



**International covenant  
on civil and  
political rights**

Distr.  
GENERAL

CCPR/C/PRT/2002/3  
6 June 2002

ENGLISH  
Original: FRENCH

---

HUMAN RIGHTS COMMITTEE

**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES  
UNDER ARTICLE 40 OF THE COVENANT**

**Third periodic report**

**PORTUGAL\***

[3 June 2002]

---

\* This report is issued unedited, in compliance with the wish expressed by the Human Rights Committee at its sixty-sixth session in July 1999.

## Introduction

Portugal is a democratic State governed in accordance with the rule of law and the sovereignty of the people, the plurality of democratic expression and political organization, respect for fundamental rights and freedoms and the guarantee of the exercise and use thereof. As a State based on the rule of law, it upholds the fundamental rights of the human person, which are embodied in the Constitution,<sup>1</sup> and all other human rights enshrined in the international instruments to which it is a party. With regard to the right of peoples to self-determination, attention is drawn to the initial articles of the Portuguese Constitution, which, under the heading “Fundamental Principles”, proclaim the sovereignty of the Portuguese Republic based on the dignity of the human person and the will of the people, the objective of which is to build a free, fair and united society.

Article 2 of the Constitution proclaims the democratic nature of the Portuguese Republic based on the sovereignty of the people, the plurality of democratic expression and political organization and the guarantee of the effective exercise of fundamental rights and freedoms. Sovereignty rests with the people, which exercises it in accordance with the procedures specified in the Constitution, the State being subject thereto and based on democratic legality. In this respect, it may be added that the validity of the laws and acts of the State, the autonomous regions and local authorities depends on their conformity with the Constitution (art. 3).

According to article 18 of the Constitution, rights, freedoms and guarantees may be restricted by law only in cases expressly provided for in the Constitution. Restrictions must be limited to what is necessary to safeguard other rights or interests protected by the Constitution. Restrictive legislation must be general and abstract in nature; it may not have retroactive effect and may not limit in extent or scope the essential content of constitutional principles.

The organization of political power is based on universal suffrage and political parties, which represent the diversity of popular opinion and which take part in national and local elections in representation of the will of the people (arts. 108 to 119).

Portugal recognizes the primacy of international law subject to the monistic principle. There is only one legal system and the rules and principles of general or customary international law are an integral part of Portuguese law. Rules provided for in international conventions that have been duly ratified or approved apply in domestic law, following their official publication, so long as they remain internationally binding with respect to the Portuguese State. Finally, rules made by the competent organs of international organizations to which Portugal belongs take effect directly in domestic law, insofar as this is established in the respective constitutive treaties.

With regard to the legislative situation, this report covers the period between 1994 and 30 April 2002. Annexes have been updated to end 2000. This long delay and the extensive period covered are due to the considerable number of new laws passed and to significant progress in Portugal’s efforts to improve the living conditions of citizens residing in the country. During the period covered by the report, four governments have taken office without giving rise to political instability. The complexity of the issues covered in each article and the detailed

approach of Portuguese legislation and practice are further causes of the lengthy period and delay in submitting the report. Wherever possible, every effort has been made to provide full, though not exhaustive, information, statistics and data concerning practical living conditions.

In its general observations on Portugal's second periodic report, the Committee requested information on:

- The conditions under which journalists were obliged to reveal their sources: see article 17 (17.42);
- The status of women: see article 3 (3.11 et seq.); article 6 (6.14 et seq.); article 22 (22.14 et seq.); article 23 (23.6) and article 25 (25.63 et seq.);
- The treatment of prisoners: see article 9 (9.29 et seq.), article 10, article 14 (14.30 et seq.);
- The suspension of rights under states of emergency: see article 4 (4.3).

## **Article 1**

### **The right of peoples to self-determination**

1.1 Articles 1 and 3 of the Constitution state that Portugal's sovereignty is based on the will of the people, while article 7, paragraph 3, recognizes the right of peoples to self-determination. Article 2 states the basic principles of the Portuguese Republic as a democratic State based on the rule of law (sovereignty of the people, pluralism of democratic expression and democratic political organization, respect and effective guarantees for fundamental rights and freedoms and the separation and interdependence of powers).

1.2 With respect to international relations, Portugal follows the rules set out in article 7 of the Constitution, namely the right of peoples to self-determination, equality between States, the peaceful settlement of international disputes, non-interference in the internal affairs of other States and cooperation with all other peoples for the emancipation and progress of humankind.

1.3 During the period of decolonization, Portugal established special cooperation links with Portuguese-speaking African countries. It also cooperates closely with Brazil, another Portuguese-speaking country which maintains many economic and cultural links with Portugal.

1.4 Macao was transferred to China in 1999, but was able, in the final days of the Portuguese administration, to submit a report on the implementation in the territory of the International Covenant on Civil and Political Rights.

1.5 The people of East Timor exercised its right to self-determination on 30 August 1999. Timor has recently been through some very difficult moments in the course of its progress to full self-determination, following decades of efforts by successive Portuguese Governments. In these difficult times, Portugal has done its best to support East Timor as much as possible.

The question of East Timor has evolved considerably in the course of the last 17 years, ever since the General Assembly requested the Secretary-General to initiate consultations with all the parties directly concerned in order to find a solution to the problem. These consultations eventually led to the Agreements of 5 May 1999, concluded with the help of the United Nations Secretary-General (A/53/951 and S/1999/513 dated 5 May 1999).

1.6 Under those Agreements, the Secretary-General was entrusted with the task of conducting a popular consultation in East Timor regarding the status of the territory, through a direct, secret, universal ballot. This therefore marks the culmination of the efforts made for so long by the international community, and especially by Portugal, in order to ensure for the Timorese people the right to decide its own future. Under the tripartite Agreements of 5 May regarding the modalities for the popular consultation in East Timor, Indonesia was requested to ensure security in the territory in order to allow the referendum to take place.

1.7 The ballot which was held on 30 August 1999 and in which 98.6 per cent of enrolled Timorese voters took part is the culmination of the struggle waged by the Timorese themselves, who never gave up their right to decide their own destiny. It is only regrettable that they should not have been given the opportunity to do so under conditions appropriate for a decision of such magnitude, since even before the consultation process began, militia forces, under the benign gaze of members of the Indonesian armed forces and police, conducted a campaign of terror and intimidation to defeat the ballot.

1.8 The outcome of the vote (with 78.5 per cent rejecting the Indonesian proposal for autonomy, leading to the territory's independence) immediately triggered a series of acts of terror and systematic violations of human rights, by which all Timorese were affected. Some managed to hide in the mountains, where they lived in frightful conditions, while others had to leave the territory to go and live in refugee camps.

1.9 In the face of these barbarous acts, Portugal requested the United Nations to intervene. Measures were then taken, particularly with the adoption of resolution 1264 by the United Nations Security Council, and the Indonesian Government agreed to the deployment of an international force in East Timor (INTERFET).

During the tragic events in East Timor, all human rights, including the right to life, were systematically violated and the humanitarian situation was catastrophic.

The Government of Portugal then requested the convening of an extraordinary meeting of the Commission on Human Rights, for the purpose of considering the human rights situation in Timor, in a letter dated 9 September 1999 addressed to the United Nations High Commissioner for Human Rights. Portugal welcomed the adoption of the Commission's resolution 1999/S-4/1 (adopted at its fourth special session) concerning the situation of human rights in East Timor, in which the Commission "calls upon the Secretary-General to establish an international commission of enquiry [...], to gather and compile systematically information on possible violations of human rights and acts which may constitute breaches of international humanitarian law committed in East Timor since the announcement in January 1999 of the vote and to provide the Secretary-General with its conclusions [...]."

1.10 Lastly, resolution 1272 (1999) of the United Nations Security Council, dated 25 October, established the United Nations Transitional Administration in East Timor (UNTAET), which was to be “endowed with overall responsibility for the administration of East Timor” and would be “empowered to exercise all legislative and executive authority, including the administration of justice”. Apart from giving UNTAET a mandate to restore security, to rebuild infrastructures and to organize basic public services, the Security Council included among its objectives “a governance and public administration component, including an international police element”, while stressing the need for “UNTAET to consult and cooperate closely with the East Timorese people in order to carry out its mandate effectively with a view to the development of local democratic institutions, including an independent East Timorese human rights institution, and the transfer to these institutions of its administrative and public service functions”.

1.11 It was under the terms of this Security Council resolution, which transferred the administration of East Timor to the United Nations, that Portugal formally ceased to be the Power administering Timor.

1.12 Elections were held on 30 August 2001 for the Constituent Assembly and on 14 April for the Presidency.

1.13 Subsequently, on 20 May 2002, Timor achieved independence and is at present an independent State. On 17 May 2002, the Security Council decided (in resolution 1410) to establish as of 20 May 2002 and for an initial period of 12 months, a United Nations Mission of Support in East Timor (UNMISET) to replace the UNTAET.

## **Article 2**

### **Respect for fundamental rights without distinction of any kind**

#### **Principle of non-discrimination**

2.1 The principle of non-discrimination is a general principle (article 13 of the Constitution), which includes the fundamental right not to be discriminated against for any reason whatever. As such, it is a principle which underlies other fundamental rights.

For the implementation of this principle, see the accounts given for each individual article of the Covenant analysed below in this report.

#### **Equality between nationals and aliens**

2.2 Article 15 of the Constitution places nationals and aliens on an equal footing. Thus aliens and stateless persons, temporarily or habitually resident in Portugal, enjoy the same rights and are subject to the same obligations as Portuguese citizens.

2.3 By way of example, two situations may be mentioned; section XXV of Act No. 48/90 of 24 August 1990 concerning the National Health Service (the framework-law on health), which gives aliens equal entitlement to health services, subject to reciprocity, and Decree-Law No. 296-A/98 of 25 September 1998 (as amended by Decree-Law No. 99/99 of 30 March 1999)

concerning access to higher education. Students from Portuguese-speaking African countries holding fellowships, as well as nationals of East Timor and their children, are entitled in addition to special conditions of access and admission to higher education (Decree-Law No. 393-A/99 of 2 October 1999). Students holding a Portuguese Government fellowship who are resident in East Timor also enjoy the benefit of special conditions of access and admission to higher education in the Portuguese public system under the terms of Decree-Law No. 230/2001 of 24 August 2001. For further considerations regarding this principle, see the comments on articles 12 and 13 below.

2.4 With regard to the second periodic report submitted by Portugal to the Committee, the question was raised of compatibility with the principle of non-discrimination of the rule contained in article 15, paragraph 2, of the Constitution, whereby aliens are allowed access only to non-political and essentially technical functions in the administration. This is still the case, although article 15, in paragraph 4, already provided that certain political responsibilities could be exercised by aliens. That was further confirmed by the draft produced by the third and fourth constitutional reforms, allowing aliens the right to vote and stand as candidates in local elections, which is by no means negligible. The recently approved fifth constitutional revision (Constitutional Act No. 1/2002 of 12 December 2001) brought the nationals of Portuguese-speaking States residing in Portugal closer to the status of Portuguese citizens, directly allowing them rights (subject to reciprocity) which are denied to aliens. Under the old wording of article 15, paragraph 3, of the Constitution, such rights were recognized only if provided under an international agreement. The remaining limitations may be justified by the fact that nationals may be expected to display greater loyalty in the discharge of their duties than might be required of aliens.

### **General framework of the defence of fundamental rights**

#### **European Convention for the Protection of Human Rights and Fundamental Freedoms**

2.5 Through its Parliamentary resolution No. 22/90 and Presidential Decree No. 51/90 of 27 September 1990, Portugal incorporated Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms into its domestic legal system. This Protocol concerns the principle of two-tier jurisdiction in proceedings, which was new compared with the Portuguese legal system formally described (in the second periodic report). This new feature has also been reflected in the domestic system: article 410 of the Code of Penal Procedure allows a decision to be rescinded if appealed against on grounds of unintelligibility, which covers miscarriage of justice and allows verification of the facts. This is also permitted under article 712 of the Code of Civil Procedure.

As far as the other Protocols are concerned, while Portugal has ratified all the Protocols to the European Convention on Human Rights prior to Protocol 11, the ratification of Protocols 9 and 10 became meaningless with the ratification of Protocol 11, instituting the single European Court of Human Rights. Protocol 12 (which prohibits discrimination in general terms and not only with regard to the exercise of any one right provided by the Convention) was signed by Portugal on 4 November 2000. Protocol 13 (concerning the abolition of the death penalty in all circumstances) was signed on 3 May 2002.

## **Right of access to the courts**

2.6 The Code of Civil Procedure provides that every right may give rise to legal action. The task of ensuring access to rights, that is, by means of legal information, is the responsibility of the State, which pays the costs of judicial staff who operate the system.

2.7 Act No. 30-E/2000 of 20 December 2000 strengthened the guarantees provided under Decree-Law No. 387-B/87 of 29 December 1987 with regard to access to the law and the courts, leaving the social security services the task of assessing requests for legal aid, in order to ensure that no one should be prevented or impeded in any way, on account of his or her social or cultural condition, or for lack of financial resources, from knowing, stating or defending his or her rights.

2.8 According to this legislation, the State has a duty to take whatever steps are necessary to make the law and legislation known through publications or other forms of communication. Reception services should be set up accordingly in the courts and in related services.

2.9 Legal protection includes court assistance and legal advice, which is available to all nationals and to alien and stateless persons - provided that they are habitually resident in Portugal. Moreover, the right to legal protection is allowed to foreigners who are not habitually resident in Portugal, subject to equivalent reciprocal arrangements for Portuguese nationals under the laws of their countries of origin.

Legal assistance includes not only advice but also help with out-of-court procedures.

Court assistance may include total or partial exemption from the payment of legal costs in court and payment by the State of barristers' salaries and fees. See annex No. 1 for related statistical data.

## **Constitutional Court**

2.10 The Constitutional Court exercises extensive powers to ensure that laws and other legislative acts are in conformity with the Constitution. It is also responsible for judging whether any action is unconstitutional (by a breach of legislation or constitutional principles), for preventive supervision, for subsequent abstract supervision and for concrete supervision.

2.11 It is responsible in the first place for monitoring constitutionality in practice. Thus the courts cannot apply rules that contravene the Constitution or the principles contained therein (article 204 of the Constitution). According to article 280, "the Constitutional Court has jurisdiction to hear appeals against any of the following court decisions: (a) decisions refusing to apply a legal rule on the ground of unconstitutionality; (b) decisions applying a legal rule, the constitutionality of which was challenged during the proceedings".

2.12 Act No. 85/89 of 7 September 1989 amended Act No. 28/82 of 15 November 1982 on the organization, functioning and procedure of the Constitutional Court. The latter also has jurisdiction to hear appeals by individuals against court decisions refusing to apply a legislative provision on the ground of illegality arising from contravention of a higher law, decisions

applying a provision, the legality of which was challenged during the proceedings, and decisions refusing to apply a provision on the ground of incompatibility with the provision of a treaty or applying such a provision in contravention of a decision already taken by the Constitutional Court (article 70, new draft).

2.13 Among the questions raised during the presentation of Portugal's second periodic report, it was asked whether there had been any court decisions as to the standing of international law relative to domestic law. We would like to take this opportunity to give an example from a case decided by the Constitutional Court. On that occasion, the Constitutional Court stated as follows (decision of 15 February 1989, in Ministry of Justice Bulletin No. 384, page 163): "Article 6 (1) of the European Convention on Human Rights does not make any explicit or implicit reference to giving reasons for judgements in criminal cases, which means that this article does not conflict with the rule contained in article 469 of the Code of Penal Procedure, which is understood as forbidding reasons from being given in replies to questions in complaint proceedings; this rule does not infringe the principle of the hierarchical precedence of treaty rules, which may be assumed from article 8 (2) of the Constitution, nor the *Pacta sunt servanda* principle enshrined in article 8 (1) of the Constitution."

Another important decision is that of the Constitutional Court, under No. 222/90, in which it is stated that: the Constitutional Court may take into account "any contribution, related to legal thought or jurisprudence (with regard to the application of the European Convention on Human Rights), which can assist with the interpretation of the nature and scope of provisions of the Constitution or those of the Universal Declaration of Human Rights". There are other decisions which also establish the primacy of international law over domestic law in general terms, as well as its compliance with the Constitution.

2.14 A more detailed analysis of this point will be given under consideration of article 14 of the Covenant.

### **Ombudsman**

2.15 Since the holder of the office is appointed by the Assembly of the Republic, the Ombudsman acts independently of any contentious or voluntary administrative procedures. According to the Constitution (in the draft introduced with the fourth constitutional revision - Constitutional Act No. 1/97 of 20 September 1997), the public administration must cooperate with the Ombudsman (art. 23, para. 4).

2.16 The Ombudsman takes action either in response to complaints lodged by individuals against acts or omissions on the part of public authorities, or *ex officio*.

His power is limited to submitting recommendations to the administration, although he may institute proceedings with the Constitutional Court. The rate of success of proceedings initiated by the Ombudsman ranged between 75 and 80 per cent during the period under consideration. For statistical data, see annexes 2 and 3 to this report.



## **Right of petition and popular action**

2.17 At the presentation of Portugal's second periodic report, an explanation was requested of the term "right of petition and popular action".

2.18 The right of petition and popular action is provided in article 52 of the Constitution, according to which "all citizens have the right to submit, individually or jointly with others, petitions, representations, claims or complaints to sovereign bodies or to any authority, for the purpose of defending their rights, the Constitution, the law or the general interest". This includes the rights enshrined in the Covenant, insofar as the latter is considered an integral part of the Portuguese legal system.

Article 52 also refers to the right, either personally or through associations defending the interests at issue, to pursue the prevention, cessation or prosecution of offences against public health, consumer rights, the quality of life, the preservation of the environment and the cultural heritage, and to claim due remedies for injured parties.

The right to take part in administrative proceedings and the right of popular action were introduced under Act No. 83/95 of 31 August 1995. This law protects the above-mentioned interests, as well as the legitimacy of individual citizens and associations when instituting proceedings in defence of civil and political rights. It also makes provision for civil liability, which includes liability without fault (objective liability), as well as criminal responsibility.

2.19 Act No. 43/90 of 10 August 1990 regulates private persons' access to the public authorities, excluding the courts, by means of petitions (in cases where the person requests the adoption of particular measures), claims (where the person is opposed to an administrative act by the public authorities affecting that person) or complaints (in the case of unconstitutional, illegal or abnormal action by a public service, with a view to initiating action against those responsible), for the purpose of defending citizens' interests, the Constitution, the law or the general interest. Such actions may be undertaken individually or jointly.

2.20 The right of petition is available to citizens as well as to aliens and stateless persons residing in Portugal in the case where their legally protected rights and interests are concerned.

Exercise of the right of petition is free, subject to no harmful effect for the petitioner. It is universal, insofar as it is available to all, and free of charge.

## **Legal framework within which administrative action is conducted**

2.21 The acts of the public administration are governed essentially by the Constitution and the Code of Administrative Procedure.

2.22 The administrative authorities base their action on the criteria of equality, impartiality and proportionality, avoiding discrimination between individuals. Administrative acts must be appropriate for the purposes they serve, for which no excessive use of means is permitted.

2.23 As with the courts, the principle of *non licere* is inadmissible. The administration has the duty to provide information on any matter within its jurisdiction, especially regarding the interests of individuals.

It must also inform private citizens on all matters concerning them and on any petition submitted to it (in the broader sense as used in the law on exercising the right of petition referred to above), in order to defend the Constitution, the law or the general interest. The duty to decide no longer applies if a decision on the same matter has been taken within less than two years.

2.24 Administration must be conducted efficiently. Administrative procedures are generally free of charge and access to administrative courts is guaranteed.

2.25 An administrative procedure may be initiated *ex officio* or at the request of interested parties (article 54 of the Code of Administrative Procedure), who may be either the holders of subjective rights or legally protected interests or citizens with general interests (public health, housing, education, cultural heritage, environment, land planning, quality of life, danger to public property).

2.26 When a procedure is initiated, the parties are notified. The administration acts according to the investigatory principle, which means it must examine the case (art. 56). The administration must act rapidly (art. 57), having to complete the procedure within not more than 90 days.

2.27 Private citizens are entitled to information and the principle of open administration is enshrined in the Code. Under the terms of Act No. 65/93 of 26 August 1993, as amended by Act No. 8/95 of 29 March 1995 and Act No. 94/99 of 11 July 1999, access to administrative documents has been simplified (art. 1): access by private citizens to administrative documents must be ensured by the public administration in accordance with the principles of publicity, transparency, equality, justice and impartiality.

A Commission on Access to Administrative Documents has also been set up under Act No. 8/95 of 29 March 1995. This Commission is responsible for answering complaints lodged by individuals; it gives opinions on access to personalized documents, and on the system used for document classification. Each year it draws up a report on the application of the law and on its activity, which it submits to Parliament and which is reviewed by the Prime Minister.

