protection. For example, is living with violence towards their mothers defined as a child protection matter, or is IPV considered in child contact/custody hearings where the parents are separated?



299. As indicated in other parts of this study, the way violence against children is dealt with takes into account that this kind of violence often takes place in the family environment in combination with gender violence suffered by mothers. The systematic application of the civil and criminal rules combined with the protection offered by the Integrated Act against gender violence and the Act on assistance to victims of violent crime and crimes against sexual freedom, permits offering protection to different kinds of cases. In some cases, protection should be offered to mothers and children simultaneously and in other cases separately in order to guarantee that the interest of the child prevails, as established by the current legislation.



4. Legal measures on Sexual Identity based Violence

FSJ: There is no internationally agreed definition of sexual identity violence (SIV): SIV is often described as homophobic violence, however this term does not include, as SIV does, violence against transgendered persons. SIV is, therefore, a more inclusive concept. Mirroring the UN definition of VAW we see SIV as violence or abuse which takes place because the person belongs, or is perceived to belong, to a sexual minority. Note: this is a narrower concept than discrimination, referring only to violence.

The European Parliament defines homophobia as an irrational fear of and aversion to homosexuality and to lesbian, gay, bisexual and transgendered (LGBT) people based on prejudice and similar to racism, xenophobia, anti-semitism and sexism. It manifests itself in the private and public spheres in different forms, such as hate speech and incitement to discrimination, ridicule and verbal, psychological and physical violence, persecution and murder, discrimination in violation of the principle of equality and unjustified and unreasonable limitations of rights, which are often hidden behind justifications based on public order, religious freedom and the right to conscientious objection.

4.1 Explore how the concept of SIV (or homophobic) violence is understood and addressed in law and policy (notably whether or not there is a link to discrimination based on sexual preference/orientation).

300. In Spain, any kind of discrimination due to sexual orientation is forbidden. The Spanish Constitution establishes that "Spanish citizens are equal before the law, being forbidden any type of discrimination due to origin, race, sex, religion, opinion or any other condition or personal or social circumstance". Even though the Spanish Constitution does not explicitly prohibit discrimination due to sexual identity, the Spanish Constitutional Court has ruled that discrimination due to (...) homosexual orientation is, undoubtedly, a circumstance included within the "any other condition or personal or social circumstance" clause of article 14 of the Spanish Constitution (...). Differently from "gender-based violence", there is no specific criminal law to deal with SIV cases and, thus, the general provisions contained in the Spanish Criminal Code for any crime must be applied. In spite of that, the Spanish Criminal Code establishes certain provisions in order to punish and fight against sexual identity violence such as: a) the application of an aggravating circumstance of criminal liability such as "to commit a crime for racist or anti-Semitic reasons or other types of discrimination on grounds of the victim's ideology, religion or beliefs, ethnic, racial or national origin, gender or sexual identity, or illness or disability"; b) banning hate speech; c) banning discrimination on grounds of sexual orientation with access to public services; d) banning discrimination on grounds of sexual orientation in connection to the exercise of their professional or managerial activities; and e) considering as illegal associations those that promote or prompt discrimination, hatred or violence against people, people, groups or associations on grounds of their ideology, religion or beliefs, ethnic, racial or national origin, gender, sexual orientation, family situation, illness



or disability". As previously stated, in Spain any kind of discrimination due to sexual orientation is forbidden. The Spanish Constitution establishes that "Spanish citizens are equal before the law, being forbidden any type of discrimination due to origin, race, sex, religion, opinion or any other condition or personal or social circumstance". Even though the Spanish Constitution does not explicitly prohibit discrimination due to sexual identity, the Spanish Constitutional Court has ruled, by means of Section 2.4 of Decision 176/2008 of December 22nd, 2008, that even though transsexuality is not expressly included within Section 14 of the Spanish Constitution, it must be considered, undoubtedly, a circumstance included within the "any other condition or personal or social circumstance" clause of article 14 of the Spanish Constitution (...) (Spanish available version at <http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=9604>). Thus, discrimination due to transsexuality is forbidden.

4.2. If the concept of 'hate crime' has been introduced, how has this taken place and is it considered by scholars and/or NGOs an emancipatory development.

