

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

Portugal

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Foreword

CESIS, as the FRA Portuguese Focal Point, was asked to up-date this legal study, in late 2013-early 2014. A final draft of the up-dated study is dated July 2014. The legal up-date was conducted by Josefina Leitão (legal expert) in co-operation with Heloísa Perista (senior expert).

A specific remark on footnotes and references has also to be made. Whenever possible, the links to the original sources were also updated. In the cases when this was not possible, and the original link is no longer active, that footnote was deleted.

Several paragraphs in the original report did not include reference to the source. In these cases, we opted either to keep that paragraph, even if without proper referencing, when we found that paragraph particularly relevant, or to delete it.

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

The methodology adopted in the original study was as follows:

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:

- Medical Association (*Ordem dos Médicos*);
- Commission for Equality in Labour and Employment (*Comissão para a Igualdade no Trabalho e no Emprego*, CITE);
- Commission for Citizenship and Gender Equality (*Comissão para a Cidadania e Igualdade de Género*, CIG);
- Institute of Registration and Notary Affairs (*Instituto dos Registos e Notariado*, IRN);
- Service for Foreigners and Borders (*Serviço de Estrangeiros e Fronteiras*, SEF);
- Directorate-General for Justice Policy (*Direcção-Geral da Política de Justiça*, DGPJ);
- Authority for Working Conditions (*Autoridade para as Condições de Trabalho*, ACT)
- General Confederation of Portuguese Workers (*Confederação Geral dos Trabalhadores Portugueses – Intersindical Nacional*, CGTP-IN);
- General Workers' Union (*União Geral dos Trabalhadores*, UGT).

The legal up-date which is now presented takes into consideration, in an exhaustive way Portuguese legislation and EU and International Law.

Regarding case law, there are not many examples of Court decisions in Portugal till today. This is why we have maintained some case law prior to 2000 and included a decision of the court of first instance of Barreiro, not available on the internet (made available to us by the competent judge, following a

specific request in written), which we thought to be relevant. Case law concerning same-sex marriage and homosexual relationships between adult males and adolescent males constituted landmarks in the history of Fundamental Rights in Portugal before 2010. After 2010 the Constitutional Court has played a major role because it was asked twice to appreciate the accordance of two subjects with the Constitution. One, about same-sex marriage and another about the questions to be included in a referendum about co-adoption. The first is included in the case law in annex. The second is not included because the matter was not of substance.

Besides desk research, several direct requests for information in written, in most cases accompanied by phone contacts, were also made in order to: i) check availability of data; and ii) collect relevant data, either quantitative or qualitative. These requests were complemented by a face-to-face meeting with ILGA Portugal. The following entities were consulted:

- Commission for Citizenship and Gender Equality (*Comissão para a Cidadania e Igualdade de Género*, CIG);
- Institute of Registration and Notary Affairs (*Instituto dos Registos e Notariado*, IRN);
- Service for Foreigners and Borders (*Serviço de Estrangeiros e Fronteiras*, SEF);
- Directorate-General for Justice Policy (*Direcção-Geral da Política de Justiça*, DG PJ);
- Authority for Working Conditions (*Autoridade para as Condições de Trabalho*, ACT);
- Portuguese Council for Refugees (*Conselho Português para os Refugiados*, CPR);
- General Confederation of Portuguese Workers (*Confederação Geral dos Trabalhadores Portugueses – Intersindical Nacional*, CGTP-IN);
- General Workers' Union (*União Geral dos Trabalhadores*, UGT);
- ILGA Portugal;
- Opus Gay.

Nevertheless, the lack of statistics and the low number of relevant case law make it difficult the identification of trends during the last reporting period.

Executive summary

During the course of the original version of this study, 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. The situation in 2013-2014 has somehow changed, given that the available sources on this topic are now more diverse and robust: either in terms of academic research or of the work conducted and published by the LGBT associations, ILGA in particular.

It was, and still is, though 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 Constitution¹ 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. On the other hand, the Article 26 (1) in the Constitution states: “*Everyone is recognised as having the right to his or her personal identity, personality development, civil capacity, citizenship, good name and reputation, and likeness, the right to speak out and the right to the protection of the privacy of his or her personal and family life (...) and to legal protection against any form of discrimination*”. According to Article 18 (1) of the Constitution these articles are self-executing and oblige public and private entities.

It is important to stress, on this matter, that the discrimination factors mentioned in the Article 13 (2) in the Constitution are merely examples. Therefore the prohibition of discrimination does not cover only discrimination on grounds of sexual orientation, it also extends to discrimination of any LGBT persons. In effect, since the first times of the 1976 Constitution, the Opinions of the Constitutional Commission,² and subsequently the rulings of the Constitutional Court have confirmed the notion that those discrimination factors are merely a concretion of the general idea of equality.³ It has also been understood that this Article consecrates a prohibition precluding arbitrariness,⁴ which means that the differentiation criteria should be objectively adequate to the prosecution of the proposed aim

¹ Portugal, Constitutional Law No.1/2005, VII Constitutional revision (*Lei Constitucional n.º 1/2005, VII Revisão constitucional*), 12 August 2005, available at: <https://dre.pt/pdf1sdip/2005/08/155A00/46424686.pdf>. All hyperlinks were accessed on 15 July 2014.

² Portugal, Parecer da Comissão Constitucional n.º 5/82, de 25 de Janeiro de 1982, *Pareceres XVIII* (81-82), pp. 184-185.

³ Portugal, Ruling of the Constitutional Court 44/84, of 22 May 1984, *Diário da República*, n.º 159, II série, pp. 6156-6157, available at: www.dgsi.pt/atco1.nsf/904714e45043f49b802565fa004a5fd7/15dcb7845b0112bf8025682d00648664?OpenDocument.

⁴ Portugal, Parecer da Comissão Constitucional n.º 14/78, de 4 de Maio de 1998, *Pareceres V*, p. 109.

according to a reasonable factual basis. These principles apply both to the law design, and to its implementation.⁵

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

- adoption by same-sex couples married or in *de facto* unions;⁶
- assisted reproduction;⁷
- acceptance of children at risk;
- in the event of guardianship, the fact that same-sex couples who are either married or living in a *de facto* relationship do not have the right to adopt children, is used as a preponderant argument when making an appreciation of custody applicants at the Social Security services.⁸

The 2004 constitutional amendment was insufficient to create a new administrative approach to the issue of sexual orientation. In fact, no public body was set up with the power to investigate charges and apply fines and other punitive measures against discrimination in general. Effectively speaking, although the Portuguese Commission for Citizenship and Gender Equality (*Comissão para a Cidadania e a Igualdade de Género*, CIG) is empowered to act within the domain of equality and non-discrimination in general, questions in terms of LGBT are not expressly mentioned in the Commission's organic law.⁹

Implementation of Employment Directive 2000/78/EC

Directive 2000/78/CE was transposed by the Labour Code and by Law 35/2004.¹⁰ The Labour Code and the Law 35/2004 were replaced by a new Labour Code passed by Law 7/2009, of the 12 February.¹¹ This Labour Code did not change the substance of the provisions about equality and non-discrimination found in the first Code.¹² However, these provisions on equality and non-discrimination only now are applied to private contracts. Public employees, who were formerly covered in this question by the 2003 Labour Code and by Law 35/2004 are covered by Law 59/2008 of 11 September (which approves the System of Employment Contract in Public Functions).¹³ In the meantime, Law 59/2008 was revoked and replaced by Law 35/2014 of 20 June, the so-called

⁵ Machado Dray, G. (1999), *O princípio da Igualdade no Direito do Trabalho, Sua aplicabilidade no domínio específico da formação de contratos individuais de trabalho*, Coimbra, Almedina.

⁶ Portugal, Law 9/2010 which allows same-sex marriage (*Lei n.º 9/2010 que permite o casamento civil entre pessoas do mesmo sexo*), 31 May 2010, available at: <http://dre.pt/pdf1s/2010/05/10500/0185301853.pdf>.

⁷ Portugal, Law 32/2006, which approves Medically-Assisted Reproduction (*Lei n.º 32/2006 que aprova a Procriação medicamente assistida*), 26 July 2006, available at: <http://dre.pt/pdf1s/2006/07/14300/52455250.pdf>.

⁸ Portugal, Decree-Law 121/2010 which regulates the Legal System on Civil Guardianship (*Decreto-Lei n.º 121/2010 que regulamenta o regime jurídico do apadrinhamento civil*), 27 October 2010, Art. 3 (4), available at: <https://dre.pt/pdf1sdip/2010/10/20900/0489204894.pdf>.

⁹ Portugal, Regulatory Decree 1/2012, Organic Law of CIG (*Decreto-Regulamentar n.º 1/2012, Lei Orgânica da CIG*), 6 January 2012, available at: <http://dre.pt/pdf1s/2012/01/00500/0004300046.pdf>.

¹⁰ Portugal, Law 35/2004 which regulates Law 99/2003 of 27 August, which approved the Labour Code (*Lei n.º 35/2004 que regulamenta a Lei n.º 99/2003, de 27 de Agosto, que aprovou o Código do Trabalho*), 29 July 2004, available at: <https://dre.pt/pdf1sdip/2004/07/177A00/48104885.pdf>.

¹¹ Portugal, Law 7/2009 approving the revision of the Labour Code (*Lei n.º 7/2009 que aprova a revisão do Código do Trabalho*), 12 February 2009, available at: <http://dre.pt/pdf1s/2009/02/03000/0092601029.pdf>.

¹² Portugal, Law 7/2009 approving the revision of the Labour Code (*Lei n.º 7/2009 que aprova a revisão do Código do Trabalho*), 12 February 2009, Art. 23 to 28, available at: <http://dre.pt/pdf1s/2009/02/03000/0092601029.pdf>.

¹³ Portugal, Law 59/2008 which approves the System of employment contract in Public Functions (*Lei n.º 59/2008 que aprova o Regime do Contrato de Trabalho em Funções Públicas*), 11 September 2008, subject to successive amendments, the last one by Law 68/2013, de 28 de Agosto, article 13 to 17 of Annex I and 5 to 14, annex II, available at: www.dre.pt/pdf1s/2008/09/17600/0652406630.pdf.

General Law on Work in Public Functions. According to this law, which will come into force on 1 August 2014, the rules namely on personality rights and equality and non-discrimination laid down in the Labour Code apply, with the necessary adaptations, to workers in public functions (Annex, Article 4 (1) b and c).¹⁴

As regards independent work and the legal procedures of organisations that aim at defending or promoting the rights and interests of people against discrimination, Directive 2000/78/EC was transposed to Law 3/2011 of 15 February.¹⁵ This law applies to gaining access to or undertaking work in the private, cooperative and social sectors; in local, regional and central public administration; in public institutions, and in any collective parties coming under public law.

Therefore, from 1 August onwards, the workers, including LGBT workers, regardless of being covered by a private or a public employment relationship, shall be in principle subjected to the same law, in matters of equality and non-discrimination: the Labour Code. As to independent workers, the law has a general application; as a consequence, the nature of the body that benefits from independent work is indifferent.

Non-discrimination with respect to sexual orientation is expressly upheld by the Labour Code and the others laws mentioned above. The right to equality and non-discrimination encompasses the access to subordinate labour and independent work; vocational training and promotion; working conditions, including pay and all direct or indirect in-work benefits; termination of employment contract; as well as the prohibition of harassment, namely on grounds of sexual orientation.

Breaching the Labour Code articles on equality in treatment, and on prohibiting discrimination namely on grounds of sexual orientation, are very serious offences that are punishable with an administrative penalty of between 20 and 600 UC (unit of account), where it may also lead to additional punishment.¹⁶ The UC was determined as €102 in 2009; this should be updated annually on the basis of the update rate of the Social Support Index (*Indexante dos Apoios Sociais* - IAS).¹⁷ Its first update should have had occurred in January 2010. However, the successive State Budget laws maintained the IAS unchanged till today.

Breaching the Law which ensures equality of treatment and forbids any discrimination namely on grounds of sexual orientation in gaining access to and exercising independent work, means committing an administrative offence that is punishable with fines ranging from 1 to 5, or 2-10 times the value of the minimum guaranteed monthly wage depending upon whether an individual person or a collective is involved; further penalties may be applied.¹⁸ In both cases, the worker has the right

¹⁴ Portugal, Law 35/2014, General Law on Work in Public Functions (*Lei n.º 35/2014, Lei Geral do Trabalho em Funções Públicas*), 20 June 2014, available at: <https://dre.pt/pdf1sdip/2014/06/11700/0322003304.pdf>.

¹⁵ Portugal, Law 3/2011 which forbids any discrimination in gaining access to and exercising independent work, transposing Council Directive 2000/43/EC of 29 June, Council Directive 2000/78/EC of 27 November and Directive 2006/54/EC of the European Parliament of 5 July (*Lei n.º 3/2011 que proíbe qualquer discriminação no acesso e no exercício do trabalho independente e transpõe a Directiva n.º 2000/43/CE, do Conselho, de 29 de Junho, a Directiva n.º 2000/78/CE, do Conselho, de 27 de Novembro, e a Directiva n.º 2006/54/CE, do Parlamento Europeu e do Conselho, de 5 de Julho*), 15 February 2011, available at: <https://dre.pt/pdf1sdip/2011/02/03200/0080900811.pdf>.

¹⁶ Portugal, Law 7/2009 approving the revision of the Labour Code (*Lei n.º 7/2009 que aprova a revisão do Código do Trabalho*), 12 February 2009, Art. 23 to 28 and 554, 556, available at: <http://dre.pt/pdf1s/2009/02/03000/0092601029.pdf>.

¹⁷ Portugal, Order 9/2008, fixing the amount of the Social Support Index (*Portaria n.º 9/2008 que fixa o valor do Indexante dos Apoios Sociais*), 3 January of 2008, available at: <https://dre.pt/pdf1sdip/2008/01/00200/0008200087.pdf>.

¹⁸ Portugal, Law 3/2011 which forbids any discrimination in gaining access to and exercising independent work, transposing Council Directive 2000/43/EC of 29 June, Council Directive 2000/78/EC of 27 November and Directive 2006/54/EC of the European Parliament of 5 July (*Lei n.º 3/2011 que proíbe qualquer discriminação no acesso e no exercício do trabalho independente e transpõe a Directiva n.º 2000/43/CE, do Conselho, de 29 de Junho, a Directiva n.º 2000/78/CE, do Conselho, de 27 de Novembro, e a Directiva n.º 2006/54/CE, do Parlamento Europeu e do Conselho, de 5 de Julho*), 15 February 2011, available at: <https://dre.pt/pdf1sdip/2011/02/03200/0080900811.pdf>.

to receive compensation for material and moral damages.¹⁹ The Authority on Working Conditions (*Autoridade para as Condições de Trabalho*, ACT) is liable to investigate breaches in the law and establish the penalties.²⁰

Freedom of movement

In terms of freedom of movement, Directive 2004/38/EC was transposed by Law 37/2006. According to this law, freedom of movement is guaranteed to the spouse of a citizen of the Union and to the partner living in a *de facto* union with a citizen of the Union, or with whom he/she maintains a permanent relationship, duly certified by the competent body of the Member State where he/she lives.²¹

In 2001, Law 7/2001, of 11 May,²² 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.

Since June 2010, same-sex marriages, are also recognised under Law 9/2010, 31 May.²³

These laws apply to the freedom of movement, therefore being an opposite or same-sex couple is no longer relevant. The same situation occurs in relation to a Portuguese citizen married abroad with a same-sex person. He/she may proceed with the transcription of marriage in the consulate or in any civil registry office in Portugal, adding the foreign marriage certificate.²⁴

Asylum and subsidiary protection

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

¹⁹ Portugal, Law 7/2009 approving the revision of the Labour Code (*Lei n.º 7/2009 que aprova a revisão do Código do Trabalho*), 12 February 2009, Art. 28, available at: <http://dre.pt/pdf1s/2009/02/03000/0092601029.pdf>.

²⁰ Portugal, Decree-Law 126-C/2011 establishing the organic law of the Ministry for Economic Affairs and Labour (*Decreto-Lei n.º 126-C/2011 que aprova a Lei Orgânica do Ministério da Economia e do Emprego*), 29 December 2011, available at: <https://dre.pt/pdf1sdip/2011/12/24901/0002000032.pdf> and Regulatory Decree 47/2012 establishing the organic law of the Authority for Working Conditions (*Decreto Regulamentar n.º 47/2012 que aprova a orgânica da Autoridade para as Condições do Trabalho*), 31 July 2012, available at: <http://dre.pt/pdf1sdip/2012/07/14700/0395903962.pdf>.

²¹ Portugal, Law 37/2006 which rules on exercising the right to free circulation and residence of European citizens and their families in Portugal and transposes Directive 2004/38/CE of the European Parliament and the Council dated 29 April, to the Portuguese legal system (*Lei n.º 37/2006 que regula o exercício do direito de livre circulação e residência dos cidadãos da União Europeia e dos membros das suas famílias no território nacional e transpõe para a ordem jurídica interna a Directiva n.º 2004/38/CE, do Parlamento Europeu e do Conselho, de 29 de Abril*), 9 August 2006, article 2 e), available at: <https://dre.pt/pdf1sdip/2006/08/15300/57175724.pdf>.

²² Portugal, Law 7/2001 amended by Law 23/2010 which adopts measures to protect unmarried couples unions (*Lei n.º 7/2001 alterada pela Lei n.º 23/2010 que adopta medidas de protecção das uniões de facto*), 11 May 2001, available at: <https://dre.pt/pdf1sdip/2001/05/109A00/27972798.pdf>.

²³ Portugal, Law 9/2010 which allows same-sex marriage (*Lei n.º 9/2010 que permite o casamento civil entre pessoas do mesmo sexo*), 31 May 2010, available at: <http://dre.pt/pdf1s/2010/05/10500/0185301853.pdf>.

²⁴ Portugal, Decree-Law 131/95 approving the Civil Registration Code (*Decreto-Lei n.º 131/95, aprova o Código do Registo Civil*), 6 June 1995, available at: <https://dre.pt/pdf1sdip/1995/06/131A00/35963638.pdf>.

reasons.²⁵ This law was amended and republished by Law 26/2014 of 5 May which transposes into the Portuguese legal order Directives 2011/95/UE, 2013/32/UE and 2013/33/UE.²⁶

A relevant ruling was adopted by the South Administrative Central Court (*Tribunal Central Administrativo do Sul*) on 20 March 2014. This ruling (included in Annex 1) confirms the refusal of asylum to an applicant who invoked the possibility of persecution on grounds of sexual orientation in his country of origin, Senegal. This ruling may though not be considered as shaping a trend towards the refusal of asylum on the grounds of sexual orientation, given the pleas invoked, namely the Geneva Convention of 1951 and the New York Protocol, and because this is unique on this matter.

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

Family reunification

The Law 23/2007 of 4 July, amended and republished by the Law 29/2012 of 9 August, recognizes the right of family reunification to the spouse of a citizen of the Union and to the partner living in a de facto union with a citizen of the Union, or with whom he/she maintains a permanente relationship, duly certified by the competent body of the Member State where he/she lives.²⁷

Given the provisions of the laws 7/2001 and 7/2010, family reunification covers same-sex unions and same-sex marriages.

The beneficiaries of the status of refugee or of subsidiary protection are entitled to family reunification with the members of their family, according to the terms defined in the legal framework governing the entry, presence, departure and removal of foreigners to, in and from Portugal, therefore according to the terms mentioned in the previous paragraph.²⁸

Freedom of assembly

The right to meet and demonstrate is laid down in the Portuguese Constitution in the section dealing with Fundamental Rights and Duties and is directly applicable to private and public entities²⁹.

²⁵ Portugal, Law 27/2008 on the conditions and the procedures for granting asylum or subsidiary protection as well as the statuses of asylum-seeker, refugee and subsidiary protection (*Lei n.º 27/2008 que estabelece as condições e procedimentos de concessão de asilo ou protecção subsidiária e os estatutos de requerente de asilo, de refugiado e de protecção subsidiária*), 30 June 2008, Art. 2 (2), available at: www.dre.pt/pdf1s/2008/06/12400/0400304018.pdf.

²⁶ Portugal, Law 29/2012 the first amendment to Law 23/2007 of 4 July, which approved the legal regime for the entrance, permanence, exit and removal of foreign citizens (*Lei n.º 29/2012, primeira alteração à Lei n.º 23/2007, de 4 de Julho, que aprovou o regime jurídico de entrada, permanência, saída e afastamento de estrangeiros do território nacional*), 9 August 2012, available at: <http://dre.pt/pdf1sdip/2012/08/15400/0419104256.pdf>.

²⁷ Portugal, Law 29/2012 the first amendment to Law 23/2007 of 4 July, which approved the legal regime for the entrance, permanence, exit and removal of foreign citizens (*Lei n.º 29/2012, primeira alteração à Lei n.º 23/2007, de 4 de Julho, que aprovou o regime jurídico de entrada, permanência, saída e afastamento de estrangeiros do território nacional*), 9 August 2012, Art. 98 to 108, available at: <http://dre.pt/pdf1sdip/2012/08/15400/0419104256.pdf>.

²⁸ Portugal, Law 27/2008 on the conditions and the procedures for granting asylum or subsidiary protection as well as the statuses of asylum-seeker, refugee and subsidiary protection (*Lei n.º 27/2008 que estabelece as condições e procedimentos de concessão de asilo ou protecção subsidiária e os estatutos de requerente de asilo, de refugiado e de protecção subsidiária*), 30 June 2008, Art. 68 (1), available at: www.dre.pt/pdf1s/2008/06/12400/0400304018.pdf.

²⁹ Portugal, Constitutional Law 1/2005, VII Constitutional revision (*Lei Constitucional n.º 1/2005, VII Revisão constitucional*), 12 August 2005, Art. 45 e 18, available at: <https://dre.pt/pdf1sdip/2005/08/155A00/46424686.pdf>.

Although the Portuguese law governing freedom of assembly dates back to 1974,³⁰ it does not forbid LGBT parades or demonstrations. The law only requires that persons or organisations wishing to organise meetings, rallies, demonstrations or parades in public spaces or open to the public give previous notice in written to the competent body at the latest two working days in advance.

Several LGBT demonstrations and parades have taken place in complete freedom, e.g. in a total of 10 in 2013.

Criminal law

The Portuguese Penal Code, dating from 1995, was amended several times. The 2007 and 2013 amendments deserve specific mention.³¹

Following the 2007 amendment, the hate crimes namely on the grounds of the victim's sexual orientation were aggravated, e.g. in the case of murder or grievous bodily harm. On the other hand, it was determined that the victim in the domestic violence crime could be a person of the opposite or the same-sex with whom the agent maintained or would have maintained a dating relationship or a relationship analogous to the spouses, even if without cohabitation. The crime of discrimination was considered regarding the setting-up of organisations or the development of organised propaganda inciting to discrimination, hate or violence against people or group of people because of their race, colour, ethnic or national origin, religion, sex, sexual orientation, or the participation in these organisations and their funding; as well as defamation or menace to person or group of persons namely on the grounds of their sexual orientation.

Following the 2013 amendment, gender identity was included among the aggravating factors and in the crime of discrimination above mentioned.

Transgender issues

Law 7/2011 of 15 March established the procedures by which sex changes and first name changes are made at the civil registry offices.³² People who are legally apt to apply for a sex change at the Civil Registry Office together with the application, they should namely provide a "Report that backs up a diagnosis claiming gender identity dysphoria which is also known as transexuality. The diagnosis has to be made by a multidimensional medical team specialising in clinical sexology and operating in public or private health establishments in Portugal or abroad". Furthermore, the report has to be signed by at least one physician and a psychologist.