2.28 The interested parties may express their views and the investigator may opt for a written or oral hearing.

2.29 All administrative acts must give reasons, especially when they affect rights or protected interests, when they decide on a claim or an appeal, when they reject a request, when they decide against a received opinion, when they go against guidance normally followed by the administration and whenever they imply the cancellation, modification or suspension of a previous administrative act.

2.30 A valid act may be annulled, unless it is not subject to annulment by law, if it gives rise to legally protected rights or interests or if it implies legal duties and unrenounceable rights for the administration.

Acts giving rise to legitimate rights or interests may be annulled in the part where they are unfavourable to the interests of the parties concerned, provided that all the interested parties agree to the annulment and that their rights and interests are not unavailable.

2.31 Any administrative act which is contrary to a fundamental right is considered null and void. Such an act from the start produces no legal effect and its invalidity may be invoked or declared at any time by any administrative body or by any court.

2.32 Appeals may be brought by interested parties to have administrative acts annulled or modified, on the grounds that the act is either illegal or inappropriate.

The legitimacy of a complaint rests with the holder of a subjective right infringed by the administrative act.

Appeal may take the form of a complaint or a hierarchical appeal, even if a judicial appeal is possible.

### **Human rights dissemination, training and information**

2.33 A number of activities are regularly conducted in this area. Examples include:

(a) Training:

- Human rights studies are incorporated in the continuous training of teachers, magistrates, police officials, social workers and other professionals;
- Human rights are also one of the core subjects of continuous training courses and activities, and of courses and seminars which have already been organized for teachers, magistrates, lawyers and civil servants.

(b) Activities of the Ombudsman:

- Publication and dissemination of the book “The work of the Office of the Ombudsman in safeguarding human rights”, which contains reports of actions taken by the Ombudsman under each article of the Constitution. The publication of the book was sponsored by the National Commission on the Commemoration of the Fiftieth Anniversary of the Universal Declaration of Human Rights (see below);

- Participation by the Ombudsman in seminars and preparation of documentation for the dissemination of human rights, such as: “Equal opportunities after 25 April”; “Acting and reacting - preventing violence against elderly persons”; “Elderly persons and violence - awareness for prevention”;
- Institutionalization of the “Message of the Child” Green Line, in 1994, which receives complaints from minors or from adults and which is attached to the Ombudsman’s Office;
- International colloquy on Social Exclusion;
- Establishment, in 1999, of a telephone line for elderly citizens, which is attached to the Ombudsman’s Office and is designed to inform users about their rights, their obligations and their entitlements, and which forwards complaints to the relevant bodies;

(c) Information:

- An independent commission was set up in 1998 to promote the commemoration of the fiftieth anniversary of the adoption of the Universal Declaration of Human Rights and the United Nations Decade for Human Rights Education (1995-2004). The commission’s activity is chiefly aimed at ensuring dissemination of the texts and creating awareness in society and among government departments, through multimedia publicity campaigns; preparing and disseminating graphic material for distribution among public bodies, schools and the media; publishing works concerning human rights; setting up an official web site and an e-mail address;<sup>2</sup> encouraging the ratification by Portugal of international human rights instruments; promoting and providing support for lectures, talks and special activities in schools, especially by organizing a competition to select the best work on human rights; supporting activities initiated by civil society, and cooperating with other institutional bodies;
- A human rights web site has been set up, with logistical support by the Documentation and Comparative Law Department (GDCC) of the Office of the Government Procurator. The web site is divided into sections on different topics. For example, it is possible to retrieve the full text in Portuguese of all the international legal instruments ratified by the Portuguese State (such as the present Covenant and its two Optional Protocols), as well as reports submitted by Portugal to the United Nations treaty bodies, the summary records of the meetings at which the reports were considered and the concluding observations of the committees. The web site also gives information on the human rights protection systems of the United Nations, the Council of Europe and OSCE (Organization for Security and Cooperation in Europe) including a detailed explanation concerning the way communications should be forwarded to the various mechanisms, as well as a bibliography on human rights;

- Under some provisions, the State may even disseminate information on certain rights (e.g. Act No. 4/84 on pregnant women, children and parents);
- Under the aegis of the National Commission on the United Nations Decade on Human Rights, the Documentation and Comparative Law Department (GDDC) of the Office of the Government Procurator provides translations into Portuguese of several works on human rights, which it publishes, such as the complete collection of Fact Sheets on Human Rights and the Professional Training Series of the Office of the United Nations High Commissioner for Human Rights. Other published titles include the text of the Vienna Declaration and Programme of Action and the implementation report submitted by Portugal. The full versions of all these works are available on the GDDC's web site ([www.gddc.pt](http://www.gddc.pt));
- Lastly, Infocid is an information system for citizens dealing with all matters relating to their rights, which is available on the Internet, at <http://infocid.pt>;
- Other forms of information and training related to the Covenant's rights are mentioned elsewhere, as appropriate, in this report.

### Article 3

#### Principle of non-discrimination related to gender

##### Constitution

3.1 The Constitutional Act of 1997 expressly enshrined the principle of non-discrimination related to gender in access to political office.

##### Acquisition of nationality by children and spouses

3.2 Act No. 37/81 of 3 October 1981, amended by Act. No. 25/94 of 19 August 1994, distinguishes between nationality of origin and acquired nationality. Its provisions apply regardless of the gender of parents or spouses.

3.3 Nationality of origin is a combination of *jus sanguinis* and *jus soli*, to which are added acquisition criteria that depend on the occupation of the Portuguese father or on the statement made by the persons concerned.

3.4 Children are deemed to have Portuguese nationality of origin if they are born on Portuguese territory or abroad if the father, at the time of their birth, was working for the Portuguese Government. Decree-Law No. 308-A/75 of 24 July 1975 lays down rules for the maintenance of Portuguese nationality by Portuguese citizens residing in an overseas territory which has become independent.

3.5 The children of Portuguese parents also acquire Portuguese nationality if, independently of the positions held by the parents, they state their desire to have Portuguese nationality. Children born in Portugal of foreign parents residing in the country for more than 6 or 10 years, depending on whether the parents are nationals of countries with Portuguese as their official language or other countries, may acquire Portuguese nationality if they decide to apply for it.

3.6 Lastly, any children born in Portugal who have no other nationality are considered Portuguese nationals.

3.7 Nationality (not of origin) may be acquired by expressing a wish to do so. Thus the children of foreign fathers or foreign mothers who have acquired Portuguese nationality are also entitled to acquire it merely by stating that they wish to do so.

3.8 After three years' marriage to a Portuguese national, that person's spouse may state his or her wish to acquire Portuguese nationality. A declaration of nullity or annulment of the marriage will not affect the nationality entitlement acquired by a spouse in good faith.

3.9 Full adoption also entitles an adopted child to acquire Portuguese nationality.

3.10 The effects of conferring nationality are to attribute to naturalized citizens or citizens having acquired nationality the same rights and obligations as Portuguese citizens.

### **Commission on equality and women's rights**

3.11 The Commission on Equality and Women's Rights was set up by Decree-Law No. 166/91 of 9 May 1991, replacing the Commission on the Status of Women. It was part of the Commission in Charge of Revising the Civil Code and contributed to the revision of family law and criminal law, legislation on nationality, protection of motherhood and fatherhood, family planning and sex education, and military service.

3.12 The Commission also attended the Commission on the Situation of Unmarried Mothers and the Inter-ministerial Commission on the Family. It was also part of the Commission on the International Year of the Family, of working groups on reconciling family life and working life and on marital preference, and of the interdepartmental organizational unit on family affairs.

3.13 The Commission's aim is to achieve equality between men and women not only by combating discrimination against women, but also by taking steps to establish true equality of opportunities, rights and dignity. As a body the Commission's purpose is to study and analyse the circumstances related to equality of rights and opportunities, as well as to take action in all areas, especially with respect to the situation of women and the principle of equality.

3.14 The Commission is responsible for:

- Assisting with the preparation of overall and sectoral policy, related to the situation of women and to equal rights between women and men, with a view to achieving effective joint responsibility for women and men in all aspects of family, professional, social, cultural, economic and political life;

- Contributing to legislative modifications required in different areas, by proposing measures, by giving opinions on draft or proposed legislation, and by seeking the establishment of mechanisms required for the effective implementation of legislation;
- Promoting actions leading to broader participation by women in development and in political and social activities;
- Promoting actions encouraging women and society as a whole to become aware of the discriminations to which they are still exposed, so that women may take direct action to improve their status, and in order to create a sense of responsibility in this respect in society as a whole;
- Carrying out and encouraging inter-disciplinary research into matters related to equality and the situation of women, especially by making the relevant bodies aware of the need to take account of statistics concerning the situation of women in their areas of activity, while promoting the dissemination of this research and the implementation of actions aimed at achieving equal rights and opportunities. (Each year the Commission publishes a book on “Portugal - situation of women” and other periodicals, works intended to supply information on the rights and situation of women, as well as fact sheets and studies carried out either within or with the support of the Commission.) Between 1994 and 1999 the latter organized a number of colloquies and conferences on the question of equality;
- Informing and creating awareness among the public with regard to women’s rights and the values of equality through the mass media. In 1999, the Commission published a report on the situation of women in Portugal, which is attached herewith;
- Taking up positions on questions affecting equal rights and opportunities, the situation of women and the compatibility of family and professional responsibilities;
- Facilitating access to the law by providing a legal information service for women. Since 1976, the Commission has been running an information and consultation bureau which is free of charge and open to the public, offering contact by correspondence, by telephone or personal. This service holds about 1,000 consultations each year;
- Cooperating with international organizations and foreign bodies pursuing objectives similar to those of the Commission.

### **General Plan for Equal Opportunities**

3.15 Meanwhile, a General Plan for Equal Opportunities has been launched by Council of Ministers resolution No. 49/97 of 24 March 1997. The plan's activities include collecting and disseminating rules related to equal opportunities, creating awareness among the public, particularly through information campaigns, incorporating the topic in vocational training activities and school curricula, collating statistical data on the situation, seeking financial support for the implementation of projects by women, and supporting teenage mothers in order to avoid them having to leave either their school or their jobs.

The report of March 1988 by the Office of the High Commissioner for Equality and the Family (which in the meantime has been dissolved and replaced by the Secretary of State for Equality) sums up progress achieved under the General Plan for Equal Opportunities:

- Courses and training have been provided for all public servants of central, local and regional government, whose activity is in any way connected with equal opportunities between men and women;
- The Management of Educational Resources Department of the Ministry of Education has adjusted the maximum leave period allowed by law, according to teaching timetables, in the case of breastfeeding twins, benefiting teachers of the second and third cycles of primary and secondary education, to be extended subsequently to pre-school teachers and teachers in the first cycle of primary education;
- The Secretary of State for Public Administration has drawn up a draft decree-law allowing a reorganization of work and greater flexibility of working hours;
- An agency has been selected to develop awareness campaigns in public opinion on the importance of sharing family responsibilities for the sake of family equilibrium and the development of children and young people;
- A draft law is under study to set up reception centres for special situations of housing shortages (single-parent families, people at risk, the elderly, etc);
- New social measures have been implemented, through the welfare job market, in order to enhance the quality of family life, and in particular the lives of women;
- A study has been made of the possibility of introducing the principle that public administration appointments should take account of the need for proximity between spouses.



Another report, dated March 1999, was prepared by the Social Intervention Study Centre (CESIS), which was set up in 1992 as a private non-profit-making association conducting social research. The report also gives an assessment of the implementation of the above plan. According to the report, which covers the period from March to November 1998, only 4 out of the 51 measures listed in the General Plan for Equal Opportunities have not been implemented.

The report mentions the following developments:

- A draft law has been prepared allowing a reorganization of work and more flexibility in working hours;
- The draft law on reception centres has been prepared;
- A study has been launched into the use of time in the paid activities of men and women, as part of a broader study on a legal framework for household occupations;
- The Ministry of Education is preparing a series of facilities for schools, with double page announcements in the newspapers and magazines and an advertising campaign in public transport and regional health directorates (targeting teenage mothers in order to protect them);
- A public awareness campaign has been launched with the slogan “couples who share their tasks enhance the quality of life”. The campaign has included an advertisement on television entitled “Ana Cristina”, one on radio, double page announcements in newspapers and magazines and the distribution of posters in public transport and in the regional health directorates (the campaign was conducted from 15 September to 15 November 1998 and was jointly financed by the European Social Fund).

### **The Commission on Equality at Work and in Employment**

3.16 The Commission on Equality at Work and in Employment (CITE) was set up when Decree-Law No. 392/79 of 20 September 1979 was approved. Under the terms of Decree-Law No. 254/97 of 26 September 1997, the CITE has been transferred to the Ministry for Qualifications and Employment.

3.17 The Commission submits recommendations to the Minister in charge for the adoption of legislative, regulatory or administrative measures aimed at improving the application of rules concerning equality of access to employment and at work between men and women; it undertakes studies and research aimed at eliminating discrimination against women at work and in employment, and encourages and promotes actions in favour of equality of access to employment; it approves opinions submitted by the Secretariat on equality at work and in employment; it must also use all available means to publicize any infringements of the rules concerning equality of access to employment.

3.18 The CITE secretariat is responsible for providing technical support to bodies preparing collective work regulations with a view to establishing the correct equivalents between professional categories and corresponding salaries; for issuing opinions, at the request of labour inspectorates, trial courts, workers' and employers' unions, the body in charge of seeking settlements in individual labour conflicts or at the request of any individual concerned; for paying visits to workplaces in order to monitor possible discriminatory practices; and for developing the Commission's activity.

3.19 The CITE is directly answerable to individuals and enterprises on any matter related to the law applicable in practical situations they have to deal with (through personal contacts, in writing or by telephone - a free (green) line has recently been opened to provide information on rights related to the protection of motherhood and fatherhood at work and in employment). The CITE also receives and processes complaints, in an effort to resolve disputes between workers and employers. It awards the "Equality is Quality" prize to enterprises that implement model policies with respect to equal opportunities.

Within the framework of the EQUAL European Community initiative, the CITE is currently running nine specific projects, which are aimed at reconciling work and family life and at reducing disparities between men and women in the labour market. It is undertaking two further initiatives aimed at promoting equality of pay between men and women: the project "Guaranteeing the right to equal pay" (aimed at analysing and putting forward proposals related to Community legislation and its enforcement mechanisms) and the project "Equal pay, the challenge of democratic and economic development" (aimed at promoting the employment of women and equal treatment and pay).

3.20 The CITE publishes several books, intended either for users in general (especially women) or enterprises, on topics such as: Good practices for reconciling work and family life (2001), Understanding women's work in order to change it (2000), Guide to good practices for reconciling family life and working life (2001), Equal opportunities and collective bargaining in Europe - analysis of the negotiating process (2000), and Protection of motherhood and fatherhood - legislation (2001).

### **Access to work and vocational training**

3.21 Everyone's right to work is enshrined in the Constitution, as well as equal opportunities in the choice of a profession. There must be no limitation under any circumstance with regard to conditions of access to work according to gender. Under article 59 on workers' rights, it is the duty of the State to provide special protection at work for women during pregnancy and after childbirth.

3.22 Act No. 105/97 of 13 September 1997, amended by Act No. 118/99 of 11 August 1999, guarantees the right to equal treatment at work and in employment, in both public and private sectors.

The concept of direct discrimination is defined in the Act as follows: direct discrimination occurs whenever an apparently neutral measure, criterion or practice is disproportionately disadvantageous to persons of one sex in particular, especially because of their civil or family status, without being objectively justified for any reason or any condition not related to the person's sex. According to this law, one particular sign of discriminatory practice would be disproportionately high numbers of either male or female workers in the service of the employer compared with the proportion of workers of that sex employed elsewhere in a similar area of activity.

3.23 The trade unions representing workers employed by the enterprise which has infringed the right to equal treatment can initiate proceedings before the relevant courts with a view to proving discriminatory practice, without prejudice to the workers' or candidates' right to take legal action themselves.

In such proceedings, the burden of proof rests with the employers, who must prove the absence of any gender-based practice, criterion or discriminatory measure.

A register of all competitions held and job offers must be kept by enterprises for five years.

All discriminatory practices are punishable by fines. In the event of a repeated offence, employers will be sentenced by the court to pay the expense of unofficially publishing an extract of the decision concerning the discriminatory practice in one of the most widely read newspapers in the country. All decisions are forwarded to the Commission for Equality at Work and in Employment, which holds a register thereof.

For statistical data concerning court proceedings for administrative offences related to gender discrimination, see annex 4.

It should be pointed out that in the year 2000 the General Labour Inspectorate received no request for action in this respect. In October 2000, the General Labour Inspectorate, in partnership with the CITE, conducted a campaign targeting 1,200 advertisers in order to encourage non-discrimination in advertisements and job offers. The campaign started with the dispatch of a joint letter, which was followed by a meeting and discussion on the subject. Enterprises are currently going through a process of self-assessment by sending in replies to a survey/checklist to ascertain how the law is applied in advertisements and job offers. In the course of 2000, there was no need for any coercive action in this respect.

3.24 Under Decree No. 1212/2000 of 26 December 2000, increases have been approved in the funding provided to support employment policy in occupations badly affected by discrimination, such as train drivers, building workers, pre-school teachers, dressmaking, embroidery and nursing.

### **Protection of motherhood and fatherhood**

3.25 Act No. 4/84 of 4 April 1984 (amended by Act No. 17/95 of 9 June 1995, Act No. 102/97 of 13 September 1997, Act No. 18/98 of 28 April 1998, Act No. 118/99 of 11 August 1999, Act No. 142/99 of 31 August 1999, and by Decree-Law No. 70/2000 of 4 May 2000) establishes legal conditions for the exercise of motherhood and fatherhood. The two spouses have the same rights and the same obligations regarding the maintenance and education of their children (art. 3) (see also comments under article 23).

3.26 The State has specific duties, consisting in a system of care appropriate for family planning and the protection of motherhood and fatherhood.

3.27 Women are entitled to free health care during pregnancy and for 60 days after childbirth. Health centres must provide whatever assistance is required during pregnancy and, during the first year of life, a child will undergo at least nine medical examinations free of charge spaced according to medical prescription and the child's state of health and stage of development. The child will also be given whatever vaccinations are required.

3.28 A pregnant woman may not in principle be dismissed from work, except in exceptional cases laid down by law. Before it is accepted, dismissal must be subject to a prior report by the Commission for Equality at Work and in Employment, based on a presumption that dismissal is not justified.

3.29 Working women are entitled to 120 days of maternity leave, of which 90 must be taken after delivery, without losing any entitlement, including salary. In the event of adoption, maternity leave is 100 days. Grandparents are entitled to leave in the case of girls aged under 16.

3.30 In some circumstances this leave may be given to the father (in the event of the mother's physical or mental disability or demise or by joint decision of the parents). Also women attending training courses for whom a prolonged absence would be undesirable benefit from the fact that the maternity leave may be transferred to the father. The duration of maternity leave cannot affect entitlements acquired during an unfinished period of training, but the course will have to be completed later.

Pregnant women are entitled to leave their work for prenatal consultations and, if they are breastfeeding, they may leave their jobs twice a day for up to one hour.

3.31 Workers are entitled to leave their work to attend to sick or injured children (including adopted children and the spouse's children) and are entitled to days off to assist the spouse and older generations. Such absence from work does not entail any loss of entitlement.

3.32 Children in hospital are entitled to be accompanied by the father or mother. Working parents are entitled to leave their jobs to accompany a child in hospital. In order to make this entitlement more attractive, under Decree-Law No. 26/87 of 13 January 1987, free meals are offered to parents who accompany their children in health-care units.

3.33 Working parents who have children under the age of 12 are entitled to switch to half-time work or to flexible time in certain circumstances.

3.34 The law affords genetic protection to men and women by prohibiting or restricting activities that may expose them to risks in that respect. Workers who are expecting a child, have recently given birth or who are breastfeeding their child are entitled to special conditions of security and health at the workplace, such as being relieved of night work and being prevented from performing certain types of work entailing a specific risk of exposure to dangerous chemicals, processes or working conditions.

3.35 The social security and welfare system includes a maternity or paternity benefit, and an allowance for assistance to sick children. Leave periods give rise to social security entitlements for purposes of invalidity or old age retirement.

### **Sex education and family planning**

3.36 Act No. 3/84 of 24 March 1984 recognized the right to sex education, as part of the right to education in general.

The State is responsible for promoting the dissemination of family planning methods and for organizing legal and technical facilities as required to encourage the exercise of responsible motherhood and fatherhood.

Young people are entitled to sex education, which the State is to provide through schools, health-care organizations and the media.

Scientific knowledge concerning anatomy, genetic physiology, human sexuality, AIDS and other sexually transmissible diseases, contraceptive care and family planning, inter-personal relations and the sharing of responsibilities and equality between men and women is to be offered by schools, as a way of contributing to the elimination of gender-based discrimination and traditional divisions between men and women and to encourage the development of responsible personal attitudes regarding sexuality and future motherhood and fatherhood.

