

**EUROPEAN CONSORTIUM FOR CHURCH AND STATE RESEARCH  
OXFORD CONFERENCE  
RELIGION AND DISCRIMINATION LAW IN THE EUROPEAN UNION**

**RELIGION AND DISCRIMINATION LAW IN SPAIN**

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**I. HISTORICAL, CULTURAL AND SOCIAL BACKGROUND**

**1. Constitutional framework and historical background**

Article 14 of the Spanish Constitution of 1978 proclaims equality before the law and outlaws discrimination: “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 condition or personal or social circumstance”.

This constitutional precept contains two distinct but closely related notions: the principle of equality and the prohibition of discrimination. Thus, its first part amounts to a general clause stating the equality of all Spaniards before the law, this general principle of equality having been configured as a subjective right of all citizens to receive equal treatment, a right which the organs of power are bound to respect, and a right which requires that de facto equal circumstances are given identical treatment as far as their legal consequences may be concerned and that, before any distinctions are made between them, there must exist sufficient, solid and reasonable justification for them in accordance with generally accepted criteria and value judgements and whose consequences are not disproportionate. The scope of article 14 of the Constitution is not, however, limited to its general, opening expression of equality for it goes on to proclaim the prohibition of a series of particular grounds or reasons for discrimination. This express reference to such grounds or reasons does not imply that its list of cases of discrimination is closed; but it does represent an explicit indictment of certain differences which go back a long way in history and, thanks to the action of the public authorities and to social practice, have situated some sectors of the population to positions which are not only unfavourable but also contrary to the dignity of the individual as recognised in article 10 of the Constitution. In this regard, whether in relation to the list of grounds or reasons for discrimination expressly forbidden by article 14 of the Constitution, taken as a whole or in relation to one or other of them in particular, the Constitutional Court has declared constitutionally illegitimate differences in treatment which are based on those grounds or reasons<sup>1</sup>.

Article 16 of the Constitution recognises the fundamental right of religious freedom and defines the model of Church-State relations: “1. Freedom of ideology, religion

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<sup>1</sup> Sentence of the Constitutional Court 200/2001, 4 October, Legal Ground 4.

and worship of individual and communities is guaranteed, with no other restriction on their expression than may be necessary to maintain public order as protected by law. 2. Nobody may be compelled to make statements regarding his religion, beliefs or ideology. 3. There shall be no State religion. The public authorities shall take the religious beliefs of Spanish society into account and shall in consequence maintain appropriate cooperation with the Catholic Church and the other denominations”.

From articles 14 and 16 of the Constitution, the Constitutional Court has deduced four legal principles which inspire and shape all regulations concerning religion matters: the principle of religious freedom, the principle of non-discrimination, the principle of neutrality, and the principle of cooperation between public authorities and religious denominations.

The essential content attributed by the Constitutional Court to these four principles may be synthesised as follows:

a) The principle of religious freedom guarantees the existence of an intimate repository of beliefs and, therefore, of an intellectually self-determined space regarding religion which is bound up with one's very personality and individual dignity. In addition to this internal dimension, this principle also makes room for an external dimension of *agere licere* which enables citizens to act in accordance with their own convictions and to uphold them before third parties<sup>2</sup>.

b) The principle of non-discrimination assumes that it is impossible to establish any kind of discrimination or different legal treatment of citizens on the basis of their ideologies or beliefs. At the same time, this principle demands the equal enjoyment of religious freedom for all citizens<sup>3</sup>.

c) The principle of neutrality has two aspects: on the one hand it implies that the state, having a view to the plurality of beliefs that exists in Spanish society and to the guarantee of religious freedom, is non-confessional; on the other, religious groups are unable to exceed the ends that are proper to them or to be legally equated to the state, since the Constitution prohibits any type of confusion between religious and state functions<sup>4</sup>.

d) The principle of cooperation between the public authorities and the religious denominations means the state should adopt a positive attitude towards manifestations of the right of religious freedom. The Constitution deems the religious component to be perceptible in Spanish society and instructs the public authorities to maintain relations of cooperation with the Catholic Church and other religious denominations by introducing an idea of positive neutrality<sup>5</sup>.

