



Executive Summary

Portugal country report on measures to combat discrimination by Manuel Malheiros

1. Introduction

Portugal has a population of around 10.5 million inhabitants and it is a relatively homogeneous society, composed mainly of Portuguese nationals. The Census of March 2001 pointed out to 10.356.117 residents, value corresponding to an increase of 4, 8% for the decade (almost plus 500.000 individuals). This evolution confirms both the migration turnover experienced by Portugal in the 1990s (from emigration to immigration country) and the high contribution of net migration to population growth.

Serious problems are experienced in relation to equal rights and integration by the Roma community (estimated at 50,000). Members of this community face many difficulties in the fields of employment, housing and education and cases are reported of discrimination in daily life. A policy to facilitate employment for Roma must be accompanied by measures controlling any discriminatory conduct by employers who refuse to take on Roma on the grounds of their ethnic origin.

Some Roma communities live in the most basic of encampments on the outskirts of towns, sometimes without any access to essential services such as water and electricity. A great number of Roma in Portugal are living in encampments and better places should be found in order to avoid their having constantly to move from one place to another under the pressure of local residents and authorities. The reception of Roma children in schools should be improved and all necessary measures should be taken to deal with any hostile reactions from the parents of non-Roma children.

The allegations of ill-treatment committed by law enforcement officers against Roma should be investigated and legal action taken against those responsible.

We can find also in some cases a latent racism towards the ethnic minorities of African origin. There are frequent allegations of police misconduct towards ethnic minorities and people of non-Portuguese origin, including excessive use of force, ill-treatment and violence.

Discrimination based on sexual orientation is still frequent in society. Questions like marriage of same-sex couples or adoption of children by homosexuals still raise great discussions. The Criminal Code is under revision. In what concerns non-discrimination on the ground of sexual orientation the main proposals go in the sense of non discrimination of the sanctions on the basis of homosexual or heterosexual relationships involved.

Age discrimination issues are a relatively new subject of which society is not yet completely aware and is only slowly becoming conscious of its implications. The Portuguese Government regards its law as already implementing the Directive in respect of age. We consider that the Directive has been implemented but the positive measures have not so far been completely successful.

2. Main legislation

The Portuguese Constitutional principles apply to all areas covered by the Directives. They are broader than the material scope of the Directive, covering ancestry, sex, race, age, disability, language, territory of origin, religion, political or ideological convictions, education, economic situation, social condition or sexual orientation, and guaranteeing protection against any kind of discrimination.

Portugal has ratified the European Convention on Human Rights (ECHR), the Convention on the Elimination of All Forms of Racial Discrimination, the Revised European Social Charter and the Convention on the Elimination of Discrimination against Women, the International



Covenant on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights and the ILO Convention no. 111 on Discrimination.

The Criminal Code only sanctions discrimination in its most extreme forms: homicide and assault motivated by racial or religious hatred, genocide, racial and religious discrimination and related intolerance, insults on grounds of religion and profanation of cemeteries. This Code is now under revision.

Law 134/99 forbids discrimination in the exercise of rights which is based on race, colour, nationality or ethnic origin and establishes the principle of equality treatment of persons, without distinction on the basis of racial or ethnic origin and a legal framework to combat discrimination on the grounds of social or ethnic origin.

Article 23 of the Labour Code which transposes Directive 2000/78 prohibits discrimination on the grounds of ancestry, disability or chronic disease, age, race, sex, ethnic origin, sexual orientation, religion, civil status, political or ideological convictions, family situation, trade union affiliation, genetic patrimony and reduced capacity for work.

Religious freedom and equal treatment of religions and beliefs are regulated in Law 16/2001. Only in the field of labour law have there been established rules against discrimination on the grounds of age, sexual orientation, disability, religion and political convictions in addition to rules against discrimination on the grounds of race or ethnic origin. There is no specific protection in the field of self-employment; Article 13 of the Labour Code grants only limited protection, but the principle of non discrimination as applicable in what concerns access and exercise of independent protections. Law 35/2004 of 29 July 2004 imposes the duty on the employer to display in an appropriate area, information related to the worker's rights and duties according to the principles of equality and non-discrimination (Article 31).

Two important legislative acts were introduced in Portugal on the field of discrimination based on disability:

Decree-law 163/2006 of 8 August 2006 which approves the accessibility regime to buildings and public premises and Law 46/2006 of 28 August 2006 prohibiting and punishing discrimination based on disability, and on the grounds that a person has a pre-existing aggravated risk to their health. The objectives of this law are to prevent and forbid direct or indirect discrimination on grounds of any kind of disability and on the grounds that a person has a pre-existing aggravated risk to the health of the person and to sanction the practice of acts which may constitute violation of any fundamental rights, or the refusal or restriction of the exercise of any economic, social, cultural or other rights, by any persons on the basis of any kind of disability.

This law is applicable to the actions of all natural and legal persons, public or private and comprises all direct or indirect discrimination and it also does not oppose the taking of positive action. The fields covered by this law are: the access to employment, health, economic activity, goods and services, rental or selling of estates, to buildings and public premises, public transports and to educational establishments among others.

