

Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity

Alexandre Sousa Pinheiro
Dinamene de Freitas
Inês Marinho
Portugal
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Foreword

This report was written by Alexandre Sousa Pinheiro (Senior Expert), Dinamene de Freitas (Expert) and Inês Marinho (Expert) during over a three-month period (December [2007], January and February [2008]).

Based on the Guidelines drawn up by FRA experts, the main objective was to find answers to all questions posed.

The first step was to attend a meeting with an ILGA-Portugal representative, who supplied us with important information about the LGBT community in Portugal and studies of the community's typical concerns.

Next, other LGBT associations and supporters were contacted by mail, e-mail or telephone. Some did not respond.

Research of LGBT Internet sites provided a better understanding of the issue.

Administrative bodies consulted were:

- *Ordem dos Médicos* [Doctors' Public Association];
- *Comissão para a Igualdade no Trabalho e Emprego* (CITE) [Commission for Equality in Labour and Work (CELW)];
- *Comissão para a Cidadania e Igualdade de Género* (CIG) [Commission for Citizenship and Gender Equality (CCGE)];
- *Instituto dos Registos e Notariado* [Institute for Public Registers];
- *Serviço de Estrangeiros e Fronteiras* [Office of Foreign People and Boundaries] (OFPB);
- *Direcção-Geral da Política de Justiça* [General Direction of the Policy of Justice];
- *Autoridade para as Condições de Trabalho* [Authority on Labour Conditions – Inspector General of Labour];
- CGTP-IN (Trade Union);
- UGT (Trade Union).

The data collected from those bodies were, in almost every case, useless because of the absence of figures.

In the legal field, the paper aims to be exhaustive, taking into consideration Portuguese legislation and EU and International Law.

Regarding case law, there are not many examples of Court decisions in Portugal. This is why we have included some decisions made before 2000. Decisions concerning same-sex marriage and homosexual relationships between adult males and adolescent males constitute true landmarks in the recent history of Fundamental Rights in Portugal.

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Executive summary

During the course of this survey, it proved very difficult to find sources, other than legal ones, relevant to analysing the problem of homophobia and discrimination on the grounds of sexual orientation.

It was practically impossible to find reliable statistics issued by the Public Administration or by private associations. There are three main reasons for this:

- LGBTs do not advertise their sexual orientation (while racial discrimination is based on visible skin differences);
- the lack of an official service or body dealing with this kind of discrimination;
- the difficulty of defining valid criteria for collecting and classifying special data concerning sexual orientation.

In fact, a global policy involving LGBTs can only be carried out with some degree of accuracy if quantitative data exists. To obtain such data, the principles of data protection must be strictly respected.

Sexual orientation has been enshrined in the Portuguese Constitution since 2004. Article 13 states: 'Every citizen shall possess the same social dignity and shall be equal before the law'. Section 2 of the Article ensures that: 'No one shall be privileged, favoured, prejudiced, deprived of any right or exempted from any duty on the basis of ancestry, sex, race, language, place of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation'. Thus, in accordance with the principle of equality, citizens cannot be discriminated against on the basis of sexual orientation.

In spite of the constitutional provision of 2004, recent legal measures continue to prohibit LGBTs to exercise rights such as:

- adoption by same-sex *de facto* unions;
- assisted procreation;
- acceptance of children at risk.

The 2004 amendment was insufficient to create a new administrative approach to the issue of sexual orientation. In fact, no public body was created with power to investigate charges and apply fines and other punitive measures.

It is fair to say that the promotion of the 'European Year of Equal Opportunities for All', during the period of the Portuguese Presidency, was crucial to shedding light on problems faced by LGBTs.

Implementation of employment Directive 2000/78/EC

Directive 2000/78/CE was transposed by the Labour Code and by Lei 35/2004. These instruments are only applied to private contracts. However, the provisions on equality, contained in these instruments, are immediately applied to Public Employment as well.

Non-discrimination with respect to sexual orientation is expressly guaranteed by the Portuguese Legal System in the field of labour law.

In this area there is no equality body empowered to investigate charges and establish penalties for reasons of discrimination on the basis of sexual orientation. However, the President of the Commission for Citizenship and Gender Equality publicly committed to resolving this institutional omission.

In Portugal, it is not possible for public bodies or private associations to act in court on behalf of a LGBT who has suffered any kind of discrimination on the grounds of sexual orientation.

Freedom of movement

In terms of freedom of movement, Directive 2004/38/EC was transposed by Lei 37/2006. According to this law, freedom of movement is guaranteed to members of *de facto unions*, and Portuguese law allows same-sex *de facto unions*.

Portuguese law makes no reference to family members of a Third State national who lives in *de facto* union with an EU citizen.

Portuguese law now recognises, since June 2010, same sex marriages, under Law 9/2010, 31 May.¹ Same-sex marriage is also recognised between Portuguese and EU citizens or between non-EU citizens.

¹ <http://www.dre.pt/pdf1s/2010/05/10500/0185301853.pdf> (last visit 30.10.2010).

Asylum and subsidiary protection

Law 27/2008, 30 June which transposes Directives 2004/83/EC and 2005/85/EC makes reference to “sexual orientation” as a cause to offer asylum to people persecuted for such reasons.

Asylum procedures in Portugal do not include discriminatory practices such as “phallometry” or “phallometric testing”.

Family reunification

In terms of family reunification, the law does not make specific reference to LGBTs. Nevertheless, they are covered by the law in general terms.

Freedom of assembly

Although the Portuguese law governing freedom of assembly dates back to 1974, it does not forbid LGBT parades or demonstrations.

Criminal law

Portuguese Criminal Code is completely neutral in terms of sexual orientation, whereas in the past, when LGBTs committed certain crimes (of a sexual nature), the sentences they received were particularly harsh.

The Criminal Code now considers the publishing and distribution of material designed to offend LGBTs as Hate Crimes.

In the case of violent crimes committed against victims on the basis of their sexual orientation, this factor contributes to increase punishments.

Transgender issues

In Portugal a law regarding gender identity does not exist. Thus the Doctors' Public Association and the courts were forced to elaborate a system of rules applicable to transgender individuals.

Miscellaneous

Law 7/2001 recognises *de facto* unions of opposite- and same-sex couples.

The Constitutional Court considered that the absence of a law allowing same sex marriages was not unconstitutional because the State must have the possibility of choosing models of what constitutes a family. In this decision, the court did not discuss the issue of same sex marriage².

The decision was voted by 3-2 and the dissident judge claimed that to forbid same sex marriage goes against the principle of equality.

Parliament approved on Thursday 11 February 2010 a bill presented by the Government allowing same sex marriages but denying the right to adopt children³.

This whole issue of same sex marriage has been hotly debated and is now in the hands of the President of the Republic in order to be promulgated or vetoed.

90 000 people signed a petition requesting that a referendum should be held in an attempt to prevent such a measure from passing into law. This petition was rejected by Parliament⁴.

The President of the Republic can now send the bill to the Constitutional Court in order to be analysed by 13 judges. If they consider the law unconstitutional the bill must be returned to Parliament.

In the new Government the new position of Secretary of State for Equality was created with strong powers in discriminatory matters on the grounds of sexual orientation.

According to the new law on enforcement of criminal sentences, it is now possible for homosexuals to receive conjugal visits. In the former law, this right was only applicable to heterosexual couples⁵.

Same sex *de facto* unions were not allowed give shelter to children at risk.

As regards blood donors, discrimination against gay men exists, despite non-discriminatory legislation.

² <http://www.tribunalconstitucional.pt/tc/acordaos/20090359.html> (18-02-2010)

³ http://tsf.sapo.pt/PaginaInicial/Portugal/Interior.aspx?content_id=1492669 (18-02-2010)

⁴ <http://www.scribd.com/doc/22932129/Peticao-Plataforma-Cidadania-e-Casamento> (18-02-2010)

⁵ http://www.pgdlisboa.pt/pgdl/leis/lei_mostra_articulado.php?nid=1147&tabela=leis&ficha=1&pagina=1 (18-02-2010)

As regards institutional homophobia, in Portugal it was not adopted any kind of practice similar to that of Lithuania was adopted.

1. Implementation of Employment Directive 2000/78/EC

The Directive was transposed by the Labour Code (which came into effect in 2003) and only related to employment aspects. The Labour Code regulates the most important aspects of labour law and is applicable to private contracts. However, provisions on equality are also applied to public employment until special legislation is approved. Law 35/2004 was approved by the Parliament in order to complement the Code.

