

**Universal Periodic Review of Portugal**

**19<sup>th</sup> Session**

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**Joint submission by:**

**APF – Portuguese Family Planning Association**

**[www.apf.pt](http://www.apf.pt)**



**&**

**Sexual Rights Initiative**



**Key Words: LGBT rights, LGBT parenting projects, adoption, medically assisted procreation, sexual orientation discrimination.**

### **Executive Summary**

1. This report is jointly submitted by APF<sup>1</sup> – Portuguese Family Planning Association, and the SRI<sup>2</sup> – Sexual Rights Initiative. The report advocates for the adoption of a Human Rights-based approach concerning lesbian, gay, bisexual and transgender (LGBT) people in Portugal, specifically as it relates to the right to form a family as proclaimed in article 16 of the Universal Declaration of Human Rights (UDHR). Portugal does not allow LGBT couples to adopt children and denies access to medically assisted procreation to these couples and also to single women. Other forms of discrimination against LGBT people are frequent in Portuguese society, such as blood donation of men who have sex with men (MSM). This report analyses the context concerning these issues and provides recommendations aimed at advancing the Human Rights of LGBT people.

### **Progress and gaps in implementation of recommendations from previous cycle**

2. Since 2009, when Portugal underwent its first review within the Universal Periodic Review (UPR), Portugal made several efforts in to fulfill its accepted recommendations, especially those related to Gender Equality issues. APF, as a leading Portuguese civil society organization regarding Sexual and Reproductive Health and Rights (SRHR), positively notes all the improvements that have been adopted by Portugal.
3. We also underline some efforts made in what concerns some LGBT rights, particularly all the legislation improvements made in early 2010 that allowed same sex marriages. Furthermore, Portugal was advised to ratify the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD), which it did in 2009, as well as to follow up the recommendations made by the Committee on the Elimination of Discrimination Against Women (CEDAW). Since 2009, Portugal has reinforced its attention to violence against women/gender based violence, particularly improving the fight against domestic violence, human trafficking (especially of woman and girls) and sexual exploitation, by, for example, increasing the budget to support NGOs working in these areas.

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<sup>1</sup> APF (Portuguese Family Planning Association) is a Portuguese NGO for Development. Working since 1967, its mission is to contribute so people can make free and responsible choices in their sexual and reproductive lives, including the promotion of positive parenting. APF focus its work through nationally and internationally advocacy, raising awareness to Sexual and Reproductive Health and rights issues. At same time, APF is responsible for several community development projects across all country, operating specially towards specific vulnerable groups such as male and female sex workers, drug addicts, roma people, human traffic female victims (and their minor children), female genital mutilation affected migrant communities and adolescent mothers. APF has a strong training center specialized in sexual education and frequently trains teachers, parents and students, as well as frequently produces educative materials to help sexual education of young people. APF is also providing intense training in human trafficking issues, raising awareness at schools, but also working with health professionals, police forces and municipality social networks.

<sup>2</sup> The Sexual Rights Initiative (SRI) is a coalition of organizations that advocates for the advancement of human rights in relation to gender and sexuality within international law and policy. The SRI focuses its efforts particularly on the work of the United Nations Human Rights Council, including its resolutions and debates as well as the work of the Universal Periodic Review mechanism and the system of Special Procedures. The SRI combines feminist and queer analyses with a social justice perspective and a focus on the human rights of all marginalized communities and of young people. It seeks to bring a global perspective to the Human Rights Council, and collaborates in its work with local and national organizations and networks of sexual and reproductive rights advocates, particularly from the Global South and Eastern Europe. The SRI partners are: Action Canada for Population and Development, Akahatá - Equipo de Trabajo en Sexualidades y Géneros, Coalition of African Lesbians, Creating Resources for Empowerment in Action (India), Egyptian Initiative for Personal Rights, and Federation for Women and Family Planning (Poland).

