

PORTUGAL

Portuguese courts are autonomous and operate independently. A large backlog of pending trials has apparently resulted in the dismissal of cases due to their exceeding the limitation period. New legislation was adopted during the period covered by this report aimed at reducing the backlog of cases.

The Republic of Portugal, a democratic state, was established in 1976 by a Constitution which has since been amended four times. The last amendment adopted in 1997 allowed immigrants to vote in presidential elections. Article 2 of the 1997 Constitution provides that the Portuguese State is based upon the rule of law, the sovereignty of the people, the pluralism of democratic expression and the respect and guarantee of fundamental rights and freedoms. In April 2001, under Assembly Resolution n.27/2001, the Assembly of the Republic was granted the power extraordinarily to revise the Constitution.

The Constitution provides in Article 111 for the separation of powers. The Portuguese system is structured as a mixed parliamentary and presidential regime, whereby the President and the Prime Minister are directly elected by popular franchise. Executive power is vested in the President of the Republic and in the Prime Minister. The President is elected by universal, direct and secret suffrage for a five-year term, renewable once. According to Article 141 of the Constitution, the President receives advice from the Council of State, a political organ that includes the President of the Assembly, the Prime Minister, the President of the Constitutional Court, the Ombudsman, former presidents, five members chosen by the legislature and five chosen by the president. Effective executive power is exercised by the Prime Minister, who runs the government with the help of the Council of Ministers. Under Article 187 of the Constitution, the President appoints the Prime Minister after consulting the parties represented in the Assembly and with due regard for the results of the general election. The government serves a four-year mandate. It can be recalled by a non-confidence motion passed in parliament by a qualified majority or by a decision from the president based on "its inability to maintain the normal functioning of the democratic institutions." Only the President may dissolve the parliament and call for a general election.

Legislative power is divided between the Government and the Parliament, the *Assembleia da Republica*, the latter having a reserved sphere of competence which includes, *inter alia*, ratification of treaties, deferred bills, approval of the annual budget and the economic plan. Bills from the government or the Parliament must meet the approval of the President, who can use his veto powers to prevent a law from being enacted (in the case of government bills) or to force its approval by a qualified majority (in the case of parliament laws). Deputies are elected from lists presented by parties or party coalitions in each electoral constituency. The electoral term is four years, corresponding to the term of the legislature.

The autonomous regions of the Azores and Madeira have their own political and administrative regimes, with their own legislative and executive powers. Portugal handed over Macao, its last colony, to China on 19 December 1999. (Until June 1999, Macao's judiciary was structured following the provisions of the Portuguese administration. The Portuguese Supreme Court and the Constitutional Court sitting in Lisbon were the highest judicial authorities in Macao.) On 24 May 2001, an official agreement was signed providing for close co-operation between Portugal and China's Macao Special Administrative Region (SAR) in the fields of economy, culture, public security and administration of justice.

Prime Minister Guterres's Socialist Party has ruled Portugal since 1995. The last parliamentary elections for the 230-seat Assembly were held on 10 October 1999. In the presidential election of 14 January 2001, Jorge Sampaio of the ruling Socialist Party was re-elected for a second five-year term.

HUMAN RIGHTS ISSUES

In Portugal, human rights are protected by the Constitution, which stresses the principles of equality before the law and non-discrimination. Under Article 8, international law is incorporated into domestic law and both the Constitution and laws are interpreted and implemented in harmony with the Universal Declaration of Human Rights. National institutions for ensuring respect for human rights include the Office of the Ombudsman (*Provedor de Justiça*), the Women's Equality and Rights Commission, the Attorney-General's office, the Bureau for Documentation and comparative law, and the Commission on the Promotion of Human Rights and the Prevention of Educational Inequalities.