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<sup>2</sup> Sentence of Constitutional Court 154/2002, 18 July, Legal Ground 6.

<sup>3</sup> Sentence of Constitutional Court 24/1982, 13 May, Legal Ground 1.

<sup>4</sup> Sentence of Constitutional Court 340/1993, 16 November, Legal Ground 4.

<sup>5</sup> Sentence of Constitutional Court 46/2001, 15 February, Legal Ground 4.

The Constitution's recognition of the four principles of religious freedom, non-discrimination, neutrality, and cooperation was a radical innovation not only with respect to the immediately preceding legal regime of the Franco dictatorship (1939-1975), but also to Spain's constitutional history which, with the exception of the Second Republic (1931-1939), has been marked by the Catholic affiliation of the state.

The state's affiliation to the Catholic Church oscillated between two extremes: the total prohibition of non-Catholic religious manifestations and the tolerance of non-Catholic worship. Article 12 of the 1812 Constitution expresses the first extreme: "the religion of the Spanish nation is and will always be Catholic, Apostolic, Roman, single and true. The nation protects it with wise and just laws". For its part, article 11 of the 1876 Constitution espouses tolerance: "Nobody in Spanish territory will be challenged for his religious opinions or for the exercise of their corresponding faith, provided there is due respect for Christian morality. Nevertheless, no other public ceremonies or manifestations will be permitted than those of the religion of the state".

The Franco regime adopted a system which professed the Catholic faith but was tolerant of other confessions. Thus, article 6 of the *Fuero de los Españoles* (an Act of 1945) laid down that "[t]he profession and practice of the Catholic religion, which is the religion of the Spanish State, will enjoy official protection. Nobody will be challenged for their religious beliefs or for the private exercise of their faith. No other ceremonies or outward manifestations than those of the Catholic religion will be permitted". This tolerance underwent a profound evolution in the course of the regime. In the early years the tolerance was almost non-existent and clearly discriminated against those who professed non-Catholic beliefs, while in the later years it became more open, admitting the exercise of religious freedom with some restrictions. The chief indication of this change was Act 44/1967, of 28 June, which regulated the exercise of the civil right of freedom in religious matters. This Act applied to all confessions except the Catholic Church which was run in line with the Concordat with the Holy See of 1953. The first section of the Act's first article recognized the right to religious freedom. Nevertheless, section 3 of the same article added that the exercise of the right to religious freedom, a right conceived in accordance with Catholic doctrine, had to be compatible in all cases with the recognition of the Catholic Church as the official church of the Spanish state as proclaimed in its Fundamental Laws. Article 3 of the Act gave express treatment to non-discrimination and stipulated that religious beliefs would provide no ground for inequality among Spaniards before the law. More particularly, article 4 stated that all Spaniards, regardless of their religious beliefs, had the right to hold any job or activity and to carry out public office or functions in accordance with their merits and capacity, the only exceptions being those which were set out in the Fundamental Laws or in the legal agreements with the Catholic Church.

## **2. International Law**

Article 10.2 of the Spanish Constitution of 1978 establishes that regulations concerning the fundamental rights and freedoms it recognises will be interpreted in compliance with the Universal Declaration of Human Rights and the relevant international treaties and accords ratified by Spain. This means that the application and interpretation of the Constitution's articles 14 (equality and non-discrimination) and 16 (religious freedom) must take into account international regulations and resolutions as interpretative canon for the application of fundamental rights.

As the Constitutional Court stated in its Sentence 236/2007, of 7 November, "that decision on the part of the writers of the constitution acknowledges our coincidence with the realm of values and interests protected by said instruments as well as our will as a nation to form part of an international legal order which advocated the defence and protection of human rights as the fundamental basis of the organization of the state"<sup>6</sup>.

When the Constitution came into force on 29 December 1978, Spain had already ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (both were ratified on 13 April 1977 and came into force on 27 July 1977). For its part, the European Convention on Human Rights was ratified on 26 September 1979 (coming into force on 4 October 1979), and its 12th Protocol on 25 January 2008 (coming into force in Spain on 1 June 2008).

