

# PORTUGAL

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# Foreword

[1]. This report was written by Alexandre Sousa Pinheiro (Senior Expert) and Dinamene de Freitas (Expert) in September and October 2009.

[2]. The methodology used consisted of researching case law on the Internet and contacting the Data Protection Authority.

[3]. The experts had direct contact with psychiatrists who work in the equality body, which was a very useful introduction to the legal framework

[4]. The documents sent by FRA were taken into consideration in this report.

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# I. Executive Summary

## Definitions

[5]. The definition of “persons with mental disorders” is accepted by Portuguese law as well as “persons with mental illness.” Portuguese law uses other expressions related to mental health. The Civil Code and private law mainly use the term “psychical anomaly”. The Constitution contains the expression “persons with intellectual disability”. Most of the legislation does not make a distinction between different kinds of disabilities, so the term covers both physical and mental disabilities.

[6]. The Portuguese Constitution<sup>1</sup> refers<sup>2</sup> to involuntary placement as a case of deprivation of freedom.

[7]. The Portuguese legal system does not use the concepts presented in the guidelines. The expression “psychical anomaly” is neutral, in legal terms, and can be determined by specialists.

## Anti-discrimination

[8]. Portugal adheres to the “Convention on the Rights of Persons with Disabilities” as well as to the Optional Protocol. According to the Constitution, discrimination against people with disabilities is strictly forbidden. An additional specific law has been approved to prohibit and punish discrimination on the grounds of disability.

[9]. The principle of equality and non-discrimination is enshrined in Article 13 of the Portuguese Constitution. This rule applies equally to persons with intellectual disabilities and mental disorders.

[10]. With regard to mental disability the Portuguese Constitution makes specific reference to persons with such disabilities and imposes on the State the obligation to treat, rehabilitate and integrate such citizens (Article 71).

[11]. There is a law that prohibits and punishes discrimination on the grounds of disability and the grounds of probable deterioration of a person’s health - Law 46/2006, 28.08.2006. This Law is not only applied in employment but, as well, in health care, education, and housing.

[12]. Article 85 of Labour Code makes direct reference to the rule of equality: “Workers with disabilities or chronic illness have the same rights and are bound by the same duties as other workers in access to employment, training and promotion in his/her career.”

[13]. The Labour Code also makes express reference to workers with reduced working capacity, with disability and chronic illness. The Labour Code establishes the obligation to provide “reasonable accommodation for disabled persons” in Article 86: “the employer shall take measures to ensure that the person with a disability or chronic illness has access to employment, is able to exercise his/her profession and receive training, unless such measures require a disproportionate burden for employer.”

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<sup>1</sup> [http://app.parlamento.pt/site\\_antigo/ingles/cons\\_leg/Constitution\\_VII\\_revisao\\_definitive.pdf](http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf) (2.11.2009).

<sup>2</sup> Article 27.3 h) – entitled «Right to freedom and security».

[14]. The Portuguese Equality body for discrimination on the grounds of disability is the National Institute for Rehabilitation, I.P., (NIR).<sup>3</sup> The organic law and the statutes of this Institute make no distinction between types of disabilities.

[15]. In Portugal there are two national plans related to mental health: the National Plan for Mental Health and the Action Plan for the Integration of Persons with Disabilities. The Portuguese equality body for discrimination on the grounds of disability is the “National Institute of Rehabilitation”.

## Specific fundamental rights

[16]. The Constitution makes clear reference to citizens with “mental disability” and Law 36/98 uses the expression “psychical anomaly” in order to cover all cases of mental disorder.

[17]. Importantly, under the Constitution:

- The right to life cannot be questioned.
- The freedom from torture or cruel, inhuman and degrading treatment cannot be questioned.
- The freedom from exploitation is part of the principle of human dignity and as such cannot be questioned.
- The right to liberty can only be limited in cases of involuntary placement.
- The right to a fair trial is ensured by trustees or public prosecutors both in civil action and criminal actions.
- Everyone has the right to privacy, including the protection of clinical files.

[18]. However, persons with a “psychical anomaly” are not entitled to marry. Persons who suffer from a “psychical anomaly” are entitled to have their own possessions (including property) but cannot dispose of them. Persons who, according to the courts, suffer from a “psychical anomaly” are not entitled to vote or be elected.

## Involuntary placement and involuntary treatment

[19]. Portuguese law does not differentiate between involuntary placement and involuntary treatment because the former without the latter is considered unacceptable.

[20]. The law stipulates that mental health care must focus on the specific needs of the individual, taking into account his/her age and must be implemented at community level.

[21]. Involuntary placement is reserved solely for cases of danger and urgency. Internees must suffer from a severe psychical anomaly and pose a threat to themselves and/or others or to their belongings and/or those of others.

[22]. Regarding involuntary placement, the main goal of the law is to protect public order, the internee, their belongings and those of others.

[23]. The decision for involuntary placement is taken by the court after an evaluation made by psychiatrists.

[24]. Habeas corpus is applicable in cases of unlawful involuntary placement.

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<sup>3</sup> <http://www.inr.pt/> (2.11.2009).

[25]. Public prosecutors are allocated to patients in order to provide legal protection during the procedure.

## Competence, capacity and guardianship

[26]. Portuguese law establishes two kinds of incapacity: interdiction and inability.

[27]. The contracts made by persons with mental disorders or with intellectual disabilities are declared null and void.<sup>4</sup> The Portuguese Civil Code<sup>5</sup> provides for a declaration of incapacity following a procedure defined by the Code of Civil Procedure<sup>6</sup>.

[28]. Capacity – under the Portuguese law - is the ability to take part effectively in all issues involving a person's life.

[29]. Legal incapacity is based (except the case of minors) upon psychical anomaly (*anomalia psíquica*), deafness, deaf-muteness and blindness (interdiction) or upon prodigality or excessive use of alcohol or drugs (inability).

[30]. In our view, it is necessary to change the civil law in order to bring it into line with the laws related to involuntary placement, because the decisions are taken by different courts. The real problem is that decisions taken by different courts on related issues can be incompatible.