301. Spanish Criminal Code Article 510, enacted by means of Organic Act 10/1995 establishes that 1. Those who promote discrimination, hatred or violence against groups or associations, for racist or anti-Semitic reasons, or other reasons related to ideology, religion or beliefs, family situation, ethnic or racial origin, national origin, gender, sexual orientation, illness or disability, will be punished with a prison term of one to three years and a penalty of six to twelve months. 2. Those who, knowing it to be false or in reckless disregard of the truth, spread injurious information on groups or associations in relation to their ideology, religion or beliefs, ethnic, racial or national origin, gender, sexual orientation, illness or disability, will be punished with the same penalties. 1995 Spanish Criminal Code introduced, for the first time in Spain, the hate crime concept. Even though the amount of cases reaching the Court regarding this subject matter is low, contents of Article 510 are applied by Spanish Courts. Several NGOs, such as "Movimiento contra la intolerancia" (Movement against intolerance) or International Amnesty (IA) release reports and monitor hate crimes held in Spain. "Movimiento contra la intolerancia" has recently claimed to strictly implement article 510 of Spanish Criminal Code to those on the Internet –through websites, portals, social networks, or other spaces of communication– who incite hatred, violence, and discrimination. See: <http://www.movimientocontralaintolerancia.com>, and <http://movementagainstintolerance.wordpress.com>.

4.3. Have cases come to court, how have they been dealt with?

302. Even though there are no specific SIV sections within the yearly Chronicles released by the Constitutional Court, and the Supreme Court, among others, several important decisions issued during last ten years must be stressed. Besides Constitutional Court Decision 41/2006 (quoted in the next question), reference must be made to the Supreme Court Decision 1341/2002 (Criminal Court), that, examining a case where four people attacked one individual due to its sexual identity, portrays how Spanish Courts must apply aggravating criteria established within article 22.4 of the Criminal Code before, among others, homophobic cases. Another reference must be made to the Supreme Court Decision 2108/2002 (Criminal Court). In this case, the court ruled that two local policemen who called "*maricón*" (in slang, "fag") to an individual ostentatiously dressed in the street, and arrested him using disproportionate violence, charging him with supposed offences of blaming



public authorities, where guilty of a criminal offence of illegal detention committed by a public servant. The Court specially took into account the evident homophobic behaviour of the agents.

303. Regarding SIV within a County Court scope, quote must be made to Decision 529/2002 of the Provincial Court of Madrid (17th Section), where two skin-heads, with no previous reason or provocation, blamed, attacked, and threatened with a knife a homosexual couple who were kissing in the street. The Court considered that it was evident that both aggressors had performed those actions against the couple due to their sexual identity. On the other hand, we must quote Decision 621/2002 of the Provincial Court of Barcelona (2nd Section), regarding injuries caused to an individual that implied the loss of an eye, grounded on the fact that this individual stared at the aggressor, as an example of dismissing the aggravating circumstance of Article 22 (4). The judge dismissed the claims of the Prosecutor, that considered that the aggression had taken place due to the homosexual identity of the individual, considering that, even though the aggressor blamed the individual, calling him "*maricón de mierda*" (in slang, "damned fag"), it cannot be stated without hesitation that the aggression was due to an alleged aim of discriminating him due to its sexual identity.

4.4. Have any leading cases developed jurisprudence?

304. Constitutional Court Decision 41/2006 ruled that, even though the general equality clause, contained within article 14 of the Spanish Constitution, does not explicitly prohibit discrimination due to sexual orientation, homosexuality must be considered as a circumstance contained within the provision "any other condition or personal or social circumstance". The Constitutional Court ruled that it was evident that the applicant had been dismissed due to his homosexuality and, accordingly, he had been illegally discriminated, violating constitutional provisions. Consequently, the Court accepted the applicant's appeal and quashed the decision appealed from the Catalanian High Court, Labour Court.

4.5. Are there any protective measures available for victims of SIV? Are they similar or different to those for IPV/stalking?

305. Besides the common protective measures foreseen for any type of crime within the Criminal Code, no specific protective measures available for victims of SIV are available. In spite of that, it has to be stressed that, recently a Court from Sabadell (Barcelona), issued the first decision in Spain equalling gender-based violence to homophobic violence, establishing an injunction order of 300 metres and an economical fine to a group of minors (aged between 16 and 18 years old) who aggressed an individual due to his sexual identity⁷⁹.