Also the Plano Nacional de Promoção da Acessibilidade (National Plan for the Promotion of Accessibility) was approved. This Plan will be in force until 2015 and SNRIPD - Secretariado Nacional para a Reabilitação e Integração das Pessoas com Deficiência (National Secretariat for the Rehabilitation and Integration of People with Disabilities) will be the responsible body for its implementation. At the end of each civil year, they will have to deliver to the

Government member with competence on the area of disability, a report concerning the execution of the measures foreseen in this Plan.

The promotion of accessibility to buildings and public premises, to transports and to the information communication technologies are the main axes of this plan and aim to increase competitiveness and employment, to reinforce social cohesion and to promote sustainable progress.

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3. Main principles and definitions

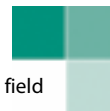
The main definitions related to discrimination have been incorporated into the legal system. Racial discrimination is defined as, "Any distinction, exclusion, restriction or preference on the grounds of race, colour, ancestry, national or ethnic origin, which has the objective of, or results in the invalidation or restriction of the recognition, enjoyment or exercise, in conditions of equality, of rights, liberties or guarantees or economic, social or cultural rights". Concerning disability, a disabled person is defined as a person who, due to loss or abnormality of psychological, intellectual, anatomical structure or function, susceptible to limited capacity, may be considered at disadvantage for the exercise of normal activities, taking into account age, sex and the prevailing socio-cultural factors. Discrimination by association or on assumed grounds or characteristics is also covered by the law and punished.

According to the legislation (Law 18/2004 and Law 35/2004) direct discrimination exists when, on one of the grounds referred in the Directives and in Portuguese law, "a person is treated less favourably than another is, has been or will be treated in a comparable situation". Indirect discrimination exists "whenever an apparently neutral provision, criteria or practice would put persons with one of the characteristics referred in the Directives and in Portuguese law 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".

Labour Code prohibits "employers' discrimination against workers or applicants for a job based on grounds of ancestry, age, sex, sexual orientation, civil status, genetic patrimony, work capacity, disability, chronic disease, nationality, ethnic origin, religion, political or ideological convictions or trade unions affiliation" and so sets out the grounds of discrimination without any limitation concerning the actual situation of the worker and in such a broad way that it covers discrimination based on association.

In Article 24 of the Labour Code and in Article 3(4) of Law 18/2004 harassment is defined as any form of unwanted behaviour that is related to racial or ethnic origin and has the purpose or effect of affecting a person's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

Article 24(1) of the Labour Code states that harassment of employees and job applicants is to be considered a form of discrimination. Article 24(2) defines harassment as: "... any kind of unwanted behaviour related to one of the grounds referred to in section 1 of the previous Article, occurring in the context of an application for a job or in the context of actual employment, occupation or professional training, which has the purpose or the effect of affecting a person's dignity or of creating an intimidating, hostile, degrading, humiliating or



offensive environment". Article 24(3) stresses that "any unwanted verbal, non-verbal, or physical behaviour of a sexual nature, with the purpose or the effect described in the previous section", constitutes harassment. Article 23(1) of the Articles 73 and 74 of the Labour Code establish that the employer has a duty to provide reasonable accommodation for disabled people. The State has a duty to give support to the employers. The burden is not considered disproportionate when it is compensated by the State (Article 74(3)).

Article 74 states that the employer shall adopt appropriate measures of positive action to enable a person with a disability or a chronic disease to have access to, participate in, or progress in his or her career, or to undergo training, unless such measures would impose a disproportionate burden on the employer. The burden shall not be considered disproportionate when it is sufficiently covered by legal measures that exist within the framework of the national disability policy. The burden will not be considered disproportionate when it is compensated for by the State in terms still to be provided for in special legislation. This legislation has not yet been adopted.

Specific rules against victimisation only exist in relation to employment; there are no rules against victimisation in Law 18/2004 which is supposed to implement Directive 2000/43/EC.

Article 122(a) of the Labour Code prohibits the employer from "opposing, in any way whatsoever, the exercise by the worker of his/her rights, as well as from dismissing an employee or imposing any sanctions on him or her or subjecting him or her to any adverse treatment because of that same exercise."

Article 374(1)(a)(d) considers that any disciplinary measure taken against a worker is to be considered abusive (and therefore illegal) if it is in retaliation to a complaint against working conditions or to the (present) exercise, the past exercise or the intention to exercise or invoke rights and guarantees on the part of the employee. According to Article 34 of Law 35/2004 acts of retaliation are null and void.

Based on these provisions (and also on the provisions set forth in Articles 396(1)(2) and 429(c) of the Labour Code), any kind of victimisation is considered illegal under the labour law.

Situations of multiple discrimination are not specifically considered but according to the principles of criminal and administrative law they can be considered as an aggravating element relevant to determine the amount of the fine.

