



Executive Summary

Portugal country report on measures to combat discrimination

by Manuel Malheiros

1. Introduction

Portugal has a population of around 10.5 million inhabitants and it is a relatively homogeneous society, composed mainly of Portuguese nationals. The Census of March 2001 pointed out to 10.356.117 residents, value corresponding to an increase of 4, 8% for the decade (almost plus 500.000 individuals). This evolution confirms both the migration turnover experienced by Portugal in the 1990s (from emigration to immigration country) and the high contribution of net migration to population growth. This higher relevance of net migration to the population growth in Portugal is a new phenomenon, because between 1960 and 1991 natural increase has always been the main force of demographic change. This situation is mainly due to the significant acceleration in the growth of the number of foreigners settled in Portugal observed after 1999/2000.

We can find in some cases a latent racism towards the ethnic minorities of African origin. Certain problems are experienced in relation to equal rights and integration for the Roma community (estimated at 50,000). Members of this community face many difficulties in the fields of employment, housing and education and cases are reported of discrimination in daily life. The integration of "second generation" people of African origin (black) is also problematic. There are frequent allegations of police misconduct towards ethnic minorities and people of non-Portuguese origin, including excessive use of force, ill-treatment and violence. Discrimination based on sexual orientation is still frequent in society. Questions like marriage of same-sex couples or adoption of children by homosexuals still raise great discussions and are frequently a matter of emotional dispute in the last year of legislative elections. Age discrimination issues are a relatively new subject of which society is not yet completely aware and is only slowly becoming conscious of its implications. Regarding disability, positive actions are difficult to implement due to the financial difficulties: the lack of funds is the argument used to delay improvement in accessibility and implementation of projects. According to the Census of 2001 the number of disabled people is 636,000 and only 60,000 of them live in accessible buildings, – with access ramps, for instance. Around 330,000 disabled people live on social benefits and 150,000 on employment income. There are some special programmes for disabled people.

As regards promoting employment opportunities for a person with a disability, the law states that the Portuguese State shall create incentives for hiring people with disabilities or chronic diseases. Public authorities shall also adopt policies on employees who have newly acquired disabilities or chronic diseases. These policies shall give incentives to employers to include measures to help these people retain their employment when developing a strategy for managing disability in the workplace. Several rights are guaranteed to workers with disabilities: the right to be exempted from a specific amount of working hours; the right not to perform extra working hours and the right not to work during the night if that is considered constituting a risk to their health or to the safety of the workplace.



In what concerns the Roma community, positive actions have been developed by the ACIME¹ namely in regulations and permits for travelling salespeople, which prevails as the main activity of this community and support of Roma NGOs and NGOs involved in work with the Roma community.

In terms of racial and ethnic discrimination, the most vulnerable groups are Roma, immigrants and ethnic minorities even when they have Portuguese nationality. The Roma ("ciganos" as they are known and call themselves in Portugal) are still discriminated against in daily life. They face many problems in relation to housing, education, employment and health care. More positive action measures would facilitate the integration of the Roma. It is necessary to ensure that the culture of the Roma and also of migrants' home countries (and especially the Muslim religion) is reflected in school curricula and textbooks.

2. Main legislation

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

Portugal has ratified the European Convention on Human Rights (ECHR), the Convention on the Elimination of All Forms of Racial Discrimination, the Revised European Social Charter and the Convention on the Elimination of Discrimination against Women, the International Covenant on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights and the ILO Convention no. 111 on Discrimination.

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

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

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

Religious freedom and equal treatment of religions and beliefs are regulated in Law 16/2001. Only in the field of labour law have there been established rules against discrimination on the grounds of age, sexual orientation, disability, religion and political convictions in addition to rules against discrimination on the grounds of race or ethnic origin. There is no specific protection in the field of self-employment; Article 13 of the Labour Code grants only

¹ ACIME – Alto Comissariado para a Imigração e Minorias Étnicas (HCIEM – High Commissioner for Immigration and Ethnic Minorities) (see below heading 6)



limited protection, but the principle of non discrimination as applicable in what concerns access and exercise of independent protections. Law 35/2004 of 29 July 2004 imposes the duty on the employer to display in an appropriate area, information related to the worker's rights and duties according to the principles of equality and non-discrimination (Article 31). The violation of this disposition is considered as "contra-ordenação leve" (a minor offence) according to Article 473 of this law (punishable with a fine that may vary from 178 to 1,335 Euros). Article 23(1) of the Labour Code grants protection against discrimination on grounds of race or ethnic origin.

3. Main principles and definitions

The main definitions related to discrimination have been incorporated into the legal system. Racial discrimination is defined as, "Any distinction, exclusion, restriction or preference on the grounds of race, colour, ancestry, national or ethnic origin, which has the objective of, or results in the invalidation or restriction of the recognition, enjoyment or exercise, in conditions of equality, of rights, liberties or guarantees or economic, social or cultural rights".

Concerning disability, a disabled person is defined as a person who, due to loss or abnormality of psychological, intellectual, anatomical structure or function, susceptible to limited capacity, may be considered at disadvantage for the exercise of normal activities, taking into account age, sex and the prevailing socio-cultural factors. Discrimination by association or on assumed grounds or characteristics is also covered by the law and punished.

According to the legislation (Law 18/2004 and Law 35/2004) direct discrimination exists when, on one of the grounds referred in the Directives and in Portuguese law, "a person is treated less favourably than another is, has been or will be treated in a comparable situation". Indirect discrimination exists "whenever an apparently neutral provision, criteria or practice would put persons with one of the characteristics referred in the Directives and in Portuguese law at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary"

Harassment is defined as any kind of unwanted behaviour which has the purpose of affecting a person's dignity or of creating an intimidating, hostile, humiliating or disturbing environment.