4.6. Summarize and explain any barriers to the procedures against SIV.

⁷⁹ Source of the news:

http://www.elpais.com/articulo/sociedad/juez/Sabadell/dicta/orden/alejamiento/homofobia/elpepusoc/20100316elpepusoc_1/Tes



306. First of all, no specific judiciary units to fight against SIV exist, as within the case of gender-based violence. Thus, no specific reports regarding this subject matter are released by any judiciary Spanish entity in Spain and it is not possible to determine the number and characteristics of SIV cases. Furthermore, there are no specific protective measures available for victims of SIV.

4.7. Have any recent measures been evaluated? What were the main findings?

307. Up to date, and due to the lack of data released by official institutions, no evaluations have been made.

4.8. What are the current debates about legal and procedural measures, include the key criticisms and limitations of current responses.

308. Currently, one of the main subjects regarding SIV is the inclusion of SIV between members of a homosexual or lesbian couple within the scope of Organic Act 1/2004. It has to be stressed that this act is only applicable to heterosexual couples where women are injured, and it is not applicable to violence between members of homosexual couples. In fact, Organic Act 1/2004 establishes, within its Article 1.1, that its aim is "to act against the violence that, as a way to discriminate, the situation of inequality and relationships of power of men over women, is exercised over women by those who are, or have been, their couples, or have, or have held with them similar relationships of affectivity, even if there has been no cohabitation. Both the Spanish Constitutional Court (Decision 59/2008), and the Spanish Supreme Court (Criminal Court Decision 1068/2009, regarding the interpretation of Article 171.4 of the Spanish Criminal Code -threats made by a man to a woman with whom he has had or has a relationship-) have confirmed this interpretation and, thus, provisions contained in acts following this interpretation (mainly, provisions of the Spanish Criminal Code). In spite of that, recently, a Court from Sabadell (Barcelona), has issued the first decision in Spain equalling gender-based violence to homophobic violence, establishing an injunction order of 300 metres and an economical fine to a group of minors (aged between 16 and 18 years old) who aggressed an individual due to his sexual identity⁸⁰.

⁸⁰ Source of the news:

http://www.elpais.com/articulo/sociedad/juez/Sabadell/dicta/orden/alejamiento/homofobia/elpepusoc/20100316elpepusoc_1/Tes



5. National knowledge base

FSJ: In this chapter we are seeking a short overview of the extent to which there is strong evidence base – official statistics, independent legal and social research - on:

- the prevalence of VAW, VAC, SIV;
- data on reporting, investigation and prosecution – including whether there are mechanisms for identifying cases where there is no specific act (for example on IPV or SIV), and criminal prosecutions take place through the general legal/Criminal Code, or where cases are dealt with first by social service agencies and may not enter into police statistics. Are there ways to identify how many cases of VAC/VAC/SIV come to the attention of authorities?
- regular publication by police/prosecutors of data on the reporting/ investigation/ prosecution of VAW, VAC, SIV;
- regular publication by ministries or agencies of child protection data;
- monitoring data by NGOs;
- evaluation data on the effectiveness of current responses.

5.1. Please provide some assessment in the chapter of the availability, validity and reliability of official statistics, and the strength – or not – of independent research on VAW, VAC and SIV. You should include both legal and social research in your assessment.

309. The main statistics and databases regarding VAW and VAC are the following (on SIV there are no databases or statistics available):

310. PERPOL Database: this is a Police database. It contains the personal details – including race, health and sex life – of all those “natural persons, national and foreign, against whom search warrants have been issued, who have been arrested or whose involvement in criminal facts has been demonstrated or who have been convicted in criminal proceedings”. The Act on the Protection of Personal Data provides that the collection and handling of personal data by the security forces and bodies without the consent of the person concerned are limited to those circumstances and types of data where their use is necessary for the prevention of a real danger, for the sake of public security or for the repression of criminal violations. The person concerned can at any time have access to their data and/or request their elimination. This database is important as it contains the identity of all persons subject to restraining or protection orders, as well as those who have infringed any of those orders.