3.37 Act No. 120/99 of 11 August 1999 introduced measures to facilitate access to family planning and methods of contraception, with a view in particular to preventing unwanted pregnancies and to combat sexually transmissible diseases. See annex 5 for the relevant statistics.

Any health-care establishment which has terminated a pregnancy at the woman's request or which has provided care for an abortion case must ensure that the woman concerned, within seven days at most, obtains access to family planning guidance.

### **Other guarantees for women**

3.38 The rights of women's associations were strengthened under Act No. 10/97 of 12 May 1997 and are currently governed by Decree-Law No. 246/98 of 11 August 1998. Those same rights were further strengthened by Act No. 128/99 of 20 August 1999, which allowed the associations broadcasting time and the status of social partner, with a right to join the Economic and Social Council.

3.39 Act No. 61/91 of 3 August 1991 protects women who have been the victims of violent crime through an SOS Office set up in the Ministry of Justice, providing practical, medical and legal assistance.

### **Domestic violence**

3.40 In the light of a study sponsored in 1997 by the Commission on Equality and Women's Rights, which showed that the family home and the husband were the main factors responsible for violence against women, Act No. 107/99 of 3 August 1999 set up a public network of centres to support women who had been the victims of violence, in which it is intended to create a family-type environment offering women opportunities for social and occupational resettlement, where necessary, and which are staffed by teams that include psychologists, lawyers and social workers.

3.41 Council of Ministers resolution No. 55/99 of 15 June 1999 approved a national plan against violence in the home, adopting several measures for the protection of the women involved, especially by keeping a "green line" free telephone line open 24 hours a day, incorporating the subject in school curricula and creating awareness through pre-school human rights education, informing the general public through the media and launching projects with the support of community funds.

3.42 In 1995, heavier sentences were prescribed in the Penal Code for the crimes of ill-treatment to spouses and rape. In 2000, a further legislative change ensured that criminal prosecution would no longer depend on a complaint by the victim, with the crime being considered a public matter. Furthermore the crime of sexual coercion has been separately specified, as well as rape arising from an abuse of authority due to a relationship of hierarchical, economic or job-related dependence.

Under the terms of Act No. 129/99 of 20 August 1999, advance compensation may be paid by the State to the victims of marital violence.

3.43 The Code of Advertising prohibits any race or gender-based discrimination (Decree-Law No. 330/90 of 23 October 1990).

**Military service**

3.44 In 1987, women were allowed for the first time by the Military Service Act to serve in the armed forces. From 1991 onwards, women were allowed to do military service in all branches of the armed forces. The Military Service Act, No. 174/99 of 21 September 1999, which introduced voluntary service as a general rule, established equal military rights and duties for men and women.

**Guaranteed minimum income**

3.45 A system of guaranteed minimum income was introduced in 1996 (under the terms of Act No. 19-A/96 of 29 June 1996) in order to provide individuals and their families with enough resources to meet their minimum needs and to assist their gradual social and occupational rehabilitation. Recipients of the benefit include pregnant women aged 18 or over, or less than 18 if they are economically independent. All recipients of the guaranteed minimum income have access to a specific occupational resettlement programme (see comments below under article 8, paragraphs 8.5 et seq. and article 24, paragraph 24.93).

**Protection of the family**

3.46 See comments below under article 23.

**Article 4****Suspension of civil and political rights****State of siege and state of emergency**

4.1 The Constitution was amended in this respect in 1989. According to the latest version, a state of emergency may be declared when the circumstances governing the declaration of a state of siege (including actual or imminent aggression by foreign forces; serious threat to or disturbance of the democratic constitutional order, or a public disaster) are of a less serious nature.

4.2 The principle of proportionality, which was already contained in the law (Act No. 44/86 of 30 September 1986 governing states of siege and emergency) and in general terms in the Constitution itself is now expressly recognized. In the actual choice between declaring a state of siege or a state of emergency, as well as in the declaration and effective implementation of either, this principle has to be respected, so that any measures taken must be limited to those strictly necessary for the prompt restoration of normality.

4.3 Confirmation is given of what was already contained in the law and, in general terms, in the Constitution itself, namely that a state of emergency must in no event affect the rights to life, to personal integrity and identity, to civil capacity and citizenship, to the non-retroactivity of criminal law, to the defence rights of accused persons and to freedom of conscience and religion.

4.4 Constitutional normality may be affected only within the limits set out in the Constitution itself, without infringing constitutional provisions governing the powers and operation of sovereign organs and the governments of the autonomous regions or the rights and immunities of their members.

4.5 Otherwise, the provisions of the Constitution and the above Act are maintained, expressly with regard to the exceptional nature of such declarations and, amongst others, the time and territorial limits applying to the situation. The constitutional rules governing the declaration of a state of siege or emergency, which determine action by the President of the Republic, consultation of the Government and authorization by Parliament, subject to legislation, are also maintained. For more details, see second periodic report, paragraphs 224 et seq.

## **Article 5**

### **Limitations of guaranteed rights**

5.1 Under the Portuguese constitutional system, the State cannot commit acts that detract from civil and political rights, without subverting the system itself.

5.2 In Portugal, in addition to fundamental rights recognized in domestic law, article 16 of the Constitution recognizes the applicability of fundamental rights “provided for in the laws or rules of applicable international law”.

In paragraph 2, article 16 of the Constitution adds that the fundamental rights recognized in the Constitution and the legislation must be construed and interpreted in harmony with the Universal Declaration of Human Rights.

Article 5 of the Covenant contains a clause safeguarding international instruments, which stipulates that none of the rights in the Covenant may be interpreted as implying the acceptance, through the exercise of those rights, of their limitation. This “Weimar Clause” appears in practically all legal systems, including the Portuguese, where it is mentioned in article 18, paragraph 2 of the Constitution: fundamental rights may be restricted by law only in cases expressly provided for in the Constitution, and restrictions must be limited to the extent necessary to safeguard other rights or interests protected by the Constitution.

## **Article 6**

### **Right to life**

#### **Under the Constitution**

6.1 After five legislative revisions of the Constitution, article 24 now definitively guarantees the right to life and its inviolability.



With regard to the abolition of the death penalty, reference should be made to paragraphs 254 and following of the second periodic report (CCPR/C/42/Add.1). On extradition, in the event that the death penalty may potentially be applied, see comments under article 13 (para. 13.8 et seq.).

### **Under the Penal Code**

6.2 The 1982 Penal Code was amended by Decree-Law No. 48/95 of 15 March 1995 introducing the new Penal Code. The new Code attaches more importance to crimes against the person than to crimes against property, thus rectifying a shortcoming in the old Code. It has further been amended in this respect recently in Act No. 65/98 of 2 September 1998 and Act No. 7/2000 of 27 May 2000.

### **Protection of life**

6.3 Under article 131 of the Code, homicide is punishable by a prison sentence of between 8 and 16 years. Aggravated homicide (art. 132) is punishable by a prison sentence of between 12 and 25 years, if death is brought about in particularly perverse or vile conditions (e.g. if the perpetrator is a parent or child of the victim; if the act is perpetrated against a person who is defenceless on account of age, disability, disease or pregnancy; other aggravating circumstances include the use of torture; the pleasure of killing or cupidity; the satisfaction of a sexual instinct; racial, religious or political hatred; committing the crime to hide another crime; the use of poison; cold-bloodedness in the perpetration of the act; attacking a member of a sovereign organ; if the perpetrator is a civil servant or commits the deed through serious abuse of authority).

6.4 Any form of participation, cooperation, instigation, assistance, incitement or intervention, with malice or negligence, in the unnatural or illegal termination of a human life is punishable by a heavy sentence of imprisonment. Aiding or abetting suicide is also punishable, as well as infanticide.

### **The crime of genocide**

6.5 The new Penal Code covers crimes against peace and against humanity. Article 239 deals with genocide in the following terms:

“Anyone who commits one or more of the following acts with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

- (a) killing members of the group;
- (b) causing serious bodily harm to members of the group;
- (c) inflicting on the group cruel, degrading or inhuman living conditions or treatment likely to bring about its destruction, in whole or in part;

- (d) forcibly transferring children of the group to another group; or
- (e) preventing procreation or births in the group;

shall be liable to a prison sentence of 12 to 25 years.”

Incitement to genocide is punishable by a prison sentence of two to eight years. Abetting the crime of genocide is punishable by a prison sentence of one to five years.

### **War crimes**

6.6 Articles 236, 237 and 238 of the Code cover incitement to war, the commitment of the armed forces to war against another country and the recruitment of mercenaries. The first of these crimes is punishable with six months' to three years' imprisonment and the last two to imprisonment of one to five years.

War crimes committed against civilians are dealt with in article 241: “Any person who, contravening the rules and principles of general or customary international law, in times of war, armed conflict or occupation, commits any of the following acts against the civilian population, the wounded, sick or prisoners of war:

- (a) intentional homicide;
- (b) torture or cruel, degrading or inhuman treatment;
- (c) intentional impairment of physical integrity;
- (d) taking hostages;
- (e) forced service in enemy armed forces;
- (f) deportation;
- (g) serious, prolonged or unjustified restrictions of personal liberties;
- (h) the removal or unjustified destruction of valuable property;

shall be liable to a prison sentence of 10 to 20 years.”

The minimum and maximum limits of this penalty are increased by a quarter if the acts referred to are committed on persons belonging to a humanitarian institution.

6.7 The Penal Code also penalizes the crimes of destruction of monuments (3 to 10 years' imprisonment), torture and other cruel, inhuman or degrading punishment or treatment (1 to 16 years) and failure to report a crime by a hierarchical superior who has knowledge thereof (6 months to 3 years).

## **Suppression of terrorism**

6.8 As already mentioned in the previous report, the European Convention on the Suppression of Terrorism is currently in force under Portuguese law.

The suppression of terrorism is covered in articles 297 and following of the Penal Code. Penalties of up to 15 years' firm imprisonment are provided for offences ranging from public defence of a crime to the formation of terrorist organizations (art. 300) and terrorism itself (art. 301).

6.9 Decree-Law No. 324/85 of 6 August 1985 makes the Portuguese State liable to pay compensation to public servants, whether civilian or military, who have been the victims of a terrorist act in the performance of their duties or on account thereof. This decree-law has been applied in the following circumstances:

- Joint Order by the President of the Council of Ministers and the Ministries of National Defence and Finance, dated 20 July 1992, authorizing the payment of compensation to a police official, Mr. Fernando Duarte de Sá, whose car was set on fire as a result of reprisals for the performance of his duties in coordinating operations conducted against drug and robbery offenders;
- Joint Order by the President of the Council of Ministers and the Ministries of Internal Affairs and Finance, dated 20 July 1992, authorizing payment of compensation to a police officer, Mr. António Manuel Correia Canelhas, whose car was set on fire by rebellious individuals;
- Resolution by the President of the Council of Ministers, dated 23 October 1987, authorizing the payment of compensation to the widow and son of Mr. Alvaro Morais Militão dos Santos, a police officer assassinated in the course of combating banditism;
- The scope of Decree-Law No. 324/85 has been extended to members of juries, which the law considers as public servants. Similar provisions are made in article 15 of Decree-Law No. 387-A/87 of 29 December 1987, concerning the new jury system in criminal procedure. The same conclusion was reached in the opinion issued by the Consultative Council for the Office of the Procurator-General published in the Official Journal, series II, No. 168, of 24 July 1987, with regard to mayors.

## **Protection of victims**

6.10 On 11 September 1995, Portugal acceded to the United Nations Convention on the Prevention and Punishment on Crimes Against Internationally Protected Persons, including Diplomatic Agents.

6.11 In March 2000, Portugal ratified the European Convention on the Compensation of Victims of Violent Crimes of the Council of Europe.

6.12 Apart from the cases already mentioned, for private citizens Decree-Law No. 423/91 of 30 October 1991 introduces provisions for the protection of victims of violent crimes. It is enforced through Regulatory Decree No. 1/99 of 15 February 1999.

This decree-law set up a social insurance scheme, paid for out of public funds, to compensate victims of violent crimes in the event that the perpetrators of the crime (including State officials) are unable themselves to pay compensation or so long as such compensation has not been paid.

Compensation is paid only in cases of damage to property and physical injuries. The dependents of victims who have died as a result of a violent crime are also entitled to compensation.

6.13 Victims are exempted from legal costs. In this respect, since acts of terrorism come under the category of violent crimes, individuals and their families are also protected and entitled to receive similar compensation.

6.14 In 1999, the INOVAR programme was launched with a view to preparing police authorities, through special training, to provide suitable assistance to crime victims (with formalities or information), especially for the most vulnerable groups, such as the elderly, children, women and tourists. It is intended to set up data banks providing information on all institutions liable to offer help to victims, and others, and to collect statistical data.

6.15 An INOVAR file is also to be set up for the public, containing security rules, legislation on victims and application forms. Other measures include the conclusion of protocols with various bodies, with a view to improving the diversity and quality of assistance given to victims; awareness-creation, in general, through the media and schools, especially through the submission of competitive work on the subject, as well as the training of hospital staff in emergency units to provide information and guidance to victims.

6.16 There are also INOVAR offices in the "Citizen's Centre" (that houses several public bodies in order to provide the public with easy access in one place to several administrative services), while information on the project is to be made available on Internet.

6.17 For women victims of crimes, see comments concerning article 3 (para. 3.42 et seq).

### **Protection of life before birth**

6.18 Abortion is generally punishable in Portugal, with penalties ranging from two to eight years' imprisonment for any person causing a woman to abort. Women undergoing abortion incur penalties of up to three years (article 140 of the new Penal Code in the draft contained in Act No. 90/97 of 30 July 1997).

A referendum on the elimination of current restrictions on abortion was held in June 1998. The Portuguese population opted to reject any extension of abortion facilities, by 50.92 per cent of votes against and 49.08 per cent in favour of abortion.

6.19 According to the Penal Code, an abortion carried out by a doctor or under a doctor's guidance, in an official health-care establishment or one which is publicly recognized, with the consent of the pregnant woman, is not punishable if, in the light of current medical knowledge and experience in the field:

(a) It constitutes the only means of avoiding a danger of death or serious and irreversible physical or mental harm to the pregnant woman;

(b) It constitutes an appropriate means of avoiding death or serious and irreversible physical or mental harm to the pregnant woman, and is carried out during the first 12 weeks of pregnancy;

(c) There are definite reasons for believing that the unborn child may incurably suffer from serious disease or malformation, if conducted during the first 24 weeks of pregnancy;

(d) There are serious grounds for believing that rape has taken place, in which case the abortion must be conducted in the first 16 weeks.

The periods referred under (c) and (d) were extended under Act No. 90/97 of 30 July 1997 from the 16 to 24 weeks and from 12 to 16 weeks respectively.

6.20 According to the law, doctors and other health workers are entitled to voice conscientious objections to the practice of illegal abortions, which allows them to refuse to perform a medical act if this is contrary to their moral, religious or humanitarian conscience.

A pregnant woman's consent to abortion must be given expressly and specifically in a written document, signed by the woman herself.

6.21 Doctors who fail to obtain the necessary documents for legal abortion (i.e. the mother's consent) must act according to their conscience if the documents concerned are not available or if the abortion is urgent.

## **Drugs**

6.22 In 1991, Portugal ratified the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

6.23 After ratifying the Convention and with a view to fulfilling its commitments, the Portuguese State issued Decree-Law No. 15/93 of 22 January 1993, repealing Decree-Law No. 430/83 of 13 December 1983, and establishing legislation governing the traffic in narcotics and psychotropic substances. Special rules were provided for minors.

The main objectives of the decree-law are to deprive persons engaging in such illegal traffic of the benefits of their criminal activities, thereby removing their main motivation, to take steps to control certain substances, including precursors, chemical products and solvents used to manufacture narcotics and psychotropic substances and whose availability has led to an increase in the illegal manufacture of such narcotics and substances, as well as to improve international cooperation for the elimination of illegal trafficking.

6.24 According to this law, the National Institute for Pharmacy and Medicine has the power to issue authorizations for the cultivation, production, manufacture, extraction, preparation, sale, distribution, transport, possession and use of certain plants, substances or preparations listed in tables annexed to the law.

The decree-law provides penalties of imprisonment for persons who, without authorization or, more seriously, in violation of an issued authorization, engage in the cultivation, production, supply, manufacture, extraction, preparation, sale, distribution or transport of plants, substances or preparations listed in the tables annexed to the law.

6.25 Criminal associations engaging in activities constituting offences listed under the decree-law are liable to heavy penalties.

6.26 Act No. 30/2000 of 29 November 2000 contains provisions governing the consumption of narcotics and psychotropic substances, as well as the health and social protection of persons consuming such substances without a doctor's prescription. The consumption of some substances is no longer an offence.

The consumption of the substances listed in the legislation is an administrative offence, liable to a fine. The fine may be replaced by an admonition. Alternatively or cumulatively, penalties may include forbidding the offender to exercise a particular profession, to enter certain premises, to carry arms or to travel abroad without authorization, or else to appear regularly at a certain place. These rules cease to apply, however, if the user requests the assistance of health services.

The anonymity of persons who consume narcotics or other illegal substances or who request the assistance of social security services or private clinics is guaranteed.

6.27 Several support centres for drug users have been set up under a policy to expand treatment facilities.

6.28 As stated in the last report, Council of Ministers resolution No. 23/87 of 21 April 1987 approved a comprehensive plan to combat trafficking and illegal use of narcotics and psychotropic substances. This plan, known as the "Life Project", depends on several ministries, including the Ministry of Education. The latter has already taken some important measures as a result of the resolution, of which the following may be mentioned:

- Introduction of material concerning drug use, alcoholism, smoking and the illegal use of medicines in school curricula;

- Introduction of these subjects in initial and further training programmes for primary and secondary schoolteachers;
- Establishment of prevention teams in schools;
- Information campaigns intended for the general public and for young people and parents in particular. These campaigns, conducted through the media, aimed to create awareness in large sectors of the population regarding drug problems, the reasons that lead to drug abuse, the dangers this implies and existing support facilities for combating drug abuse or at least reducing its harmful effects;
- Dissemination of information concerning the danger of the spread of AIDS among drug users, which is a high risk group;
- Awareness-creation and information campaigns for students in higher education.

6.29 Order No. 172/ME/93 of 13 August 1993 introduced the Health Promotion and Education Programme aimed at conducting health promotion and education activities, focusing on the prevention of drug use and AIDS and establishing links with other government departments conducting similar activities.

6.30 Decree-Law No. 43/94 of 17 February 1994 approved the organizational law for the Drug Abuse Prevention and Treatment Service (SPTT), which deals with prevention and the treatment and social rehabilitation of drug users.

6.31 In 1999, the National Drug Prevention Strategy was approved, establishing a set of related principles, objectives and strategies, and introducing mechanisms to ensure better coordination between services, in particular in favour of the prevention, treatment and rehabilitation of drug users.

In 2000, the Life Project was incorporated in the recently created Portuguese Drug and Drug Abuse Institute, with a view to rationalizing resources and improving the effectiveness of measures taken. This project is aimed in particular at assessing policies, putting forward proposals for new legislation, promoting prevention, promoting and supporting the activities of private organization, as well as collecting, processing and disseminating relevant data in Portugal.

The National Drug Prevention Strategy was approved by Act No. 109/99. The conditions for implementing the strategy are:

- Adapting existing regulations to the strategy;
- Coordinating measures;
- Becoming familiar with the situation and its characteristics;
- Preventing drug consumption;

- Offering treatment and reducing risks;
- Social rehabilitation;
- Preventing and penalizing trafficking;
- International cooperation.

6.32 On 9 April 2001 (under Council of Ministers resolution 39/2001), the National Plan of Action to combat drugs and drug dependence was approved, including action in the following areas: primary prevention, prevention and reduction of risks and damage, treatment, social rehabilitation, measures against illegal drug trafficking and money laundering, investigation and information, policy assessment and international cooperation. This Plan of Action, which is related to the European Union's Action Plan on Drugs (2000-2004), will remain in effect until 2004.

6.33 Other current measures related to the treatment and social rehabilitation of drug users include the following:

- Reviewing the legal background of support for private institutions in the area of the treatment and social rehabilitation of drug users;
- Expanding the network of public services for the treatment and rehabilitation of drug users with the addition of new reception centres;
- Approval of the Special Drug Prevention Programme for Prisons;
- Establishment of a special medical unit to assist drug users in prison.

### **Alcoholism**

6.34 Articles 291 and 292 of the new Penal Code penalize dangerous driving of vehicles under the influence of alcohol.

6.35 In view of the fact that alcoholism is the most serious form of drug addiction in Portugal, the Government decided in 1999 to set up an inter-ministerial commission to deal with matters related to the prevention of alcoholism and to propose a plan of action, which was eventually submitted and approved in 2000. The aim is to coordinate this plan of action with the European Alcohol Action Plan and the World Health Organization.

