

PORTUGAL

The Portuguese judiciary was declared to be in a state of emergency due to the large backlog and the inability on the part of prosecutors and judges to speed up trials before the procedural terms elapsed. At the end of 1999 Portugal handed over its former colony, Macao, to Chinese control. Despite the agreements between the two countries, which provide for a series of guarantees and rights for the Macao people, there is a well-grounded concern about the lack of sufficient guarantees for the independence of the judiciary in Macao.

Portugal is a republic organised under a Constitution adopted originally in 1976 and amended four times since. The last amendment was made in 1997. Article 2 of the Constitution defines Portugal as a democratic state that is based upon the Rule of Law, the sovereignty of the people, the respect and guarantee of fundamental rights and freedoms and the separation of powers.

The Constitution allocates executive power to the President of the Republic who serves a five-year term, renewable only once and a Prime Minister who effectively runs the government with the help of a Council of Ministers. The Prime Minister is appointed and dismissed by the President of the Republic, but the installation of his government requires a vote of confidence from parliament. A unicameral Assembly of the Republic exercises legislative power and its members are elected by electoral districts in periodic general elections.

Parliamentary elections for the 230-seat Assembly of the Republic were held on 10 October 1999, resulting in the ruling Socialist Party returning to power. It won 115 seats and Mr. Antonio Guterres, a historical socialist leader, came back to power, appointing a new Cabinet of Ministers.

Human Rights Background

The Portuguese Constitution and the law grant Portuguese citizens the right to a fair trial within a reasonable time and the right to be assisted by a lawyer before any authority. Many of the guarantees of due process of law during criminal proceedings were introduced by the constitutional amendments of 1994. These guarantees include the right to be presumed innocent until proven guilty, the right of defence and the right not be tried twice for the same crime. These rights are generally respected, although an alarming rate of cases undergo lengthy proceedings and this enhances impunity.

The Constitution and the law guarantee physical integrity. However, there are instances of police abuse during the arrest of people, as well as inside prisons. Immigrants are especially affected by these abuses.

There are also problems of child labour, as well as trafficking of women and forced prostitution. On 21 December 1999, the International Commission of Jurists (ICJ) issued a press statement on the adoption by the Committee of Ministers of the Council of Europe of a resolution following the complaint the ICJ had lodged against Portugal on child labour, under the European Social Charter. Meeting at deputy level, the Committee of Ministers, political body of the Council of Europe, took note of the report submitted on 10 September 1999 by the European Committee of Social Rights, composed of independent experts. This Committee found a breach by Portugal of Article 7(1) of the European Social Charter, which prohibits the employment of children under 15. The European Committee of Social Rights observed, on the basis of the evidence submitted by the ICJ and as confirmed by a survey carried out by the Portuguese Ministry of Labour itself and the ILO, that

several thousand children under 15 worked in breach of both the Charter and Portuguese law. The Committee noted that the 25,000 children performing unpaid work as part of helping out the family, mainly in agriculture and the catering sector, must be taken into account under the Charter. The Committee acknowledged that despite the measures adopted by Portugal to combat child labour, it is clear that the problem has not been resolved.

The ICJ, however, deplored that, contrary to the specific prescription of Article 9 of the 1995 Additional Protocol to the European Social Charter, the Committee of Ministers did not adopt a clear-cut recommendation following the conclusion of the European Committee of Social Rights, according to which Portugal was not in conformity with the Charter. Instead, it limited itself to adopting a resolution referring back to the recommendation it adopted in 1998 against Portugal for its breach of Article 7(1). The ICJ also deplored that the Committee of Ministers did not award it compensation in respect of costs incurred in preparing and submitting the complaint.

The Judiciary

The judiciary is organised under the terms provided by the Constitution, the Statute of Judicial Magistrates (Estatuto dos Magistrados Judiciais - Law 21 of 1985) and the Law of Judicial Tribunals (Lei Orgânica dos Tribunais Judiciais - Law 3 of 1999 which modifies the Law of 1987). Article 204 of the Constitution declares that the courts are independent and subject only to the law. The Constitution also provides for public court hearings and trial by jury at the request of the prosecution or the defence in the most serious cases.

The judiciary, however, is understaffed and underfunded. The consequence of this is a severe slowness in dealing with cases that has resulted in the virtual collapse of judicial activities and has undermined public confidence, as well as enhancing effective impunity.