311. Central Register for the Protection of Victims of Domestic Violence: created by Royal Decree 355/2004, regulating the Central Register for the Protection of Victims of Domestic Violence. It contains information on protection orders issued for victims of domestic and gender-based violence since 2003.



312. Women's Health Observatory: related to a interdepartmental Committee of the Ministry of Health and the Ministry of Employment and Social Affairs. It contains data on specific health needs, combining information on health, consumption, quality of life and the environment.
313. State Observatory on Violence against Women: has been created a collegiate interdepartmental body attached to the Ministry of Equality through the Government Delegation on Gender Violence, which is responsible for providing advice, evaluations, institutional collaboration, elaboration of reports and studies, and formulating action proposals in the field of gender violence. The observatory offers statistical information (including the monthly and yearly reports drafted since its creation) as well as the text of the reports that have been elaborated in Spanish, French and English (the reports are published annually and on certain issues executive reports are available). Some Autonomous Communities have created similar bodies.
314. Observatory on Domestic and Gender Violence: has created in the General Council of the Judiciary (governing body of the judiciary). The Observatory elaborates quarterly reports on domestic and gender violence, with data arranged by judicial districts. It also offers statistical data on the application of judicial protection orders for the victims of gender violence; these data originate from the creation of the Monitoring Committee for the implementation of the Act regulating the protection order for victims of domestic violence, established by the Second additional provision of Act 27/2003, of 31 July. The latest statistical data published by the Observatory of the Council refer to the year 2009.
315. The Government Prosecutor's Office: publishes yearly reports which include information on the action taken by public prosecutors for the prosecution of violent crimes against women and children.
316. The Children's Observatory of the Ministry of Health and Social Policies elaborated a report on "Child Abuse: detection, notification and registration of cases" (October 2006). In various Autonomous Communities similar observatories exist.
317. Unified Register of Child Abuse (RUMI): created by the Catalan Government. It is still being implemented and will be operational as of 2011. It offers a database which doctors of the National Health System can consult in case they suspect that a child has been abused.
318. Various NGOs elaborate reports and have information on concrete aspects of violence according to their specialisation (the Spanish committee of UNICEF publishes annual reports on the situation of children; ACSUR Las Segovias has prepared reports on the trafficking of human being for the purpose of sexual exploitation; the Federation of Progressive Women also published reports on trafficking and gender-based violence; the Women's Network (*Mujeres en Red*) offers statistics and information on violence against women; Amnesty International, Save the Children and others.
319. Regarding SIV, among others: FELGTB⁸¹, COGAM, Colegas⁸² and FAGC⁸³.

⁸¹ National Federation of lesbians, gays, transsexuals and bisexuals.

⁸² *Colegas*: groups several associations, distributed over different Autonomous Communities of Spain (among others, Madrid, Andalusia, Castile-La Mancha, Castile and León) which work for the equality of lesbians, gays, bisexuals and transsexuals.

⁸³ Catalan Front of Gay Liberation: NGO that works within the Autonomous Community of Catalonia.



6. Promising practices

6.1. Using the criteria set out at in paragraph 18 identify practices and measures which have been evaluated or shown to work (this might be official data such as the number of applications for protection orders, or an increase in prosecutions) in enhancing safety and/or realizing rights in terms of access to, procedural and/or outcome justice for victims/survivors of VAW, VAC, SIV. Where there is no evidential basis, but there is a strong belief that the practices are effective please include these but note that there is currently no strong evidence to support the assertion.

320. The most important steps that can be considered good practices are:

- The adoption of protocols to prevent female genital mutilation, aimed at health professionals, educational staff, social workers and security forces;
- The creation of various observatories on gender-based violence (by the General Council of the Judiciary, the Ministry of Equality and several Autonomous Communities);
- The creation of children's observatories (on a State level and by several Autonomous Communities);
- Specialized training offered to various professional groups (judiciary, public prosecutors, police, etc) in order to prevent and adequately treat gender-based violence;
- The creation of specialized Courts for gender-based violence;
- The creation of a Unified Register of Child Abuse (RUMI) in Catalonia with medical databases;
- The creation of specialized Ombudsmen for the protection of children in several Autonomous Communities;
- Adoption in Catalonia of an "Interdepartmental Plan against LGTB discrimination", leading to a wide range of actions for the protection of Lesbians, Gays, Transsexuals and Bisexuals. Among others: courses for the Catalan security forces to prevent and deal with problems related to homophobia; the creation and diffusion in Police stations of a "Victims of homophobic aggressions Protocol".