³⁰ Portugal, Decree-Law 406/74 that rules on the right to assembly (*Decreto-Lei n.º 406/74 que garante e regulamenta o direito de reunião*), 29 August 1974, available at: <https://dre.pt/pdf1sdip/1974/08/20101/00020003.pdf>.

³¹ Portugal, Decree-Law 48/95, Penal Code, amended by Law 59/2007 of 4 September and Law 19/2013 of 21 February (*Decreto-Lei n.º 48/95, Código Penal, alterado pela Lei 59/2007 de 4 de Setembro e pela Lei n.º 19/2013 de 21 de Fevereiro*), 15 March 1995, available at: <https://dre.pt/pdf1sdip/1995/03/063A00/13501416.pdf>.

³² Portugal, Law 7/2011 giving the procedures for changing sex and first names at the Civil Registry offices and amending the Civil Registration Code for the 17th time (*Lei 7/2011 que cria o procedimento de mudança de sexo e de nome próprio no registo civil e procede à décima sétima alteração ao Código do Registo Civil*), 15 March 2011, Art. 3(2) and (3), available at: <http://dre.pt/pdf1sdip/2011/03/05200/0145001451.pdf>.

Status of intersex persons

No reference is made to “intersex” people in Portuguese law or case law. “Intersex” is not also found among the factors leading to discrimination that are expressly forbidden in the Portuguese Constitution.³³ However it is commonly understood that the factors mentioned in the Constitution are not comprised of a closed list but are merely examples. As a matter of fact, the doctrine has considered that the anti-discrimination constitutional rule that forbids differences in treatment based on a number of subjective factors – typified as a rule (Article 13 (2) – must be interpreted under the equality rule (Article 13 (1) that prohibits any unjustified differences.³⁴ In consequence discrimination of intersex people should be considered forbidden.

Intersex discrimination is not specifically covered under national non-discrimination policies. However, the 5th National Action Plan for Equality, Citizenship and Gender 2014-2017 (*V Plano Nacional para a Igualdade, Cidadania e Género*) passed by Council of Ministers Resolution 103/2013 of 30 December,³⁵ includes a Strategic Area 4, about Sexual Orientation and Gender Identity. The law does not define gender identity. Therefore, considering gender identity in a broad sense, it is possible to argue that this Area covers intersex persons.

The Civil Registration Code (*Código do Registo Civil*) does not foresee the situation of intersex persons.³⁶ However, according to the Institute of Registration and Notary Affairs (*Instituto dos Registos e Notariado*, IRN), the birth certificate should be adapted to the special circumstances of this particular case, and the reference “undetermined” will be included regarding sex. Once the sex of the child is defined, the birth certificate will be amended accordingly.

Miscellaneous

Law 7/2001, amended by Law 23/2010 of 30 August, recognises *de facto* unions of opposite and same-sex partners.³⁷

The Parliament approved on 11 February 2010 a law presented by the Government, Law 9/2010, allowing same-sex marriages but denying the right to adopt children.³⁸

On 25 July 2012, the Socialist Party (*Partido Socialista*) submitted to the Parliament a draft law consecrating the possibility of co-adoption by same-sex spouses or *de facto* partners. According to this draft law, co-parent adoption refers to cases where the spouse or the unmarried partner in a same-

³³ Portugal, Constitutional Law 1/2005 (*Constituição da República Portuguesa, Lei Constitucional 15/2005*) of 12 August, Art. 3 (2), available at: <http://dre.pt/util/pdfs/files/crp.pdf>

³⁴ Leite, J. (2004), *O princípio da igualdade salarial entre homens e mulheres no direito português, Compilação de elementos para uma consulta especializada sobre igualdade de remunerações*, Lisboa, Comissão para a Igualdade no Trabalho e no Emprego.

³⁵ Portugal, Council of Ministers Resolution 103/2013 that approves the V National Action Plan for Gender Equality, Citizenship and Non-Discrimination, 2014-2017 (*Resolução do Conselho de Ministros n.º 103/2013 que aprova o V Plano Nacional para a Igualdade de Género, Cidadania e Não-Discriminação, 2014-2017*), 31 December 2013, available at: <http://dre.pt/pdf1sdip/2013/12/25300/0703607049.pdf>.

³⁶ Portugal, Code of Civil Registration (*Código do Registo Civil*), Decree-Law 131/95 of 6 June (*Decreto-lei 131/95, de 6 de Junho*), in its updated version, available at: www.pgdlisboa.pt/leis/lei_mostra_articulado.php?ficha=101&artigo_id=&nid=682&pagina=2&tabela=leis&nversao=&so_miolo=.

³⁷ Portugal, Law 23/2010 which adopts measures to protect unmarried couples unions (*Lei n.º 23/2010 que adopta medidas de protecção das uniões de facto*), 30 August 2010, available at: <https://dre.pt/pdf1sdip/2010/08/16800/0376403768.pdf>.

³⁸ Portugal, Law 9/2010 which allows same-sex civil marriage (*Lei n.º 9/2010 que permite o casamento civil entre pessoas do mesmo sexo*), 31 May 2010, available at: <http://dre.pt/pdf1s/2010/05/10500/0185301853.pdf>.

sex couple co-adopts a minor whose parental responsibilities are committed to the other spouse or unmarried partner, by adoption or parentage.³⁹

The Parliament has been discussing the law on co-parent adoption where the draft law was tabled by the Socialist Party and passed in its general form. However, when the final vote was called, the Members of Parliament (MPs) for the Social Democratic Party (*Partido Social Democrata*, PSD) understood that the matter should be decided upon in a Referendum. This meant that the Law ended up by not being passed.

The Social Democratic Party deputies (MPs) managed to drum up the votes needed to pass Resolution No. 6 -A/2014 of 20 January (Proposal to hold a Referendum about the possible co-parent adoption by couples in a same-sex marriage or in a *de facto* union regarding the likelihood of adoption by couples in a same-sex marriage or in a *de facto* union).⁴⁰ This was contrived by imposing Party discipline on the way its deputies voted and the abstention of the deputies from the Christian Democratic-People's Party (CDS-PP) which forms a coalition with the governing PSD Party. All the other political parties in the Parliament (Assembleia da República) voted against the Resolution.

In agreement with the Constitution, (Article 115 (8)),⁴¹ the President of the Republic requested that a prior appreciation of Resolution No. 6 -A/2014 be made by the Constitutional Court.

The Constitutional Court decided in its Judgement 176/2014 of 19 February, that the proposal to hold a referendum infringed upon several articles in the Constitution namely because two questions would be asked about different matters (one about co-parent adoption and the other about adoption made by same-sex couples) instead of one subject allowed by the Constitution. Moreover, the questions were not clearly, objectively or precisely formulated so as to obtain yes/no answers (Constitution, Article 115 (6)).⁴² It should be pointed out that the matters dealt with in the Judgement are of an exclusively formal nature and did not touch upon co-parent adoption as such.⁴³

Following the Constitutional Court decision, the Socialist Party proposed a new discussion on the draft law. The Parliament, in its session of 14 March 2014, voted against this draft law, by a minor difference in the number of votes: 111 against, 107 in favour and five abstentions.

Following Parliament's initial failure to pass the law about co-parent adoption, on May 2013, the ILGA Portugal lodged a people's case at the Lisbon Administrative Court against the Portuguese

³⁹ Portugal, Draft Law 278/XII which consecrates the possibility of co-adoption by same-sex spouses or *the facto* partners and makes the 23rd amendment to the Civil Registration Code (*Projeto de Lei n.º 278/XII que consagra a possibilidade de co-adoção pelo cônjuge ou unido de facto do mesmo sexo e procede à 23.ª alteração ao Código do Registo Civil*), available at:

<http://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063446f764c3246795a5868774d546f334e7a67774c336470626d6c7561574e7059585270646d467a4c31684a535339305a58683062334d76634770734d6a63344c56684a5353356b62324d3d&fich=pjl278-XII.doc&Inline=true>.

⁴⁰ Portugal, Assembly of the Republic Resolution 6 -A/2014 which proposes to hold a Referendum about the possible co-parenting adoption by couples in a same-sex marriage or in a *de facto* union regarding the likelihood of adoption by couples in a same-sex marriage or in a *de facto* union (*Resolução da Assembleia da República n.º 6-A/2014 que propõe a realização de um referendo sobre a possibilidade de co-adoção pelo cônjuge ou unido de facto do mesmo sexo e sobre a possibilidade de adoção por casais do mesmo sexo, casados ou unidos de facto*), 20 January 2014, available at: <https://dre.pt/pdf1sdip/2014/01/01301/0000200002.pdf>.

⁴¹ Portugal, Constitutional Law 1/2005, VII Constitutional revision (*Lei Constitucional n.º 1/2005, VII Revisão constitucional*), 12 August 2005, available at: <https://dre.pt/pdf1sdip/2005/08/155A00/46424686.pdf>.

⁴² Portugal, Constitutional Law 1/2005, VII Constitutional revision (*Lei Constitucional n.º 1/2005, VII Revisão constitucional*), 12 August 2005, available at: <https://dre.pt/pdf1sdip/2005/08/155A00/46424686.pdf>.

⁴³ Portugal, Constitutional Court Judgment 176/2014 of 19 February. The Judgement is not analysed in the Case Law because it lays outside the reference deadline. Available in English at: www.tribunalconstitucional.pt/tc/acordaos/20140176.html.

State, the Ministry of Justice and the Institute of Registries and Notaries. The case contained the example of 10 families in which the children are reared by same-sex couples, and demanding that the parenthood of both the members of the couple whether they are married or living in a *de facto* union be registered when in co-parent situations thus replacing the current situation where the child is registered only in the name of (one) legally-acknowledged parent.⁴⁴

In terms of full adoption by same-sex couples, there have been no developments in the legal sphere. However, the mass media has reported a decision made by Court of the First Instance that has been made in the child's higher interest and has turned over the child to the custody of a same-sex couple.⁴⁵

According to the 2009 law on enforcement of criminal sentences, it is now possible for imprisoned homosexuals to receive conjugal visits. In the former law, this right was only applicable to heterosexual couples.⁴⁶

⁴⁴ www.ilga-portugal.pt/noticias/index.php?codigo=450.

⁴⁵ Público (2013), 'Quando os juizes decidem que o melhor para as crianças é ficar com um casal gay', 3 June 2013. Even though this is a decision from a Court of the First Instance, therefore not made available on-line, taking into account the relevance of this case, exceptionally this decision was requested to the competent judge and is analysed in the Case Law.

⁴⁶ Portugal, Law 115/2009 which approves the Code of Execution of Penalties and custodial measures (*Lei n.º 115/2009 que aprova o Código da Execução das Penas e Medidas Privativas da Liberdade*), 12 October 2009, available at: <https://dre.pt/pdf1sdip/2009/10/19700/0742207464.pdf>.

1 Implementation of Employment Directive 2000/78/EC

The Employment 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 were also applied to public employment until special legislation was approved. Law 35/2004 was approved by the Parliament in order to complement the Code.⁴⁷

The Labour Code and Law 35/2004 were replaced by a new Labour Code as laid down by Law 7/2009 of 12 February.⁴⁸

The Labour Code passed by Law 7/2009⁴⁹ brought together in a single law the subject matter that was divided between the two laws that had previously been applied: the Labour Code of 2003 and Law 35/2004. However, where equality and non-discrimination were concerned, this joint law did not make any serious changes given the fact that although the form of the law had changed, its substance remained almost the same. What happened was that certain articles which had belonged to Law 35/2004,⁵⁰ were now integrated into the Labour Code. This is what happened for example, with the articles dealing with definitions, that reproduce the Directive, the duty to inform and the right to equality when seeking employment and applying for a job, which we shall be mentioning later on in this study.

Some relevant provisions of the Labour Code regarding equality and non-discrimination namely on grounds of sexual orientation are described below:

Article 24 (1) of the Labour Code states that any worker or candidate to a job has the right to the same opportunities and treatment in having access to work, vocational training, promotion, or advancing in his/her career and in his/her working conditions, and may not receive privileges, benefits, or be prejudiced or deprived of any right or exempt from any duty on the grounds namely of ascendance, age, sex, sexual orientation, marital status, family situation, economic situation, education, social origins or condition, genetic heritage, reduced working capacity, disability, chronic illness, nationality, ethnic origin or race, country of birth, language, religion, political or ideological convictions or trade union membership, whereby it is the State's duty to promote equality in the attainment of such rights.

Article 24 (2) states that: the right referred to in (1) shall respect namely 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; rewards and other company benefits, promotion to all levels of the hierarchy and criteria used for selecting employees to be dismissed; membership or participation in collective representative bodies or in any organisation whose members exercise a particular profession.

⁴⁷ Portugal, Law 35/2004 which regulates Law 99/2003 of 27 August, which approved the Labour Code (*Lei 35/2004 que regulamenta a Lei n.º 99/2003, de 27 de Agosto, que aprovou o Código do Trabalho*), 29 July 2004, available at: <https://dre.pt/pdf1sdip/2004/07/177A00/48104885.pdf>.

⁴⁸ Portugal, Law 7/2009 approving the revision of the Labour Code (*Lei 7/2009 que aprova a revisão do Código do Trabalho*), 12 February 2009, available at: <http://dre.pt/pdf1s/2009/02/03000/0092601029.pdf>.

⁴⁹ Portugal, Law 7/2009 approving the revision of the Labour Code (*Lei 7/2009 que aprova a revisão do Código do Trabalho*), 12 February 2009, available at: <http://dre.pt/pdf1s/2009/02/03000/0092601029.pdf>.

⁵⁰ Portugal, Law 35/2004 which regulates Law 99/2003 of 27 August, which approved the Labour Code (*Lei 35/2004 que regulamenta a Lei n.º 99/2003, de 27 de Agosto, que aprovou o Código do Trabalho*), 29 July 2004, available at: <https://dre.pt/pdf1sdip/2004/07/177A00/48104885.pdf>.

According to Article 24 (4) it is the duty of the employer to affix information in an appropriate place about workers' rights and duties as regards equality and non-discrimination.

Any breach of the provision in Article 24 (1) above, constitutes a very serious administrative offence while a breach of Article 24 (4) above, constitutes a light administrative offence.

Furthermore, Article 25 (1) states that: the employer may not undertake any acts of either direct or indirect discrimination on the grounds of any of the factors referred to in Article 24 (1). However, Article 25 (2) establishes that: behaviour based on discrimination on the grounds that it is a warranted and determining demand for exercising a particular professional activity in virtue of the nature of the activity in question or the context in which it is undertaken, and should the aim of such behaviour be lawful and the demand proportional, it will not be deemed discrimination.

Equally relevant is Article 25 (5) that establishes the burden of proof: if a person considers that he/she has 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.

Article 25 (7) still deserves specific mention since it stipulates that: any act of retaliation that jeopardises the worker as a result of rejecting or obeying discriminatory behaviour, is null and void.

Any breach of the provisions in Article 25 (1) or (7) above, is classed as a very serious administrative offence

Concerning the employee's privacy, the Labour Code states that the employer cannot require the employee or a job applicant 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.⁵¹

The same thing happens in connection with a worker's state of health or pregnancy except when particular demands that come with the job arise and then, in this event, a written report explaining the situation has to be provided. This information is transmitted to the doctor who may only tell the employer if the worker is not able to carry out his/her duties.⁵²

Furthermore, the applicant to a job or the worker who has given information of a personal nature has the right to supervise his/her respective personal data and may learn what they consist of and the aims of such information, as well as demand that the data are corrected and updated. Mention should be made, in this regard, that breaching the worker's or the job applicant's privacy is a very serious administrative offence.⁵³

The Labour Code states that apart from the situations foreseen in the law pertaining to safety and health on the job, the employer may not demand that the applicant for a job or the worker take medical tests of whatever nature revealing his/her physical or mental condition in order to be taken on or to continue working at the company; the exception is when such tests have the aim of protecting and ensuring the safety of the worker or of third parties, or when particular demands have to met to do the job or that justify such tests, in which case, they need to be explained in writing to the applicant

⁵¹ Portugal, Law 7/2009 approving the revision of the Labour Code (*Lei n.º 7/2009 que aprova a revisão do Código do Trabalho*), 12 February 2009, Art.17 (1) a) available at: <http://dre.pt/pdf1s/2009/02/03000/0092601029.pdf>.

⁵² Portugal, Law 7/2009 approving the revision of the Labour Code (*Lei n.º 7/2009 que aprova a revisão do Código do Trabalho*), 12 February 2009, Art. 17 (1) b) and (2), available at: <http://dre.pt/pdf1s/2009/02/03000/0092601029.pdf>

⁵³ Portugal, Law 7/2009 approving the revision of the Labour Code (*Lei n.º 7/2009 que aprova a revisão do Código do Trabalho*), 12 February 2009, Art. 17 (3), (4) and (5), available at: <http://dre.pt/pdf1s/2009/02/03000/0092601029.pdf>.

or the worker with the respective reasons. Breaching this provision is deemed a very serious administrative offence.⁵⁴

Harassment is forbidden by the Labour Code. Harassment is an undesirable conduct based on the grounds of discrimination, namely on sexual orientation. Discrimination takes place when applying for a job or at work on the job itself, or when in professional training, whereby such behaviour has the purpose or effect of disturbing or embarrassing a person, offending his /her dignity or creating an intimidating, hostile, degrading, humiliating or unsettling environment. Sexual harassment is undesirable conduct of sexual nature, using verbal, non-verbal or physical behaviour with the same purpose or effect as mentioned above. Harassment is a very serious administrative offence.⁵⁵

Indulging in a harmful discriminatory act against the worker or the applicant to the job gives any of the above the right to demand compensation for damages to tangible and intangible assets in the general terms of the law.⁵⁶

Criminal and administrative liabilities are dealt with in Book II of the Labour Code.⁵⁷ As was mentioned above when referring to some of the articles, breaching provisions based on equality and non-discrimination constitute very serious administrative offences. The minimum and maximum values of the fines corresponding to very serious offences vary with the amount of business offending company does, but the fines may stand between 20 UCs in the event that the company has less than €500,000 of business, and a high of 600 UCs if the company has a volume of business that exceeds €10,000,000 (Article 554 (4)). The Labour Code⁵⁸ likewise lays down the ability of applying additional penalties (Article 562).

1.1 Independent work

The most relevant progress regarding the transposition of Union law refers to the protection of independent workers.

The term **independent work** is understood to be freelance work exercised by the professional without recourse to an employment contract or in a legally equivalent situation wherein the legal procedures of organisations have the aim of defending or promoting the rights and interests of people against discrimination. This is established in Directive 2000/78/EC which was transposed into Law 3/2011 of 15 February.⁵⁹ The law is applicable to the access to or the exercise of independent

⁵⁴ Portugal, Law 7/2009 approving the revision of the Labour Code (*Lei n.º 7/2009 que aprova a revisão do Código do Trabalho*), 12 February 2009, Art. 19 (1) and (4), available at: <http://dre.pt/pdf1s/2009/02/03000/0092601029.pdf>.

⁵⁵ Portugal, Law 7/2009 approving the revision of the Labour Code (*Lei n.º 7/2009 que aprova a revisão do Código do Trabalho*), 12 February 2009, Art. 29, available at: <http://dre.pt/pdf1s/2009/02/03000/0092601029.pdf>

⁵⁶ Portugal, Law 7/2009 approving the revision of the Labour Code (*Lei n.º 7/2009 que aprova a revisão do Código do Trabalho*), 12 February 2009, Art. 28, available at: <http://dre.pt/pdf1s/2009/02/03000/0092601029.pdf>.

⁵⁷ Portugal, Law 7/2009 approving the revision of the Labour Code (*Lei n.º 7/2009 que aprova a revisão do Código do Trabalho*), 12 February 2009, available at: <http://dre.pt/pdf1s/2009/02/03000/0092601029.pdf>.

⁵⁸ Portugal, Law 7/2009 approving the revision of the Labour Code (*Lei n.º 7/2009 que aprova a revisão do Código do Trabalho*), 12 February 2009, available at: <http://dre.pt/pdf1s/2009/02/03000/0092601029.pdf>.

⁵⁹ Portugal, Law 3/2011 which forbids any discrimination in gaining access to and exercising independent work, transposing Council Directive 2000/43/EC of 29 June, Council Directive 2000/78/EC of 27 November and Directive 2006/54/EC of the European Parliament of 5 July (*Lei n.º 3/2011 que proíbe qualquer discriminação no acesso e no exercício do trabalho independente e transpõe a Directiva n.º 2000/43/CE, do Conselho, de 29 de Junho, a Directiva n.º 2000/78/CE, do Conselho, de 27 de Novembro, e a Directiva n.º 2006/54/CE, do Parlamento Europeu e do Conselho, de 5 de Julho*), 15 February 2011, Art. 2 and 3 (1) and (3), available at: <https://dre.pt/pdf1sdip/2011/02/03200/0080900811.pdf>.

occupations in the private, cooperative and social sectors, in local, regional and central administration, in public institutions and in any third party companies under public law.

According to this Law, a person who applies for or is engaged in doing independent work has the right to equal opportunities and treatment, to training and the conditions falling within rendered services, and may not be benefited or prejudiced on the grounds of discrimination.

The right refers namely to: a) Selection criteria and contracting conditions; b) Access to all kinds of guidance and professional training at whatever level including gaining practical experience; c) Payment for services rendered and the termination of the contract; d) Membership or participation in any organisation whose members exercise a particular profession and receive associated benefits.

In the same Law, Article 3 (4) states that the provision in the previous paragraphs, does not jeopardise the application of: a) Legal provisions in terms of a non-national or alien exercising an occupation; b) Provisions related to the special protection of genetic heritage, pregnancy, parenthood, adoption and other situations based on harmonising professional life with family life.

Article 4 about equality pertaining to the conditions in which services are rendered, states in (1) and (2) that equality in the payment of the service means remunerating equal service or service of equal value, and implies that:

- a) Any form of variable payment that may be used, namely piece-work payment, has to be based on the same unit measure;
- b) payment of services calculated in terms of time spent in rendering service, should be the same.

Taking (1) in account, it follows that;

- a) Equal services rendered means the services which are rendered to the same beneficiary are equal or objectively similar in nature, quality and quantity;
- b) Rendering service to an equal value as the service rendered to the same beneficiary is equivalent mainly owing to qualifications or experience in exerting the job.

Article 4 (3) refers to the fact that the difference of payments does not mean that discrimination has happened when it is based on objective criteria that are common to both men and women, namely, merit, nature, quality and quantity.

Article 5 forbids discrimination and stipulates that the person benefiting from independent work rendered, may not directly or indirectly discriminate against and deprive any applicant for the task or any person engaged in doing it, of his/her rights as laid down in the Law 3/2011.⁶⁰

Furthermore, it states that:

- a) direct discrimination is where, on the grounds of discrimination, a person is given less favourable treatment than what is given to another in exactly the same situation; and
- b) indirect discrimination is where a disposition, criterion or apparently neutral act is prone to placing a person, due to a discriminating factor, in disadvantage as compared with others.

⁶⁰ Portugal, Law 3/2011 which forbids any discrimination in gaining access to and exercising independent work, transposing Council Directive 2000/43/EC of 29 June to Council Directive 2000/78/EC of 17 November and Directive 2006/54/EC of the European Parliament of 5 June (*Lei n.º 3/2011 que proíbe qualquer discriminação no acesso e no exercício do trabalho independente e transpõe a Directiva n.º 2000/43/CE, do Conselho, de 29 de Junho, a Directiva n.º 2000/78/CE, do Conselho, de 27 de Novembro, e a Directiva n.º 2006/54/CE, do Parlamento Europeu e do Conselho, de 5 de Julho*), 15 February 2011, available at: <https://dre.pt/pdf1sdip/2011/02/03200/0080900811.pdf>.

Discrimination also occurs when any order or instruction is given that aims at prejudicing someone on the grounds of discrimination.