The plan includes public information campaigns, especially in schools, on the harmful effects of alcohol, the dissemination of current international instruments and of the results of recent studies, restrictions on the times and terms of advertising of alcoholic drinks, as well as on their sale, and increases in related duties.



### **Increase in average life expectancy, infant mortality and disease prevention**

6.36 Several laws have dealt with specific problems affecting average life expectancy, including Decree-Law No. 301/2000 of 18 November 2000, amending Decree-Law No. 390/93 of 20 November 1993, concerning the exposure of workers to carcinogenic agents, whereby employers are obliged to evaluate the degree of risk or to reduce the use of such agents.

The number of exposed workers must be reduced to a minimum, while employers must circulate information and introduce protection and health measures and working methods likely to reduce risks. Medical records must be held for workers and kept for 40 years, together with other important data.

6.37 In order to increase average life expectancy, measures include exemption from taxes on medical services for chronic disease sufferers requiring frequent consultations and treatment and likely to reduce average life expectancy.

In view of the high rate of mortality due to lung diseases and cancer, information campaigns have been conducted to make the public aware of the need for better air quality in towns by following the European scheme of one day without cars in towns in 2000. Special attention was also paid to environmental problems, both from a legislative and from a practical action point of view (e.g. treatment of solid waste, action to improve water quality, creation of several nature reserves, etc.).

6.38 For statistical data, see annexes 6 and 7.

### **Regulations concerning the use of firearms, explosives and other weapons**

6.39 Generally speaking, the use, in any form, the sale, import, possession or manufacture of any explosive or radioactive device or substance or of weapons of any kind is deemed an offence in the Penal Code (art. 275).

6.40 In 1999, Portugal ratified the Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects.

In May 2000, Portugal also ratified the Comprehensive Nuclear-Test-Ban Treaty of the United Nations.

### **Use of explosives and firearms by security forces**

6.41 The use of firearms by the National Police and by the Judicial Police is governed by Decree-Law No. 364/83 of 28 September 1983, article 17 of Decree-Law No. 275-A/2000 of 9 November 2000 and by Decree-Law No. 457/99 of 5 November 1999. The latter decree-law establishes in general terms the conditions under which firearms may be used by the police, and is applicable, adapted as necessary, to the use of explosives.

The use of firearms by police officers is permitted only in the case of absolute necessity, as an extreme measure of coercion and provided their use is proportional to circumstances, in particular if there is no possibility of using other less dangerous means. Human life must be safeguarded wherever possible. Thus the use of firearms is permitted:

- To prevent imminent aggression or an execution, against a police officer or a third party;
- For the purpose of arresting or preventing the escape of a determined individual suspected of having committed a serious crime, or who is making use of firearms, bombs, grenades or explosives;
- To arrest a person who has escaped or is under arrest order or warrant, or to prevent the escape of any lawfully imprisoned or detained person;
- To free hostages;
- To prevent a serious, imminent attack on public or social installations, public transport vehicles or vehicles transporting dangerous substances, the destruction of which might produce major damage;
- To shoot dangerous animals;
- As an alarm signal or call for help in an emergency situation;
- To overcome violent resistance to the performance of a service following an unequivocal summons to obey and if all other means have been tried.

6.42 The use of firearms is forbidden whenever third parties are at risk, except in the case of legitimate self-defence or of necessity.

6.43 The use of firearms must be preceded by a clearly perceived warning whenever the nature of the service or circumstances permit. Such warning may consist in firing a shot in the air if it is considered that no one may be injured and that no other prior intimidation or warning may be clearly and immediately understood.

All police officers using firearms must report the fact in writing to their superiors as soon as possible, even if no damage was caused.

Any violation of rules concerning the use of firearms by police officers may give rise to an investigation, in order to determine responsibility for disciplinary purposes. The Public Prosecution Department must be notified for the purpose of instituting appropriate criminal proceedings.

Even though the National Police Force and the National Republican Guard have their own inspection services, responsible where necessary for initiating disciplinary procedures, the General Inspectorate of Internal Affairs monitors the legality of police activities and also initiates disciplinary action where necessary. Even though it is placed under the Ministry of Internal Affairs, this General Inspectorate is currently presided over by a Deputy Procurator, who is therefore technically and functionally independent of the Minister.

The General Inspectorate carries out regular visits and spot inspections without warnings, in the course of which it checks general operating conditions and especially the conditions of pre-trial detention in police stations.

The Judicial Police is organizationally dependent on the Ministry of Justice and functionally attached to the Public Prosecution Department, which coordinates its activity for the purposes of criminal procedure.

6.44 Under the terms of Act No. 252/2000 of 16 October 2000, the Aliens and Frontiers Department is considered part of the criminal police. Its inspectors and directors are considered to be criminal police officers, authorized to use firearms under the rules provided in Decree-Law No. 457/99 of 5 November 1999.

6.45 It is absolutely forbidden to use firearms in detention centres for young people, under article 20 of Decree-Law No. 90/83 of 16 February 1983.

#### **Use of firearms by private individuals**

6.46 Decree-Law No. 22/97 of 27 June 1997, amended in 1998 and 2001, regulates the possession and use of firearms within the country. The possession of a firearm is permitted for professional reasons or in cases of great necessity, especially for the purpose of personal defence. Strict criteria are provided for the issue of permits, with applicants being subject to medical and psycho-technical examinations and to expert opinion, besides having no police record.

The issue of permits for the use of precision or leisure firearms can only be issued if the general conditions are met, except in the case of professional requirements or personal defence, when conditions regarding the applicant's criminal record are less strict.

#### **Disappeared persons**

6.47 Portugal acceded to the Schengen Agreement in 1993, which introduced measures for determining the whereabouts of disappeared persons. In doing so, Portugal allows access to the housing forms of foreign citizens, by the competent authorities, while a common information system has been set up between the contracting States.

An on-line communication system was established under Council of Ministers resolution 133/98 of 15 November 1998, in order to ensure the horizontal circulation of information among the police stations and units of the security forces, as a means of facilitating immediate and effective action in the search for disappeared persons.

This communication system, however, is subject to supervision by the National Commission for the Protection of Personal Data.

### **Article 7**

#### **No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment**

7.1 Portugal ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 9 February 1989 and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on 29 March 1990. The instruments of ratification of the first and second protocols to this convention were deposited on 20 March 1998 and 3 February 2000 respectively.

#### **Under the Constitution**

7.2 As stated in the previous report, paragraph 1 of article 25 recognizes the inviolability of the right to moral and physical integrity of the person, while paragraph 2 of the same article establishes that “no one shall be subjected to torture or to cruel, degrading or inhuman treatment or punishment”. In accordance with the constitutional system of fundamental rights provided under article 18 (1) of the Constitution, this right is directly applicable and binding on both public and private bodies.

7.3 This protection applies even in the event of the declaration of a state of siege or emergency (see paragraph 4.3 above).

7.4 According to one of the guarantees in criminal proceedings established under article 32 of the Constitution, evidence is of no effect if obtained by torture, force, infringement of the physical or moral integrity of the individual, or wrongful interference with private life, the home, correspondence or telecommunications.

#### **The law of penal procedure**

7.5 Article 126 of the Code of Penal Procedure confirms article 32 of the Constitution by establishing, in paragraph 2, that any evidence obtained by one of the following means, even with the consent of the person concerned, constitutes a violation of the person’s physical or moral integrity: the use of ill-treatment, physical abuse or fraudulent, hypnotic or other means likely to weaken the accused’s will or sense of judgement; the impairment, by any means, of the person’s memory or sense of judgement; the use of force, beyond legally permitted limits; threats of a legally inadmissible kind or denying legally authorized benefits; or the promise of benefits forbidden by law.

7.6 Any person under questioning must be left free unless restraint is necessary to prevent escape or acts of violence.

7.7 According to Decree-Law No. 433/82 of 27 October 1982 (updated by Decree-Law No. 244/95 of 14 September 1995) concerning administrative offences (*ilícito de mera ordenação social*), evidence related to private life, physical examinations or blood tests may be admitted only with the consent of the persons concerned (art. 42).

### **Under criminal law**

7.8 The above-mentioned constitutional principles are confirmed in the new Penal Code with regard to crimes against life (art. 131 et seq.), crimes against the physical integrity of persons (art. 143 et seq.) and crimes against the freedom of persons (art. 153 et seq.), for example, by penalizing threats (art. 153), coercion (arts. 154 and 155), confinement (art. 158) and abduction of minors (art. 160) or of any other person (art. 160). Penalties for these crimes are increased if they were committed by officials seriously abusing their authority, in particular to force a person to act or to refrain from acting in a certain way.

7.9 Any act of cruelty intended to increase a victim's suffering aggravates the standard penalty. The same principles apply in rules governing sexual crimes under articles 163 et seq. of the new Penal Code.

7.10 It is also worth mentioning articles 243 and 244 of the new Penal Code, which depart from the previous Code. Any person who, in the legitimate or usurped performance of duties of preventing, prosecuting, investigating or taking cognizance of criminal offences, summary offences or disciplinary offences, or enforcing penalties of a similar nature, or protecting, guarding or supervising a detained person, subjects the person to torture or to cruel, degrading or inhuman treatment with a view to obtaining a confession, a statement or information, or punishing or intimidating the person, or with a view to intimidating another person, shall be liable to a prison sentence of one to five years (art. 243 of the Penal Code).

7.11 In the event of a serious offence against physical integrity, or the use of particularly serious means or methods of torture, or of the reiterated perpetration of the acts referred to in the foregoing article, the prison sentence shall be increased to between 3 and 12 years.

If death should ensue as a result of ill-treatment or suicide resulting from the above acts, the official shall be liable to a prison sentence of 8 to 16 years (art. 244 of the Penal Code).

7.12 Torture or cruel, degrading or inhuman treatment is considered to consist in any act which inflicts physical pain or serious physical or psychological fatigue, or which uses chemical substances, drugs or any other natural or artificial means of impairing the victim's free will or sense of judgement.

7.13 Any superior in the hierarchy who fails to report such behaviour is liable to a prison sentence of up to three years.

### **Under penitentiary law**

7.14 See comments under article 10.

### **Police measures**

7.15 Article 272 (1) of the Constitution stipulates that the police is responsible for defending democratic legality and guaranteeing internal security and the rights of citizens. Police must act in accordance with the law and within the bounds of what is strictly necessary (para. 2).

7.16 The prevention of crime must be conducted subject to respect for the rights, liberties and guarantees of citizens (para. 3).

7.17 According to the organizational or statutory laws governing police forces, police are specifically responsible for refraining from the use of torture or inhuman, cruel or degrading treatment, as well as for refraining from carrying out or ignoring, if necessary, any orders or instructions to impose such treatment, and for acting without using any more force than is strictly necessary for the execution of a legally required or authorized task. Any abuse of such rules will give rise to an investigation and a right of appeal on the part of the victims, who, according to the general terms already mentioned, are entitled to compensation.

These rules are contained in article 21 of Act No. 145/99 of 1 September 1999 and in article 30 of Decree-Law No. 265/93 (for the National Republican Guard); in article 16 of Decree-Law No. 196/94 of 21 July 1994 and articles 13 and 17 of Decree-Law No. 275-A/2000 of 9 November 2000 (for the Judicial Police); and in article 4 of Act No. 5/99 of 27 January 1999 (for the National Police).

### **Medical and scientific experiments**

#### **Under the Penal Code**

7.18 Medical and surgical acts or treatment, carried out in accordance with professional practice, by a physician or person legally authorized, for the purpose of preventing, curing or relieving suffering, are not considered bodily harm (art. 150). In the event that the rules of professional practice have been violated, this constitutes an offence punishable with a prison sentence of up to two years or fine of up to 240 days' earnings, unless a more serious penalty is appropriate.

7.19 Prior consent of the patient must have been obtained in a valid and proper manner. Such consent is valid only if given by a person over 14 years of age, possessing sufficient judgement to assess the meaning and consequences of such consent at the time it is given (art. 38, para. 3). Arbitrary medical or surgical acts or treatment (without consent) are punishable under article 156 (prison sentence of up to three years or fine).

#### **Physicians' Code of Professional Conduct**

7.20 The Physicians' Code of Professional Conduct has been established within the profession by the Order of Physicians (legal person of public utility).

7.21 Volume II, chapter IV (Doctors serving their patients) deals with problems related to experiments on humans, and makes specific reference to safeguards and the ethical limits to experimentation.

7.22 Article 44 (in chapter I of the same volume) stipulates that when a doctor treating children, elderly or disabled persons or invalids finds that they have been the victims of cruelty, maltreatment or other ordeals, he must take appropriate measures to ensure their protection, and in particular inform the police or the relevant social services.

7.23 Chapter III of volume II deals specifically with ill-treatment of patients in prisons. Under article 58, doctors must in no circumstances carry out, collaborate in or accept the use of violence, torture or other cruel, inhuman or degrading treatment, regardless of the offence the prisoner or detainee has committed or is accused of, including during states of siege, wars or civil conflicts. These provisions include the refusal to hand over premises, instruments or medicines and the refusal to transmit scientific knowledge allowing torture to be applied.

### **Rules governing the removal and transplant of organs and human tissue**

7.24 The removal or gift of organs and human tissue from deceased or living persons for the purposes of a diagnosis, a transplant or any other therapeutic purpose, is governed by Act No. 12/93 of 22 April 1993. All such acts must be carried out under the guidance and responsibility of a physician and in accordance with professional practice in a public or private hospital (art. 3, para. 1).

7.25 It is forbidden to sell human organs or tissue for therapeutic purposes (art. 5).

7.26 Removals of human parts are authorized only in the case of regenerable substances. The gift of non-regenerable organs or substances is permitted only in the case of kinship to the third degree between donor and receiver. Gifts of non-regenerable substances by minors or incapable persons are forbidden. Gifts are not allowed either if they imply, with a high degree of probability, the serious and permanent impairment of the physical integrity and health of the donor (art. 6).

Doctors have to inform donors and receivers clearly and intelligibly of the possible risks involved in the gift (art. 7). The removal of human substances must be subject to the free, clear and unconditional consent of both donor and receiver. Such consent may be freely withdrawn. The donor is entitled to name the beneficiary (art. 8). Consent for the gift of organs by minors must be given by the parents, unless their parental authority has been withdrawn. In that case, consent must be given by the court. The court will also give its consent on behalf of adults who are incapacitated on account of mental disorders.

7.27 Potential post-mortem donors include all national citizens, stateless persons or aliens residing in Portugal, who have not expressly notified the Ministry of Health that they object to being donors (art. 10). All non-donors are registered in the National Registry of Non-Donors (RENNDA).

The Order of Physicians is responsible for establishing criteria and rules of procedure for the certification of death, subject to the opinion of the National Council of Ethics for Life Sciences. No doctor belonging to the transplant team may certify the death of the patient.

7.28 Under article 15, the Government has launched an information campaign concerning the significance of the policy pursued in the text concerned, aimed at clarifying the possibility of expressing personal unavailability for post-mortem gifts.<sup>3</sup>

### **Compensation for victims**

7.29 Please see comments in this report concerning article 6 (paragraph 6.10 et seq. above).

### **Detained minors**

7.30 See comments under article 9 below (paragraph 9.16 et seq.)

## **Article 8**

### **No one shall be held in slavery. Prohibition of slavery, servitude, forced or compulsory labour**

8.1 Slavery has been forbidden in Portugal since the nineteenth century (for further details, see previous report - CCPR/C/42/Add.1, paras. 335 et seq.).

8.2 By Decree of the President of the Republic No. 48/91 of 10 October 1991, Portugal ratified the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. On 27 January 2001, the Protocol amending the Convention for the Suppression of the Traffic in Women and Children, concluded at Geneva on 30 September 1921, and the Convention for the Suppression of the Traffic in Women of Full Age, concluded at Geneva on 11 October 1933, was ratified on 27 January 2001 for the purposes of accession (Assembly of the Republic resolution No. 5/2001 of 27 January 2001 and Decree of the President of the Republic No. 6/2001 of 27 January 2001).

### **Prevention of the situation of dependence and punishment of offenders**

8.3 The Penal Code punishes “anyone who reduces a person to the state or status of slave” with a prison sentence of 5 to 15 years. A similar sentence was established for anyone who sells, transfers or acquires a human being or who takes possession of a human being in order to keep him or her in a state of slavery or servitude (art. 159). Illegal confinement (art. 158), the abduction of minors (art. 160) and the abduction of others (art. 160) are also punishable under the criminal law.

8.4 The criminal law also punishes the traffic of persons abroad (two to eight years’ imprisonment) or the exploitation for professional purposes or for profit of the practice of acts of prostitution or grave sexual acts (six months to five years’ imprisonment). The sentence is extended in the event of exploitation of the physical incapacity of the victim (one to eight years’ imprisonment).



The Portuguese Government is extremely concerned by the widespread sexual exploitation of women. This situation appears to be related to the Russian mafia, which has infiltrated into Portugal and which uses women as a means of livelihood.

With regard to children, Decree-Law No. 98/98 has established the National Commission for the Protection of Children and Young Persons at Risk. This Decree-Law has drawn much of its inspiration from the United Nations Convention on the Rights of the Child.

8.5 A new law on the protection of children and young persons in danger was adopted in 1999 (Act No. 147/99 of 1 September 1999), to allow organizations dealing with children and young people, commissions for the protection of children and young people and the courts to intervene whenever parents, the legal representative or the person having custody of the child jeopardize the child's security, health, training, education or development, or whenever the danger arises from the action or omission by a third party or by the child or young person himself, if the latter has not been appropriately dissuaded from committing such action. A child or young person is deemed to be at risk whenever they find themselves in one of the following situations: if they are abandoned or live on their own; if they are subjected to physical or mental ill-treatment or sexual abuse; if they do not receive the care or affection suitable for their age and personal situation; if they are compelled to perform activities or labours which are excessive or unsuitable for their age, their dignity or their personal situation or are harmful to their training and development; if they are subjected, directly or indirectly, to behaviour seriously affecting their security or their emotional equilibrium; if they engage in behaviour or activities or consume substances seriously affecting their health, their security, their training, their education or their development, without their parents, legal representative or de facto guardian taking appropriate action to remedy the situation.

Intervening in order to promote the rights or protect a child or young person at risk is subject to the following guidelines:

1. The best interests of the child or young person: any intervention must in the first place consider the interests and rights of the child or young person, without prejudice to consideration owed to other legitimate interests in the event of different interests arising in the case;
2. Privacy: the promotion of the rights and protection of the child or young person must be conducted with due respect for their privacy, their image and the protection of their private lives;
3. Early intervention: action must be taken as soon as the risk situation is detected;
4. Minimum intervention: the intervention must be conducted only by bodies or organizations whose action is essential for the effective promotion of the rights and protection of the child or young person at risk;

5. Proportionality and immediacy: the intervention must be necessary and appropriate for the situation of risk in which the child or young person finds himself at the time the decision is taken and must not interfere with their private lives or those of their families except to the extent that is strictly necessary to attain the desired objective;
6. Parental responsibility: the intervention must be conducted in such a way that parents assume their responsibilities towards the child or young person;
7. Primacy of the family: in the promotion of the rights and the protection of children and young persons, preference must be given to measures that integrate them in their families or that favour their adoption;
8. The obligation to inform: the child or young person, their parents, the legal representative or the person with custody of the child or young person are entitled to be informed of their rights, of the reasons for the intervention and the way it is conducted;
9. Compulsory hearing and participation: the child or young person, either alone or accompanied by the parents or by a person of their choice, as well as the parents, legal representatives or persons with custody of the child or young person, are entitled to be heard and to participate in the proceedings and in deciding the measure adopted for the promotion of the child's rights and protection;
10. Subsidiarity: the intervention must be conducted successively by organizations dealing with children and young persons, by commissions for the protection of children and young persons and, in the last resort, by the courts.

8.6 With regard to additional measures adopted with a view to avoiding or remedying situations of dependence, it is worth mentioning Order No. 348-A/98 of 18 June 1998, which set up placement institutions (non-profit-making legal persons), in order to combat the exclusion from employment of disadvantaged persons. These include the long-term unemployed, persons in receipt of the guaranteed minimum income (beneficiaries must of course remain actively available for work or for enrolling on training or vocational placement courses), former prisoners or persons serving or who have served sentences or court orders without detention, young persons at risk, persons suffering from psychiatric disorders in the stage of recovery, drug users in the process of recovery and the victims of prostitution or other behaviour offensive to the dignity of the human person.

8.7 These institutions are supported by the Employment and Vocational Training Institute through the supply of funding and technical resources, in order to ensure vocational training for the beneficiaries of the programme and their eventual employment. In addition, employers that admit persons seeking such placement enjoy a financial benefit.

8.8 There is also Order No. 1109/99 of 27 December 1999, which created the placement/Employment Programme in support of welfare-oriented activities for recipients of the guaranteed minimum income and their families, in institutions participating in the programme, in

particular through the offer of vocational training. Beneficiaries receive a monthly income while employers taking on beneficiaries of the programme, on an open-ended work contract, receive a premium. The implementation of the programme is supervised by a joint committee and an external commission contracted for the purpose.