Law 18/2004 Article 3(4) states that an instruction to discriminate on grounds of race or ethnic origin is considered to be a form of racial discrimination. Law 35/04 Article 32(3) specifically states that "an order or instruction with the purpose of disadvantaging any person by reason of one of the grounds referred to in Article 23(1) of the Labour Code shall be deemed to constitute discrimination". Specific rules against victimisation only exist in respect to employment, not in relation to race discrimination in general.

Article 122 of the Labour Code forbids the employer "to oppose in any way whatsoever the exercise by the worker of his or her rights or to dismiss an employee or apply to him or her any sanctions or subject him or her to any adverse treatment because of that same exercise". Article 374 considers that any disciplinary measure taken against a worker is to be considered abusive (and therefore illegal) if it is in retaliation to a complaint against working conditions or to the past, present or future exercise of rights and guarantees on the part of

the employee. The law foresees an exception for genuine and determining occupational requirements.

Article 3(3)(c) of Law 18/2004 states that behaviour based on race and ethnic origin is not considered discrimination whenever, due to the nature of the activities or the context of their execution, such a factor constitutes a justifiable requirement and determinant for its exercise, but the objective must be legitimate and the requirement proportionate.

Article 23(2) of the Labour Code prohibits, in effect, all practices by the employer of direct and indirect discrimination on the grounds referred to. According to the same Code, a difference in treatment which is based on a characteristic related to any of the above referred grounds shall not constitute discrimination if, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate. Articles 73 to 78 of the Labour Code contain provisions aiming to ensure health and safety at work for disabled persons to enable their better integration in the workplace. The law foresees several positive actions to be agreed between the employer and the State concerning reasonable accommodation and between the employer and the employee, such as a flexible or alternative timetable and dispensing with supplementary work and night work whenever necessary.

4. Material scope

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

5. Enforcing the law

According to the Labour Code, only trade unions can act in support of the victim in administrative procedures for the imposition of fines. Concerning racial discrimination, Law 18/2004 Article 5 states that “associations with the objective of combating discrimination based on racial or ethnic origin have the right to engage in judicial procedures on behalf or in support of the interested persons, with their approval”. NGOs only have the right, like any body, to inform the High Commissioner for Immigration and Ethnic Minorities (HCIEM) and the General Labour Inspectorate of racist practices. They do not have any right to intervene in the administrative procedure for the imposition of fines. Associations which work for people with disabilities may engage in criminal proceedings either on behalf or in support of a person with a disability, provided his or her approval is given. In administrative procedure these associations have the right to be informed about the enforcement of the obligations that exist under the legal provisions that protect people with disabilities.

Generally speaking, regarding the burden of proof, a presumption of discrimination is created once the victim can demonstrate the existence of facts that allow for such a presumption to be established. Once they have been established, the burden of proof will shift, since the respondent has the duty to prove that the facts alleged are not

discriminatory. This principle does not apply to criminal procedure or to actions when according to the law it is up to the court or other jurisdiction to carry out the investigation.

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

The Labour Code considers discrimination a petty (administrative) offence punishable with fines that vary between 900 and 53,400 Euro according to the circumstances of the case. The victim of discrimination has the right to the payment of compensation for pecuniary and non-pecuniary (moral) damages in accordance with the principles of the Civil Code. There are no ceilings on the amount of compensation which may be awarded. As provided for in the law, the sanctions are proportionate and dissuasive. According to the information available, only in a very few cases have sanctions been imposed.

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

In civil, criminal and labour proceedings, plaintiffs have the right to require through the Court that the data in possession of the respondents or third parties to determine a *prima facie* case of discrimination to be put at the Court's disposal and, if necessary, subject to the appreciation of experts.

Situation testing is acceptable as evidence under the same rules as evidence by witnesses.

6. Equality bodies

The core of the system to fight racial and ethnic discrimination is the High Commissioner for Immigration and Ethnic Minorities which functions as a unified and co-ordinating agency vested with all the powers envisaged under Article 13 of Directive 2000/43. He enjoys wide-ranging powers including consultation and dialogue with the bodies representing immigrants or ethnic minorities in Portugal. The High Commissioner carries out studies on various themes relating to the integration of immigrants or ethnic minorities in co-operation with employers' associations and trade unions, social welfare institutions and other public or private bodies involved in this area. The High Commissioner's role is to help to eliminate discrimination and combat racism, xenophobia and exclusion in relation to the entry to, residence in and departure from Portugal by foreign nationals and proposes legislative measures to help immigrants and ethnic minorities, including assistance to victims.

The HCIEM is independent in the performance of his or her functions. He may assist victims of discrimination but cannot represent them in Court. The HCIEM has no legal standing in the sense that he cannot intervene before the Courts in support of the victims. He has administrative powers to enforce the law and to impose fines which are subject to appeal to the Courts.

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

The Ombudsman is an independent organ appointed by the Parliament. His or her main tasks are to defend and promote the rights, freedoms, safeguards and lawful interests of citizens, by ensuring, through informal means (that is without any judicial procedure), that the authorities exercise their powers fairly and in compliance with the law. He can hear complaints from nationals or non-nationals about acts or omissions committed by the authorities. He has addressed a number of matters concerning racism, namely against non-nationals and the Roma/Gypsy community, mainly by adopting recommendations addressed to the authorities.