On the other hand, discrimination does not happen when:

- a) the difference in treatment is the result of a requisite that is proportionally and justifiably vital in exercising a profession, and that has a lawful goal, taking into account the nature or the context of exercising this profession, mainly in the fashion world, publicity and entertainment;
- b) a disadvantaged position that arises from disposition, criterion or act that is validated owing to a lawful aim and provided that the means for achieving this aim are adequate, namely the demand for specific training in order to undertake a particular job;
- c) the difference in treatment is based on age, which is necessary and suitable for achieving lawful goals that mainly have to do with public labour policies, the labour market or professional training.

In Article 5 (5) and (6), harassment is considered to be discrimination whenever the person benefiting from services rendered by an independent worker, undertakes an act or fails to do so, including an act of a verbal or physical sexual nature that is not acceptable to the person to whom it is addressed and that is based on a discriminating factor, thus offending the latter's dignity or causing an intimidating, hostile, degrading, humiliating or unsettling environment.

In the same way that it is laid down in the Labour Code, Article 6 (1) and (2) in Law 3/2011⁶¹ establishes that: as the result of suffering from a discriminatory act, the injured party has a right to compensation for tangible and non-tangible damages in the general terms of the law, and that the act of rejecting or submitting the person undertaking independent work to discriminatory conduct is null and void.

As regards the burden of proof, the principle also holds that it falls to the person alleging discrimination to present the evidence likely to substantiate the fact, while it falls to the beneficiary of the service rendered to prove that the difference in treatment is not based on any discriminating factor (Article 7).

According to Law 3/2011,⁶² the organisations based on defending or promoting the rights and interests of people against discrimination in terms of applying for work, doing training or supplying services in the quality of it being **independent or subordinate work**, have the legal right to intervene in a court case and represent the interested party, providing that: a) in doing so, it expressly falls within the organisation's attributions or defending the person in cause is laid down in its rules; b) the organisation has the express permission of the person being represented. However there are no cases of judicial and/or administrative procedure engaged by associations, organisations or other legal entities.

⁶¹ Portugal, Law 3/2011 which forbids any discrimination in gaining access to and exercising independent work, transposing Council Directive 2000/43/EC of 29 June, Council Directive 2000/78/EC of 27 November and Directive 2006/54/EC of the European Parliament of 5 July (*Lei n.º 3/25011 que proíbe qualquer discriminação no acesso e no exercício do trabalho independente e transpõe a Directiva n.º 2000/43/CE, do Conselho, de 29 de Junho, a Directiva n.º 2000/78/CE, do Conselho, de 27 de Novembro, e a Directiva n.º 2006/54/CE, do Parlamento Europeu e do Conselho, de 5 de Julho*), 15 February 2011, available at: <https://dre.pt/pdf1sdip/2011/02/03200/0080900811.pdf>.

⁶² Portugal, Law 3/2011 which forbids any discrimination in gaining access to and exercising independent work, transposing Council Directive 2000/43/EC of 29 June, Council Directive 2000/78/EC of 27 November and Directive 2006/54/EC of the European Parliament of 5 July (*Lei n.º 3/25011 que proíbe qualquer discriminação no acesso e no exercício do trabalho independente e transpõe a Directiva n.º 2000/43/CE, do Conselho, de 29 de Junho, a Directiva n.º 2000/78/CE, do Conselho, de 27 de Novembro, e a Directiva n.º 2006/54/CE, do Parlamento Europeu e do Conselho, de 5 de Julho*), 15 February 2011, Art. 8, available at: <https://dre.pt/pdf1sdip/2011/02/03200/0080900811.pdf>.

Only two employee complaints were brought to the attention of the trade union known by the acronym CGTP-IN (*Confederação Geral dos Trabalhadores Portugueses – Intersindical Nacional*). 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. According to information provided by CGTP following an ad hoc request, no other similar cases occurred in the last reporting period.

Articles 9 and 10 in the same Law respectively refer to the administrative offences and accessory penalties eventually applicable together in the event of having breached the rules on discrimination that are laid down in the law.

Breaching the prohibition of direct and indirect discrimination is punishable with fines ranging from 1 to 5, or 2-10 times the value of the minimum guaranteed monthly salary depending upon whether an individual person or a collective is involved. In the event of a repeat offence the values of the minimum and maximum penalties are doubled. Attempted discrimination and negligence are also punishable (Article 9, (1), (3) and (4)).

1.2 Workers exercising public functions

In Law 59/2008 of 11 September (System of employment contract in public functions)⁶³ referred to above, gave provisions of a general nature about equality and non-discrimination in terms that were very similar to what comes in the Labour Code about this subject. It therefore follows strategies traced out by the last few governments so as to close the gap between work in the public and private sectors. In the meantime, Law 59/2008 was revoked and replaced by Law 35/2014 of 20 June, the so-called General Law on Work in Public Functions.⁶⁴ According to this law, the rules namely on personality rights and equality and non-discrimination laid down in the Labour Code apply, with the necessary adaptations, to workers in public functions (Annex, Article 4 (1) b and c).

1.3 Labour inspectorate

In agreement with Regulatory Decree 47/2012 of 31 July (*The Organic Law of the Authority on Working Conditions, ACT*), it falls to the Authority on Working Conditions to namely monitor whether the rules on labour are being respected, both in the domain of private labour relations and in the sphere of the Public Administration. It is therefore the duty of the Authority on Working Conditions to monitor whether the legal provisions about equality and non-discrimination at work and on the job namely on the basis of sexual orientation, are being respected.⁶⁵ Furthermore, it falls to the General Inspectorate of Labour (*Inspector-Geral de Trabalho*) to apply fines and accessory penalties as a result of having committed administrative labour offences. These powers were seconded by Decree-law 167-C/2013 of 31 of December, which laid down the Organic law of the

⁶³ Portugal, Law 59/2008 which approves the System of Employment Contract in Public Functions (*Lei n.º 59/2008 que aprova o Regime do Contrato de Trabalho em Funções Públicas*), 11 September 2008, Art. 13 to 17, available at: www.dre.pt/pdf1s/2008/09/17600/0652406630.pdf.

⁶⁴ Portugal, Law 35/2014, General Law on Work in Public Functions (*Lei n.º 35/2014, Lei Geral do Trabalho em Funções Públicas*), 20 June 2014, available at: <https://dre.pt/pdf1sdip/2014/06/11700/0322003304.pdf>.

⁶⁵ Portugal, Regulatory Decree 47/2012 establishing the organic law of the Authority for Working Conditions (*Decreto Regulamentar n.º 47/2012 que aprova a orgânica da Autoridade para as Condições do Trabalho*), 31 July 2012, Art. 2 (1) and 4 (1) a, available at: <http://dre.pt/pdf1sdip/2012/07/14700/0395903962.pdf>.

Ministry of Solidarity, Employment and Social Security, following a change in the Government's structure.⁶⁶

In the Authority on Working Conditions – ACT 2012 Annual Report (Table 49 – Intimidating and Non-intimidating Procedures in the field of labour relation, p. 78), 127 warnings and 56 reported infringements involving breaches of the legal provisions covering equality and non-discrimination. The breaches were committed with respect to equality in gaining access to a job and to work (1 warning and 8 reported infringements); affixing information about rights and duties in terms of equality and non-discrimination (126 warnings and 13 reported infringements); forbidding discrimination (13 reported infringements), and harassment (22 reported infringements). With reference to Point 3.4 in the Report - Inspections into vulnerable groups – see Table 87 (p. 136), data are provided about sexual, nationality and racial discrimination happening on the job and at work although no mention was made of sexual orientation which may be covered by “other kinds of discrimination”, or to LGBT workers who may be included in “other vulnerable groups of workers.”⁶⁷

On the other hand, the Labour Procedure Code (*Código do Processo do Trabalho*), states that: in activity which places the individual interests of the workers or the employers at stake, the respective associations may intervene, offering assistance to their members provided that written permission is given on the part of the interested party as to the acceptance of this intervention.⁶⁸

The lack of statistical data on discrimination of LGBT persons in labour and employment does not allow to issue a reasoned judgment, neither on the effectiveness of the law nor on the prevalence of discrimination, or to identify trends on these matters. Additionally, the lack of jurisprudence on discrimination, namely on the grounds of sexual orientation, would suggest difficulties of these workers regarding access to the law and to justice. Furthermore, the awareness of workers about the difficulties in finding a job, given the very high level of unemployment, may lead to a lesser call for the due respect of their rights, namely as regards the more vulnerable workers, as it is often the case of the LGBT workers.

1.4 Agencies working for equality that are not directly involved in the implementation of Directive 2000/78/EC as regards sexual orientation

In the field of equality in labour and employment, there is a special equality body, the Commission for Equality in Labour and Employment (*Comissão para a Igualdade no Trabalho e no Emprego*, CITE), but its competences are restricted to gender equality, *i.e.*, equality between women and men.

⁶⁶ Portugal, Decree-Law 167-C/2013, which defines the mission, competences, organic structure and services, bodies, consultative body of the Ministry of Solidarity, Employment and Social Security (*Decreto-Lei n.º 167-C/2013, Define a missão, atribuições, estrutura orgânica e serviços, organismos, órgão consultivo do Ministério da Solidariedade, Emprego e Segurança Social*), 31 December 2013, Art. 11 (1) and (2) a), available at: <http://dre.pt/pdf1sdip/2013/12/25303/0035600364.pdf>.

⁶⁷ Portugal, Authority on Working Conditions (2012) Activity Report 2012 of the ACT (*Relatório de 2012 da Actividade da ACT*), available at: www.act.gov.pt/pt-PT/crc/PublicacoesElectronicas/Documents/Relatorio_AI_2012.pdf.

⁶⁸ Portugal, Decree-Law 480/99 adopting the Code of Labour Procedure (*Decreto-Lei n.º 480/99 que aprova o Código de Processo do Trabalho*), 9 November 1999, Art. 5 (5), available at: <https://dre.pt/pdf1sdip/1999/11/261A00/78427870.pdf>.

Another organisation working on equality, is the Commission for Citizenship and Gender Equality (*Comissão para a Cidadania e Igualdade de Género*, CIG) which deals with gender equality in general. It had its powers increased in 2007 in order to include citizenship in its area of competence.

Its Organic Law (Decree-Law 164/2007 of 3 May)⁶⁹ provided the CIG with new powers and additional areas of competence. However there is no mention of discrimination on the grounds of sexual orientation in the Organic Law of the Commission for Citizenship and Gender Equality.

Organic Law 164/2007 was replaced by a new Organic law that was published in Regulatory Decree 1/2012 of 6 January,⁷⁰ in which LGBTs are still not expressly referred to. Nevertheless the CIG is empowered in the field of equality and non-discrimination in general, which means that the LGBTs lie with its field of action.

With regard to this question, it should be stressed that while the 3rd Plan for Equality - Citizenship and Gender -2007-2010 (*III Plano para a Igualdade – Cidadania e Género*) does not contain any mention of sexual orientation, this does not happen in the 4th Plan for Equality, Gender, Citizenship and Non-Discrimination-2011-2013 (*IV Plano para a Igualdade, Género, Cidadania e não Discriminação*). In this Plan, a Strategic Area (11) is included about sexual orientation and gender identity. Moreover, in the 5th Plan for Gender Equality, Citizenship and Non-Discrimination-2014-2017 (*V Plano para a Igualdade de Género, Cidadania e não Discriminação*), there is a strategy precisely about this topic. Nevertheless, the measures included in these two Plans have nothing directly to do with Directive 2000/78/EC.⁷¹

During the Portuguese Presidency (July-December 2007), the CIG was the main responsible for organising ‘The European Year of Equal Opportunities for All’, because of the background and knowledge in this field that had been acquired by the Commission.

At the closing conference of ‘The European Year of Equal Opportunities for All’, the CIG Chairperson at the time, 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’.⁷²

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

The Consultative Committee of the CIG is a forum for discussion and acts as an advisory body for the public policies in equality matters. The Committee is presided over by the chairperson of the CIG. Inter-ministry sectors, the NGOs and a technical and scientific group of experts all take part in this Committee. LGBT associations are now members of the Consultative Committee. This Committee meets three times a year and contributes to policy-making and the implementation of projects and legislation in the fields of equality and citizenship.

⁶⁹ Portugal, Decree-Law 164/2007, Organic Law of CIG (*Decreto-Lei n.º 164/2007, Lei Orgânica da CIG*), 3 May 2007, available at: www.dre.pt/pdf1sdip/2007/05/08500/29422946.PDF.

⁷⁰ Portugal, Regulatory Decree 1/2012, Organic Law of CIG (*Decreto-Regulamentar n.º 1/2012, Lei Orgânica da CIG*), 6 January 2012, available at: <http://dre.pt/pdf1s/2012/01/00500/0004300046.pdf>.

⁷¹ Portugal, Commission for Citizenship and Gender Equality-CIG (*Comissão para a Cidadania e a Igualdade de Género-CIG*), National Action Plans for Gender Equality, Citizenship and Non-Discrimination, available at: www.cig.gov.pt/planos-nacionais-areas/cidadania-e-igualdade-de-genero/.

⁷² Available at: www.cig.gov.pt/.

Among other subsidised studies, the CIG has awarded an academic study on discrimination and homophobia in Portugal that is now published (Nogueira and Oliveira, org., 2010).⁷³

It should be mentioned that for the first time, in 2013, the CIG carried out a publicity campaign on discriminating against LGBT persons. It therefore fulfilled one of the aims in its 4th National Plan for Equality (*IV Plano Nacional para a Igualdade*) which also included a strategic area focusing on sexual orientation and gender identity, as mentioned earlier on. The campaign was presented to the public by the Secretary of State for Parliamentary Affairs and Equality.

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

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.

⁷³ Nogueira, C. and Oliveira, J. M. de (Org.) (2010) *Estudo sobre a Discriminação em função da Orientação Sexual e da Identidade de Género*. Lisboa: CIG, Coleção de Estudos de Género 8, available at: www.igualdade.gov.pt/IMAGES/STORIES/DOCUMENTOS/DOCUMENTACAO/PUBLICACOES/ESTUDO_ORIENTACAOSEXUAL_IDENTID.PDF.

2 Freedom of movement

Directive 2004/38/CE was transposed by Law 37/2006.⁷⁴ 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 Law 37/2006. According to Article 3 (5) the same situation is applicable to the family members of Portuguese citizens regardless of their nationality.

In 2001, Law 7/2001 of 11 May⁷⁵ 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.

The Regulation only came out in 2010 by means of Law 23/2010 of 30 August,⁷⁶ that made important changes to Law 7/2001.

Among the changes included Article 2 on "Proving *de facto* unions", were the following:

1 – Due to the lack of a legal or regulatory provision that demands specific documentary proof, a de facto union may be proved by any admissible legal means.

2 – In the event that the declaration proving a de facto union is issued by the competent parish or ward council, the document should be accompanied by a declaration made under oath by both members of the couple to the effect that they have lived together in a de facto union for more than two years. Furthermore, the document should be accompanied by the full copy of the birth certificates of each member of the couple.

3 – In the event that the de facto union has been dissolved upon the desire of one or both members of the couple, the provision in the previous number should be applied after having been duly adapted wherein a declaration is made under oath as regards the termination of the union. In the event that one of the partners in the de facto union is not inclined to countersign the joint declaration of the dissolved de facto union, the interested party may present a declaration on his/her own.

4 – In the event of the death of one of the partners in the de facto union, the declaration issued by the parish or ward council should bear witness that the interested party had resided with the deceased for more than two years before his/her death and this should be accompanied by a declaration made by the interested party, under oath to say that he/she had lived in a de facto union with the deceased for more than two years prior to the latter's death, all of which should be accompanied by the full copy of the birth certificate of the interested party and the death certificate of the deceased.

5– False declarations are punished in terms of the criminal law.

⁷⁴ Portugal, Law 37/2006 which rules on exercising the right to free circulation and residence of European citizens and their families in Portugal and transposes Directive 2004/38/CE of the European Parliament and the Council dated 29 April, to the Portugal legal system (*Lei n.º 37/2006 que regula o exercício do direito de livre circulação e residência dos cidadãos da União Europeia e dos membros das suas famílias no território nacional e transpõe para a ordem jurídica interna a Directiva n.º 2004/38/CE, do Parlamento Europeu e do Conselho, de 29 de Abril*), 9 August 2006, available at: <https://dre.pt/pdf1sdip/2006/08/15300/57175724.pdf>.

⁷⁵ Portugal, Law 7/2001 amended by Law 23/2010 which adopts measures to protect unmarried couples unions (*Lei n.º 7/2001 alterada pela Lei n.º 23/2010 que adopta medidas de protecção das uniões de facto*), 11 May 2001, Art. 1 (2), available at: <https://dre.pt/pdf1sdip/2001/05/109A00/27972798.pdf>.

⁷⁶ Portugal, Law 23/2010 which adopts measures to protect unmarried couples unions (*Lei n.º 23/2010 que adopta medidas de protecção das uniões de facto*), 30 August 2010, available at: <https://dre.pt/pdf1sdip/2010/08/16800/0376403768.pdf>.

Therefore, two people, regardless of their sex who have proved their *de facto* union for more than two years, are included in the definition of *family* which is laid down in Law 37/2006.⁷⁷

In the main, the same demands are made with regard to the civil marriage of same-sex partners, as covered by Law 9/2010 of 31 May (*Allowing civil marriages between same-sex partners*).⁷⁸ Indeed, Article 5 in this Law expressly establishes that all the legal provisions pertaining to the marriage and its effects, should be interpreted in the light of the present law, regardless of the sex of the partners except when there is a the legal likelihood of adoption.

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.⁷⁹

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.⁸⁰

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.⁸¹

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.⁸²

⁷⁷ Portugal, Law 37/2006 which rules on exercising the right to free circulation and residence of European citizens and their families in Portugal and transposes Directive 2004/38/CE of the European Parliament and the Council dated 29 April, to the Portugal legal system (*Lei n.º 37/2006 que regula o exercício do direito de livre circulação e residência dos cidadãos da União Europeia e dos membros das suas famílias no território nacional e transpõe para a ordem jurídica interna a Directiva n.º 2004/38/CE, do Parlamento Europeu e do Conselho, de 29 de Abril*), 9 August 2006, Art. 2 (5), available at: <https://dre.pt/pdf1sdip/2006/08/15300/57175724.pdf>.

⁷⁸ Portugal, Law 9/2010 which allows same-sex marriage (*Lei n.º 9/2010 que permite o casamento civil entre pessoas do mesmo sexo*), 31 May 2010, available at: <http://dre.pt/pdf1s/2010/05/10500/0185301853.pdf>.

⁷⁹ Portugal, Law 37/2006 which rules on exercising the right to free circulation and residence of European citizens and their families in Portugal and transposes Directive 2004/38/CE of the European Parliament and the Council dated 29 April, to the Portugal legal system (*Lei n.º 37/2006 que regula o exercício do direito de livre circulação e residência dos cidadãos da União Europeia e dos membros das suas famílias no território nacional e transpõe para a ordem jurídica interna a Directiva n.º 2004/38/CE, do Parlamento Europeu e do Conselho, de 29 de Abril*), 9 August 2006, available at: <https://dre.pt/pdf1sdip/2006/08/15300/57175724.pdf>.

⁸⁰ Portugal, Law 37/2006 which rules on exercising the right to free circulation and residence of European citizens and their families in Portugal and transposes Directive 2004/38/CE of the European Parliament and the Council dated 29 April, to the Portugal legal system (*Lei n.º 37/2006 que regula o exercício do direito de livre circulação e residência dos cidadãos da União Europeia e dos membros das suas famílias no território nacional e transpõe para a ordem jurídica interna a Directiva n.º 2004/38/CE, do Parlamento Europeu e do Conselho, de 29 de Abril*), 9 August 2006, Art. 4 (5), available at: <https://dre.pt/pdf1sdip/2006/08/15300/57175724.pdf>.

⁸¹ Portugal, Law 37/2006 which rules on exercising the right to free circulation and residence of European citizens and their families in Portugal and transposes Directive 2004/38/CE of the European Parliament and the Council dated 29 April, to the Portugal legal system (*Lei n.º 37/2006 que regula o exercício do direito de livre circulação e residência dos cidadãos da União Europeia e dos membros das suas famílias no território nacional e transpõe para a ordem jurídica interna a Directiva n.º 2004/38/CE, do Parlamento Europeu e do Conselho, de 29 de Abril*), 9 August 2006, Art. 10 (1) to (4)), available at: <https://dre.pt/pdf1sdip/2006/08/15300/57175724.pdf>.

⁸² Portugal, Law 37/2006 which rules on exercising the right to free circulation and residence of European citizens and their families in Portugal and transposes Directive 2004/38/CE of the European Parliament and the Council dated 29 April, to the Portugal legal system (*Lei n.º 37/2006 que regula o exercício do direito de livre circulação e residência dos cidadãos da União Europeia e dos membros das suas famílias no território nacional e transpõe para a ordem jurídica interna a Directiva n.º 2004/38/CE, do Parlamento Europeu e do Conselho, de 29 de Abril*), 9 August 2006, Art. 10 (5), available at: <https://dre.pt/pdf1sdip/2006/08/15300/57175724.pdf>.

Both EU citizens and their third State family members are entitled to the same treatment as nationals, without prejudice to EU law.⁸³

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

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

Given that same-sex marriages are recognised under Portuguese law, 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.⁸⁴

On the other hand, 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 recognised 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 unregistered *de facto* partners in accordance with Article 3(2)(b) of the Free Movement Directive.

There is no case law on this matter.⁸⁵

⁸³ Portugal, Law 37/2006 which rules on exercising the right to free circulation and residence of European citizens and their families in Portugal and transposes Directive 2004/38/CE of the European Parliament and the Council dated 29 April, to the Portugal legal system (*Lei n.º 37/2006 que regula o exercício do direito de livre circulação e residência dos cidadãos da União Europeia e dos membros das suas famílias no território nacional e transpõe para a ordem jurídica interna a Directiva n.º 2004/38/CE, do Parlamento Europeu e do Conselho, de 29 de Abril*), 9 August 2006, Art. 20 (1) and (2), available at: <https://dre.pt/pdf1sdip/2006/08/15300/57175724.pdf>.

⁸⁴ Portugal, Law 37/2006 which rules on exercising the right to free circulation and residence of European citizens and their families in Portugal and transposes Directive 2004/38/CE of the European Parliament and the Council dated 29 April, to the Portugal legal system (*Lei n.º 37/2006 que regula o exercício do direito de livre circulação e residência dos cidadãos da União Europeia e dos membros das suas famílias no território nacional e transpõe para a ordem jurídica interna a Directiva n.º 2004/38/CE, do Parlamento Europeu e do Conselho, de 29 de Abril*), 9 August 2006, available at: <https://dre.pt/pdf1sdip/2006/08/15300/57175724.pdf>.

⁸⁵ Portugal, Legal Documentary Databases (*Bases Jurídico Documentais*) of the Ministry of Justice, available at: www.dgsi.pt/, consulted on 3 June 2014.

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 Constitution⁸⁶ (Article 33 ‘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 of the Portuguese Constitution pertaining to International Law).

With regard to conventional international law, the 28 July 1951 Geneva Convention relating to the status of refugees, as amended by the Protocol signed in New York on 31 January 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 26/2014 of 5 May,⁸⁷ which established the new legal framework pertaining to asylum and refugees, revising Law 27/2008 of 30 June and transposing into the Portuguese legal order Directives 2011/95/UE, 2013/32/UE and 2013/33/UE. This Law, that came into force on 5 July 2014, in its Article 28, revoked Laws 15/98 of 26 March and 20/2006 of 23 June.