Structure

The Portuguese judiciary is composed of a Supreme Court (Supremo Tribunal de Justiça), Appeals Courts (Tribunais de 2º Instância ou da Relação) and a lower court system. There are also a Supreme Administrative Court and Fiscal Courts, as well as a Court of Audit. The Constitution (Article 209) prohibits the establishment of exceptional courts to try specific categories of offences, although there are special courts to deal with labour matters, offences against public health and minor offences, as well as Justices of the Peace.

The Supreme Court is the highest judicial authority in the country, except on matters for which the Constitutional Court has jurisdiction. The Courts of Appeal function as second instance courts for cases heard before first instance courts. The Constitutional Court has jurisdiction on matters involving questions of a legal or constitutional nature.

Public prosecutors have the power to investigate and initiate prosecutions against offenders in defence of the public interest. They are grouped in the Office of the Attorney General, are hierarchically graded, and can be transferred, suspended, retired or dismissed only under the circumstances provided by law. The Office of the Attorney General is headed by the Attorney General who serves a term of six years.

Appointment and Security of Tenure

Article 216 of the Constitution guarantees security of tenure for all judges. They may be transferred, suspended, retired or removed from office only as provided by law, and may not be liable for the content of their decisions.

Authority over appointment, assignment, transfer and promotion of judges is given to the High Council of the Judiciary, which also has disciplinary power. The Council is composed of two members appointed by the President of the Republic, seven members elected by the Assembly of the Republic and seven judges elected by their peers by a system of proportional representation. There is also a High Council of the Public Prosecution that holds the same powers over all public prosecutors. The composition of the Council of the Judiciary permits the possibility that a majority of its membership be appointed by political bodies. The old wording of the Constitution before the 1997 amendment provided that one of the two members appointed by the President of the Republic should be a judge. The High Council of the Judiciary is headed by the President of the Supreme Court.

The Constitutional Court is composed of thirteen judges, ten of whom are appointed by the Assembly of the Republic. They remain in office for a non-renewable period of nine years. The judges of the Constitutional Court enjoy the same guarantees of independence and security of tenure as judges of ordinary courts.

The Collapse of the Portuguese Judiciary

In late December and early January 2000 the government implemented a series of exceptional measures to tackle a judicial emergency. The Minister of Justice, Mr. Antonio Costa, recognised in a press statement that approximately one million cases are pending before the courts and that each year at least 100,000 more go into the system. It was reported that the judiciary has no possibility to deal with such a backlog and that this has frequently caused the closing of cases due to the application of the Statute of Limitations. Various observers have stressed that the application of the Statute of Limitations to cases is far from being exceptional in the Portuguese judicial system, and that this is a sign of its collapse.

A study by the Ministry of Justice recognised that between 1993 and 1998 a total of 38,531 criminal complaints did not proceed until the trial stage because the legal terms for investigations had been exhausted. In 1998 alone such cases amounted to 12,000 and the situation is getting worse each year.

The cases closed by application of the Statute of Limitations include outstanding cases involving members of parliament (the so-called "false trips" cases) and the death of two children in an aquatic park in Lisbon (see below).

In January 2000 the President (bastonario) of the Bar Association underlined as the causes for the impunity in many outstanding cases the misuse of the criteria of opportunity and the non-respect for the terms of investigations and indictments on the part of the prosecutor which leads to delays, as well as the difficulties in lifting the confidentiality and secrecy of bank accounts. He also stressed that is necessary to put an end to the negligence and lack of responsibility displayed by judges and prosecutors.

In September 1999, the High Council of the Magistracy reported that the system needed at least 55 additional judges and 100 prosecutors. Many of the judicial districts created by law in January 1999 have not yet been installed due to a lack of judges and magistrates. In Lisbon alone, of 15 new courts

foreseen by the law, only 12 have started their work and not all 10 supposed to work in the judiciary's headquarters are already functioning.

The measures announced by the government in January 2000 include: empowering the High Council of the Magistracy to exceptionally hire retired judges as advisers in pending cases, as well as to appoint lawyers as first instance judges for a period of three years to deal with the backlog. The Council would also be allowed to hire lawyers working in the public administration. Additional measures will involve a law reducing the training period within the Centre for Judicial Studies and the establishment of special incentives for those persons who agree to settle their disputes - mainly law suits on debts - outside the courts.

On his part, the President of the Supreme Court, as President of the High Council of the Magistracy, suggested enlarging the terms for investigation and preparation for trials in cases involving murder and other serious offences. He also proposed a review of the system of recourse and appeals available before the Supreme Court and the Constitutional Court.