From the very start, Spain's Constitutional Court has taken into account the content of international treaties and declarations when interpreting and applying the Constitution. Thus, Sentence 22/1981, of 7 July, cites directly jurisprudence of the European Court of Human Rights when interpreting article 14 of the Constitution's principle of non-discrimination: "although it is true that the legal equality recognised in article 14 of the Constitution is binding and is intended not only for the Administration and the Judiciary, but also for the Legislative powers, as may be deduced from articles 9 and 53 of the same, that does not mean that the principle of equality contained in that article implies equal legal treatment in all cases and the removal of all differentiating elements of legal relevance. The European Court of Human Rights has pointed out, in relation to article 14 of the Agreement for the Protection of Human Rights and Fundamental Freedoms, that not all inequalities necessarily amount to discrimination. Article 14 of the European Agreement, as the Constitutional Court states in several of its sentences— does not prohibit all differences of treatment in the exercise of rights and freedoms: equality is only violated if the inequality lacks any objective or reasonable justification, and the existence of any such justification must be appreciated in relation to the purpose and effects of the measure under consideration, with the means employed being in reasonable proportion to the end pursued"<sup>7</sup>.

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<sup>6</sup> Legal Ground 3.

<sup>7</sup> Legal Ground 3.

### **3. Implementation to Spanish Regulation of EC Directives 2000/43/EC and 2000/78/EC**

Neither the formulation nor the implementation of EC Directives 2000/43/EC and 2000/78/EC in the Spanish law sparked political or social debate in Spain. There was no formal consultation of religions, and these made no significant contributions or declarations.

Their implementation in the Spanish law was effected by means of Act 63/2003, of 30 December, regarding fiscal, administrative, and social measures. This Act complements the General State Budget Act and covers a variety of matters. Thus, no specific legislation was introduced for implementing the directives.

Chapter III of the second title of Act 63/2003, which extends from articles 27 to 43, includes various measures to avoid cases of discrimination, and to that end Spain's principal labour legislation has been reformed: The Workers' Statute (Royal Legislative Decree 1/1996, of 24 March), the Labour Procedure Act (Royal Legislative Decree 2/1995, of 7 April), and the Social Order Infractions and Sanctions Act (Royal Legislative Decree 5/2000, of 4 August).

On 3 June 2011 the government presented in Spain's lower chamber, the Congress of Deputies, a draft bill integrating equality of treatment and non-discrimination, which is now going through Parliament. In its statement of aims it says: "One of the purposes of this act is to implement more adequately the goals and ends of EC Directives 2000/43/EC and 2000/78/EC, something which was only done in part in Act 62/2003, of 30 December, regarding fiscal, administrative, and social measures and without sufficient public debate in a field which requires raising public awareness and making the issues more visible, the social and political airing of related discussions, and a meaningful process through parliament. At the same time, that implementation was subjected to criticism by the European Commission, social groupings, particularly human rights organisations, in a process from which a series of proposed improvements have emerged. Moreover, that implementation has proven to be insufficient and inadequate when it comes to dealing with problems concerning equality and non-discrimination in Spanish society, above all in the current context of economic crisis".

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

### **1. Administrative bodies with the duty to veil for non-discrimination**

Article 33 of Act 62/2003 set up the Council for the promotion of equality and non-discrimination of persons on the grounds of racial or ethnic origin. The council's ambit of action covers education, health, social benefits and services, housing and, in general, the supply and access to any goods or services, as well as access to employment, self-employment, the carrying out of professional functions, membership of and participation in trade unions and management organisations, working conditions, promotion at work, and professional and ongoing training. Its

job is to veil for compliance with the stipulations of EC Directive 2000/43/EC and it is attached to the Ministry of Work and Immigration. Its powers are: a) to assist victims of racial or ethnic discrimination in filing their complaints; b) carry out studies and publish reports on racial and ethnic discrimination; c) promote measures which contribute to eliminating racial and ethnic discrimination, making recommendations, where necessary, regarding any matter related to such discrimination.

All Ministries with powers in matters related to the Council's ambit of activity have a seat on it, together with the autonomous regions (*Comunidades Autónomas*), local governments, and the most representative union and employers' organizations, as well as other organizations with an interest in matters of race or ethnicity. At all times the Council must have respect for the powers of the Public Ombudsman as laid down in Organic Law 3/1981, of 6 April. The Public Ombudsman may set up mechanisms of cooperation and collaboration with the Council with a view to promoting the equal treatment and non-discrimination of people on the grounds of racial or ethnic origin.