International Human Rights Mechanisms

Portugal is a party to the United Nations International Covenant on Civil and Political Rights (ICCPR), the First and Second Optional Protocol to the ICCPR, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol, and the Convention on the Rights of the Child. On 6 September 2000, Portugal signed the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, as well as the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

Portugal was admitted to the Organisation for Security and Co-operation in Europe (OSCE) on 25 June 1973. It is a member-state of the European Union and of the Council of Europe. Portugal is bound by the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The European Committee for the Prevention of Torture (CPT) carried out its last visit in Portugal on 19 April 1999. Portugal is also a state-party to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Committee against Torture (CAT)

In its concluding remarks on the third periodic report of Portugal, on 8 May 2000, the CAT recommended that the country should continue to engage in vigorous measures "to maintain the momentum of moving the police culture in Portugal to one that respected human rights". The Committee suggested that Portugal should ensure that criminal investigations and prosecution of public officers were undertaken whenever evidence revealed the commission of torture, or cruel or inhuman or degrading treatment and punishment. The Committee welcomed the restructuring of the police agencies in order to emphasise the civil features of policing. It also welcomed the initiation of a practice of prison visits on a monthly basis by magistrates to receive complaints by prisoners of their treatment, as well as the enactment of regulations relating to conditions of detention in police lock-ups, and the establishment of minimum standards to be observed. The governmental delegation from Portugal told the CAT that the Government was training its law enforcement officers in human

rights and ethics, and that consequently there had been a reduction in the number of complaints against public officials.

The Committee on the Elimination of Racial Discrimination (CERD)

As one of 157 State parties to the Convention, Portugal must submit reports to the Committee and send a delegation to answer questions from the Committee's Experts. On 13 March 2001, the Portuguese delegation addressed a variety of issues including the treatment of the Roma and refugees. The delegation cited various punishments and fines for those guilty of racial discrimination, including losing the right to public subsidies and the right to public employment. In its comments on 21 March 2001, the Committee welcomed the enactment of Decree-Law 4/2001 modifying the regulations on the entry, stay and departure of foreigners with a view to introducing penal legislation in Portugal against the illegal trafficking of migrant workers as well as an enlarged definition of the beneficiaries of family reunification. The Committee noted that incidents of racial discrimination and xenophobia did occur in Portugal and recommended that the authorities continue to monitor such incidents closely. The Committee welcomed the establishment of the Commission for Equality and against Racial Discrimination.

It should be noted that a new law in force since January 2001 grants legal status to workers who lack proper documents.

The Committee on Economic, Social and Cultural Rights

Portugal's third periodic report was considered by the Committee at its November/December 2000 session. The Committee welcomed legislative amendments to promote equality between men and women, but expressed its concern as to the issue of child labour (see *Attacks on Justice 1999-2000*) and the increase in paedophilia and child pornography.

Police abuse

The Constitution and the law guarantee physical integrity. However, there are instances of police abuse during arrest, as well as during the imprisonment period. Immigrants are especially affected by police ill-treatment.

Among the most widely reported cases were the deaths of two men after they were allegedly ill-treated in custody by Public Security Police (PSP) officers in Oporto in January 2000. Alvaro Rosa Cardoso, a member of the Roma community, was reportedly severely beaten when police brought a street disturbance under control. According to the police the cause of death was heart attack. However, the autopsy report referred to a ruptured spleen as being the cause of death. A judicial inquiry was initiated and the Interior Ministry's General Inspectorate (IGAI) initiated investigations. IGAI's preliminary report linked the death to physical ill-treatment by PSP officers. They were detained in April 2000 under investigation for homicide. The general commander of the Oporto PSP was removed from his post. Another man, Paulo Silva, who was also beaten by PSP officers, died of internal injuries in hospital on the same night. He had allegedly gone to the Cerco area in Oporto to buy heroin and returned home unable to stand upright, telling his mother he had been severely beaten by the police. The IGAI and the criminal investigation department of the prosecutor's office

(DIAP) opened separate investigations. However, by June 2000, no charges had been brought against the PSP officers and they had not been suspended.

The official investigations into the death of Alvaro Rosa Cardoso gave rise to widespread anger among police officers. A number of police officers gathered at the entrance of the court-house (TIC) in Oporto, awaiting the decision of the judge regarding the extension of detention of their two colleagues or their release. When the police officers heard that the two colleagues were to remain in custody, they behaved menacingly against a prosecuting magistrate who was leaving the court-house. The magistrate was forced to ask for a Judicial Police escort to leave the house safely and PSP police officers reportedly surrounded the magistrates car and made death threats. No judicial investigation was undertaken, as no formal complaint was lodged by the magistrate, who asked not to be identified.