Article 22.º (1) of the Labour Code states that all workers have the same rights when applying for a job and regarding training and promotional prospects.

Article 22.º (2) reinforces (1), stipulating that no worker or applicant can benefit or be discriminated against on the basis of: family background, age, gender, sexual orientation, marital status, genetic status, genetic heritage, reduced capacity for work, disability, chronic diseases, nationality, ethnic background, religion, political or ideological conviction or trade union membership.

Article 23.º dictates that no employer can directly or indirectly discriminate against employees on the grounds of family background, age, gender, sexual orientation, marital status, genetic status, genetic heritage, reduced capacity for work, disability, chronic diseases, nationality, ethnic background, religion, political or ideological conviction or trade union membership.

According to Law 35/2004, direct discrimination is defined as any behaviour – in a situation referred to in Article 23 (1) of the Labour Code – according to which a person is treated less favourably than another person in a comparable situation is, has been or will be treated.

Indirect discrimination means an apparently neutral provision, criterion or practice – referred to under Article 23 (1) of the Labour Code – that places a person at a particular disadvantage compared to other persons. Indirect discrimination does not exist if such provision, criterion, or practice is objectively justified by a legitimate aim, and the means to achieve it are appropriate and necessary.

According to Article 32 (3) of Law 35/2004, an order or instruction intended to put any person at a disadvantage by reason of one of the grounds referred to under Article 23 (1) of the Labour Code shall be deemed as discrimination.

Law 35/2004 specifies that the right to equal opportunities and treatment regarding access to employment, professional training and promotion includes:

- selection criteria and recruitment conditions, whatever the branch of activity and at all levels of professional hierarchy;
- access to all types and levels of vocational guidance and training, including practical work experience;
- payment, promotions and criteria used in the selection of employees to be dismissed.

Concerning the employee's privacy, the Labour Code states that the employer cannot require the employee to disclose any information regarding his/her private life, except when it is strictly necessary and relevant to evaluate the worker's ability to perform the task.

Article 25 of the Labour Code states that legislative measures of a special temporary nature, benefiting certain disadvantaged groups and enacted to guarantee the exercise of their functions in conditions of equality and to correct a situation of factual inequality, shall not be considered discriminatory. Such disadvantaged groups include those:

- defined with reference to sex;
- with reduced working capability, disability or chronic illness;
- defined on the basis of nationality or ethnic origin.

This article, does not exclude sexual orientation.

The burden of proof of discrimination is treated in Article 23 (3) of the Labour Code: if a person considers that they have been discriminated against in relation to other co-workers, that person should bring such discrimination to light by contrasting their own situation with that of co-workers. The employer has to prove that discrimination is not the cause of such differences.

The concept of victimisation does not form part of the Portuguese law. However, Law 35/2004 states that any action aimed at putting an employee at a disadvantage as a consequence of any discriminatory action shall be considered void.

There is no equality body empowered to pass judgement on charges relating to sexual orientation, nor is there any equality body or ombudsman expressly dealing with discrimination on the grounds of sexual orientation.

In reference to labour and work, there is a special equality body, the Commission for Equality in Labour and Work (CELW), but its competences are restricted to gender equality, *i.e.*, equality between women and men.⁶

⁶ See document 1.

Another equality body, the Commission for Citizenship and Gender Equality (CCGE) which deals with gender equality, had its powers increased in 2007 in order to include citizenship in its area of competence.

The Statute Law [Decreto-Lei n.º 164/2007, (03.05.2007)]⁷ provided CCGE with new powers and additional areas of competence. Therefore, it is fair to say that CIG now has a broader intervention area.

So far there is no mention of discrimination on the grounds of sexual orientation in the CCGE Statute Law,⁸ but according to official information,⁹ a future objective of this public body is to ensure the protection of victims of discrimination on the grounds of sexual orientation.

During the Portuguese Presidency (July-December 2007), CIG was mainly responsible for organising 'The European Year of Equal Opportunities for All', because of CCGE background and knowledge in this field.

At the closing conference of 'The European Year of Equal Opportunities for All', CCGE President made a firm commitment to address sexual orientation as part of the Commission's work. Furthermore, the President explicitly affirmed that 'the NGO's that work in the area of sexual orientation will become part of the Consultative Committee of the Commission for Citizenship and Gender Equality, thus occupying an institutional space that they have never had before'.¹⁰

This commitment has become effective and the issue of sexual orientation acquired a different status and gained new attention.

Among other subsidized studies, CCGE has awarded an academic study on discrimination and homophobia in Portugal that is currently in preparation. It must be stressed that since October 2009, the newly empowered Government has a new Secretary of State for Equality and this position was assumed by the former CCGE President

The Consultative Committee of the CIG is a forum for discussion and a counselling body to the Portuguese Government in equality matters. This Committee is presided over by the member of the Government responsible for citizenship and gender equality issues, now the Secretary of State for Equality. This is currently the Secretary of State to the Presidency of the Council of Ministers. This Committee meets three times a year and contributes to policy-

⁷ Available at: <http://www.dre.pt/pdf1sdip/2007/05/08500/29422946.PDF> (last visit 15/02/2008)

⁸ See document 2.

⁹ This official information comes from an e-mail received from CCGE President, which is included in the Annex.

¹⁰ This speech is available in English, as *Discurso Dra. Elza Pais (Ing.)*, at: <http://www.cig.gov.pt> (last visit 15/02/2008)

making and the implementation of projects and legislation in the fields of equality and citizenship.

Based on CCGE task mentioned above, it is now possible to offer support to victims of discrimination, including legal advice and psycho-social support. However, CCGE is not empowered to assist victims of discrimination in legal procedures or to issue penalties related to complaints. CCGE can only forward these complaints to the competent authorities, but may issue opinions and recommendations (Article 2).

Portuguese law does not recognise the power of public bodies or private associations to act in court or some other official arena on behalf of persons discriminated against on the grounds of sexual orientation. The exceptions are trade unions, which can represent the interests of their members in court, but not specifically on the grounds of sexual orientation.

The Labour Code considers violations of the articles concerning equality very serious offences. The amount of the fines in such cases varies: for natural persons, between 900 to 2,200 euros (for unintentional offences) and 2,200 to 4,500 (for intentional offences). Fine amounts for legal persons are higher (in euros):

- 1,800-3,500 for non-intentional offences and 4,000-8,500 for intentional offences, if the legal person's annual income is less than 500,000;
- 2,800-7,100 for non-intentional offences and 7,600-17,000 for intentional offences, if the legal person's annual income is 500,000-2,500,000;
- 3,700-10,700 for non-intentional offences and 10,700-25,000 for intentional offences, if the legal person's annual income is 2,500,000-5,000,000;
- 5,000-12,500 for non-intentional offences and 13,000-35,600 for intentional offences, if the legal person's annual income is 5,000,000-10,000,000;
- 8,000-26,700 for non-intentional offences and 26,700-53,400 for intentional offences, if the legal person's annual income is 5,000,000-10,000,000.

Only two employee complaints were brought to the attention of the trade union known by the acronym CGTP. One of the employees felt he was the victim of discrimination because of his sexual orientation, but did not present a formal complaint. The second case involved a woman whose contract was not renewed because of her sexual orientation. In order to prevent such situations from ever

arising again, the trade union advocated that special legislation should be approved.¹¹

The Inspector General of Labour (the public servant in charge of investigating worker complaints)¹² revealed that no statistics have ever been issued regarding complaints involving direct and indirect discrimination. In 2008, it is hoped that statistics will be provided on cases of discrimination, including those based on sexual orientation.

The NGOs contacted do not keep a record of complaints received in this area. Verbal reports were given. Without documentary evidence, however, such information cannot be reproduced in a paper of this nature.

¹¹ See document 3.

¹² See document 4.

2. Freedom of Movement

Directive 2004/38/CE was transposed by Lei 37/2006. According to this law, a 'family member' applies, among others, to the partner with whom an EU citizen lives in a *de facto* union or permanent relationship duly attested by the Member State in which they reside. Freedom of movement applies to EU citizens, as well as to their family members as defined in Article 2 (e) of Lei 37/2006.

In 2001, Law 7/2001 was approved with the aim of recognising the rights of persons living in a *de facto* union. This law makes no distinction between opposite- and same-sex unions and is applicable to unions lasting more than two years.

