Portuguese Law and Sexual Orientation

Ana Cristina Santos
Ana Cristina Santos is a sociologist working, since 1998, in the Centre for Social Studies of the University of Coimbra. She is also a researcher for the international project Reinventing Social Emancipation, online here. She is currently finishing her MA thesis on the subject of LGBT human rights.

Portugal finds itself in an ambiguous position today, attempting both to defend the principles of equality promoted by the EU and, at the same time, to uphold the country's conservative moral standards, resulting from centuries of religious tradition and a lack of social debate.

There is a growing gay rights movement in Portugal. During the last decade, Portuguese society has witnessed protests, demands and debates concerning lesbian, gay, bisexual and transgendered (LGBT) rights. Set against this, the Portuguese state continues to constrain LGBT identity through juridical omission or ineffective implementation of relevant laws. Discrimination in the public and private spheres can be partially explained by the strong regulatory influence of the Catholic church.

The Portuguese state shoulders little responsibility in the social realm generally and in the field of sexuality in particular. Where laws to protect difference exist they often remain unimplemented. [1] Homosexuality is notable in the Portuguese legal system rather for its absence than for any direct discrimination. However, omissions in the law allow social exclusion to thrive, forcing sexual difference into a murky realm of legal impotence. To this day, Portuguese law does not punish discrimination on grounds of sexual orientation, despite European Union recommendations. [2] With homophobic violence on the rise, the need for legal recourse is increasingly evident.

Legislating for sexuality

Homosexuality was criminalized in Portugal throughout the years of the Salazar dictatorship (1926-1974), in laws dating back to 1912. The 1966 penal code stipulated a maximum two-year sentence "to whomsoever frequently makes an indecent assault on someone of the same sex" (Article 253). Not until 1982 were amendments introduced decriminalizing homosexual relations in private between people over sixteen.

Portugal's 1986 accession to the EU benefited lgbt citizens in several ways, mainly through contact with the freedoms enjoyed in other countries. [3] Following further amendments to the code in 1995, crimes relating to sexuality were no longer considered to be "against the values and interests of social life", constituting instead a separate chapter of the code labelled "crimes against sexual freedom and self-determination". Apparently, the individual right to sexual freedom and self-determination now outweighed the collective moral values of society in the eyes of the lawmakers. The pejorative term "indecent assault" was replaced by the more neutral "sexual action", and then redefined in detailed descriptions of specific sexual practices.

However, homosexuality continues to appear as an aggravating factor in Article 175 of the penal code: "induced misconduct of minors by adults of the same sex". This article repeats interdictions already laid down in previous articles - "sexual abuse of children" (art. 172), "sexual abuse of teenagers and subordinates" (art. 173) and "rape" (art. 174) - but apparently additionally punishes the sexual orientation of the abuser. As in some other European countries, the age of consent is discriminatory. Sex between an adult and a minor is permissible from the age of 14 amongst heterosexuals, 16 for gay people.

Outside the legal arena, severely discriminatory provisions appear in the internal regulations of certain public institutions. Some examples:

- *The army*: Although prison sentences for gay soldiers, laid down in the 1925 Code of Military Justice, were finally abolished in 1977, more than 20 years later the guidelines for recruitment dating from 1989 still include "homosexuality and other sexual perversions" under the chapter heading "neurotic, behavioural and other perturbations". [4]
- *Healthcare*: An internal regulation of the Portuguese Institute of Blood, a public entity attached to the Ministry of Health, excludes gay men from donating blood. In April 1999, the Institute's president justified the exclusion on the basis of an alleged high level of promiscuity among gay people. [5]
- *Prisons*: On the 28 August 2000, the General Directorate of Correctional Services took steps to hire 116 prison guards. The list of inadmissible criteria contained a section on psychopathic diseases, which specifically included "sexual perverts, especially inverts". [6] This norm was changed later following protests by Portuguese lgbt organisations.

