

Executive Summary

Portuguese Country Report on measures to combat discrimination by Manuel Malheiros. 2007

1. Introduction

Portugal has a population of around 10.6 million inhabitants and has a relatively homogeneous society. The Census of March 2001 indicated 10,356,117 residents, a value corresponding to an increase of 4.8 per cent for the decade (an increase of almost 500,000 individuals). This development confirms both the migration turnover experienced by Portugal in the 1990s (the change from country of emigration to country of immigration), and the high contribution of net migration to population growth. The number of foreign citizens living in Portugal is around 500,000, which represents 5 per cent of the total population.

Serious problems are experienced in relation to equal rights and integration by the Roma community (estimated at 50,000 people). 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 high number of Roma in Portugal are still living in encampments.

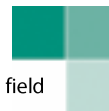
There are generally tense relations between members of the Roma communities and the law enforcement agencies, as well as allegations that the law enforcement agencies continue to discriminate against Roma, particularly when the latter attempt to engage in itinerant trading. There have been reports of arbitrary police raids on entire Roma camps. There have also been reports of racist violence, with Roma representatives explaining that the victims do not report such matters to the police, as they say they have never heard of any cases where a police officer has been punished for such behaviour against Roma.

The specialised body in Portugal, *Alto-Comissariado para a Imigração e Diálogo Intercultural I.P.* (ACIDI I.P.) [High Commission for Immigration and Intercultural Dialogue] considers the situation in regard to Roma as a priority issue. They have established a new website on Roma, '*Ciga-nos*' ('Follow us') <http://www.ciga-nos.pt/>, where useful information about this community is available.

ACIDI sometimes acts as mediator in cases where Roma have reported discriminatory conduct on the part of the police.

We can also find evidence in some cases of latent racism towards 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.



According to the ILGA Portugal report (May 2008), a legal ‘ghetto’ is maintained in matters relating to access for same-sex couples to marriage and parenthood, and a social ‘ghetto’ is retained in relation to sexual orientation and gender identity. Parenthood and marriage are fundamental issues where homophobic practices can still be perceived in Portugal.

Portuguese society is not yet fully aware of the issues involved in the relatively new field of age discrimination, and is only slowly becoming conscious of their 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 that positive measures have not so far been completely successful.

The European Commission has considered in a reasoned opinion that Portugal has failed to fulfil its obligations in respect of Articles 4, 7(2) and 9 of Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

2. Main legislation

Portuguese Constitutional principles go beyond the areas covered by the Directives. 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, 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, and has signed the Convention on the Rights of Persons with Disabilities.

The Criminal Code has recently been amended and its Article 240 covers discrimination based on race, colour, ethnic origin or nationality, religion, gender or sexual orientation. This article does not cover disability. Paragraph 1 of this article makes it an offence to establish organisations or engage in organised propaganda activities which incite or encourage discrimination on grounds of race, colour, ethnic origin or nationality, religion, gender or sexual orientation.

Paragraph 2 of Article 240 punishes anyone who in a public meeting, in writing intended for dissemination, or by any other means of social communication, provokes acts of violence against an individual or group of individuals on grounds of their race, colour, ethnic origin or nationality, religion, gender or sexual orientation with the intention of inciting to or encouraging racial or religious discrimination. Paragraph 2 also punishes anyone who in a public meeting, in writing intended for dissemination, or by any other means of social communication, defames or insults an individual or group of individuals on grounds of their race, colour, ethnic origin or nationality, religion, sex and sexual orientation.

Those who incite or encourage racial, religious or sexual discrimination will be subject to terms of imprisonment of from six months to five years.

These provisions do not cover disability, as sanctions are foreseen in Articles 9 and 10 of Law 46/2006 of 28 August 2006 (regulated by Decree-law 34/2007 of 15 February) prohibiting and punishing discrimination based on disability, and on the grounds that a person has a pre-existing aggravated risk to their health.

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.

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, but the same principles are applicable; Article 13 of the Labour Code grants only limited protection, but the principle of non-discrimination is applicable in regard to access to and exercise of independent professions. Law 35/2004 of 29 July 2004 imposes a duty on employers to display in an appropriate area information related to workers' rights and duties in accordance with the principles of equality and non-discrimination (Article 31).