4. An additional example of this is 'CAP' - a shelter for human trafficking victims, run by APF, with the support from Portuguese state mechanisms (including: Ministers Council Presidency, Ministry of Internal Administration, Ministry of Justice, Ministry of Social Security and Work). This shelter provides support for women (and their minor children) that are identified as human trafficking victims, regardless of nationality, age, religion, ethnicity, sexual orientation, disability, marital status, political orientation and socio-economic status. CAP is also supported by Multidisciplinary Teams that follow an intervention accordingly to the action process used in Portugal called Signalization, Identification and Integration of Victims Model. Since November 2012, AFP assisted to the arrival of four new multidisciplinary teams, following a call for proposals from the Portuguese government.
5. At same time, Portugal provided training to personal, especially police, prison and judicial personal on Sexual Rights issues on using a human rights-based approach. This training was very important but, nevertheless, it is very much focused on gender based violence, rather than adopting a more comprehensively approach which could address issues related to sexual rights, namely those related to sexual orientation and gender identities, as was recommended to Portugal in the outcome report of its last UPR review<sup>3</sup>.
6. The Report of the Working Group on the UPR of Portugal states in paragraph 8: "Portugal noted the appointment of a Secretary of State for Equality, who will have within her priorities the fourth National Plan for Equality and Against Domestic Violence and the second National Plan against Trafficking in Human Beings. She will promote women's entrepreneurship in the context of fighting the global economic and financial crisis. The Government will propose to Parliament the adoption of an Equality Act and a **new legislation to allow same sex marriages**".
7. Portugal has managed significant advances in LGBT civil rights, especially with equal and legal access to civil marriage - Law 9/2010<sup>4</sup> approved by the Parliament in 2010 - and legislating on gender identity by facilitating and dignifying the process and establishing the procedures for sex and name changing in the registration services - Law 7/2011<sup>5</sup> approved by the Parliament in 2011. This law allows transgender people to have the right to its identity, making Portugal a European example of commitment to human rights.
8. The fight for non-discrimination based on sexual orientation and gender identity is closely linked to the struggle for equality between men and women, and both the Portuguese LGBT movement and the Portuguese institutions and mechanisms of state, such as Commission for Citizenship and Gender Equality (CIG) recognize it.
9. Despite evidence of progress, there are some aspects regarding LGBT people's human rights that are still neglected by Portuguese law or by its mechanisms and formal procedures that require addressing.

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<sup>3</sup> Portugal accepted recommendations on last UPR cycle from Slovenia, Bosnia & Herzegovina and Czech Republic on training for state personal on sexual rights issues. Particularly Czech Republic suggested that Portugal should adopt further measures to provide police, prison and judicial staff with human rights training with specific focus on protection of human rights of women, children, ethnic or national minorities as well as of **persons of minority sexual orientation or gender identity** and strengthen the accountability of such personnel for their proper conduct, particularly when dealing with cases of hate crimes.

<sup>4</sup>Diário da República, 1.ª série — N.º 105 — 31 de Maio de 2010 (<http://dre.pt/pdf1s/2010/05/10500/0185301853.pdf>)

<sup>5</sup>Diário da República, 1.ª série — N.º 52 — 15 de Março de 2011 (<http://dre.pt/pdf1sdip/2011/03/05200/0145001451.pdf>)

