

Deusto Journal of Human Rights

Revista Deusto de Derechos Humanos

No. 11/2023

DOI: <https://doi.org/10.18543/djhr122023>

ARTICLES / ARTÍCULOS

Non-discrimination of immigrants in Spain: contributions of new Spanish legislation on equal treatment and non-discrimination to the European and international sphere

No discriminación de personas inmigrantes en España: contribuciones de la nueva legislación española sobre igualdad de trato y no discriminación a la esfera europea e internacional

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<https://doi.org/10.18543/djhr.2903>

E-published: December 2023

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Deusto Journal of Human Rights

ISSN: 2530-4275 • ISSN-e: 2603-6002, No. 12/2023, Bilbao

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Submission date: 31.05.2023

Approval date: 03.08.2023

E-published: December 2023

Citation / Cómo citar: Camas, Fernando. 2023. «Non-discrimination of immigrants in Spain: contributions of new Spanish legislation on equal treatment and non-discrimination to the European and international sphere.» *Deusto Journal of Human Rights*, No. 12: 37-67. <https://doi.org/10.18543/djhr.2903>

Summary: Introduction. 1. Keys to the new Spanish law on equal treatment and non-discrimination. 2. Breaches of the right to equal treatment and non-discrimination: typology of cases of discrimination. 3. Sectors covered by the new equal treatment and non-discrimination legislation. 4. On the right to non-discrimination of migrants under Spanish aliens' law. 4.1. The recognition of equal treatment and non-discrimination by the 2000 legislation on aliens. 4.2. An important area for experiencing situations of discrimination: employment relations. 4.3. Legal proposals for the solution of immigrant discrimination issues. Conclusions. Bibliography.

Abstract: The purpose of this paper is to carry out an analysis of Law 15/2022, of 12 July, on equal treatment and non-discrimination, approved in Spain in 2022, especially with regard to those of its precepts that affect migrants, and the contributions that this Spanish law can make to international and European legislation. In this sense, a comparison is made with the current Organic Law 4/2002, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration, which also

recognises anti-discrimination rights for migrants. In any case, the basic field of study in the application of the anti-discrimination principle for foreigners who are third-country nationals is the labour market. It is precisely in the field of employment that this paper makes proposals for a more effective application of the principle of anti-discrimination to foreigners.

Keywords: Non-discrimination, equal treatment, migrants workers, employment, labour market, multiple discrimination, intersectional discrimination.

Resumen: El objeto del presente artículo es llevar a cabo un análisis de la Ley 15/2022, de 12 de julio, integral para la igualdad de trato y la no discriminación, aprobada en España en 2022, en especial respecto de aquellos de sus preceptos que afectan a las personas migrantes, y las aportaciones que esta ley española puede suponer para la legislación internacional y europea. En este sentido, se hace una comparativa con la vigente Ley Orgánica 4/2002, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, en la que también se reconocen derechos anti-discriminación a las personas migrantes. En todo caso, el campo básico de estudio en la aplicación del principio antidiscriminatorio para extranjeros nacionales de terceros países es el mercado de trabajo. Es justamente en el ámbito del empleo donde este trabajo se hacen propuestas para aplicar con más eficacia el principio de antidiscriminación a las personas extranjeras.

Palabras clave: No discriminación, igualdad de trato, trabajadores migrantes, empleo, mercado de trabajo, discriminación múltiple, discriminación interseccional.

Introduction

In 2023, Deusto Journal of Human Rights has had the fortunate idea of proposing a monographic issue on “Equality, discrimination and immigration”, since analysing this issue is a real challenge for researchers, especially when the field of analysis is law. Although we may assume that migrants are discriminated against in various social spheres, it is truly difficult to go deeper into this issue to find the corresponding solution. First, the cause (or causes in the plural) for which an immigrant may experience discrimination must be found. These may be based on their migratory status or other factors, such as sex, beliefs, ethnicity, etc. Besides, this search for the grounds of discrimination against migrants must be based on the legislation in force, as we may find, for example, that the “immigration” factor is not recognised as a cause of discrimination.

The call launched by the Deusto Journal of Human Rights for research on the subject of “equality, discrimination and immigration” actually links three notions that are not connected from a legal point of view. If I simplify the notion of equality and discrimination in the call for papers on equal treatment and non-discrimination on the one hand, and I take the notion of immigration on the other, the result is that neither in the European nor in the Spanish sphere is there a right to non-discrimination of immigrants. However, as will be developed below, Spanish law prohibits acts of discrimination against “foreign citizens”, and also, the International Labour Organisation and the United Nations prohibit discriminatory treatment of “migrant workers” and members of their families. But as a general rule, the recognition of a principle of non-discrimination with respect to the “immigrant” (and I insist, as a broader notion than that of “migrant worker”) is not included in either European or Spanish legislation.

Therefore, in order to carry out a study on equal treatment and non-discrimination in relation to immigration, the first step is to approach the latter concept as closely as possible from the element of foreignness that it presupposes, i.e. that immigrants have a nationality other than that of the country of destination. However, not only nationality should be taken as a factor that constitutes discrimination, but in order to understand whether immigrants experience discrimination, it is necessary to analyse the way in which they may experience it based on other grounds, such as racial or ethnic origin.

Finally, this paper will address the grounds for discrimination that a migrant person may face under Spanish law. This is not a natural choice in relation to the nationality of this writer, but I believe that the

adoption of legislation in 2022 with many new developments in the field of equal treatment and non-discrimination is worth disseminating through research work, as well as raising awareness of its limits, particularly with regard to foreign citizens who are third-country nationals of the European Union.

1. **Keys to the new Spanish law on equal treatment and non-discrimination**

Law 15/2022 of 12 July 2022 on equal treatment and non-discrimination was published in the Official State Gazette on 13 July 2022, and provided for the entry into force of most of its contents on the following day, 14 July 2022.

Already from the outset, the approval of the law must be positively assessed, since its very title makes its purpose clear. I wish to emphasise this point because until the adoption of Law 15/2022, the applicable legislation in relation to the principle of non-discrimination on grounds of racial or ethnic origin, religion or beliefs, disability, age or sexual orientation was *Law 62/2003, of 30 December, on fiscal, administrative and social order measures*, a law which, as can be seen from a first reading of its title, does not reveal the important anti-discrimination content it contains, and this has contributed to the fact that it has been, and continues to be, largely unknown among legal operators and society.

The new Law 15/2022 is expected to fill this gap in the citizens' knowledge of specific legislation on rights and duties of equal treatment and non-discrimination. It did not start off well, since it came into force in the middle of the summer holiday period for many citizens and, apparently, also for some of the public administrations with responsibilities in this area, due to the lack of publicity it was given. Nevertheless, in its legal course, it will be necessary for the public authorities to make a major effort to disseminate the law, especially among people who may be victims of discrimination, but also among the many public and private actors (companies, health services, internet media, etc.), who have specific anti-discrimination duties under the law.