According to this law, the Government should have enacted the necessary regulations to cover the remaining aspects of this law but failed to do so. One of the aspects was how to prove the existence of a *de facto* union.

The usual way of obtaining such proof, up to now, has been a certificate issued by the President of the '*Junta de Freguesia*' (the smallest municipality), confirming that a same-sex couple live in the same residence (Article 1, Decreto-Lei 217/88).

Through this process, it is impossible to prove that a *de facto* union really exists.

Some scholars disagree with this method and maintain that there are only two ways of proving same-sex partnerships:

- through witnesses or;
- by a solemn declaration made by the partners.

In Portugal there are no same-sex registered couples, because the law does not make a provision for such a system.

In general, an EU citizen's family members who are Third State nationals do not require a visa to enter Portugal, provided they have a residence permit issued by Portugal.

Any family member who does not hold the nationality of an EU Member State shall inform the authorities of his/her presence in Portugal, on pain of the application of penalties enshrined in the law.

Portuguese law does not mention the rights of family members of a non-national of any EU Member State in a partnership with an EU citizen.

EU citizens who have resided legally in Portugal for five years are entitled to permanent residence. These same rights are enjoyed by Third State family members who have resided legally with a EU citizen in Portugal for an equal period of time.

The EU citizen or members of their family lose this right to permanent residence only if they are away from the country for two years.

Both EU citizens and their Third State family members are entitled to the same treatment as nationals, without prejudice to EU law.

Freedom of movement by EU citizens and their family members can only be restricted for reasons of:

- public order;
- public security; and
- public health.

Portuguese law now recognises, since June 2010, same-sex marriages, under Law 9/2010, 31 May.¹³ Same-sex marriage is also recognised between Portuguese and EU citizens or between non-EU citizens.

A new Decree Law has already been checked by the Constitutional Court and is awaiting presidential promulgation. This law will amend the Portuguese Civil Code in order to recognize same-sex marriages.

Once this new law enters into force, same-sex spouses who have validly contracted a marriage according to the law of the country of origin will be granted entry and residence as spouses for the purposes of letter a) of Article 2(2) of the Free Movement Directive. As a matter of fact they will be spouses for the purpose of the above mentioned Article 2(e) of Law 37/2006.

Nevertheless, until this new Decree Law is enacted, same-sex spouses are still recognized as living in a permanent relationship duly attested by the Member State in which they reside.

Same-sex registered partners who have validly concluded a registered partnership according to the law of the country of origin will be granted entry and residence and are recognized as family members. This applies to those who live in a permanent relationship duly attested by the Member State in which they reside.

Also this broad notion of family member – which includes those who live in a permanent relationship duly attested by the Member State in which they reside – transposes the duty to facilitate entry and residence of unmarried and

¹³ <http://www.dre.pt/pdf1s/2010/05/10500/0185301853.pdf> (last visit 30.10.2010).

unregistered de facto partners in accordance with Article 3(2)(b) of the Free Movement Directive. Since the words of the Directive also requires proper certification of that union, Portuguese law recognizes any public certificate of the relationship recognized by the Member State in which they reside.

3. Asylum and Subsidiary Protection

In Portugal, the legal framework that regulates matters related to asylum and subsidiary protection is composed of several pieces of legislation, which must be read in conjunction with the Portuguese Constitution (Article 33.º ‘expulsion, extradition and the right to asylum’) and, according to its system of reception of international law, with the obligations undertaken internationally by Portugal (Article 8.º of the Portuguese Constitution pertaining to International Law).

With regard to conventional international law, the 28.07.1958 Geneva Convention relating to the status of refugees, as amended by the Protocol signed in New York on 31.01.1967, and the main instruments of human rights, such as the European Convention of Human Rights and the International Covenant of Civil and Political Rights, are pillars of the Portuguese asylum system.

In terms of national legislation, the relevant instruments are:

- Law 27/2008 of 30 June 2008,¹⁴ which established the legal framework pertaining to asylum and refugees and transposed into the Portuguese legal order Directive 2004/83/EC and Directive 2005/85/EC;
- Law no 23/2007 of 4 July 2007, which transposed into the Portuguese legal order Directive 2003/86/EC on the right of family reunification (among others) and approved the legal framework regarding entrance, staying, leaving and withdrawal from the national territory.
- Law 20/2006 of 23 June 2006, which transposed to the Portuguese legal order Directive 2003/9/EC and approved complementary norms for the legal framework pertaining to asylum and refugees.

The general principle enshrined in Article 33 (8) of the Constitution and Article 1 (1) of Law 15/98: the right of asylum is guaranteed to foreigners and stateless persons who are persecuted or seriously threatened of being persecuted owing to their activity in favour of democracy, social and national liberation, peace among people, freedom and human rights undertaken in the State of their nationality or habitual residence. This covers essentially all situations of political asylum.

Article 3(2), Law 27/2008, further expands the right of asylum to foreigners or stateless persons who reasonably fear persecution because of their race, religion, nationality, political opinions or association with a specific social

¹⁴ <http://dre.pt/pdf1sdip/2008/06/12400/0400304018.pdf> (last visit 28.10.2010)

group, and who because of that fear cannot or wish not to return to their State of nationality or habitual residence.

According to Article 2(2) of the new law, persons persecuted because of sexual orientation are considered as a “group” and therefore can obtain the right to asylum. However, even before this specific article, Portuguese law was sufficiently flexible to encompass social grounds and already supported an interpretation that included LGBT persecution as ‘persecution of a specific social group’.

Asylum procedures in Portugal regarding LGBT persecution do not include discriminatory practices such as “phallometry” or “phallometric test”.

Besides the right to asylum, Article 7 of Law 27/2008 grants authorisation for living in Portugal (*autorização de residência*, which cannot be refused because of administrative reasons) to foreigners and stateless persons to whom Article 3 (mentioned above) is not applicable, that is to say, to whom the status of refugee cannot be given for humanitarian reasons and who are unable or feel unable to return to their State of nationality or residence because of serious insecurity owing to armed conflict or the systematic violation of human rights that occur therein. There is no explicit reference to persecution of LGBTs owing to sexual orientation; however there are explicit references to discriminatory measures and to persecutions on the grounds of gender as relevant persecution. Thus and according to a human rights safeguard persecution owing to a specific sexual orientation must be considered.

Law 27/2008 (Article 68) states that the effects of granting asylum to a person may be declared to be extended to family members in a similar way as in the law regarding the entry and staying in the country of foreign citizens.

However, new legislation regulating unmarried couples has been adopted. In the specific cases mentioned, *de facto* union has particular relevance. In these situations, most of the rights related to the contract of marriage are recognised for unmarried couples who have lived together for more than two years (this legal regime can be found in Law 7/2001 of 11.05.2001). Given this, one can conclude that there is, as of 2001, the possibility of considering LGTB partners as family members, in the context of asylum and subsidiary protection.

As mentioned above Portuguese law now also recognises same-sex marriages, under Law 9/2010, 31 May: married or unmarried same-sex partners are legally recognised as family members.

4. Family Reunification

Council Directive 2003/86/EC of 22.09.2003, on the right to family reunification, was transposed into the Portuguese legal system through Law 23/2007 of 04.07.2007 (Article 2 (1)), which approved the legal framework on entry, staying, leaving and withdrawal from the national territory. This law was further regulated by Regulatory Decree 84/2007 of 05.11.2007. That being said, and with regard to the right to family reunification in the context of asylum and subsidiary protection, the legislation already mentioned in Chapter 3, particularly Law 15/98, equally applies, as some of the elements of Directive 2003/86/EC are regulated in those instruments. These instruments need to be read and applied together.

There is no specific procedure with regard to family reunification of LGBT partners. The general regime, which was previously explained, and the national legislation on unmarried couples are applied equally to LGBT partners.

Indeed, as stated above, the effects of granting asylum to a person may be declared to be extended to the spouse and his/her children who are minors, upon request of the asylum seeker, per Articles 13(4) and 68 of Law 27/2008. Also as described above, today the LGBT married or unmarried partner is considered as his/her spouse, *i.e.*, a member of the family. As such, if the asylum seeker is LGBT, he/she can make the request.

Law 27/2008 regulates the period when asylum (and the request for family reunification) may be requested and Law 23/2007 of 4 July 2007 further regulates some specificities of this procedure, particularly regarding the issuing of visas.