[31]. The Civil Code establishes the possibility of requesting a review of actions taken by the trustees.

[32]. Inability is the less severe form of incapacity and is applied in cases where a person is unable to make logical decisions regarding his/her property.

[33]. Interdiction is more severe and involves representation by the guardian in all legal issues relate related to the person and property.

[34]. An examination by experts is required before the court's final decision regarding interdiction or inability.

## II. Definitions

[35]. Related to 'persons with mental disorders,' the Portuguese law on mental health (approved by Law n. 36/98, 24.07.1998),<sup>7</sup> which also regulates involuntary placement, refers to people who are subject to such measures, such as 'people with mental disorders' [*anomalia psíquica* – psychic anomaly], including 'people with mental illness' [*doença mental*].

[36]. The Portuguese Constitution also refers to involuntary placement as a case of 'deprivation of freedom for such time and under such conditions as the law may determine' and an exception to the principle that deprivation of any freedom must be a 'consequence of a judicial decision imposed for

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<sup>4</sup> Under Article 257 of Civil Code, the declaration made by any person, due to any cause, was accidentally unable to make sense of it or did not have the free exercise of his will is voidable if the fact is notorious or known to the declarator (counter-part).

<sup>5</sup> <http://www.dgpj.mj.pt/sections/leis-da-justica/livro-iii-leis-civis-e/leis-civis/codigo-civil> (2.11.2009).

<sup>6</sup> <http://www.dgpj.mj.pt/sections/leis-da-justica/livro-iii-leis-civis-e/leis-de-processo-civil/codigo-de-processo-civil> (2.11.2009).

<sup>7</sup> <http://www.dre.pt/util/getpdf.asp?s=dip&serie=1&iddr=1998.169A&iddip=19982031> (2.11.2009).

the practice of an act that is punishable by law with a prison term or the imposition by a court of a security measure.’

[37]. The exact terms are the following: ‘committal of a person suffering from a psychological anomaly to an appropriate therapeutic establishment, when ordered or confirmed by the responsible judicial authority.’

[38]. More recently, the Portuguese Government adopted the First National Plan on Mental Health (2007-2016) – approved by the Resolution of the Council of Ministers n. 49/2008, 6.03.2008– and the words of this Plan are homogeneous, referring to ‘people with mental disorders’ [*pessoas com perturbações mentais*].

[39]. Concerning mental disorders, the abovementioned terms used in the Portuguese legislation have the common meaning: people with mental health problems (including disorders). The distinction presented in the guidelines between mental disorders and mental disability is not followed by Portuguese law. For this reason, the expression used to refer to both is “psychic anomaly”.

[40]. Regarding the term ‘persons with intellectual disability,’ the Portuguese Constitution uses a very similar expression: ‘citizens with physical or mental disabilities [*cidadãos portadores de deficiência física ou mental*] shall fully enjoy the rights and shall be subject to the duties enshrined in this Constitution.’<sup>8</sup>

[41]. Law 46/2006, 28.08.2006<sup>9</sup> that prohibits and punishes discrimination on grounds of a disability and the likelihood of worse health refers to ‘people with a disability’ [*pessoas com deficiência*] as a whole. It prevents discrimination on the grounds of any kind of disability, including mental or intellectual disabilities.

[42]. Portuguese law does not establish differences between people with mental disabilities and people with mental disorders. The decision of the Portuguese legislature was to find a broad concept able to include very different categories of mental illness.

[43]. National terminology and its scope have not raised issues before the courts since it has been used in a consistent way for more than thirty years. Consequently there is no relevant case law on this issue.

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<sup>8</sup> Article 71.1.

<sup>9</sup> <http://www.dre.pt/util/getpdf.asp?s=dip&serie=1&iddr=2006.165&iddip=20062807> (2.11.2009)

### III. Anti-discrimination

#### A. Incorporation of United Nations standards

[44]. Portugal is a party to the Convention on the Rights of Persons with Disabilities (CRPD) as well as to the Optional Protocol to the Convention. Deposition of the ratification instruments was concluded on 23.09.2008.

[45]. Since Portugal already has legislation regarding persons with mental disorders and the persons with intellectual disabilities (e.g. the National Plan for Mental health, the Mental Health Law and Anti-Discrimination on Grounds of Disability Law) the ratification procedure has not yet been followed by amendments of relevant legislation concerning the rights of persons with mental disorders and subject to persons with intellectual disabilities. However, some of these Acts occurred after Portugal's signature to the Convention, specifically the National Plan on Mental Health.

[46]. The Plan expressly aims to be a response to the recommendations made by the European Commission in its Green Paper "Improving the mental health of the population. Towards a strategy on mental health for the European Union."

[47]. The United Nations standards related to the protection of rights and freedoms of persons with mental disorders and persons with intellectual disabilities have been generally achieved by Portuguese legislation. However, the relevant publicity about the UN Convention and the implications of its ratification has not been as broad as would be advisable in order to raise awareness on this issue.

[48]. Also the exigency of "reasonable accommodation" previously recognised in the Labour Code is not echoed other anti-discrimination laws, e.g., regulating equality on access to goods and services.

#### B. The Anti-Discrimination National Framework

[49]. Mental disorders are not expressly referred to by the Portuguese Constitution except for the purpose of granting adequate standards of protection against arbitrary involuntary placement (see *infra*).

[50]. Nevertheless the Portuguese Constitution is particularly clear on the principle of equality and establishes general guarantees against all kinds of discrimination.

[51]. With regard to disability, we found however a specific reference to equality of rights and duties (Article 71.1) as well as a provision establishing a complex task for the state in this regard (Article 71.2): "The state shall undertake a national policy for the prevention of disability and the treatment, rehabilitation and integration of disabled citizens and the provision of support to their families, shall make society aware of its duty to show respect for and solidarity with such citizens, and shall ensure that they effectively enjoy their rights, without prejudice to the rights and duties of their parents or guardians."