- Law 27/2008 of 30 June 2008,⁸⁸ amended and republished by the Law mentioned above 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 2007,⁸⁹ 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. This Law was revised and republished by Law 29/2012 of 9 August,⁹⁰ which implements at national level Regulation (EC) 810/2009 and transposes into the Portuguese legal order Directives 2008/115/EC, 2009/50/EC, 2009/52/EC, 2011/51/UE and 2011/98/UE.

⁸⁶ Portugal, Constitutional Law No.1/2005, VII Constitutional revision (*Lei Constitucional n.º 1/2005, VII Revisão constitucional*), 12 August 2005, available at: <https://dre.pt/pdf1sdip/2005/08/155A00/46424686.pdf>.

⁸⁷ Portugal, Law 26/2014, first amendment to Law 27/2008 on the conditions and the procedures for granting asylum or subsidiary protection as well as the statuses of asylum-seeker, refugee and subsidiary protection and transposed into the Portuguese legal order Directives 2011/95/UE, 2013/32/UE and 2013/33/UE (*Lei n.º 26/2014 que procede à primeira alteração à Lei n.º 27/2008, de 30 de junho, que estabelece as condições e procedimentos de concessão de asilo ou proteção subsidiária e os estatutos de requerente de asilo, de refugiado e de proteção subsidiária, transpondo as Diretivas n.os 2011/95/UE, 2013/32/EU e 2013/33/EU*), 5 May 2014, available at: <https://dre.pt/pdf1sdip/2014/05/08500/0260602637.pdf>.

⁸⁸ Portugal, Law 27/2008 on the conditions and the procedures for granting asylum or subsidiary protection as well as the statuses of asylum-seeker, refugee and subsidiary protection and transposed into the Portuguese legal order Directive 2004/83/EC and Directive 2005/85/EC (*Lei n.º 27/2008 que estabelece as condições e procedimentos de concessão de asilo ou proteção subsidiária e os estatutos de requerente de asilo, de refugiado e de proteção subsidiária e que transpõe para a ordem jurídica portuguesa a Diretiva 2004/83/EC e a Diretiva 2005/85/EC*), 30 June 2008, available at: www.dre.pt/pdf1s/2008/06/12400/0400304018.pdf.

⁸⁹ Portugal, Law 23/2007, which approved the legal regime for the entrance, permanence, exit and removal of foreign citizens (*Lei n.º 23/2007, de 4 de Julho, que aprovou o regime jurídico de entrada, permanência, saída e afastamento de estrangeiros do território nacional*), 4 July 2007, available at: <http://dre.pt/pdf1s/2007/07/12700/42904330.pdf>.

⁹⁰ Portugal, Law 29/2012 the first amendment to Law 23/2007 of 4 July, which approved the legal regime for the entrance, permanence, exit and removal of foreign citizens (*Lei n.º 29/2012, primeira alteração à Lei n.º 23/2007, de 4 de Julho, que aprovou o regime jurídico de entrada, permanência, saída e afastamento de estrangeiros do território nacional*), 9 August 2012, available at: <http://dre.pt/pdf1sdip/2012/08/15400/0419104256.pdf>.

The general principle enshrined in Article 33 (8) of the Constitution and Article 3 (1) of Law 27/2008:⁹¹ 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) of Law 27/2008⁹² 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 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 this law, persons persecuted on the grounds of gender identity and sexual orientation can be 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 “phallographic test”.

Besides the right to asylum, Article 7 of Law 27/2008⁹³ grants residence permit 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 27/2008⁹⁴ 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.

⁹¹ Portugal, Law 27/2008 which establishes a new legal-legal regime on asylum and refugee (*Lei 27/2008 que estabelece um novo regime jurídico-legal em matéria de asilo e de refugiados*), 30 June 2008, available at: www.dre.pt/pdf1s/2008/06/12400/0400304018.pdf.

⁹² Portugal, Law 27/2008 on the conditions and the procedures for granting asylum or subsidiary protection as well as the statuses of asylum-seeker, refugee and subsidiary protection and transposed into the Portuguese legal order Directive 004/83/EC and Directive 2005/85/EC (*Lei n.º 27/2008 que estabelece as condições e procedimentos de concessão de asilo ou protecção subsidiária e os estatutos de requerente de asilo, de refugiado e de protecção subsidiária e que transpõe para a ordem jurídica portuguesa a Diretiva 004/83/EC e a Directiva 2005/85/EC*), 30 June 2008, available at: www.dre.pt/pdf1s/2008/06/12400/0400304018.pdf.

⁹³ Portugal, Law 27/2008 on the conditions and the procedures for granting asylum or subsidiary protection as well as the statuses of asylum-seeker, refugee and subsidiary protection and transposed into the Portuguese legal order Directive 004/83/EC and Directive 2005/85/EC (*Lei n.º 27/2008 que estabelece as condições e procedimentos de concessão de asilo ou protecção subsidiária e os estatutos de requerente de asilo, de refugiado e de protecção subsidiária e que transpõe para a ordem jurídica portuguesa a Diretiva 004/83/EC e a Directiva 2005/85/EC*), 30 June 2008, available at: www.dre.pt/pdf1s/2008/06/12400/0400304018.pdf.

⁹⁴ Portugal, Law 27/2008 on the conditions and the procedures for granting asylum or subsidiary protection as well as the statuses of asylum-seeker, refugee and subsidiary protection and transposed into the Portuguese legal order Directive 004/83/EC and Directive 2005/85/EC (*Lei n.º 27/2008 que estabelece as condições e procedimentos de concessão de asilo ou protecção subsidiária e os estatutos de requerente de asilo, de refugiado e de protecção subsidiária e que transpõe para*

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).⁹⁵ 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 of 31 May⁹⁶ married or unmarried same-sex partners are legally recognised as family members.

A relevant ruling was adopted by the South Administrative Central Court (*Tribunal Central Administrativo do Sul*) on 20 March 2014. This ruling (included in Annex 1) confirms the refusal of asylum to an applicant who invoked the possibility of persecution in his country of origin, Senegal, on grounds of sexual orientation. This ruling may though not be considered as shaping a trend towards the refusal of asylum on the grounds of sexual orientation, given the pleas invoked, namely the 1951 Geneva Convention and the New York Protocol, and because this is unique on this matter.

The applicant fled his country and travelled to Lisbon using a forged passport. According to the Court the report of the facts does not present enough evidence to reveal that the threat felt by the applicant is objective or even that he actually feels seriously threatened by persecution. Therefore the Court considered that, since it was not possible to draw that the applicant is being persecuted or that he feels seriously threatened, no facts have been produced that may substantiate the request for asylum, in the light of Article 3 (2) of Law 27/2008 of 30 June. Likewise, the Court considered that from the declarations made by the applicant it is also not possible to conclude that he has been threatened, since he does not make any mention to this issue, for the purpose of granting a residence permit on the grounds of humanitarian reasons, in accordance with Article 7 of Law 27/2008. For all the above mentioned, the Judges of the South Administrative Central Court have agreed to dismiss the appellant's application and to uphold the contested decision.

Mention should be made to the fact that when this asylum request was made to the Service of Foreigners and Borders (*Serviço de Estrangeiros e Fronteiras*) the Portuguese Council for Refugees (*Conselho Português para os Refugiados*, CPR) issued an opinion coming out in favour of the admission of the request.

The 2013 SEF's Report⁹⁷ identifies a growing number of asylum requests over the last years, with an exponential growth since 2010. This number reached 507 in 2013, compared with 299 in 2012. However, there is not any mention to persecution of LGBT persons as ground for these requests.

According to the 2012 ILGA Portugal "Report on implementation of the Recommendation CM/Rec(2010)5 of the Committee of Ministers of the Council of Europe on measures to combat

a ordem jurídica portuguesa a Diretiva 004/83/EC e a Diretiva 2005/85/EC, 30 June 2008, Art. 68, available at: www.dre.pt/pdf1s/2008/06/12400/0400304018.pdf.

⁹⁵ Portugal, Law 7/2001 amended by Law 23/2010 which adopts measures to protect unmarried couples unions (*Lei n.º 7/2001 alterada pela Lei n.º 23/2010 que adopta medidas de protecção das uniões de facto*), 11 May 2001, available at: <https://dre.pt/pdf1sdip/2001/05/109A00/27972798.pdf>.

⁹⁶ Portugal, Law 9/2010 which allows same-sex marriage (*Lei n.º 9/2010 que permite o casamento civil entre pessoas do mesmo sexo*), 31 May 2010, available at: <http://dre.pt/pdf1s/2010/05/10500/0185301853.pdf>.

⁹⁷ Portugal, Serviço de Estrangeiros e Fronteiras, SEF (2014), *Relatório de imigração, fronteiras e asilo 2013*, Barcarena: Serviço de Estrangeiros e Fronteiras, available at: http://sefstat.sef.pt/Docs/Rifa_2013.pdf.

discrimination on grounds of sexual orientation or gender identity”,⁹⁸ between 2000 and 2010, 11 asylum requests due to persecution on grounds of sexual orientation were submitted in Portugal. Two of these requests were readressed to other EU member state. The others were not granted due to lack of evidence of persecution and lack of contact with the authorities in the countries of origin. However, subsidiary protection was granted in two of these cases: to one person from Senegal, where homosexuality is a crime; and to another one from Guinea-Conakry, due to systematic violation of human rights in this country.

⁹⁸ ILGA Portugal (2012), *Relatório sobre a implementação da Recomendação CM/Rec(2010)5 do Comité de Ministros do Conselho da Europa aos Estados-membros sobre medidas para o combate à discriminação em razão da orientação sexual ou identidade de género*, Lisboa, ILGA Portugal.

4 Family reunification

Council Directive 2003/86/EC of 22 September 2003, on the right to family reunification, was transposed into the Portuguese legal system through Law 23/2007 of 4 July,⁹⁹ which approved the legal framework on entry, staying, leaving and withdrawal from the national territory.

In order to translate the evolution in the EU law into domestic law, the Law 23/2007 was amended by the Law 29/2012 of 9 August.¹⁰⁰ The publication of this last law had effects on the regulation of Law 23/2007, made by the Regulatory Decree 84/2007 of 5 November,¹⁰¹ which was amended and republished by the Regulatory Decree 2/2013 of 18 March,¹⁰² whose Articles 66 to 69 are dedicated to the procedures to be adopted in case of family reunification.

With regard to the right to family reunification in the context of asylum and subsidiary protection, it is also necessary to take into consideration the legislation previously mentioned, particularly Law 26/2014 of 5 May,¹⁰³ that came into force on 5 July 2014, which established the new legal framework pertaining to asylum and refugees, revising Law 27/2008, of 30 June, and transposing into the Portuguese legal order Directives 2011/95/UE, 2013/32/UE and 2013/33/UE. As a matter of fact, these instruments need to be read and applied together in the framework of family reunification.

As mentioned above, Law 23/2007 was amended and reprinted as an annex to Law 29/2012 of 9 August. This law applied on a nationwide basis Regulation (EC) 810/2009 which established the Community Visa Code and transposed Directives 2008/115/CE of 16 December, 2009/50/CE of 25 May, 2009/52/CE of 18 June, 2011/51/UE of 11 May, and 2011/98/UE of 13 December (Article 1).

Article 98, 99 and 100, which was kept in its original version speaks about the right to reunite the family as regards the resident's family. Article 99 speaks about the concept of family members and Article 100 about *de facto* unions to same effect.

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

⁹⁹ Portugal, Law 23/2007, which approved the legal regime for the entrance, permanence, exit and removal of foreign citizens (*Lei n.º 23/2007, de 4 de Julho, que aprovou o regime jurídico de entrada, permanência, saída e afastamento de estrangeiros do território nacional*), 4 July 2007, available at: <http://dre.pt/pdf1s/2007/07/12700/42904330.pdf>.

¹⁰⁰ Portugal, Law 29/2012 the first amendment to Law 23/2007 of 4 July, which approved the legal regime for the entrance, permanence, exit and removal of foreign citizens (*Lei n.º 29/2012, primeira alteração à Lei n.º 23/2007, de 4 de Julho, que aprovou o regime jurídico de entrada, permanência, saída e afastamento de estrangeiros do território nacional*), 9 August 2012, available at: <http://dre.pt/pdf1sdip/2012/08/15400/0419104256.pdf>.

¹⁰¹ Portugal, Implementing Decree 84/2007 which implemented Law 23/2007, of 4 July, the law which approved the legal regime for the entrance, permanence, exit and removal of foreign citizens (*Decreto Regulamentar n.º 84/2007, de 5 de novembro, que regulamenta a Lei n.º 23/2007, de 4 de julho, que aprova o regime jurídico de entrada, permanência, saída e afastamento de cidadãos estrangeiros de território nacional*), 5 November 2013, available at: www.sef.pt/documentos/35/DR84_2007.pdf.

¹⁰² Portugal, Regulatory Decree 2/2013 which amendend and republished Regulatory Decree 84/2007 (*Decreto Regulamentar 2/2013 que altera e republica o Decreto Regulamentar 84/2007*), 18 March 2013, available at: <https://dre.pt/pdf1sdip/2013/03/05400/0165801691.pdf>.

¹⁰³ Portugal, Law 26/2014, first amendment to Law 27/2008 on the conditions and the procedures for granting asylum or subsidiary protection as well as the statuses of asylum-seeker, refugee and subsidiary protection and transposed into the Portuguese legal order Directives 2011/95/UE, 2013/32/UE and 2013/33/UE (*Lei n.º 26/2014 que procede à primeira alteração à Lei n.º 27/2008, de 30 de junho, que estabelece as condições e procedimentos de concessão de asilo ou proteção subsidiária e os estatutos de requerente de asilo, de refugiado e de proteção subsidiária, transpondo as Diretivas n.os 2011/95/UE, 2013/32/EU e 2013/33/EU*), 5 May 2014, available at: <https://dre.pt/pdf1sdip/2014/05/08500/0260602637.pdf>.

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 27/2008.¹⁰⁴ 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 27/2008,¹⁰⁵ amended by Law 26/2014 regulates the conditions under which asylum (and the request for family reunification) may be requested and Law 23/2007, amended by Law 29/2012¹⁰⁶ further regulates some specificities of this procedure, particularly regarding the issuing of visas.

No case law on family reunification of same-sex couples was found.¹⁰⁷

According to the above mentioned, the law on family reunification does not make any differentiation regarding LGBT persons, since it is written in a neutral way, in order to cover every person. As to the implementation of the law, the lack of judicial decisions on this matter as well as of data from the SEF - both statistics and reported qualitative information - on requests for family reunification of same-sex married or cohabiting persons, do not allow making a judgement neither on the practice nor on the eventual reasons for the absence of requests.

¹⁰⁴ Portugal, Law 27/2008 on the conditions and the procedures for granting asylum or subsidiary protection as well as the statuses of asylum-seeker, refugee and subsidiary protection (*Lei n.º 27/2008 que estabelece as condições e procedimentos de concessão de asilo ou protecção subsidiária e os estatutos de requerente de asilo, de refugiado e de protecção subsidiária*), 30 June 2008, available at: www.dre.pt/pdf1s/2008/06/12400/0400304018.pdf.

¹⁰⁵ Portugal, Law 27/2008 on the conditions and the procedures for granting asylum or subsidiary protection as well as the statuses of asylum-seeker, refugee and subsidiary protection (*Lei n.º 27/2008 que estabelece as condições e procedimentos de concessão de asilo ou protecção subsidiária e os estatutos de requerente de asilo, de refugiado e de protecção subsidiária*), 30 June 2008, available at: www.dre.pt/pdf1s/2008/06/12400/0400304018.pdf.

¹⁰⁶ Portugal, Law 23/2007, which approved the legal regime for the entrance, permanence, exit and removal of foreign citizens (*Lei n.º 23/2007, de 4 de Julho, que aprovou o regime jurídico de entrada, permanência, saída e afastamento de estrangeiros do território nacional*), 4 July 2007, available at: <http://dre.pt/pdf1s/2007/07/12700/42904330.pdf>.

¹⁰⁷ Portugal, Legal Documentary Databases (*Bases Jurídico Documentais*) of the Ministry of Justice, available at: www.dgsi.pt/.

5 Freedom of assembly

The most important law relating to freedom of assembly dates from 1974 (Decree-Law 406/74) and continues to be in force with minor alterations.¹⁰⁸ 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 authorization 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, amended by Organic Law 1/2011 of 30 November,¹⁰⁹ 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 Mayor of the municipality in which they will take place, at least two working days beforehand. Such gatherings shall only be prohibited when the terms of Article 1 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.

Several parades, festivals and other initiatives promoted by LGBT civil society organisations have been taking place, especially in Lisbon and Oporto. The number of these initiatives rose in recent years. (See statistical information on freedom of assembly included in Annex 2.) There have been no incidents reported regarding these demonstrations which have been staged peacefully.¹¹⁰

However, back in 2005, a small demonstration (200 people) was staged by PNR (*Partido Nacional Renovador*, National Party for the Renovation) (a far right political party) against the adoption of children by gay or lesbian couples, as well as against paedophilia and the gay lobby.¹¹¹ 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*.¹¹²

On 25 July 2013, another small demonstration (about 100 people) against tolerance of LGBT people was organised in Lisbon. By occasion of the date scheduled for the voting about co-adoption of children by same-sex couples in the Parliament, the National Commission Pro-Referendum Life (*Comissão Nacional Pró-Referendo Vida*), promoted a vigil in front of the Parliament building, under the *moto* “for the right to a mother and a father”. This vigil had the support of Christian, royalist, nationalist and neo-nazi movements. A group of LGBT activists arranged a counter-vigil, the so-

¹⁰⁸ Portugal, Decree-Law 406/74 which regulates and guarantees the right of assembly (*Decreto-Lei n.º 406/74 que garante e regulamenta o direito de reunião*), 29 August 1974, available at: <https://dre.pt/pdf1sdip/1974/08/20101/00020003.pdf>.

¹⁰⁹ Portugal, Organic Law 1/2011 which transfers responsibility of civil governments to other government entities regarding reserve of legislative competence of Parliament (*Lei Orgânica n.º 1/2011 que transfere competências dos governos civis para outras entidades da Administração Pública em matéria de reserva de competência legislativa da Assembleia da República*), 30 November 2011, available at: www.dre.pt/pdf1s/2011/11/23000/0511705128.pdf.

¹¹⁰ ILGA Portugal (2012), *Relatório sobre a implementação da Recomendação CM/Rec(2010)5 do Comité de Ministros do Conselho da Europa aos Estados-membros sobre medidas para o combate à discriminação em razão da orientação sexual ou identidade de género*, Lisboa, ILGA Portugal.

¹¹¹ Available at: <http://ultimahora.publico.cliv.pt/noticia.aspx?id=1233094&idCanal=62>.

¹¹² Available at: www.pnr.pt/portal/index.php?option=com_content&task=view&id=62&Itemid=103.

called “night rainbow”. The two groups met in front of the Parliament and insults and threats were exchanged. The police formed a barrier, avoiding confrontations. Meanwhile the Christian groups made a few speeches, appealing for the referendum of the law as a means to protect the children, and prayed in another corner. After a while, things calmed down and the LGBT group decided to leave.¹¹³

¹¹³ Available at: www.vice.com/pt/read/nao-e-todos-os-dias-que-vemos-activistas-lgbt-neonazis-e-familias-cristas-no-mesmo-sitio.

6 Criminal law

6.1 Penal Code

The Portuguese Penal Code (Decree-Law 48/95 of 15 March)¹¹⁴ was the object of successive amendments.

A first relevant amendment was made by Law 59/2007 of 4 September.¹¹⁵ This amendment is described by scholars and NGOs as anti-homophobic, as it treats crimes of a sexual nature committed by homosexuals or heterosexuals on an equal footing, and recognises *de facto* unions of same-sex couples. Several of the amendments introduced are directly or indirectly relating to sexual orientation, protection of LGBTs and equal treatment.

For example, when the criminal procedure depends on filing a complaint, in case of death of the victim, the surviving spouse, or the person of the opposite or same-sex with whom the victim lived in conditions analogous to the spouses, may file complaint.¹¹⁶

When the agent commits the fact against spouse, ex-spouse, person of the opposite or the same-sex with whom he/she maintains or has maintained a relationship analogous to the spouses, this is considered as being likely to reveal particular objectionableness or perversity. This leads to qualified murder, with the consequent increase in the penalty, from 8-16 years to 12-24 years.¹¹⁷

The same happens with the crimes of domestic violence, coercion and kidnapping which now cover person of the opposite or the same-sex with whom the victim lived in conditions analogous to the spouses.¹¹⁸

Another important change regards hate crimes, that cover murder committed for reasons namely of sexual orientation of the victim and the qualified offence to physical integrity for the same reason.¹¹⁹

On the other hand, the crime of discrimination is now foreseen, covering either the constitution of organisations or the development of organised propaganda activities, their funding or their dissemination, by oral, written or computer means, of incitement to hate and violence. The crime of

¹¹⁴ Portugal, Decree-Law 48/95, Penal Code, amended by Law 59/2007 of 4 September and Law 19/2013 of 21 February (*Decreto-Lei n.º 48/95, Código Penal, alterado pela Lei 59/2007 de 4 de Setembro e pela Lei n.º 19/2013 de 21 de Fevereiro*), 15 March 1995, available at: <https://dre.pt/pdf1sdip/1995/03/063A00/13501416.pdf>.

¹¹⁵ Portugal, Law 59/2007, 23th amendment to the Penal Code, (*Lei n.º 59/2007, 23.ª alteração ao Código Penal*), 4 September 2007, available at: <http://dre.pt/pdf1s/2007/09/17000/0618106258.pdf>.

¹¹⁶ Portugal, Law 59/2007, 23th amendment to the Penal Code, (*Lei n.º 59/2007, 23.ª alteração ao Código Penal*), 4 September 2007, Art. 113 (2), available at: <http://dre.pt/pdf1s/2007/09/17000/0618106258.pdf>.

¹¹⁷ Portugal, Law 59/2007, 23th amendment to the Penal Code, (*Lei n.º 59/2007, 23.ª alteração ao Código Penal*), 4 September 2007, Art. 113 (2), available at: <http://dre.pt/pdf1s/2007/09/17000/0618106258.pdf>.

¹¹⁸ Portugal, Law 59/2007, 23th amendment to the Penal Code, (*Lei n.º 59/2007, 23.ª alteração ao Código Penal*), 4 September 2007, Art. 152 (1) b), Art. 154 (4) and Art. 158 (2) f), available at: <http://dre.pt/pdf1s/2007/09/17000/0618106258.pdf>.

¹¹⁹ Portugal, Law 59/2007, 23th amendment to the Penal Code, (*Lei n.º 59/2007, 23.ª alteração ao Código Penal*), 4 September 2007, Art. 132 (2) f) and Art. 145 (2), available at: <http://dre.pt/pdf1s/2007/09/17000/0618106258.pdf>.

discrimination also covers defamation or menace to person or group of persons namely on the grounds of sexual orientation.¹²⁰

The Portuguese Penal Code was again amended in 2013 by the Law 19/2013 of 21 February,¹²¹ in which gender identity was added.

This is the case of the crimes of qualified murder and qualified offence to physical integrity, mentioned before, where the gender identity of the victim was now included in the reasons of the crime.¹²² The same situation occurs in the crimes of discrimination and with hate speech related to homophobia above mentioned on the grounds of sexual orientation. 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 or gender identity, 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 pressed by individuals.¹²³

The above mentioned provisions of the amended Penal Code¹²⁴ have been broadened to include discrimination on the grounds of sexual orientation, gender identity or homophobic motivation.

6.2 Prisoners – Conjugal visits

According to Article 3 (3) of the Law 115/2009 of 12 October (Code on enforcement of criminal sentences about custody),¹²⁵ “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 (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”.

¹²⁰ Portugal, Law 59/2007, 23th amendment to the Penal Code, (*Lei n.º 59/2007, 23.ª alteração ao Código Penal*), 4 September 2007, Art. 240 (*Racial, religious, and sexual discrimination*), available at: <http://dre.pt/pdfs/2007/09/17000/0618106258.pdf>.