The Judiciary

The judiciary is organised under the terms provided by Section V of the Constitution, the Statute of Judicial Magistrates (*Estatuto dos Magistrados Judiciais*- Law 21/1985) and the Law of Judicial Tribunals (*Lei Organica dos Tribunais Judiciais*-Law 3 of 1999 which modifies the Law of 1987). According to Article 202, para.4, the law may provide for alternative methods of dispute resolution that do not involve the courts.

Article 23 of the Constitution provides for the post of an Ombudsman. Citizens may present complaints concerning acts or omissions on the part of public officials to the Ombudsman, who shall undertake a review, without power of decision, and make recommendations to the competent organs as to prevent injustice. The actions of the Ombudsman are independent of any legal remedies provided for in the Constitution. The Ombudsman may also refer any provision for the constitutionality test to the Constitutional Court. The Ombudsman is an independent person appointed by the Assembly of the Republic.

Article 203 of the 1997 Constitution provides that the courts are independent and subject only to law. The courts are organs of sovereignty with the power to administer justice in the name of the people. Portuguese courts are required to desist from the application of any rules that contravene the provisions of the Constitution or the principles contained therein. Decisions of the courts are binding on all public and private bodies and prevail over decisions of all other authorities.

Article 20 of the Constitution guarantees the right to access to effective legal assistance. This right is protected even under a state of emergency. Decree-Law No.387-B, revised by Decree-Law No.391/88, ensures the right to legal information and the right to legal protection. In this regard, the law provides for the publication and dissemination of legal information booklets, as well as the establishment of technical support offices within the legal departments. Legal protection is also granted to individuals who lack the means to pay the costs of the legal proceedings. Court hearings are public unless personal dignity or public morality would be safeguarded by closed sessions. Juries may be summoned for trials of serious crimes at the request of the prosecution, but this procedure rarely occurs in practice.

Article 29 of the Constitution provides that “citizens who have been unjustly convicted shall have the right, in the conditions determined by the law, to have their sentences reviewed and to be compensated for any injury suffered”.

In the 1990s, the Minister of Justice launched the “citizen and justice” programme, which aims at transparency within the administration of justice and facilitated access to justice by setting up legal information and legal advice offices and strengthening confidence in the judicial system.

Structure

There are five areas of jurisdiction, including constitutional, general, administrative, fiscal and audit. The Constitution provides for a Constitutional Court, a Supreme Court (*Supremo Tribunal de Justiça*), an Appeal Court (*Tribunais de Segunda Instancia ou da Relação*), and a lower court system. Article 209 of the Constitution establishes the Supreme Administrative Court, other administrative and fiscal courts and the Audit Court. The Constitution 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. Justices of the Peace are competent to hear cases from September 2001. Administrative justice is organised in administrative circuit courts, courts of first instance, a central administrative court and a supreme administrative court.

The Constitutional Court has jurisdiction in matters involving questions of a legal or constitutional nature. 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. Under Article 278 of the Constitution, the President of the Republic may also request the Constitutional Court to undertake a review of the constitutionality of any provision of an international treaty before it is ratified. On the same grounds, Ministers of the Republic may also request the Court to decide on the constitutionality of any provision of regional legislative decrees or regulatory decrees. The Courts of Appeal function as second instance courts for cases heard before first instance courts. The Supreme Court is the highest judicial authority in the country, except on matters over which the Constitutional Court has jurisdiction.

The Constitution allows for the establishment of maritime courts, arbitration tribunals and military courts. The military courts have jurisdiction to try essentially military offences and their jurisdiction is defined *rationae materiae* on the basis of certain categories of offences.

According to Article 14 of the Judicial Act 38/87, civil courts have jurisdiction over cases not assigned to other courts. Apart from the criminal courts, there are also courts that carry out investigations for preliminary investigations, pre-trial proceedings, and examination proceedings (discovery). The domestic courts are responsible for preparing and hearing cases concerning matrimonial relations. The labour courts have jurisdiction over issues concerning infringements of labour law provisions. There are also courts for the supervision of sentences that exercise overall jurisdiction in relation to the modification or replacement of sentences. The Decree-Law 314/1978 organises the Juvenile courts.

