

# NON-DISCRIMINATION BASED ON SEX OR SEXUAL ORIENTATION: A REVIEW OF SPANISH CASE LAW

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# Summary

- Legal context
- Judgments and Court orders that mention/are based on art. 21 Charter of Fundamental Rights of the European Union (CFREU)
- Judgments based on Spanish legislation (an overview)
  - Constitutional Court
  - Supreme Court
    - Civil section
    - Labor section
- Some hypothesis

# Legal context

- Besides art. 21 CFREU and other international conventions and treaties
  - Art. 14 Spanish Constitution (1978): “Spaniards **are equal before the law and may not in any way be discriminated against** on account of birth, race, **sex**, religion, opinion **or any other personal or social condition or circumstance**”
  - Act 3/2007 of 22<sup>nd</sup> March, on equality amongst men and women
  - No Act (at a national level) about equality or non-discrimination based on sexual orientation grounds
  - Several regional Acts on both topics; the rights to equality and non-discrimination are even enshrined in the Statutes of many Autonomous Communities
- Focus on private parties’ relationships

# Judgments/Court orders that mention art. 21 CFREU

- Even if Spanish Courts have issued **several judgments** that make reference to arts. 20 and 21 CFREU (mainly to clarify the difference between right to equality and prohibition of discrimination), they are not related with sex or sexual orientation
- Instead: **very few** in the topic of interest
  - **Seven** cases (rulings and court orders) regarding discrimination based on sex
  - **One** ruling referred to sexual orientation
- They have been delivered by different Courts
  - Constitutional Court
  - Spanish Supreme Court
  - High Courts of the Autonomous Communities
- Most of them deal with Labor law (social security) matters

# Judgments that mention art. 21 CFREU (discrimination based on sex grounds)-I

- **Constitutional Court Judgment 138/2018**, related to paternity leave: a father claimed the right to a paternity leave of equal extension to the maternity leave. The Court considered there was no discrimination, but one of the justices (woman) delivered a dissenting opinion. In this case, it was **the plaintiff** who **made use of art. 21 CFREU** to sustain his petition
- **Spanish Supreme Court (civil section) Judgment of 19 October 2009**, about succession on nobility titles. The High Court granted the title to a woman who claimed to have better right to a man (her brother). The woman (**defendant**) had **founded her appeal on art. 21 CFRUE**. There is a long story on this kind of cases

# Judgments that mention art. 21 CFREU (discrimination based on sex grounds)-II

- Judgment of **Madrid's High Court (23 February 2018)**, in which two female workers sued both a public company and two male employees regarding a competition for internal promotion. The judgment **declared there was indirect discrimination** on grounds of sex, on the assumption that the competition rules (notwithstanding their neutral character since no link was made to the employees' sex) affected mainly female workers, because most of them worked part-time. The Court based (partially) its decision on arts. 21 and 23 CFREU
- Judgment of **Castilla-León's (11 July 2019) High Court**, in which a female worker sued the Social Security Agency with regard to the way of calculating her retirement pension. The judgment allowed her appeal and **considered it was discriminatory the way in which retirement pensions were calculated** (part-time workers were treated in a worst way than full-time employees and part-time workers are mainly women), after raising two questions to the CJEU, one of which was based on art. 21 CFRUE

# Court orders that mention art. 21 CFREU (discrimination based on sex grounds)-I

- Order of **Castilla-León’s High Court (17 January 2018)**, that raises a question to the CJEU about the **calculation of retirement pensions**. The CJEU ruled, on 8 May 2019 (judgment C-161-18), that
  - *“Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as **precluding legislation** of a Member State, such as that at issue in the main proceedings, **which provides that the amount of retirement pension based on contributions of a part-time worker is to be calculated** by multiplying a basic amount, established from the remuneration actually received and contributions actually paid, by a percentage which relates to the length of the period of contribution, that period being itself modified, by a reduction factor equal to the ratio of the time of part-time work actually carried out to the time of work carried out by a comparable full-time worker, and increased by the application of a factor of 1.5, **to the extent that that legislation places at a particular disadvantage workers who are women as compared with workers who are men**”*