[52]. Notably, disabled citizens' organisations shall receive special support from the state (Article 71.3).

[53]. At the legislative level, it is important to point out the existence of a specific law that prohibits and punishes discrimination on the grounds of disability and the grounds of probable deterioration of a person's health - Law 46/2006, 28.08.2006.

[54]. This Law applies to areas other than employment (which is also covered by Labour Code), in particular health care, education, and housing, which are envisaged in the Draft of the “horizontal” Directive, and also to insurance and, in general, to access to goods and services. This Law is applicable to both the public and the private sector.

[55]. The definitions of direct and indirect discrimination in Law n.46/2006 are similar to the explanations of these concepts in the Draft Directive. Some behaviours qualify as acts of discrimination if adopted on the grounds of disability and the deterioration of the person’s health: refusing to sell or rent properties; refusing to admit someone to public places or places open to the public; refusing to grant access to public or private schools and constituting school classes exclusively in terms of discriminatory criteria based on disability.

[56]. This Law, as referred above, does not differentiate intellectual disability from other disabilities. The same Law does not even refer to people with mental disorders. However, the definition of “people at risk of deterioration health,” also covered by the scope of protection of the law, includes “people suffering from any disease which involves irreversible, long-term, evolutionary and potentially disabling organisational and operational change, with no prospect of remission and change the quality of life of patients in physical, mental, emotional, social and economic terms and is a potential cause of early disability or significant reduction of life expectancy.”

[57]. The term ‘mental disorder covers a broader range of situations but some mental disorders (the most serious) are certainly included. For example, in cases of discrimination on the basis of mental disability, the law must be interpreted with reference to the specific mental disorder involved. This is one of the consequences of not having a clear legal distinction between two different kinds of mental illness.

[58]. The Employment Equality Directive (EED) was transposed by the Labour Code that was then in force. Since then, this Code has undergone at least two different amendments. The one presently in force was approved by Law n. 7/2009, 12.02.2009, and also refers to the fact that it transposes the EED. Successive amendments relating to equality and non-discrimination have improved the original clauses, specifically by creating a different kind of procedure for the labour courts to void discriminatory acts; the new procedure is dealt with under urgency.

[59]. In the Labour Code two distinct areas are covered: Direct Discrimination and Indirect Discrimination. Direct Discrimination is when someone is treated less favourably than others because of a specific fact such as disability and chronic disease (Article 23.1.a LC). Indirect discrimination is a more subtle form of discrimination using means that *prima facie* appear to be fair (Article 23.1.a LC).

[60]. The Labour Code refers generally to “workers with reduced working capacity, with disabilities or chronic illness.” Mental disorder is never mentioned as such or referred to as being included in the notion of disability. However we must admit that most persons with mental disorder either have reduced working capacity or a chronic illness. Very few would fall outside of these two categories. According to Article 24, any employee or job applicant is entitled to equal opportunities and equal treatment as regards access to employment, vocational training and promotion and in his/her career.

[61]. Article 85 strengthens equality rules related to workers with disabilities and chronic illness: “Workers with disabilities or chronic illness have the same rights and are bound by the same duties as other workers in access to employment, training and promotion in his/her career.” Breaching this rule can lead the employer to a fine of between €2040 and €72 000 depending on the amount of business of the employer and the degree of guilt.

[62]. The State is also legally required to encourage and support the action of the employer in hiring workers with disabilities or chronic diseases, and their vocational rehabilitation (Article 85.2).

[63]. The Labour Code also defines some rules protecting these workers from adverse working conditions. Article 87 states that “workers with disabilities or chronic illness are excused from performance of work, if it can harm their health or safety at work.” In the same spirit “workers with disabilities or chronic illness are not required to work overtime” (Article 88). Disregarding these rules is punishable.

[64]. Preferences for part-time admission should also be established, in collective regulation agreements, in favour of a person with family responsibilities, with reduced working capacity, with disabilities or a chronic illness, or for those that frequent an educational establishment (Article 152).

[65]. According to the Code of Individual Tax, taxes are deductible for individual taxpayers with disabilities to an amount equal to four times the monthly minimum wage for each dependent and disabled person; taxes are also deductible for 30% of spending on education and rehabilitation of the disabled taxpayer or a dependent disabled person. Also tax deductible, as expenditure tracking, is an amount equal to four times the monthly minimum wage for each taxpayer or dependent, whose degree of permanent disability, duly attested by competent authority, is not less than 90%. In general, for tax laws a disabled person is a person whose certified multipurpose incapacity (e.g. for work) is not less than 60%.

[66]. The obligation to provide “reasonable accommodation” to meet the needs of the person with a disability is met by the Labour Code demanding affirmative measures by the employer in such cases. In fact, Article 86 establishes that “the employer shall take measures to ensure that the person with a disability or chronic illness has access to employment, is able to exercise his/her profession and receive training, unless such measures require a disproportionate burden for employer.” Such burden would not be found as disproportionate when they are offset by support from the State, as provided in specific legislation to be approved. At the same time, the State should encourage and support, by appropriate means, the action of the employer in achieving those objectives.

[67]. At last, we must stress the existence of two National Plans related to this area. One was already mentioned: National Plan for Mental Health (2007-2016). The other is the Action Plan for Integration of Persons with Disabilities or Impairments (2006-2009), approved by the Resolution of the Council of Ministers n. 120/2006, 21.09.2006. This resolution was amended by the Resolution of the Council of Ministers No. 88/2008 of 29.05.2008.

[68]. As a guiding principle, on human rights, the first Plan states that people with mental disorders are to be respected in regards to all their rights including the right to appropriate care, residence and employment as well as protection against all types of discrimination.

[69]. The latter assumes that the greatest challenge is the integration of persons with disabilities, and that demands a national strategy. A strategy of promotion and consolidation of respect for human rights, promotion of equal opportunities, particularly bearing in mind the imperatives of promoting gender equality, combating discrimination and ensuring full participation in social, economic and policy of all people without exception, with particular attention to the vulnerabilities and obstacles to persons with disabilities.