## **Background and context**

10. Portuguese Republic Constitution (CRP)<sup>6</sup> is very clear in its Article 13 when sustaining the **Principle of Equality**: “1 - All citizens have the same social dignity and are equal before the law. 2 - No one can be privileged, favoured, prejudiced, deprived of any right or exempted from any duty on the basis of ancestry, sex, race, language, territory of origin, religion, political or ideological convictions, education, economic status, social status or sexual orientation”.
11. The CRP also sustains in its Article 36, on Family, Marriage and Affiliation, that “1 - everyone has the right to form a family and to marry on terms of full equality” and, about adoption as an option to families parenting projects, in its no. 7, the article states that this matter is “regulated and protected by law, which shall ensure the expeditious conduct of the procedure”.
12. Beyond the UDHR, Portugal has ratified several international Human Rights instruments. One of them is the European Convention on Human Rights (ECHR) of the European Council. In March 2010, the Committee of Ministers of Member States adopted measures to combat discrimination on grounds of sexual orientation or gender identity, providing some recommendations<sup>7</sup>.
13. The document (ECHR) has a specific point on the Right to respect for private and family life. According to the document, “where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation”. The same document makes considerations on parenting:
  - 13.1. “Taking into account that the child’s best interests should be the primary consideration in decisions regarding the parental responsibility for, or guardianship of a child, member states should ensure that such decisions are taken without discrimination based on sexual orientation or gender identity”.
  - 13.2. “Taking into account that the child’s best interests should be the primary consideration in decisions regarding adoption of a child, member states whose national legislation permits single individuals to adopt children should ensure that the law is applied without discrimination based on sexual orientation or gender identity”.
  - 13.3. “Where national law permits assisted reproductive treatment for single women, member states should seek to ensure access to such treatment without discrimination on grounds of sexual orientation”.
14. Portugal values the international human rights instruments which it has ratified, and their recommendations, and is committed to ensuring compliant national legislation. It is widely recognized that these documents provide guarantees on the human rights of LGBT individuals to form a family, and their right to benefit from scientific progress (including reproductive technologies).
15. The advances that Portugal has made in regard to legislating same sex marriage, as well as the gender identity law were due to two important dynamics in Portuguese society. On one hand the associative movement that acted towards the struggle for equality and rights; on the other, the institutionalization of legal and state mechanisms to promote gender equality adopted by

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<sup>6</sup> The CRP can be found at <http://www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx>

<sup>7</sup> More information at [http://www.coe.int/t/dg4/lgbt/Source/RecCM2010\\_5\\_EN.pdf](http://www.coe.int/t/dg4/lgbt/Source/RecCM2010_5_EN.pdf)

the Portuguese state, namely the reinforcement of the work developed/coordinated by CIG through different specific National Plans: Citizenship and Gender Equality, Domestic Violence, Human Trafficking and Female Genital Mutilation.

16. Several public debates and media attention around same sex marriage have provided social attention to the LGBT movement's agenda. The issue of sexual orientation has recently become a cleavage line between conservative and progressive visions of society. This contributed to a clearer definition of opposite fields (until then uncommon in Portugal, with exception to the debate on abortion) indicating a significant sociological change. If, on one hand, some actors of Portuguese society oppose all kind of adoption by same sex couples, as they opposed legislating on same sex marriages (such actors include: anti-choice organizations and some individuals who broadly oppose respect for Sexual and Reproductive Health and Rights); on the other hand, there seems to be a growing tolerance to the promotion of full and equal LGBT rights, being this issue currently considered to be of interest to the general public. For example, the LGBT movement is growing stronger, particularly in terms of the ability to participate at media, volunteer mobilization and participation in associations, and public and private recognition of their role and service offerings. New associations have appeared, bringing into public new perception concerns, such as AMPLOS<sup>8</sup>, the first association, in Portugal, of mothers and fathers advocating for freedom of their sons and daughters to express their sexual orientation.
17. Despite such advances, and the legalization of same-sex marriage in 2010, contradictions in Portuguese society and the specific political ideology of Portuguese government and party system represented at the Parliament, have led to the postponing of ending some other inequalities, particularly concerning the area of reproduction and parenting, for being considered divisive political issues.