Another body with powers in this area is the Advisory Committee on Religious Freedom, created by article 8 of Organic Law 7/1980, of 5 July, regarding religious freedom. This Committee exists within the Ministry of Justice and is composed in equal number of representatives of the state administration, of the churches and experts whose opinion is deemed of interest in relation to matters connected with religious freedom. The tasks of the Committee include studying, reporting on and proposing anything related to the application of the Organic Law of Religious Freedom, article 1.2 of which states that: a) religious beliefs will not be considered ground for inequality or discrimination before the law; b) religious reasons may not be put forward to prevent anyone from carrying out any employment or activity or discharging public offices and functions.

## **2. Regulations regarding the prohibition of discrimination and fields covered by the prohibition**

The principle regulation in this respect is article 14 of the Spanish Constitution of 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 condition or personal or social circumstance". The contents of this article are interpreted, as mentioned earlier, by the Constitutional Court in accordance with the jurisprudence of the European Court of Human Rights.

This prohibition of discrimination is of application in public and private spheres. Its transversal nature embraces the whole of the legal framework which means that it must be abided by in the different areas of the public administration (including the armed and security forces) and in the private sector.

This prohibition of discrimination is referred to in numerous regulatory dispositions, many of which stem from Act 62/2003, of 30 December, regarding fiscal,

administrative, and social measures, by means of which, as mentioned earlier, a series of legislative reforms were introduced with a view to fitting Spanish law to the stipulations of EC Directives 2000/43/EC and 2000/78/EC.

Besides the reforms it introduced in other legislative dispositions, Act 62/2003 itself refers to the prohibition of discrimination on the grounds of religion in chapter III of its second part, which deals with measures for the application of the principle of equal treatment. Article 27 lays down that the objective of this chapter of Act 62/2003, which is to be applied in public and private sectors, is to establish measures for the real and effective application of the principle of equal treatment and non-discrimination, particularly on the grounds of racial or ethnic origin, religion or convictions, disability, age or sexual orientation, in the terms set out in each of its sections.

Article 28 is taken up with definitions which shape the chapters understanding of the principle of equality as the absence of any direct or indirect discrimination for reasons of a person's racial or ethnic origin, religion or convictions, disability, age or sexual orientation. Direct discrimination occurs when a person is treated less favourably than another in a similar situation for reasons of racial or ethnic origin, religion or convictions, disability, age or sexual orientation. Indirect discrimination occurs when a legal or regulatory disposition, a conventional or contractual clause, an individual agreement or a unilateral decision, although apparently neutral, may occasion a particular disadvantage to one person in relation to others for reasons of racial or ethnic origin, religion or convictions, disability, age or sexual orientation whenever it is plain that those dispositions, clauses or decisions serve no legitimate end and that the means for achieving that end are not appropriate or necessary. Harassment is defined as any undesired conduct related to a person's racial or ethnic origin, religion or convictions, disability, age or sexual orientation, the aim or consequence of which is to demean that person's dignity and create an intimidatory, humiliating or offensive environment.

The 3rd section of chapter III, second part, of Act 62/2003 (articles 31 to 43) is concerned with measures in matters of equal treatment and non-discrimination in the work-place. Article 34 states that the aim of this section is to establish measures which enable the principle of equality and non-discrimination to be real and effective in access to employment, membership and participation in trade union and management organizations, working conditions, promotion at work, and professional and ongoing training, as well as access to self-employment or carrying out a profession and membership and participation in any organization whose members carry out a particular profession. To this end, the principle of equal treatment means the absence of any direct or indirect discrimination of any person on the grounds of racial or ethnic origin, religion or convictions, disability, age or sexual orientation. Differences in treatment based on any characteristic related to any of the cases referred to in the previous paragraph will not amount to discrimination whenever, due to the nature of the particular professional activity at stake or the context in which it is carried out, that characteristic constitutes an essential and intrinsic

professional requirement provided that the goal pursued is legitimate and the requirement proportional.

