**Questionnaire for National Human Rights Institutions (NHRIs), by the**

**Special Rapporteur on the right to education**

**Subject: THE RIGHT TO EDUCATION, ADVANCES AND CHALLENGES**

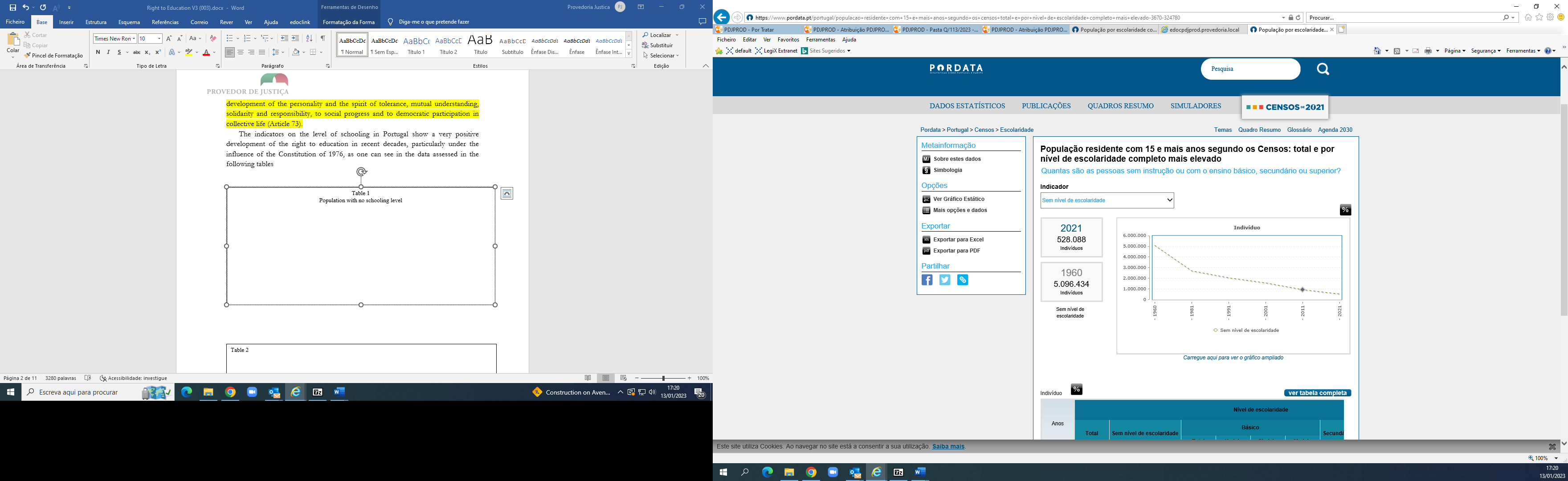
**13.01.2023**

The Portuguese Ombudsman institution, in its capacity as a national human rights institution in line with the Paris Principles and accredited with “A” status since 1999, hereby replies to the questionnaire from the Office of the United Nations High Commissioner for Human Rights.

The current mandate holder, Maria Lúcia Amaral, took office in November 2017 and was reelected by the Portuguese Parliament for a second (and last) mandate in November 2021.