[70]. The Constitution anti-discrimination and equality clause is applying equally to persons with disabilities and mental disorders (Article 13).

[71]. The Portuguese Equality body for discrimination on the grounds of disability is the National Institute for Rehabilitation, I.P., (NIR). The organic law and the statutes of this Institute will make no distinction between types of disabilities. Thus, NIR in our view would be competent to tackle discrimination on grounds of intellectual disability.

[72]. As a matter of fact is for this Institute to monitor the application of the Law that prohibits and punishes discrimination on grounds of disability and the likelihood of worse health - Law 46/2006, 28.08.2006. Besides this function, the NIR is compelled to give non-binding opinions in all processes of investigation. Inquiries are initiated by the Public Administration for acts prohibited under this law and practiced by employees or agents of the Public Administration.

[73]. The punitive system related to discrimination acts on the grounds of disability is administrative – fines and other sanctions applied by public services after the investigating procedure. There is no history of these final (positive or negative) decisions being reviewed in court and that is why we found no case law on this matter.

## IV. Specific Fundamental Rights

### The right to life

[74]. The right to life is expressly recognised by the Constitution in Article 24.1: “human life shall be inviolable.” Article 24.2 then enshrines that “the death penalty shall not exist under any circumstances.”

[75]. As far as the experts are aware, there is no case law related to Article 24 related to ‘mental disorder’ or ‘mental disabilities.’ The right to life has been mainly discussed in legislation concerning abortion.

### The right to freedom from torture or cruel, inhuman or degrading treatment or punishment

[76]. The Portuguese Constitution forbids torture or cruel, inhuman or degrading treatment or punishment. Article 25.2 establishes that “no one shall be subjected to torture or to cruel, degrading or inhuman treatment or punishment.” This article is applicable to ‘medical treatments.’

[77]. As far as the experts are aware, there is no case law related to this article related to ‘mental disorders’ or ‘mental disabilities.’

### The right to freedom from exploitation

[78]. The Portuguese Constitution enshrines the principle of dignity in Article 2: “Portugal shall be a sovereign Republic, based on the dignity of the human person and the will of the people and committed to building a free, just and solidary society.”

[79]. The meaning of Article 2 in respect of this survey means that under the Portuguese legal system the exploitation of people who suffer from ‘mental disorders’ or ‘mental disabilities’ is unacceptable. The principle of dignity enshrined in the Constitution and the reference made to the Universal Declaration of Human Rights both form a framework design to prevent any possible exploitation of people with “psychic anomalies.”

[80]. As far as the experts are aware, there is no case law related to this article related to ‘mental disorders’ and ‘mental disabilities.’

### The right to liberty and security

[81]. The general rule under the Portuguese Constitution is the right to be free (Article 27.1): “Everyone shall possess the right to freedom and security.” The exceptions to this rule must be expressly permitted by the Constitution (Article 27.3).

[82]. According to Article 27.3.h), the following constitutes a case of deprivation of freedom: “committal of a person suffering from a psychic anomaly to an appropriate therapeutic establishment, when ordered or confirmed by a competent judicial authority.” This was introduced by a 1997 amendment.

[83]. The case law related to this issue will be included in Section V below – under the heading ‘involuntary placement and involuntary treatment.’

## The right to fair trial

[84]. The right to fair trial is ensured to persons who suffer from a psychic anomaly, because he/she is represented in court by a trustee that has been previously defined by the court (Article 145 Civil Code).

[85]. The Civil Code and the Code of Civil Procedure do not establish precisely who can act as a trustee. This means that anyone considered eligible by the courts can be appointed to perform this function.

[86]. Concerning criminal actions, the Criminal Code<sup>10</sup> in Article 20 considers a person’s incapacity to evaluate the nature of their actions and if they constitute crime punish by law as not being responsible for their own actions where such actions constitute a crime punishable by law. If such incapacity is proven, the said individual is deemed not responsible for the actions in question.

[87]. Person who suffer from a psychic anomaly are not convicted as criminals but subjected to treatment in a public facility when it is considered that new actions against society can be committed (Article 91 of the Criminal Code).

## The right to privacy

[88]. According to the Constitution, everyone is entitled to “protect the privacy of their personal and family life” (Article 26.1). There are no specific restrictions in terms of age or personal capacity.

[89]. The Portuguese Data Protection Authority (*Comissão Nacional de Protecção de Dados – CNPD*) had decided that in a police investigation, the authorities cannot have access to the clinical file of a suspect in order to determine if he/she has or has not psychic anomaly.<sup>11</sup> This is because the privacy of a person that probably suffers from such condition would be at stake if such information was to be divulged.

[90]. The mother of a daughter – who lives with her – has the right to have access to her clinical file if the doctor thinks that the daughter is unable to authorise the disclosure, and where a involuntary treatment is at issue (Decision of the Data Protection Authority (CNPD), 123/2003).<sup>12</sup> The problem concerning data protection involved the daughter giving her consent to the release of clinical data. According to article 35 of the Portuguese Constitution, this kind of data is of sensitive nature. Despite the fact that the daughter is studying at University, the Portuguese Data Protection Authority decided that in the interests of the ill person, data should be accessed by her father: The origin of the problem was that the daughter had refused treatment and medical car and the hospital had contacted her father in this regard.

## The right to marry, to found a family and to respect of family life

[91]. The Portuguese Constitution refers to the family as following: “A fundamental element in society, the family shall possess the right to protection by society and the state and to the effective

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<sup>10</sup> [http://www.nao-estas-a-venda.sef.pt/docs/codigo\\_penal.pdf](http://www.nao-estas-a-venda.sef.pt/docs/codigo_penal.pdf) (1.11.2009).

<sup>11</sup> <http://www.cnpd.pt/bin/decisooes/2003/htm/del/del102-03.htm> (1.11.2009).

<sup>12</sup> <http://www.cnpd.pt/bin/decisooes/2003/htm/del/del123-03.htm> (1.11.2009).

implementation of all the conditions needed to enable family members to achieve personal fulfilment” (Article 67.1).