6.2. Present all important legal provisions, e.g. laws, decrees, administrative regulations, and legal interpretations (for example in case law) in your legal system, which could serve as models for other Member States and the European Union institutions. Please include a link to websites detailing such provisions and interpretations (including pages in English). Please provide any available information (including case law and evaluative research) on their favourable impact.

321. At a legislative level we can consider the following instruments as models:

- Organic Act 1/2004, of 28 December, on Comprehensive Protection Measures against gender-based violence. Worth noting is the comprehensive character of this act, which is applied in all areas (criminal, civil, administrative, labour, family, etc...).
<http://www.redfeminista.org/nueva/uploads/Organic%20ACT%201-2004.pdf>
- Organic Act 3/2005, of 8 July, on the modification of Organic Act 6/1985, of 1 July, of the Judiciary, to prosecute the practice of female genital mutilation outside territorial boundaries.



<http://www.boe.es/boe/dias/2005/07/09/pdfs/A24457-24457.pdf>

- Act 27/2003, of 31 July, regulating the protection order for victims of domestic violence.
http://www.boe.es/aeboe/consultas/bases_datos/doc.php?id=BOE-A-2003-15411
- Organic Act 3/2007, 22 March, on the Effective Equality of Women and Men.
http://www.boe.es/aeboe/consultas/bases_datos/doc.php?id=BOE-A-2007-6115
<http://tienda.boe.es/detail.html?id=9788434018471>

322. With regard to case law it should be noted that for the first time a protection order has been issued in a case of SIV (Court of Sabadell, 2010).



7. Ongoing challenges and barriers

FSJ: Here you should summarise the challenges and barriers which in your national context that limit the protection of individuals from interpersonal violence, and the same with respect to criminal law provisions. The barriers can range from under-reporting through lack of expertise among police/prosecutors and other practitioners to the legal provisions themselves being inadequate.

7.1. What are the major gaps in law and procedure for:

VAW

VAC

SIV

323.VAW: the main obstacles to the application of the rules on gender-based violence are, on the one hand, the financial difficulties in creating specialized courts for gender-based violence; on the other hand, the lack of information under foreign women regarding the Spanish legislation; moreover, the implementation of the electronic surveillance system is carried out very slowly.

324.VAC: it has already been explained that criminal acts taking place in the family and domestic sphere are difficult to report. Reporting problems also apply to FGM and forced marriages. With regard to sexual offences against minors, the adoption of effective protocols for prevention and repression is hindered by the lack of integration of the applicable legislation (the regulations are too disperse); furthermore, the judicial proceedings affecting minors do not always offer sufficient specialized resources for their optimal execution (social assistants, psychologists, interpreters, etc).

325.SIV: no specific legislation is available to tackle the problem adequately.

7.2. Describe any barriers and challenges which are specific to your national context and/or legal system.

326.This question has already been answered in the previous section.



8. Perspectives on law and harmonisation

FSJ: Given that this is a feasibility study on harmonization of legal measures we are interested in the perspective on this issue at the political level and among legal practitioners in your national context.

8.1. Do you know of any legal frameworks in other EU countries that might, in your estimation, be a potential good practice standard, and that you consider capable of transfer to your own country?

327. To properly respond to this question, it would be necessary to consult the other country reports. A possible example might be the specific acts on forced marriages that exist in other European countries.

8.2. Are there forms of, or approaches to, harmonization which are more and less acceptable?

328. To properly respond to this question, it would be necessary to consult the other country reports. We can only state that when equality or non discrimination EC Directives have been approved, Spain has duly implemented and developed the community law, contributing to a better harmonization.

8.3. What would your priorities for harmonization be?

329. To harmonize the protection measures for victims of gender-based violence, given the fact that due to the possibility of free movement measures adopted in the State of origin may not be applied in other Member States.