The Portuguese territory is divided into four judicial sections, 55 judicial circuits and 233 districts. The Supreme Court of Justice, the Supreme Administrative Court, the Central Administrative Court and the Audit Court have jurisdiction over the entire territory.

Training, appointment and security of tenure

Judges and public prosecutors are recruited according to a competitive selection procedure followed by a course of initial training. The Centre for Judicial Studies (*Centro de Estudos Judiciarios*) is

responsible for this training. Admission to the Centre is effected by written and oral exam sessions. The requirements for judicial appointment, as laid out in the Judicial Act 21/1985, are in accordance with the provision of Article 10 of the United Nations Basic Principles on the Independence of the Judiciary that “persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications of law...”

The judiciary, the government counsels and the state prosecutors are distinct and independent of the central power. This separation between the judiciary and the Attorney-General’s department ensures that proper judicial proceedings take place within the safeguards required by the democratic process. The judiciary consists of judges in law, Appeal Court judges and judges of the Supreme Court of Justice.

Article 216 of the Constitution guarantees security of tenure for all judges. Judges may be transferred, suspended, retired or removed from office only as provided by law, and may not be held liable for the content of their decisions. Judges in office are not allowed to perform functions unrelated to the work of the courts unless authorised by the Superior Council of the Judiciary. The Superior Council of the Judiciary has the power to appoint, assign, transfer and promote the judges of the courts of law and of the administrative and fiscal courts and to exercise disciplinary control over them. The Superior Council of the judiciary is presided by the President of the Supreme Court and is composed of 16 members, two members appointed by the President of the Republic, seven members elected by the Assembly and seven judges elected by their peers under a system of proportional representation. It is notable that, under Article 218, para.2 of the Constitution, the rules relating to guarantees for judges apply to all members of the Superior Council of the Judiciary.

The judges of the Constitutional Court enjoy the same guarantees of independence and security of tenure as judges of ordinary courts.

The selection of judges of the courts of law of second instance is made largely on the basis of merit by means of competition among the judges of the courts of law of first instance and based on their curricula. The law determines the qualifications and rules for the selection of judges of the courts of law of first instance. Nomination to the post of Appeal Court judge is carried out by promotion and by means of curricula selection from amongst judges of the court of law, and is based on the criteria of merit. Access to the Supreme Court of Justice is based on curricula selection, and is open to judges of the courts of law, public prosecutors and other jurists of merit.

The public prosecution magistrature is divided into assistant Public Prosecutors, District Attorneys, Assistant Attorneys-General, Deputy Attorney-General and Attorney General. According to Article 219 of the Constitution, public prosecutors are entrusted with representing the state and defending legitimacy. They are accountable judicial officers, hierarchically graded, and may be transferred, suspended, retired or dismissed only in the circumstances provided by law. Public prosecutors are promoted on merit and length of service. Assistant public prosecutors with more than ten years for service are eligible for the post of District Attorney. Promotion to the office of Assistant Attorney-General is by merit.

The Attorney-General is appointed by the President of the Republic, on nomination by the government. The designation to this post is the only one in the Public Prosecution service that falls within the competence of politicians. The choice is not restricted to an area of recruitment or even to particular qualifications. The post of Attorney-General requires the confidence of both the government and the President of the Republic. The Attorney-General’s Office is the highest authority in public prosecution and has the power to appoint, assign, transfer and promote, as well as

to exercise disciplinary control over public prosecutors. The Attorney-General's Office is presided by the Attorney General and contains the Higher Council for the Public Prosecution Service.

The Higher Council for the Public Prosecution Service is composed of four district attorneys, a deputy public prosecutor, two prosecutors of the republic and four assistant prosecutors elected by their respective peers, five members elected by the Assembly and two appointed by the Minister of Justice. Judges from other courts are regulated by their own legislation.

The “collapse” of the Portuguese judiciary

In late December 1999 and early January 2000, the government announced a series of exceptional measures to tackle a judicial emergency. The Minister of Justice, Mr. Antonio Costa, acknowledged in a press statement that approximately one million cases were pending before the courts and that each year at least 100,000 more go into the system. It was reported that it would be impossible for the judiciary to deal with this backlog and that frequently cases are dismissed because they exceed the statutory limitation period. The application of the Statute of Limitations to cases is frequent in the Portuguese judicial system and this is a sign of its collapse.