[92]. The persons who are not able make decisions over one’s goods – after a court decision – or those who are suffering from obvious dementia (i.e., that can be identified by everyone) are not entitled to marry (Article 1601.b of the Civil Code [*Código Civil*] – C.C)<sup>13</sup> or to make a will (Article 2189.b C.C). The legal effects of a *de facto union* are also not applicable to persons who are not able to make decisions over their goods, or those who suffer from obvious dementia.<sup>14</sup>

## The right to have children and maintain parental rights

[93]. Regarding children, the case law has not been favourable to the maintenance of parental rights.

[94]. In spite of being parents, persons who are not able to decide over their lives are not entitled to take care of their own children. The Upper Court of Guimarães (*Tribunal da Relação de Guimarães*) has considered that the opinions of experts are crucial in such cases and that the psychic anomaly should be considered “an illness that deprives a person of their capacity to accept social responsibilities.”<sup>15</sup>

## The right to property

[95]. The right to property is enshrined in the Portuguese Constitution in Article 62.1: “Everyone shall be guaranteed the right to private property and to the transmission thereof in life or upon death, as laid down by this Constitution.”

[96]. According to the law, a person who suffers from a psychic anomaly is able to acquire properties, but not to act upon them. The person can be declared unable to take care of their own goods because of a psychic anomaly. This status can be requested from a court by the husband/wife, any member of the family or by the Public Prosecutor (Articles 138-151 of the C.C, which refer particularly to the rules of prohibition).

[97]. The Court must appoint the husband/wife, a member of the family or a third person as a trustee empowered to act on behalf of the person that suffers from a psychic anomaly (Article 143 C.C).<sup>16</sup>

## The right to vote

[98]. According to the different electoral laws (to elect the President of the Republic and the Parliament) persons who suffer from psychic anomaly, declared so by the court, cannot vote or be elected. Persons suffering from evident dementia who try to vote are, as well, forbidden to vote.<sup>17</sup>

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<sup>13</sup> <http://www.dgsi.pt/jtrp.nsf/0/67d096fab14ced4c802570b20053968e?OpenDocument> (1.11.2009).

<sup>14</sup> <http://www.setubalnarede.pt/content/index.php?action=articlesDetailFo&rec=8687> (1.11.2009).

<sup>15</sup> <http://www.dgsi.pt/jtrg.nsf/0/ba66eab1b168af3a80256d25003c3528?OpenDocument> (1.11.2009).

<sup>16</sup> [http://www.trp.pt/jurisprudenciavel/civel08\\_5295.html](http://www.trp.pt/jurisprudenciavel/civel08_5295.html) (1.11.2009).

<sup>17</sup> [http://www.cne.pt/dl/legis\\_lepr\\_2005.pdf](http://www.cne.pt/dl/legis_lepr_2005.pdf) and [http://www.cne.pt/dl/legis\\_lear\\_2002\\_2.pdf](http://www.cne.pt/dl/legis_lear_2002_2.pdf) (1.11.2009).

## V. Involuntary placement and Involuntary Treatment

[99]. After having consulted various United Nations websites<sup>18</sup> the experts did not find any particular reference to Portugal in the field of involuntary placement or involuntary treatment.

[100]. The main and most relevant finding of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) related to the issue of involuntary placement and involuntary treatment in Portugal is a report from 14 to 25 January 2008.<sup>19</sup>

[101]. The main recommendations of the report, in the view of the authors, are: (i) the necessity to be taken to ensure that outdoor exercise is offered on a daily basis (Hospital Miguel Bombarda); (ii) efforts to be made to provide group therapy to patients (Hospital Miguel Bombarda); (iii) the necessary steps to be taken to ensure that application of means of restraint in principle occurs out of sight from other patients.

### A. Legal Framework

[102]. The legal framework is composed of constitutional rules and the law of mental health (Law 36/98, 24.07.1998). The law came into effect six months after being published in the official gazette (Article 48). No important changes have been made to this law. It was subject only to an amendment, which focused on paragraph 2 of art. 30. No, operated by Law No. 101/99, of 26.07.1999.

[103]. The Portuguese law does not establish any distinction between involuntary placement and involuntary treatment, because the former necessarily leads to treatment (Article 12). It is not acceptable to detain or confine someone without ensuring medical treatment.

[104]. The Portuguese law (Article 12) distinguishes between involuntary placement for reasons of danger and involuntary placement for reasons of urgency. Sometimes they overlap. The law aims to fulfil various functions. According to Article 5, mental health care is provided to individuals preferably within their community setting in order to facilitate their rehabilitation and social inclusion.

[105]. As far as involuntary placement is concerned, the law aims to protect public order, the internee as well as their own belongings and the belongings of others.

[106]. In terms of aftercare following involuntary placement, a mentally ill patient continues to be monitored by local hospitals and in the rehabilitation phase they are assisted by a multidisciplinary team composed of medical psychologists and nurses (male or female).

[107]. According to Article 7.b, “voluntary” placement can be required by the legal representative of minors from the age of 14. If the child is younger than 14, the parents can require his/her individual placement.

[108]. According to Portuguese law patients are not divided into specific groups or categories.

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<sup>18</sup> <http://www2.ohchr.org/english/issues/health/right/annual.htm>,  
<http://www2.ohchr.org/english/issues/health/right/>,<http://www2.ohchr.org/english/bodies/cat/index.htm>,<http://daccessdds.un.org/doc/UNDOC/GEN/G03/109/79/PDF/G0310979.pdf?OpenElement>,  
[http://www2.ohchr.org/english/issues/escr/docs/wg23-crp1\\_En.pdf](http://www2.ohchr.org/english/issues/escr/docs/wg23-crp1_En.pdf) and  
[http://www2.ohchr.org/english/issues/health/discrimination/docs/150109consultationHRC%208\\_13CompilationSubmissions.doc](http://www2.ohchr.org/english/issues/health/discrimination/docs/150109consultationHRC%208_13CompilationSubmissions.doc) (1.11.2009).