It is also necessary to have a good knowledge of the new law because it is a kind of benchmark for the rest of the anti-discrimination regulations included in our legal system. Law 15/2022 does not repeal these, but as it states in its preamble, "is destined to become the common minimum standards that contain the fundamental definitions

of Spanish anti-discrimination law and, at the same time, include its basic guarantees, aware that, in its current state, the difficulty in the fight against discrimination lies not so much in the recognition of the problem as in the real and effective protection of the victims". The objective stated in the explanatory memorandum is to include the basic concepts of non-discrimination from which the rest of the specific laws, albeit previously approved, build on according to their peculiarities. Thus, it seeks to ensure that the configuration of an anti-discriminatory system, regardless of the factor of discrimination or the field to which it applies, is consistent without leaving any gaps in the legislation.

The explanatory memorandum of Law 15/2022 goes on to say that its text has three main features: that it is "a law of guarantees, a general law and a comprehensive law". All three categorisations are given a meaning in the law: with regard to the first, because it is intended as a norm that seeks to guarantee anti-discrimination rights that are already recognised by various laws and yet still have problems in terms of due compliance. I consider that on this point, the legal proposals contained in the Law on the infringement and sanctioning regime in matters of non-discrimination or the actions of the Independent Authority should be carefully followed.

In addition, the explanatory memorandum states that it is a general law, "as opposed to sectoral laws, which operates as general legislation to protect against any discrimination". Its function would be to act as an umbrella legislation or to cover the existence of other sectoral laws, such as, for example, those relating to equality between men and women, which it respects in their validity. It is important to be vigilant with regard to the frictions between these sectoral regulations and the general law that Law 15/2022 is intended to become, especially with regard to Law 62/2003 referred to above, which initially transposed the European Non-Discrimination Directives, 2000/43/EC and 2000/78/EC. In fact, the preamble of Law 15/2022 states that one of its objectives is to transpose those European standards "in a more appropriate manner" (as Law 62/2003 did, it should be understood). This more appropriate, or rather necessary, transposition is intended to cover several fronts: on the one hand, the regulation of a sanction regime for breaching the principle of non-discrimination, which has been lacking in many areas, but also, the creation of new equality bodies that extend competences to those that have existed until now. Thus, under the new Law 15/2022, the Independent Authority for Equal Treatment and Non-Discrimination is established. This is a state administration body, which means that it is configured as a public law

entity that acts for the fulfilment of its purposes with full independence and functional autonomy from the public administrations; it is responsible for protecting and promoting equal treatment and non-discrimination of persons on the grounds of the causes and in the areas of state competence provided for under this Law, both in the public and private sectors. Consequently, the Independent Authority for Equal Treatment and Non-Discrimination is set up as an Equality body with responsibility for the promotion of equal treatment of all persons (Morondo and Camas 2022).

Finally, Law 15/2022 defines itself as a comprehensive law. In its explanatory memorandum, the law is described as being comprehensive “with regard to the grounds of discrimination”, and later adds that the same idea presides over the political, economic, cultural and social spheres of life to which it applies, as well as, it should also be added, cases of non-compliance with the principle of equal treatment and non-discrimination, thus including concepts hitherto unknown in the Spanish legal system (such as intersectional discrimination or discrimination by error, for example).

The subjective scope of application of the law is set out in Art. 2 of Law 15/2022. On the one hand, it recognises the right of all persons to equal treatment and non-discrimination irrespective of their nationality, whether they are minors or adults, or whether they are legally resident or not. This is an expansive clause on the holders of this right, as it would initially include immigrants in an irregular situation (without authorisation for legal residence) to be protected by the right to equal treatment and non-discrimination, although this will need to be qualified by subsequent comments.

Following this recognition, the first paragraph of Art. 2 establishes that “no one may be discriminated against on the grounds of birth, racial or ethnic origin, sex, religion, beliefs or opinion, age, disability, sexual orientation or identity, gender expression, illness or health condition, serological status and/or genetic predisposition to suffer pathologies and disorders, language, socio-economic situation, or any other personal or social condition or circumstance”. As can be seen from the reading of the provision in Art. 2.1 of Law 15/2022, the grounds of “illness or health condition”, “serological status and/or genetic predisposition to suffer pathologies and disorders”, “sexual identity”, “gender expression”, “language” and “socio-economic situation” are now added to grounds of discrimination prohibited by Art. 14 of the Spanish Constitution.

Expanding discrimination factors is in line with the comprehensive perspective sought by Law 15/2022. The regulation of this set of

discrimination factors suggests a common element that characterises many of them, namely that these grounds arise in a context of structural discrimination against certain social groups (such as women, or people of other ethnicities, or people with other religious beliefs), leading them to persistently experience situations of discrimination. The law's own explanatory memorandum actually states that "it is important to bear in mind that discriminatory acts are committed in a context of structural discrimination which explains historical inequalities resulting from a situation of social exclusion and systematic subjugation through social practices, beliefs, prejudices and stereotypes". This reference to "structural discrimination" is of interest: on the one hand, because in the law there is an underlying spirit of protection of groups or collectives that have historically suffered discrimination; on the other hand, although the notion of structural discrimination is not used in the articles of Law 15/2022 (except one reference on its article 40K which gives to the Independent Authority for Equal Treatment and Non-Discrimination the function to promote studies on historical forms of structural discrimination), it justifies the specific motivations that can give rise to situations of discrimination that do appear in Art. 2.1, and which affect groups of people, whether they are visible (women, the elderly, etc.) or not (for example, LGBTBI people or people with mental illnesses)¹. In conclusion, structural discrimination is not defined or introduced in the law but underlies the inclusion of grounds of discrimination targeted by the law.

2. Breaches of the right to equal treatment and non-discrimination: typology of cases of discrimination

One of the most important issues addressed by Law 15/2022, and set out in Art. 1, is the regulation of the definition of types of discrimination that imply a breach of the right to equal treatment and non-discrimination. The discriminatory modes or attitudes, listed in Art. 6, do not constitute discrimination in the proper sense when the conduct or acts to which they correspond can be objectively justified by a legitimate aim and as an appropriate, necessary and proportionate

¹ Of interest are the references made by the European Commission to groups that are potentially victims of discrimination, some of them visible (women, elderly people, people with certain disabilities, young people, ethnic minorities), and others not visible (LGTBI people or people with mental illnesses or certain disabilities or religious minorities). See European Commission (2022)

means of achieving that aim. Therefore, in order to be considered acts of discrimination, they must all be filtered by the parameters on the purpose and the means to achieve them established by jurisprudence.

In addition, in order to properly understand the modalities of discrimination, attention should be paid to Art. 4.4 of Law 15/2022, according to which "anti-discrimination policies shall take into account the gender perspective and pay special attention to its impact on women and girls as an obstacle to access to rights such as education, employment, health, access to justice and the right to a life free of violence, among others". The provision is aimed at anti-discrimination policies, and it is precisely the definition of some of the discriminatory modalities that will be discussed here that respond to the development of these policies in favour of equality between men and women. Here, I consider the gender perspective to be inherent in the perception of types of discriminatory behaviour, in particular those of a multiple nature. It should not be forgotten that point 14 of *Council Directive 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* states that the implementation of this principle "should aim to eliminate inequalities and to promote equality between men and women, especially since women are often the victims of multiple discrimination".