Article 35 addresses the possibility of adopting measures of positive action in order to give practical guarantees of full equality regardless of racial or ethnic origin, religion or convictions, disability, age or sexual orientation. In this connection, the principle of equal treatment does not rule out the maintenance or adoption of specific measures favouring certain groups with a view to forestalling or redressing the disadvantages that affect them in regard of the matters included in the ambit of application of this section.

Finally, article 36 regulates the burden of proof. In civil and administrative law proceedings where it may be deduced from the allegations of the plaintiff that evidence exists of discrimination with respect to the matters included in the ambit of application of this section on the grounds of the person's racial or ethnic origin, religion or convictions, disability, age or sexual orientation, the respondent will have to supply objective, reasonable and sufficiently proven justification of the measures taken and their proportionality.

In much the same way as the 3rd section, the 2nd section of chapter III, second part, of Act 62/2003 (articles 29 to 33) establishes measures in matters of equal treatment and non-discrimination for reasons of a person's racial or ethnic origin.

The prohibition of discrimination on religious grounds is dealt with in legal dispositions covering a great diversity of matters. As far as the civil service is concerned, article 14 of Act 7/2007, of 12 April, regarding the basic statute of public employees, recognises the right of public employees to non-discrimination on the grounds of birth, racial or ethnic origin, gender, sex or sexual orientation, religion or convictions, opinion, disability, age or any other personal or social condition or circumstance. The cluster of ethical principles which must be respected by public employees includes respect for fundamental rights and public freedoms, which means the avoidance of any action that might cause any discrimination on the grounds of birth, racial or ethnic origin, gender, sex or sexual orientation, religion or convictions, opinion, disability, age or any other personal or social condition or circumstance. Article 95 of that Statute regards as a very serious offense any action that entails either discrimination on the grounds of birth, racial or ethnic origin, religion or convictions, disability, age or sexual orientation, language, opinion, place of birth or residence, sex or any other personal or social condition or circumstance, or harassment on the grounds of racial or ethnic origin, religion or convictions, disability, age or sexual orientation, or moral, sexual or gender harassment.

As far as labour relations are concerned, it is the Workers' Statute itself, in its revised version approved by Royal Legislative Decree 1/1995, of 24 March, which regulates the prohibition of discrimination on religious grounds in several articles. Article 4.2 establishes that in working relationships workers have the right not to be discriminated directly or indirectly when seeking employment or when employed on the grounds of sex, civil status, age within the limits set by the same piece of



legislation, racial or ethnic origin, social condition, religion or convictions, political ideas, sexual orientation, membership or otherwise of a trade union, or language within the Spanish state. At the same time, they have the right to respect for their privacy and to due consideration for their dignity, which together comprise protection against harassment on the grounds of racial or ethnic origin, religion or convictions, disability, age or sexual orientation, as well as against sexual or gender harassment. Article 16.2 requires that, within their ambit of action, placement agencies guarantee the principle of equality in employment access and outlaws all discrimination for reasons of origin, including racial or ethnic origin, sex, age, civil status, religion or convictions, political opinions, sexual orientation, membership of trade unions, social conditions, language within the state and disability, provided that the worker has the aptitude to carry out the work or employment in question. Article 17 is concerned explicitly with non-discrimination in labour relations, laying down that any regulatory precepts, clauses in collective agreements, individual accords or unilateral decisions made by the employer which directly or indirectly contain negative discrimination on the grounds of age or disability, or positive or negative discrimination in the workplace in matters of pay, timetables or other conditions of work for reasons of sex, origin, including racial or ethnic origin, civil status, social condition, religion or convictions, political ideas, sexual orientation, membership or otherwise of trade unions or adherence to agreements made by them, kinship with other workers in the company or language within the Spanish state will be considered void and with no effect. Also considered void are any instructions to discriminate or any decisions made by the employer which entail detrimental treatment of workers in response to any complaint lodged in the company or any administrative or legal proceeding intended to enforce the principle of equal treatment and non-discrimination. Finally, article 54, which regulates disciplinary dismissals, treats as breach of contract the dismissal of any worker as the result of harassment for reasons of racial or ethnic origin, religion or convictions, disability, age or sexual orientation or the sexual or gender harassment of the employer or the employees who work in the company.