### **Human Rights of LGBT individuals and the Family**

18. Several recognized collegiate bodies have shown that a child raised by a same sex couple is in no way impaired. The cognitive, emotional, physical and sexual development is not affected by the educators gender as already concluded the American Academy of Child and Adolescent Psychiatry, American Academy of Pediatrics, the American Academy of Family Physicians, the American Medical Association, the American Psychiatry Association, the American Psychological Association, the American Psychoanalytic Association, the Child Welfare League of America, the National Association of Social Workers and the North American Council on Adoptable Children.
19. Law 9/2010, as mentioned, allowed same sex marriages and introduced, in its article 2, some alterations to Civil Code, namely to article 1577, which has changed according the following: "Marriage is a contract between two people wishing to form a family through full communion of life, under the provisions of this code".
20. Despite the victory and advances on LGBT rights, Portuguese law upholds barriers to LGBT people parenthood rights - Law 9/2010, in article 3 particularly addresses Adoption: "1 - The amendments made by this Law do not imply the legal admissibility to adoption, in any way, by persons married to a same sex spouse. 2 - No legal provision on adoption can be interpreted contrary to the provisions of previous paragraph".

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<sup>8</sup> More in formation at <http://amplosbo.wordpress.com/>

21. The approach taken by Portugal differs from other countries where adoption was recognized at same time as same sex marriage (e.g. Netherlands, Spain, France), or even where adoption preceded the recognition of same sex marriages (e.g. UK). In fact, same sex couples can marry or live in a *união de facto*<sup>9</sup> (union) but are unable to fully benefit from these rights, when compared to different sex marriages and unions. Indeed, by not being considered able to adopt children, these couples see denied their right to form a family. This is despite the CRP and the UDHR which both explicitly recognize the principle of non-discrimination on the grounds of sexual orientation and the right of all people to form a family<sup>10</sup>.
22. Portuguese Members of Parliament (MPs) are divided in what concerns legal right to adoption by same sex couples and several initiatives took place in last years. In February 2012 left wing parties presented bills regarding the abolition of impeditive clauses in the law that forbid same sex couples to adopt a child, but they were all rejected. However, in May 2013, the international day against homophobia and transphobia, four initiatives were presented to the Portuguese Parliament regarding Adoption and Medically Assisted Procreation by the Left Block (BE) party, by the Ecologist Party "The Greens" (PEV) and the Co-adoption by Socialist Party (PS). Three of them were rejected. The bill on **Co-adoption was approved by a small vote difference** (99 votes in favor, 94 against and 9 abstentions).
23. MP Isabel Moreira (PS) headed the approved bill that intended to allow co-adoption to same sex couples, according to the following draft of the proposal: "when two same sex persons are married or live in a union, and one of them exercises parental responsibilities in relation to a minor, through affiliation or adoption, the spouse or the united can co-adopt the referred minor". Also according to the same proposal, under the terms of this recently approved bill, persons over 25 years and at a situation where there is not a "second link of affiliation towards the minor", may co-adopt. Moreira also pointed out, when defending the bill, a decision of the European Court of Human Rights<sup>11</sup> which, in her opinion, will force Portugal sooner or later to amend legislation on child protection and adoption by couples united or indeed of same sex.
24. According to Portuguese legislative rules, although a first approval in a general session at the Parliament, this bill has to be approved in a specialized debate, followed by the definitely approval of the Parliament. The final approval was scheduled to July 24<sup>th</sup> 2013, but the parliament decided to change it to September 2013, regarding some questions raised by right wing parties (Popular Party – PP and Social Democratic Party - PSD) concerning time to analyse the document.<sup>12</sup>

### Right to access medically assisted procreation

25. The clinical use of medically assisted procreation (MAP) techniques has undergone major expansion worldwide. Although Portugal is in a similar technical and scientific level to that of most advanced countries in this field, there are still shortcomings arising from limitations inscribed in the law that are impeding a broader access to the techniques of MAP for same-sex

<sup>9</sup> *União de facto* is a Portuguese juridical situation for two people that, not being married to each other or to other person, regardless the gender, live in the same situation that spouses do, since more than two years. It brings some legal recognition and social and financial benefits. We will use the expression Union(s) or United (when used as an adjective).