¹²¹ Portugal, Law 19/2013, 29th amendment to the Penal Code, (*Lei n.º 19/2013, 29.ª alteração ao Código Penal*), 21 February 2013, Art. 132 (2) f), Art. 145 (2) and Art. 240, available at: <http://dre.pt/pdfs/2013/02/03700/0109601098.pdf>.

¹²² Portugal, Law 19/2013, 29th amendment to the Penal Code (*Lei n.º 19/2013, 29ª alteração ao Código Penal*), 21 February 2013, Art. 132 (*Qualified homicide*), available at: <http://dre.pt/pdfs/2013/02/03700/0109601098.pdf>.

¹²³ Portugal, Decree-Law 78/87, Law on Code of Criminal Procedure (*Decreto-Lei n.º 78/87 que aprova o Código do Processo Penal*) 17 February 1987, available at: <https://dre.pt/pdfs/1987/02/04000/06170699.pdf>.

¹²⁴ Portugal, Law 19/2013, 29th amendment to the Penal Code, (*Lei n.º 19/2013, 29.ª alteração ao Código Penal*), 21 February 2013, available at: <http://dre.pt/pdfs/2013/02/03700/0109601098.pdf>.

¹²⁵ Portugal, Law 115/2009 which approves the Code of Execution of Penalties and Custodial Measures (*Lei n.º 115/2009 que aprova o Código da Execução das Penas e Medidas Privativas da Liberdade*), 12 October 2009, available at: <https://dre.pt/pdfs/2009/10/19700/0742207464.pdf>.

Based on this Article, homosexual inmates are able to receive conjugal visits in prison. The so-called conjugal visits – from which only heterosexual inmates could benefit until then – 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 Ombudsperson and accepted by the Government which presented the proposal to the Parliament.¹²⁶

6.3 Other hate crimes

In the course of 2005, LGBTs of Viseu, a small town 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.

Several other hate crimes targeted at LGBT persons and/or organisations in Portugal have been reported. This is particularly the case in the report on “Hate crimes targeted at LGBT persons and/or organisations in Portugal” compiled by ILGA Portugal for ILGA Europe’s comprehensive submission to OSCE/ODHIR “Hate Crime Report”.

The last national report dates from 2012 (made available to CESIS by ILGA Portugal) and includes incidents regarding public verbal abuse; refusal of gay publicity; threats and psychological violence; murder; blood donation refusal; homophobic festival, music lyrics and media news; and discrimination in sports, at the workplace or in court.

Relevant examples of homophobia are included in the respective thematic sections of this report.

A couple of examples of hate crimes, identified in the ILGA Portugal report mentioned above are presented in the following paragraphs:

1. Threats and psychological violence:

Date: 18 February 2012.

Location: Barreiro.

Source of information: email sent to ILGA Portugal.

Victim: unknown male couple.

Perpetrator: neighbour known to the victims

Type of crime: stalking, individually targeted verbal hate speech, death threats.

Brief description of the case: The victims are constantly harassed by the perpetrator and have already reported the case to the local PSP (security force).

Status of the crime: Unknown. ILGA Portugal encouraged the victims to report these incidents to the police again and to assure that the report mentioned the homophobic motivation.

2. Homophobic media story:

Date: 9 April 2012.

Location: Lisboa.

¹²⁶ Available at: www.provedor-jus.pt/site/public/archive/doc/Ofic_R3109_08.pdf.

Source of information: media report.¹²⁷

Brief description of the case: this article starts with “in front of me, in the lift, there’s a 16,17 year old boy. By the way we stands, crosses his hands and slightly tilts his head, I understand that he is gay.” He refers to homosexual couples in between brackets (as if they were not real couples) and mentions that the gay community is increasing and that “what happens is that gay people are less and less afraid to come out, to reveal their leanings and are proud (not ashamed) to be as they are.” The article continues in this tone and refers to gay men as contentious, reactionary men as if it was a matter of following a trend and reacting against social norms and duties.

Status of the case: a complaint was filed with the Portuguese Regulatory Authority for the Media (*Entidade Reguladora para a Comunicação Social*, ERC),¹²⁸ and a well-known humorist made a radio programme¹²⁹ on the absurd of the arguments presented by this media article.

¹²⁷ Available at:

http://sol.sapo.pt/inicio/Opinio/interior.aspx?content_id=46207&opinio=Pol%EF%BF%BDtica+a+S%EF%BF%BDrio.

¹²⁸ Available at: <http://dezanove.pt/340028.html>.

¹²⁹ Available at: www.tsf.pt/Programas/programa.aspx?audio_id=2415161&content_id=904110.

7 Transgender issues

In 2011 Law 7/2011 of 15 March¹³⁰ was adopted. It dealt with sex-change and the procedures that should be followed in the Registry offices to change first or given names. It involved the 17th amendment to the Civil Registration Code.

According to this Law (Article 2) any adult Portuguese national may legally request a sex-change provided that that he/she has not been forbidden or shown to be psychologically ill equipped to do so, and that he/she has been diagnosed with gender identity dysphoria.

Such procedures, which are of a confidential nature (Article 1 (2)), are initiated with a request handed in to any Civil Registry Office. This application should be accompanied by various documents, among which a report which shows that a diagnosis has been made of gender identity dysphoria also called transsexuality, that was drawn up by a multidimensional medical team specialised in clinical sexology and operating in public or private health establishments in Portugal or abroad (Article 3 (1)b).

Law 7/2011¹³¹ applies to all requests involving sex-change registries from the moment the law was enforced, regardless of a pendent court case in existence, or having obtained a court verdict about the subject prior to the law coming into force. On the other hand, the Portuguese State recognises changes in the registration of sex made by Portuguese nationals who, in having another nationality, had changed their registration in terms of their sex with the authorities of this other nationality (Article 6).

Before this Law was issued, there are also regulations that were passed by the Medical Association¹³² or by court decisions, According to a resolution passed by the Executive Committee of the Medical Association on 19 May 1995, sex change operations were forbidden except in cases where a suitable diagnosis confirmed transsexualism or gender dysphoria.

The ILGA Portugal gave out the information that the Genital-Urinary and Sexual Reconstructive Surgery Unit (*Unidade Reconstitutiva Genito-Urinária e Sexual*, URGUS) at the Coimbra University Teaching Hospital had a list of some 26 people for psychological testing between September 2011 and August 2013; 15 people had already begun the treatment (hormone therapy) leading up to a sex change, and 25 people had already undergone surgery.¹³³ Besides this unit in Coimbra, there are two other units, in Lisbon and Oporto performing sex-change operations.

¹³⁰ Portugal, Law 7/2011 which set in place the procedures for making a sex change and for taking on a new name at the Registry Office (*Lei n.º 7/2011 que cria o procedimento de mudança de sexo e de nome próprio no registo civil e procede à décima sétima alteração do Código de Registo Civil*), 15 March 2011, available at: <http://dre.pt/pdf1sdip/2011/03/05200/0145001451.pdf>.

¹³¹ Portugal, Law 7/2011 which set in place the procedures for making a sex change and for taking on a new name at the Registry Office (*Lei n.º 7/2011 que cria o procedimento de mudança de sexo e de nome próprio no registo civil e procede à décima sétima alteração do Código de Registo Civil*), 15 March 2011, available at: <http://dre.pt/pdf1sdip/2011/03/05200/0145001451.pdf>.

¹³² The public association responsible for ensuring ethical practices in the profession. It is an autonomous body.

¹³³ News published on the ILGA Portugal webpage (*Associação ILGA Portugal*), available at: <http://ilga-portugal.pt/noticias/479.php>.

Apart from setting down what the procedures are for changing one's sex, Law 7/2011¹³⁴ also changed the Civil Registration Code¹³⁵ owing to these amendments. The Articles in the Civil Registration Code that were changed were: 69, 70, 104, 123, 214 and 217, passed by Decree-Law 131/95 of 6 June.¹³⁶

According to Article 69 (4), sex-change and changes in given names shall be registered in the birth certificate of the person who went through sex-change. The same does not apply to the birth certificate of adult offspring or of the respective spouse/partner. The register of the sex-change of the parent or of the spouse/partner shall only occur at the request of the former.

Registration

According to Article 70 (1), the marriage certificate especially needs to be registered. Provided that the other spouse gives his/her consent, the sex-change of either of the spouses and as a result, the need to change the first names, should be made in a declaration witnessed by a civil registry officer or an original document or an authenticated copy of it.

Article 104 (1) rules that the name registered on the birth certificate may only be changed provided that permission is obtained from the Central Registry Office (*Conservador dos Registos Centrais*). In (2) the exceptions are given of the above: g) A change in first names that have been registered after a sex-change.

Article 123 (1) states that the sex-change and the subsequent change in first names may become an integral part of the birth certificate that has been registered, upon the verbal request of the interested parties or their legal representatives, whereby a new birth certificate will be issued. Therefore, the situation that originated two of the case law included in the Annex 1 is no longer possible.

Article 214 (3) establishes that only the interested parties themselves, their rightful heirs and court or police authorities who are carrying out criminal investigations or hearings, may request complete certificates or copies of them, in the event of that any certificate has been registered after a sex-change.

Article 217 (5) establishes in case of cancelled registration due to sex-change, only the persons themselves, their rightful heirs and court or police authorities who are carrying out criminal investigations or hearings, are considered interested parties.

There is no legal provision expressly regarding prohibition of discrimination of transgender persons. As a matter of fact, the legal provisions regarding prohibition of discrimination only refer to discrimination on grounds of sex, sexual orientation and, sometimes, gender identity, although not defining these concepts. Furthermore, it was not possible to identify any juridical studies framing the discrimination of transgender persons either on discrimination on grounds of sex or of sexual orientation. As to jurisprudence, this does not also issue opinion on this matter, despite the existence, of three rulings on transgender issues in the Legal Documentary Databases two of which dated of 1984 (and not available in full text which prevents their analysis in the case law included in Annex 1) and the other of 2004, included in Annex 1.¹³⁷ Mention should also be made to a fourth relevant

¹³⁴ Portugal, Law 7/2011 which set in place the procedures for making a sex change and for taking on a new name at the Registry Office (*Lei n.º 7/2011 que cria o procedimento de mudança de sexo e de nome próprio no registo civil e procede à décima sétima alteração do Código de Registo Civil*), 15 March 2011, available at: <http://dre.pt/pdf1sdip/2011/03/05200/0145001451.pdf>.

¹³⁵ Portugal, Decree-Law 131/95 approving the Civil Registration Code (*Decreto-Lei n.º 131/95 que aprova o Código do Registo Civil*), 6 June 1995, available at: <https://dre.pt/pdf1sdip/1995/06/131A00/35963638.pdf>.

¹³⁶ Portugal, Decree-Law 131/95 approving the Civil Registration Code (*Decreto-Lei n.º 131/95 que aprova o Código do Registo Civil*), 6 June 1995, available at: <https://dre.pt/pdf1sdip/1995/06/131A00/35963638.pdf>.

¹³⁷ Available at: www.dgsi.pt/jtrl.nsf/Por+Ano/?SearchView&Query=FIELD DESCRITORES=TRANSEXUALIDADE.

ruling, dated of 1986 (included in Annex 1).¹³⁸ Indeed, this is a merely theoretical issue given that, as mentioned regarding intersex persons, the anti-discrimination constitutional rule that prohibits different treatment on grounds of a number of subjective motives – typified as a rule (Article 13 (2)) – shall be interpreted under the equality rule (Article 13 (1), that prohibits any unjustified differentiations.

It is thus important to stress, also on this matter, that the discrimination factors mentioned in the Article 13 (2) in the Constitution are merely examples. Therefore the prohibition of discrimination does not cover only discrimination on grounds of sexual orientation, it also extends to discrimination of any LGBT persons. In effect, since the first times of the 1976 Constitution, the Opinions of the Constitutional Commission,¹³⁹ and subsequently the rulings of the Constitutional Court have confirmed the notion that those discrimination factors are merely a concretion of the general idea of equality.¹⁴⁰ It has also been understood that this Article consecrates a prohibition precluding arbitrariness,¹⁴¹ which means that the differentiation criteria should be objectively adequate to the prosecution of the proposed aim according to a reasonable factual basis. These principles apply both to the law design, and to its implementation.¹⁴²

A study, promoted by the CIG,¹⁴³ includes a section on the LGBT context in Portugal where the juridical evolution of the legislation on this matter until 2010 is analysed. However the issue of the legal frame of discrimination of transgender persons in discrimination on grounds of sex or of sexual orientation is not addressed.

7.1 Gisberta's case

In February 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.

In their defense, 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, of 1 August 2006, 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

¹³⁸ *Coleção de Jurisprudência*, Ano XXIX, Tomo III/2004, p. 111.

¹³⁹ Portugal, Parecer da Comissão Constitucional n.º 5/82, de 25 de Janeiro de 1982, Pareceres XVIII (81-82), pp. 184-185.

¹⁴⁰ Portugal, Ruling of the Constitutional Court 44/84, of 22 May 1984, *Diário da República*, n.º 159, II série, pp. 6156-6157, available at:

www.dgsi.pt/atco1.nsf/904714e45043f49b802565fa004a5fd7/15dcb7845b0112bf8025682d00648664?OpenDocument.

¹⁴¹ Portugal, Parecer da Comissão Constitucional n.º 14/78, de 4 de Maio de 1998, Pareceres V, p. 109.

¹⁴² Machado Dray, G. (1999), *O princípio da Igualdade no Direito do Trabalho, Sua aplicabilidade no domínio específico da formação de contratos individuais de trabalho*, Coimbra, Almedina.

¹⁴³ Nogueira, C. and Oliveira, J. M. de(Org.) (2010), *Estudo sobre a discriminação em função da orientação sexual e da identidade de género*, Lisboa, Comissão para a Cidadania e a Igualdade de Género, available at: www.igualdade.gov.pt/IMAGES/STORIES/DOCUMENTOS/DOCUMENTACAO/PUBLICACOES/ESTUDO_ORIENTACAOSEXUAL_IDENTID.PDF.

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 criticised 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.¹⁴⁴

In court, the defense 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 Família e Menores* (Juvenile and Family Court) was as follows:¹⁴⁵

- 11 out of the 13 involved were sentenced to 11 to 13 months in a semi-open educational centre;
- 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'.¹⁴⁶

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.¹⁴⁷

One of the convicted minors appealed to the Court of Appeal in Porto, invoking that the Juvenile and Family Court violated several provisions of, among others, the Constitution, the Educational Guardianship Act and the Code of Penal Procedure. On the other hand, being 13 years old, the application of the educational guardianship measure of 13 months in an educational centre in a semi-open regime should be replaced by guardianship measure and education support for a 12 month period. In case this is not the understanding, a detention measure in semi-open regime longer than 11 months should never be applied to the minor. In any case, the period in which the minor was subject to detention measure in semi-open regime since 24 February 2006 should be deducted in full. Following the analysis of the reasons invoked, the Court of Appeal of Porto issued, by unanimity, in 14 March 2007, a Judgement that considered the appeal unfounded, confirming the decision appealed in full.¹⁴⁸

¹⁴⁴ Available at: www.esquerda.net/index2.php?option=com_content&do_pdf=1&id=293.

¹⁴⁵ The Ruling of the Juvenile and Family Court of Porto that convicted the minors to the educational guardianship measures is reproduced in the Judgment of the Court of Appeal of Porto Porto, available at: www.dgsi.pt/jtrp.nsf/c3fb530030ea1c61802568d9005cd5bb/ac497c9bc88735e9802572b3004ba1c0?OpenDocument&Highlight=0,travesti

¹⁴⁶ Available at: <http://ilga.org/ilga/pt/article/899>.

¹⁴⁷ Available at: <http://atranspt.blogspot.com/2007/02/comunicado-de-imprensa-pantres-cor-de.html>.

¹⁴⁸ Portugal, Judgment of the Court of Appeal of Porto of 14 March 2007, available at: www.dgsi.pt/jtrp.nsf/c3fb530030ea1c61802568d9005cd5bb/ac497c9bc88735e9802572b3004ba1c0?OpenDocument&Highlight=0,travesti

An extraordinary appeal to establish jurisprudence was lodged in the Supreme Court of Justice regarding the decision of the Court of Appeal of Porto to not deduct from the educational guardianship measure applied the period in which the minor was subject to detention measure in semi-open regime immediately following the crime. The Supreme Court of Justice ruled, in a Judgment of 8 October 2010, that *in educational guardianship process there is no room for the deduction of the time the minor spent in educational centre, when, once subject to this educational guardianship measure, a detention measure is later applied to this minor*. The Judgment appealed was thus confirmed.¹⁴⁹

The suffering of Gisberta, as well as the reasons explaining the crime, were the subject of a film documentary and a solidarity song.¹⁵⁰

7.2 Additional remarks

According to the IRN, 171 name changes owing to gender change took place between 2011 and 2013 (see Statistics in annex).

However, the ILGA Portugal 2012 Report on implementation of the Recommendation CM/Rec(2010)5¹⁵¹ includes several relevant remarks on transgender issues:

- The labour law provisions only include prohibition of discrimination on grounds of sexual orientation, thus not covering transgender people.
- Complaints have been made regarding the existence of a list of medical doctors authorised to subscribe the diagnosis of gender dysphoria in the INR.
- There are records of difficulties faced by Portuguese transgender people in Portuguese consulates or embassies abroad, namely in Paris, where a set of documents, which go well beyond the law, have been required.

¹⁴⁹ Portugal, Ruling of the Supreme Court of Justice, 8 October 2008, available at: <http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/f1b7249bd177b0518025756000361d0f?OpenDocument&Highlight=0,medida,tutelar>

¹⁵⁰ Available at: www.youtube.com/watch?v=C3gitWW715c.

¹⁵¹ ILGA Portugal (2012), *Relatório sobre a implementação da Recomendação CM/Rec(2010)5 do Comité de Ministros do Conselho da Europa aos Estados-membros sobre medidas para o combate à discriminação em razão da orientação sexual ou identidade de género*, Lisboa, ILGA Portugal.

8 Miscellaneous

8.1 The Portuguese Constitution

According to the principle of equality enshrined in Article 13 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.

8.2 Partnering

8.2.1 *De facto* union (Law 7/2001 of 11 May, amended by Law 23/2010 of 30 August)¹⁵²

Some exceptions are stipulated in the *de facto* union law, for example, according to Law 7/2001, amended by Law 23/2010 of 30 August, it is forbidden to attribute rights or benefits whether in life or in death, to the partners in a *de facto* union under the following circumstances:

- Less than 18 years of age on the date on which the *de facto* union was recognised;
- Clear cases of dementia with lucid intervals and being rendered incapacitated or unable due to psychological disturbances, except in the event that the dementia or the disturbances are witnessed after the *de facto* union has begun;Unbroken marriage, except in the event of having obtained an official separation between people and property;
- Direct relation or a second-degree relation or affinity in a direct line;
- Previous conviction of one of the partners as the author or the accomplice in the murder, even if not committed, of the spouse of the other.

Persons living in *de facto* unions have the following rights (Article 3):

- protection of family residence;
 - the same entitlement to holidays, leave and preference in public service placements (just like married couples);
- in private contracts, the same entitlement to holidays and 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.

¹⁵² Portugal, Law 23/2010 which adopts measures to protect unmarried couples unions (*Lei n.º 23/2010 que adopta medidas de protecção das uniões de facto*), 30 August 2010, Art. 2, available at: <https://dre.pt/pdf1sdip/2010/08/16800/0376403768.pdf>.

Different from what is seen in partners of the opposite sexes living in a *de facto* union, partners in a same-sex *de facto* union do not enjoy the right to adopt (Article 3 (3)).

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 or rent (Article 5 (1) (7)). 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, living with the deceased for more than a year, has the option of becoming the new lessee (Civil Code, article 1106, amended by Law 31/2012 of 31 August¹⁵³).

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.

8.2.2 Same-sex marriages (Law 9/2010 of 31 May)¹⁵⁴

The Constitution of the Portuguese Republic (2005) establishes that everyone has the right to found a family and to marry in full equality. It is up to the law to regulate the requirements and the effects of marriage (Article 36 (1) and (2)). The law that regulates the requirements and the effects of marriage is the Civil Code.

Before Law 9/2010 of 31 May,¹⁵⁵ according to the Civil Code, marriage was a contract entered into by two people of opposite sexes.

In 2009, in this legal context, 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 Constitutional Court in the case law 359/2009 of 9 July 2009,¹⁵⁶ available at Annex 1, 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. For the Court, marriage cannot be reduced to its effects, for example procreation. However, 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 five judges, three of whom voted in favour and two against, which already indicates the possibility of a change of direction of this Court in the future.

¹⁵³ Portugal, Law 31/2012 which amended Civil Code (*Lei n.º 31/2012 que procede à revisão do Código Civil*), 14 August 2012, Art. 8 (1) b and (2), available at: <http://dre.pt/pdf1sdip/2012/08/15700/0441104452.pdf>.

¹⁵⁴ Portugal, Law 9/2010 which allows same-sex marriage (*Lei n.º 9/2010 que permite o casamento civil entre pessoas do mesmo sexo*), 31 May 2010, available at: <http://dre.pt/pdf1s/2010/05/10500/0185301853.pdf>.

¹⁵⁵ Portugal, Law 9/2010 which allows same-sex marriage (*Lei n.º 9/2010 que permite o casamento civil entre pessoas do mesmo sexo*), 31 May 2010, available at: <http://dre.pt/pdf1s/2010/05/10500/0185301853.pdf>.

¹⁵⁶ Portugal, Constitutional Court, case law 359/2009 of 9 July 2009, available in English version at: www.tribunalconstitucional.pt/tc/acordaos/20090359.html.

In 2010, the Government (supported in Parliament by the Socialist Party) presented a bill before the Parliament discussing same-sex marriages. In the Preamble of the bill, the Government¹⁵⁷ underlined that one of the electoral promises was to remove the legal hurdles faced by people who wish to 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. According to this bill, article 1577 of the Civil Code should have this wording: *Marriage is a contract entered into by two persons who want to constitute a family for life, according to the terms of this Code.*

However the bill does not allow the adoption of children by same-sex couples on the grounds that in such cases the interests of the child should prevail.

The biggest opposition party (centre-right party) PSD (*Partido Social Democrata*, Social Democratic Party)¹⁵⁸ did not agree with the bill of the Socialist Party on same-sex marriage and presented a different bill in order to create a registered civil union. This registered civil union would be a contract entered into by two persons of the same-sex specifying rights and obligations. This kind of contract would be specially designed for same-sex unions that want to share their life together.

Another bill was presented before the Parliament by *Bloco de Esquerda*¹⁵⁹ (a left wing party) in favour of same-sex marriage maintaining 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 Green Party also agreed with same-sex marriage and the right of same sex couples to adopt children.

In the frame of the debate in the Parliament concerning same-sex marriage, an organisation 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 the Members of the Parliament of the need to hold a referendum on the issue, in the belief that the results of such a referendum would be against same-sex marriage. The organisation 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.

On 20 February 2010, the “Platform for Citizenship and Marriage” organised a demonstration in order to defend their values.¹⁶⁰

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

In spite of the debate, the Parliament adopted the Decree 9/XI and before promulgating it, the President of the Republic, required to the Constitutional Court, according to article 134 g) of the Constitution of the Republic, the anticipatory evaluation of the constitutionality of the Decree 9/XI. In case law 121/2010, of 28 April 2010, included in Annex 1, the Constitutional Court did not deem Decree 9/XI to be unconstitutional.¹⁶¹

¹⁵⁷ Available at: www.parlamento.pt/ActividadeParlamentar/Paginas/DetailIniciativa.aspx?BID=35004.