Article 96 of the revised Labour Procedure Act, passed by Royal Legislative Decree 2/1995, of 7 April, which concerns the burden of proof, lays down that in those processes where it may be deduced from the allegations of the plaintiff that evidence exists of discrimination with respect to the matters included in the ambit of application of this section on the grounds of the person's racial or ethnic origin, religion or convictions, disability, age or sexual orientation, the respondent will have to supply objective, reasonable and sufficiently proven justification of the measures taken.

Articles 8, 9 and 16 of Royal Legislative Decree 5/2000, of 4 August, which gave approval to the revised act regarding infractions and sanctions in the social order, qualifies discrimination as a very serious infraction, both in labour relations and in matters of employment.

As for foreigners, article 23 of Organic Law 4/2000, of 11 January, regarding the duties and freedoms of foreigners in Spain and their social integration, defines which

acts are to be considered as discriminatory. Such acts are all those which, directly or indirectly, lead to any distinction, exclusion, restriction or preference to the detriment of a foreigner on the grounds of race, colour, parentage, national or ethnic origin, religious convictions and practices, and whose end or effect is to undermine or impair the recognition or exercise on equal terms of human rights and fundamental freedoms on the political, economic, social or cultural planes. That said, the following are discriminatory acts: a) those performed by the public authority, civil servant or staff entrusted with a public service who, in carrying out their functions, by commission or omission carries out any discriminatory act prohibited by law against a foreign citizen merely because of his or her condition as such or because he or she belongs to a particular race, religion, ethnic group or nationality; b) all those which impose more stringent conditions than on Spanish citizens, or conditions which imply some resistance to furnishing the foreigner with goods or services offered to the public at large on the mere ground of being a foreigner or of belonging to a particular race, religion, ethnic group or nationality; c) all those which unlawfully impose more stringent conditions on the legally resident foreigner than on Spanish citizens, or restrict or limit access to employment, housing, education, professional training and the social and health services, as well as any other right recognized by the present act, on the mere ground of his or her condition as such or because he or she belongs to a particular race, religion, ethnic group or nationality; d) all those which by omission or commission impede the exercise of any lawfully undertaken economic activity by a legally resident foreigner in Spain, on the mere ground of his or her condition as such or because he or she belongs to a particular race, religion, ethnic group or nationality; e) any treatment deriving from the adoption of criteria which are prejudicial to workers on account of their condition as such or because they belong to a particular race, religion, ethnic group or nationality constitutes indirect discrimination. Article 54 of the act qualifies all the foregoing as very serious infractions in matters relating to foreign citizens.

Finally, the prohibition of discrimination is also protected in penal law. Various articles of the Penal Code, passed by Organic Law 10/1995, of 23 November, contemplate the prohibition of discrimination on the grounds of religion. Article 22 considers as aggravating circumstances the commission of a crime for racist or anti-Semitic reasons, or for any other sort of discrimination related to the victim's ideology, religion or beliefs, the ethnic group, race or nationality he or she belongs to, his or her sex or sexual orientation, or any illness or disability he or she may suffer. Article 324 defines discrimination in the field of work. Articles 510, 511 and 512 respectively regulate the crimes of provocation to discrimination, hatred or violence towards groups, of refusal to provide a public service, and of refusal to provide a professional or commercial service. Lastly, article 515 establishes that illicit associations may be sanctioned if they promote or incite discrimination, hatred or violence towards people, groups or associations for reasons of ideology, religion or beliefs, the ethnic group, race or nationality they belong to, their sex or sexual orientation, or any illness or disability they may suffer.

### **3. Case-law**

Out of all constitutional jurisprudence, two cases concerning discrimination on the grounds of religion are worth highlighting.

The first is the case contemplated in Sentence 19/1985, of 13 February, regarding a Seventh Day Adventist who was dismissed after refusing to work on a Saturday. The Constitutional Court came to the conclusion that the worker had not been discriminated against because he had been treated in the same way as the rest of his fellow workers. In the Court's opinion, to have let the workers have Saturdays off would have amounted to an exception which, albeit reasonable, would mean the lawfulness of the granting of this dispensation of the general regime, but not its imperative imposition on the employer<sup>8</sup>. The date of this sentence should be born in mind, since it came at a time when the notion of indirect discrimination had not yet entered Spanish law.