8.9 In order to avoid the marginalization and loss of motivation of workers in receipt of unemployment benefit, since 1985 occupation programmes have been promoted to assist their social resettlement. Order No. 192/96 of 30 May 1996 regulates the system, which supplements the scheme for unemployed persons known to be in needy circumstances.

8.10 Decree-Law No. 433-A/99 of 26 October 1999 approved the statutes of the Institute for Social Development, a public law corporation, granted administrative and financial independence and control over its own assets, attached to and supervised by the Ministry of Labour and Solidarity. Its objectives, amongst others, are to promote and manage programmes and other actions aimed at promoting social development and combating poverty and social exclusion, especially for the benefit of children and young people, families, communities and the elderly.

### **Imposed labour**

#### **Community service**

8.11 Article 58 of the Penal Code provides for community service in place of prison sentences not exceeding one year. This entails rendering free services, outside normal working hours, for the benefit of the State and for whatever public law corporations or private organizations are deemed by the courts to serve the community. The option must be applied only with the consent of the convicted offender.

8.12 If the convicted person is unable to work for reasons beyond his control, the court may impose a fine or even lift the sentence. If the convicted person wilfully incapacitates himself for work or refuses to work without justification, the court may terminate the community service option and restore the original prison sentence.

8.13 The Penal Code provides for the total or partial replacement of unpaid fines by days of work in establishments, workshops or works run by the State or other public law corporations or in private welfare institutions. If a fine is not replaced by workdays and the convicted person fails to pay it voluntarily or forcibly, the original sentence must be served.

#### **Conscientious objectors**

8.14 Conscientious objectors to military service must, according to their status, perform community service instead. (For further details, see article 18 below). Military service has ceased to be compulsory since 2001 and has become voluntary in peace time (Act No. 174/99 of 21 September 1999).

## **Civil Protection**

8.15 Under the terms of the framework law governing civil protection - Act No. 113/91 of 29 August 1991 - civil protection is defined as activity undertaken by the State and the citizens with a view to preventing collective risks arising from situations of serious accidents, catastrophes or disasters, of natural or technological origin, alleviating their effects and assisting persons at risk when such situations occur.

8.16 Exceptional measures may be taken under the above law. Civil mobilization may be ordered for individuals for limited periods, in specific areas or sectors of activity, under the supervision of competent authorities.

8.17 The choice and effective implementation of such exceptional measures must depend on the criteria of necessity, proportionality and suitability for the intended objectives.

8.18 The temporary requisition of services gives entitlement to a benefit if the rights or interests of any citizen or private organization are affected thereby, as shown by duly recorded losses.

8.19 The Government is responsible for defining and declaring a state of catastrophe, which may be declared on its own initiative or on a proposal by the Ministry of Internal Affairs or the Regional Governments of the Azores and Madeira.

## **Case law**

8.20 In 1993, the Collegiate Court of Loulé convicted an individual for the offence of attempted slavery.

8.21 The accused, a man of Angolan nationality residing illegally in Portugal, had tried in July 1992 to sell his two youngest children, born on 12 December 1990 and 7 January 1992. He had obliged his eldest son, aged 5 at the time, to pawn a book with a message inside the cover that read: "children sold". The accused had not established what price he would ask for his children, as he intended to bargain according to the interest shown by the buyer. The attempt was eventually ended by the action of the Republican National Guard. It was subsequently proved that the accused had behaved in this way as a result of mental disorders.

## **Article 9**

### **Right to liberty and security**

#### **Under the Constitution**

9.1 Article 27 of the Constitution enshrines the right to liberty and security. According to paragraph 2 of this article, "No one shall be deprived of his or her liberty, in whole or in part, unless as the consequence of a sentence of imprisonment imposed by a court convicting him or her of an offence punishable by law, or as the consequence of a judicially ordered security measure."<sup>4</sup>

9.2 Detention, for periods and under conditions stipulated by law, is applied exceptionally in the following cases:

- (a) Detention in a case of *flagrante delicto*;
- (b) Detention or pre-trial detention where there is strong evidence that a person has wilfully committed an offence punishable by a sentence which may exceed three years;
- (c) Arrest, detention or any other measure of restraint subject to court supervision, of persons who have unlawfully entered or stayed in Portuguese territory or against whom extradition or deportation proceedings have been instituted;
- (d) Disciplinary arrest of military personnel, subject to right of appeal to the competent court;
- (e) When a minor is placed in an appropriate institution, for purposes of protection, assistance or education, subject to a court decision;
- (f) Detention by court order following failure to comply with a court decision or for the purpose of ensuring appearance before the competent judicial authority;
- (g) Detention of suspects for identity checks, in the event of absolute necessity and for such time as is strictly necessary for the purpose;
- (h) Internment of a person affected by mental disorder in an appropriate care establishment, subject to court decision or confirmation.

9.3 According to article 28 of the Constitution, concerning pre-trial detention, “Detention shall, within 48 hours, be subject to a court order either releasing the person or applying a suitable measure of restraint. The judge must be informed of the reasons for the detention and must inform the detainee thereof, question him and give him the opportunity to defend himself. Pre-trial detention is an exceptional measure. It may not be ordered or maintained where it can be replaced by bail or some other more favourable measure available under the law. Pre-trial detention shall be subject to the time limited laid down by law.”

9.4 The court order determining deprivation of liberty or maintaining the detention must be immediately communicated to a relative of the detainee or to a person of trust named by the detainee (para. 3).

## **Under the Code of Penal Procedure**

### **General measures of coercion**

9.5 According to the principle of legality, stipulated in article 191 of the Code of Penal Procedure, a person’s freedom may not be restricted, either completely or in part, except for procedural purposes, by measures of coercion or financial security as provided by law.

9.6 Measures of coercion and financial security are also subject to the principles of adequacy and proportionality: they must be adequate for the purposes of prevention in the circumstances and proportional to the seriousness of the offence and the applicable penalties. Such measures should not affect the exercise of fundamental rights which are not incompatible with the purposes of prevention in the circumstances.

9.7 The coercive measures admissible under the Code are listed in articles 196 to 202:

1. Declaration of identity and residence (*termo de identidade e residência*), which consists in the obligation for an accused person to appear before the competent authority whenever required by law and to refrain from changing residence or leaving his residence without giving due notice and without the means of being contacted;
2. Bail obligation. This measure is applicable when the charge may give rise to a sentence of imprisonment. If the accused person is unable or barely able to put up bail, the judge may, on his own initiative or on request, replace it with any other coercive measure, except pre-trial detention or house arrest. In any event, the amount of bail prescribed must take account of the financial means of the accused person;
3. Obligation to appear regularly before a judicial authority or a criminal police authority on prescribed days and at prescribed times. This measure of constraint may be applied in cases where the charge may give rise to a sentence which may exceed six months;
4. Suspension of duties, occupation and rights. This measure may be applied in addition to another legally applicable measure in cases where the charge may give rise to a prison sentence of two years or more. Under these rules, the accused person may be prevented from performing public duties, an occupation or an activity, the exercise of which depends on a public title or an authorization or approval by a public authority or parental authority, guardianship or supervision, the administration of property or issue of loans (in cases where such restriction has been imposed as an effect of the indicted offence);
5. Restricted residence, prohibition of absence or contacts. Such measures may be applied, together or separately, whenever there are strong indications of an intentional offence giving rise to a prison sentence of more than three years;
6. Obligation to remain at home or not to leave the house without prior authorization. This measure will be applied whenever there is a strong presumption that an intentional offence has been committed giving rise to a prison sentence of more than three years;
7. Pre-trial detention is considered as a measure of last resort. It is distinctly subsidiary in character, which means that it may be applied only if other measures prove

to be inadequate or insufficient (for statistical data, see annex 8). In such cases, pre-trial detention may be applied if there are strong grounds for believing that the person has committed a deliberate offence punishable by a prison sentence which may exceed three years, or a person who has entered and remained illegally on Portuguese territory, or against whom extradition or deportation proceedings have been instituted.

If the accused appears to be suffering from a mental disorder, the court may order him to be placed in a psychiatric establishment while the disorder persists, after hearing counsel for the defence and, as soon as possible, a member of the accused's family. The necessary precautions are taken to prevent any risk of escape and to prevent any further crimes from being committed.

The time limits of pre-trial detention are strictly regulated by article 215 of the Code of Penal Procedure: the maximum time limits relate to the duration of detention before charges are brought (6 months), the decision of the pre-trial investigation (10 months), a verdict of guilty by a court of first instance (18 months) and final conviction having the force of *res judicata* (2 years). These time limits may be extended, as in the case where an appeal has been lodged before the Constitutional Court (according to article 43 of Act No. 13-A/98 - the Organizational Act of the Constitutional Court - for appeals before the Constitutional Court, during which court rulings have been issued in criminal proceedings, for which one of the persons concerned is detained or imprisoned but without being finally convicted, the procedural time limits provided by law must not be interrupted during court vacations), or in cases of terrorism or violent or highly organized crime. The time limits may also be extended if the accused falls ill and requires hospitalization.

9.8 Measures of coercion and financial security only apply if the person concerned has already been charged. They may not be applied if there are good grounds for believing that there are causes entailing exemption from responsibility or extinguishment of the criminal prosecution (art. 192, para. 2). Apart from the declaration of identity and residence, all these measures are applied by decision of the court, on the request of the Public Prosecutor's Department, during the inquiry and even *ex officio*, following an inquiry, after hearing the Public Prosecutor's Department (art. 194, para. 1).

9.9 Article 104, which establishes the general rules governing coercive measures, stipulates that no such measure may be applied, except the declaration of identity and residence, unless in the case concerned there is escape or the risk of escape, a risk of interference with the inquiry or destruction of evidence or unless the maintenance of public order and peace is jeopardized.

9.10 Measures of restraint will be immediately annulled by order of the court if they have not been applied in situations prescribed by law or if the circumstances that justified their application no longer apply (art. 212). These measures are subject to modification by court order if the original circumstances have changed. The annulment of the measures is governed by article 214, which stipulates that they must cease immediately if any of the following conditions apply:

- (a) The investigation has been discontinued and pre-trial proceedings have not been requested;
- (b) The discharge order has been finally issued by the court;

- (c) The order rejecting the charge as manifestly groundless, under the terms of article 311, paragraph 2 (a), has acquired the force of res judicata;
- (d) Acquittal has been ruled;
- (e) The conviction has acquired the force of res judicata.

### **Detention**

9.11 The law draws a clear distinction between pre-trial detention, as a measure of restraint of last resort, and detention, whose purpose is explained in article 254 in the following terms:

(a) To bring the detainee before a court within 48 hours of his arrest (or, if that is not possible, before the magistrate with jurisdiction over the place of detention) or to bring him, within the same time limit, before the examining magistrate in charge of conducting the initial judicial inquiry, or to order a measure of restraint or financial security. The detainee may in any event be brought immediately after arrest before the Public Prosecutor with jurisdiction at the place of detention. After hearing the accused, the Public Prosecutor may order his release or decide that he should be brought before the court, following the procedure established in previous situations;<sup>5</sup>

(b) To bring the detainee immediately before a court for procedural purposes, within 24 hours at most.<sup>6</sup>

9.12 According to article 255, paragraph 1, in the case of *flagrante delicto* relating to an offence punishable by a prison sentence, arrest may be carried out by a judicial authority or by the police or by any other person in the absence of the former and if it is not possible for them to be summoned in time.

9.13 If prosecution of the offence is by private action, *flagrante delicto* arrest is not allowed, but only the identification of the offender (art. 255, para. 4).

9.14 In cases other than *flagrante delicto*, an arrest warrant must always be issued by a court, or by the Public Prosecutor in cases where pre-trial detention is applicable (art. 257, para. 1). According to article 257, an arrest may also be ordered by the criminal police authorities, in situations other than *flagrante delicto*, if the conditions for pre-trial detention apply in the case in question, if there are grounds for fearing the person may abscond and if it is impossible, for reasons of urgency and the risk of undue delay, to wait for the judicial authority to intervene.

9.15 Under article 259, the police units which have placed the person under arrest must immediately inform the court or the Public Prosecutor's Department, as appropriate. Whichever unit has ordered the arrest, or before which the detainee has been brought, must decide the release of the latter immediately, in the event of the detainee's identity being mistaken, in situations which are not covered by the law or in cases where the detention has become unnecessary (art. 261, para. 1).



## Minors

9.16 Under the terms of the Educational Tutelage Act (Act No. 166/99 of 14 September 1999, which repealed the Tutelary Organization of Minors, or OTM), a minor aged between 12 and 16 may be arrested: in a case of *flagrante delicto*, for a period not exceeding 48 hours, if he is suspected of committing an offence carrying a prison sentence; in the event that he needs to be brought before a judicial authority, for the application or implementation of a provisional measure, in which case he must be immediately interrogated within not more than 12 hours; or to be submitted to psychiatric or personality tests. In the latter cases, the minor may be arrested only if the parents or legal representatives are unable to guarantee his appearance and it must be ordered by a court.

If the minor cannot be brought immediately before the court and the parents or legal representatives cannot guarantee the purposes of the arrest or court appearance, the minor may be placed by the police in a tutelary establishment or in an “appropriate section” thereof. The appearance of the minor becomes mandatory as soon as the hindrance ceases. Detention will be maintained only if the minor has committed an offence incurring a prison sentence which may exceed three years.

9.17 The parents, legal representative or person with custody of the minor must be notified prior to the minor’s arrest in cases other than *flagrante delicto*, unless such notification may impede the arrest. In any event, such persons must be notified of any arrest as soon as possible and by the quickest means possible.

9.18 Any decision which applies or maintains a preventive measure, or which terminates proceedings, or which affects the personal or property rights of the minor is subject to appeal before the Court of Appeal.

9.19 When the tutelary procedure has been initiated, the court may decide as a precaution to place the minor in an institution only if there is a presumption that a tutelary measure will be applied under the final ruling, if there are indications that a criminal offence has been committed and there is a risk that the minor might abscond or commit other offences.

9.20 The preventive measure must be preceded by a hearing of the Public Prosecutor, of the defence counsel and, if possible, the parents, legal representatives or person in charge of the minor. Such measures are limited in time: placement in an educational centre must not exceed three months, extendable for another three months in the event of duly substantiated special complexity. The placement of the minor in a public or private institution or in the care of the parents, legal representatives or any other appropriate person, must not exceed six months until a decision is rendered by a court of first instance and one year until a final ruling. The measure must be reconsidered if the conclusion is reached that it is not achieving the desired objectives. It is reviewed unofficially every two months and must cease as soon as the grounds for it no longer apply.

9.21 Minors between the ages of 12 and 16 having committed acts considered as offences or as requiring an educational tutelary measure maybe interned in an educational centre, which may operate on an open, semi-open or closed system. The choice of such a measure must take account of the need to interfere as little as possible with the minor's independent power of decision or conduct of his life and must be most likely to obtain the support of the parents, legal representatives or person in charge of the minor, subject invariably to the principle of the best interest of the minor.

9.22 The duration of internment must be proportional to the seriousness of the act committed and to the minor's need for education. Internment may in no event be prolonged beyond the maximum limit of the prison sentence provided for the offence concerned and in no event may exceed two years, except in the case of a closed system or where the offence committed gives rise to a notional penalty of eight years' imprisonment; in such a case, internment must not exceed three years. The purpose of internment is to remove the minor temporarily from his normal environment and, through the use of educational programmes and methods, to inculcate values such as to enable the minor in future to lead a responsible life.

9.23 A closed internment measure maybe applied only in the following cases: if the minor has committed an act considered to be an offence carrying a maximum notional prison sentence greater than five years or if the minor has committed two or more acts against persons, which are considered to be offences and which carry a notional prison sentence of more than three years. In addition, the minor must be at least 14 years of age when the internment is ordered.

9.24 Any decision terminating the procedure, applying or reviewing a tutelary measure or effecting the personal or property rights of the minor or third parties is subject to appeal before the Court of Appeal, in which case the rules of the Code of Penal Procedure apply.

9.25 It may be possible to order a disciplinary measure suspending contacts with the minor's friends, for a period not exceeding one week, but only in the event of a very serious offence (e.g. the perpetration of an act of physical violence or coercion, participation in or instigation of acts of mutiny, acts of insubordination or disobedience, escape from the centre, the consumption or distribution of drugs, or the possession of weapons or other dangerous objects). Disciplinary measures must be registered, may be appealed against and may be applied only at the outcome of a disciplinary procedure. Internment may be ordered for minors suffering from mental disorders.

### **Military**

9.26 According to the Rules of Military Discipline, the conditions for detention, pre-trial detention and measures substituting pre-trial detention are subject to the provisions of the Code of Penal Procedure, except as stipulated in the provisions of the Code of Military Justice - approved by Decree-Law No. 141/71 of 9 April 1971. Pre-trial detention is maintained only if it cannot be replaced by provisional release. Bail is always replaced by an obligation to appear before a particular authority, but this obligation is waived in the case of military personnel in active service.

### **Compulsory internment of persons suffering from psychic disorders**

9.27 Act No. 36/98 of 24 July 1998 lays down rules for the compulsory internment of persons suffering from psychic disorders. The purpose of the legislation is to introduce a system more in conformity with current situations and with the need to protect the rights of sick persons.

Compulsory internment may be ordered subject to the principles of necessity (to be replaced wherever possible by outside treatment) and proportionality, and only on completion of court formalities. Internment must cease whenever the reasons for it have ceased to apply, and must be reviewed if the person is still interned two months after the original decision or the decision to prolong the internment. The Public Prosecutor's Department has an important role to play in this procedure, from the point of view of defending the patient. It may be added that only a judge may order internment.

9.28 An interned person must be informed of his rights, of the reasons for his internment and of his right to be assisted by counsel, whether chosen or by appointment. A supervisory commission will monitor cases of compulsory internment. Under article 31 of the Constitution, the remedy of habeas corpus is available in the event that the authority ordering or enforcing the deprivation of liberty is deemed to be illegal or incompetent. If the court considers that the application is not manifestly groundless, it may order, if necessary by telephone, the immediate appearance of the person suffering from a psychic disorder and may summon the institution in charge or the person to submit information. Appeal against other decisions, including the internment order, may be brought before the Court of Appeal. The Code of Penal Procedure applies subsidiarily.

### **Right of Appeal**

9.29 Apart of the above-mentioned cases, according to article 42 of the Constitution, the penal procedure provides all necessary safeguards for the defence.

Any detainee is entitled to launch an appeal before a higher court to have the decision concerning the restraint or deprivation of liberty re-examined.

Under article 219 of the Code of Penal Procedure, an accused person is entitled to appeal against any decision to apply or maintain measures of restraint.

### **Habeas Corpus**

9.30 Habeas Corpus is dealt with in article 31 of the Constitution. It may be applied for by the person concerned or by any citizen qualified to exercise his political rights. An application for habeas corpus may be launched, as appropriate, before a court of law or a military court against abuse of power leading to unlawful arrest or detention. The court must rule on the application for habeas corpus within eight days, at a hearing attended by both parties.

9.31 The legal system of habeas corpus in cases of unlawful detention is covered in articles 220 and 221 of the Code of Penal Procedure, which establishes that persons detained by order of an authority may apply for release on grounds of:

- (a) Expiry of the time limit for transfer to the judicial authority;
- (b) Maintenance of detention outside the premises permitted by law;
- (c) The detention being conducted or ordered by an unauthorized authority;
- (d) The person being detained for reasons not permitted by law.

9.32 Habeas corpus in cases of unlawful detention is governed by articles 222 and 223, according to which all persons in such a situation may lodge an application for habeas corpus with the Supreme Court of Justice. The grounds for such an application must be the unlawful nature of the detention in the following cases:

- (a) If the detention has been conducted or ordered by an unauthorized body;
- (b) If the detention has been ordered for a reason that is not recognized by the law;
- (c) If it is maintained beyond the time limits established by law or by court order.

9.33 Failure to comply with a decision by the Supreme Court of Justice regarding how a detainee who has applied for habeas corpus should be dealt with is punishable as provided in paragraphs 4 and 5 of article 369 of the Penal Code (prison sentence of between one and eight years).

9.34 The Code of Penal Procedure establishes time limits for each stage of the procedure and in the event of an appeal. If these time limits are exceeded, the accused in pre-trial detention must be immediately released, subject to court order. Habeas corpus may be applied for if the time limits have been exceeded. The court may, where appropriate, decide to apply other measures of restraint.<sup>7</sup>

### **Right to compensation**

9.35 Under the terms of article 27, paragraph 5, of the Constitution, the State is under an obligation to compensate any person deprived of liberty in violation of the provisions of the Constitution or the law.