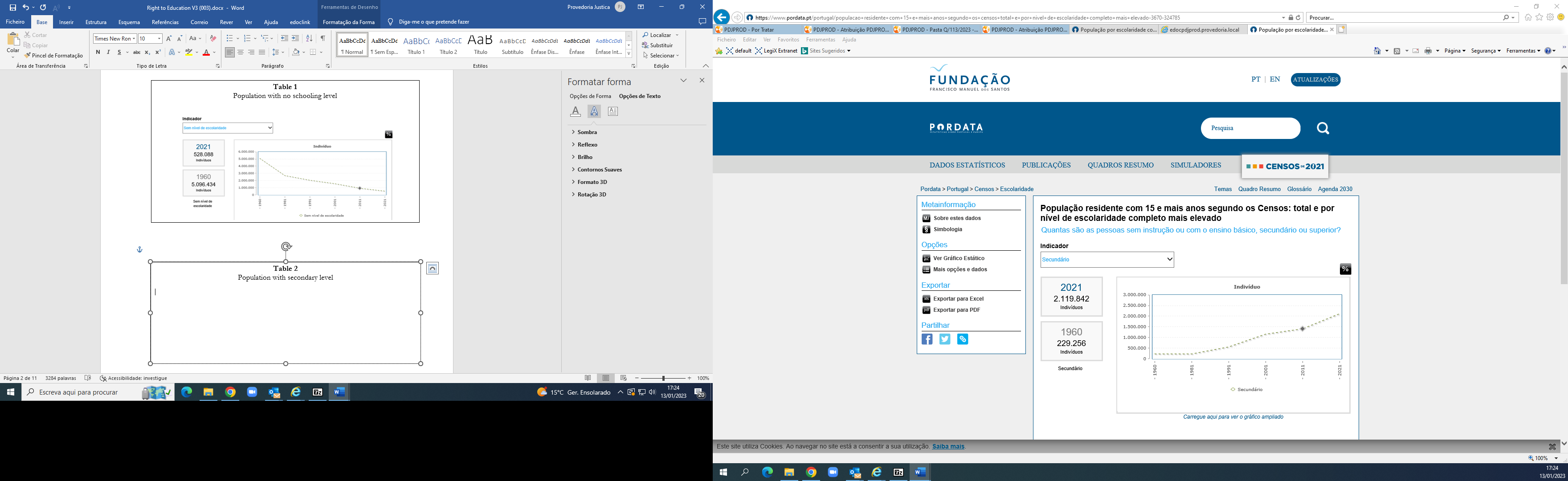
1. **Assessing the achievements made by the mandate of the Special Rapporteur on the right to education over the last 25 years**
   * + 1. ***In your country, are education issues approached through the lens of the human right to education, and if so, with what challenges and results? In your view, what is the added value of such an approach in your work?***
2. Yes, insofar Portuguese legislation and practice are aligned with international human rights law.
3. Alongside with the binding force of the core human rights treaties, the 1976 Portuguese Constitution[[1]](#footnote-1) sets out that all fundamental rights therein enshrined, which includes right to education, must to be interpreted and applied in harmony with the Universal Declaration of Human Rights (Article 16.2).
4. In this light the content of the right to education, within its constitutional framework further implemented by legislation and regulations adopted thereunder, relies on the aims and spirit of universal human rights system, the Covenant on Economic, Social and Cultural Rights being paramount on this matter.
5. Intended to the full development of human personality, the normative content of the right to education encompasses, *inter alia,* the freedom to learn and to teach, the right to found private schools, the liberty of parents to choose the kind of education that shall be given to their children, right to attend school and the right to access higher education according to one’s abilities (Articles 36.5, 43, 73, 74 and 76).
6. In implementing education policy, the State has to promote the democratisation so that it may (through school and other formative means) contribute to equal opportunities and the overcoming of economic, social and cultural inequalities, the development of the personality and the spirit of tolerance, mutual understanding, solidarity and responsibility, to social progress and to democratic participation in collective life (Article 73).
7. The indicators on the level of schooling in Portugal show a very positive development of the right to education in recent decades, particularly after the Constitution of 1976, as one can see in the data assessed in the following tables[[2]](#footnote-2).