The law includes as modalities or types of discrimination, and therefore as breaches of the right to equal treatment and non-discrimination, the customary "direct discrimination", which is a situation in which a person or group in which he/she forms part is, has been or could be treated less favourably than others in a similar or comparable situation for the reasons set out in Art. 2.1 of the Law. Interestingly, a legislative innovation in the area of direct discrimination is to consider the denial of reasonable accommodations to persons with disabilities as, if you'll forgive the repetition, an act of direct discrimination. While until now the refusal to provide reasonable accommodation to persons with disabilities was not automatically considered as discrimination, but had to be proven, with the new legislation the inaction, for example in the field of business, to adapt the working environment to the disabled person can now be regarded as direct discrimination.

On the other hand, indirect discrimination is also included, understood as when an apparently neutral provision, criterion or practice causes or may cause one or more individuals a particular disadvantage with respect to others due to the causes foreseen in Art. 2.1 of Law 15/2022. I consider that this discrimination constitutes a key element in determining situations of discrimination, both with regard

to a person and to a group, even if the decision from which it stems has no discriminatory intent. Moreover, in the labour sphere, the definition of this modality is particularly interesting because it actually implies that the business sector has to drive business policies in terms of the effects they entail. In fact, the importance I attach to this modality contrasts with the schematic nature of the definition, which can be explained by the very consideration of the law as a common minimum standard applicable to other sectors where the definition has been more developed.

Thirdly, Law 15/2022 includes so-called discrimination by association. In fact, the law introduces new types of violations of the right to equal treatment and non-discrimination, such as the prohibition of discrimination by association and by error, as well as multiple and intersectoral discrimination.

The Law defines discrimination by association as “when a person or group of which he or she is a member, due to his or her relationship with another person or group of which any of the grounds set out in the first paragraph of Article 2 of this law applies, is subjected to discriminatory treatment”. This new regulation on discrimination by association is to be welcomed, although its recognition, albeit not expressly provided for in the past, could find its way into the legal interpretation of sectoral laws, as for example in the area of discrimination on racial grounds. In this respect, Law 62/2003 prohibits direct discrimination on grounds of race in general, i.e. it does not link it to the fact that the recognition of a discriminatory attitude on racial grounds must be proven towards a person because of ‘his’ or ‘her’ race. This could also be interpreted as covering a specific form of discrimination by association (Camas 2021). In this regard, the CJEU Judgment of 16 July 2015 (Case C-83-14, *Chez v. Komisia za zashtita ot diskriminatsia*), which dealt with non-discrimination on grounds of racial or ethnic origin, showed that a person who was not of Roma origin could benefit from the corresponding anti-discrimination action on racial or ethnic grounds, since, despite not identifying with the Roma ethnic group, he or she suffered less favourable treatment or a particular disadvantage in the same way as the Roma. As the European Commission noted, discrimination does not depend on the existence of an intimate or close relationship between the alleged victim and the group with which he or she is associated².

² Report from the Commission to the European Parliament and the Council on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (“the Racial Equality

In addition, Law 15/2022 defines discrimination by error (or what is known in doctrinal circles mainly as discrimination by misperception or assumption) as “that which is based on an incorrect assessment of the characteristics of the person or persons discriminated against”. Article 4.1 states that “multiple or intersectional discrimination” is considered a violation of the right to equal treatment and non-discrimination.

It is at the definition level that the differences in both modalities emerge: multiple discrimination is defined as that which occurs “when a person is discriminated against simultaneously or consecutively for two or more of the causes foreseen in this law”; while intersectional discrimination is when “several of the causes foreseen in this law concur or interact, generating a specific form of discrimination”. The law differentiates at the level of “definition” between multiple and intersectional discrimination; the main difference between the two being that in the latter it is decisive that the sum of different motivations or discriminatory factors generate a specific form of discrimination.

Nevertheless, I consider that both modalities (multiple and intersectional) are manifestations of the same type of discrimination, or rather, that intersectional discrimination is a specific expression of multiple discrimination. In fact, Law 15/2022 has a homogeneous approach to the effects of both types of discrimination. Only on one very notable occasion does it establish the exclusive consideration of multiple discrimination, namely when Art. 47 establishes that conduct constituting multiple discrimination (thus failing to include intersectional discrimination) shall be considered a very serious offence. The failure to regulate the “specific form of discrimination” giving rise to intersectional discrimination as a very serious offence could lead to a flaw in the principle of criminalisation of offences. However, I also consider intersectional discrimination to be sanctionable from the moment that the interaction of the causes of discrimination that give rise to it is accredited, although it will not be sanctionable as such, but as multiple discrimination.

It is in this type of multiple and intersectional discrimination that the situation of women comes into play, and hence, as I said before, my argument for a gender perspective in the identification of these discriminatory modalities. In this regard, it should be noted that the

Directive”) and Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (“the Employment Equality Directive”, Brussels, 19.3.2021, Document COM(2021) 139 final: See at: <https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:52021DC0139&from=EN>

explanatory memorandum of Law 15/2022 states on the one hand that it contains “instruments to address the serious consequences that occur when two or more grounds of discrimination interact in the same person, especially in women”, while on the other, and specifically when talking about multiple and intersectional discrimination, the preamble justifies its adoption by stating its importance for the development of equality policies aimed at women, who are “especially vulnerable to this type of discrimination when to the ground of discrimination on grounds of sex is added any other ground provided for in the law”.

In addition to the importance of the “sex” factor as a key motive in multiple or intersectional discrimination, it is worth reflecting on when it is combined with discrimination against immigrants for their status as such, even though it is not stated in the law. As seen above, Law 15/2022 includes racial or ethnic origin, sex or religion as grounds for discrimination. This means, in principle, that a Spanish citizen, a woman, a person of another ethnicity, for example, from the Roma or Gypsy community, and with a different belief or religion from the mainstream ones, can be subject to multiple discrimination if a situation of discrimination on the basis of the three grounds (sex, ethnicity and religion or belief) occurs simultaneously or consecutively. In the event that this person is an immigrant (whether she has migrated in search of work or for any other reason), in any of the areas in which the law applies (employment, housing, education, etc.), it could be thought of as multiple discrimination, since in addition to discrimination based on her sex, ethnicity and religion or beliefs, as provided for in the law, there could also be that derived from the fact that she is a migrant or from her personal status as a migrant.

Although it is not expressly specified, the person’s status as a migrant could be included within the general clause of Spanish law prohibiting discrimination against any individual on the basis of his or her personal or social circumstances. Nevertheless, such a consideration still fails to address the discrimination that actually exists against migrants in their country of destination simply because of the fact that they are migrants. In my opinion, this historical factor of structural discrimination is curiously not addressed by European or international legislation (disregarding the recognised right of “documented migrant workers” to equal treatment and non-discrimination in their working conditions), nor indeed is it addressed by the Spanish legislation. This lack of specific legal provision for discrimination based on the person’s migratory status leads me to support the greater relevance of considering as intersectional discrimination the proof that a situation of

specific discrimination has occurred when the three causes of discrimination expressed by the law in the cited case (sex, ethnicity and religion) are combined with the victim's migratory status (i.e. in their specific status as migrants, even if they are properly documented). I consider that intersectional discrimination, in cases involving migrants, may be a useful category in which to include cases of discrimination against migrants in conjunction with what may be other factors of discrimination expressly provided for in the law.