The second case was resolved by means Sentence 166/1996, of 28 October. The appellant, a Jehovah's Witness, declared that his right to religious freedom had been violated and that he had been the victim of discrimination when he was not guaranteed the right to receive medical and surgical attention from the public health service without the use of blood transfusions. In his plaint before the Constitutional Court he alleged that while he accepted that religious freedom did not of itself determine the health service's duty to provide attention in the terms obliged by one particular mandate of a particular religious confession, that duty did derive from article 14 of the Constitution which obliges the public authorities to guarantee sufficient care and benefits for all with no discrimination. The Constitutional Court based its rejection of this alleged violation on the ground that article 14 of the Constitution acknowledges the right not to be discriminated against, but not the hypothetical right to impose or demand different treatment. As the objective of the appeal was not to guarantee equal treatment –for the legally established regime for the provision of health care is already egalitarian– but the contrary, namely to modify standard medical treatment for reasons of religious beliefs and thereby condition the professional activity of the medical staff, there was no discrimination<sup>9</sup>.

### **III. The Right to Distinguish or Differentiate: Exceptions to the General Prohibition of Discrimination**

#### **1. Cases where it is possible to make exceptions to the prohibition of discrimination**

In the context of exceptions to the prohibition of discrimination, a distinction has to be made between two issues: on the one hand, the so-called measures of positive action set out in article 5 of EC Directive 2000/43/EC and article 7 of EC Directive 2000/78/EC, the aim of which is to prevent or compensate the disadvantages affecting certain groups or people; on the other, differences in treatment which are justified because they constitute an essential and decisive professional requisite

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<sup>8</sup> Legal Ground 3.

<sup>9</sup> Legal Ground 5.

either because of the nature of the activity or because of the context in which it is carried out, in accordance with article 4 of EC Directive 2000/78/EC.

Spanish law recognises both exceptions. The first, otherwise known as positive discrimination, has been developed in such areas as disability or the constitutional dignity of women. The Constitutional Court acknowledges the constitutionality of these exceptions to article 14 of the Constitution on the grounds of article 9.2 of the Constitution, according to which it is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life.

In this regard the Constitutional Court has pointed out that the mandate issued to the public authorities in article 9.2 of the Constitution amounts to a modulation of article 14 in so far as “no consideration of discriminatory and constitutionally prohibited – but rather the contrary– can be given to the action of favourable treatment, even if only temporary, on the part of those authorities to the benefit of certain groups, historically overlooked and marginalised, with a view to mitigating or redressing their situation of tangible inequality by means of special and more favourable treatment”<sup>10</sup>.

This positive discrimination is not applicable to the religious affairs since it is at odds with the principle of neutrality laid down in article 16.3 of the Constitution, which requires of the public authorities a position of impartiality in regard to religious matters.

The second exception concerning differences in treatment which are justified because they constitute an essential and decisive professional requisite either because of the nature of the activity or because of the context in which it is carried out, is acknowledged in the case of so-called companies or bodies, the ethos of which is based on religion or belief, and, in particular, of those religious denominations to which article 6 of Organic Law 7/1980, of 5 July, regarding religious freedom, grants full autonomy and the right to establish their own rules of organization, internal regime and working regime. Those rules, as well as those regulating the organizations they create for the pursuance of their objectives, may include clauses which are protective of their religious identity and singular character, as well as of the due respect for their beliefs, without that meaning any impairment of the respect for the rights and freedoms recognised by the Constitution, particularly those of freedom, equality and non-discrimination.

While on the point, it should be clarified that these considerations have nothing to say about the differences that exist in the legal position of religious groups. In the Spanish system, and the constitutional principles of non-discrimination and neutrality notwithstanding, not all religious groups enjoy the same legal status. The religious

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<sup>10</sup> Sentence of Constitutional Court 216/1991, 14 November, Legal Ground 5.

confessions can be divided into five groups: 1) the Roman Catholic church; 2) those churches which have signed a cooperation agreement with the state in accordance with article 7 of Organic Law 7/1980, of 5 July, regarding religious freedom; 3) churches that, thanks to their reach and number of believers, have obviously taken root in Spain; 4) churches entered in the Register of Religious Organisations, regulated in 5 of the Organic Law regarding Religious Freedom; 5) churches not entered in that register. Each of these categories comes under a particular regulatory framework, which means the members of different confessions have different rights.