<sup>19</sup> <http://www.cpt.coe.int/documents/prt/2009-13-inf-eng.pdf> (1.11.2009).

[109]. In addition to the qualifications listed, we can still point the Decree-Law No. 35/99 of 05.02, which establishes the guiding principles of organization, management and evaluation of mental health services, which came to be along the lines arising of the National Mental Health Plan and the change in the structure of the Ministry of Health, as amended and republished by Decree-Law No. 304/2009, of 22.10.2009.

[110]. One of the general principles set out in art. 2. states that the provision of mental health care should focus on specific conditions and needs of individuals, depending on their age and differentiation to be promoted at the community level in the least restrictive means possible, with the care units located in general hospitals.

[111]. Art. 6.states that the specialized care services of mental health are organized at regional and local integrated health units. Local services are considered the basis of a national mental health, and work in an integrated and in close coordination with primary health care, other services and health facilities to ensure the unity and continuity of care.

[112]. In this law also lays down the establishment of a National Council of Mental Health, as an advisory body on mental health, which is to advise and make proposals and recommendations at the request of the Government member responsible for Health or on its initiative on the topics listed in subparagraphs of art. 3. °. It should be noted that the National Institute for Rehabilitation is one of the organizations represented in this body.

[113]. In conjunction with the national network of integrated and continuous care with the local mental health provided for in Decree-Law No 304/2009 of 22.10, cited above, and following the Mental Health Act, approved by Law No. 36 / 98, 24/07, was recently published Decree-Law No. 8 / 2010, of 28.01, which creates a set of units and integrated continuing care teams for mental health for persons with severe mental illness resulting in disability and psychosocial who are in a situation of dependence, regardless of age, which will be designated for persons with psychosocial disability.

[114]. According to this organizational model, the provision of mental health care is being provided by multidisciplinary teams and units empowered to respond in a coordinated manner, to medical, psychological, social, nursing and rehabilitation. These disciplinary structures are of three types: home care teams, socio-occupational units and residential units and are characterized on the art. 8. of this law.

[115]. However, the decree-law must also be regulated within 90 days after its entry into force, and the units and teams provided by law should be implemented gradually through pilot experiences, to create in the 12 months and remained temporarily in force the answers already existing.

## B. Criteria and Definitions

[116]. The criteria to be fulfilled by law to order an involuntary placement or involuntary treatment are defined in Article 12. Internees must suffer from a severe psychic anomaly and pose a threat to themselves and/or others or to their belongings and/or those of others. Involuntary placement requires, in addition, a refusal on the part of the patient to submit to treatment.

[117]. According to the law mental health care must focus on the specific needs of the individual, taking into account his/her age and must be implemented at community level. Such patients should preferably receive treatment in general hospitals. In terms of the National Health Plan (2007-2016) the decision to resort the involuntary placement can only be applied when all other measures failed.

[118]. The opinion of the patient is relevant and he/she has the right to accept or reject some treatments, except in cases of involuntary placement or urgency.

[119]. Patients cannot be submitted to electroconvulsive therapy without prior written consent.

[120]. The law does not provide a table of the risk level posed by different categories of patients.

## C. Assessment, Decision Procedures and Duration

[121]. According to Article 17, the evaluation is made by two psychiatrists within a period of 15 days, with the possible assistance of other professionals in the field of mental health, such as other psychiatrists, psychologists and trained nurses.

[122]. The decision for an involuntary placement is taken by a judge (Article 20).

[123]. In cases where a voluntary placement becomes an involuntary one, the legal framework of involuntary placements is applied.

[124]. After the psychiatric evaluation as defined in Article 17, the judge must summon the parties involved to a meeting at which the lawyer of the patient or the public prosecutor must be present (Article 19). The law does not define a specific period of time from the moment of evaluation to involuntary placement.

[125]. The law does not define the specific duration of involuntary placement in emergency cases.

[126]. Electroconvulsive therapy is referred to in the law and requires the written consent of the patient or his/her representative.

[127]. The law does not permit any coercive measures (e.g. physical restraint, reclusion, etc.) to be applied.

[128]. The legality of involuntary placement can be questioned under Article 31 on *habeas corpus*. This right can be exercised by the patient or any citizen as to the ancient institute of *habeas corpus* which has always recognised a broad legitimacy to question any measure affecting individual freedom.

[129]. When a person has no lawyer to go to court or to defend himself/herself before court, the BAR association supplies one. With patients in these circumstances, this general rule is not observed. Instead of a lawyer appointed by the BAR association public prosecutors are allocated to patients in order to provide better (specialized) and immediate protection. This means somehow that State is

evolved to the resolution of the case and treats the defence of the patient as a matter of public relevance.

## VI. Competence, Capacity and Guardianship

[130]. Since the *Second Disability High Level Group Report* (2009)<sup>20</sup> there have been no changes in the legal regime for interdiction and inability.

[131]. Protection of persons with mental disorders or with intellectual disabilities who are unable to manage their affairs is granted on the basis of the declaration of any contract signed by such persons being declared null and void. Furthermore the Portuguese Civil Code<sup>21</sup> provides for a declaration of incapacity following a procedure defined by the Code of Civil Procedure.<sup>22</sup>

[132]. Once a person with mental disorder or with an intellectual disability is unable to manage his/her affairs, a special process for inability or interdiction may be requested by the spouse of that person, the guardian or carer, a relative who is an heir or by the Public Prosecutor. An interim measure can also be pressed in the proceedings in case of risk for the person or his/her property.

[133]. According to Portuguese law, capacity is seen as the ability to take part effectively in all issues involving a person's life. This means signing contracts, selling or buying property and so on.

[134]. Legal incapacity is based (except the case of minors) upon psychic anomaly (*anomalia psíquica*), deafness, deaf-muteness and blindness (interdiction) or upon prodigality or excessive use of alcohol or drugs (inability).