330. To harmonize the repression of sexual tourism affecting children.

331. To progressively harmonize the legal definitions of VAW, VAC and SIV.



Annex 1 – Presentation of case law

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| Case title | Marital violence |
| Decision date | 25 October 2001 |
| Reference details (type and title of court/body; in original language and English [official translation, if available]) | Supreme Court (Criminal Section) |
| Key facts of the case (max. 500 chars) | Gerardo lived together with Maribel as husband and wife since 1992. When she wanted to end their relationship, he hit her in the presence of their daughters and while threatening to kill her and in spite of her resistance, he penetrated her. On another occasion, he hit her and threw her against the wall. In the night of 5 June 2000, he wanted to have sex with her, hit her and threw her against the wall, but he was interrupted by two relatives who had been warned. She left the family home that night with her daughters and reported him. During the last year they lived together he maltreated Maribel continuously. |
| Main reasoning/argumentation (max. 500 chars) | The crime of maltreatment does not subsume the crime of rape. Each one of them protects a different legal interest: family peace, on the one hand, and personal sexual freedom and personal dignity, on the other hand. The act permits the concurrence of crimes. Articles 178 and 170 do not exclude sexual aggression when the victim is the spouse or comparable life partner of the offender. There is no "right" to sexual relations as part of marital obligations. |
| Key issues (concepts, interpretations) clarified by the case (max. 500 chars) | Declaration of the victim. Capacity to refute the presumption of innocence. The crime of habitual maltreatment (art. 153) cannot subsume the crime of sexual aggression (art. 178). Real concurrence of different offences. No legal impediment to the passive subject of the crime being the spouse or comparable life partners of the offender. |
| Results (sanctions) and key consequences or implications of the case (max. 500 chars) | The cassation appeal is rejected; the judgment is upheld: 1) As guilty of sexual aggression (art. 179), six years of prison 2) As guilty of family maltreatment (art. 153), one year of prison 3) As guilty of three misdemeanours concerning maltreatment without causing injuries (art. 617.2), three fines of thirty days, daily amount 200 pesetas. |



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| Case title | Application of aggravating circumstance |
| Decision date | Sentence of Supreme Court nº 1341/2002 (Criminal Section, second room) 17 of July |
| Reference details (type and title of court/body; in original language and English [official translation, if available]) | Tribunal Supremo (Supreme Court) Criminal Section Appeal Number 2494/2000 Rapporteur: Mr. Joaquín Martín Canivell |
| Key facts of the case (max. 500 chars) | Four people attacked one individual due to its sexual identity, and were condemned by the Barcelona County court, Criminal Court, in application of the special aggravating circumstances foreseen in article 22.4 of the Criminal Code. Aggressors submitted an appeal before the Supreme Court against the proved facts contained within the County's Court Decision, and alleged the incorrect application of several provisions of the Criminal Code regarding the evidences, and the presumption of innocence. |
| Main reasoning/argumentation (max. 500 chars) | The Court dismissed all the allegations submitted by the applicants. It has to be stressed that the Court ratified the criteria set at the County's Decision where, in order to apply the aggravating circumstance established within article 22.4 of the Criminal Code, considered as key facts that accused individuals had voluntarily been around a zone that they knew was frequented by homosexuals, and that one of the accused affirmed before Court that homosexuals were disgusting and hideous. |
| Key issues (concepts, interpretations) clarified by the case (max. 500 chars) | The Supreme Court considered that, even though aggressors did not know for sure the sexual identity of the attacked individual, undoubtedly, the aggression was grounded on its supposed homosexual identity. |
| Results (sanctions) and key consequences or implications of the case (max. 500 chars) | The Court dismissed the appeal submitted by the applicants. |