However, multiple and intersectional discrimination also have points in common, such as the fact that when reasons are given for differences in treatment in order to avoid a charge of discrimination, these reasons must be given in relation to each of the grounds of discrimination. Likewise, in cases of multiple and intersectional discrimination, the affirmative action measures promoted by the law must also consider the concurrence of the different causes of discrimination. Hence, considering a migrant's status as a factor of discrimination may also lead to the adoption of affirmative action measures.

Also, in the area of aspects shared by both modalities, it should be remembered that in accordance with Art. 34, regulating the State Strategy for Equal Treatment and Non-Discrimination, special attention should be paid to intersectional or multiple discriminations which, by their very nature, represent a more serious attack on the right to equal treatment and non-discrimination.

3. Sectors covered by the new equal treatment and non-discrimination legislation

Regarding the objective scope of application of the above prohibition of discrimination, it should be noted that Art. 3 lays down that the Law applies to the following areas: employment and self-employment, access to employment, working conditions, including pay and dismissal, professional promotion and training for employment; access, promotion, working conditions and training in public employment; membership and participation in political, trade union, business, professional and social or economic interest organisations; education; health; transport; culture; public safety; administration of justice; social protection, benefits and social services; access, offer and supply of goods and services available to the public, including housing, which are offered outside the sphere of private and family life; access and stay in establishments or spaces open to the public, as well as the

use of public streets and permanence therein; advertising, media and services of the information society; Internet, social networks and mobile applications; sports activities, in accordance with Law 19/2007, of 11 July, against violence, racism, xenophobia and intolerance in sport. Finally, it also applies to Artificial Intelligence and big data management.

Title I of Law 15/2022 lays down provisions of interest to companies, trade unions and employers' organisations or public administrations in all these areas, and I would like to focus on those in which the law refers, albeit indirectly, to foreign citizens. In particular, one of the areas mentioned in the law is where the presence of the immigrant as a possible victim of discrimination can be found most implicitly, that of health care. Specifically, Law 15/2022 states that the health administrations will promote actions aimed at those population groups with specific health needs, such as "the elderly, minors, people with disabilities, people belonging to the LGTBI collective, people suffering from mental, chronic, rare, degenerative or terminal diseases, incapacitating syndromes, virus carriers, victims of abuse, homeless people, people with drug addiction problems, ethnic minorities, among others, and, in general, people belonging to groups at risk of exclusion and homelessness in order to ensure effective access and enjoyment of health services in accordance with their needs". The law does not mention foreigners or immigrants in an irregular or undocumented situation among the groups, although a nuance included in Art. 15.6 of Law 15/2022 should be noted: according to this provision, no one may be excluded or suspended from basic or specialised health care under equal conditions, nor be denied health treatment "due to a lack of documentary accreditation or a demonstrable minimum length of stay". This lack of "documentary accreditation" would imply a reference to undocumented foreigners, and therefore, they are entitled to full health treatment.

If we go back over what has been said so far with regard to foreign citizens, firstly, the principle of equal treatment and non-discrimination applies to all persons regardless of their nationality or whether or not they are legally resident in Spain, which would suggest that it also applies unconditionally to an undocumented foreigner, i.e. without a legal residence or work permit. Moreover, we have seen that lack of authorisation to reside or work is not an obstacle to full access to the right to health care either.

These advances with respect to immigrants must be qualified in any case by a provision included in Law 15/2022, specifically its fourth additional provision entitled "Non-affectation of legislation on aliens".

According to this precept, “the provisions of this law [Law 15/2022] are without prejudice to the regulation established in Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain and their social integration and in its implementing regulations”. In other words, what Law 15/2022 says on the recognition of the principle of equal treatment and non-discrimination of all persons regardless of their nationality or legal residence is subject to what other legislation, specifically legislation dating from 2000 (Organic Law 4/2000) concerning the rights and duties of foreigners, establishes on this matter. As will be seen, the focus of Organic Law 4/2000 is more restrictive than that of Law 15/2022 in anti-discrimination matters, especially with regard to undocumented immigrants.

4. On the right to non-discrimination of migrants under Spanish aliens’ law

The starting point in relation to the rights and responsibilities of non-EU Community citizens in Spain is Article 13.1 of the Spanish Constitution, which stipulates that aliens shall enjoy the fundamental rights and liberties protected by the Constitution ‘under the terms to be laid down by treaties and the law’. A first reading of the supreme Spanish law implies that rights such as equal treatment and non-discrimination are not accorded directly to aliens, but only insofar as those rights are recognised under the law that serves to regulate their situation. The first ruling of the Constitutional Court that addressed the issue of equal treatment between foreign citizens and Spanish nationals in the exercise of rights (in the case in question, in relation to the right to work of an undocumented foreigner residing in Spain) was Ruling 107/1984 of 23 November 1984. In its decision, the Constitutional Court stated that the text of the Constitution makes no mention of a general principle of equality between Spanish nationals and aliens and, therefore, “equality or inequality in the entitlement to and exercise of rights will depend, as laid down in the Constitution itself, on the free will of the Treaty or the law” (Foundation 3). In basic and general terms, the enjoyment of most of the fundamental rights enshrined in the Constitution corresponds to foreigners in the manner directly established by the Spanish law on the rights and duties of foreigners, which, as we have seen above, is Law 4/2000. Thus, for example, in relation to access to employment, this law (as was the case in 1984, the date of the aforementioned Constitutional Court ruling), the right to work corresponds to foreigners residing in Spain, i.e. once

they have obtained authorisation to reside and work in the country. For this reason, in the particular case brought before it, the Constitutional Court concluded that there was not a constitutional right to equal treatment for aliens in access to employment, since the right to work is only recognised for Spanish nationals. This means that a non-EU migrant worker not yet in Spain cannot demand equal treatment with a Spanish national to enter Spain and gain access to employment. To do so, the non-EU worker would previously need to have obtained authorisation from the state to live and work in Spain.

In fact, Law 4/2000 regulates the list of rights that correspond to foreigners (the right to documentation, the right to work and social security, the right to health care, the right to access to justice, etc.), recognising these rights mainly for foreign citizens legally residing in Spain; only those rights listed in Organic Law 4/2000 that are linked to human dignity also correspond to undocumented foreigners. This was established in Constitutional Court Rulings No. 236/2007 of 7 November 2007 and No. 257/2007 of 19 December of the same year. In these rulings, the Constitutional Court admitted that it may be constitutional for the legislator to differentiate between resident aliens and undocumented aliens in order to shape the legal status of foreigners as long as doing so does not violate precepts or principles of the Constitution. However, the threshold imposed by the Constitution when excluding certain rights for foreigners in an irregular situation was found by the Constitutional Court to be dignity. According to the constitutional interpretation, “the dignity of the person, as the “foundation of the political order and social peace” (Art. 10.1 SC), obliges us to grant any person, regardless of their situation, those rights or their content which are essential to guarantee it, thus establishing dignity as an invulnerable baseline which, by constitutional imperative, is imposed on all powers, including the legislator”. For this reason, the Constitutional Court admits the ownership and full exercise of certain fundamental rights also for undocumented foreigners, such as the right to assembly, association, education, health care, freedom of association and strike or free legal aid.