Aquaparque Case

The case of Aquaparque, in which two children were sucked down by a water fountain in a recreation ground and died, was closed due to the application of the Statute of Limitations. The case had raised much concern among the population, as well as expectation that those responsible will be adequately punished.

The High Council of the Magistracy opened investigations into allegations of negligence on the part of the investigating judge who spent four years in the investigative stage. This disciplinary investigation prompted Mr. Orlando Afonso, the President of the Association of Portuguese Magistrates, to declare that adequate conditions for judges to carry out their duties were no longer in place and that the independence of the judiciary was threatened by the pressure to deal with cases quickly.

Judge Orlando Afonso emphasised the lack or insufficiency of resources in the judiciary as the cause for the alarming rate of unsolved cases within the legal terms.

However, other factors, such as inadequate laws and a lack of adequate training for judges, also contribute. In addition, there is a certain legal culture of abuse of procedural recourses before the courts (such as delaying tactics by the defence counsel) on the part of litigants and their legal counsels.

MACAO

On 20 December, Macao, an area comprising a portion of peninsular mainland and the islands of Taipa and Coloane, recognised by Portugal and China as Chinese territory under Portuguese administration, was handed over by the administering power to Chinese sovereignty. The handover poses a series of domestic and international law concerns, notably with regard to the legal system of protection of human rights and the independence of the judiciary.

Macao had been living with a considerable degree of autonomy from Portugal with regard to administrative, financial and legislative matters since 1976 when an "Organic Statute for Macao" was promulgated by Portugal. Under this basic legal instrument the Governor was appointed by the Portuguese President and a legislative assembly was set up. One third of the members of the assembly

were elected directly by the people, the other two thirds being appointed by social and economic groups.

In 1987 Portugal and China signed a "Joint Declaration on the Question of Macao" whereby they declared Macao to be Chinese territory and provided for China to resume the exercise of sovereignty over it as of 20 December 1999. Under the terms of the Joint Declaration China undertook a series of basic policies following the principle of "one country, two systems". These undertakings include the establishment in Macao of a Special Administrative Region (Macao SAR) of the People's Republic of China which will be under the direct authority of the Chinese Central Government and will enjoy substantial autonomy, including executive, legislative and "independent judicial power, including that of final adjudication". China also undertook to respect the current social and economic system in Macao as well as the laws and the life-style, which are to remain in place for 50 years.

China's obligations under the Joint Declaration were further elaborated in an annex, whereby it was established that legislative authority will be vested in the legislature of the Macao Special Administrative Region and that most of the legislature members will be elected by popular vote. The legislature will have the power to enact laws in accordance with the provisions of the Basic Law of the region, amending or repealing any previously existing law. There is also a provision for all laws previously in force to be maintained unless amended by the legislature. Judicial power is vested in the courts of the Macao SAR (see below).

Additionally, paragraph eight of the annex to the Joint Declaration provides that international agreements to which the People's Republic of China is not a party, but which are implemented in Macao may remain in force in the Macao SAR.

In March 1993 the Chinese legislature passed a bill enacting the "Basic Law of the Macao SAR of the People's Republic of China". In this Basic Law which works as a Constitution for the region, rights and guarantees for the Macao residents, as well as the political structure of the region, were developed. Article 36 entitles all Macao residents to resort to law, and have access to the courts and to lawyer's assistance for the protection of their rights and interests, including the right to institute legal proceedings before the courts against the acts of the executive authorities and their personnel. Article 40 further develops the provisions of the 1987 Chinese-Portuguese Joint Declaration by establishing that the provisions of the International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and international labour conventions which applied to Macao will remain in force and be implemented in the Macao SAR.

The Macao SAR Basic Law, in accordance with the Chinese-Portuguese Joint Declaration, provides for a Chief Executive to hold executive power in the Macao SAR. This Chief Executive will be elected by a 300-member Election Committee, composed of representatives elected by economic and social interests groups, and will hold office for a renewable five-year term (Annex I to the Basic Law). However, the first Chief Executive was appointed directly by the Chinese Central Government in accordance with a decision of the Chinese legislative assembly on "The Formation of the First Government, the First Legislative Council and the First Judiciary of Macao SAR". This decision aimed at establishing a special transitional period in which the first Chief Executive would be elected by a 200-member Selection Committee, which in turn was chosen by a Preparatory Committee of 100 members elected by the Chinese legislative assembly to oversee the handover. This decision also governs the election of the first legislature of Macao. The first legislative assembly is to be composed of 23 members of which only 8 are directly elected by the people. Eight are elected by interest groups and seven are elected by the Chief Executive of the SAR. All of them will serve until October 2001

when a new legislative assembly will be elected. The number of legislators will increase in successive terms: the second legislature will be composed of 27 members (of which 10 will be directly elected) and the third of 29 (12 elected directly). This decision of the Chinese legislative assembly also provides for the organisation of the first judiciary after the handover by the Preparatory Committee (see below).