**Table 1**

Resident population aged 15 and over without schooling

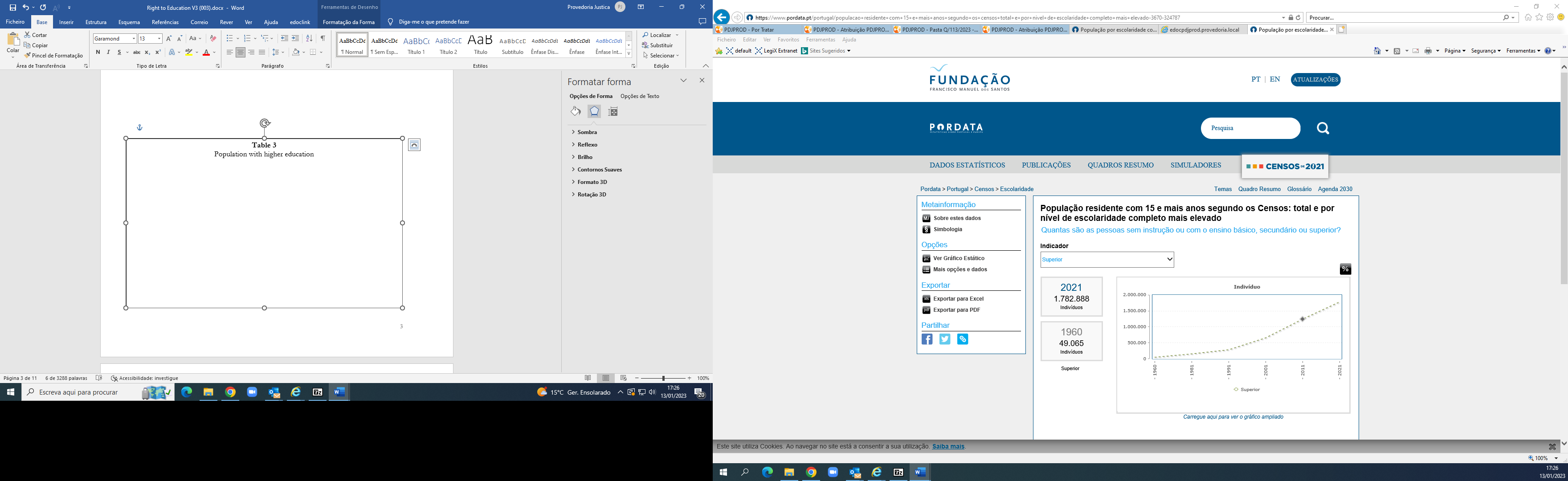
**Table 3**

Resident population aged 15 and over with secondary level (ISCED 3)



**Table 2**

Resident population aged 15 and over with higher education (ISCED 5 to 8)



* + - 1. ***How do you assess the 4 A’s framework of availability, accessibility, acceptability and adaptability as conditions for realizing the right to education? Is such a framework integrated in legal and policy documents relating to education in your country, as well as used in practice? If not, what are the key obstacles? Should the framework be reviewed to include other dimensions? If so, which?***