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 involve 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. Another law provides for witnesses to testify in cases heard in distant jurisdictions via teleconference. In November 2000, the Ministry of Justice announced a plan to expedite the service of subpoenas.

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.

A study by the Ministry of Justice found that between 1993 and 1998 a total of 38,531 criminal complaints did not proceed to the trial stage because the legal terms for investigations had been exhausted. In 1998 alone such cases amounted to 12,000. The situation is deteriorating and since 1993 more than ten per cent of cases will not be tried.

The cases that were dismissed because they fall outside the limitation period include those involving members of parliament (the so-called “false trips” cases) and the Aquaparque case. The case of Aquaparque concerning the death of two children in a recreation ground was dismissed due to the running out of the Statute of Limitations. The investigating judge had reportedly spent four years in the investigative stage. Concerns about impunity have also been raised surrounding the similar dismissal of a case dealing with the death of a child due to electrical problems at a traffic light in Lisbon.

In January 2000, the President (*bastonario*) of the Bar Association stressed that the main causes of impunity are non-compliance of the terms of investigations and indictments on the part of the prosecutor which lead to delays, as well as the difficulties with banking secrecy. He also stated that it is necessary to put an end to the negligence and lack of responsibility displayed by judges and

prosecutors. In addition, abuse of procedural mechanisms for the purpose of causing delays by litigants and their counsel is widespread.

The Portuguese judiciary and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

During the period covered by this report, the European Court of Human Rights found Portugal in 19 cases to be in violation of Article 6, para.1 of the ECHR that provides for a fair and public hearing within a reasonable time. The Court found in the subject cases that the period of duration of the proceedings was far from reasonable. In the case of *Fentiladour S.A. v. Portugal*, the company complained that civil proceedings to which it was a party had lasted almost 13 years and were still ongoing. Similarly, in the *Comingersoll S.A. v. Portugal* case, the Court found that there had been substantial delays, justifying the conclusion that the proceedings had been unreasonably long. The Court ruled that “a period of seventeen years and five months for a final decision that had to be delivered in proceedings issued on the basis of an authority to execute –which by their very nature needed to be dealt with expeditiously –could not be said to have been reasonable”. The Court has ordered the Portuguese Ministry of Justice to pay a fine to all plaintiffs in similar cases.

CASES

Dr. Duarte Teives Henriques (lawyer) lodged a complaint that he had been assaulted by three PSP officers in July 1995. Allegedly, he was kicked and verbally abused, when he challenged the lawfulness of an officer’s order to move his car. According to Amnesty International, the police charged him with refusing to obey orders, failing to identify himself, damaging a vehicle and insulting authority. Internal disciplinary proceedings against the police were dismissed on the grounds that the police officers were not responsible for mistreatment. In November 1999, 53 months after the incident, the IGAI reported that judicial proceedings were still pending due to a request for new preliminary investigations.

Dr. Vaz Martins, (lawyer) a lawyer originally from Cape Verde, was allegedly punched in the face and hit with the handle of a firearm by an officer at the PSP station in Alfragide, in December 1994. Allegedly, Dr. Vaz Martins had to undergo four operations in an attempt to restore his eyesight. The same lawyer had also reportedly become impatient after waiting 45 minutes to see a client at the same PSP station, in September 1996. An argument about racism reportedly ensued with the duty officer and the lawyer was allegedly forced to leave the station at gunpoint. Concerning the incident in 1996, the IGAI reported in 1997 that no complaint had been lodged by the lawyer and therefore no investigation had been undertaken by the PSP. A judicial inquiry was under way concerning a complaint by Vaz Martins and a counter-complaint by the officer in connection with the 1994 incident. In 1999, the IGAI reported that it could find no evidence of misconduct by the police in connection with the 1996 incident. Regarding the 1994 incident, there was no evidence found during the disciplinary procedures against the two officers “because Mr. Vaz Martins had an aggressive attitude towards the officers which justified the use of force.” In November 1999, 60 months after the incident occurred, a new preliminary investigation was being conducted.