Edmund Ho Hau Wah was elected in May 1999 to be the first Chief Executive after the handover takes place. In September the Chief Executive-elect appointed six new legislators to serve after the handover in December.

The Judiciary

The organisation of the Macao judiciary, as well as guarantees of judicial independence, after the handover of sovereignty over Macao to the People's Republic of China are a major subject of concern.

Until June 1999 Macao's judiciary was structured following the lines of the Portuguese administration. The Portuguese Supreme Court and Constitutional Court sitting in Lisbon were the highest judicial authorities in Macao, and a High Court sitting in Macao itself used to work as an appeals court for cases heard by first instance courts within the territory. The High Court was composed of 6 magistrates sitting in panels of three. In some cases the appeals of cases heard initially by a three-judge panel were re-heard by the whole bench of six judges, including those who had already heard the case. It was contended that this was inconsistent with the standards on impartiality of judgement.

In June 1999, Portugal adopted measures to sever the ties of the Macao High Court with the Portuguese Supreme Court and Constitutional Court as part of the transition. All cases that formerly had to go to Lisbon were to be heard by the Macao High Court itself. As the case load increased provisions were taken to increase also the number of judges.

Since the handover in December 1999 the organisation of the courts is governed by the provisions of the Basic Law. Article 83 establishes that the courts of Macao SAR shall exercise judicial power independently. Article 84 establishes first-level courts, intermediate courts and a final appeals court in the Macao SAR, the power of final adjudication being vested in the Court of Final Appeal. Other provisions establish administrative courts for fiscal and administrative matters.

Appointment and Security of Tenure

Article 87 of the Basic Law provides that all judges will be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, lawyers and eminent persons. No rules as to the composition and the method of appointment of this independent commission are provided in the Basic Law and reports say that its members are in fact appointed by the Chief Executive himself.

The same article provides that judges can only be removed from office for inability to discharge their duties or for behaviour incompatible with the post, by the Chief Executive acting on the recommendation of a tribunal appointed by the President of the Court of Final Appeal and composed of not less than three local judges. In the case of the justices of the Court of Final Appeal, their removal may only be decided by the Chief Executive following a recommendation of a review committee composed of members of the legislature.

Article 88 provides for the appointment of the presidents of all tribunals by the Chief Executive of Macao SAR. By the end of 1999 there were no laws or regulations to further preserve the independence of Macao's judiciary and the system provided for in the Basic Law seems to be insufficient and even prejudicial to such independence. The excessive power granted to the Chief Executive to appoint all judges and to dismiss them following recommendation by committees that he himself appoints or controls indirectly collides with international standards and principles on independence of the judiciary, as provided in the UN Principles. The power to appoint all presidents of tribunals in the region seems also to be incompatible with the necessary independence and impartiality that such judges should have in discharging their functions.

UN Human Rights Committee's Concluding Observations

On 4 November 1999 the UN Human Rights Committee adopted its Concluding Observations following the examination of Portugal's (Macao's) periodic report. The Committee expressed its satisfaction with the Chinese-Portuguese agreement of March 1998 on the principles underlying the organisation of the legal system, which guarantee the non-removability of judges and the autonomy and independence of the judiciary. It also reiterated its view that human rights treaties devolve with territory and that states continue to be bound by the obligations under the covenants entered into by the predecessor state (Paragraph 3).

Among the subjects of concern and recommendations mentioned by the Committee are the following:

- It still remains unclear, at the date, which laws, including human rights laws, will be held incompatible with the Basic Law of the Macao SAR and therefore will be invalid after 20 December 1999.
- The paucity of judges, lawyers and interpreters that might adversely affect the administration of justice, and recommended that further efforts should be made to train lawyers and interpreters and give them specialisation in human rights.
- That Law 6/97/M on promoting, founding or supporting a secret association, creates a vague and insufficiently defined offence and the imposition of an increased sentence or conviction on the basis that the person is an "habitual offender" or is likely to repeat such an offence. The Committee recommended that these provisions should be brought into line with the provision of the International Covenant on Civil and Political Rights that prohibits double jeopardy and bans laws with retroactive effect.
- The Committee also expressed concern at the paucity of human rights organisations and the fact that their establishment is not being encouraged.