

Religion and Discrimination Law in Portugal

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I. Historical, Cultural and Social Background

Portugal was a constitutional monarchy from 1822 to 1911 with Catholicism as State religion. During most of this period was in force the constitutional charter of 1826, according to which “no one might be persecuted on grounds of religion, once it respects that of the State and does not offend public morality” (Article 145, § 4). The same formula, excepting the reference to public morality, is to be found in the short lived constitution of 1838 (Article 11). The republican constitution of 1911 repeated the last wording, almost unaltered, but reinforced by the prohibitions of being asked by any authority about the professed religion (Article 3, no. 6) and of being, because of religious opinion, deprived of any right or exempt from any civil duty (Article 3, no. 7). The undemocratic constitution of 1933 repeated the same words (Article 8, no. 3). In fact, the first Portuguese republic persecuted the Catholic Church and the dictatorship from 1926 to 1974 discriminated in favour of Catholicism (specially after the concordat of 1940), declared to be “the traditional religion of the Portuguese Nation” in 1971 (Article 46 of the Constitution of 1933, version of Law 3/71).

The principle of equality has been solemnly declared (“the law is equal for all” in 1822, 1826, 1838 and 1911, “all citizens are equal before the law” in 1933 and 1976) by all constitutions, but the Constitution of 1976 added a non-discrimination clause, inspired by Article 2 of the Universal Declaration of Human Rights: “No one shall be privileged or favoured, or discriminated against, or deprived of any right or exempted from any duty, by reason of his or her ancestry, sex, race, language, territory of origin, religion, political or ideological convictions, education, economic situation or social circumstances” (Article 13, no. 2). The principle is repeated in regard of religion in no. 2 of Article 41, about “Freedom of conscience, religion and worship”: “No one shall be persecuted or deprived of rights or exempted from civil responsibilities or duties by reason of his or her convictions or religious observance.” These dispositions were taken by the Constituent Assembly by unanimous vote. They should be interpreted in accordance with Article 16, also unanimously approved: “1. The fundamental rights contained in this Constitution shall not exclude any other fundamental rights provided for in the laws or resulting from applicable rules of international law. 2. The provisions of this Constitution and of laws relating to fundamental rights shall be construed and interpreted in harmony with the Universal Declaration of Human Rights.” Among the applicable rules of international law are since 1978 those of the European Convention of Human Rights.

The Law no. 16/2001 (Religious Freedom Law) recognizes a principle of equality regarding religion in its Article 2: “1. No one can be privileged, benefited, aggrieved, persecuted, deprived of any right or exempt from any duty on account of his or her convictions or religious practice. 2. The State shall not discriminate any church or religious community in relation to others.”

When EU Directive 2000/43/EC was adopted, the Portuguese Parliament had just approved Law no. 134/1999 prohibiting discrimination in the exercise of rights on grounds of race, colour, nationality or ethnic origin. This Law was in some respects larger than the EU Directive, covering for example grounds of nationality, not

mentioned in the later. Therefore it was not abrogated by Law no. 18/2004 that transposes into national law Directive 2000/43/CE.

In the field of labour relations, Law 7/2009 adopted the Labour Code that implements *inter alia* the Directive 2000/43/EC and the Directive 2000/78/EC (abrogating the earlier Labour Code – Law 99/2003 – that first implemented the Directives). Article 25 of the Code forbids the practice of any direct or indirect discrimination, based namely on the grounds referred to in Article 24: “ancestry, age, sex, sexual orientation, civil status, family situation, economic situation, education, origin or social condition, genetic patrimony, impaired work capacity, disability, chronic disease, nationality, ethnic origin, language, religion, political or ideological belief and membership of a trade union”. Discrimination on the grounds of disability, as regards employment and occupation has been again prohibited in a more general framework by Law 46/2006, prohibiting and punishing discrimination based on disability and on the grounds that a person has a pre-existing aggravated health risk. This law was made the subject of detailed regulations by Decree-law 34/2007.

Religions were nor mentioned and did not interfere in the debate about such legislation.

II. The Duty not to Discriminate: The Prohibition against Discrimination

1. The prohibition of religious discrimination is sanctioned by various sets of rules that are to be applied by diverse authorities. There are two authorities that are charged to oversight discrimination in general including religious discrimination, being thereby concerned with the implementation of the directives 2000/43/EC and 2000/78/EC. The Comissão para a Igualdade e contra a Discriminação Racial (Commission for Equality and Against Racial Discrimination), or CICDC, that was created by Law no. 134/1999 to deal with discrimination on grounds of race, colour, nationality or ethnic origin and to which the implementation of Directive 2000/43/EC referred, was integrated by Decree-law 167/2007 in the new ACIDI, short for the Alto Comissariado para a Imigração e Diálogo Intercultural, I.P. (High Commission for Immigration and Intercultural Dialogue), formerly ACIME (High Commission for Immigration and Ethnic Minorities). One of functions of ACIDI is “to combat every kind of discrimination based on race, colour, nationality, ethnic origin or religion by means of positive actions towards conscientiousness, education and formation, and by initiating procedures relative to minor offences (transgressões) described in the law”. In the field of labour, the directive 2000/78/EC is implemented by the Labour Code (Law 7/2009). The competence to combat all violations of labour law, including the prohibitions of discrimination, belongs to the Autoridade para as Condições de Trabalho (Authority for Labour Conditions), regulated by Decree-Law 326-B/2007 and by Decree-Law 267/2007.