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| Case title | Homophobic conduct |
| Decision date | Sentence of Supreme Court nº 2108/2002 (Criminal Section, Second room). 5 of December. |
| Reference details (type and title of court/body; in original language and English [official translation, if available]) | Tribunal Supremo (Supreme Court) Criminal jurisdiction Appeal Number 1865/2001 Rapporteur: Mr. José Ramón Soriano Soriano |
| Key facts of the case (max. 500 chars) | Two local policemen called "maricón" (in slang, "fag") to an individual ostentatiously dressed in the street, and arrested him using disproportionate violence, charging him with supposed offences of blaming public authorities. Both of them were condemned by the County Court of Barcelona, and submitted an appeal before the Supreme Court based on the incorrect evaluation of the evidences done by the County Court, and an alleged breach of the fundamental right to the presumption of innocence. |
| Main reasoning/argumentation (max. 500 chars) | The Supreme Court dismissed all the allegations submitted by the applicants and, thus, considered that the homophobic behaviour of the applicants had been clearly proved within the process. |
| Key issues (concepts, interpretations) clarified by the case (max. 500 chars) | Interpretations regarding provisions of the Criminal Procedure Code, and the right to the presumption of innocence. |
| Results (sanctions) and key consequences or implications of the case (max. 500 chars) | The Court specially took into account the evident homophobic behaviour of the agents, and considered that both of them were guilty of a criminal offence of illegal detention committed by a public servant established within articles 163 and 167 of the Spanish Criminal Code, and, accordingly, condemned them to a 3 year prison sentence and the prohibition of holding public services for life. |



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| Case title | Rape and maltreatment as separate offences |
| Decision date | Supreme Court Sentence 29 January 2005 |
| Reference details (type and title of court/body; in original language and English [official translation, if available]) | Supreme Court (Criminal Section) |
| Key facts of the case (max. 500 chars) | Carlos had been living together with Carmela as husband and wife since 1990. Since 1997 they stopped having sex. She requested to be awarded the custody of their children and alimony in 1998. One day, Carlos proposed her to have sex. When she refused, he held her down by force and penetrated her; the he took her to the bedroom and penetrated her again. As a result of this, Carmela suffered injuries. Carlos was convicted for rape and maltreatment as a single offence. She filed an appeal for cassation with the Supreme Court. |
| Main reasoning/argumentation (max. 500 chars) | The statement of the victim is accepted as the only incriminatory evidence as it fulfilled the legal requirements of veracity and sufficiency. When the victim refused to have sex, the aggressor caused her injuries, using physical force to overcome her resistance. Sexual aggression is considered proven. The inflicted injuries constitute an independent offence from rape due to their nature; therefore it is correct to punish them separately. The awarded compensation of 6,000 Euros for the moral damages caused by the rape is considered pertinent and proportionate. |
| Key issues (concepts, interpretations) clarified by the case (max. 500 chars) | Rape. Presumption of innocence. Sufficiency of victim's statement. Requirements. Sexual Aggression of art. 179. Concept of rape. Resistance by the victim. Intensity. Maltreatment not subsumed by rape. Civil liability. Moral damages. Proof. |
| Results (sanctions) and key consequences or implications of the case (max. 500 chars) | The previous conviction is upheld: As guilty of the crime of rape and the misdemeanour of maltreatment, seven years of prison and complete disqualification during this period. Two weekends of house arrest for the misdemeanour. Payment of 224,22 Euros of compensation for injuries and 6,000 for moral damages. Costs to be paid by the appellant. |



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| Case title | Discrimination due to sexual orientation |
| Decision date | Sentence of the Constitutional Court nº 41/2006 (Second room). 13 February 2006 |
| Reference details (type and title of court/body; in original language and English [official translation, if available]) | Tribunal Constitucional (Constitutional Court) Rapporteuse: Ms. Elisa Pérez Vera |
| Key facts of the case (max. 500 chars) | The applicant submitted an appeal before the Constitutional Court against the Decision issued by the Catalanian High Court, Labour Court, deeming unfair his dismissal from Alitalia. The applicant claimed that his dismissal was not due to the alleged circumstances contained within the dismissal letter, and that, in fact, he had been dismissed due to his homosexuality. Thus, the applicant claimed that the dismissal was null and void as his fundamental rights had been violated (and, accordingly, he had to be readmitted in the Company). |
| Main reasoning/argumentation (max. 500 chars) | Even though most of the evidences alleged by the applicant were circumstantial, the sued Company was unable to sufficiently prove that the dismissal was not due to the applicant's homosexuality, as it could not prove any of the alleged breaches of the contract alleged within the dismissal letter. |
| Key issues (concepts, interpretations) clarified by the case (max. 500 chars) | The Constitutional Court ruled that, even though the general equality clause contained within article 14 of the Spanish Constitution does not explicitly prohibit discrimination due to sexual orientation, homosexuality must be considered as a circumstance contained within the provision "any other condition or personal or social circumstance". Furthermore, the Court establishes that sexual orientation has historically been a discriminating reason in our societies, such as other discriminations prohibited within article 14 (e.g.: sex, origin, age, etc.). |
| Results (sanctions) and key consequences or implications of the case (max. 500 chars) | The Constitutional Court ruled that the applicant had been dismissed due to his homosexuality and, accordingly, he had been illegally discriminated, violating constitutional provisions. Consequently, the Court accepted the applicant's appeal and quashed the decision appealed from the Catalanian High Court, Labour Court. |