9.36 The Code of Penal Procedure also establishes (arts. 225 et seq.) that any person subjected to manifestly unlawful detention or pre-trial detention may apply to a competent court for compensation for losses incurred as a result of the deprivation of liberty. This provision also applies to any person subjected to pre-trial detention, which, though not unlawful, may prove to be unjustified owing to a serious fault in the appreciation of the facts on which it depended, in cases where the detention caused the person abnormal and particularly serious harm. It does not apply in cases where the detainee has contributed to the fault, through deceit or negligence.

## Article 10

### **All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person**

#### **Respect for the dignity of detainees**

10.1 According to article 30 of the Constitution, no penalty may imply, as a necessary effect, any loss of civil, occupational or political rights and persons subjected, on conviction, to a sentence or a security measure involving the deprivation of liberty remain entitled to their fundamental rights, subject to the limitations inherent in their sentence and the requirements of its enforcement.

10.2 As mentioned in the previous report, the penitentiary law (Decree-Law No. 265/79 of 1 August 1979, amended by Decree Law No. 49/80 of 22 March 1980 and Decree-Law No. 414/85 of 18 October 1985, has not been altered since the last report was submitted) establishes that detainees retain their entitlement to fundamental human rights, except with regard to limitations stemming from a conviction and sentencing, and the requirements of order and security in the prison establishment. In addition to the comments given in the last report, to which readers are referred (paras. 311 et seq. and 395 et seq.), the following information may be offered.

10.3 The aim of Decree-Law No. 79/83 of 9 February 1983 is to provide moral and religious assistance to prisoners, regardless of their religious persuasion. The Religious Liberty Act (Act No. 16/2001 of 22 June 2001) also provides that “detention in a prison or any other place of detention shall not impede the exercise of religious liberty and in particular the right to religious assistance and to religious worship”. The law also lays down that restrictions which are necessary for operational or security reasons may be imposed only subject to prior consultation, whenever possible, of the minister of religion concerned. Moreover, in view of the principle of separation and that of cooperation, the State has an obligation to ensure proper conditions for the exercise of religious assistance in prisons (among other institutions). For more details, see the previous report, paragraphs 665 et seq.

10.4 The purpose of the Prison Training Centre is to provide training to all prison staff, with an emphasis on human rights, ethics and rules of professional conduct. Instructors are chosen from among either prison staff or university lecturers. Other human rights organizations are also invited to participate, such as representatives of Amnesty International and Portuguese non-governmental organizations.

The training of prison warders covers topics such as personal and social development, justice and discipline, prison technique and practice, institutional security, drugs and the penitentiary system, or human relations. Courses now include the study of the protection of human rights and various international instruments, and the work of the Committee against Torture, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the European Court of Human Rights.

### **Rules governing pre-trial detention**

10.5 According to these rules, a person held in pre-trial detention is presumed innocent and must be treated accordingly (Decree-Law No. 265/79, art. 209, para. 1).<sup>8</sup> Pre-trial detention must be conducted in such a way as to avoid any restraint of freedom which is not strictly necessary for the purpose served and for the maintenance of discipline, security and order in the prison establishment (art. 209, para. 2).

10.6 Persons in pre-trial detention must be held separately from convicted prisoners (see articles 12 and 210, paragraph 5).

10.7 The internment of accused adults up to the age of 25, who are being held in pre-trial detention, must as soon as possible take place in a clean establishment and must be for an essentially educational purpose (art. 216).

10.8 According to article 210, paragraph 1, the normal practice applied to pre-trial detention consists of detainees sharing their activities with small groups of other detainees during the daytime and being isolated at night. According to paragraph 2, these rules are not applied to detainees who apply expressly and in writing to the prison governor concerned.

10.9 In such cases, the prisoner may be transferred to a different type of establishment, subject to the authorization of the General Directorate of Penitentiary Services, although the pre-trial detention system will continue to be applied and as soon as possible the prisoner will be separated from other categories of prisoners (para. 5).

10.10 Persons held in pre-trial detention are also governed by the general rules applying to other categories of prisoners, particularly with regard to visits (arts. 31 to 39), correspondence (arts. 40 to 48) and leisure occupations (arts. 83 to 88).

### **Treatment of persons sentenced to deprivation of freedom**

10.11 In the enforcement of sentences and security measures, in the choice of establishment in which a prisoner will serve his sentence and in the treatment meted out to prisoners, the social rehabilitation of offenders remains the prime objective of the penitentiary law.

10.12 According to article 12 of Decree-Law No. 265/78, prisoners should be held in separate establishments or if that is not possible, in separate quarters within the same establishment, according to their sex, their age and their legal situation (with regard to whether they are accused, convicted, first offenders or recidivists).

10.13 All the factors which might be important for the social rehabilitation of the offender must be taken into account in the choice of establishment. Such factors, according to article 11, paragraph 1, include the duration of the sentence, the prisoner's state of physical and mental health, the proximity to the family home and reasons of security, school education and work.

10.14 Establishments for young adults and detention centres are provided for young people between the ages of 16 and 21. The youngsters can remain there until they are 25 years old, depending on their treatment (arts. 158, para. 5 (a) and 160). The principle of re-educating inmates to facilitate their future social rehabilitation is applied to conditions of internment in detention centres for adults up to the age of 25 (art. 201).

10.15 The Social Rehabilitation Institute is responsible, under the Ministry of Justice, for policies of criminal prevention and social rehabilitation, in particular in the areas of the prevention of juvenile delinquency, tutelary educational measures and the promotion of alternative penalties to imprisonment. The Institute's criminal prevention activities are aimed at limiting opportunities for committing offences, while at the same time contributing to social development.

10.16 In order to assist the rehabilitation and future social rehabilitation of offenders, opportunities are offered, in conjunction with the Ministry of Education, for prisoners to take distance education courses aiming for the baccalaureate (*bacharelato*) generally requiring three years of study, or a university degree (*licenciatura*), (generally five years of study), or general training, including the study of foreign languages, physical education, visual education and musical education. Vocational training programmes are also now available. For statistical data see annex 9.

Information campaigns are also conducted with State enterprises and employers in general in order to seek their assistance for the social and occupational resettlement of prisoners. This has been particularly successful in the case of prisoners previously placed in open detention conditions (see annex 10).

10.17 More libraries have been either introduced or updated in prisons in recent years and events have been held, such as competitions, festivals or sporting events.

10.18 Under Act No. 109/99 of 3 August 1999, a medical supervision centre was set up for drug users held in detention centres, in order to provide them with support and assist with their rehabilitation and treatment. Act No. 170/99 of 18 September 1999 introduced measures to combat the spread of infectious diseases in prisons, in particular by providing information on behavioural risks and means of prevention, and by supplying equipment for the purposes of prevention and treatment. The law expressly forbids any form of discrimination or segregation against infected prisoners.

10.19 In order to avoid the loss of family ties and assist the social rehabilitation of prisoners, conditions of intimacy are provided for prisoners receiving visits by their partners or spouses, subject to the necessary health precautions. These rules have been applied since 1998.

10.20 The governor of the establishment is responsible for applying disciplinary measures. No physical punishment is allowed. Before any disciplinary measure is applied, prisoners must be examined by a doctor.

10.21 Disciplinary measure may include internment in a single room or a disciplinary cell for a period not exceeding one month. The premises must be habitable subject to checks by the medical services. They must also satisfy proper conditions of hygiene.

In the case of disciplinary internment, medical observation becomes particularly strict and the prisoner remains under medical observation, if necessary in the doctor's opinion on a day-by-day basis. The doctor in charge may propose the suspension, non-enforcement or substitution of the disciplinary measure on grounds of the prisoner's health or physical or mental integrity.

10.22 Prisoners subjected to disciplinary internment may receive visits by officials, education services or social workers, as often as the prison governor considers necessary. With the latter's authorization, they may receive visits by relatives, their lawyer or a minister of religion. Any prisoner subjected to a disciplinary internment measure exceeding eight days may appeal to the judge responsible for the execution of sentences with suspensive effect.

10.23 Prisoners may complain to or bring any matter before the governor of the prison, prison officials and prison inspectors, or the judges responsible for the execution of sentences. The latter may try to settle the matter with the prison governor. If this is unsuccessful, the matter will be brought before the prison's technical council, whose decision may be appealed against before the Minister of Justice with suspensive effect.

10.24 Generally speaking, prisoners may still, individually or jointly, submit requests, claims or complaints in defence of their rights, the Constitution or the law in general, to sovereign organs or any other authority, with the possibility of exercising their right to participate in public life.

10.25 In its final observations of 8 May 2000 on Portugal, the Committee against Torture noted the following developments:

- (a) The restructuring of the police agencies, which is designed to emphasize the civilian aspects of policing;
- (b) The decision to set up an inspectorate of prisons;
- (c) The creation of a database to streamline information relating to cases of abuse of public power;
- (d) The enactment of regulations governing police use of firearms that reflect the Basic Principles on the Use of Firearms by Law Enforcement Officials;
- (e) The enactment of regulations relating to conditions of detention in police lock-ups, setting out the minimum standards to be observed;
- (f) The acknowledgement by the European Committee for the Prevention of Torture, as a result of its 1999 inspection, that improvements have taken place with respect to prisons, including the creation of a national drug unit for prisons and the setting up of new prison health units;



(g) The initiation of the practice of monthly prison visits by magistrates to receive prisoners' complaints concerning treatment;

(h) The introduction in 2000 of a new system of police training with a curriculum developed by a board that includes representatives of civil society;

(i) The active measures that have been taken to reduce violence in Portuguese prisons;

(j) The active dissemination of information relating to the Convention, including publication for the judiciary, in an official periodical, of the proceedings relating to the second periodic report.

10.26 For the sake of greater transparency with regard to problems and conditions in prisons, two publications have been issued: "Prison Review" (bimonthly) and "Prison Issues" (annual). These are available to any interested party on subscription and are sent out automatically to all prisons, public bodies and corresponding foreign institutions.

### **Article 11**

#### **No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation**

11.1 Imprisonment for debt does not exist in the Portuguese legal system, so that matters in that respect have remained unchanged since the last report.

### **Article 12**

#### **Right to freedom of movement and free choice of residence**

12.1 In its article 44, the Constitution recognizes that all citizens, without discrimination, have the right to travel and to settle freely anywhere within the national territory. They also have the right to emigrate, to leave the national territory and to return. In this respect, article 15 of the Constitution places aliens temporarily or habitually resident in Portugal and Portuguese citizens on an equal footing.

This means the same rules apply to Portuguese nationals and to aliens residing in Portugal.

12.2 Portuguese citizens are entitled to leave their own country if they wish to and the issue of passports is restricted only in the case of a court order to that effect or an objection on the part of minors' parents.

12.3 The right to freedom of movement and free choice of residence guaranteed in the Portuguese legal system implies prior non-discrimination allowing all without distinction to move about freely.

### **Rules concerning the entry and residence of aliens in Portugal**

12.4 Under article 2 of Decree-Law No. 244/98 of 8 August 1998 (amended by Act No. 97/99 of 26 July 1999 and by Decree-Law No. 4/2001 of 10 January 2001), which repealed Decree-Law No. 59/93 of 3 March 1993 and which introduced rules concerning the entry and residence of aliens in Portugal, an alien is considered to be any person who does not have Portuguese nationality.

12.5 In order to enter and leave the national territory, aliens must cross Portugal's frontiers and generally speaking show an approved travel document.

12.6 In order to enter Portuguese territory, they must also have a valid visa or a visa issued by the competent authorities of the States party to the Convention implementing the Schengen Agreement on the free movement of persons.

12.7 Passports and visas may, however, not be necessary in certain cases, particularly for the nationals of States which have signed agreements allowing entry simply on presentation of an identity card.

12.8 For aliens to enter and stay in Portugal, they must hold a certain sum of money, which can pay their subsistence expenses in Portugal and their return to the country where they are guaranteed readmittance, or they must be legally in a position to acquire such means (article 14 of Decree-Law No. 244/98).

12.9 Any alien holding a valid residence permit in Portugal is considered to be resident. Residence permits are issued according to the type of residence requested. Visas may be issued for stop-over, transit, short stay, residence, study, work, temporary presence (issued abroad) and visas issued at border posts (transit, short stay or special - arts. 47, et seq.).

12.10 Aliens must on request present documents supporting the reason for their return or alleged transit.

12.11 Aliens who are not resident in Portugal and who have difficulty leaving the country are issued a safe conduct, solely for the purpose of enabling them to leave the country.

12.12 Resident alien minors will be refused authorization to leave Portuguese territory if they are travelling without a person exercising parental authority or without a duly certified permission issued by that person.

12.13 Despite the difficulties aliens may face in seeking establishment in Portugal, once that problem has been overcome they are treated the same as Portuguese citizens. Their freedom of movement within the country is not restricted, except for the requirement on resident aliens to inform the Aliens and Frontiers Department of a change of residence within 60 days.

12.14 All aliens entering the national territory must fill in a housing form, so that the presence of aliens in the country may be monitored. Enterprises renting out housing to aliens are obliged to notify the Aliens and Frontiers Department of that fact within three days and report the aliens' departure within the same time limit. The housing form gives only the identity of the entity providing the housing, the address, telephone contacts and the alien visitor's name, place and date of birth, residence, identity card number and passport number.

12.15 The rules governing the entry, departure and expulsion of aliens to and from the national territory were amended by Decree-Law No. 4/2001 of 10 January 2001. The aim of this law was to incorporate the principles adopted by the European Union regarding family reunion, by extending that right to members of the families of resident citizens already on the national territory, and to alter the rules governing the accessory penalty of expulsion, by not applying it to citizens born on the national territory where they habitually reside, or to citizens having children in their custody within Portuguese territory, or to citizens who are habitually resident in Portugal and have been living in the country since before the age of 10.

12.16 Extended facilities have been provided to support the voluntary return of aliens to their countries of origin.<sup>9</sup>

#### **Regulations governing the entry and residence in Portugal of nationals of member States of the European Community**

12.17 Specific rules have been introduced in the Portuguese legal system for the nationals of member States of the European Community since Portugal joined the Community and the Treaty on European Union came into effect.

12.18 Thus Decree-Law No. 60/93 of 3 March 1993, amended by Decree-Law No. 250/98 of 11 August 1998, regulates special conditions of entry and residence in Portugal of the nationals of member States of the European Community and their beneficiaries. Such persons are allowed access to the national territory on the sole condition that they can show an identity card or valid passport.

12.19 Under the terms of article 3, the persons entitled to these rights include paid foreign workers from a member State, persons entitled to free establishment and free provision of services, paid or unpaid nationals of a member State who have stopped working, students and any national of a member State who has no other entitlement under Community law, having sufficient means of subsistence, as well as their beneficiaries, referred to in the articles mentioned (articles 3 and 9 of the above-mentioned Decree-Law).

12.20 Portugal has already ratified the Protocol of Accession to the Agreement on the gradual abolition of controls at the common frontiers, signed in Schengen on 14 June 1985, and the Agreement on the Accession to the Convention implementing the Schengen Agreement, signed in Schengen on 19 June 1990. These agreements were approved and ratified by Portugal on 25 November 1993.

12.21 These agreements, which are complementary to the Rome Treaties and were incorporated in the legal framework of the community by the Amsterdam Treaty, are aimed at strengthening ties between member States by eliminating common borders and existing barriers to the movement of the nationals of signatory States within common borders, with the aim of ensuring the free movement of persons and goods, subject to strict regulation of entries at external borders.

12.22 The agreements also stipulate that the contracting parties will arrive at arrangements regarding police cooperation for the prevention of crime and research, and will consider agreements for international judicial cooperation and extradition with a view to improving cooperation between the parties.

12.23 The first of these agreements contains some short-term and some long-term measures. The former include those relating to the removal of border formalities and the harmonization of visa policies. With regard to the free movement of persons in the longer term, the Parties will aim to remove controls altogether at their common borders and transfer them to their external borders.

12.24 The Convention implementing the Schengen Agreement provides for the abolition of checks at internal borders, which may be crossed at any point without any checks on persons being carried out. External borders may be crossed only at border crossing points during fixed opening hours. The Convention also sets out conditions for the movement of aliens, introducing a common visa system.

12.25 The establishment of European citizenship has had political consequences (election of European Community nationals to local government and to the European Parliament in the country of residence) and diplomatic consequences (protection of Community citizens by any diplomatic representation of any of the Union's countries). At the same time, Community citizens enjoy freedom of movement, establishment, access to work and access to services in every member State.

12.26 For reasons of public order and national security, and subject to consultation with the other parties to the Schengen Agreement concerned, it is possible to reimpose document checks at internal borders exceptionally and for a limited period of time.

### **Aliens and Frontiers Department**

12.27 The organizational law governing the duties and powers of the Aliens and Frontiers Department was approved by Decree-Law No. 440/86 of 31 December 1986, amended amongst others by Decree-Law No. 252/2000 of 16 October 2000.

12.28 The Department, which is attached to the Ministry of the Interior, examines, promotes, coordinates and executes measures connected with border crossings by persons at land, sea and air frontiers, preventing the entry of individuals without documents or proper authorization; it is responsible for checking the stay and activities of aliens on Portuguese territory and coordinating

cooperation with all the security forces and services of other countries, within the framework of the movement of persons at borders and the monitoring of aliens; it is also responsible for supplying data concerning the domestic part of information systems on the movement of persons under agreements with the European Community.

Act No. 2/94 of 19 February 1994 establishes monitoring and inspection mechanisms under the Schengen Agreements, by setting up a National Commission for the Protection of Computerized Personal Data, the authority in charge of monitoring the domestic part of the system and for checking whether the treatment and use of data does not infringe fundamental rights and freedoms, and the Data Centre, which is attached to the Aliens and Frontiers Department.

### **Restrictions**

12.29 According to article 18 of the Constitution, rights, freedoms and guarantees may be restricted only as expressly provided for in the Constitution. Restrictions must be limited to the extent necessary to safeguard other rights or interests protected by the Constitution. Restricted laws must be general and abstract in character, must not have retroactive effects and must not limit in extent or scope the essential content of constitutional provisions.

12.30 Article 19 of the Constitution makes it illegal to suspend the exercise of rights, freedoms and guarantees, except where a state of siege or a state of emergency has been declared in a manner prescribed by the Constitution.

12.31 Certain restrictions, however, on freedom of movement in the event of a state of siege or emergency are provided under Act No. 44/86 of 30 September 1986. Any restrictions on the free movement of persons must abide by the principle of equality and non-discrimination, and the authorities are responsible for taking whatever measures are necessary under a state of siege or a state of emergency, particularly with regard to the transport, housing and maintenance of the citizens affected (art. 2, para. 2 (c)).

12.32 Act No. 113/91 of 29 August 1991, the framework law on civil protection (in art. 4, para. 1 (a)) also restricts the stay or movement of persons or vehicles in certain places, in the event of serious accidents, catastrophes or disasters.

12.33 The coercive measures of the Code of Penal Procedure include injunctions forbidding individuals either to stay, to travel abroad, to remain in certain regions, to consort with certain circles or to frequent certain places (art. 200). Under article 201, a person may be placed under house arrest, if there are serious grounds for presuming that an offence involving a maximum prison sentence exceeding three years has been committed.

12.34 For identification purposes but not as a measure of restraint, the criminal police may hold a person in custody for up to six hours (arts. 191, para. 2, and 250).

12.35 Under article 52 of the new Penal Code, individuals may be prevented from consorting with certain circles or residing in certain places or regions, for purposes of rehabilitation.

12.36 Young people are also subject to certain restrictions regarding their behaviour under Decree-Law No. 402/82 of 23 September 1982.

12.37 In the case of administrative offences, the competent administrative or police authorities are entitled to require that offenders identify themselves. In a case of *flagrante delicto*, custody for identification purposes must not exceed 24 hours. In ordinary cases of a need for identification, detention must not exceed 2 hours (Act No. 5/95 of 21 February 1995 on carrying identity documents). These rules apply only to routine situations and are in no way related to penal procedure. The person whose identity is requested may contact a lawyer or known persons (relatives or otherwise) to present the missing documents.

### Article 13

#### Extradition, expulsion and right of asylum

##### Extradition

13.1 The basic principles regulating extradition are set out in article 33 of the Portuguese Constitution (amended following the fifth constitutional review in December 2001) and Act No. 144/99 of 31 August 1999 (repealing Decree-Law No. 43/91 of 22 January 1991). This Act (amended by Act No. 104/2001 of 25 August 2001) regulates international judicial cooperation in penal matters and applies to the following forms of cooperation: extradition; transmission of penal procedures; enforcement of penalties; transfer of convicted persons; general judicial assistance in penal matters and supervision of convicted or paroled persons.

13.2 This legislation remains applicable in the event of the absence or inadequacy of rules in this respect under an international treaty or convention. The provisions of the Code of Penal Procedure apply subsidiarily.

13.3 Under this law, international cooperation is subject to the principle of reciprocity. Nevertheless, the absence of reciprocity does not mean that a request for cooperation may not be agreed to provided that such cooperation: (a) proves necessary owing to the nature of the event or the need to combat certain forms of serious crime; (b) may help improve the situation of the accused person or facilitate his social rehabilitation; (c) may shed light on deeds of which a Portuguese citizen is suspected.