In the field of religion, the ACIDI is not only charged to combat discrimination, but also “to promote interculturality by means of intercultural and inter-religious dialogue based on the Constitution, on the laws, and also by valuing cultural diversity in a milieu of mutual respect” and “to promote the dialogue with the religions by means of the knowledge of the diverse cultures and religions and by building an attitude of mutual respect and love of diversity both within the national frontiers and in the relation of Portugal with the world” (Decree-Law 167/2007, Article 3, (e) and (m)). The Law 134/99 created minor offences (*contra-ordenações*) constituted by any act of discrimination based on race, colour, nationality or ethnic origin by individuals or legal persons (Articles 9 to 12). The ACIDI is empowered to initiate the procedure and to impose the penalties for such offences, but no new minor offences were created in

regard of religious discrimination. The ACIDI is a large administrative body that directs most of the state action toward immigrants and its president, the High Commissioner for the Immigration and Intercultural Dialogue, has the status of an undersecretary of State¹. The ACT is directed by the general inspector of Labour, who has general powers of inspection in the field of labour, including labour health, and is empowered to investigate and to punish minor offences against labour legislation.

2. There are various types of remedies in the cases of religious discrimination to be applied by the corresponding branches of the judicial system. The labour courts are the appeal courts from the fines applied by the ACT to the minor offences of religious discrimination. The Labour Code, Articles 24 (5) and 551 (4), considers any violation of its prohibitions of discrimination as a very serious minor offence (*contra-ordenação*) to be punished by a fine from Euro 2 040.00 – negligence of a small size employer - to Euro 61 200.00 – intentional discrimination by a big size employer.

The administrative courts may declare the nullity or revoke any acts of the administration of a discriminatory character.

Acts of prohibited discrimination are civil torts that originate civil responsibility. The duty to compensate for moral and patrimonial damages is eventually declared and executed by the civil courts. Article 28 of the Labour Code recognizes that compensation is not excluded by, but is cumulative to other sanctions. It says that “the practice of a discriminatory act that causes damage gives the employee or job applicant concerned the right to be compensated for pecuniary or non-pecuniary damages in accordance with the general provisions of law”.

Finally there are crimes of discrimination dealt with by the criminal courts. Following the adoption of the Council of the European Union of the Joint Action of 15 July 1996, concerning action to combat racism and xenophobia (96/443/JHA), article 240 of the Penal Code, in the version of Law 59-2007, created crimes of racial or religious discrimination:

“1. A person:

a) Who founds or constitutes an organization or developps activities of organized propaganda that incite to racial or religious discrimination, hate or violence against a person, or a group of persons, on grounds of her, or their, race, colour, ethic or national origin, religion, sex or sexual orientation, or encourage them;

b) Who participates in the organization or the activities refered to in a) or gives them assistance, including finance for them;

shall be punished with imprisonment from 1 to 8 years.

2. A person who in a public reunion, by writing destined to publication or by any mean of social communication:

a) Provokes acts of violence against a person, or group of persons, on grounds of her, or their race, colour, ethic or national origin, religion, sex or sexual orientation;...

c) Menaces a person, or a group of persons, on grounds of her, or their, race, colour, ethic or national origin, religion, sex or sexual orientation;

intending to incite to racial or religious discrimination or to encourage it, shall be punished with imprisonment from 6 months to 5 years”.

The law about minor offences (*contra-ordenações*) establishes that “if the same fact constitutes simultaneously a crime and a minor offence, the agent will be punished only

¹ Most cases of discrimination dealt with by the ACIDI concern Roma and African immigrants: see Country Report Portugal by Manuel Malheiros and Alexandra Rosado for the European Network of Legal Experts in the Non-discrimination Field (state 31 December 2009) at <http://www.non-discrimination.net/en/home> , where all types of discrimination, including practical aspects, are treated.

on the ground of the crime, notwithstanding the application of the accessory sanctions prescribed for the minor offence” (Law 244/95, Article 20).

The prohibition of religious discrimination is extended by the Constitution to other convictions (Article 41, (2)), especially political and ideological convictions (Article 13 (2)). There is no legal definition of religion. The Religious Freedom Law (Law 16/2001) defines “church or religious community” (Article 20: “Churches and religious communities are organized and enduring social communities, in which believers can fulfil all the religious ends that are proposed by the respective denomination”) and “religious objectives” (Article 21: “Religious ends are those of exerting the cult or the or the rites, religious assistance, training of ministers of religion, missionary work and dissemination of the professed denomination and religious education”) in terms that do not apply to non religious associations. The Labour Code equates “religion, political or ideological belief” in its prohibition of discrimination (Article 24).