4.1. *The recognition of equal treatment and non-discrimination by the 2000 legislation on aliens*

In the area of equal treatment and non-discrimination of foreigners in Spain, there is a series of articles, from the most general to the most specific, which will be briefly described below. Starting with the first of

these, Article 3 of Organic Law 4/2000 recalls, in the same way as the Spanish Constitution, that foreign citizens enjoy fundamental rights and duties in the terms established in international treaties and in Law 4/2000 itself (which means that this Law must be reviewed to see how these rights are regulated. As we have seen, these rights are generally granted to documented foreigners, with the exception of those rights most closely linked to human dignity, which are also recognised for undocumented foreigners). In addition, as a general interpretative criterion, foreigners shall be understood to exercise the rights recognised by this Law (whether they are documented or undocumented) on an equal footing with Spanish nationals.

On the other hand, Art. 2bis of Organic Law 4/2000 regulates the immigration policy to be carried out by each public administration involved in this field in accordance with its competences. This provision establishes two principles that must guide the actions of these public authorities in the exercise of their powers in the area of immigration, the first relating to the "effectiveness of the principle of non-discrimination", and the second consisting of "equal treatment in employment and social security conditions". It should be noted that in the first principle, the predicate effectiveness of the principle of non-discrimination has as a consequence, as stated literally in the provision, "the recognition of equal rights and obligations for all those who live or work legally in Spain, under the terms provided by law", i.e., the Public Administrations must act to give effect to the principle of non-discrimination with respect to documented foreigners insofar as they live or work "legally" in Spain. Curiously, however, the second principle governing the actions of the public authorities is that of "equal treatment in working conditions and social security". From the outset, this principle applies without a doubt to documented foreigners. However, as this principle of action by the public authorities does not make any reference to the legal residence status of foreigners in Spain, it should also be applicable to undocumented foreigners when they are working, while respecting the specific limits for illegally employing them or for the purposes of Social Security. In labour matters, if the migrant worker, despite being undocumented, and therefore without the right to access employment, is working, his or her minimum working conditions must be respected, as recognised in Article 36 of Organic Law 4/2000. In other words, based on this recognition of their labour rights as if they had a valid employment contract, the need to maintain the equality of their conditions with respect to the rest of the workers who do have one can be inferred.

Articles 23 et seq. of Organic Law 4/2000 define acts of discrimination as follows. In principle, discrimination is understood to be any act which "directly or indirectly involves a distinction, exclusion, restriction or preference against a foreigner based on race, colour, ancestry, national or ethnic origin, religious convictions and practices, and which has the purpose or effect of destroying or limiting the recognition or exercise, under conditions of equality, of human rights and fundamental freedoms in the political, economic, social or cultural spheres". This provision considers discrimination to be one of the actions generally described in the international sphere (exclusion, restriction or preference) that is directed against a foreigner, which must be understood in a general sense (i.e. including undocumented foreigners), but with several caveats. Firstly, as mentioned above, only those rights and fundamental freedoms that the Constitutional Court links to human dignity are applicable to them.

Secondly, notwithstanding the recognition of the principle of non-discrimination of foreigners in the exercise of their human rights, this recognition does not affect their compliance with the legal requirements for entry into Spain, residence in or expulsion from Spanish territory. That is, from the outset, the principle of non-discrimination of foreigners on the basis of race, colour, ancestry or national or ethnic origin, religious convictions and practices does not intervene in the authorisation procedures for entry and stay in Spain. It must be noted that the entry, stay and exit procedures are formulated precisely because the foreigner does not have Spanish nationality. He or she cannot request the same treatment as a Spanish citizen to enter, stay or leave given this shortcoming. In fact, on grounds such as race or ethnic origin, but also on grounds of religion or belief, disability, age or sexual orientation specifically in the field of employment and occupation, the European Directives governing these grounds exclude themselves from their application in relation to State provisions and conditions regulating the entry and residence of third-country nationals and stateless persons in the territory of the Member States and from any treatment arising from the legal status of third-country nationals and stateless persons. This European regulation has been transposed into Spanish law by Law 62/2003, which in its seventh additional provision, under the title "Non-applicability to the legislation on aliens", establishes that the articles transposing the anti-discrimination directives do not affect the rules provided for "on the entry, stay, work and establishment of foreigners in Spain under Organic Law 4/2000".

Apart from the general concept of discriminatory acts discussed above, Organic Law 4/2000 also defines specific acts of discrimination.

I consider it interesting to distinguish between these specific discriminatory acts, in particular those that may affect resident or documented foreigners, and those that may also be subject to prohibition for undocumented foreigners.

Firstly, there are certain prohibited acts of discrimination which, in my opinion, would apply to both documented and undocumented foreigners, albeit in this case with the caveats expressed above, i.e. they would be recognised as forbidden acts of discrimination but would not affect the enforcement by state authorities of the relevant decisions on entry and stay (the basis of which is the foreigner having a different nationality from Spanish nationals). According to Organic Law 4/2000, these prohibited acts of discrimination include those carried out by the authority or public official or personnel in charge of a public service, who in the exercise of their functions, by action or omission, carry out any act of discrimination prohibited by law against foreign citizens only "because of their condition as such" or because they belong to a certain race, religion, ethnic group or nationality. As can be seen, the active subject of this discriminatory act is an employee of the sector and the passive subject is a foreigner, which must be understood in general terms, whether he/she is legally resident in Spain or whether he/she is in an irregular situation or undocumented. However, the prohibition of the discriminatory act depends on whether it is prohibited by law and whether it is motivated by the victim's status as a foreigner or for other reasons such as race, religion, ethnicity or nationality.

I believe that despite the fact that these acts of discrimination, from the outset, do not have a bearing on the fulfilment of state requirements on entry and stay in Spain by foreigners, a discriminatory action based on specific grounds such as race or ethnicity or religion or nationality or, as the law states, on the status of foreigner, could be subject to activating prohibition and appropriate anti-discrimination measures if it were to violate the foreigner's human rights in the framework of the procedure authorising entry or stay. However, I insist, these procedures are not directly egalitarian with respect to foreigners in general due to the fact that they fail to have Spanish nationality.

I would also include under this recognition as discrimination any foreigner, whether documented or undocumented, with respect to those acts that impose more onerous conditions than on Spanish nationals, or that imply resistance to providing a foreign citizen with "goods or services" offered to the public, "solely because of their condition as such" or because they belong to a certain race, religion,

ethnicity or nationality. With regard to undocumented foreigners, I consider that they should be recognised in the provision of these goods or services offered to the public, unless an objective cause or the connection of these goods or services with rights to stay in Spain prevents it, provided that this does not violate their human rights.