¹⁵⁸ Available at: www.parlamento.pt/ActividadeParlamentar/Paginas/DetailIniciativa.aspx?BID=34822.

¹⁵⁹ Available at: www.parlamento.pt/ActividadeParlamentar/Paginas/DetailIniciativa.aspx?BID=35011.

¹⁶⁰ Available at: <http://spedeus.blogspot.com/2010/01/manifestacao-pela-familia-e-pelo.html>.

¹⁶¹ Portugal, Constitutional Court Judgment 121/2010 of 8 April. Available at: <http://dre.pt/pdf2sdip/2010/04/082000000/2236722383.pdf>

As a result, Law 9/2010¹⁶² was published in the Government Gazette (*Diário da República*) on 31 May. At present, Article 1577 in the Civil Code, tal como tinha sido proposto on the bill of the Socialist Party, is:

Marriage is a contract entered into by two persons who want to constitute a family for life, according to the terms of this Code.

Law 9/2010¹⁶³ changed the system pertaining to marriage as laid down in the Civil Code so as to bring it into line with same-sex marriage. The changes were written into Articles 1577, 1591 and 1690.

The Law 9/2010 also established (in Article 5) that “*all the legal provisions in terms of marriage and its effects should be interpreted in the light of the present law, regardless of the gender of the spouses, without jeopardising the provision in Article 3*”. Article 3 states that “*1 - The changes introduced (...) mean that it is legally inadmissible for spouses in a same-sex marriage to adopt in any way or form*”. Moreover, in “*2 – None of the legal provisions to do with the matter of adoption may be interpreted in the opposite senses to the provision in the previous number*”.

Thus, this law was not limited only to enshrine same-sex marriage, extending its effects to other laws applicable to spouses. The same did not occur, though, regarding adoption, which continued to be reserved to heterosexual couples.

8.2.3 Nationality law

The amendment to the Law on Nationality approved by Organic Law (*Lei Orgânica*) 2/2006 of 17 April,¹⁶⁴ (4th amendment to Law 37/81 of 3 October- Nationality Law) recognises the acquisition of Portuguese nationality in the case of *de facto* unions. Thus a foreigner who lives 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 Decree-law 237-A/2006,¹⁶⁵ which stipulates that a foreigner who lives 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 same-sex. In principle, it should be applied in terms of Portuguese legislation, which recognises same-sex unions. In the main, the same happens in same-sex marriages.

¹⁶² Portugal, Law 9/2010 which allows same-sex marriage (*Lei n.º 9/2010 que permite o casamento civil entre pessoas do mesmo sexo*), 31 May 2010, available at: <http://dre.pt/pdf1s/2010/05/10500/0185301853.pdf>.

¹⁶³ Portugal, Law 9/2010 which allows same-sex marriage (*Lei n.º 9/2010 que permite o casamento civil entre pessoas do mesmo sexo*), 31 May 2010, available at: <http://dre.pt/pdf1s/2010/05/10500/0185301853.pdf>.

¹⁶⁴ Portugal, Organic Law 2/2006, 4th amendment to Law 37/81, 3 October - Nationality Law (*Lei n.º 2/2006, quarta alteração à Lei n.º 37/81, de 3 de Outubro - Lei da Nacionalidade*), 17 April 2006, Art. 3 (3), available at: <https://dre.pt/pdf1sdip/2006/04/075A00/27762782.pdf>.

¹⁶⁵ Portugal, Decree-Law 237-A/2006 which approves the Regulation of Portuguese Nationality (*Decreto-Lei n.º 237-A/2006 que aprova o Regulamento da Nacionalidade Portuguesa*), 14 December 2006, Art. 14 (2), available at: <https://dre.pt/pdf1sdip/2006/12/23901/00020016.pdf>

8.3 Parenting

8.3.1 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 Law 31/2003),¹⁶⁶ 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.

Law 9/2010 of 31 May,¹⁶⁷ allows same-sex couples to marry at a civil registry office but expressly refuses to allow them to adopt a child.

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

8.3.2 Assisted reproduction

Law 32/2006 of 26 July¹⁶⁸ governs assisted reproduction. 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. I.e. according to Article 6 (1), same-sex persons who are married or are *de facto* union partners may not resort to assisted reproduction.

8.3.3 Children at risk

The protection system of children at risk is mainly based on the Law for Protecting Children and Young People at Risk (*Lei de Protecção de Crianças e Jovens em Perigo*) (Law 147/99 of 1 September).¹⁶⁹ There are several measures dispersed in different laws in the frame of the system of prevention and protection of children. Among these, Decree-Law 11/2008¹⁷⁰ and Decree-Law 121/2010 of 27 October¹⁷¹ are particularly relevant regarding the situation of same-sex married or in *the facto* union couples.

The Decree-Law 11/2008 establishes the system of temporary foster care of children foreseen by the Law for Protecting of Children and Young People at Risk. According to this Decree-Law, providing

¹⁶⁶ Portugal, Law 31/2003 amending the Civil Code (*Lei n.º 31/2003 que altera o Código Civil*), 22 August 2003, available at: <https://dre.pt/pdf1sdip/2003/08/193A00/53135329.pdf>.

¹⁶⁷ Portugal, Law 9/2010 which allows same-sex marriage (*Lei n.º 9/2010 que permite o casamento civil entre pessoas do mesmo sexo*), 31 May 2010, Art. 3, available at: <http://dre.pt/pdf1s/2010/05/10500/0185301853.pdf>.

¹⁶⁸ Portugal, Law 32/2006, which approves Medically-Assisted Procreation (*Lei n.º 32/2006 que aprova a Procriação medicamente assistida*), 26 July 2006, Art. 6, available at: <http://dre.pt/pdf1s/2006/07/14300/52455250.pdf>.

¹⁶⁹ Portugal, Law 147/99, Law for Protecting Children and Young People at Risk (*Lei 147/99, Lei de Protecção de Crianças e Jovens em Perigo*), 1 September 1999, available at: http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=545&tabela=leis.

¹⁷⁰ Portugal, Decree-Law 11/2008, Law on Regime of Foster Care (*Decreto-lei n.º 11/2008, Regime de execução do acolhimento familiar*), 17 January 2008, available at: <https://dre.pt/pdf1sdip/2008/01/01200/0055200559.pdf>.

¹⁷¹ Portugal, Decree-Law 121/2010 which regulates the Legal System on Civil Guardianship (*Decreto-lei n.º 121/2010 que regulamenta o regime jurídico do apadrinhamento civil*), 27 October 2010, available at: <https://dre.pt/pdf1sdip/2010/10/20900/0489204894.pdf>.

for foster care in a family involves nurturing confidence in the child or the young person in a family environment and giving him/her suitable care adjusted to his/her needs and well-being and providing the education that is necessary for his/her integral development (Article 2). This measure is applied keeping in mind the child or young person's foreseeable return to his/her natural family.

This Decree-Law 11/2008 also establishes the conditions for recruitment and selection of foster care families (Article 16). However, it does not define the concept of family for these purposes, being up to the bodies in charge of the selection of families to interpret the concept according to the laws that regulate family formation by marriage or *the facto* union. Now as to the families constituted by two same-sex persons, both Law 9/2010 (same-sex marriage) and Law 7/2001 (same-sex *de facto* unions), as mentioned before, expressly prohibit the adoption of children by same-sex couples either married or cohabiting. For this reason, however Decree-Law 11/2008 does not contain an express provision to that effect, the bodies in charge of the selection of foster care families have refused handing over children and young people to same-sex couples.

Furthermore, Decree-Law 121/2010 of 27 October followed on from the rulings about the legal system of civil guardianship (*apadrinhamento civil*) passed by Law 103/2009 of 11 September by laying down the necessary requirements and procedures to qualify people who wanted to become a child's guardian. The law sought to provide new answers for children and young people at risk who were in institutional foster care and thus failed to benefit fully from the care provided by their parents although were not in a situation to be adopted. Civil guardianship allows children and young people at risk to permanently stay and create emotional ties with the family with whom they are living. The family takes over the powers and duties of the parents although the child still keeps up his/her biological ties. In selecting the guardians, it is therefore necessary to make an evaluation of particular qualities, mainly the capacity to live up to their parental responsibilities. Among the factors that Decree-Law 121/2010 (Article 3 (4)) defines as to be taken into consideration are the conditions stipulated both in the laws about same-sex *de facto* unions (Law 7/2001, Article 7) and same-sex marriage (Law 9/2010, Article 3), where both fail to accept adoption by these couples.

It is therefore very difficult for same-sex couples to benefit from the measures regarding either foster care to children or civil guardianship.

8.4 Non-discrimination

8.4.1 Insurance policies and bank loans

According to data provided by ILGA Portugal, there were no cases of same-sex unions experiencing problems with insurance policies reported in the last few years.

As to bank loans, most banks consider such unions eligible for mortgages and other loans at the same rate as for married couples.

However, 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. 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.

8.4.2 Domestic violence – Victims protection and support services

In cases of domestic violence victims, according to the Portuguese Penal Code (referred to above, Article 152) the victim can be part of a heterosexual relationship as well as of an homosexual one.

Law 112/2009 of 16 September,¹⁷² amended by Law 19/2013 of 23 February,¹⁷³ 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, disability) 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 this kind of occurrence among same-sex couples is not insignificant.

8.4.3 Blood donors

Currently, according to the law (Decree-Law 267/2007 of 24 July),¹⁷⁴ LGBTs can be blood donors. The restrictions established by law apply to all individuals. Anyone whose sexual 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 National Institute of Blood (*Instituto Português do Sangue*) specifies that blood should not be donated by a potential donor of either sex who has:¹⁷⁵

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

¹⁷² Portugal, Law 112/2009, establishes the legal regulations applying to the prevention of domestic violence for protection and support to victims and revokes Law 107/99 of 3 August, and the Decree-Law 323/2000 of 19 December (*Lei n.º 112/2009, estabelece o regime jurídico aplicável à prevenção da violência doméstica, à protecção e à assistência das suas vítimas e revoga a Lei n.º 107/99, de 3 de Agosto, e o Decreto-Lei n.º 323/2000, de 19 de Dezembro*), 16 September 2009, Art. 5, available at: <http://dre.pt/pdf1s/2009/09/18000/0655006561.pdf>.

¹⁷³ Portugal, Law 19/2013, 29th amendment to the Penal Code, (Lei n.º 19/2013, 29.ª alteração ao Código Penal), 21 February 2013, available at: <http://dre.pt/pdf1s/2013/02/03700/0109601098.pdf>.

¹⁷⁴ Portugal, Decree-Law 267/2007 which establishes the legal regime of the quality and safety of human blood and blood components, their technical requirements, traceability requirements and notification of serious adverse reactions and incidents, transposing into national law various Directives (*Decreto-Lei n.º 267/2007 que estabelece o regime jurídico da qualidade e segurança do sangue humano e dos componentes sanguíneos, respectivas exigências técnicas, requisitos de rastreabilidade e notificação de reacções e incidentes adversos graves, transpondo para a ordem jurídica nacional várias Directivas*), 24 July 2007, available at: <https://dre.pt/pdf1sdip/2007/07/14100/0469604717.pdf>.

¹⁷⁵ Available at: http://ipsangue.org/ipsangue2011/index.php?option=com_content&view=article&id=55:posso-dar-sangue&catid=37:posso-dar-sangue&Itemid=79.

This legislation does not seem to discriminate against LGBTs. However, in the Portuguese Blood Institute, a question 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 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 behaviour.¹⁷⁶ The President expressed the view that homosexuals who refuse to reveal their sexual orientation should be tried by courts.

Several complaints against the Portuguese Blood Institute were filed in the Portuguese Ombuds Office (*Provedoria de Justiça*) regarding the discrimination of gay men in blood donation. In 2006 the Ombudsmen suggested that the reference to *men who have intercourse with other men*, as a risk factor in the Portuguese Blood Institute website, should be replaced by men and women who have intercourse with multiple partners. However, other complaints followed due to the same reasons.¹⁷⁷

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 behaviour.¹⁷⁸

8.4.4 Student and School Ethics Regulation (Law 51/2012 of 5 September)¹⁷⁹

This Law lays down the rights and duties of students in compulsory and secondary school and the commitment made by their parents, the teaching staff and the other members of the school community ensuring the students’ education and training.

According to Articles 7 (1) a) and 10 d) in Law 51/2012,¹⁸⁰ that enshrine the rights and duties of the student, the student has the right to be treated by any member of the school community with respect and civility and to treat others in the same way. In no way may the student be discriminated against owing to his/her ethnic origin, health, sex, sexual orientation, age, gender identity, economic, cultural or social condition, or his/her political, ideological, philosophical or religious convictions.

Article 22 states that when the student breaches some of his/her duties as stipulated in Article 10 or in the school rules, in a continuous way or in behaviour that disturbs the school’s normal routine or the school community’s relationships, it consists of an offence involving indiscipline that may be subject to a corrective measure or disciplinary action involving punishment.

¹⁷⁶ Available at: www.ionline.pt/artigos/15804-gays-que-nao-se-assumam-devem-ser-processados-video.

¹⁷⁷ ILGA Portugal (2012), *Relatório sobre a implementação da Recomendação CM/Rec(2010)5 do Comité de Ministros do Conselho da Europa aos Estados-membros sobre medidas para o combate à discriminação em razão da orientação sexual ou identidade de género*, Lisboa, ILGA Portugal.

¹⁷⁸ Available at: www.ilga-portugal.pt/noticias/20090730.htm.

¹⁷⁹ Portugal, Law 51/2012 which approves the Statute of Student and School Ethics (*Lei n.º 51/2012 que aprova o Estatuto do Aluno e a Ética Escolar*), 5 September 2012, available at: <https://dre.pt/pdf1sdip/2012/09/17200/0510305119.pdf>.

¹⁸⁰ Portugal, Law 51/2012 which approves the Statute of Student and School Ethics (*Lei n.º 51/2012 que aprova o Estatuto do Aluno e a Ética Escolar*), 5 September 2012, available at: <https://dre.pt/pdf1sdip/2012/09/17200/0510305119.pdf>.

Article 38 adds that the application of corrective measures or disciplinary action involving punishment does not exempt the student and his/her respective legal representative from bearing civil and criminal liabilities that may take place under the general terms of the law. Owing to emergency situations, and without prejudice to police redress, when a student aged more than 12 and less than 16 years of age commits an act that may be considered a crime, the school leadership should communicate the fact to the Public Prosecutor's Office attached to the appropriate juvenile court. In the event that the child is less than 12 years old, the Commission for the Protection of Children and Young People at Risk (*Comissão de Protecção de Crianças e Jovens em Perigo - CPCJ*) should be contacted or in the absence of the CPCJ, the Public Prosecutor's Office.

However, there are no official programmes or guidelines for action regarding the prohibition of discrimination of students on grounds of sexual orientation or gender identity. This is the case namely in what concerns homophobic and transphobic bullying.¹⁸¹

Recent research data show that 42% of 210 students in Portugal (70% of whom identify as LGBT), declare to have been victims of homophobic bullying at school; 67% say that they had observed colleagues being victims of homophobic bullying at school; and 87% state that they heard homophobic comments in the school context.¹⁸²

8.4.5 Institutional homophobia

No practices of institutional homophobia have been reported in Portugal.

However, an individual case can be mentioned: a 17 years old girl 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.¹⁸³

¹⁸¹ ILGA Portugal (2012), *Relatório sobre a implementação da Recomendação CM/Rec(2010)5 do Comité de Ministros do Conselho da Europa aos Estados-membros sobre medidas para o combate à discriminação em razão da orientação sexual ou identidade de género*, Lisboa, ILGA Portugal.

¹⁸² Universidade de Lisboa – ISCTE (2010), *Estudo sobre Bullying Homofóbico nas Escolas em Portugal*, Lisboa, Universidade de Lisboa.

¹⁸³ Information given by Paulo Corte-Real, President of ILGA Portugal.

9 Good practices

Few good practices as such (according to the FRA's criteria) may be identified in Portugal. In any case, examples of events and initiatives that may represent positive developments are presented below.

9.1 Equality and non-discrimination on the grounds of sexual orientation in the academia

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 2005-2006.¹⁸⁴

At the ISCTE - University Institute of Lisbon (ISCTE – IUL) same-sex studies were conducted on issues related to LGBTs (mainly in the Department of Anthropology).¹⁸⁵

Several other universities and have been conducting research and studies on LGBT related topics. This is the case, among others, of the universities of Minho, Coimbra, Nova de Lisboa and of the Institute of Social Sciences of the University of Lisbon (*Instituto de Ciências Sociais da Universidade de Lisboa*, ICS).

9.2 The role of LGBT NGOs

On 15 December 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.

In March 2009 a two day International Conference on "Mainstreaming LGBT anti-discrimination policies" took place in Lisbon. It was organised 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.¹⁸⁶

In October 2011, ILGA Portugal, in cooperation with the Research Network Centre on Anthropology (Centro em Rede de Investigação em Antropologia, CRIA), organised an international conference on parental rights of same-sex couples. The participants came from different countries and had diverse disciplinary backgrounds. The conference proceedings were published by ILGA Portugal in 2013.¹⁸⁷

¹⁸⁴ Available at: www.fd.unl.pt/.

¹⁸⁵ Available at: <http://iscte-iul.pt/departamentos/38/apresentacao.aspx>.

¹⁸⁶ Available at: www.ilga-portugal.pt/conferencia2009/.

Also in 2013, ILGA Portugal launched the Observatory on Discrimination (*Observatório da Discriminação*). This is targeted at LGBT persons or perceived as LGBT. It is based on an on-line survey to victims and witnesses of crimes and/or discrimination incidents based on sexual orientation and gender identity occurred in Portugal.¹⁸⁸

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 couples.¹⁸⁹ The support was given by the Portuguese Government from EU funds. According to information provided by its coordinator, this project is about to come to an end and there is no budget to keep the shelter running.

Opus Gay runs another shelter in Lisbon, since 1998, for LGBT persons victims of crime on the grounds of sexual orientation, victims of domestic violence, persons in precarious socio-economic conditions.¹⁹⁰

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.

In January 2010, a scientific Lesbian review called “Les Online”¹⁹¹ 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.

The LGBT community organises film festivals, photographic exhibitions, shows and contests, camping expeditions, radio programmes and other social events. Some LGBT associations receive subsidies from State or local authorities.

9.3 The role of trade unions

The CGTP trade union confederation 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, homophobia and transphobia, among other fears, constitute the main examples of discrimination that should be countered by organised campaigns.

The CGTP’s action plan 2012-2016 makes specific reference to the persistence of discrimination on the ground of sexual orientation and to a commitment in favour of the defence namely of the parental rights of same-sex couples.¹⁹²

The General Workers' Union (*União Geral dos Trabalhadores*, UGT) issued a release on 17 May 2012, referring to the International Day Against Homophobia and Transphobia, stating its position against all forms of discrimination, namely on the grounds of sexual orientation.¹⁹³

¹⁸⁸ Available at: <http://ilga-portugal.pt/observatorio/>.

¹⁸⁹ Available at: www.opusgay.org/Centro_Acolhimento.html.

¹⁹⁰ Available at: www.opusgay.org.

¹⁹¹ Available at: www.lespt.org/lesonline/index.php?journal=lo.

¹⁹² Available at: www.cgtp.pt/images/stories/Estatutos_CGTP-IN_bte17_2012.pdf.

¹⁹³ Available at: www.ugt.pt/UGT_17_05_2012.pdf.

9.4 The role of public authorities

The CIG, coordinating body of the IV National Plan for Equality – Gender, Citizenship and Non-Discrimination 2011-2013, promoted a national campaign for non-discrimination on the grounds of sexual orientation and gender identity: Dislike Homophobic Bullying (*Dislike Bullying Homofóbico*). The main goal of the campaign was to promote the change of mentalities, sensitising the population to the harmful effects that bullying homophobic taunts about its victims. It was intended to eradicate homophobic and transphobic violence of the Portuguese society, decreasing social costs and eliminating the suffering of the victim(s) of this type of violence, as well as family and friends. The campaign was launched in July 2013. The campaign consisted in a TV Spot, Radio Spot, Leaflets and a Website.¹⁹⁴

On 16 May 2014 the General-Directorate of Education and the CIG promoted a seminar on fighting against homophobia and transphobia at school (*Luta contra a homofobia e transfobia na escola*). This seminar aimed at celebrating the International Day Against Homophobia and Transphobia. It took place in a secondary school located in the surroundings of Lisbon. The seminar programme included the participation of members of the Government, civil servants, academics, LGBT NGOs, and students.¹⁹⁵

¹⁹⁴ Available at: www.dislikebullyinghomofobico.pt.

¹⁹⁵ Available at: www.cig.gov.pt/2014/05/seminario-luta-contra-a-homofobia-e-a-transfobia-na-escola/.

10 The status of intersex persons

There is no specific reference to “intersex” people in the Portuguese anti-discrimination law, nor in higher-court case law. The ground of intersex is not included also in non-discrimination policies.

Discrimination on ground of ‘intersex’ is covered by the 1st Constitution. The answers given below follow on from this premise.

Although “intersex” is not found among the factors leading to discrimination that are expressly forbidden in the Portuguese Constitution¹⁹⁶ Article 13 (2), it is commonly understood that the factors mentioned are not comprised in a closed list but are merely examples. As a matter of fact, the doctrine has considered that the anti-discrimination constitutional rule which prohibits different treatment on grounds of certain subjective motives – typified as a rule (Article 13 (2)) – shall be interpreted under the equality rule (Article 13 (1)), which prohibits any unjustified differentiations.¹⁹⁷ This view is bolstered by Article 26 (1) in the Constitution which states: “*Everyone is recognised as having the right to his or her personal identity, personality development, civil capacity, citizenship, good name and reputation, and likeness, the right to speak out and the right to the protection of the privacy of his or her personal and family life (...) and to legal protection against any form of discrimination*”. According to Article 18 (1) of the Constitution these articles are self-executing and oblige public and private entities.

Regarding jurisprudence, no case law were found referring specifically to intersex persons. However there are some decisions regarding transsexuality, prior to the law that approves sex change, that may indicate a trend towards the implicit inclusion of intersex persons in the anti-discrimination legal provisions.

These judgements refer expressly the following: *I – Transsexuality is not regulated in our legal order, having to be treated according to the norm that the interpreter would create if he/she had to legislate within the spirit of the system. II – The respect by the moral personality of the individual imposes the recognition of sex change, even if voluntarily obtained by him/her self and its consecration in civil registration.*¹⁹⁸

In the same sense, another ruling of the same Court states that: *I The transsexual, i.e. the individual whose deep psychological profile is opposite to his/her karyotype, insensibly tends to make his/her sexual appearance coincide with his/her true feeling, “therefore correcting the nature. II Thus a male pseudo-hermafrodite, who got the physical appearance of a woman, through surgeries, has the right, since the Portuguese law does not prohibit it, although it does not foresee it, to rectify his civil registration, in such a way that this states that she is a female individual instead of male.*¹⁹⁹

¹⁹⁶ Portugal, Constitutional Law 1/2005, VII Constitutional revision (*Lei Constitucional n.º 1/2005, VII Revisão constitucional*), 12 August 2005, available at: <https://dre.pt/pdf1sdip/2005/08/155A00/46424686.pdf>.

¹⁹⁷ Leite, J. (2004), *O princípio da igualdade salarial entre homens e mulheres no direito português, Compilação de elementos para uma consulta especializada sobre igualdade de remunerações*, Lisboa, Comissão para a Igualdade no Trabalho e no Emprego.

¹⁹⁸ Portugal, Judgement of the Court of Appeal of Lisbon of 5 May 1984, available at: www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/f23a62e316cb9fbd802568030003dfad?OpenDocument.

¹⁹⁹ Portugal, Judgement of the Court of Appeal of Lisbon of 17 January 1984, available at: www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/67f529a8e2023ad2802568030003cf06?OpenDocument.