Portuguese courts have not so far proved effective in defending difference and eliminating prejudice. In one striking example, a gay father lost custody of his eight-year-old daughter specifically because of his sexual orientation. The ruling reversed an earlier 1994 decision of the Family Court, which had broken new ground by granting him custody in full awareness of his sexual orientation. In 1996, following a petition by the mother to the Court of Appeal, the previous decision was revoked, according to lead justice Dinis Nunes, because: "The young girl should be raised in a traditional Portuguese family and this is certainly not the kind of family her father wants, since he lives with another man as if they were wife and husband." [7] In December 1999, the European Court of Human Rights rejected the appeal decision as a violation of Article 14 of the European Convention of Human Rights. [8] The Portuguese state was ordered to pay the man 1,800,000 escudos (c. € 400,000).

Prejudice in a conservative place

Analysed from the perspective of gay rights, Portuguese legislation exhibits numerous opportunities for discrimination against lgbt individuals, and denial of access to certain rights and guarantees. [9] Legitimised by law, discrimination spreads throughout the public and even private spheres.

The first known homophobic attack took place in 1996 outside a disco-pub named "Kings and Queens", where two gay men were stabbed. In that same year, when the first Gay and Lesbian Community Centre was opened in Lisbon, posters appeared throughout the city defending the creation of special clinics for the confinement and rehabilitation of gay people. [10]By the year 2000, gangs roamed the cities of Braga and Évora, harassing homosexual men in known gay haunts.

Another example of public sector homophobia was the publication, by the Superior Council of Statistics, on 6 January 1999, of the *National Classification of Disabilities*, which included the category "deficiency of the heterosexual function" - effectively classifying homosexuals as disabled. Under the same chapter-heading ("Emotional Disabilities"), the "deficiency" was listed alongside anorexia, bulimia, alcoholism and drug addiction. [11] The classification was removed two months later, following campaigns by LGBT organisations.

Far from moving to defend gay victims of discrimination and violence, the Roman Catholic church, a powerful influence in Portuguese society, has rather contributed to the problem. In 1994, for example, archbishop Eurico Dias Nogueira classified LGBT relationships as freaks of nature, stating that it would be "absolute nonsense" to classify them as having rights equivalent to the family. [12] Again, sustained lobbying on the part of gay rights organisations was required before this stigma finally began to lift.

Asserting LGBT rights

These incidents reveal the relative and recent successes of gay rights groups in Portugal, most ow which emerged only in the 1990s. [13] The largest LGBT organisation in the country, ILGA-Portugal was officially recognised in April 1996 at the same time as the Lisbon City Hall President inaugurated the new Gay and Lesbian Community Centre. The existence of these organisations and their increasing activities - the Pride Celebration, Gay and Lesbian Film Festivals and street marches - amount together to a new social movement. [14]

Legal activism in Portugal has centred with varying degrees of success on a range of issues, encompassing domestic partnership, sex education and the inclusion of "sexual orientation" among the suspect grounds for discrimination in the Constitution. [15] In the latter case, an amendment proposed by ILGA-Portugal was adopted by the Green Party, but failed to achieve the two-thirds parliamentary majority required for legal passage.

Domestic partnership was championed by an organisation known as "Socialist Youth" in 1997. In May 1998, when Parliament heard the demands of non-married heterosexual couples, this group insisted on the need to expand legal protection to gay domestic partnerships also. [16] After several setbacks, legal rights and tax benefits were finally granted to LGBT couples living together for more than two years in March 2001. Other important legal issues which have mobilised LGBT movements elsewhere, such as marriage, adoption and the age of consent, remain to be addressed. [17]

In a society that is still very conservative when it comes to sexuality, [18] the political message is gradually changing towards respect for sexual diversity and the right to free expression of sexuality. The state appears to finally recognise the importance of information and public debate on these issues, about which Portuguese society has been traditionally silent, both publicly and privately. However, progress to date has been characterised by juridical and political hesitancy: few positive measures to fight discrimination on the basis of sexual orientation have been advanced.