The law includes as prohibited acts of discrimination “for foreigners who regularly reside in Spain” all actions that illegitimately impose more burdensome conditions than those imposed on Spanish nationals or restrict or limit access to work, housing, education, vocational training and social and social welfare services, as well as any other right recognised under Organic Law 4/2000 itself, such as the exercise of an economic activity, solely because of their status as such or because they belong to a certain race, religion, ethnic group or nationality.

As can be seen, the causes or grounds of discrimination that are common denominators in all the acts described are race, religion, ethnicity, nationality and discrimination on the basis of their status as foreigners (the law repeatedly refers to discrimination “on the basis of their status as such”).

Two issues are worth highlighting in the way these grounds are framed. Firstly, the problems of the relationship between nationality as a ground of discrimination and race or ethnic origin. To this end, reference should be made to the UN Human Rights Committee (UNHRC) in an opinion published in 2009. This opinion found a violation of the International Covenant on Civil and Political Rights by Spain in the case of Rosalind Williams. Ms. Williams, an African-American from the United States, acquired Spanish nationality in 1969. In 1992, a National Police officer asked her for her national identity card. The complainant asked the officer to explain the reasons for the identity check; the officer replied that he was obliged to check the identity of persons “like her”, as many people like her were undocumented foreigners. The Spanish Constitutional Court, in its ruling of 29 January 2001, justified the police action because it “applied the racial criterion as a mere indication of a greater probability that the person in question was not a Spanish national”, and because “what could have been discriminatory would have been the use of a criterion [in this case racial] unrelated to the identification of the persons for whom the law provides this administrative measure, in this case foreign citizens”. Ms. Williams filed a complaint with the UNHRC. The Committee recalled its jurisprudence that not every differentiation of treatment constitutes discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to

achieve a legitimate purpose under the Covenant, but in this case “the criteria of reasonableness and objectivity were not met”. Consequently, the UNHRC declared that Article 2 of the Convention had been violated. The UNHRC’s opinion is very significant because it questions the doctrine established by the Spanish Constitutional Court in 2001, legitimising the use of the racial criterion as a valid indicator of nationality and as a reason to assume that a foreigner’s presence in Spain is more likely to be irregular.

Secondly, it is also of interest to focus on two other grounds that appear as separate in the legislation under review: discrimination against a foreigner “in his or her capacity as such” and discrimination based on nationality. A first reading leads one to consider that both grounds are separated in the law and are therefore of different content: one could think that discrimination on the grounds of being a foreigner has a general scope (i.e. one is discriminated against without taking into account the specific nationality held, only for not having Spanish nationality), while in discrimination on the grounds of nationality one is discriminated against on the grounds of having a specific or determined nationality that does not correspond to the Spanish one. Or put another way, the law considers that an act of discrimination on grounds of nationality occurs when a certain nationality is taken as a reference to make its citizens of worse status than others and Spanish nationals. And discrimination on grounds of a foreigner’s status as such would occur when, regardless of the foreigner’s nationality, he or she is treated worse solely because he or she does not have Spanish nationality.

However, I consider that the root cause of both grounds (discrimination on grounds of nationality and discrimination on grounds of being a foreigner) are equivalent in nature. In fact, according to Art. 1 of Organic Law 4/2000, those who lack Spanish nationality are considered foreigners, and discrimination on grounds of nationality in Spain is based precisely on not having Spanish nationality.

Focusing now exclusively on the area of foreigners as victims of discrimination, either because of their status as foreign citizens or because of their nationality, it should be recalled as a preliminary basis that Spanish law provides for a fundamental division between nationals of a European Union state and EU third-country nationals. The former are guaranteed freedom of movement of persons and workers by the founding Treaties and their derived regulations, and specifically the general prohibition of any type of discrimination on grounds of nationality with respect to Spanish nationals. As we have seen, EU third-country nationals do not enjoy the rights granted to the latter by

law on an equal footing with Spanish nationals, but according to the way in which these rights are regulated by law. However, as mentioned before, once these rights have been granted to documented foreign citizens, they cannot be discriminated against on grounds of their nationality in access to work, housing, education, vocational training and social and welfare services, for example.

The data suggest that EU third-country nationals are particularly affected by discrimination in relation to the labour market (discrimination in access to employment; in maintaining their contracts or completing them, and their unemployment situation; or also in terms of working conditions)³.

4.2. *An important area for experiencing situations of discrimination: employment relations*

In labour matters, the legal provisions regulating the right to employment and social security for aliens are contained in Organic Law 4/2000, Art. 10 of which lays down that “foreign nationals who possess all the necessary requirements specified in this Organic Law, and in measures implementing it, shall have the right to engage in remunerated activities, on the basis of self-employment or otherwise, as well as access to the social security system, in conformity with applicable legislation”. As a result, only foreigners who have been authorised to come to Spain to work can enjoy the right to take up employment, whether in the public or private sector – as employees, never as civil servants – on equal terms with Spanish nationals.

In relation to non-discrimination in the field of employment, due consideration must be given to the provisions of the 2015 Workers’ Statute Act (*Ley del Estatuto de los Trabajadores*). Art. 17 of this Law establishes as null and void any work-related regulatory standards, collective bargaining clauses, individual agreements and unilateral employer actions regarding pay, working hours and other labour-related conditions that lead directly or indirectly to unfavourable treatment or discrimination towards workers on the grounds of age, disability, sex, “origin, including racial or ethnic origin”, marital status, social status, religion or beliefs, political ideas, sexual orientation and identity, gender expression, sexual characteristics, trade union

³ For a study on the working conditions of migrant workers and the situations of discrimination they face, see: Gätcher (2022).

membership or adherence to union agreements, kinship ties with persons belonging to or related to the company, and language spoken within the Spanish State (to this precept must be added the commitments derived from Spain's ratification of the International Labour Organisation's Convention 111 of 1958 on discrimination in employment and occupation, which includes national descent and social origin as a factor of discrimination) (Camas 2023).

It is clear that this amalgam of grounds of discrimination in the workplace does not include those relating to the fact that a worker is a "foreign citizen" or on his or her nationality. Different grounds such as origin, including racial or ethnic origin, are included in the provision, but the notion that a foreign worker is discriminated against "because of his or her status as such" or because of his or her nationality is literally not included. In order to put this question into perspective, i.e. to uphold the impossibility for a documented foreign worker or one with a residence permit to be discriminated against in the workplace for any reason (including his or her non-national status), we must start from the premise that Article 2 of Organic Law 4/2000 provides that Public Administrations shall base the exercise of their powers related to immigration on respect for the principle of "equality of treatment in labour and social security conditions". This means that any action taken by the public administration with regard to immigrants must be focused on respecting their equality in working conditions, and therefore no discrimination on any grounds whatsoever can occur in the case of documented immigrants.