[135]. According to the doctrine accepted by Portuguese courts, dispositions of Civil Code must be interpreted as follows: "The grounds for interdiction are the causes listed in Article 138, paragraph 1 of Civil Code, that exhibit the following characteristics: be disabling, affecting those who become unable to manage their own person and/or property, and who are currently, not in the past or expected to be, are somewhat permanently incapacitated (although not required to be incurable)."<sup>23</sup>

[136]. The general term used by the Civil Code to refer to mental illness is "psychic anomaly". While not specifically defined, this term is more closely associated with intellectual disability than with mental disorder. In cases where "psychic anomaly", although permanent, is not so severe that the individual is unable to conduct his/her business, said individual must be declared "unable" and not be interdicted.

[137]. Inability is the less severe form of incapacity and should be applied in cases where a person is unable to make coherent decisions regarding his/her property. Sometimes Courts have difficulty in deciding between inability and interdiction because there can be a degree of overlap.

[138]. Where an individual is represented or assisted by a legal representative, guardian or carer in the exercise of his/her rights, the individual's overall ability remains intact provided his/her legal capacity is not affected.

[139]. Inability means an individual's legal incapacity is replaced by the carer's assistance in all issues related to the person's property. The carer must be previously authorised by the court to provide any such assistance.

[140]. Interdiction is more severe and involves representation by the guardian in all legal issues related to the person and their property.

<sup>20</sup> Available at: <http://ec.europa.eu/social/BlobServlet?docId=2790&langId=en> (12.06.2009).

<sup>21</sup> <http://www.dgpj.mj.pt/sections/leis-da-justica/livro-iii-leis-civis-e/leis-civis/codigo-civil> (2.11.2009).

<sup>22</sup> <http://www.dgpj.mj.pt/sections/leis-da-justica/livro-iii-leis-civis-e/leis-de-processo-civil/codigo-de-processo-civil> (2.11.2009).

<sup>23</sup> Cf. Case by the Supreme Court of Justice, 29 April 2003, Proc. 03A2745.

[141]. There is no time limit specified regarding the period during which adults considered incapable can be placed under a protective system. It is up to the court to decide if the status of incapacity should be removed at the request of the spouse, the guardian, the carer, the heir or the Public Prosecutor.

[142]. There is just one exception, when the inability is based upon prodigality or use of alcohol or drugs; in such cases the status of cannot be removed before 5 years passed since the judicial decision was taken or the last request is was turned down.

[143]. Only civil courts are entitled to declare an adult legally incapable and to take measures aimed at to the protection of the person or his/her property.

[144]. An examination by experts is required before the court's final decision regarding interdiction or inability. In fact, the opinion of the experts is the determining factor in the court's decision. In 2003, the Supreme Court of Justice declared null and void a decision taken by a Court of First Instance because the examination did not follow the proper procedure. The Supreme Court of Justice ordered the entire process to be repeated.<sup>24</sup>

[145]. Along with the appointment of a tutor or a carer, a "family council"- who have a valid interest in the welfare of the person concerned - must also be formed. Said council must be heard by the judge before he/she decides to go ahead with the process of interdiction/inability.

[146]. The "family council" is composed of relatives, friends, neighbours or others who may be interested in the person concerned, and it must be heard before the judge's ruling to give its opinion on the process of interdiction/inability.

[147]. Any appeal must be lodged within a period of 30 days of the judge's decision. Said appeal is a common procedure and the representative of the person declared incapable is always present at the court.

[148]. The priority duty of any guardian is to take care of the interdicted person's, health and welfare.

[149]. The Civil Code expressly recognises that guardianship should be entrusted in the first place to the spouse or, failing that, to one of his/her ascendants, to the descendants, or to one whom the court decides. The court must convene a meeting immediately prior to designate the person.

[150]. A "pro-guardian" is appointed from among the other members of the family council and has the mandate to supervise the work of the guardian.

[151]. The appeal procedure against a decision of appointment of a guardian or carer follows the common legal steps for appeal.

[152]. Decisions of incapacity consequently determine the need of a guardian or of a carer. Once the judge decides that way he/she ought to determine a meeting of the family council just before the designation of the person entitled to be the guardian/carers.

[153]. These decisions are not periodically reviewed but are subject to judicial revision should it be required by the person or by one or more of the other responsible parties mentioned above. When ceases the cause of interdiction no longer exists, the latter ceases as well.

[154]. Finally, we must underline that this system is expected to undergo a full amendment since the Action Plan for the Integration of Persons with Disabilities or Impairments states the necessity to

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<sup>24</sup> Cf. Case by the Supreme Court of Justice, 12 June 2003, Proc. 1717-03.

“review the current legal regime of interdiction and inability, upon approval and implementation of a new system of legal representation and related matters.” A draft law has already been delivered to the Ministry responsible but is still awaiting further proceedings. The execution of this Plan should be implemented in the near future.

## VII. Miscellaneous

[155]. NTR.

## Annex – Case Law

[156]. In different Sections of the Guidelines, experts have been asked to refer to case law. Please present the case law reference in the format below

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| <b>Case title</b>  | <i>Psychic anomaly v. cultural deficit</i>   |
| <b>Decision date</b>   | 29.04.2003   |
| <b>Reference details</b> (reference number; type and title of court/body; in original language and English [official translation, if available]) | Supreme Court of Justice ( <i>Supremo Tribunal de Justiça</i> ), Proc. 03A2745.  |
| <b>Key facts of the case</b> (max. 500 chars)  | <p>This is a decision on appeal over a court ruling that denied a declaration the interdiction or inability of A, requested by her sister.</p> <p>The defendant lives alone, is a farmer and takes care of herself alone. She knows what money is but does not know how to count it. However, she does do the shopping and asks for others to pay with her money. She cannot read or write, nor does she understand the concept of time, but has her meals on time. She goes to the doctor with a friend in order to have some help in understanding how to take the medicine prescribed to her.</p> <p>The house where she lives is extremely poor but she likes to live there and has some help from her neighbours with her work.</p> |
| <b>Main reasoning/argumentation</b> (max. 500 chars)   | <p>‘A’ cannot read or write, not because she is incapable of learning but because her parents never let her go to school, because they needed her help at work. They also do not know fully understand money, can not read the time, but knows the hours of meals. They comprehend the concept of the days of the week.</p> <p>As concluded in this case, it is not a case of mental disorder or psychic anomaly, but an event of enormous cultural deficit of the defendant, from her previous <i>modus vivendi</i>, and mirrored in the records and in the lack of opportunities to acquire knowledge (led a life devoted to farming, from morning to night).</p>  |