1. Yes, Portuguese legislation and practice are truly committed to the four A’s approach which are foreseen in Constitution and, at legislative level, in Education Act.[[3]](#footnote-3)
2. As regards **availability**, the State has created a system of schools able to meet the needs of the entire population. Public schools are, in general, equipped with sufficient human resources (teachers and auxiliary staff), material resources (such as clean facilities with appropriate size to provide teaching and, if applicable, extra-curricular activities to all students living nearby), and educational resources (*v.g*., libraries, musical instruments, sports equipment, laboratory applications). On the other hand, within the scope of educational freedom, creation and maintenance of private schools are also encouraged by the State.
3. **Accessibility** is also assured in its three dimensions:
4. **non-discrimination** – the education system is organized in such a way as to ensure equal opportunities and avoid any form of negative discrimination. In this context concrete measures have been adopted to protect and promote the access of disadvantaged with highlight to the realms of special education of children with disabilities as well as to financial assistance (through school social action or scholarships). For instance, regarding students with special education needs, the existing system provides for inclusive education as the best guarantee of equity, being the schools forbidden to reject acceptance or enrolment of children based on their disabilities. Failure to comply with this principle of non-discrimination leads to legal consequences.
5. **physical accessibility** – under the Education Act, the special needs of students with disabilities are always taken into account in building design and selection of equipment.
6. **economic accessibility** – education is free for all children from age 4 to 18, covering pre-school, basic and secondary levels. Besides school attendance, the principle of non-chargeable applies to tuition fees, to all administrative fees (*v.g*., related with registration or certifications) and to textbooks. Students with economic difficulties are in addition entitled to financial assistance and, in some circumstances, to free transportation, food and accommodation. In higher education, there is a principle of progressive free education which is not incompatible, as pronounced by the Constitutional Court, with the requirement of tuition fees, since financial support mechanisms are provided for students who cannot pay them.
7. As for **acceptability*,***the right to free education encompasses the freedom to teach and learn without philosophical, aesthetic, political, ideological or religious bias, meaning that indoctrination is totally prohibited in public school. Regarding religious instruction it is worth noting that, despite the public education cannot be confessional, the teaching of a subject with a religious character is admitted as long as it is on an optional basis. The principle of secularism does not apply, however, to private education, where autonomy of schools to program curricula prevails.
8. **Adaptability** is, in turn, also safeguarded.While there is a minimum standard of education to be followed in basic and secondary levels as demanded by principle of equality, schools are granted with a sphere of autonomy to carry out appropriate adjustments to specific needs resulting from circumstantial or local idiosyncrasies.
   * + 1. ***The human right to education entails States’ obligations to respect, protect and fulfil the right to education in international human rights law. To what extent are these obligations clearly identified in your country’s legislation and in practice?***
9. All three tiers of obligations are well incorporated throughout the overarching legal framework on the right to education.
10. In compliance with the **obligation to respect**, the State does not prevent parents from choosing their children's educational project, regardless of whether it takes place in public, private or domestic dimension or whether it follows some personal conviction of a religious or other nature.
11. The **obligation to protect** is met by imposing twelve years of compulsory education for all children, whether Portuguese or foreign residents.
12. Regarding **obligation to fulfill**, the pivotal task is to implement a public system of schools able to cover the needs of all children in basic and secondary level, while respecting a balanced territorial distribution.
    * + 1. ***Has the right to free education been progressively implemented at all levels of education in your country, based in particular on article 26 of the Universal Declaration of Human Rights, articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights, and article 28 of the Convention on the Rights of the Child? If yes, please provide examples. If not, please explain why not.***
13. Yes, progressive expansion of free education has been an omnipresent aspiration in operationalizing the right to education at all levels as it is an obligation of the State stressed in the Constitution (Article 74.2(e)).
14. Amendments to the law on pre-school system and on textbooks are illustrative examples of this public commitment.
15. Free education, which was initially guaranteed in compulsory levels (primary and secondary), was extended in 1997 to optional pre-school education, covering children from 3 up to 6 years old, regardless of the economic situation of their families.
16. On the other matter, in 2016 it was determined the free distribution of textbooks to all first-year students, being then forecasting the gradual extension of this benefit to the remaining years of compulsory schooling. This prediction was realized in the following years, reaching its maximum amplitude in 2019, with the free availability of textbooks being from thenceforth guaranteed to all students in compulsory education (primary and secondary) who attend public schools.
17. Regarding free textbooks, the Portuguese Ombudsman recommended extending the measure to all students in need, addressing a Recommendation for legislative amendment to the Minister of Education to extend the free distribution of textbooks to all demonstrably disadvantaged students attending private or cooperative education. However, the Recommendation has not been successful so far[[4]](#footnote-4).
    * + 1. ***Is the right to education considered a justiciable right in your country and if so which aspects of that right? If so, please provide a short summary of emblematic cases.***
18. Yes, the right to education is justiciable, namely as regards the freedoms’ aspects grafted therein and the non-discrimination axiom.
19. In 2021 an emblematic judicial case took place in Portugal that raised doubts on the scope of compulsory attendance law.
20. At the basis of the dispute was the content of the subject of “Citizenship and Development”, which is taught during the twelve-year compulsory schooling.
21. The parents of two siblings students filed a lawsuit against the Ministry of Education asking to be granted their children full exemption from that mandatory subject as it imposes an ideology on the conception of the world, namely on sexuality and on gender equality, which jeopardizes the parents’ fundamental right to freely choose the kind of education that shall be given to their children without being subject to State guidelines of a philosophical, aesthetic, political, ideological or religious nature, in breach of the Portuguese Constitution (Articles 36.5, 41.6 and 43) and the Universal Declaration of the Human Rights (Article 26). Like the subject of “Religion and Morals”, parents advocated that attendance in “Citizenship and Development” should be optional.
22. The court however did not agree with the parents, having upheld that the contents of the subject of “Citizenship and Development” do not lead to ideological indoctrination, but rather reflect constitutional values envisaged to promote the development of a tolerant and pluralistic spirit, respectful of others and their ideas, open to dialogue with a view to forming citizens capable of critically judging the social environment in which they live (Article 73 of Constitution).
23. Despite being exemplary students and having excellent grades in other subjects, absences to “Citizenship and Development” were considered unjustified and they can be forced to repeat the school year (noting that the Ministry of Education proposes learning recovery plans as an alternative to the pupils' academic failure).
    * + 1. ***To what extent are the non-discrimination and equality principles respected in implementing the right to education in your country? Have past recommendations made by the Special Rapporteur on the right to education of vulnerable and marginalized populations been taken into account? If so, can you list which ones?***
24. Firstly, in Portugal, access to education is not dependent on the student's economic conditions. In addition to the universal, free and compulsory education system up to the 12th grade - which is to be noted -, recently some measures were taken in terms of Early Childhood Education and Care, such as the intention to guarantee the universality of pre-school education from the age of 3 and the free attendance of crèches (with a cooperation agreement with Social Security) for children under 3 years of age. It can be provided, if needed, financial assistance (through school social action or scholarships).
25. It is also worth mentioning the national distribution of free school manuals (although only in public schools, which excludes students from private schools, even if they are economically deprived[[5]](#footnote-5) ) and the free transport passes for children and students (in the metropolitan areas of Lisbon and Oporto).
26. All these policies and measures benefit all students, Portuguese or foreigners living in Portugal, without any distinction.
27. Equality, as the overriding human rights principle, is taken very seriously in the implementation of right to education in Portugal. All internationally prohibited grounds of discrimination have been duly imported into national law and positive discrimination measures are well implemented, namely in favor of persons with disabilities, marginalized population and migrants.