On the other hand, it could also be argued, although this should be a matter for judicial interpretation, that the notion of "origin", including racial or ethnic origin, is applied both to Spanish nationals and to foreign workers who are not nationals of an EU Member State. Not only that, but the notion of origin could also be interpreted as national origin or nationality. In other words, the prohibition of national origin discrimination also includes foreigners who have obtained the relevant authorisation to reside and work (Camas and López Roca 2010). It must be noted that the mentioned precept of the Workers' Statute Act stems from Law 62/2003⁴, which transposed EU Directive 2000/43 concerning the principle of equal treatment between persons irrespective of racial or ethnic origin. This Directive states in its preamble that it "does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry

⁴ Law 62/2003 on fiscal, administrative and social measures.

and residence of third-country nationals and their access to employment and to occupation". In other words, depending on the Member State, nationality cannot be claimed by the foreigner as grounds for discrimination when gaining access to employment, or in the exercise of their work. As we have seen, third-country nationals wishing to enter Spain to work do not benefit from the principle of equality with Spanish nationals (at least, not until they have obtained authorisation to reside and work). If they fail to obtain authorisation, yet continue to work in Spain, they are unable to claim national origin discrimination in their workplace (since they are *de facto* not entitled to work). As we will see later, they can claim equal working conditions to Spanish national workers, but by other legal means. Nonetheless, as I see it, foreigners who are legally authorised to reside and work can defend themselves from any discrimination on the grounds of national origin under the concept of "origin", provided for under the Workers' Statute Act, which assumes that Spanish Law will not only respect Directive 2000/43, but enhance it in this particular point.

In order to achieve equal treatment and the prohibition of discrimination against immigrants, certain actions should be taken under Law 62/2003. These include corporate equality plans, promoting equality in collective bargaining between employers and union representatives, as well as adopting corporate diversity plans. These actions should always be conducted from the perspective of social dialogue between employers and workers.

4.3. *Legal proposals for the solution of immigrant discrimination issues*

However, this regulation is not preventing situations of discrimination against foreign citizens, either in their access to work, or with regard to the working conditions they may face, or in any of the areas in which they may be discriminated against.

One solution would be to reform the current legal regulation and expressly include discrimination on the basis of "migrant status". This means not to establish the reasoning that discrimination should be prohibited on the basis of anyone's nationality, but expressly on the grounds of being an "immigrant" or, in other words, of having the status of a "migrant person".

This specific mention would promote the visibility of migrant personnel in society, and especially of migrant workers, beyond them being cornered in concepts common to Spanish nationals and immigrants, such as origin, including ethnic origin, as well as their lack

of visibility if they are only considered as not having Spanish nationality. The term migrant includes, *per se*, an element of foreignness, but goes beyond this in terms of the characteristics that can identify a migrant, whatever the reason for arriving in the country of destination, but who decide to settle in a country other than their own with a view to stability if they can earn a living or improve on the life they had in their country of origin.

It is indeed noteworthy that the employment legislation passed in 2023, in particular Law 3/2023 of 28 February on Employment, establishes a regulation of interest. Article 50 sets out what is considered to be a group of priority attention for employment policy; these are groups of people who, due to their special difficulties in accessing and remaining in the labour market, require specific programmes aimed at promoting their employment and their permanence in the labour market. This includes, literally, “migrant persons”. What the law states is that foreign citizens who have come to Spain to work have significant difficulties in obtaining an employment contract or in avoiding dismissal, and therefore these migrant workers should be granted specific measures to combat these difficulties.

In this context, it is worth mentioning the statements made by the State Attorney General’s Office in the 2023 Annual Report presented by the Attorney General Mr. Álvaro García, indicating that in our society, the immigration factor constitutes a potential element of restriction, limitation or even elimination of the enjoyment of fundamental rights. For the Attorney General, the alien factor delimiting this lack of recognition of rights is often associated with non-nationals whose common denominator is their poverty and vulnerability. The report goes on to state that vulnerable foreigners, and in particular migrants whose problems reach the Attorney General’s Office, often share the common feature that, in addition to being foreigners, they are poor, and in many cases, they are poor precisely because they are foreigners (i.e. because their status as foreigners makes it extremely difficult for them to access the labour market or any economic activity). The Attorney General concludes that “therefore, on this sociological level, it is perfectly possible to separate the status of foreigner from that of migrant, and from that of poor migrant foreigner, when examining the cases that this Office deals with. The first is a sector of the population which, without further details, is not substantially different in the field of constitutional litigation from the rest of the population, but the other two – and especially the third – are clear examples of a vulnerable population”

(Fiscalía General del Estado 2023). As I have argued in this paper, beyond a purely sociological perspective, and as indicated in the aforementioned Report, the person's status as a migrant should be transposed to the field of prohibition of discrimination, especially when the distance between this and that of a poor (and therefore vulnerable) migrant foreigner is so small.

Clearly, the difficulty of this proposal lies in the definition of migrant person (not contained either in Spanish or international or European legislation), beyond the concept of "migrant worker", which does appear in Convention No. 97 of 1949 of the International Labour Organisation on migrant workers and in Convention No. 143 of 1975, with the same purpose (or also the definition of migrant workers in the 1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families). Incidentally, for the purposes of protection measures, the first of these refers not only to migrant workers but also to "immigrants", who, if they are lawfully within the territory of a State, must be accorded a series of rights listed in the Convention without discrimination on grounds of nationality, race, religion or sex, and must receive no less favourable treatment than that which is accorded to the state's own nationals. It could be understood that the very notion of immigrants goes beyond the concept of migrant workers to also include their family environment (Camas 2016, 55 et seq.).

However, I believe that the actual characteristics of a migrant in a broad sense, beyond being considered as a worker, could play a more important role in the fight against discrimination that the latter may experience as a foreign citizen. And also, any person with migrant status regardless of the reason for which they have moved to another country (including asylum-seeking, for studies, etc.).

Finally, I would like to make one last reference to an issue that is of interest insofar as a difference (which may not be objective and reasonable) is established in the legislative sphere, not between Spanish nationals and migrant workers, but among migrant workers themselves, and in particular, on the basis of their qualifications.

To begin with, the European Commission's Communication concerning the *New Pact on Migration and Asylum* published in September 2020 envisages revising *Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State* (better known as the Single Permit Directive). It should be

recalled that the transposition of this Directive is mainly reflected in Articles 36, 38 and 40 of Organic Law 4/2000, as well as in Royal Decree 557/2011, of 20 April (Articles 62 to 70), which establish in general terms the system of work permits for employed persons and the requirements for obtaining them, as well as the procedure for granting initial work permits when this competence is assumed by the Autonomous Communities. As stated in Art. 68 of Royal Decree 55/2011, any procedure relating to an initial authorisation for temporary residence and work as an employed person shall involve the submission of a single application and shall end with a single administrative decision.

In the view of the European Commission in its Communication on the *New Deal on Migration and Asylum*, Directive 2011/98 has failed to fully achieve its objective of simplifying admission procedures for all third-country workers. The aim would be to explore ways of simplifying and clarifying the scope of the legislation, including the conditions of admission and residence for “low- and medium-skilled” workers.