5. Freedom of Assembly

The most important law relating to freedom of assembly dates from 1974 (Decreto-Lei n.º 406/74) and continues to be in force with minor alterations. For this reason, the issue of gay parades and similar events have not received due attention. However, the law does not prohibit these kinds of gatherings.

Under the law, all citizens have the right to take part in pacific gatherings in public places, such as stadiums, and on private property. For such gatherings, no authorisation is needed provided that participants respect public order and do not break the law or violate moral codes or rights of other persons.

According to Article 2.º, individuals or private organisations that intend to hold meetings, organise rallies, stage demonstrations or parades must give due notice of their intentions in writing to the '*Governador Civil*' of the District in question. Such gatherings shall only be prohibited when the terms of Article 1.º are violated.

The authorities should take all necessary measures to ensure that such demonstrations or parades take place without the interference of any counter-demonstrations.

This legislation is compatible with LGBT freedom of assembly in all its various forms. However, a new law could better define specific rules applicable to demonstrations like LGBT parades.

In 2005, a small demonstration (200 people) was staged by PNR¹⁵ (a far right political party) against the adoption of children by gay or lesbian couples, as well as against paedophilia and the gay lobby.¹⁶

In the PNR political programme an explicit reference is made to the 'traditional heterosexual family, as the only one that according to the Natural Order ensures natural reproduction and a normal upbringing for our children'.¹⁷

¹⁵ In English, NPR (National Party for the Renovation).

¹⁶ See: <http://ultimahora.publico.clix.pt/noticia.aspx?id=1233094&idCanal=62> (last visit 15/02/2008)

¹⁷ See: http://www.pnr.pt/portal/index.php?option=com_content&task=view&id=62&Itemid=103 . (last visit 15/02/2008)

6. Criminal Law

The amendments of 2007 are described by Scholars and NGOs as anti-homophobic, as they treat crimes of a sexual nature committed by homosexuals or heterosexuals on an equal footing, and recognises *de facto* unions of same-sex couples.

The Portuguese Penal Code was amended in September 2007¹⁸ and several innovations have been introduced directly or indirectly relating to sexual orientation, protection of LGBTs and equal treatment.

Hate speech related to homophobia and discrimination on the grounds of sexual orientation is classified as a crime in criminal law under the designation 'Racial, religious and sexual discrimination' (Article 240). In fact, this article describes several discriminatory behaviours as crimes and is not restricted to the above mentioned grounds for discrimination.

Article 240.º (1) with respect to racial, religious, and sexual discrimination states that anyone who:

- (a) creates an organisation or provides organised activities that incite discrimination, hatred or violence against individuals or groups of individuals because of their race, skin colour, ethnic background, religion, sex or sexual orientation, or
- (b) takes part in the above mentioned activities, including financial assistance, will be sentenced to between 1 and 8 years in prison.

Article 240.º (2) stipulates that anyone in a public gathering who, by printed or electronic means:

- (a) causes acts of violence against individuals or groups of individuals based on their race, skin colour, ethnic background, religion, sex or sexual orientation;
- (b) defames or insults individuals or groups of individuals because of their race, skin colour, ethnic background, religion, sex or sexual orientation, for example, by denying war crimes or crimes against peace and humanity; or
- (c) threatens individuals or groups of individuals because of their race, skin colour, ethnic background, religion, sex or sexual orientation with the intention of inciting social, religious or sexual discrimination will be sentenced to between 6 months to 5 years in prison.

¹⁸ Portugal/Código Penal (23ª alteração) Lei n.º 59/2007 (04.09.2007), available at: <http://www.dre.pt/pdf1sdip/2007/09/17000/0618106258.PDF> (last visit 15/02/2008).

According to the above mentioned article, it is a crime to create an association or organisation or to develop activities in order to incite discrimination against or hatred of someone or a group based on its sexual orientation. It is also a crime to participate in the activities of or support such associations, including financially.

Besides this, homophobic motivations are relevant at least in three other crimes: murder, assault and severe assault. The homophobic motivation in these crimes is an aggravating factor.

Article 132.º, qualified homicide, states that if the circumstances in which the homicide was committed are particularly perverse or heinous, the perpetrator will be sentenced to 12-25 years in prison. A homicide committed for reasons of sexual orientation constitutes a qualified homicide.

Assault motivated by the victim's sexual orientation can be punished with up to four years in prison (Article 145, 1a), while 'simple' assault can be punished with a fine or up to three years in prison (Article 143). Severe assault can be punished with up to ten years in prison (Article 144), or, if motivated by the victim's sexual orientation, with between 3-12 years in prison (Article 145).

The factors to classify crimes as qualified grievous bodily harm are the same applicable to those applicable to qualified homicide.

All said crimes can be investigated and prosecuted by public authorities, whether or not charges (last visit 15/02/2008) pressed by individuals.

The above mentioned provisions of the amended Penal Code have been broadened to include discrimination on the grounds of sexual orientation or homophobic motivation.

As pointed out, there are still other dispositions in the Penal Code aimed at giving equal protection and treatment to LGBTs.

Those dispositions refer to the right to press charges in case of a victim's death, protection against domestic violence, privacy in some crimes and penalisation absence in certain crimes committed to protect the spouse or unmarried partner. Since they are not connected with hate crimes or homophobically motivated crimes, they would be treated under 'Miscellaneous'.

7. Transgender Issues

At present in Portugal, there is no law related to gender identity.

Regulations that do exist were approved by the Doctors' Public Association¹⁹ or are court decisions.

According to a resolution approved by the executive branch of the Doctors' Public Association on 19.05.1995, operations to change an individual's sex are prohibited except where adequate diagnosis confirms a case of transsexualism or gender dysphoria.

The regulation also stipulates that operations will only be performed after prior medical diagnosis by two psychiatrists has been made and a mandatory opinion issued by one 'ad hoc commission' whose members are appointed by the Doctors' Public Association.

The candidate for surgery must be over 18, of sound mind and not married. The first step in the procedure consists of hormone treatment lasting two years at a public hospital. It is against the law to prescribe a hormone treatment before the age of 18.

However, within the health care the debate on the need to start these processes earlier is becoming evident, at least about 16 years old. In the absence of law that specifically supports these situations nothing can be changed in this respect.

Portugal seems to be the only European country that requires an opinion of the Doctors' Public Association prior to carrying out this surgical process. This is not imposed by law but by Regulations of the Public Association.

There is only one surgeon who performs gender reassignments in Portugal. Despite being retired since 2009, this person continues to operate to meet these requests. These surgeries are completely reimbursed by the State since the World Health Organization included gender identity disorder in the list of mental illnesses.

The birth certificate is the document that determines a person's gender. In the absence of any law regulating name changes in terms of gender, transsexuals wishing to change their name are compelled to initiate a legal proceeding before the State. Courts have continued to express the view that a lacuna in this area

¹⁹ The public association responsible for ensuring ethical practices in the profession. It is an autonomous body.

still exists²⁰ (though with some exceptions²¹). Therefore, they have accepted name changes provided the following prerequisites are met by the candidate:

- over 18;
- not in a position to procreate;
- has undergone the operation;
- the changes are irreversible;
- has been living for a year with the new identity;
- has no children.

Transsexuals who have not undergone genital surgery or have children can only change their names to those used for both genders, such as Jó or Zara.

According to Portuguese law (Article 104 of the Code of Civil Register), name changing must be authorised by the Ministry of Justice. However, regarding transgenders, such intervention is not required, because of a previous Court decision.

²⁰ See:
<http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/67f529a8e2023ad2802568030003cf06?OpenDocument> (last visit 15/02/2008).

²¹ See:
<http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/58ee23e8bb10804580256803000570d6?OpenDocument> (last visit 15/02/2008).

8. Miscellaneous

The Portuguese Constitution

According to the principle of equality enshrined in Article 13.º of the Portuguese Constitution: 'Every citizen shall possess the same social dignity and shall be equal before the law'. Section 2 of the Article ensures that: 'No one shall be privileged, favoured, prejudiced, deprived of any right or exempted from any duty on the basis of ancestry, sex, race, language, place of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation'.

The explicit reference to sexual orientation was inserted into the Constitution by a unanimously approved 2004 amendment.

De facto union Law (Lei 7/2001, 11 May)

The remaining aspects of *de facto* union law are described in the section entitled Freedom of Movement.