## **2. Organisations which may lawfully establish differences of legal treatment for reasons of religion**

The organisations which may lawfully establish differences of legal treatment for reasons of religion are the organisations, the ethos of which is based on religion or belief, included the churches entered in the Ministry of Justice's Register of Religious Organisations in accordance with article 5 of Organic Law 7/1980, of 5 July, regarding religious freedom. These are the religious denominations to which article 6 of the Law confers full autonomy to establish their own rules of organisation, internal regime and working regime.

## **3. Conditions required for the establishment of differences based on religion**

The principle of non-discrimination does not imply uniformity of legal treatment, which is why the differences are lawful.

That said, as the Constitutional Court has made clear<sup>11</sup>, regulatory differences are consistent with equality when their purpose is not in contradiction of the Constitution and when, moreover, the rules from which the difference stems form a coherent structure in terms of reasonable proportion to the end thereby pursued. As contrary to equality is one rule which diversifies because of a merely selective whim, as another rule which, in pursuance of a legitimate end, is designated in evident disproportion to that end or with no regard for the necessary relationship of proportionality. Similarly contrary to equality is any rule whose legal consequences lack proportionality.

In order to permit different treatment of similar situations, a double guarantee must be in place: a) the reasonableness of the measure, given that not all unequal legal treatment represents an infringement of article 14 of the Constitution, any such infringement only arising when that inequality sets up a difference between situations which may be regarded as equal and when it lacks any objective and reasonable justification; b) the proportionality of the measure given, that the principle of equality does not rule out the existence of all inequality, but only those inequalities in which there is no proportion between the means employed and the end pursued, for more is required for differentiation to be constitutionally licit than that the end pursued by it is lawful: rather it is also essential that the legal consequences that attach to such differentiation are in accordance with and in proportion to that

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<sup>11</sup> Sentence of Constitutional Court 96/2002, 25 April, Legal Foundations 7 and 8.

end, so that the relationship between the measure adopted, the result produced and the end sought by the legislator might overcome any consideration of its proportionality in the Constitutional Court and thus avoid any particularly deleterious or disproportionate results.

An extra element needs to be added to these general postulates: the evaluation carried out in each case of difference of treatment must bear in mind the substantive legal regime of the ambit of relations in which it is produced, for the consideration of proportionality is not carried out in the abstract but in the light of the circumstances of the particular case. This means that the individual situations which are to be compared need to be homogeneous or comparable, that is to say, the point of the comparison cannot be arbitrary or capricious.

#### **4. Case-law**

The most important cases that have emerged regarding this question have to do with teachers of religion in state schools: Sentences of the Constitutional Court 38/2007, of 15 February, 128/2007, of 4 June, and 51/2011, of 14 April. These teachers are chosen by the religious authorities but their contracts are with the Public Administration, which bears the cost of and pays their remuneration. To be contracted as a religion teacher the law requires obtaining a certificate of suitability from the relevant religious authority, while the loss of that certificate entails the extinction of the contract with the Administration.

For the Constitutional Court, the requirement of the certificate of suitability as a necessary pre-requisite of being contracted by the Administration is not a violation of the prohibition of discrimination since that requirement cannot be considered arbitrary or unreasonable, or at odds with the principles of merit and capacity, given that the employment contracts at issue are formulated solely and exclusively for the teaching of religion. To the Court's mind, the specific function to which workers contracted for this end devote themselves constitutes a distinction in fact which determines that the difference of treatment substantiated in the requirement of the certificate of suitability issued by the relevant religious authority may be objectively and reasonably justified, and is proportionate and suited to the ends pursued by the legislator, and cannot therefore be branded discriminatory<sup>12</sup>.

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<sup>12</sup> These are the terms used by the Constitutional Court in Legal Ground 9 of Sentence 38/2007, 15 February.