The significance of these developments has wider application than the rights of LGBT persons alone. Discussion of sexual identity is one way to make democratic societies more inclusive for all, providing an opportunity to "democratise democracy". [19] In the interests of creating a European society where difference is a value in itself, it is vital to prevent the hegemony of a homogenous heterosexual identity.

Footnotes

[1] See De Sousa Santos, B. (1995), *Pela Mão de Alice. O Social e o Político na Pós-Modernidade.*

[2] See, among others, the report and resolution adopted by the European Parliament on 16 March 2000 on the respect of human rights in the European Union (EP document A5-0050/2000) and the resolution on equal rights for gays and lesbians in the European community (A3-0028/94); see also recommendations 924 (1981) and 1474 (2000) of the Council of Europe and Opinion No. 216 (2000) to the Draft Protocol No. 12 to the European Convention on Human Rights by the Parliamentary Assembly of the Council of Europe.

[3] See Clapham, A; Weiler, J. (1993), "Lesbians and Gay Men in European Community Legal Order", in K. Waaldijk and A. Clapham (eds.), *Homosexuality: A European Community Issue*, pp. 38-69; Bell, M. (1998), "Sexual Orientation and Anti-Discrimination Policy. The European Community", in T. Carver and V. Mottier (eds.), *Politics of Sexuality. Identity Gender, Citizenship*, pp. 58-67.

[4] See ILGA-Portugal (1999), "A Discriminação em Portugal. Enquadramento Jurídico Geral", p.2.
Online at: http://www.ilga-portugal.org/portugues/inf/conjuga.html, accessed 7 July 1999.

[5] *Público*, 20 April 1999.

[6] Vilar, E. (2000), "'Invertidos' Fora de Concurso", *Público*, 30 August 2000, p. 22.

[7] Soares, M. G. (1996), "Tribunal Retira Filha a Homossexual", *Expresso*, 3 February 1996.

[8] Salgueiro da Silva Mouta v. Portugal (No. 33290/96), 21 December 1999 [Section IV].

[9] Fontes, F. and Santos, A. C. (1999), *Descobrindo o Arco-Íris. Identidades Homossexuais em Portugal [Searching for the Rainbow. Homosexual Identities in Portugal]*. Graduation thesis in Sociology. Faculty of Economics of the University of Coimbra.

[10] See Fontes and Santos.

[11] *Diário da República* [state official publication], 6 January 1999, Second series, p.110.

[12] Rodrigues, L. P. (1994), "Uniões de Facto São Marginais", *Expresso*, 26 July 1994.

[13] The Homosexual Working Group (GTH) was founded in 1991, ILGA-Portugal in 1995, Clube Safo in 1996, Opus Gay in 1997. Other groups have emerged lately.

[14] The first street march, in Lisbon in 2000, attracted around 500 LGBT people. The march was successfully repeated in June 2001.

[15] Constitution of Portugal, Article 13, Para. 2: "No one can be privileged, benefited, harmed, prevented from any right or excused from any duty based on background, sex, race, language, place of birth, religion, political or ideological beliefs, education, economic situation or social condition".

[16] Juventude Socialista (1999), "União de Facto".
Online here, accessed 21 August 1999.

[17] See Waaldijk and Clapham; Van der Veen, E., Hendriks, A., Mattijssen, A. (1993), "Lesbian and Gay Rights in Europe: Homosexuality and the Law", in A. Hendriks *et al* (eds), *The Third Pink Book. A Global View of Lesbian and Gay Liberation and Oppression*, pp. 225-245.

[18] In one recent survey, the percentage of Portuguese who reject homosexual relationships outright is 80%, similar to the percentage who reject adultery on moral grounds. Pais, J. M. (ed.) (1998), *Gerações e Valores na Sociedade Portuguesa Contemporânea*.

[19] De Sousa Santos, B. (1998), "Globalização: o Regresso das Identidades". Presentation at the Faculty of Economics of the University of Coimbra, 18 March 1998.