Some exceptions are stipulated in the law (see Freedom of Movement), for example, both partners must be 16 or over.

Persons living in *de facto* unions have the following rights:

- protection of family residence;
- the same entitlement to holidays, sick leave and preference in public service placements (just like married couples);
- in private contracts, the same entitlement to holidays and sick leave as married couples;
- subject to the same tax laws as married couples;
- in case of death, the surviving partner has the right to any subsidies due in terms of social welfare regulations;
- in case of death resulting from occupational accident or disease, the surviving partner is entitled to legal protection;

- the surviving partner is entitled to receive any pension resulting from outstanding services to the nation.

Regarding the family residence, when the partner who owns the property dies, the surviving partner has the right to carry on living there for a period of five years. After this period, he/she has the same option to purchase. The exception to this right is when the deceased has made a provision to the contrary in his/her will.

In the case where a *de facto* union couple lived in a rented home, the surviving partner has the option of becoming the new lessee.

The surviving partner has the right to inherit the goods and chattels of the deceased.

In principle, *de facto* unions cease to exist when the partners so desire. Court intervention is only required when rights are in dispute.

This law clearly stipulates that under no circumstances can same-sex unions adopt children.

Nationality Law

The amendment to the Law on Nationality approved by Lei Orgânica 2/2006 recognises the acquisition of Portuguese nationality in the case of *de facto* unions. Thus a foreigner who has lived in a *de facto* union with a Portuguese national for more than three years can ask for Portuguese nationality by placing such a request before the civil courts.

The Law on Nationality is regulated by Decreto-Lei 237-A/2006, which stipulates that a foreigner who has lived with a Portuguese national for more than three years and whose union has been recognised by the courts is entitled to Portuguese nationality, should he/she so desire.

The Law on Nationality makes no reference to the nature of such a *de facto union* – heterosexual or LGBT. In principle, it should be applied in terms of Portuguese legislation, which recognises LGBT unions.

Social Welfare

Concerning health service systems for public servants and spouses, until 2005 'spouse' was defined as one married to the public servant. Since Portuguese law does not accept same-sex marriages, it was arguable that same-sex unions were not entitled to such coverage.

However, in 2005, several Decretos-Leis amended the legal instruments relating to health service systems for public servants (the general one, ADSE, and other specialised ones). What these amendments have in common is that they all recognise the right of *de facto* same-sex couples to benefit from the same coverage as heterosexual *de facto unions*.

Among the rights to which same-sex unions are entitled is the right to a subsidy in case of a partner's death.

The most important welfare benefits are extended equally to same-sex *de facto unions*.

Insurance Policies and Bank loans

According to data provided by a NGO (Ilga-Portugal), same-sex unions experienced problems with health insurance policies. Although *de facto unions* are accepted, some companies refuse to recognise same-sex unions as eligible for such contracts.

Most banks, on the other hand, consider such unions eligible for mortgages and other loans at the same rate as for married couples.

In 2007, a bank was found guilty of refusing to recognise a gay couple's eligibility for a mortgage. The Court ordered the bank to pay damages.²²

The principle of equality was not the Court's *ratio decidendi*. Rather, the decision was based on the bank's previous, 1994 granting of a mortgage to a gay couple. It was concluded that the bank could not adopt a different policy thereafter.

Criminal Code (2007)

This section includes remaining aspects of current criminal law not mentioned in Section 6.

When the offended person dies without having pressed charges, the surviving partner can do so.

Anyone who repeatedly, or not, harms, either physically or psychologically, persons of the same or opposite sex with whom he/she lives or has lived will be sentenced to 1-5 years in prison.

²² See: <http://eyesonthepride.blogspot.com/2007/08/ilga-denunciar-ue-discriminacao-homofobica.html> (last visit 15/02/2008).

In crimes of coercion involving parties of the same or opposite sex, a criminal procedure depends on a formal charge being filed.

In the same cases, as enshrined in Article 364.º, a partner of the same or opposite sex can have the sentence reduced or even serve no time in prison if he/she acted with the aim of protecting the person with whom he/she lives.

Regarding the covering up of crimes, in certain cases enshrined in Article 367.º, a partner of the same or opposite sex cannot be punished.

Imprisoned – Conjugal visits

According to Article 3, n. 3 of the recently approved Law n. 115/2009, 12 October,²³ (Code on enforcement of criminal sentences about custody), “the execution of the sentence is fair and should not privilege, benefit, harm, deprive of any right or exempt from any duty, any inmate, particularly on grounds of sex, race, language, place of origin, nationality, ethnic origin, religion, political or ideological belief, educational, economic status, social status or sexual orientation”.

As a result of this equality principle, Article 59, n. 3, establishes that “the inmate not eligible for exit permits can receive regular visits from his/her intimate partner or other person of another or the same sex, with whom he/she maintains a relationship akin to marriage or a stable affective relationship”.

Based on this article, homosexual inmates are going to be able to receive conjugal visits in prison. The so-called conjugal visits - which currently only heterosexual prisoners can benefit from - began in Portugal in 1998, in the prisons of Vale de Judeus and Funchal (Madeira).

The extension of this right was suggested by the Portuguese Ombudsman and accepted by the Government which presented the proposal to the Parliament.

Domestic Violence – Victims protection and support services

In cases of domestic violence victims, according to the Portuguese Penal Code (referred to above) the victim can be part of an heterosexual relationship as well as of an homosexual one.

²³ Available at <http://www.dre.pt/util/getpdf.asp?s=dip&serie=1&iddr=2009.197&iddip=20092859> (11-02-2010).

Law 112/2009, 16 September,²⁴ aims to create a general framework to prevent domestic violence, to support and assist its victims. As a general principle there is an explicit reference to equality principle which forbids discrimination on different grounds (such as sex, age, nationality, economic condition, belief and religion, handicap) including sexual orientation.

In the context of the law this means that, for instance, special rights of these victims in criminal procedures, social support (including faster and urgent procedures, exemption from payment in the National Health Service, worker's rights, housing support, and all kinds of assistance are granted to victims of domestic violence whether violence happens in the context of a heterosexual relationship or in the context of an homosexual one. Also support services such as shelter homes available in preference to women will be able to cover also the battered women in a homosexual relationship.

According to LGBT NGOs this is an important feature since they this kind of occurrence among same sex couples are not insignificant..

Children at Risk

Recently, Decreto-Lei 11/98 approved the giving of shelter to children at risk by families. This decree-law does not mention *de facto unions*, but merely couples and relatives living in the same household. Because LGBTs are not entitled to marry, the new law is not applicable to them.

This discriminatory objective was confirmed by the former and present Secretary of State for Rehabilitation in an interview. Since the *de facto* union statute refers to the rights and faculties of its members and does not mention that possibility of being a shelter family the new law would not be entitled to do so.

This understanding is even odder because law on *de facto* unions just excludes adoption and shelter families are not entitled to adopt. Regarding this we believe that once same sex couples are entitled to marry there would be no interpretation to exclude them from sheltering children at risk.

Blood Donors

Currently, according to the law (Decreto-Lei 267/2007), LGBTs can be blood donors. This law does not discriminate against LGBTs. Therefore, the restrictions established by law apply to all individuals. Anyone whose sexual

²⁴ Available at <http://www.dre.pt/util/getpdf.asp?s=dip&serie=1&iddr=2009.180&iddip=20092540> (7/2/2010).

behaviour places them at risk of contracting serious sexually transmitted diseases is not allowed to give blood.

The information available on the website of the *Instituto Português do Sangue* [National Institute of Blood] specifies that blood should not be donated by a potential donor of either sex who has:²⁵

- had several sexual contacts in exchange for money or drugs;
- engaged in sexual activities with multiple partners.

This legislation does not seem to discriminate against LGBTs.

However, in the Portuguese Blood Institute, a manual is used to screen donors. For this purpose, the relevant question for male donors is: “have you had intercourse with another man?”

Concerning the application of the law, the President of the Portuguese Blood Institute said recently in an interview that the risk of contamination of blood increases if the donor is a man who engages in intercourse with another man. According to the President, the donation of blood is accepted regardless of the donor’s political affiliations, religious beliefs and so on, but some homosexual practices are considered as high risk behaviour²⁶.

In 2008, 25,000 donations were made and only 8 were refused. The President expressed the view that homosexuals who refuse to reveal their sexual orientation should be tried by courts.