This initiative should be put into context. First, it should be recalled that European Union legislation deals with legal labour migration in a sectoral and dispersed manner. That is, since the adoption of the 2005 Legal Migration Plan, the EU has not opted for a model of horizontal legislation generally applicable to all migrant workers, but for the adoption of sectoral directives applicable to specific categories of labour migrants (Rojo 2006; Rodríguez Copé 2011); mainly concerning foreign workers for highly qualified jobs (Directive 2009/50/EC, also known as the Blue Card Directive); seasonal workers (Directive 2014/36/EU); or workers posted to the territory of the Union in the framework of an intra-corporate transfer (Directive 2014/66/EU). And beyond these labour migrants, but with an impact on this issue, Directive 2016/801 on entry for the purpose of study, training, volunteering or au-pair work.

It could be said that a nuance to this strategy is provided by Directive 2011/98/EC. Unlike the others, this directive does not apply to a specific group of migrants, so it cannot be strictly qualified as an exception to the sectoral directives mentioned above, but it is also true that Directive 2011/98 has a transversal character with respect to the rest of the specific directives on migrant workers and homogenises in certain aspects the rights that correspond to all of them. Specifically, one of the key features of this regulation is that it establishes a “simplified common procedure” for citizens applying to reside and work in the territory of a Member State, as well as guaranteeing a right to equal treatment for third-country nationals working in an EU Member State in relation to certain matters of a social nature (working

conditions or social security, among others), and, may I say, regardless of their qualifications.

To focus the subjective scope of such equal treatment of non-EU foreign workers, it actually defines a “third-country worker” as “any third-country national who has been admitted to the territory of a Member State, who is legally resident there and who is authorised, in the context of a paid employment relationship, to work in that Member State in accordance with national law or practice”. Although this definition of a “third-country worker” is limited to the effects of this Directive, which, as we have seen, grants a common right to equal treatment to foreign workers, the fact is that it is also very relevant for the rest of the workers covered by the other Directives mentioned above, since from the moment their application follows the procedural path of Directive 2011/98/EC, they become entitled to equal treatment (Camas 2019).

However, Directive 2011/98/EU is not a Directive that “specifically” regulates the conditions of entry and residence of third-country nationals with “medium or low qualifications”. Naturally, medium and low-skilled foreign workers can, like other migrant workers, benefit from the block of rights to equal treatment and procedural guarantees under that Directive, but their rights are not established under a specific EU entry scheme. In other words, there is no specific harmonised EU instrument for the admission of medium and low-skilled workers (European Commission 2018, 84), as is the case, for example, with the highly skilled migrant regime.

Against this background, the first voices from EU bodies such as the European Commission concluded that the consequences of the lack of harmonised rules on admission and residence in the EU for attracting low- and medium-skilled third-country nationals were difficult to assess in the light of the different needs faced by Member States with regard to these groups of third-country nationals (European Commission 2018, 84). However, a number of emerging factors should lead to a more open-minded approach to facilitating entry of low or medium-skilled foreigners, i.e. to favouring the reception of regular labour migration.

What actually underlies the call for legislation on entry channels for low- and medium-skilled workers is the lack of regular and legal entry routes for a significant number of migrant workers, an issue that is beginning to be seen as urgent given various social and labour-related factors that have come to the fore.

However, the trend towards creating legal channels to attract low- and medium-skilled foreign workers is gradually opening up in EU

policies. This is what I understand from the initiatives launched by the European Commission in its Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 27 April 2022 entitled: *Attracting Skills and Talent to the EU*⁵.

This Communication sets out a number of objectives of importance for the future of migration policy in relation to EU labour markets. In my opinion, one of them is the promotion of labour migration through legal channels, since the basic objective of the set of measures to be promoted is to encourage migrants who are nationals of third countries to come to Europe to work. Another is, as the title of the Communication itself indicates, to attract skills and talent to the EU. If one were to retain only the title of the document, it could be assumed that the main thrust is for the proposed measures to seek to enhance the reception of skilled migrant workers (understood as those with higher qualifications), when in fact the Community objective is to broaden the promotion of labour migration towards low- and medium-skilled workers. In fact, when the Communication speaks of fostering legal migration in a critical demographic context, it states that the EU must address labour shortages in specific sectors and in specific regions, especially derived from the difference in levels of development between them, covering "all types of skill levels". The reference to broadening the legal avenues for receiving migrants beyond the highly skilled is again highlighted in the Communication calls for the EU to become more attractive to "talent from all over the world". This is clarified in the Communication by warning that the quest for greater attractiveness for migrant workers cannot only stem from the objectives pursued by the amendment of the Highly Skilled Workers Directive, but that all those aspects that seek to do so "should also be strengthened for other categories of migrants, together with measures to combat labour exploitation and discrimination". Incidentally, one of the sectors where the issue of attracting all types of skilled workers needs to be made more concrete, according to the European Commission, is in the area of long-term care. With regard to this sector, the Communication points out that consideration should be given to how best to attract the "low- and medium-skilled workers" needed by the EU labour market.

⁵ Brussels, 27.4.2022. COM(2022) 657 final: <https://eur-lex.europa.eu/legal-content/ES/TXT/HTML/?uri=CELEX:52022DC0657>

Conclusions

The adoption of Law 15/2022 in Spain should be seen in a very positive way. Among the reasons for this positive assessment are the increase in the number of prohibited factors of discrimination; the regulation of different types of discrimination, such as multiple and intersectional discrimination, which can be very important in preventing discrimination against migrants; the establishment of a system of sanctions and, finally, the creation of a public authority with special competence to combat discrimination in Spanish society. However, the downside of this positive assessment is that, precisely with regard to foreigners in Spain, the contributions of the law are subordinated or subject to what is already regulated by the Organic Law 4/2000, of 11 January, on the rights and freedoms of foreigners in Spain. This means that in terms of discrimination against foreigners, instruments dating back to the year 2000 still have to be used, which may be obsolete or simply do not respond to the ever-increasing presence of immigrants in Spain and the situations of discrimination to which they may be subjected.

In the field of employment, this paper analyses the arsenal of rights and duties relating to anti-discrimination at work according to factors such as racial or ethnic origin, sex, religion, beliefs or opinion, age, disability, sexual orientation or identity, gender expression, etc. As can be seen, these factors affect any person, whether a Spanish national or a foreigner. In fact, from an overview of the legislation with respect to other sectors (education, public sector, etc.), it can be said that the prohibited grounds of discrimination are broadly the same. The Organic Law 4/2000 also includes the same grounds for discrimination, but adds the prohibition of discrimination against foreigners on the basis of their status as foreigners, i.e. their nationality.

In any case, this regulation makes discrimination against “migrant persons” invisible, and therefore this paper calls for a reform that literally states that this status of persons is a ground for discrimination. In my view, despite the difficulties of this proposal I am making, a ground for discrimination on the grounds of being a “migrant person” should be included in the law. This specific mention would promote the visibility of migrant persons in society, and especially of migrant workers, beyond them being cornered in concepts common to Spanish nationals and immigrants such as origin, including ethnic origin. The term migrant personnel as a subject of discrimination includes, *per se*, an element of foreignness, but goes beyond this in terms of the characteristics that can identify a migrant, whatever the reason for

arriving in the country of destination, including the need to work in order to earn a living survive or improve on the life they had in their country of origin.

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