Two important legislative acts were introduced in Portugal in the field of discrimination based on disability, namely Decree-law 163/2006 of 08 August 2006, which approves a regime for accessibility to buildings and public premises, and Law 46/2006 of 28 August 2006 (regulated by Decree-law 34/2007 of 15 February) 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 these laws 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 their health; 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.

The fields covered by these laws are access to employment, health, economic activity, goods and services, rental or selling of estates, to buildings and public premises, public transport and to educational establishments, among others.

The Plan of Action for the Integration of People with Disabilities or Incapacities (PAIPDI), approved by the Council of Ministers in Resolution 120/2006 of 21 September 2006, foresees 95 measures and will be implemented between 2007–2009. This plan sets out a group of measures and actions which form a policy that is integrated and cross-sectoral and aims to promote the rehabilitation, integration and participation of people with disabilities in Portuguese society.

3. Main principles and definitions

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’. This definition is so broad that it also covers discrimination by association. Discrimination by association or on any assumed grounds or characteristics is also covered by the law and punished.

In regard to 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 a disadvantage for the exercise of normal activities, taking into account age, sex and prevailing socio-cultural factors. Discrimination by association or on assumed grounds or characteristics is also covered by the law and punished.

Law 18/2004 forbids discrimination on grounds of racial or ethnic origin, nationality and colour, and Law 35/2004 forbids discrimination on grounds of ancestry, sex, race, colour, language, country of origin, religion, political or ideological convictions, education, economic situation, social condition and sexual orientation, civil status, family situation, genetic patrimony, reduced capacity to work, disability or chronic disease, nationality, or membership of a trade union. Direct discrimination exists when, on one of the grounds referred to in the directives and in Portuguese law, ‘a person is treated less favourably than another is, has been or would be treated in a comparable situation’. Indirect discrimination exists ‘whenever an apparently neutral provision, criterion or practice would put persons with one of the characteristics referred to 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’.

The Labour Code prohibits ‘discrimination by employers 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 union 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 by 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 23(1) and Articles 73 and 74 of the Labour Code establish that employers have a duty to provide reasonable accommodation for disabled people. The State has a duty to give support to employers. The burden on an employer is not considered disproportionate when it is compensated for by the State (Article 74(3)).

Article 23(1) of the Labour Code prohibits in effect all practices of direct and indirect discrimination by employers on the grounds listed. According to the same code, a difference in treatment which is based on a characteristic related to any of the grounds listed shall not constitute discrimination if, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a justifiable and genuine occupational requirement, provided that the objective is legitimate and the requirement is proportionate; Article 32(2) of Law 35/2004, which regulates Article 23(2) of the Labour Code, corresponds to the wording of Article 23(2) of the Labour Code.

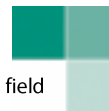
Specific rules against victimisation only exist in relation to employment; there are no rules against victimisation in Law 18/2004, which is supposed to implement Directive 2000/43/EC.

Article 122(a) of the Labour Code prohibits an employer from 'opposing, in any way whatsoever, the exercise by a worker of his or 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 for 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.

4. Material scope

Anti-discrimination provisions cover all the fields listed in the Directives, namely social benefits, education, goods and services and housing. 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 relation to the exercise of any civil rights, liberties or social or cultural rights. In regard to employment, this applies to both the public and the private sectors. The Portuguese anti-discrimination system goes beyond the personal scope of the directives, as it covers other grounds such as 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. In regard to racial discrimination, Article 5 of Law 18/2004 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 other body, to inform ACIDI and the *Autoridade para as Condições do Trabalho* (ACT), formerly the Labour Inspectorate, of racist practices. They do not have any right to intervene in administrative procedures 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 procedures, these associations have the right to be informed about 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 this has 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 where according to the law it is the responsibility of a 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 the responsibility of the court to evaluate the evidence resulting from the statistics.

Situation testing is acceptable as evidence under the same rules as evidence given 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 619–645 of the Civil Procedure Code and Articles 340–349 of the Criminal Procedure Code).