In view of these decisions, despite the differences between transgender and intersex issues, it seems plausible that the jurisprudence would respect the Constitution and would adopt a position of full openness regarding situations of discrimination of intersex persons.

Intersex discrimination is not specifically covered under national non-discrimination policies. However, the 5th National Action Plan for Equality, Citizenship and Gender 2014-2017 (*V Plano Nacional para a Igualdade, Cidadania e Género*) passed by Council of Ministers Resolution 103/2013 of 30 December,²⁰⁰ includes a Strategic Area - 4, about Sexual Orientation and Gender Identity. The Area pays special attention to initial training and on-going training of professionals who are more particularly working in sectors such as health, education, social welfare, the mass media and also the police authorities, the Armed Forces and the law courts. The Plan lays down five measures and the following strategic aims: predict and fight against all forms of discrimination against sexual orientation and identity gender; promote a sense of awareness about this subject in Portuguese society; ensure that the international commitments to which Portugal is bound in terms of non-discrimination of sexual orientation and gender identity are ensured, applied and monitored.

If the understanding is that gender identity, which is a concept not defined by law nor by jurisprudence, may be interpreted in a broad sense, encompassing the situation of intersex people, these may be covered by the existing policies.

According to Article 96 in the Code of Civil Registration, Decree-Law 131/95 of 6 June,²⁰¹ any birth on national soil should be registered verbally within 20 days following the birth, in any civil registry office, or if the birth occurred in a health clinic where is it possible to register it, until the date on which the newly delivered mother is signed out.

When the birth has not been registered within the legal deadline, the administrative and police authorities should inform the Public Prosecutor's Office of this fact in order to a register the newborn. Any citizen makes likewise inform these authorities despite the fact that they have no special interest in registering the child.

According to Article 102, apart from the general requirements, registering a birth should take into account the following: a) first names and family names; b) the sex; c) the date of birth including the exact time, if possible; d) the parish /ward and municipality of birth; e) the complete name, age, civil status, nationality and usual residence of the parents; f) the complete names of the grandparents; g) the information demanded by the law in special cases.

However, according to a clarification provided in written by the Institute of Registration and Notary Affairs (*Instituto dos Registos e Notariado*, IRN), following a specific request for information, the birth certificate should be adapted to the special circumstances of the particular case. Therefore, and following the understanding of the IRN, having been declared that the subject to registration is hermaphrodite, the reference "undetermined" will be included regarding sex.

²⁰⁰ Portugal, Council of Ministers Resolution 103/2013 that approves the V National Action Plan for Gender Equality, Citizenship and Non-Discrimination, 2014-2017 (*Resolução do Conselho de Ministros n.º 103/2013 que aprova o V Plano Nacional para a Igualdade de Género, Cidadania e Não-Discriminação, 2014-2017*), 31 Constitutional Court, Case law 247/2005 of 10 May 2005, available in English version at: www.tribunalconstitucional.pt/tc/acordaos/20050247.html

²⁰⁰ Portugal, Council of Ministers Resolution 103/2013 of 30 December 2013, available at: <http://dre.pt/pdf1sdip/2013/12/25300/0703607049.pdf>.

²⁰¹ Portugal, Decree-Law 131/95 approving the Civil Registration Code (*Decreto-Lei n.º 131/95 que aprova o Código do Registo Civil*), 6 June 1995, Art. 98, available at: <https://dre.pt/pdf1sdip/1995/06/131A00/35963638.pdf>.

In these circumstances, the person reporting the birth (usually a parent) is advised, in the civil registry office, to choose a first name easily adapted to both sexes.

Once the sex of the child is defined, the birth certificate will be amended accordingly. The Portuguese law does not impose any time limit to the definition of sex in the registry.

Surgical and medical interventions are performed on intersex people in Portugal.

However, as said above, there is a legal vacuum in Portugal regarding the situation of intersex people.

This conclusion was confirmed by ILGA Portugal which, following a specific request for information, replied in written that this is “an invisible reality” and that “there is no guarantee of respect for the physical integrity and human rights of intersex people”.

Reference can though be made to Law 7/2011 of 15 March,²⁰² which regulates starting procedure for a sex change and the person’s given or first name at the Registry Office. Article 3 in this Law pertaining to sex change and how to go about asking for one, in the Report to be handed in, there is no reference to intersex but to “gender identity dysphoria which is also known as transsexuality” (“*perturbação de identidade de género, também designada como transexualidade*”). Despite this fact, in the main, and by analogy, it could be considered that the situation involving intersex may be covered here.

There is no information available on medical grounds or medical protocols or procedures applicable to such interventions.

ILGA Portugal does not possess any information on this issue. Despite a specific request for information, the Ministry of Health did not give any reply to ILGA Portugal regarding these procedures.

Information on if the fully informed consent of the parties concerned required by law or by protocol – and who are those interested parties considered to be (parents/guardians etcetera) is not available.

Information is also not available on if there is any explicit reference made to a certain age of consent? (under national law and/or medical protocol), neither on if the fully informed consent is sought from the intersex person him/herself or are parents/guardians/legal representatives of the intersex person granted the right to consent on the persons’ behalf.

²⁰² Portugal, Law 7/2011 which set in place the procedures for making a sex change and for taking on a new name at the Registry Office (*Lei n.º 7/2011 que cria o procedimento de mudança de sexo e de nome próprio no registo civil e procede à décima sétima alteração do Código de Registo Civil*), 15 March 2011, available at: <http://dre.pt/pdf1sdip/2011/03/05200/0145001451.pdf>.

Conclusions

In recent years, non-discrimination on grounds of sexual orientation and gender identity gained increased recognition and awareness in the law and institutional practices in Portugal, either at the public level or from NGOs.

The Portuguese Constitution expressly prohibits discrimination on grounds of sexual orientation (Article 13º). Separate legislation also includes references to sexual orientation, namely the Criminal Code, with increased penalties for hate-motivated crimes and hate speech, and some legal provisions in the areas of education and employment.

Specific reference to gender identity has also been included in some Portuguese legal diplomas, although not in the Constitution.

Furthermore, no legal protection against discrimination on grounds of sexual orientation and gender identity exists in Portugal in regards to goods and services.

The scarce number of case law involving LGBT persons may indicate eventual difficulties of these persons in having access to the law and courts.

The legal recognition of same-sex *de facto* unions and marriages constitute relevant landmarks in the anti-discrimination Portuguese legal framework. However, in spite of progress achieved, some laws still exclude LGBTs from their scope and the specificities of some groups are still unmet.

This is the case of intersex people, on whom a legal vacuum remains. This is also the case, currently under the political spotlight, of the recognition of parental rights of same-sex couples, namely regarding adoption.

The research material available for this study was limited, especially in terms of statistical data. In fact, official or unofficial figures are clearly insufficient to establish patterns of discrimination on the grounds of sexual orientation or to analyse trends on this regard.

This may constitute an expression of the still scant public policies specifically oriented towards the tackling of homophobia and discrimination on grounds of sexual orientation and gender identity in Portugal.

Annex 1 - Case Law

Case title	Homosexual sex with adolescents
Decision date	10 May 2005
Reference details	<i>Tribunal Constitucional</i> [Constitutional Court] ²⁰³
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 to 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>

²⁰³ Portugal, Constitutional Court, case law 247/2005 of 10 May 2005, available in English version at: www.tribunalconstitucional.pt/tc/acordaos/20050247.html.

	The Court argued that: ‘homosexual acts committed by adults with adolescents, regardless of the sexual experience of the minor, are overwhelmingly more traumatising 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	<p>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.”</p> <p>The Public Prosecutor merely remarked that the legislative power enjoyed ample scope when it came to defining crimes and punishments to be applied.</p> <p>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.</p> <p>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.</p>
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	2 September 2007
Reference details	<i>Supremo Tribunal de Justiça</i> [Supreme Court of Justice] ²⁰⁴

²⁰⁴ It was not possible to find this case in the Legal Documentary Databases (*Bases Jurídico Documentais*) of the Ministry of Justice (www.dgsi.pt/) on the date mentioned, 2 September 2007, nor in close dates. However, given the importance of this ruling as one of the precedings of Law 9/2010 of 31 May.

<p>Key facts of the case</p>	<p>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.</p>
<p>Main Reasoning/argumentation</p>	<p>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).</p>
<p>Key issues (concepts, interpretations) clarified by the case</p>	<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 of Lisbon)²⁰⁵. 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. 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.

²⁰⁵ Portugal, Ruling of the Court of Appeal of Lisbon of 15 February 2007, available at: <http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/f2c9a606d4e2613180257296004e5975?OpenDocument>

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, which adopted the Ruling 359/2009 of 9 July. ²⁰⁶
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Case title	Parental authority
Decision date	9 January 1996
Reference details	<i>Tribunal da Relação de Lisboa</i> [First Court of Appeal of Lisbon] ²⁰⁷
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’.

²⁰⁶ Portugal, Constitutional Court, case law 359/2009 of 9 July 2009, available in English version at: www.tribunalconstitucional.pt/tc/acordaos/20090359.html This case is mentioned regarding the precedings of Law 9/2010 of 31 May on same-sex marriage.

²⁰⁷ Due to the insufficient available information, it was not possible to find this judgement in the Legal Documentary Databases (*Bases Jurídico Documentais*) of the Ministry of Justice, available at: www.dgsi.pt/.

Results (sanctions) and key consequences or implications of the case	The Court decided in favour of the mother.
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Case title	Transsexualism ²⁰⁸ / Transgender
Decision date	6 October 1986
Reference details	<i>Tribunal da Relação de Lisboa</i> [First Court of Appeal of Lisbon] ²⁰⁹
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.

²⁰⁸ The descriptor in the Legal Documentary Databases (*Bases Jurídico Documentais*) of the Ministry of Justice (www.dgsi.pt/), in Portuguese, is *transexualidade*.

²⁰⁹ Portugal, Ruling of the Court of Appeal of Lisbon, 6 October 1986, available at: www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/58ee23e8bb10804580256803000570d6?OpenDocument&Highlight=0,mudan%C3%A7a,sexo. This ruling is mentioned in section 7. Transgender issues, regarding discrimination of transgender persons.

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.
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Case title	Transsexualism ²¹⁰ / Transgender
Decision date	22 June 2004
Reference details	<i>Tribunal da Relação de Lisboa</i> [First Court of Appeal of Lisbon] ²¹¹ .
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.

²¹⁰ The descriptor in the Legal Documentary Databases (*Bases Jurídico Documentais*) of the Ministry of Justice (www.dgsi.pt/), in Portuguese, is *transsexualidade*.

²¹¹ This ruling is not available on line in the Legal Documentary Databases (*Bases Jurídico Documentais*) of the Ministry of Justice (www.dgsi.pt/). It is however available at: *Colectânea de Jurisprudência*, Ano XXIX, Tomo III/2004, p. 111. In 2011, Law 7/2011 of 15 March was adopted. It dealt with sex-change and the procedures that should be followed in the Registry offices to change first or given names. It involved the 17th amendment to the Civil Registration Code. This problem no longer exists. See above Section 7.

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 her name to a feminine one.
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Case title	Same-sex marriage
Decision date	8 April 2010, published in the <i>Government Gazette (Diário da República)</i> 2nd Series, 28 April 2010, and also available in English version at: www.tribunalconstitucional.pt/tc/acordaos/20050247.html
Reference details	Constitutional Court, Judgement No. 121/2010, Court case No. 192/2010, prior appreciation of the constitutionality of the material. ²¹²
Key facts of the case	Within the terms of the Portuguese Constitution and the Law on the Organisation, Functioning and Procedure in the Constitutional Court as regards undertaking prior reviews, the President of the Republic requested that Articles 1 and 2 be examined for their constitutionality - where Article 2 changed the wording in Articles 1577, 1591 and 1690 (1) in the Civil Code, and of Articles 4 and 5 in the Parliamentary Decree 9/XI passed by the Assembly of the Republic, which allows a same-sex couple to marry in a civil ceremony. The President had received this material for promulgation. The request for prior appreciation was accompanied by a Statement of Opinion in which it was argued namely that a civil marriage between same-sex partners does not arise from the constitutional imposition of equality. The choice involving differentiation is followed in most of the EU member states wherein Portugal's legal culture is inserted. In dealing with different realities in the same way, it could mean breaching the principle of equality; it is doubtful that the solution being proposed is in conformity with Article 16 (1) of the Universal Declaration of Human Rights.
Main reasoning/argumentation	In its answer, the Constitutional Court gives an extremely lengthy and elaborate argument in which it refers to the Council of Europe Recommendations, the European Court of Human Rights (ECHR), the European Parliament Resolutions and the Decisions made by the European Court of Justice about the question of recognising, or not, equal rights in terms of same-sex couples and the non-sanctioning of any discrimination on the basis of sexual orientation. Furthermore, the Constitutional Court Decision quotes Article 19 of the Treaty on the Functioning of the European Union, and Articles 9 and 21 (1) of the European Charter of Human Rights (ECHR).

²¹² This ruling is at the basis of Law 9/2010, of 31 May, mentioned in 8.2.2. Same-sex marriage.

	<p>In its analysis of comparative law and jurisprudence, the Constitutional Court also examines the situations in the EU members countries as well as in other countries where the legal or jurisprudential definition of either “civil union” or “marriage” has been made, and where possible constitutional difficulties may be raised. Finally, a study is made of the developments witnessed in this domain as regards the Portuguese legal system, drawing attention to Law 7/2001 that recognises same-sex <i>de facto</i> unions but excludes these couples from applying for adoption and medically-assisted procreation. The Judgment also refers to Judgment No. 359/2009 handed down by the same court, stating that the Constitution provides an open-ended legal-constitutional framework in terms of the freedom of the legislator in matters to do with same-sex marriage.</p>
<p>Key issues (concepts, interpretations) clarified by the case</p>	<p>In making its appreciation, the Constitutional Court studied the rights as laid down in Article 36 of the Constitution, in particular, the right to found a family and to marry. It considered them to be two fundamental rights that form a whole and cannot be divided, thereby refuting point by point each of the arguments put forward (in the Statement of Opinion).</p> <p>In considering the equal treatment of different <i>de facto</i> situations which were claimed to breach the principle of equality, it was understood that this only happens when equal treatment has not been possible owing to a reasonable cause that arises in the nature of things, or when a provision is deemed arbitrary. <i>“Nevertheless, as is customary to repeat, the binding nature of the legislator to the principle of equality does not invalidate the freedom of legislative conformity, and it falls to the legislator to identify or qualify de facto situations that should act as reference points to treat equally or unequally”</i> (“<i>Todavía, como también é de uso repetir, a vinculação do legislador ao princípio da igualdade não elimina a liberdade de conformação legislativa, cabendo-lhe identificar ou qualificar as situações de facto que hão-de funcionar como elementos de referência a tratar igual ou desigualmente</i>”).</p> <p>Where same-sex marriage is concerned, the Court states that <i>“Extending marriage to persons of the same-sex does not dispute recognising and protecting the family in the way of recognising and protecting the family as a fundamental unit in society. It is important to bear in mind that the Constitution dissociates the founding of the family from marriage. The concept of the family that the Constitution upholds as a fundamental element in society is an open, plural concept that may be adapted to social needs and realities. The Constitution does not define what a family is, thus covering the different models that exist in society”</i> (“<i>A extensão do casamento a pessoas do mesmo sexo não contende com o reconhecimento e protecção da família como o reconhecimento e protecção da família como célula fundamental da sociedade. Importa ter presente que a Constituição desvinculou a constituição da família do casamento. O conceito de família que a Constituição acolhe como elemento fundamental da sociedade é um conceito aberto e plural, adaptável às necessidades e realidades sociais. A Constituição não definiu o que é a família, dando protecção aos distintos modelos que existam na sociedade</i>”).</p>

<p>Results (sanctions) and key consequences or implications of the case</p>	<p>Due to the reasons that are raised in great detail in its argument, the Constitutional Court deemed that the doubts about the constitutionality warranting the request for a prior assessment on the grounds of being unconstitutional, were unfounded and did not consider that any of the rules subject to appreciation had breached paragraph 1 of Article 36 in the Constitution. In these terms, the Court decided not to pronounce upon the unconstitutionality of the rules in Article 1, Article 2 – where Article 2 changed the wording of Articles 1577, 1591 and 1690 (1) in the Civil Code, and Articles 4 and 5 in the Parliamentary Decree 9/XI passed by the Assembly of the Republic.</p>
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<p>Case title</p>	<p>Exercising parental responsibilities</p>
<p>Decision date</p>	<p>19 October 2012</p>
<p>Reference details</p>	<p>The Barreiro Family and Minors Court, Court Case No. 782/11.4TBBRR-A Not available in electronic version</p>
<p>Key facts of the case</p>	<p>A child who had Down Syndrome, was intolerant to certain foods and suffered from a measure of motor impairment, was given a foster home for about one year by A and B, a homosexual couple because the biological mother did not possess the means to give the child the care and treatment it needed. A and B showed that they were very fond of the minor and ensured that it received specialised medical treatment, went to nursery school and received other care which resulted in an improvement in the child's health. The father, who was serving a prison sentence and was separated from the mother, and the paternal grandparents did not agree with the above-mentioned foster care owing to the sexual orientation of A and B. In confronting the situation described above, the couple brought about an injunction seeking a ruling on their exercise of parental responsibilities.</p> <p>It was not possible to arrive at any agreement in conference with the parents. In having notified the parties to make their claims, only A and B did so, appealing that the child be entrusted to them.</p>

<p>Main reasoning/argumentation</p>	<p>The Public Prosecutor issued a Statement of Opinion where it urged that the minor remain under the care of A and B and the exercise of parental responsibilities be attributed exclusively to the mother, whereby a schedule of personal contacts be drawn up with the parents.</p> <p>In its argument, the Court mainly took into consideration Article 180 (1) of the Organisation for the Guardianship of Minors (<i>Organização Tutelar de Menores</i>) which establishes that in the event of divorce or separation, the exercise of parental responsibilities should be ruled “in harmony with the interests of the minor, whereby with regard to the minor’s future, he/she should be entrusted to the guardianship of either one of the parents, a third party or an educational or social welfare establishment” (“<i>de harmonia com os interesses do menor, podendo este, no que respeita ao seu destino, ser confiado à guarda de qualquer dos pais, de terceira pessoa ou de estabelecimento de educação ou assistência</i>”).</p> <p>In the event that the minor is entrusted to a third party, the said party would take over parental responsibilities in order to carry out its functions adequately. Furthermore, it would fall to the Court to decide in which terms the parental responsibilities should be exercised where such duties are not jeopardised (Civil Code, Article 1907 (1-3). As a rule, it has been understood that under these circumstances, the third party should exercise the powers/duties of the minor’s guardianship, representation, assistance and education needed so as to satisfy its functions. The parents would have the remaining parental duties. The question of deciding who is</p>
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<p>Key issues (concepts, interpretations) clarified by the case</p>	<p>The Court deliberated upon what were deemed to be the child’s best interests, in conformity with the Organisation for the Guardianship of Minors (Organização Tutelar de Menores) and the Law for Protecting Children and Young People at Risk, where the child may be entrusted to a third party. At this point the UN Declaration of the Rights of the Child (1959) were consulted in terms of (No. 2): “The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity.” The Convention on the Rights of the Child was also referred to.</p> <p>The Court considered that the concept “the best interests of the child” was relatively vague and it falls to the Court to elaborate upon the values contained therein, acknowledging the family phenomenon in all its complexity. After undertaking a systematic and multidisciplinary assessment of each child's concrete situation, the Court would then decide on what it deems to be fair and adequate.</p> <p>Therefore in this concrete case, the Court has to weigh up all the circumstances, namely the minor’s family, the affection and care demonstrated by A and B, as well as the fact that the couple have the available economic resources to ensure paying for the cost of specialised treatment. Where the father and paternal grandparents called into question the sexual orientation of A and B, the Court found that the sexual orientation of the couple may never be a circumstantial factor preventing it from being entrusted with the child under its care, owing to the fact that it constitutes discrimination on the basis of the couple’s sexual orientation, which is forbidden by the Constitution because it breaches the principles of the human person’s</p>
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Results (sanctions) and key consequences or implications of the case	<p>Under Civil Code Articles 1905, 1906 and 1907, and Article 180 of the Organisation for the Guardianship of Minors, the Court decided that:</p> <ol style="list-style-type: none">1. The minor would remain under the custody of A and B who would watch over the child's health, safety, food and education, whereby the exercise of parental responsibilities that were not entrusted to the third party would fall exclusively to the mother;2. The exercise of guardianship powers/duties would fall to A and B, as well as the minor's representation, assistance and education, mainly in terms of all usual acts and questions, more importantly those related with the child's health or education, including the possibility of going abroad and therefore renewing the child's passport without need the approval of either one of the parents.3. The mother may see and be with the minor on days, places and times to be arranged with A and B, whereupon she should respect the child's school and treatment activities and the minor's rest;4. The father may see and be with the minor on days, places and times to be arranged with A and B, after he has completed his prison sentence, whereupon he should respect the child's school and treatment activities and the minor's rest. His visits should be made in presence of A and B, or in the presence of a person delegated for the purpose;5. The parents do not have any established obligations in terms of the minor's food although as soon as their incomes and expenditure allow otherwise, this fact should not hinder its later enforcement.
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Case title	Right of asylum
Decision date	20 March 2014
Reference details	South Administrative Central Court ²¹³
Key facts of the case	<p>A. came to the Lisbon airport border on 1 October 2013, using a forged passport from the Republic of Senegal. Since he did not hold a valid travel document, he was not allowed to entry national territory. A. presented an asylum request to the Office of Asylum and Refugees (<i>Gabinete de Asilo e Refugiados, GAR</i>), under the SEF, claiming he was a national citizen from Senegal. Heard as to the grounds of his request, he declared his Wolof ethnic origin, his Muslim religious convictions, his single status and his professional activity as street vendor. He escaped Senegal because he is homosexual and there was a hunt for homosexual persons, during which, he believes, his partner was killed. He said he used to go to night discos without any problems. However, he used to be insulted whenever he went out with his partner, although they had not been physically assaulted. He never had any troubles with law enforcement agencies, and was never in jail. After the death of his partner, he moved to a different neighbourhood and paid for the travel documents presented at the Lisbon airport. The Portuguese Council for Refugees (<i>Conselho Português para os Refugiados, CPR</i>) issued an opinion favourable to the granting of the asylum request. The GAR considered the applicant's report superficial and contradictory, since he was not even sure that his partner had been killed. On the other hand, the applicant did not refer any situation where he was affected by discrimination, nor reported any events which might jeopardize his stay in the country, or which have raised well-founded fear of being persecuted, on the grounds of the Geneva Convention. Neither was he able to prove a causal relationship between the events related and the fear which would have made him leave his country of origin. According to the GAR, the credibility of the report is mandatory for the submission of a protection request on the grounds of the sexual orientation of the person and, thus, the belonging to a specific social group, although in some situations, it is not possible to present evidence of the alleged facts. However, according to the ACNUR handbook of procedures "(...) the benefit of the doubt shall only be granted when all the available evidence have been obtained and confirmed and when the examiner is satisfied regarding the overall credibility of the applicant". In the situation under analysis, the report and the motivation do not seem to be credible, which led the GAR to consider the non-existence of the necessary conditions for granting the benefit of the doubt to the applicant, nor the consequent recognition of either the refugee status, or the residence permit on the grounds</p>

²¹³ Portugal, Ruling of the South Administrative Central Court, 20 March 2014, available at: www.dgsi.pt/jtca.nsf/170589492546a7fb802575c3004c6d7d/7bbd820c2e6d1ae480257ca6003b4ea0?OpenDocument&Highlight=0,orienta%C3%A7%C3%A3o,sexual.