13.4 A request for cooperation will be refused: (a) if the procedure followed is not in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms or any other related major international instrument ratified by Portugal; (b) if there are serious grounds for believing that cooperation is being requested for the purpose of prosecuting or punishing a person for reasons of race, religion, sex, nationality, language, political opinions or membership of a particular social group; (c) if the person's situation may be aggravated for one of the reasons listed in subparagraph (b); (d) if the cooperation might result in a judgement by a special court or if it is related to a judgement delivered by such a court; (e) if the deed to which it is related incurs the death penalty or life imprisonment;<sup>10</sup> or if it is related to an offence giving rise to a form of lifelong security measure.

13.5 An application will also be refused if the procedure is related to a deed which, under Portuguese law, constitutes a political offence or one related to a political offence; or to a deed constituting a military offence not provided for in ordinary penal law.

For all these purposes, the extradition requested will be agreed to only in the event of a crime, or even attempted crime, punishable both by Portuguese law and by the law of the requesting State. Cooperation may also be refused if the offence is not of a serious nature and does not appear to justify such a measure, and will be agreed to only if the penalty applicable is not less than one year of imprisonment.

13.6 Aliens may be extradited except in the case of offences committed on Portuguese territory or if the person whose extradition is requested also possesses Portuguese nationality.

13.7 The extradition of Portuguese citizens from the national territory has been allowed only recently and subject to major restrictions: it must be stipulated in an international treaty, must be related to cases of terrorism or organized international crime and provided that the legal system of the applicant State contains guarantees of fair trial, taking into consideration in particular the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms or any other significant international instrument of a similar nature ratified by Portugal. This amendment to the Constitution was introduced under Act No. 1/97 of 20 September 1997 embodying the fourth constitutional review.

13.8 Neither Portuguese citizens, nor aliens, however, may be extradited for offences punishable under the law of the applicant State by the death penalty or any other penalty leading to an irreversible impairment of physical integrity, or whenever the offence is punishable by a penalty or security measure of imprisonment for life.

In this field, Portuguese law currently gives rise to some delicate problems: the death penalty is no longer a ground for refusing extradition (art. 6), as under the previous legal system, so long as the requesting authorities undertake not to apply it. The article insists in particular that the requesting authorities should have commuted the penalty. That still leaves the awkward problem of knowing whether the requesting authorities would keep their word or not.

Factors justifying the new approach, however, include the need to strengthen international cooperation, especially within the European Union, the existence generally of bilateral agreements, the application of the principle of reciprocity, the unreasonableness of refusing cooperation in the case of the most serious offences (giving rise to a liability to the death penalty or life imprisonment), which are precisely those for which the requesting countries mostly apply for extradition, the fact that the judicial authorities of the requesting State generally comply (at least on the basis of bilateral agreement) with the promise given by their national authorities not to apply these particularly serious penalties, and compliance with the principle that Portuguese nationals are judged in Portugal and extradited only in the event that the judgement cannot be enforced.<sup>11</sup>

Similarly, extradition for crimes giving rise, under the law of the requesting State, to a penalty or a security measure of restraint or imprisonment, for life or for an indefinite period, is admitted only under conditions of reciprocity established under an international treaty, provided, moreover, that the requesting State guarantees that the said penalty or security measure will not be applied or enforced in the event (arts. 4 and 6).

13.9 A few changes have been introduced in the rules governing extradition with the recent revision of article 33 of the Constitution: a new paragraph 4 has now been added, giving precedence to the rules of judicial cooperation in criminal matters established by the European Union over the principles restricting the extradition of Portuguese citizens or extradition for offences carrying a penalty of life imprisonment. From a comparison of paragraphs 4 and 6 (the latter having been amended as part of the last constitutional review), it appears that in cases carrying the death penalty, a person may be neither extradited nor handed over for any reason; in the case of the enforcement of a penalty of life imprisonment, only extradition is forbidden (in the light of the above-mentioned reservations), a rule introduced to enable Portugal to ratify the Rome Statute of the International Criminal Court.

13.10 One important feature of the extradition procedure, regarding the protection of the extradited person, is that any application for extradition must come with the proof that, in the event, the person to be extradited is subject to the penal jurisdiction of the requesting State and that, in the case of an offence committed in a third country, the person's extradition has not been requested for that offence. There is also the formal guarantee that the requested person will not be extradited to a third country, or imprisoned for a penal procedure, for the enforcement of a penalty or for any other reason, on grounds other than those on which the application for extradition was based and which existed before or at the time of that application (art. 44).

13.11 The extradition procedure is free of charge and carries an urgent rating. It continues during vacations and includes an administrative phase and a judicial phase (arts. 46 and 73).

13.12 During the administrative phase, the application for extradition is assessed by the Minister of Justice, who must decide, in the light of guarantees required, whether the application is acceptable or whether it should be rejected immediately for reasons of policy, appropriateness or relevance (art. 46, para. 2).

13.13 The Minister of Justice submits the request to the Procurator-General's Office to ensure that it is perfectly legal. The Procurator-General's Office must give an opinion within 20 days. Within 10 more days, the Minister of Justice forwards the application for extradition to the Government, together with the opinion of the Procurator-General, for a decision. Meanwhile, the Procurator-General's Office makes arrangements to keep the requested person under surveillance (art. 48).

If the application for extradition is rejected, the proceedings are struck off the register and the requesting authority is notified of the decision.



13.14 An application for extradition which is found to be admissible is then transmitted to the Deputy Procurator-General at the Court of Appeal, under whose jurisdiction the requested person resides or is living at the time of the application. The Deputy Procurator-General must then, within 48 hours, take whatever steps are necessary to meet the request (arts. 49 and 50).

This judicial phase is intended only to lead to a decision, after the person concerned has been heard, as to whether the application should be granted or not, subject to formal and substantive requirements being met.

13.15 Once it has been circulated, the procedure is immediately submitted to the reporting judge, who, within not more than 10 days, must issue a preliminary order as to whether there are sufficient grounds for the application and whether it is feasible.

13.16 If the reporting judge decides to strike the procedure immediately off the register, he must submit a report, giving his opinion in writing, for comment to each of the additional judges for five days, so that a decision can be taken at the first session.

13.17 If the procedure is to be taken further, an arrest warrant against the person to be extradited is forwarded to the Deputy Procurator-General, for the latter to take all steps required to enforce the warrant.

13.18 The authority carrying out the arrest of the person to be extradited must, within 48 hours of the arrest, bring the person, together with any objects seized, before the Deputy Procurator-General, who must immediately take all necessary steps to hear the person, after appointing an official defence counsel in the event that the person has none. The reporting judge will then proceed to identify the detainee and inform him of his right to oppose extradition or agree to it and under what conditions he may do so.

13.19 The summons to appear for these proceedings must be delivered to the person to be extradited, informing the person that he may appear with counsel and with an interpreter.

13.20 Should the person to be extradited declare that he agrees to be handed over to the requesting State, he must sign a statement to that effect with his counsel. The judge will then check whether the conditions for granting extradition have been met and certifies the statement, ordering that it should be transmitted to the requesting State.

13.21 If the person who was to be extradited is opposed to extradition, the judge will consider the reasons given, if any. Then the file is made available to counsel, who must, in writing and within five days, submit grounds for opposing extradition. The reasons given cannot include the fact that the detainee is not the person requested or the fact that extradition conditions have not been fulfilled.

Once the grounds for opposition have been submitted, or the deadline for submission has passed, the case rests for five days with the Deputy Procurator-General, to give him time to submit any supplementary questions.

The necessary formalities and those required by the reporting judge must take place within not more than 15 days, in the presence of the person to be extradited, the person's counsel and, if necessary, his interpreter and the Deputy Procurator-General.

Once the evidence is complete, the case is submitted in succession to the Deputy Procurator-General, then to counsel, for five days, for allegations (art. 58, para. 2).

13.22 If the person to be extradited has not submitted any written opposition, or following the deposit of allegations, the reporting judge considers the case for 10 days and then submits it for the opinion of each of the two additional judges for another five days.

Following the last verification, the case is submitted for immediate final decision, regardless of whether it appears on the register. The case is given priority over others and the decision is drafted in accordance with the ordinary law of penal procedure (art. 57, para. 2).

13.23 The detention of the person to be extradited must cease and be replaced by some other procedural measure of restraint if the final decision of the Court of Appeal is not given within 65 days of the arrest. If no measure of restraint not involving detention is admissible, the time period mentioned in the foregoing paragraph may be extended by 25 days, within which time the Court of Appeal must issue a ruling.

13.24 The Deputy Procurator-General and the person to be extradited can appeal against the final decision within 10 days, with suspensive effect. The appeal is considered by the criminal section of the Supreme Court of Justice.

13.25 The extradited person must be transferred out of Portuguese territory on the date agreed between the Portuguese Ministry of Justice and the authority representing the foreign State. The transfer must take place as soon as possible after the date of the decision allowing the transfer. If no one appears on the arranged date to receive the extradited person, the latter will be released after a further delay of 20 days.

13.26 If the matter is urgent, before any formal extradition proceedings are initiated, a request may be lodged for the provisional arrest of the person to be extradited. This arrest will be terminated if the request for extradition is not received within 18 days of the arrest, although this period may be extended to 40 days if sufficient grounds are put forward by the applicant State. As soon as an application for extradition for a detained person has been received, a specific procedural schedule will be initiated.

## **Expulsion**

13.27 The principle of non-discrimination is applied in any decision not to expel an alien who has been legally admitted to Portuguese territory. According to article 33, paragraph 2, of the Constitution, the expulsion of persons who have been authorized to enter or to stay on Portuguese territory, or persons who have obtained a residence permit, or who have lodged an application for asylum that has not been refused, must be determined by a judicial authority. The law must provide for a rapid decision in this respect.

13.28 An alien who has not been admitted to Portuguese territory must be sent back to the place where he began using the means of transport. While the person is in the international area of the port or airport through which he intended to enter, he may contact his diplomatic representation in Portugal. If his stay exceeds 48 hours, a competent judge must be notified in order to place the person in a temporary residence centre.

According to article 33, paragraph 1, of the Portuguese Constitution, Portuguese citizens may not be expelled from the national territory. The expulsion of persons who have been authorized to enter or to stay on Portuguese territory, or persons who have obtained a residence permit, or who have lodged an application for asylum that has not been refused, must be determined by a judicial authority. The law must provide for a rapid decision in this respect.

13.29 Account must also be taken of article 3, paragraph 1, and article 4 of the Fourth Protocol to the European Convention on Human Rights, whereby no one shall be expelled, by means either of an individual or a collective measure, from the territory of the State of which he is a national, and whereby the collective expulsion of aliens is prohibited. Portugal ratified this Protocol in 1978 (D.R./*Diario Oficial* of 13 October 1978, Act No. 65/78).

13.30 The reasons for expulsion are given in article 99 of Decree-Law No. 244/98 of 8 August 1998 (as amended by Act No. 97/99 of 26 July 1999 and Decree-Law No. 4/2001 of 10 January 2001). Aliens may be expelled from Portugal for the following reasons (see annex 11 for statistics):

- (a) If they have entered the national territory or reside there illegally;
- (b) If they detract in any way from national sovereignty, public order or morality;
- (c) If their activities constitute a threat to the interests of the country or the dignity of the Portuguese State and its nationals;
- (d) If they interfere abusively with the participation rights of Portuguese citizens;
- (e) If they have perpetrated acts which would have prevented their entry to Portuguese territory in the first place.

13.31 The law also allows the possibility of applying an accessory penalty of expulsion to non-resident aliens, who have been sentenced for an intentional offence to more than six months' firm imprisonment; and to aliens residing in Portugal sentenced for an intentional offence to more than one year's imprisonment (art. 101). In such a case, where the accessory penalty of expulsion is applied, account must be taken of the seriousness of the act committed by the accused, his responsibility, whether the offence has been repeated, the degree of integration in social life, special prevention and the time of residence in Portugal. The accessory penalty of expulsion may not be applied to an alien who is permanently resident in the country, unless his conduct constitutes a sufficiently serious threat to public order or national security.

The accessory penalty of expulsion may not be applied to resident aliens:

(a) If they were born on Portuguese territory and habitually reside there;

(b) If they have under-age children residing on Portuguese territory, over whom they exercised parental authority on the date of the events which led to the application of the penalty and for whose maintenance and education they are responsible, provided that the children are still under age at the time when the penalty is likely to be enforced;

(c) If they have been in Portugal since they were less than 10 years old and are habitually resident there.

13.32 Expulsion may be decided by a judicial authority or by the competent administrative authority, namely the Aliens and Frontiers Department, on the conditions outlined below.

13.33 If an accessory measure of expulsion is applied, or if the alien concerned entered Portuguese territory legally, obtained a residence permit or submitted an application for asylum which was not rejected, expulsion must be decided by a judicial authority (art. 111). The general rule is that the expulsion decision is given by a judicial authority (a court). The decision will be taken by an administrative authority only in cases of illegal entry.

13.34 The authority responsible for initiating expulsion proceedings is the Aliens and Frontiers Department. After being notified of the case, the court must order the trial to be held within the next five days. The alien will receive notification to appear at the hearing. In the notification, the person concerned must be informed that he can defend his case at the hearing, calling on witnesses and other evidence where necessary. Judgement may be postponed only once, if the alien requests an extension to prepare his defence, or if the alien or any of the witnesses, whether for the prosecution or the defence, are absent or if the judge considers it to be necessary. If the case is adjourned, judgement must take place within 10 days (articles 113, 114 and 115 of Act No. 97/99 of 26 July 1999).

The court's expulsion decision must be substantiated and must set out the alien's legal obligations, for how long he cannot re-enter Portuguese territory and the countries to which he may not be expelled, if he enjoys the guarantee, under article 105, not to be expelled to a country where he may be prosecuted for reasons which would justify asylum.

The expulsion decision may be appealed against before the Court of Appeal, with transfer of jurisdiction (art. 118).

13.35 Any alien illegally entering or residing on Portuguese territory may be arrested by any police authority, referred to the Aliens and Frontiers Department and, within not later than 48 hours, brought before the competent judicial authority for the detention to be validated and for any restraining measures to be applied (art. 119).

13.36 The Aliens and Frontiers Department is authorized to initiate expulsion proceedings. During the preparatory stages, it will hear the person whose expulsion is requested and who enjoys all rights of defence.

13.37 The decision to expel, in the case of illegal entry to Portuguese territory, is the responsibility of the head of the Aliens and Frontiers Department. An appeal may be brought before the administrative courts (arts. 120, 121, 122 and 123).

13.38 It may be added that under the terms of article 34 of Decree-Law No. 15/93 of 22 January 1993, the anti-drugs law, any alien convicted of one of the offences listed under that legislation (trafficking, cultivation, sale, distribution, criminal association) may be expelled for a period not exceeding 10 years.

### **Right of asylum**

13.39 Act No. 15/98 of 26 March 1998 (copy attached) introduces new legislation on asylum and refugees. The right of asylum is guaranteed to aliens or stateless persons persecuted or under serious threat of persecution as a result of their activities in the country of their nationality or where they are habitually resident, in favour of democracy, social or national liberation, peace between peoples, freedom or human rights.

13.40 The right to asylum is also granted to aliens or stateless persons who justifiably fear being persecuted for reasons of their race, religion, nationality, political opinions or membership of a particular social group, and are unable or, as a result of that fear, unwilling, to return to the country of their nationality or habitual residence (art. 1, paras. 1 and 2).

Residence permits for humanitarian reasons (art. 8) may be granted to aliens or stateless persons to whom the provisions of article 1 do not apply and who are prevented from returning or feel unable to return to the country of their nationality or habitual residence, for reasons of serious insecurity due to armed conflicts or systematic human rights violations occurring there. Such residence permits are valid for a maximum period of five years, but may be renewed in the light of developments taking place in the country of origin.

13.41 In addition, temporary protection may be granted, for a period not exceeding two years, to persons displaced from their country as a result of serious armed conflicts, generating outflows of refugees on a large scale (art. 9).

13.42 Under Portuguese law, the asylum procedure takes place in two stages, a preliminary stage and a stage during which the merits of the application are considered, both being deemed urgent.

The admissibility of the application is determined in the course of a preliminary procedure, leading to a decision by the head of the Aliens and Frontiers Department (SEF). This decision must be taken within 20 days of the application being submitted, failing which the application will be considered to have been tacitly admitted. According to the Code of Administrative Procedure, the asylum-seeker must be notified of the decision in writing.

If the application is accepted, the asylum-seeker will receive a provisional residence permit, allowing him to work.

If the application is rejected, the asylum-seeker may, within five days of the notification, request reconsideration of the case by the National Commissioner for Refugees, with suspensive effect.

If the rejection is confirmed, the asylum-seeker may, within eight days, lodge an appeal before the District Administrative Court (*Tribunal administrativo de "circulo"*), which will take the final decision.

Applications for asylum made at the frontier are processed more rapidly under special rules, since the asylum-seeker is obliged to remain in the international area of the port or airport of entry.

13.43 If the application is admitted, the Aliens and Frontiers Department initiates an investigation procedure, in the course of which it must complete all the required formalities and investigate all the facts considered necessary for the final decision. During this investigation procedure, representatives of the United Nations High Commissioner for Refugees or the Portuguese Council for Refugees (CPR) may file reports or information concerning the country of origin and may obtain information concerning the progress of the case.

When the investigation phase is over, the Aliens and Frontiers Department prepares a report, which is forwarded with the case file, to the National Commission for Refugees (CNR). Within 10 days of receipt, the CNR must prepare a substantiated draft proposal to grant or refuse asylum, which is forwarded to the representative of the UNHCR and the CPR, as well as to the asylum-seeker, who all have 5 days in which to give an opinion.

The CNR then reconsiders the case in the light of the new input and, within five more days, submits a proposal giving reasons to the Ministry of the Interior, which must render a final ruling within eight days.

According to the Code of Administrative Procedure, the asylum-seeker must always be notified of the decision in writing. This notification must come with a copy of the Minister's decision on the application for asylum, and a copy of the opinion of the National Commission for Refugees, on the basis of which the decision was taken. If the decision is negative, the notification must inform the asylum-seeker of his right to judicial appeal.

The refusal of asylum is subject to appeal before the Administrative Supreme Court, which is the final jurisdiction in administrative law. This appeal, which has suspensive effects, must be lodged within 20 days.

If asylum is refused, the asylum-seeker may remain on Portuguese territory for a transitional period of not more than 30 days.

13.44 According to Portuguese legislation, asylum-seekers are granted legal aid on the same conditions as Portuguese citizens, that is, if they are able to show that they have insufficient means. In that case, a lawyer designated by the Bar Association will be appointed to assist them as counsel and to act on their behalf. If so, the asylum-seeker may also be relieved of administrative and court expenses.

Under the general law, every asylum-seeker is entitled to communicate with counsel.

It may be added that Act No. 15/98 of 26 March 1998 expressly allows the Office of the United Nations High Commissioner for Refugees and the Portuguese Council for Refugees to provide legal advice to asylum-seekers at all stages of the proceedings.

13.45 The grant of asylum under the current legislation presupposes recognition of refugee status, as defined in the 1951 Geneva Convention and its Additional Protocol of 31 January 1967.

Any refugee who has been issued an identity card certifying recognition of his status in Portugal has the same rights and obligations as aliens legally residing on Portuguese territory. He is therefore not subject to any restriction on his freedom of movement or establishment within Portuguese territory.

Outside the national territory and subject to conditions laid down by other States, the refugee may travel freely and return to Portugal while the travel document he was issued remains valid.

13.46 The principle of family reunion is recognized in Portuguese asylum law. This means the rights granted to refugees may be extended to members of their families (article 4 of Act No. 15/98 of 26 March 1998). Such situations are considered on a case-by-case basis and, in fact, whenever the legal restrictions have been complied with, the rights granted to refugees have always been extended to family members on request.

Family reunion is applicable to the spouse, children who are under 18 years of age or disabled, as well as to the parents of any refugees under the age of 18.

13.47 Refugees are also granted welfare assistance where necessary, as well as assistance in terms of medical treatment, medicine, housing and food.

With regard to administrative assistance to refugees, Portugal issues certificates that replace birth certificates for marriage purposes and identity cards for foreign citizens.

As soon as he has acquired refugee status, a refugee immediately enjoys the right to work, either on his own account, or for somebody else, generally on the same conditions as aliens who are legally resident in Portugal.

## Article 14

**All persons shall be equal before the courts and tribunals. A competent, independent and impartial tribunal established by law**

### **The right to a fair trial by a competent court**

14.1 According to article 202 of the Constitution, the courts are sovereign bodies that have the power to administer justice in the name of the people. The law also stipulates that non-judicial instruments and methods may be created for the settlement of conflicts.