**i) Persons with disabilities**

1. Persons with disabilities, whether of physical or mental nature, are entitled to the same legal rights and obligations as all other citizens, except to those they are objectively unable to enjoy or meet, respectively.
2. Concerning of the right to education, the existing system provides an inclusive education at all levels with the guarantee of the right to equal opportunities in access to and success in schooling.
3. In pre-school stage it is expected to be identified inabilities and, accordingly, to promote the best action and orientation of the child concerned. In compliance with the principles contained in the Convention on the Rights of the Child, there is, since 2009, a National System of Early Childhood Intervention (SNIPI, in the Portuguese acronym) which is aimed to set up an individual plan for all children up to 6 years old, whose development is compromised. This plan, drafted by a multidisciplinary team, establishes supportive measures of preventive and rehabilitative nature, namely in the education, health and social action spheres.
4. At subsequent levels schools must take all appropriate measures to boost the fullest development of mental and physical abilities of children with disabilities, such as personalised educational support, individual specific curriculum design, adjustments in the assessment process and provision of assistive technologies.
5. Moreover, deaf and blind students, students with autistic spectrum disorders and students with multi-disability benefit from institutional adjustments and may have access to reference schools specifically organised to respond to those pathologies.
6. As far as higher education is concerned, legal rules governing access to university and the other higher education institutions shall guarantee equal opportunities and the democratisation of the education system. Hence, within the framework of the national competition procedure for access to public higher education, special conditions for persons with disabilities are granted, meaning the existence of a special access quota, which is annually updated, for applicants with physical and sensory disabilities. As regards social action, concession of a scholarship is dependent on the socio-economic situation of the applicant student. Flexibility of eligibility criteria can occur as for students with physical, sensory or other disabilities, in case their degree of disability is of 60% or more, which as to be duly attested by a medical board. This special status encompasses the possibility of taking into account the student’s specific situation and expenses, in order to fix the value of his or her annual scholarship, as well as the value of any financial assistance for accommodation and transportation (in case it is needed). Adding to the above there is the possibly of a complement to the scholarship, aimed at contributing for the purchase of assistive devices that are essential for developing education activities.

**ii) Marginalized population**

1. Attention is given to children and young people living in territories characterized by poverty and social exclusion. In this context, there is a program – “Program of Educational Territories of Priority Intervention” - whose objective is to encourage regular attendance at school, prevent drop-out, reduce indiscipline and promote academic success for all students.
2. Specifically directed at young people aged 15 to 18 who are at risk of school exclusion, there are other program – “Integrated Education and Training Program” - which is triggered after all other school integration measures have been exhausted and aims to encourage compliance with compulsory schooling, thus ensuring a basic school qualification.

**iii) Migrants**

1. It should be highlighted that in Portugal all foreign children, even without a residence permit, have the right of access to school under the same conditions as national citizens, that including access to all applicable social supports.
2. Whenever foreign children are in vulnerable socioeconomic contexts, several programs, managed by public and/or private entities, can be activated in order to promote academic success, inside or outside school, betting on the development of personal, social and cognitive skills through formal and non-formal education.
3. It is worth mentioning the “Choice Program”, created in 2001 under the tutelage of the High Commission for Migrations whose mission is to promote, among others, the social inclusion of children and young people of immigrants. Of interest is that this program applies up to the age of 30, also providing an intervention in terms of employability.
   * + 1. ***In countries where the Special Rapporteur has undertaken visits[[6]](#footnote-6), have recommendations been implemented? If so, please list recommendations acted upon.***

Not applicable.