3. The prohibition of religious discrimination is universal, but the remedies or sanctions of it may be specific of some fields. So the legal sanctions of the Labour Code – *e.g.*, the fines for minor offences – protect the “right to equality in the access to employment and in labour” that is so defined in Article 24 (1): “the employee or candidate to employment has the right to equal opportunities and treatment in access to employment, professional training, promotion and working conditions’ and cannot be privileged, benefited, deprived of any right or exempt of any duty” on the grounds of discrimination exemplified in the same Article and transcribed above. The field covered by such special right to equality is further specified in (2) as regarding namely: “a) selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy; b) access to all types and to all levels of vocational guidance, vocational training and retraining, including practical work experience; c) pay and other pecuniary payments, promotions at all hierarchical levels and the criteria used in the selection of employees to be dismissed; d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry out a particular profession, including the benefits provided by it.”

4. A general definition on direct and indirect discrimination – almost identical with that of Directive 2000/43/EC, but with a larger scope of discrimination - can be found in the Labour Code. Its Article 23 says in (1) that “a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on the basis of a ground of discrimination; b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put a person on the basis of a ground of discrimination at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary” and stipulates in (2) that “the simple order or instruction that purports to damage someone on the basis if a ground of discrimination constitutes a discrimination”.

The prohibition of harassment comprehends harassment and sexual harassment. Article 29(1) defines harassment as “an unwanted conduct, namely such based on a ground of discrimination, taking place in the context of an application for a job or in the context of actual employment, occupation or professional training, with the purpose or the effect of perturbing or coercing a person, of affecting her dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment to her”. Article 29(2) establishes that “an unwanted verbal, non-verbal, or physical conduct of a sexual nature,

with the purpose or the effect described in the previous section, constitutes sexual harassment”. Harassment of any kind is considered as a very serious minor offence to be punished by the same fine as that for discrimination (Articles 29 (4) and 551(4)). Sexual harassment may constitute a crime (Article 170 and 177 (1) (b) of the Penal Code.

5. There is no specific case-law specific of religious discrimination, since the courts dealt with such offences as offences against religious liberty².

III. The Right to Distinguish or Differentiate: Exceptions to the General Prohibition

1. Article 4 of Directive 2000/43/EC and Article 4 (1) of Directive 2000/78/EC are the sources of section 2 of Article 25 of the Labour Code that extends the disposition to every possible ground of discrimination by stating that “conduct based on a ground of discrimination does not constitute discrimination where, by reason of the nature of the occupational activity or of the context in which it is carried out, such a conduct constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate”.

The Labour Code regulates some of such cases of no discrimination. So section 3 of the same Article 25 says, referring to section 2, that “namely differences of treatment on the ground of age are permitted if they are necessary and appropriate to the realization of a legitimate aim, such as policy of employment, market of work or occupational training”. Articles 66–83 of the Labour Code contain a detailed set of rules protecting younger employees. They are exempt from overtime (Article 73). There are minimum and maximum age requirements for access to employment and retirement, etc. Similarly, the provisions about the special protection of genetic patrimony, parents, adoption and other situations relative to the conciliation of occupation with family life do not contravene the prohibition of discrimination (Article 24 (3b)). Employees with disabilities are entitled to special protection (Articles 85 to 88). Temporary statutory measures of positive action to prevent or compensate for disadvantages linked to a ground of discrimination are not deemed to be discrimination (Article 27).

2. The Labour Code does not include a disposition correspondent to Article 4 (2) of EU Directive 2000/78/EC, which provides:

“Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as

² See José de Sousa e Brito, « L'application des dispositions de la Convention européenne des Droits de l'Homme protégeant la liberté de religion et de conviction au Portugal », Achilles Emilianides (ed.), *Religious Freedom in the European Union*, Leuven : Peeters, 20011, 293 ff.

the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.”

The European provision is however “applicable in Portuguese internal law in accordance with Union law” (Article 8 (4) of the Constitution) and is in accordance with the constitutional principle (Article 41 (4) of the Constitution) that “Churches and religious communities shall be independent of the State and are free to determine their own organisation and to perform their own ceremonies and worship.” These precepts have been further developed in the field of religious education.

3. Both the Concordat of 2004 for the Catholic Church (Article 19 (3) and (4)) and the Law of Religious Freedom of 2001 (Law 16/2001, Article 24 (4)) for the other Churches and religious communities ensure that the teachers in charge of the ministration of the religious classes will be appointed or hired, transferred and excluded of teaching the subject by the State, in compliance with the representatives of the churches, communities or the representative organizations. In no such case will a person who is not considered suitable by the respective representatives minister the teaching.

4. The autonomy of churches and religious communities in matters of internal organization and cult implies that the selection, the rights and the duties of their ministers are not subject to the rules of the contract of employment, including the prohibition of discrimination. In a decision of June 16 2004 (case 04S276) the Supremo Tribunal de Justiça (Supreme Court) dismissed the claim of a cult minister for payment of salary based on contract of employment on the ground that the relationship between the minister and the religious community cannot be qualified as a contract of employment, so that the remuneration received emanates from the status of the minister as defined by the religious community.