4. Material scope

Anti-discrimination provisions cover all the fields listed in the Directives. Discrimination on the grounds of racial or ethnic origin, religion or belief, age, disability and sexual orientation are prohibited in employment and vocational training including in prisons. Discrimination on the grounds of race or ethnic origin, colour, ancestry and nationality is also prohibited in what concerns the exercise of any civil rights, liberties or social or cultural rights. In what concerns employment it applies both to the public and private sectors. The Portuguese anti-discrimination system goes beyond the personal scope of the Directives as it covers, other grounds like nationality and political opinions.

5. Enforcing the law

According to the Labour Code, only trade unions can act in support of the victim in administrative procedures for the imposition of fines. Concerning racial discrimination, Law 18/2004 Article 5 states that "associations with the objective of combating discrimination based on racial or ethnic origin have the right to engage in judicial procedures on behalf or

in support of the interested persons, with their approval". NGOs only have the right, like any body, to inform the High Commissioner for Immigration and Ethnic Minorities (HCIEM) and the General Labour Inspectorate of racist practices. They do not have any right to intervene in the administrative procedure for the imposition of fines. Associations which work for people with disabilities may engage in criminal proceedings either on behalf or in support of a person with a disability, provided his or her approval is given. In administrative procedure these associations have the right to be informed about the enforcement of the obligations that exist under the legal provisions that protect people with disabilities.

Regarding the burden of proof, a presumption of discrimination is created once the victim can demonstrate the existence of facts that allow for such a presumption to be established. Once they have been established, the burden of proof will shift, since the respondent has the duty to prove that the facts alleged are not discriminatory. This principle does not apply to criminal procedure or to actions when according to the law it is up to the court or other jurisdiction to carry out the investigation.

Statistics, if available, can be used as evidence. They are considered as documents and can also be subject to analysis by experts appointed by the parties or by the court. It is up to the court to evaluate the evidence resulting from the statistics.

There have been no cases in Portugal involving direct or indirect discrimination where statistics have played a major role. There is no reluctance to use statistical evidence in Court, on basis of ethical or methodology issues. The Courts will evaluate the evidence resulting from eventual situational tests according to their own evaluation on the credibility of the persons involved. It is quite common in Portuguese Courts to use as arguments legislation, court precedents and doctrine of other countries, mainly of European countries and also there has been no important case-law involving statistics.

Situation testing is acceptable as evidence under the same rules as evidence by witnesses. Under the general principles of the administration of evidence, "situational testing" can be admitted as evidence, but is not defined by law. The procedural rules are those applicable to evidence given by witnesses: Articles 619 to 645 of the Civil Procedure Code and Articles 340 to 349 of the Criminal Procedure Code.

The victims of discrimination may address their complaints to any police authority, to the HCIEM or to the Labour Inspectorate. In the case of a crime the public prosecutor will conduct the case in the criminal court. In the case of minor offences the HCIEM or the Labour Inspectorate will impose a fine on the perpetrator. There are very few cases of fines applied in discrimination cases. Racial discrimination in general is a summary offence (petty administrative offence). The law considers that the practice of any discriminatory action is a summary offence punishable with fines up to 2,000 Euro and these are doubled in the case of legal persons.

The Labour Code considers discrimination a petty (administrative) offence punishable with fines that vary between 900 and 53,400 Euro according to the circumstances of the case. The victim of discrimination has the right to the payment of compensation for pecuniary and non-pecuniary (moral) damages in accordance with the principles of the Civil Code.

6. Equality bodies

The core of the system to fight racial and ethnic discrimination is the High Commissioner for Immigration and Ethnic Minorities which functions as a unified and co-ordinating agency. He enjoys wide-ranging powers including consultation and dialogue with the bodies representing immigrants or ethnic minorities in Portugal.



The High Commissioner is assisted by the Commission for Equality and Against Racial Discrimination (CEARD) which only has power to issue advisory opinions. It does not have the power to bring any cases before the courts or to assist complainants in doing so. CEARD consists of two members of the Portuguese Parliament, two government representatives and two representatives respectively of immigrants' groups, anti-racist organisations, trade unions, employers' associations and human rights organisations, as well as three prominent public figures appointed by the other members. With regard to the composition of the CEARD, it can be considered to be independent.

We must refer to other Commissions whose functions are of interest for these questions:

The Commission for Equality in Labour and Employment (CITE) is a tripartite entity created in 1979. It is composed of representatives from government and social partners (the Portuguese Retail and Services Confederation – CCP, the General Confederation of Portuguese Workers – National Trades Union – CGTP-IN, the Confederation of Portuguese Industry – CIP, and the General Workers' Union – UGT).

Also CIDM - Comissão para a Igualdade e para os Direitos das Mulheres (Commission for Equality and Women's Rights) has as its main objectives the contribution for equal opportunities and rights of men and women and their effective commitment at employment, social and cultural level.

The ACIME, CITE and CIDM provide guidance via websites and in some cases on a one to one basis or through helplines such as the one from ACIME – SOS Imigrante in 5 different languages (line 808 257 257) from CITE with the maternity and parenthood (line 800 204 684) and the helpline from CIDM on information to victims of domestic violence (line 800 202 148).