<sup>10</sup> CRP, articles 13 and 36 (<http://www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx>), UDHR articles 16.3 and 25.2 (<http://www.un.org/en/documents/udhr/index.shtml#a25>)

<sup>11</sup> This decision expressed that Austria violated the European Convention on Human Rights by not allowing the co-adoption to a same sex couple. Austria was accused of discriminating this couple when compared their situation to the one of unmarried heterosexual couples. The court concluded that the Austrian government has not provided sustained evidence that could establish that it would be "harmful to a child to be adopted by a gay couple legally or have two mothers or two fathers".

<sup>12</sup> Upon submission of this report, the Portuguese Parliament had yet to set a date for the final approval of the proposed bill.

couples and to single or alone women, when compared to other countries. For example, in Spain, since 1988, MAP techniques are available for any woman in good psycho-physical health, which, once having been informed, use the MAP freely and consciously.

26. Currently, accordingly to Portuguese law on MAP (law 32/2006<sup>13</sup>), only different sex married or united women with a diagnosis of infertility can resort to MAP. Thus, the access of single women or same sex couples to MAP is prohibited. The current law also does not include surrogacy and, as it is now, puts in question the right to health, the right to access the benefits of scientific progress, the right to non-discrimination, the principle of equality and the right to form a family.
27. In January 2012, the Parliament tried to review MAP legislation, particularly focusing on four proposed bills from PSD, PS and BE parties regarding the widening of its access. PSD and PS presented two very similar proposals allowing surrogacy to heterosexual established couples; some parliamentarians from PS, supported by Socialist Youth, and BE presented the other two bills on allowing MAP in cases of to single women and to Lesbian couples and also the introducing surrogacy for married couples or single individuals regardless sexual orientation. The first two proposals were approved and followed to the specialized debate; PS 2<sup>nd</sup> proposal and BE ones were rejected.
28. The bill presented by PSD stated that "MAP is justified only when it is addressed to members of a stable heterosexual constituted couple" for being these couples able to conceive "in their womb". This point of view seems not to take into consideration that natural procreation can happen in single persons and that there is not a valid reason to justify the requirement of the condition of being married or united in a heterosexual relation to gain access to the techniques of MAP.
29. The current legislation is discriminatory based on marital status and sexual orientation and also corresponds to a health policy that violates individuals' human rights.

#### **Other situations concerning LGBT discrimination**

30. In recent years there has been a recurring controversy about blood donation by men who declare to have or have had sex with other same sex person (MSM). Although Portugal does not have specific laws that forbid blood donation from MSM, the Portuguese Blood Institute does prevent MSM from donating blood. This policy is in place at all blood collection points and is carried out by a questionnaire addressed to donors which omits a direct reference to sexual orientation, but does ask questions regarding the donors' private life. The inclusion of such questions constitutes discrimination on the grounds of sexual orientation.
31. Elza Pais (currently MP from PS, and Secretary of State for Equality in 2010), challenged the president of Portuguese Blood Institute to withdraw the questions set out in questionnaires made to blood donors related to their sexual orientation as, in her opinion, they were discriminatory.
32. Different cases have been raised to public attention when media reported that some men had been refused, when trying to donate blood, for assuming their sexual orientation or for having stated that at some point of their lives they had sex with same sex partners. Some complaints

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<sup>13</sup> Diário da República, 1.ª série — N.º 143 — 26 de Julho de 2006, (<http://dre.pt/pdf1s/2006/07/14300/52455250.pdf>)

were presented against health services and copies were sent to BE party (the party that showed more public concern about this question), who decided to analyse the issue with the Parliament.