* + - 1. ***In countries to which the Special Rapporteur has sent communications (allegation letters, urgent appeals and other letters)[[7]](#footnote-7), have measures been adopted to address the issues raised and ensure their non-recurrence? Please provide specifics.***

Not applicable.

1. **Main challenges and crucial issues for the future**
2. ***In your view, what are the main challenges in your country in implementing the right to education?***
3. Portugal is facing, at least, four main challenges in implementation the right to education.
4. First, the consequences of the COVID-19 pandemic on the development of children, some of which are still non-measurable. In addition to the socio-emotional disturbances, the recovery of lost learnings is a task that is still requiring increased resilience from school institutions and education personnel. During pandemic, the Portuguese Ombudsman published a small collection entitled “Pandemic Notebooks”. The first study focused on the general topic of education and collected information that was obtained during the first phase of suspension of classroom classes that took place in 2020, noting particular concern for children from disadvantaged backgrounds and children with disabilities[[8]](#footnote-8).
5. Second, it is essential to improve the capacity to meet all children's needs within the inclusive school. In basic education, the system experiences difficulties, for example, in guaranteeing assistance outside the classroom by auxiliary staff in cases where children lack autonomy. In secondary education, the law does not provide for a facility prepared to children stay outside teaching activities and during holidays, which jeopardizes the exercise of the working duties of parents who cannot afford a private service to leave their children. In higher education, the biggest challenge lies with the access to university entrance examinations for people with intellectual disabilities (for example, trisomy 21), which is not currently provided for.
6. Third, the preschool education network is yet unable to comply the principle of universality since there is still no structural capacity for ensure access for all eligible children, especially in the most populous city areas.
7. Fourth, the intensification of immigration in recent years has caused strong democratic pressure that has not been accompanied by a proportional increase of human, technical and material resources in education system. These vicissitudes are making it difficult for schools located close to foreign communities to provide quick and adequate access to all children who arrive, often in the middle of school year and thus after the classes have been formed up to their maximum legal limit.
8. ***What are the crucial issues to address, nationally as well as internationally, to ensure the realization of the right to education?***
9. In the immediate term, the consequences of pandemics on child and adolescent development must be addressed by all countries.
10. Also at global level, in our post-modern society, cross technological and globally interconnected, the continuous adaptability of pedagogical programs seems to be an important issue to be addressed as schools should be permeable to the evolving contemporary needs and to the emerging jobs and expertise.

13/January/2023

1. An English version of the Portuguese Constitution is available at the Parliament’s website: <https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf> [↑](#footnote-ref-1)
2. <https://www.pordata.pt/portugal/populacao+residente+com+15+e+mais+anos+segundo+os+censos+total+e+por+nivel+de+escolaridade+completo+mais+elevado-3670-324780> [↑](#footnote-ref-2)
3. Law 46/86 of 14 October 1986. [↑](#footnote-ref-3)
4. <https://www.provedor-jus.pt/en/free-textbooks-ombudsman-recommends-extending-the-measure-to-all-students-in-need/> [↑](#footnote-ref-4)
5. As mentioned *supra* (20th paragraph). [↑](#footnote-ref-5)
6. Algeria, Bhutan, Bosnia and Herzegovina, Botswana, Chile, China, Colombia, Ecuador, Fiji, Germany, Guatemala, Indonesia, Ivory Coast, Kazakhstan, Malaysia, Mexico, Mongolia, Morocco, Paraguay, Senegal, Seychelles, Tunisia, Türkiye, Uganda, United Kingdom and Northern Ireland, United States, Qatar. [OHCHR | Country visits](https://www.ohchr.org/en/special-procedures/sr-education/country-visits) [↑](#footnote-ref-6)
7. [Communication search (ohchr.org)](https://spcommreports.ohchr.org/Tmsearch/TMDocuments) [↑](#footnote-ref-7)
8. <https://www.provedor-jus.pt/en/ombudsman-publishes-pandemic-notebooks/> [↑](#footnote-ref-8)