<p>Main reasoning/argumentation</p>	<p>According to the South Administrative Central Court the report of the facts does not present enough evidence to reveal that the threat felt by the applicant is objective or even that he actually feels seriously threatened by persecution. Thus, taking into consideration the established facts, it cannot incur in any any error of law or fact invoked against the contested decision, which must be kept. As well decided by the <i>a quo</i> Court, the legal requirements for granting either the asylum request, or the subsidiary protection have not been met. In fact, according to the Geneva Convention of 1951 and in the New York Protocol, it is necessary that two elements are present: the subjective one, the fear, and the objective one, the objective situation on which those fears are based. It is up to the applicant requiring asylum right to prove, alleging and demonstrating, either directly or indirectly, his well-grounded fear of being persecuted by any of the reasons established by law, persuading the competent authorities that he was, and is, as a person, subject to persecutions or threats in the country of origin or where he usually lives, under the respective framework, which does not occur in the present situation. Although taking into consideration the public nature of the rights which are deemed to be safeguarded through the granting of the asylum status and the fact that, in most cases, it is difficult or impossible to obtain proof of the alleged facts, the burden of the proof is often mitigated by granting the benefit of the doubt, taking into account the special circumstances surrounding the request made, as long as the version of the facts claimed by the applicant is credible, coherent and consistent. In fact, in this specific case, there is not a minimum level of plausibility allowing supporting the requested protection. Likewise, the contested decision does not incur in the claimed complaint, as regards framing the request in the light of the “non-refoulement” principle, established in Article 33 of the European Covenant of Human Rights, since the factual situation, as characterized by the applicant does not fall within the claim that is put forward.</p>
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<p>Key issues (concepts, interpretations) clarified by the case</p>	<p>Article 3 (1) of Law 27/2008 of 30 June, establishing the conditions and procedures for the granting of asylum or subsidiary protection and the statuses of asylum applicant, refugee and subsidiary protection, transposing into the national jurisdiction Directives 2004/83/CE, and 2005/85/CE, such as paragraph 1 of Section 1, of Article 1 of the Geneva Convention, pertaining to the refugees' status, foresees that in order for the right of asylum to be granted it is necessary that the applicant: (i) is a foreigner or a stateless person; (ii) is being persecuted as a consequence of activity carried on in the country from where the person is a national or in his/her country of regular residence in favour of democracy, of social and national liberation, of world, of freedom and of human rights and (iii) feels seriously threatened as a consequence of the activity carried on in the country from where the person is a national or in his/her country of regular residence by the above mentioned reasons. Since it is not possible to draw from the applicant's asylum request or from the records, that he is being persecuted or that he feels seriously threatened, no facts have been produced that may substantiate the request for asylum, in the light of Article 3 (2) of Law 27/2008. Likewise, in accordance to article 3 (2) of the above mentioned Law, it has not been possible to establish that the applicant has well-founded fear to be persecuted on the grounds of race, religion, nationality, political opinion or belonging to any specific social group and that he cannot or does not wish to return, because of that fear, to the State of his nationality or residence. From the declarations made by the applicant it is also not possible to conclude that he has been threatened, since he does not make any mention to this issue, for the purpose of granting a residence permit on the grounds of humanitarian reasons, in accordance with Article 7 of Law 27/2008.</p>
<p>Results (sanctions) and key consequences or implications of the case</p>	<p>For all the above mentioned, the Judges of the South Administrative Central Court have agreed to dismiss the appellant's application and to uphold the contested decision.</p>

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.

	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, goods and services etc.)	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

	2010	2011	2012	2013
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

Total finding of Discrimination confirmed (by 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
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	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
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

	2010	2011	2012	2013
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

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
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Source: Authority for Working Conditions (*Autoridade para as Condições de Trabalho*, ACT)

Statistical information on Freedom of Movement

No data available.

	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	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A

	2010	2011	2012	2013
Number of LGBT partners of EU citizens residing in your country falling under Directive 2004/38/EC	N/A	N/A	N/A	N/A

Source: Service of Foreigners and Borders (*Serviço de Estrangeiros e Fronteiras*, SEF).

Statistical information on Asylum and Subsidiary Protection

	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

	2010	2011	2012	2013
Number of LGBT individuals benefiting from asylum/subsidiary protection due to persecution on the ground of sexual orientation	N/A	N/A	N/A	N/A
	2010	2011	2012	2013
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

Source: Service of Foreigners and Borders (*Serviço de Estrangeiros e Fronteiras*, SEF).

Statistical information on Family Reunification

No data available.

	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

	2010	2011	2012	2013
Number of LGBT partners of Third Country nationals residing in your country benefiting from family reunification	N/A	N/A	N/A	N/A

Source: Service of Foreigners and Borders (*Serviço de Estrangeiros e Fronteiras, SEF*).

Statistical information on freedom of assembly

	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				

	2010	2011	2012	2013
Number of demonstrations in favour of tolerance of LGBT people, gay pride parades etc	4*	4*	4*	10*
Number of demonstrations against tolerance of LGBT people				1*

Source: 2000-2009: ILGA Portugal and Opus Gay.

* Source: 2010-2013: ILGA Portugal.

Statistical information on criminal law, hate speech

No data available.

	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

	2010	2011	2012	2013
Number of court cases initiated regarding homophobic hate speech	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
Range of sanctions issued for homophobic hate speech	N/A	N/A	N/A	N/A
	2010	2011	2012	2013
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

Source: Directorate-General for Justice Policy (*Direção-Geral da Política de Justiça*, DGPIJ)

Statistical information on transgender issues

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

	2010	2011	2012	2013	2011-2013
Number of name changes effected owing to gender change	N/A	79*	44*	48*	156**
Number of persons who changed their gender/sex in your country under the applicable legislation	N/A	N/A	N/A	N/A	N/A

Source: 2000-2010:
Registration and Notary
Affairs (*Instituto dos Registos
e Notariado, IRN*)

* Source: Institute of
Registration and Notary

Affairs (*Instituto dos Registos e Notariado, IRN*)

** Source: *Correio da Manhã* (2013), '156 mudam de sexo em três anos', 23 October 2013.

Table 1: Requirements for rectification of the recorded sex or name on official documents

	Intention to live in the opposite gender	Real life test	Gender dysphoria diagnosis	Hormonal treatment / physical adaptation	Court order	Medical opinion	Genital surgery leading to sterilisation	Forced/ automatic divorce	Unchangeable	Notes
AT	✓	✓	✓	✓		✓	✗ court decision	✗ court decision		Legal changes expected to confirm court decisions
BE	✓			✓		✓	✓			Rectification of recorded sex
BE	✓			✓		✓				Change of name
BG				?	✓	✓	?	✓	✓ (birth certificate)	Only changes of identity documents are possible (gap in legislation)
CY						✓	✓	?		
CZ	✓	✓	✓	✓		✓	✓	✓		These requirements are not laid down by law, but are used by medical committees established under the Law on Health Care
DE	✓		✓		✓	✓				Small solution: only name change
DE	✓		✓	✓	✓	✓	✓	✗ court decision and law		Big solution: rectification of recorded sex

D K	✓	✓				✓	✓	?		Rectification of recorded sex
D K			✓			✓				Change of name
EE	✓	✓				✓	✓	?		
EL					✓	✓	✓	?		
ES			✓	✓		✓				
FI	✓	✓	✓			✓	✓	✓		Name change possible upon simple notification, also before legal recognition of gender reassignment
FR			✓	✓	✓	✓	✓	✓		Requirements set by case law, legal and medical procedures uneven throughout the country
H U						✓		✓		No explicit rules in place. Requirements descend from praxis, but unclear what is necessary in order to obtain a medical opinion. After 1 January 2011 a marriage can be transformed into a registered partnership
IE									✓	Further changes expected following court case <i>Lydia Foy</i> (2007)

									(name change possible by Deed Poll and under Passports Act 2008)	
IT			✓	✓	✓	✓	✓	✓		
LT									✓ (personal code)	Legal vacuum due to lack of implementing legislation, courts decide on an ad hoc basis.
LU										No provisions in force, praxis varies.
LV							✓	Change of name is possible after gender reassignment		Medical opinion is based on an intention to live in the opposite gender and on a diagnosis of gender dysphoria. For rectification of the recorded sex, currently the Ministry of Health decides case-by-case (parameters not specified). Amendments to the law were proposed but not adopted.
M T	✓	✓	✓	✓	✓	✓	✓	✓	(only unmarried, divorce not possible)	Requirements unclear, decided by Courts on an ad hoc basis
NL	✓	✓	✓	✓	✓	✓	✓	✓		According to Article 28a of the civil code, the requirement of physical adaptation does not apply if it would not be possible or sensible from a medical or

										psychological point of view. Changes are underway, forced sterilisation might be removed.
PL				✓	✓	✓	✓	✓		No legislation in place, requirements set by court practice
PT	✓		✓			✓				Law 7/2011, of 15 March ²¹⁴
RO				✓	✓	✓	✓			
SE	✓	✓			?	✓	✓	✓		Decision issued by forensic board
SI										No formalities for change of name
SK							✓	?		Change of name granted simply upon application accompanied by a confirmation by the medical facility.
U K										Change of name requires no formalities
U K	✓	✓	✓			✓		✓		Rectification of the recorded sex

²¹⁴ Portugal, Law 7/2011 which set in place the procedures for making a sex change and for taking on a new name at the Registry Office (*Lei n.º 7/2011 que cria o procedimento de mudança de sexo e de nome próprio no registo civil e procede à décima sétima alteração do Código de Registo Civil*), 15 March 2011, available at: <http://dre.pt/pdf1sdip/2011/03/05200/0145001451.pdf>.

Notes: This is not a table about the requirements for accessing gender reassignment treatment. This means, in particular, that gender dysphoria diagnosis might be in practice required by medical specialists as a pre-condition for a positive opinion. This situation is not captured by this table, which illustrates the conditions for legal recognition of gender reassignment.

✓= applies; ?=doubt; ✕=removed; change since 2008

Table 2: Discrimination on grounds of sexual orientation in legislation: material scope and enforcement bodies

Country Codes	Material scope			Equality body	Comments
	Employment only	Some areas of RED ²¹⁵	All areas of RED*		
AT		✓		✓	Two of nine provinces have not extended protection to all areas covered by RED: Vorarlberg and Lower Austria. Vorarlberg extended protection to goods and services in 2008.
BE			✓	✓	
BG			✓	✓	
CY	✓			✓	
CZ			✓		New anti-discrimination legislation adopted
DE			✓	✓	
DK	✓			✓	New equality body set up
EE	✓			✓	New anti-discrimination legislation adopted
EL	✓			✓	

²¹⁵ Employment discrimination is prohibited in all EU Member States as a result of Directive 2000/78/EC. Directive 2000/43/EC (Racial Equality Directive) covers, in addition to employment and occupation, also social protection (including social security and healthcare), social advantages, education and access to and supply of goods and services which are available to the public, including housing.

Country Codes	Material scope			Equality body	Comments
	Employment only	Some areas of RED ²¹⁵	All areas of RED*		
ES			✓		
FI		✓			
FR	✓			✓	
HU			✓	✓	
IE		✓		✓	
IT	✓				
LT		✓		✓	
LU		✓		✓	
LV		✓		✓	
MT	✓				
NL		✓		✓	
PL	✓				

Country Codes	Material scope			Equality body	Comments
	Employment only	Some areas of RED ²¹⁵	All areas of RED*		
PT			✓	✓	<p>Article 13 of the Portuguese Constitution prohibits discrimination on grounds of sexual orientation.</p> <p>Mention should also be made to specific anti-discrimination provisions included in article 240 of the Penal Code as well as in the Statute of Student and School Ethics.</p> <p>There is no explicit prohibition of discrimination on grounds of sexual orientation or gender identity regarding social protection and access to goods and services.</p> <p>The CIG has competences in the area of non-discrimination in general, and on non-discrimination on grounds of sexual orientation or gender identity according to the IV and V National Action Plan for Equality – Gender, Equality and Non-Discrimination. But this is not included in its organic law. The CIG is not empowered to assist victims of discrimination in legal procedures or to issue penalties related to complaints.</p>
RO			✓	✓	
SE			✓	✓	
SI			✓	✓	
SK			✓	✓	
UK			✓	✓	<p>The Equality Act 2010 replicates the sexual orientation protection offered in the Equality Act (Sexual Orientation) Regulations 2007 and the Employment Equality (Sexual Orientation) Regulations 2003 and expands protection in a number of ways. The new Equality Act is expected to enter into force October 2010.</p>
TOTAL	9	7	11	20	

Note: ✓ = Applies; ? = doubt; X = removed; **change since 2008**

Table 3: Discrimination on grounds of gender reassignment or identity in national legislation

Country Codes	Form of “sex” discrimination	Autonomous ground	Dubious/unclear	Comments
AT	✓			Legal interpretation and explanatory memorandum
BE	✓			Explicit provision in legislation or <i>travaux préparatoires</i>
BG			✓	
CY			✓	
CZ	✓			The new Antidiscrimination Act makes reference to ‘gender identification’.
DE			✓	Constitutional amendment proposal by opposition (‘sexual identity’)
DK	✓			Decisions by the Gender Equality Board
EE			✓	The Gender Equality and Equal Treatment Commissioner has dealt with one application and took the view that the Gender Equality Act could apply to ‘other issues related to gender’.
EL			✓	
ES			✓	The Constitutional Court held that gender identity is to be read in among the prohibited grounds of discrimination in Article 14 of the Constitution. Together with the adoption of several regional laws, a trend can be noted towards the protection of gender identity.

Country Codes	Form of “sex” discrimination	Autonomous ground	Dubious/unclear	Comments
FI	✓			Committee for law reform proposes to explicitly cover transgender discrimination in equality legislation.
FR	✓			Case law and decisions by the equality body
HU		✓		
IE	✓			The Employment Equality Act 1998-2004 is interpreted in accordance with the case law of the Court of Justice of the EU.
IT			✓	
LT			✓	
LU			✓	
LV			✓	
MT			✓	
NL	✓			Case law and opinions of the Equal Treatment Commission
PL			✓	
PT		✓		Gender identity is one of the factors of the discrimination crime foreseen in article 240 of the Penal Code and is an aggravating circumstance in other crimes.

Country Codes	Form of “sex” discrimination	Autonomous ground	Dubious/unclear	Comments
				Gender identity is also one of the factors on the basis of which a student has the right not to be discriminated against and the duty to not discriminate. ²¹⁶
RO			✓	
SE	✓	✓		Discrimination on grounds of gender reassignment is still considered ‘sex’ discrimination. The new ground ‘transgender identity or expression’ now covers other forms of gender variance, regardless of gender reassignment.
SI			✓	The Act Implementing the Principle of Equal Treatment contains an open clause of grounds of discrimination.
SK	✓			Explicit provision in legislation
UK		✓		The Equality Act 2010 replicates the ‘gender reassignment’ protection offered in the Sex Discrimination Act since 1999, but removes the requirement to be under “medical supervision” and expands protection in several ways. The new Equality Act is expected to enter into force in October 2010.
TOTAL	10	3 4	15 14	

Note: ✓ = applicable; positive development since 2008

²¹⁶ Portugal, Law 51/2012 which approves the Statute of Student and School Ethics (*Lei n.º 51/2012 que aprova o Estatuto do Aluno e a Ética Escolar*), 5 September 2012, available at: <https://dre.pt/pdf1sdip/2012/09/17200/0510305119.pdf>.

Table 4: Criminal law provisions on ‘incitement to hatred’ and ‘aggravating circumstances’ covering explicitly sexual orientation

Country Codes	Criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation	Aggravating circumstance	Comments
AT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
BE	✓	✓	
BG			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
CY			General provisions could extend to LGBT people.
CZ			New Criminal Code in 2009 contains no explicit recognition of homophobic hate crimes. LGBT could fall under the category ‘group of people’, but as the law entered into force in January 2010 there is no case law yet. The explanatory report of the law also does not define the term.
DE			Hate speech legislation does not explicitly extend to homophobic motive, but extensive interpretation has been confirmed by courts.
DK	✓	✓	
EE	✓		
EL		✓	Article 23 of Law 3719/2008 provides for an aggravating circumstance in cases of hate crime based on sexual orientation.
ES	✓	✓	

Country Codes	Criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation	Aggravating circumstance	Comments
FI		✓	According to the pertinent preparatory works, LGBT people could fall under the category 'comparable group'. A working group has proposed that the provision on incitement be amended to explicitly cover sexual minorities (2010).
FR	✓	✓	
HU			LGBT people could fall under the category 'groups of society'. Penal Code was amended to include hate motivated crimes against 'certain groups of society'. Case law has shown this includes the LGBT community.
IE	✓		Homophobic motivation might be taken into consideration at the sentencing stage, but this is left to the discretion of the courts.
IT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
LT	✓	✓	Homophobic motivation was included in the list of aggravating circumstances in June 2009.
LU			General provisions could extend to LGBT people.
LV			Homophobic motivation might be taken into consideration at the sentencing stage, but this is left to the discretion of the courts.
MT			Existing provisions of the criminal law against incitement to hatred explicitly restrict the protection to groups other than LGBT people.
NL	✓	✓	The 2009 Public Prosecution Service's Bos/Polaris Guidelines for Sentencing recommend a 50% higher sentence for crimes committed with discriminatory aspects.

Country Codes	Criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation	Aggravating circumstance	Comments
PL			
PT	✓	✓	Sexual orientation was already one of the factors for hate crimes foreseen in article 240 of the Penal Code and was an aggravating circumstance in other crimes. Following the amendment made by Law 19/2013 of 21 February, gender identity is also included. ²¹⁷
RO	✓	✓	Art. 317 of the Criminal Code sanctions only hate speech as 'incitement to discrimination', but includes sexual orientation. Article 369 on incitement to hatred does not mention sexual orientation explicitly, but covers incitement against a 'category of persons', without further specification. The new Criminal Code will enter into force on 1 October 2011.
SE	✓	✓	
SI	✓		Article 297 of the new Penal Code concerning provoking or stirring up hatred, strife or violence, or provoking other inequality explicitly includes sexual orientation. Homophobic intent is only considered an aggravating circumstance in the case of murder.
SK			LGBT people could fall under the category 'group of people'
UK (N-Ireland)	✓	✓	

²¹⁷ Portugal, Law 19/2013, 29th amendment to the Penal Code, (*Lei 19/2013, 29.ª alteração ao Código Penal*), 21 February 2013, available at: <http://dre.pt/pdf1s/2013/02/03700/0109601098.pdf>.

Country Codes	Criminal offence to incite to hatred, violence or discrimination on grounds of sexual orientation	Aggravating circumstance	Comments
UK (England & Wales.)	✓	✓	The Criminal Justice and Immigration Act 2008, extending provisions on incitement to racial or religious hatred to cover the ground of sexual orientation, came into force on 23.03.2010. It applies to Scotland as well.
UK (Scotland)	✓	✓	In June 2009, the Offences (Aggravation by Prejudice) (Scotland) Act was passed, entry into force on 24 March 2010, also indicating homo- and transphobic motive as an aggravating circumstance.

Note: ✓= applicable; positive development since 2008

Table 5 - Definition of ‘family member’ for the purposes of free movement, asylum and family reunification

Country Codes	Free movement ²¹⁸		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
AT		✓		✓		✓	Article 59 of the Registered Partnership Act (BGBl. I, No. 135/2009) modifies Article 9 of the Settlement and Residence Act, which now stipulates that the definition of ‘family member’ includes a registered partner. Article 57 of the Registered Partnership Act modifies Article 2/1 of the Asylum Act [Asylgesetz], which now stipulates that the definition of ‘family member’ includes a registered partner, provided that the registered partnership had already existed in the country of origin. Same-sex spouses are likely to be treated as registered partners.
BE	✓	✓	✓	✓	✓	✓	
BG							Article 7 of the new Family Code (01.10.2009) confirms that marriage is a mutual agreement between a man and a woman.
CY							
CZ		✓		✓		✓	Same-sex spouses are likely to be treated as registered partners. Rights concerning family reunification and asylum are restricted to registered partnerships.
DE		✓		✓		✓	Same-sex spouses are likely to be treated as registered partners. Rights concerning family reunification and asylum are restricted to registered partnerships.
DK	✓	✓	✓	✓	✓	✓	

²¹⁸ In the vast majority of the Member States, no clear guidelines are available concerning the means by which the existence either of a common household or of a ‘durable relationship’ may be proven for the purposes of Art. 3 (2) of the Free Movement Directive.

Country Codes	Free movement ^{t218}		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
EE							The new Family Law Act (entry into force 01.07.2010) defines marriage as a different-sex institution only and considers marriage between persons of the same-sex same-sex invalid. Family reunification possible when the partner can prove that he/she is economically or socially dependent.
EL							
ES	✓	✓	✓	✓	✓	✓	Organic Law 2/2009 of 11 December (Spain/Ley Orgánica 2/2009 (11.12.2009)) has modified Organic Law 4/2000 in order to grant couples who have an affective relationship similar to marriage the right to family reunification. Implementing regulations to this law have not been adopted, thus the meaning of the requirement that the 'affective relationship' be 'duly attested' remains to be clarified. Article 40 of the Law 12/2009 of 30 October on the right to asylum and subsidiary protection [del derecho de asilo y de la protección subsidiaria] replaces Law 5/1984 of 26.03.1984 and, by transposing the EU acquis, confirms the notion that a family member includes the de facto partner having an affective relationship similar to marriage.
FI	✓	✓	✓	✓	✓	✓	
FR	?	?	?	?	?	?	As a result of the entry into force on 14.05.2009 of a new Article 515-7-1 of the French Civil Code, inserted by law 2009-526 of 12.05.2009, foreign registered partnerships are recognised in France; the repercussions of this change for the purposes of free movement of EU citizens are still unclear. Family reunification of third country nationals depends upon the authorities' discretion, which may require additional conditions. No information available on refugees.
HU		✓		✓		?	Entry and residence rights for free movement are also granted for the unmarried <i>de facto</i> partner, subject to conditions.
IE		✓		✓		✓	Adoption of Civil Partnership Act in 2010. Immigration, Residence and Protection Bill not yet enacted, but the government intends to treat registered partners in the same way as spouses.
IT							
LT							

Country Codes	Free movement ^{t218}		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
LU		✓		✓		✓	The new law on free movement and immigration (29.08.2008) recognises as a family member a spouse or registered partner provided the conditions set forth in article 4 of the partnership law (09.07.2004) are fulfilled. Rights concerning family reunification and asylum are restricted to registered partnerships. Same-sex spouses are likely to be treated as registered partners.
LV		✓					Article 3.4 of the Cabinet of Ministers Regulation No. 586 on Entry and Residence includes in its definition of family member a person who is a dependant of a Union citizen or his or her spouse and who has shared a household with a Union citizen in their previous country of domicile.
MT							
NL	✓	✓	✓	✓	✓	✓	
PL							
PT	✓	✓	✓	✓	✓	✓	Allows same-sex couples to enter into a marriage since June 2010.
RO		?					The new Civil Code (2009) includes a prohibition of same-sex partnership and marriage, including denial of recognition of partnerships and marriages concluded in other countries.
SE	✓	✓	✓	✓	✓	✓	Allows same-sex couples to enter into a marriage since May 2009.
SI							Provides a legal scheme for registered partnership in domestic law, but without granting entry and residence rights to registered partners
SK							Family reunification possible when the partner can prove economic or social dependence.
UK	✓	✓	✓	✓	✓	✓	

Country Codes	Free movement ²¹⁸		Family Reunification		Asylum		Comments
	spouse	partner	spouse	partner	spouse	partner	
TOTAL	8	15	8	13	8	12	

Note: ✓ = applicable; ? = doubtful/unclear; positive changes since 2008; other developments since 2008.