33. In early April 2010 a draft resolution was approved by the Parliament recommending that the Government "should adopt measures to combat the current discrimination against homosexuals and bisexuals in blood collection services." BE party argued that not all the persons who have been discriminated presented a complaint, so probably these were not isolated cases.
34. The Resolution of the Parliament No. 39/2010<sup>14</sup>, suggesting alterations and urgent implementation of measures, was forwarded to the Ministry of Health. This resolution encourages the government to adopt measures to combat the current discrimination against homosexuals and bisexuals in blood collection services, according to the following:
  - 34.1. "Reformulation of all questionnaires containing homophobic statements, namely the ones that includes questions relating to the practice of sex between men;
  - 34.2. Preparation and dissemination by the sole responsibility of the Ministry of Health of a normative document that expressly prohibits discrimination of blood donors based on their sexual orientation and clarifies that the criteria for suspension of donors are based on the existence of risk behaviours and not on the existence of risk groups".
35. That resolution approved by the Parliament was based on the European directive on the subject, defining who should be excluded - "donors whose behaviours could put them at great risk of contracting serious diseases". Risk behaviours should determine the exclusion from blood donation, whether it is a man or a woman, a gay or a heterosexual, and this exclusion should not be taken concerning any other arbitrary and discriminatory factor, based in stereotypical assumptions.
36. Despite the adoption of the piece of legislation, in July 2010, the Ministry of Health announced that it would not take action against the exclusion of gay and bisexual men in blood donation. This action contravenes Parliaments' approved recommendation that would allow homosexuals and bisexuals to donate blood.
37. The current approach adopted by the Portuguese government is contradictory. Upholding discriminatory blood donation policies directly violates Portuguese anti-discrimination laws and policies. This attitude accentuates the prejudice and inequality around LGBT people and should be considered a serious violation of Portuguese constitutional principle of equality - which in its Article 13<sup>15</sup> is clear: "no citizen can be discriminated because of its sexual orientation". Forbidding by itself a man to donate blood just because he had sex with other men is a discriminatory practice.
38. Beyond the realm of Blood donation centres, schools are the second more common context in which LGBT individuals experience discrimination. According to several studies conducted with young people by NGOs, and the solutions/necessities pointed out are psychological intervention namely in bullying, and a more inclusive and non-discriminating sexual education.

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<sup>14</sup> Diário da República, 1.ª série — N.º 89 — 7 de Maio de 2010  
(<http://dre.pt/pdf1sdip/2010/05/08900/0161601616.pdf>)

<sup>15</sup> CRP, article 13 (<http://www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx>)



## **Recommendations for action:**

### **Human Rights of LGBT individuals and the Family**

39. Prevent marginalization and discrimination against, or exclusion of, LGBT individuals by approving PS bill on co-adoption.
40. Remove legal obstacles and eliminate discriminatory practices that hamper LGBT individuals from the full and equal enjoyment of human rights in the family context, including legal and practical obstacles such as discriminatory family laws and regulations, administrative and financial barriers that prevent LGBT couples from exercising their right to form a family.
41. Urgently legislate on adoption, allowing that same sex couples may legally engage in their parenting projects by applying for adoption, as different sex couples and individuals can apply, and that the adoption process and the couples/individuals social conditions be judged in an equal way without any interference based in sexual orientation.

### **Right to access medically assisted procreation**

42. Review the law on MAP adapting it as other European states did so as to ensure that all, alone, with a partner, or married to a person of the same or different sex, can have access to medically assisted procreation, including surrogacy, using the available reproductive medical help that different sex couples can use, without the threat of illegality or non-recognition of the link between the unborn child and the parents/mothers.
43. Ensure that all changes to the law ensure the right of all women resorting to the techniques of MAP without any discrimination in access.

### **Right to non-discrimination**

44. Undertake promptly a review of all legislation and other measures so as to identify and modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons on the basis of sexual orientation and gender identity.
45. Ensure the full compliance of government ministries with the Portuguese Parliament resolution no. 39/2010, which urges the adoption of measures to combat the current discrimination against homosexuals and bisexuals in blood collection services. (The Ministry of Health is mainly responsible for ensuring that this happens in all blood collecting points.)
46. If the Parliament resolution no. 39/2010 is not adopted by government, Portuguese Parliament should legislate and translate the resolution into law.
47. Ensure that the Ministry of Education proceeds to an explicit combat to homophobia and to the promotion of non-discrimination in schools, reinforcing and promoting fight against bullying and sexual education programs.