The NGO Ilga Portugal, issued a public statement classifying this criterion as discriminatory and dangerous. The problem is not that of belonging to the so-called risk groups, but that of engaging in high risk behaviour²⁷.

The Case of Gisberta

In July 2006, a Brazilian transsexual named Gisberta was murdered by a group of minors from the city of Oporto. Gisberta was homeless and frequently attacked because of her gender identity.

She was abducted by a group of minors who kept her for three days before killing her. During that time she was beaten, sexually abused and tortured before finally being thrown down a well 15 metres deep, where she drowned.

²⁵ See: <http://www.ipsangue.org/maxcontent-documento-60-posso-dar-sangue.html> (last visit 15/02/2008).

²⁶ <http://www.ionline.pt/conteudo/15804-gays-que-nao-se-assumam-devem-ser-processados> (18-02-2010)

²⁷ <http://www.ilga-portugal.pt/noticias/20090730.htm> (18-02-2010)

In their defence, the minors claimed that it was nothing more than a prank. Initially, the minors were accused of attempted homicide and concealing the body, but the Public Prosecutor changed the charges to assault causing grievous bodily harm.

Accordingly, the court stated in its verdict that the victim's death was caused by drowning rather than by the perpetrators' acts that led her to be thrown into the well. Thus the court did not consider the crime to be homicide, nor did it consider it a hate crime based on gender identity.

However, the court's sentence refers to a 'transphobic element' in its explanation because the approach of the boys in question was motivated by their curiosity to see 'a man with breasts'.

The sentence was severely criticized by gay movements and fundamental rights associations because the change in the accusation occurred during the trial. The accusation of homicide was replaced – by the Public Prosecutor – with several crimes related to physical offences and abuse of a corpse.²⁸

In court, the defence used arguments linked to the youth of the offenders, their social situation and their criminal profile (despite being minors, some of the accused were already punished for minor crimes).

One of the major grievances of those supporting Gisberta was a specific part of the sentence qualifying the facts under analysis as a 'bad joke'. The wording used by the judge was revolting to the family and friends of Gisberta.

The ruling of the *Tribunal de Menores* (Juvenile Court) was as follows:

11 of the 13 involved were sentenced to 11 to 13 months in a semi-open institution ;

- the remaining two were enrolled in a 12-month special education programme.

Associations such as Ilga-Portugal deplored the events that occurred during the court proceedings, which was considered as a 'farce'.²⁹

Two years after Gisberta's death, a vigil was organised by a LGBT group called The Pink Panthers, where a group spokesperson complained about the lack of any law related to gender identity.³⁰

²⁸ http://www.esquerda.net/index2.php?option=com_content&do_pdf=1&id=293 (8-04-2010)

²⁹ <http://ilga.org/ilga/pt/article/899> (8/4/2010)

The full content of this judicial case is not yet available. The case is still under consideration by the Court of Appeal in Porto. However, one of the offenders has already been condemned to a penalty of eight months imprisonment because, in the review, the upper court considered that there was evidence of a crime of absence of help.³¹

The suffering of Gisberta, as well as the reasons explaining the crime, were the subject of a film documentary and a solidarity song.³²

Violence in Viseu

In the course of 2005, LGBTs of Viseu, in northern Portugal, were victims of insults, assaults, torture and death threats. The unusual frequency with which these occurred was condemned by politicians across the spectrum. To show solidarity with LGBTs, a demonstration was organised.

Adoption

The Law of Adoption does not allow *de facto* – heterosexual or LGBT – unions to adopt children. According to Article 1979 of the Civil Code (amended by Lei 31/2003), the following are entitled to adopt children:

- couples married for more than four years, not separated and over 25;
- single persons over 30, regardless of marital status.

It should be noted that there are cases of individual LGBTs who have adopted children, but the numbers are unknown.

³⁰ See: <http://atranspt.blogspot.com/2007/02/comunicado-de-imprensa-pantres-cor-de.html> (last visit 15/02/2008).

³¹ <http://noticias.sapo.pt/lusa/artigo/38cac29864ca1b742c7ea2.htm> (8/4/2010)

³²

http://jpn.icicom.up.pt/2006/06/08/transexuais_evocam_gisberta_na_europa_e_brasil.html (8/4/2010) and
<http://www.youtube.com/watch?v=C3gitWW7l5c> (8/4/2010)

Assisted Procreation

Lei 32/2006 governs assisted procreation. It explicitly states that only married couples who are not separated, or opposite-sex *de facto* union partners living together for two years, are entitled to benefit from the techniques envisaged in the law.

Institutional Homophobia

As regards institutional homophobia, in Portugal, practices similar to that of Lithuania have not been adopted.

Constitutional Court

According to the Portuguese Civil Code, marriage is a contract entered into by people of opposite sexes.

The Constitutional Court had to analyse an appeal made by two women that wanted to get married. They argued that same sex marriage should be allowed by law, and that a law should be passed specifically permitting same sex marriage.

The Court considered that the key question was whether article 36 of the Constitution gave a positive answer to the plaintiffs. After due deliberation the Court denied the request of the two women based on an interpretation of article 36: "Marriage cannot be reduced to its effects, for example procreation. However the Court decided that marriage is a social institution and the State must be empowered to regulate the final form of the said institution. In the end, the relationship between an existing generation and the future generation should pass through the families composed by members of the opposite sex. This decision was taken by 5 judges, 3 of whom voted in favour and 2 against..

Same-sex Marriages

According to the Portuguese Civil Code, marriage is a contract entered into by people of opposite sexes. The Government (supported in Parliament by the Socialist Party – a central left Party) presented a bill before the Parliament that discussing same sex marriages

In the Preamble of to the bill, the Government³³ underlined that one of the electoral promises was to remove the legal hurdles faced by people who wish to

³³ <http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetailheIniciativa.aspx?BID=35004>
(18-02-2010)

marry. The main principles justifying this change in the concept of what constitutes a marriage are the principles of equality and human dignity.

The Government also stated that the current prohibition is against the evolution of social conscience. However the bill does not allow the adoption of children by same sex couples because in such cases the interests of the child are at stake.

Article 1577 of the Civil Code should have this wording, according to the new bill to be: “Marriage is a contract entered into by two persons who want to constitute a family for life, according to the terms of this Code”

The biggest opposition party (centre-right PSD)³⁴ does not agree with same sex marriage and presented a different bill in order to create a registered civil union.

This is a contract entered into by persons of the same sex and specifies rights and obligations. This kind of contract is specially designed for same sex unions that want to share their life together.

The bill presented before Parliament by *Bloco de Esquerda*³⁵ (a left wing party) in favour of same sex marriage maintained that it is important that the law be adopted in such a way as to be able to satisfy contemporary perceptions of justice. To this end, it is crucial to eliminate all discrimination based on sexual orientation.

The *Bloco de Esquerda* is also in favour of homosexual couples having the right to adopt children.

The Green Party also agreed with same sex marriage and the right of homosexuals to adopt children.

Concerning same sex marriage, an organization called: “Platform for Citizenship and Marriage” (which opposed same sex marriages) was created with the sole objective of collecting signatures to present before Parliament in order to convince Parliament of the need to hold a referendum on the issue, in the belief that the results of such a referendum would be against such unions.

The organization collected more than 90,000 signatures. The question proposed for the referendum was: “Do you agree with same sex marriage?”. Parliament rejected the proposal with the votes of left wing parties.,

³⁴ <http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalleIniciativa.aspx?BID=35011>
(18-02-2010)

³⁵ <http://www.parlamento.pt/ActividadeParlamentar/Paginas/DetalleIniciativa.aspx?BID=34822>
(18-02-2010)

The “Platform for Citizenship and Marriage”³⁶ will organize a demonstration on 20 February 2010 in order to defend their values.

The leader of PNR (a far right wing party) has already said that he and his party will be present. In a statement published on a web page, the leader of the party said that “it is urgent to fight fearlessly against those who want to plunge society into chaos”.

Two bad practices A³⁷

A and B constituted a *de facto* same sex union. After the death of A, B wished to honour him by purchasing a tombstone.

The family of the deceased (the mother and brothers) ordered the cemetery authorities to remove the stone which was placed.

The legal explanation was based on the fact that in a same sex *de facto* union this kind of right is not recognised..

B confronted the municipality and demanded that the tombstone be restored. This time the municipal authorities agreed and the stone is now there.