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| Case title | Constitutionality of the Integrated Act on the Prevention of Gender Violence |
| Decision date | Sentence of the Constitutional Court 45/2009, of 19 February 2009 |
| Reference details (type and title of court/body; in original language and English [official translation, if available]) | Constitutional Court (Plenary) |
| Key facts of the case (max. 500 chars) | Ruling on 11 questions of constitutionality by the Constitutional Court. The Criminal Code had been reformed by art. 38 of Organic Act 1/2004, of 28 December, on Comprehensive Protection Measures against Gender Violence. The ordinary Court asked the Constitutional Court whether the higher penalty for male offenders established by art. 171.4 of the Criminal Code as a result of the reform was discriminatory and contrary to art. 14 of the Constitution. |
| Main reasoning/argumentation (max. 500 chars) | The protection of the freedom and security of women in partner relations and the fight against the inequality of women make that it is not disproportionate to impose a higher penalty in case of a man using violence against a woman. |
| Key issues (concepts, interpretations) clarified by the case (max. 500 chars) | Gender violence. Art. 171.4 of the Criminal Code. Constitutionality of the act against gender violence. Proportionality of the penalties. Higher penalty for male offenders. |
| Results (sanctions) and key consequences or implications of the case (max. 500 chars) | Questions of unconstitutionality rejected. The Organic Act 1/2004, of 28 December, on Comprehensive Protection Measures against Gender Violence is declared constitutional. The Courts and public administrations should apply it fully. |



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| Case title | Definition of violence and intimidation |
| Decision date | 21 April 2009 |
| Reference details (type and title of court/body; in original language and English [official translation, if available]) | Supreme Court (Criminal Section) |
| Key facts of the case (max. 500 chars) | Eloy was convicted of family maltreatment in 2005. On 20 June 2007, when he found himself with his life partner in the family bedroom, while using the necessary force, he anally penetrated her against her will. On 16 July 2007, when she wanted to end their relationship, he convinced her to go to a house, where he ripped off her blouse, threw her on the floor and tried to strangle her until she lost consciousness, provoking injuries and requiring medical assistance. |
| Main reasoning/argumentation (max. 500 chars) | Sexual aggression constitutes an attempt against someone's freedom using violence or intimidation. By violence is meant the use of physical force which is sufficient and effective to override the will of the victim. Intimidation is of a psychological nature, being any kind of coercion, threat or terror. Both violence and intimidation have to be able to overrule self-determination. This will depend on each case. The victim has to manifest her refusal, but the force used should not be irresistible. In this case, both elements are present: the facts qualify as rape, not as sexual aggression. |
| Key issues (concepts, interpretations) clarified by the case (max. 500 chars) | Sexual aggression: concepts of violence and intimidation. Presumption of innocence: review in cassation. Mixed aggravating circumstance of family relationship. |
| Results (sanctions) and key consequences or implications of the case (max. 500 chars) | Sexual aggression constituting rape (art. 178 and 179) aggravated by family relationship: 9 years and 1 day of prison, disqualification for passive suffrage, prohibition to approach the victim, her house, her work or any place she finds herself to a distance of five hundred meters during 10 years, prohibition to communicate with her during the same period. Maltreatment in the family environment (art. 153.1 and 153.3), one year of prison and disqualification for passive suffrage. Deprivation of the right to possess and carry arms and prohibition to approach and communicate with the victim for two years. Compensation of 18,000 Euros for injuries and moral damages. |