# Court orders that mention art. 21 CFREU (discrimination based on sex grounds)-II

- Order of the **Canary Islands' High Court (7 December 2018)**, that submits a question to the CJEU about the **maternity supplement** which was only granted to women in their retirement pensions (positive action). The CJEU ruled, on 12 December 2019, in its judgment C-450-18 (answering a similar question issued by another Spanish Court) that
  - *“Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as meaning that **it precludes national legislation, such as that at issue in the main proceedings, which makes provision for the right to a pension supplement for women** who have had ... children and who are in receipt of contributory permanent incapacity pensions under a scheme within the national social security system, **while men in an identical situation do not have a right to such a pension supplement**”*
- Order of **Cataluña's High Court (28 May 2020)**, that raises a question to the CJEU about the **hypothetical discrimination** caused by a rule that hinders the plaintiff's possibility to receive a **survivor's pension** (in the case of unregistered unmarried couples) as survivor's pensions are granted mainly to women (90% of cases)

# Judgment that mentions art. 21 CFREU (discrimination based on sexual orientation)

- Ruling of the **Spanish Supreme Court (administrative section) of 19 June 2007**, that decided a case in which the plaintiff requested **compensation for damages** he suffered during the military service because of his sexual orientation (in 1979). He asked for 1M € for such damages and was awarded just 6.000 €, so he appealed to the Spanish High Court to obtain a higher amount. His appeal was rejected even if the Court (quoting art. 14 Spanish Constitution and art. 21 CFREU amongst other rules) admitted that he had been discriminated and suffered damages

# Rulings based on Spanish legislation- Constitutional Court-I

- Sex grounds:
  - Way of calculating retirement or incapacity pensions and part-time contracts
  - Right to reduction of working time due to childcaring
  - Paternity and maternity permissions (duration) and compensations
  - Pay differences
  - Worker's dismissal after maternity or during pregnancy or maternity leave
  - Unfair application of worker's (female) rights after maternity
  - Final decision about surname's order
  - Succession in nobility titles

# Rulings based on Spanish legislation- Constitutional Court- II

- Sexual orientation grounds
  - Survivor's pensions (mainly before same-sex marriage was accepted in Spain)
  - Worker's dismissal because of sexual orientation
  - Right of an under-age child to request the sex mention modification in the Civil Registry (gender issue)

# Rulings based on Spanish legislation- Supreme Court (Civil)-I

- Sex grounds:
  - Succession in nobility titles (several)
  - Final decision about surnames' order
  - Fishermen's association that denies several women the right to join it
  - Discriminatory changes of worker's labor conditions after pregnancy and maternity leave (medical doctor)
  - Right of the wife to decide, together with her husband, where to live (1983)

# Rulings based on Spanish legislation- Supreme Court (Civil)-II

- Sexual orientation grounds
  - Registration in the Civil Registry of same-sex couple's babies born making use of surrogacy motherhood
  - Right of an under-age child to request the sex mention modification in the Civil Registry (gender issue)

# Rulings based on Spanish legislation- Supreme Court (Labor law)-I

## ■ Sex grounds

- Right to maternity compensation (or other compensations) awarded to fathers, to avoid the perpetuation of women's caregiver role
- Null and void worker's dismissal after maternity or during pregnancy, maternity leave or in vitro fertilization treatment
- Right to reduction of working time due to childcaring
- Dress codes: discrimination in case the company forces nurses and auxiliary staff to wear skirt, apron and stockings
- Worker's rights (risk compensation) during breast-feeding period
- Way of calculating pensions (without taking into account maternity or paternity leaves as well as pregnancy and breast-feeding risks, part-time workers)
- Entitlement of temporary agency's workers to the measures provided by the user undertaking's Equality Plan

# Rulings based on Spanish legislation- Supreme Court (Labor law)-II

- Sexual orientation grounds
  - Survivor's pensions (same-sex couples)
  - Right to paternity compensation after the birth of a child making use of surrogacy motherhood (same-sex couple)
  - Null and void worker's dismissal due to his sexual orientation (not granted)

# Some hypothesis

- May we explain the scarce reference to art. 21 CFREU by the lack of knowledge of non-discrimination European law?
- Or maybe judges and lawyers consider that we have enough legal resources at a domestic level?
- The national/regional legislative frame on non-discrimination due to sex or sexual orientation is quite important, so perhaps Courts tend to use art. 21 CFREU mainly when a national rule is challenged
- Several relevant judgments by Labor law courts on non-discrimination problems linked to sex or sexual orientation, based on national legislation
  - Probably it is the field in which this type of discrimination is most frequent (or in which it is easier to detect)
- In the Civil law field, most of the High Court's judgments are quite irrelevant: they deal with succession in nobility titles. Instead, those related to the surnames' position or to registration of same-sex couples' children born making use of surrogacy motherhood are much more interesting