B

A girl of 17 years admitted to her godmother, who she lived with, that she was a lesbian. The godmother’s reaction shocked her so much that she left the house and tried to find alternative accommodation. She took the advice of her football coach who suggested she ask for help at a welfare institution. The decision of the welfare authorities was to place her in a catholic institution. There she was only allowed to be visited by her godmother. At the age of 18 she left the institution.

³⁶ <http://spedeus.blogspot.com/2010/01/manifestacao-pela-familia-e-pelo.html> (18-02-2010)

³⁷ Information given by Prof. Paulo Corte-Real, President of ILGA Portugal.

9. Good Practices

At the *Universidade Nova de Lisboa*, the Faculty of Law offers, as part of its degree course, a subject called 'Law of Social Equality', which devotes a section to 'Homophobia and non discrimination on the grounds of sexual orientation'. This component of the degree course has been offered since 2005-2006.

At the *Instituto Superior do Trabalho e da Empresa (ISCTE)* (Institute for Labor and Company) same sex studies were made under conducted on issues related to LGBTs (mainly in the Department of Anthropology).³⁸

In recent years, several trainings and seminars on the EU and international legal framework regarding asylum and refugee status and their effects on the Portuguese system and policies on this subject have been organised.

Since 1994, the entity that represents the UNHCR in Portugal, *Conselho Português para os Refugiados* (Portuguese Council for Refugees), organises a biannual thematic congress on asylum-related issues. In the context of this study, the 2004 congress in Lisbon, which focused on the (new) EU legal framework on asylum and refugee status, was crucial. In particular, a panel focussed specifically on issues of discrimination and equality in the context of the EU legal framework for asylum. Between February and March 2008, a training on immigration and asylum law at Lisbon University will specifically address EU asylum law and refugee status in the context of international and Portuguese law. Although not specifically mentioned, because of new elements in EU asylum instruments, LGBT issues can be considered at the training.

On 15.12.2007, two children's books were published that showed for the first time in Portuguese that there is more than one possible family model. Illustrated examples of homosexual couples helped parents, teachers and children to discuss the issue in a natural way.

Ilga-Portugal has taken steps to ensure that police officers receive adequate training while at the academy on how to deal with LGBT in a non-discriminatory way. The government has approved this initiative and its implementation.

The CGTP trade union approved a manifesto entitled 'Equal Opportunities for All' and sub-headed 'For diversity! Against the discrimination in the workplace and in society'. The trade union states that rules against direct or indirect discrimination, particularly on the grounds of sexual orientation, are not respected very often in spite of the absence of formal complaints. Xenophobia,

³⁸ See: <http://www.tintafresca.net/News/newsdetail.aspx?news=16099e0a-e795-4b51-5f8bf1c05397&edition=85> (last visit 15/02/2008).

homophobia and transphobia, among other fears, constitute the main examples of discrimination that should be countered by organised campaigns.³⁹ In March 2009⁴⁰ a two day International Conference on “Mainstreaming LGBT anti-discrimination policies” took place in Lisbon. It was organized by Associação ILGA-Portugal – Lesbian, Gay, Bisexual and Transgender Intervention, sponsored by the Embassy of The Netherlands in Lisbon and institutionally sponsored by the Commission for Citizenship and Gender Equality.⁴¹

The Opening Session was chaired by the Secretary of State of the Presidency of the Council of Ministers, former member of the Government responsible for citizenship and equality issues.

The Conference Programme identified the structure designed for the panels: the presentation of good practices and research by speakers of different countries, followed by a discussion. This discussion involved mainly policymakers and aimed at checking and analysing what the situation in Portugal is and if and how those good practices could be applied to the Portuguese case. Thus the conference aimed to give some answers to civil society and to technical and political decision-makers.

The second panel discussed LGBT's access to Employment and Social Solidarity. The President of the Portuguese Institute of Social Security and the Vice-President of the Portuguese Institute of Employment and Vocational Training were the representatives from Portugal.

The third and the fourth panels were, respectively on LGBT-Inclusive Education and Health and on Best Practices of Cross-Cutting Policies.

Gender Identity and Discrimination was the focus of the fifth panel and transgender issues were presented and discussed. From Portugal, a high representative of the Directorate-General for Health was present.

The last panel was about Discrimination of LGBT and Family Relationships and the speakers were, amongst others, the Director of the centre for Family Research from Cambridge University and a Vice-Chair from the Directorate-General Against Discrimination – Ministry of Equality from Spain.

One LGBT association in particular, *rede ex aequo*, has an updated list of gynaecologists who specialise in dealing with lesbians. The association regularly offers programmes in the field of education, participates in debates and presents discussions at schools.

The LGBT community organises film festivals, photographic exhibitions, shows and contests, camping expeditions, radio programmes and other social

³⁹ See document 3.1.

⁴⁰ See answers from CGTP of April 2007 and of 4 February 2008.

⁴¹ [http://www.ilga-portugal.pt/conferencia2009/\(11-2-2010\)](http://www.ilga-portugal.pt/conferencia2009/(11-2-2010)).

events. Some LGBT associations receive subsidies from State or local authorities.

In January 2010, a scientific Lesbian review called “Les Online”⁴² was launched. It is only available on the Internet and the first issue has six articles. The review is multilingual and can publish articles in Portuguese, Spanish, English and French.

Opus Gay, an NGO designed to promote the welfare of the gay community in Portugal, has received financial support in order to build a shelter for victims of homophobia and cases of domestic violence among same sex couples⁴³.

The support was given by the Portuguese Government from EU funds. The shelter will be located in Alentejo and Opus Gay has partnerships with the Municipality of Évora and social association Pelo Sonho é que Vamos (we are following a dream)

⁴² <http://www.lespt.org/lesonline/index.php?journal=lo> (18-02-2010)

⁴³ http://www.opusgay.org/Centro_Acolhimento.html (18-02-2010)

Conclusions

The research material available for this study was limited in terms of statistical data. In fact, there are no reliable official or unofficial figures to establish patterns of discrimination on the grounds of sexual orientation.

Portugal has transposed the EU Directives in acceptable terms. However, some laws still exclude LGBTs from their scope.

The Constitution expressly prohibits discrimination on the grounds of sexual orientation.

At the present time, no public body is empowered to deal with general complaints on the grounds of sexual orientation.

In the last seven years few public incidents revealed homophobic behaviour, though the case of transsexual Gisberta shocked the public.

Opposite-sex and same-sex *de facto* unions are recognised under Portuguese law.

Nationality Law and the transposition of the Directive concerning Freedom of Movement (Lei 37/2006) protect same-sex *de facto* unions in which a partner is not an EU citizen.

The Constitutional Court did not decide that same-sex marriage are unconstitutional.

Some universities offer subjects on equality and non-discrimination, including issues concerning LGBTs.

There is an important group of LGBT associations that engage in a wide range of activities, including organising social events and presenting lectures in schools.

The authors of this study are firmly convinced that effective problems of discrimination on the grounds of sexual orientation and disrespect for the principle of equality do indeed exist and are frequently encountered. However, the lack of information both in public bodies and in NGOs does not provide the necessary tools to quantify such problems and to establish a scientific framework. This study did not consider personal accounts lacking evidence to substantiate them.