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| <b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)   | Psychic anomaly should not be confused with the cultural deficit.<br>What is relevant in determining the interdiction is the ability to take care of one's own belongings properly.  |
| <b>Results (sanctions) and key consequences or implications of the case</b> (max. 500 chars)   | The required interdiction was denied by lack of evidence of a psychic anomaly.   |
| <b>Proposal of key words for data base</b>   | Interdiction, inability, psychic anomaly, cultural deficit.  |
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| <b>Case title</b>  | <i>Expert examination in actions of interdiction</i>   |
| <b>Decision date</b>   | 12.06.2003   |
| <b>Reference details</b> (reference number; type and title of court/body; in original language and English [official translation, if available]) | Supreme Court of Justice (Supremo Tribunal de Justiça), Proc. 1717-03  |
| <b>Key facts of the case</b> (max. 500 chars)  | <p>This decision arose as the result of an appeal from a decision in the second instance that declared the interdiction, upon an expert examination, was not carried out in a proper place and failed in its conclusion since they were not sufficiently accurate nor was beginning of the inability it determined. The applicant for this action was the Public Prosecutor who alleged that the defendant should have asked for another examination and it was not for the judge to order it.</p> <p>As a matter of fact, the examination in question was made "in difficult physical conditions, in the same room where the operator of the court works, not in a quiet environment, with several breaks and cross talk" (so said the medical experts in the preamble to the report); the report was inaccurate as to the kind of illness suffered by the defendant, on the extent of the reported disability and it furthermore omitted the probable start of the disability.</p> |

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| <b>Main reasoning/argumentation</b><br>(max. 500 chars)                                      | Before making its final decision, the court will always carry out expert examination (examination to serve as evidence) to ascertain the degree of incapacity of the defendant. This expert examination is considered the principal evidence in this kind of processes. The previous judicial decision is void as long as it has been based a decision of interdiction upon an expert examination that was not carried out in a proper place and concluded in an inaccurate way. The judge should have then officiously requested a review determined the replay the expert examination before deciding.<br>The value of the material truth must prevail in such proceedings. |
| <b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)         | Medical expert examination is the principal evidence in an action of interdiction. That examination must be lead in a proper way in relation with its purpose. If the examination or the final report of it is inadequate and inaccurate the court has an obligation to order a review of it before deciding the interdiction. This omission leads to a mistrial.   |
| <b>Results (sanctions) and key consequences or implications of the case</b> (max. 500 chars) | The judge's omission to order a review of the medical expert examination in case of inaccuracy leads to a mistrial.   |
| <b>Proposal of key words for data base</b>   | Evidence in an action for interdiction. Accuracy of medical expert examination. Powers of the judge.  |

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| <b>Case title</b>  | <i>Declaration of incompetence</i>   |
| <b>Decision date</b>   | 3.11.2005  |
| <b>Reference details</b> (reference number; type and title of court/body; in original language and English [official translation, if available]) | Proc.º number 0535475<br>Upper Court of OPorto ( <i>Tribunal da Relação do Porto</i> )   |
| <b>Key facts of the case</b><br>(max. 500 chars)   | The son requested that the court declare his mother incompetent to look after herself and her properties. According to the experts the mother suffered from an Organic Cerebral Syndrome – a kind of dementia. It was necessary to establish the precise moment when the patient was incapacitated by the illness. |

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| <b>Main reasoning/argumentation</b><br>(max. 500 chars)                                      | According to the court, psychic anomaly embraces any disturbance of intellectual faculties affecting intelligence, perception of the world and memory.<br>The legal framework consisted of giving the power to consider someone of psychic anomaly to doctors and not to lawyers. |
| <b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)         | Taking into account the experts' written opinion, the court changed the date of incompetence from 1998 to July 1999.  |
| <b>Results (sanctions) and key consequences or implications of the case</b> (max. 500 chars) | The Court declared the patient incompetent to manage their affairs and their belongings.  |
| <b>Proposal of key words for data base</b>   | Interdiction, psychic anomaly and the role of experts.  |

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| <b>Case title</b>  | <i>Declaration of incompetence</i>   |
| <b>Decision date</b>   | 29.01.2003   |
| <b>Reference details</b> (reference number; type and title of court/body; in original language and English [official translation, if available]) | Proc.º 1476/02-2<br>Upper Court of Guimarães ( <i>Tribunal da Relação de Guimarães</i> )   |
| <b>Key facts of the case</b><br>(max. 500 chars)   | 'A' requested the court to declare 'B' incompetent on the grounds of a psychic anomaly and personality disorders caused by heroin addiction over a long period (starting at the age of 13). 'B' said in her defence that she suffers from a slight personality disorder which does not affect her intelligence or ability to interact with others. |
| <b>Main reasoning/argumentation</b><br>(max. 500 chars)  | The Court of First Instance declared her incompetent and the decision was upheld by that Court.<br>B maintained that she had successfully completed her schooling and was of average intelligence.<br>On the other hand, the experts concluded that her personality disorders were severe rather than slight and that she was a psychopath.        |

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| <b>Key issues (concepts, interpretations) clarified by the case</b> (max. 500 chars)         | The main legal question that the court had to deal with was the validity of the expert's opinion. |
| <b>Results (sanctions) and key consequences or implications of the case</b> (max. 500 chars) | The Court declared the patient incompetent.   |
| <b>Proposal of key words for data base</b>   | Interdiction, psychic anomaly, role of experts and addiction to drugs.                            |