It is not easy to obtain statistical data on cases of discrimination as there are in three institutions in Portugal which may receive complaints: the Ministry of Justice, ACT (Inspectorate General of Labour) and ACIDI (High Commission).

According to the European Commission against Racism and Intolerance (ECRI) Third Report on Portugal (February 2007),¹ the dispositions laid down in Article 240 of the Criminal Code have only been applied in two cases: once in 2001 and once in 2005.

¹ ECRI Third Report on Portugal, available at:
http://www.coe.int/t/e/human_rights/ecri/1-ecri/2-country-by-country_approach/Portugal/Portugal_eng_CBC_3.asp#TopOfPage

Victims of discrimination may address their complaints to any police authority, to **ACIDI** or to the Labour Inspectorate. In the case of a crime, the public prosecutor will conduct the case in the criminal courts.

In the case of minor offences, **ACIDI** 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 of up to EUR 2,000 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 EUR 900 and EUR 53,400, according to the circumstances of the case. Victims of discrimination have 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 combat racial and ethnic discrimination is ACIDI. It is now the responsibility of ACIDI to promote equality of treatment among all persons, without any discrimination on grounds of racial or ethnic origin, and also to promote dialogue with and integration of immigrants, ethnic minorities and religions existing in the country. All the other competences of the former ACIME continue in the new ACIDI. ACIDI is governed by Decree-law 167/2007 of 03 May 2007,² which approves the organisational structure of ACIDI I.P.

In particular, it is the competence of ACIDI [High Commission] to coordinate the '*Programa Escolhas*' ['Choices Programme'], the *Estrutura de Missão para o Diálogo com as Religiões* [Structure for the Promotion of Religious Dialogue] and the *Secretariado Entreculturas* [Intercultural Secretariat].

The High Commissioner is assisted by the *Comissão para a Igualdade e Contra a Discriminação Racial* (CICDR) [Commission for Equality and Against Racial Discrimination (CEARD)], which is part of ACIDI, but a distinct body 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 this. CEARD consists of two members of the Portuguese Parliament, two government representatives and two representatives respectively from 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.

² Decree-law 167/2007 available at:

www.acime.gov.pt/modules.php?name=Downloads&d_op=getit&lid=291

ACIDI tries to increase the interest and participation of Roma citizens in legislation relative to street trading, the experience of other countries in this matter, the amounts of fines, the training needs of the Roma, the creation of specific places for street trading, the need for support by the social services for the integration of Roma families in society, measures for positive discrimination, the awareness of town hall authorities of issues concerning street trading, the difficulties members of the Roma community experience with insertion in the Portuguese labour market, amongst other matters.

ACIDI also intends to rely on the use of cultural mediators to achieve greater integration of this ethnic group. ACIDI has also set up a working group to look at the issue of itinerant trading as the most widespread means of subsistence among the Roma communities.

The *Gabinete de Apoio às Comunidades Ciganas* (GACI) [Cabinet for the Support of Roma Communities] was also established within ACIDI, and has published the '*Guia para o associativismo nas Comunidades Ciganas*' ['Guide for associative practices within the Roma Communities'] as part of the ROMA EDEM Project.

We must also refer to the Commission for Equality in Labour and Employment (CITE), which 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)).

The *Comissão para a Cidadania e Igualdade de Género* (CIG) [**Commission for Citizenship and Equality of Gender**], formerly CIDM (Commission for Equality and Women's Rights), also has as its main objectives to contribute to equal opportunities and rights for men and women, and to ensure their effective implementation in employment and social and cultural matters, as well as to promote citizenship and gender equality. The Third National Plan for Equality, Citizenship and Gender (2007–2010) is being implemented by this commission.

ACIDI, CITE and **CIG** provide guidance via websites and in some cases on a one to one basis, or through helplines, including *SOS Imigrante*, provided in five different languages by **ACIDI** (Tel. 808 257 257), a maternity and parenthood service provided by CITE (Tel. 800 204 684) and the **CIG** helpline for information for victims of domestic violence (Tel. 800 202 148).