Annexes

Annex 1 – Presentation of Case Law

Case title	Homosexual sex with adolescents
Decision date	10.05.2005
Reference details	<i>Tribunal Constitucional</i> [Constitutional Court]
Key facts of the case	<p>An adult male had sex with two male minors. Other relevant facts:</p> <ul style="list-style-type: none"> - the sexual activities were consensual; - the minors were prostitutes. <p>The Court examined the existing Article 175 of the Penal Code. According to Article 174: ‘Anyone who, being over 18, engages in coitus, anal sex or oral sex with a minor aged between 14 and 16, taking advantage of their inexperience, is punished with up two years in prison or a prison sentence of up to 240 days with the alternative of paying a fine’.</p> <p>If these acts were of a homosexual nature, Article 175 stipulates that: ‘Anyone who, being over 18, engages in serious homosexual acts with a minor aged between 14 and 16, or causes such acts to be committed by a third party, is punished with up to 2 years in prison or a prison sentence of up to 240 days with the alternative of paying a fine’.</p>
Main reasoning/argumentation	<p>The above description of the crimes shows that homosexual acts with adolescents were more severely punished than heterosexual ones.</p> <p>The <i>Supremo Tribunal de Justiça</i> (Supreme Court) applied Article 175 but it need not have done so, because of the fact that it was unconstitutional.</p>

	The Court argued that: ‘homosexual acts committed by adults with adolescents, regardless of the sexual experience of the minor, are overwhelmingly more traumatizing because they constitute abnormal sex acts in violation of Natural Order of things. In addition they put at risk or potentially endanger the development of the minor’s personality’.
Key issues (concepts, interpretations) clarified by the case	At the Constitutional Court, the defence stated: ‘only a conception of homosexuality as a vice – and hence immoral – can explain the belief that adolescents must be protected against any kind of homosexual behaviour’. It was also maintained that “if society wants to be seen neutral as regards sexual activity, this kind of legal disposition is precisely the opposite.” The Public Prosecutor merely remarked that the legislative power enjoyed ample scope when it came to defining crimes and punishments to be applied. The Constitutional Code decided to try the case on the basis of the principle of equality and the right of the minor to develop their personality in a normal way. The Court said that one of the issues at stake was the adolescent’s right to express their sexual orientation freely. Regarding the way the Penal Code treated homosexual and heterosexual relationships, it was clear that the former were deviant while the latter were socially accepted. The Court deemed that a legal judgement cannot be based on such concepts of normality.
Results (sanctions) and key consequences or implications of the case	The Court decided that Article 175 of the Penal Code was unconstitutional.

Case title	Same-sex marriage
Decision date	02.09.2007
Reference details	<i>Supremo Tribunal de Justiça</i> [Supreme Court of Justice]
Key facts of the case	Two women presented a request to start the process of a civil marriage. This was denied by the registrar of the Registry Office. The argument used was that the Civil Code prohibits same-sex marriages.
Main reasoning/argumentation	The two women appealed this decision in Court, arguing that the Portuguese Constitution not only recognises everyone’s right to marry and have a family (Article 36 of the Constitution) but also expressly forbids discrimination on the grounds of sexual orientation (Article 13

	of the Constitution).
Key issues (concepts, interpretations) clarified by the case	<p>The Court of first instance did not uphold this argument and a new appeal was made to the <i>Tribunal da Relação de Lisboa</i> (First Court of Appeal). The Court upheld the previous decision, and a new appeal was made to the Supreme Court of Justice.</p> <p>The main reasons presented by the plaintiffs are as follows:</p> <ul style="list-style-type: none"> - the unconstitutional nature of Article 1577 of the Civil Code, which defines marriage as a contract between two persons of the opposite sex; - the unconstitutional nature of Article 1628 of the Civil Code, which considers nonexistent a marriage between two persons of the same sex. <p>Such claims were based on the principle of equality and non-discrimination and the right to constitute family.</p> <p>The reasons advanced by the Supreme Court were:</p> <ul style="list-style-type: none"> - the Portuguese Constitution does not recognise the right of same-sex marriage. However, it does recognise their right to constitute a family, because partnerships and <i>de facto unions</i> are not forbidden; - it is for Parliament to decide what the prerequisites of marriage are and its effects; - in addition, special restrictions are allowed in Family Law when it comes to the marriage contract.
Results (sanctions) and key consequences or implications of the case	The Supreme Court turned down their request and now the issue is in the hands of the Constitutional Court.

Case title	Parental Authority
Decision date	09.01.1996
Reference details	<i>Tribunal da Relação de Lisboa</i> [First Court of Appeal]
Key facts of the case	Whether a gay father was able to be in charge of the education of a child.

Main reasoning/argumentation	According to the Court, children up to the age of 7 or 8 need the 'love and affection of their mothers, in a way that cannot be replaced by the father'.
Key issues (concepts, interpretations) clarified by the case	The Court decided that, despite increasing tolerance on the part of society towards homosexuals, the prevailing model continues to be heterosexuality. In addition homosexuality was considered 'abnormal', and the child should not grow up in a 'abnormal environment'.
Results (sanctions) and key consequences or implications of the case	The Court decided in favour of the mother.

Case title	Transsexualism
Decision date	06.10.1986
Reference details	<i>Tribunal da Relação de Lisboa</i> [First Court of Appeal]
Key facts of the case	A. had a gender reassignment operation and, as a consequence, intends to alter his name and sex classification in the Civil Register.
Main reasoning/argumentation	According to the Court, men who alter their physical appearance and social behaviour as a result of gender reassignment operations do not become women despite such practices.
Key issues (concepts, interpretations) clarified by the case	It is wrong to change sex through medical intervention. It is a way of deforming the body to bring it into line with a psychological illness. It is an affront to public morality, involving self-mutilation.
Results (sanctions) and key consequences or implications of the case	Hence, no authorisation was given to change the male status or the individual's name.

Case title	Transsexualism
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Decision date	22.06.2004
Reference details	<i>Tribunal da Relação de Lisboa</i> [First Court of Appeal]
Key facts of the case	A. had a gender reassignment operation and, as a consequence, intends to alter his name and sex classification in the Civil Register.
Main reasoning/argumentation	There is a lacuna in Portuguese law when it comes to the changing of names as a result of gender reassignment operations. No law exists forbidding gender reassignment: it is not considered a crime or an offence against public morality. The purpose of registers is to keep records of the most important events in a person's life. The data recorded in a register must correspond to the truth.
Key issues (concepts, interpretations) clarified by the case	An operation in which the penis and testicles are removed and a vagina is implanted involves physical as well as deep psychological consequences. The lack of a match between the physical body and the psychological state of mind is resolved through an operation of this nature.
Results (sanctions) and key consequences or implications of the case	The Court decided that, after undergoing such surgery, the individual becomes a woman and consequently can change his name to a feminine one.

Annex 2

Statistics

Case statistics and complaint data (tribunal, courts, equality bodies, etc.) regarding Employment Directive 2000/78/EC concerning the ground of sexual orientation

No data available. Source: Inspector General of Labour

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Total complaints of discrimination on the ground of sexual orientation (equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services, etc.)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Total finding of Discrimination confirmed (by equality body, tribunals, courts etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing,	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
goods and services etc.)										
National Number of sanctions/compensation payments issued (by courts, tribunals, equality bodies, etc.): if possible, disaggregated according to social areas of discrimination (employment, education, housing, goods and services, etc.)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
National range of sanctions/compensation payments (by courts, tribunals, equality bodies, etc.): if possible disaggregated according to social areas of discrimination (employment, education, housing, goods and services, etc.)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

Statistical information on Freedom of Movement

Source: Office of Foreign People and Boundaries.⁴⁴

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of LGBT partners of EU citizens residing in your country falling under Directive 2004/38/EC									N/A	N/A

⁴⁴ See document 8.

Statistical information on Asylum and Subsidiary Protection

Source: Office of Foreign People and Boundaries.⁴⁵

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of LGBT individuals benefiting from asylum/ subsidiary protection due to persecution on the ground of sexual orientation		3		1		2				
	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of LGBT partners of persons enjoying refugee/subsidiary protection status residing in your country falling under Art 2/h Directive 2004/83/EC	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

⁴⁵ See document 8.

Statistical information on Family Reunification

No data available. Source: Office of Foreign People and Boundaries

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of LGBT partners of Third Country nationals residing in your country benefiting from family reunification	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

Statistical information on freedom of assembly

Source: Ilga-Portugal and Opus Gay.

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of demonstrations in favour of tolerance of LGBT people, gay pride parades etc	1	1	1	1	1	2	2	2	1	2
Number of demonstrations against tolerance of LGBT people						1				

Statistical information on criminal law, hate speech

No data available. Source: General Direction of the Policy of Justice.⁴⁶

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of court cases initiated regarding homophobic hate speech	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Number of convictions regarding homophobic hate speech (please indicate range of sanctions ordered)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
Range of sanctions issued for homophobic hate speech	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of criminal court decisions in which homophobic motivation was used as an aggravating factor in sentencing	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

⁴⁶ See document 5.

Statistical information on transgender issues

The number of name changes effected during this period is 13. Source: Institute for Public Registers.⁴⁷

The number of persons who changed their sex during this period is 21. Source: Doctors' Public Association.⁴⁸

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of name changes effected owing to gender change									N/A	N/A
Number of persons who changed their gender/sex in your country under the applicable legislation									N/A	N/A

⁴⁷ See document 6.

⁴⁸ See document 7.