14.2 The courts are independent and subject only to the law (art. 203). For more details, see page 80, paragraph 480, of the second periodic report. Under article 206 of the Constitution, court hearings must be public, unless the court itself decides otherwise, in the form of a substantiated order, in the interest of safeguarding the dignity of persons and public morality or in order to ensure the proper functioning of the court.

14.3 According to article 215 of the Constitution, judges have security of tenure and may not be transferred, suspended, retired or removed from office except as provided by law. They may not perform any other public or private duties, except unpaid teaching or scientific research, and they may not be appointed on service commissions unrelated to the work of the courts unless authorized by the Superior Council of the Judiciary.

14.4 The appointment, assignment, transfer, promotion and removal of judges, as well as the appreciation of their professional merits and the initiation of disciplinary proceedings, are the sole responsibility of the Superior Council of the Judiciary. The Superior Council is made up of two members appointed by the President of the Republic, seven members elected by Parliament and seven members elected by their peers. The Superior Council is presided over by the President of the Supreme Court of Justice (article 137 of the Statute of the Superior Council of the Judiciary - Act No. 21/85 of 30 July 1985, amended by Acts Nos. 10/94 of 5 May 1994, 81/98 of 3 December 1998, 143/99 of 31 August 1999 and 3-b/2000 of 4 April 2000).

14.5 Article 209 of the Constitution also admits the establishment of district courts (*juiz de paz*) and forbids the establishment of courts with exclusive jurisdiction to try specific categories of offences, except for military courts. According to article 213, the latter may be set up only in times of war for the judgement of strictly military offences.

### **The Constitutional Court**

14.6 According to article 221 of the Constitution, the Constitutional Court has the specific power to administer justice in matters involving questions of a legal and constitutional nature. It also has the power to give final rulings on the proper conduct and validity of electoral procedures, in accordance with the law (art. 223, para. 1 (c)).



14.7 The Constitutional Court has the power to decide questions of unconstitutionality and illegality. There are several ways in which it can supervise constitutionality, as follows:

- Article 277 of the Constitution refers to active unconstitutionality, concerning legislation that contravenes the Constitution or principles recognized therein.
- Article 278 refers to the power held by the President of the Republic to exercise preventive review of constitutionality. This takes the form of requests to the Constitutional Court to undertake preventive reviews of the constitutionality of any provision of an international treaty that has been submitted to the President for ratification, or of any decree sent to the President for promulgation, or of any international agreement whose decree of approval has been transmitted to him for signature.
- Article 280 establishes a practical check on constitutionality and legality, which takes the form of allowing appeals to the Constitutional Court against decisions taken by other courts, particularly in cases where they refuse to apply a rule on grounds of unconstitutionality or which apply a rule whose constitutionality has been questioned in the course of proceedings.
- Article 281 introduces the notion of an abstract review of constitutionality and legality. According to this rule the Court may review and pronounce certain provisions unconstitutional or illegal, with generally binding effect, at the request of one of the sovereign bodies, the Procurator-General of the Republic or the Ombudsman.
- Article 283 lastly deals with the Court's judgement regarding unconstitutionality by omission of legislative measures required to implement the provisions of the Constitution, at the request of the President of the Republic, the Ombudsman or the presidents of the regional legislative assemblies.

### **Courts of Justice**

14.8 According to article 210, paragraph 1, of the Constitution, the Supreme Court of Justice is the highest ranking court of law. It functions as a court of last appeal to overturn judgements, according to the principle of two-tier jurisdiction followed by the Portuguese legal system.<sup>12</sup>

14.9 According to the current organizational law governing the courts (Act No. 3/99 of 13 January 1999, amended by Act No. 101/99 of 26 July 1999), applied through Decree-Law No. 186-A/99 of 31 May 1999 (itself amended by Decree-Law No. 290/99 of 30 July 1999, Decree-Law No. 178/2000 of 9 August 2000 and Decree-Law No. 246-A/2001 of 14 September 2001), appeal courts are generally courts of second instance (article 210, paragraph 4 of the Constitution). Every judicial district has one or more courts of appeal (article 47 of Act No. 3/99).

14.10 According to article 62 of Act No. 3/99, the courts of first instance are generally district courts. In keeping with the type of cases assigned to them (art. 64), courts of first instance exercise either specialized jurisdiction (judging specific matters regardless of the form of procedure) or specific jurisdiction (issuing rulings according to the appropriate form of procedure). Depending on the form of procedure, they sit as either general courts or specialized courts (art. 77), and depending on their structure, they operate as either collegiate courts, jury courts or single-judge courts (art. 67).

14.11 Single-judge courts exercising general jurisdiction are competent by default, having to deal with and judge cases that have not been assigned to another court (art. 77, para. 1 (a)).

14.12 Section III of Act No. 3/99 lists courts exercising specialized jurisdiction, as follows:

- Courts of criminal investigation are responsible for conducting criminal investigations, deciding whether to proceed with an indictment (*pronúncia*), and for exercising the jurisdictional functions relating to the preliminary investigation (art. 79);
- Family courts are responsible for preparing and hearing cases concerning marriage and for exercising civil jurisdiction over minors (articles 81 and 82 of Act. No. 3/99);
- Juvenile courts are competent to decide on measures concerning minors over the age of 12 but under 16 (in this respect, see article 24, paragraph 24.35 et seq. below);
- Labour courts are competent to exercise social jurisdiction, either in civil matters or in relation to the contravention of labour legislation (articles 85 to 88 of Act No. 3/99);
- Commercial courts deal with all matters of a commercial nature (art. 98);
- Maritime courts are referred to in article 209, paragraph, 2 of the Constitution. These courts exercise civil jurisdiction, related to administrative offences, for the enforcement of decisions, and to international matters. According to article 90 of Act No. 3/99, they exercise civil jurisdiction, amongst others, over matters related to compensation paid for damage caused by the use at sea of all kinds of vessels, and to contracts related to the construction of all types of vessels used for maritime navigation;
- Courts responsible for the enforcement of sentences may decide on the modification or replacement of sentences and security measures in the course of enforcement and for monitoring convicted detainees (articles 91 and 92 of Act No. 3/99).

14.13 As mentioned under paragraph 14.10 above, courts exercising specific jurisdiction depend on the form of the procedure involved. These courts include:

- Civil courts (*varas*), which prepare and judge questions of fact of a civil nature of a value exceeding that dealt with by courts of second instance (Esc. 750,000 being the value of a case in first instance allowing an appeal, and Esc. 3 million being the value of a case in second instance allowing appeal to the Supreme Court), except for certain special proceedings (art. 97);
- Criminal courts (*varas*), which are competent to try offences under the rules of common procedure and which include collegiate and jury courts (art. 98);
- Civil sections exercising jurisdiction by default, responsible for preparing and judging civil proceedings not assigned to the civil *varas* or to civil district courts (art. 99);
- Criminal sections authorized to prepare the judgement and subsequent records in criminal cases not assigned to criminal district courts or to criminal *varas* (art. 100);
- Criminal courts (*juízos*) of minor jurisdiction, which may be set up with mixed specific jurisdiction where necessary. Their jurisdiction may be limited in either civil or criminal matters (art. 101). These courts have to prepare and judge civil cases requiring summary proceedings (*sumaríssimo*) or civil cases not referred to in the Code of Civil Procedure, which require special proceedings and where the final decision is not open to ordinary appeal (art. 101). The criminal courts of minor jurisdiction are therefore responsible for preparing and judging cases requiring summary proceedings and proceedings related to “transgressions” (*transgressões*) (art. 102). These courts are also responsible for issuing rulings on appeals against the decisions of administrative authorities relating to infringements of regulations (*contra-ordenações*), except as provided in article 86 on the *contra-ordenação* jurisdiction of labour courts (art. 102, para. 2).

### **Military courts**

14.14 The jurisdiction of military courts used to be related to the matter concerned (*ratione materiae*), which meant they dealt with essentially military offences. Nowadays, following the fourth constitutional revision (Act No. 1/97 of 27 September 1997), military courts have been abolished (under article 209, paragraph 4 of the Constitution, courts with exclusive jurisdiction to try specific categories of offence are forbidden).

14.15 Military courts are admitted only in wartime, described by the Constitution as a state of war. If a state of war prevails, military courts have the power to judge offences which are strictly military in nature (and no longer “essentially military” as prior to the constitutional revision).

### **Magistrates' courts**

14.16 The powers, organization and functioning of magistrates' courts (*justiça de paz*) (which are permitted under article 209, paragraph 2, of the Constitution) are governed by Act No. 78/2001 of 13 July 2001. The purpose of these courts is to settle conflicts between private citizens simply, rapidly and for little cost.

14.17 Complaints may be submitted orally or in writing. The procedure includes a pre-mediation phase, which is aimed at explaining to the parties what the mediation consists in and seeing whether they are predisposed to a possible settlement in the mediation phase. If the parties appear favourably inclined, the first mediation meeting is arranged at once. If not, the case will go to the magistrate (*juiz de paz*) for judgement.

14.18 The aim of mediation is essentially to enable parties to settle their differences amicably. The proceedings are conducted in that case by the mediator in consultation with the parties. When the parties reach agreement, the terms of the agreement are drawn up in writing and signed by all the parties, for immediate registration with the magistrate, whereupon it has value of judgement. If no agreement is reached, a hearing is arranged, in the course of which the parties can put forward their case. Evidence is produced and a judgement is delivered. (If an expert's opinion is requested, the magistrate's court loses its jurisdiction and the proceedings are transferred to the competent court, where they will be continued in the light of the earlier proceedings).

14.19 The rulings given by magistrates' courts rank equally with sentences passed by courts of first instance and may be appealed against before the court exercising local jurisdiction or a court having specific jurisdiction (so long as the value does not exceed €1,871).

14.20 Magistrates' courts deal with matters valued at not more than €3,741 (the same as for a court of first instance), particularly questions of joint ownership, rentals (except actions to expel tenants), neighbourhood, delivery of movables and claims for compensation arising from a criminal offence, provided that there is no criminal investigation under way. Through mediation, however, practically any conflict between individuals can be settled, except for those concerning inalienable rights.

### **Guarantees of the accused**

14.21 According to article 32 of the Constitution, which deals with guarantees in penal procedure, the defence is offered all necessary guarantees, including a right of appeal and related guarantees.

### **The principle of the presumption of innocence**

14.22 Under article 32, paragraph 2, of the Constitution, every accused person is presumed to be innocent until finally convicted.

14.23 A person in pre-trial detention is presumed innocent and must be treated accordingly (see comments referring to article 10, paragraphs 10.5 et seq.).

14.24 The presumption of the accused's innocence is one of the basic principles of the Code of Penal Procedure. Its effects are apparent in the following cases:

- The rejection of situations in which the burden of proof is reversed. In accordance with article 243, the official reports drawn up by judicial authorities, criminal police bodies or other police bodies, under certain conditions, are regarded simply as accusations;
- According to the rules governing measures of restraint, which is subject to the principles of appropriateness, proportionality and legality (arts. 191 and 193), pre-trial detention must be applied only in the last resort with a distinctly subsidiary character (art. 202). The rules presuppose a clear preference for less restrictive measures<sup>13</sup>;
- The closing of cases for insufficient evidence;
- The accused's rights to be assisted by counsel during the trial;
- The admission of guilt is permitted under article 344 of the Code of Penal Procedure. If the accused declares that he wishes to confess, the presiding judge must ensure that the confession has been freely given, with regard in particular to full liability of the perpetrator and the accuracy of the facts confessed, failing which the confession is considered void.

### **The right to information**

14.25 Under article 61 of the Code of Penal Procedure, the accused is entitled, amongst other rights, to be present at proceedings which concern him directly, to be heard by the court or by the investigating judge whenever a measure or decision concerning him is taken; and to be informed of these rights by the judicial authority or by the criminal police body before whom he must appear.

### **The right to be tried without undue delay and to be present at the trial**

14.26 The trial must be held within the shortest possible time compatible with defence guarantees (article 32 of the Constitution). With regard to procedural time limits, the Code of Penal Procedure establishes a series of provisions regarding the procedural delays permitted and effective access to the law. This is based essentially on:

- Strict rules regarding delays - articles 103 at seq. (article 105 of the Code of Penal Procedure stipulates in particular that “unless it is specifically provided to the contrary by law, the time allowed for any procedural act shall be 10 days.”);
- The obligation to bring to the notice of the disciplinary authority the reasons justifying the failure to observe a time limit, even if the particular procedural act has already taken place (art. 105, para. 2);

- Introduction of an incidental point aimed at speeding up the procedure (by request submitted to the State Prosecutor - art. 108);
- Simplified notification of proceedings;
- The strengthening of the principles of the continuity and concentration of hearings, with fairly strict rules governing time limits and interruptions (see the case described in article 328 of the Code of Penal Procedure);
- The system of appeals and the admissibility of their rejection in certain cases provide by law (arts. 399 et seq. and art. 420).

14.27 Decree-Law No. 320-C/2000 of 15 December introduced various measures to combat procedural delays, which came into effect on 1 January 2001. Notification of the accused, the assistant and civil parties now takes place by simple letter in cases where such persons in previous proceedings have already stated their residence, place of work or other chosen residence (the accused being informed that his presence at the trial may be waived in the conditions mentioned below). The mail distribution service issues a notice giving the date and place of delivery of the notification. This statement is then forwarded to the issuing service or court, and it is considered that notification has taken place within the following five days. This avoids the need for personal notification or registered mail.

In some trials, the number of witnesses may be limited to 20, unless the giving of evidence is essential for the purpose of ascertaining the material truth or if the trial proves to be extremely complex, due to the number of accused or the organized nature of the crime.

The failure to appear of a person who has been summoned and whose presence is considered indispensable does not entail an adjournment of the hearing. The other persons concerned will be heard and the order of statements given will be adjusted accordingly.

14.28 If the accused, having been duly notified, fails to appear on time, the judge will take legally permissible measures to obtain his appearance at the trial. The trial will be adjourned only if the court considers that the presence of the accused from the beginning of the trial is essential for the purpose of ascertaining the truth.

If the courts consider that the hearing may begin without the accused being present, or if the accused is absent for a justified reason, the hearing will not be adjourned. The persons present will be questioned or heard, subject to any subsequent changes which may prove necessary, and their statements will be documented. This provision also allows the accused, if he cannot appear but is able to provide statements or evidence, to do so on the day and at the time and place decided by the court, subject to the assistant physician delivering a report, if necessary, beforehand.

14.29 In any event, the accused maintains the right to enter statements until the hearing is closed, and his chosen or appointed counsel may request that he should be heard on the second date mentioned by the judge when deciding the day of the hearing. If the hearing takes place without the accused being present, the accused will be notified of the judgement as soon as he is arrested or appears voluntarily. The time allowed for an accused to lodge an appeal runs from notification of the judgement.

14.30 The hearing may still take place if the accused is absent, provided he has given his consent.

14.31 Whenever a hearing takes place without the accused being present, the latter must be represented for all effects by counsel.

14.32 Increasing use is made of telecommunication facilities, especially teleconferencing, in order to avoid any unnecessary movement of persons, which is usually the main reason for a failure to appear.

14.33 Once the pre-trial proceedings have been concluded, the judge may immediately issue an indictment (*pronúncia*), receiving charges by the Public Prosecutor or not, and will immediately notify the parties present. Otherwise, in summary proceedings, the sentence may be delivered immediately at the end of the hearing.

### **The right to counsel and to prepare a defence**

14.34 The accused is entitled to counsel of his own choosing at any stage of the proceedings (article 62 of the Code of Penal Procedure) and to be assisted by the latter in all formalities. The cases and formalities where such assistance is mandatory are stipulated in the law.

If the accused has not made his own choice of counsel, then the judge or the public prosecutor will choose one for him whenever counsel's presence at the hearing is mandatory.

14.35 The accused has the right to communicate with his counsel, even before the first interrogation and even if he is denied the right to communicate with any person other than his counsel, as referred to in article 143, paragraph 4, of the Code of Penal Procedure (this situation of incommunication before the first court interrogation is applied only in cases of terrorism, violent crime or highly organized crime, and even in such extreme situations, detainees are still allowed to communicate with their counsel).

14.36 Articles 64, paragraph 1 (a), and 141, paragraph 2, of the Code of Penal Procedure lay down rules for mandatory legal assistance by counsel at the first interrogation of the accused. It is possible to request the judge, at the end of the interrogation, to ask questions which may assist elucidation of the truth (art. 141, para. 6). Counsel's absence in such a case automatically makes the proceedings void (art. 119 (c)). Such assistance may also be provided at the request of the

accused, once he has been informed of his rights, in cases where the public prosecutor conducts a brief interrogation before the court hearing (art. 143, para. 2). According to article 64, paragraph 1 (d), legal assistance is also mandatory in the case of an appeal. Counsel will exercise the accused's legal rights, except for those to which only the accused is entitled by law (art. 63).

14.37 Another case where legal assistance is mandatory is referred to in article 64, paragraph 1 (c), of the Code of Penal Procedure, which stipulates that such legal assistance must be provided in cases where the accused is deaf, dumb, illiterate or has no knowledge of the Portuguese language, or if the accused is less than 21 years old, or if the question is raised of the accused's total or partial absence of criminal responsibility.

14.38 With regard to assistance by counsel and free legal advice, see comments under article 2 (paragraphs 2.6 et seq.).

14.39 All communications between the accused and their counsel is confidential, and the latter are bound by professional secrecy in all proceedings. Articles 89 and 90 allow trial proceedings to be consulted and documents and information to be obtained by the public prosecutor, the accused and counsel for the defence, the only restrictions in this respect applying in the event of proceedings being still subject to judicial secrecy, e.g. before charges are brought.

#### **The right to examine witnesses**

14.40 According to article 32 of the Constitution, penal proceedings must be accusatory in nature, and the trial and preliminary investigation proceedings required by law are subject to the principle that both parties should be heard.

14.41 According to article 61, paragraph 1 (f), of the Code of Penal Procedure, the accused has the right to take part in the pre-trial investigation, to supply evidence and to request whatever formalities he deems necessary.

14.42 Article 327 of the Code of Penal Procedure, moreover, stipulates that all questions arising in the course of proceedings or regarding evidence submitted are equally subject to the principle that both parties must be heard.

#### **The right to be assisted by an interpreter**

14.43 Article 92 of the Code of Penal Procedure concerns the language used in proceedings and the appointment of an interpreter, in cases where a speaker has no knowledge or not sufficient knowledge of the Portuguese language. An appropriate interpreter will be appointed at no cost to the person, even in cases where the authority conducting the proceedings or one of the participants is familiar with the language used by the speaker. If there is no interpreter, the hearing must be adjourned.



14.44 The rules concerning the appearance of a person suffering from hearing or speaking disabilities are given in article 93 (a person with hearing disability must be assisted by an interpreter versed in sign language, lip reading or written expression; if a mute person can read, questions will be put to him orally and he will reply in writing. Otherwise, as the necessity arises, a suitable interpreter will be appointed).

#### **The right not to be compelled to testify against oneself**

14.45 Under article 61, paragraph 1 (c), the accused has the right not be obliged to reply to questions asked in the course of proceedings concerning acts with which he is charged or concerning the content of statements he has made.

#### **The right of appeal**

14.46 As mentioned earlier, the right to appeal is guaranteed under the Constitution.

14.47 Under the Code of Penal Procedure, the accused is entitled to appeal against any decisions which are unfavourable to him (art. 61, para. 1 (h)). According to article 64, paragraph 1 (d), the accused must be assisted by counsel in appeal proceedings.

#### **The right to compensation following a miscarriage of justice**

14.48 In article 29, paragraph 6, the Constitution recognizes the right to compensation following wrongful conviction: "Citizens who have been unjustly convicted have the right, under the conditions laid down by law, to a reconsideration of their sentence and to compensation for loss suffered."

14.49 In the case where a conviction has been reversed and the accused has been acquitted, the person will be entitled to compensation for any loss incurred and to be refunded legal expenses, as well as any costs or fines incurred, with a view to restoring the legal situation prior to conviction (articles 461 and 462 of the Code of Penal Procedure). Compensation is paid by the State, which is assigned the rights of the accused against all parties.

#### ***Ne bis in idem***

14.50 As mentioned earlier, article 29, paragraph 5, of the Constitution enshrines the principle of *ne bis in idem*, whereby "no one shall be tried more than once for the same offence".

14.51 Portugal is a party to the international instruments (of the European Union in particular) which support this principle. Thus the *Ne bis in idem* Convention between member States of the European community was ratified by Presidential Decree No. 47/95 of 11 April 1995.

14.52 Several international instruments to which Portugal is a party refer to the principle. These include the European Convention on Extradition, the European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, the European Convention on the International Validity of Criminal Judgements, the European Convention on the Transfer of Proceedings in Criminal Matters, the Council of Europe Convention on the

Transfer of Sentenced Persons, the European Convention on the Punishment of Road Traffic Offences, Protocol No. 7 to the European Convention on Human Rights and, of course, the International Covenant on Civil and Political Rights.

### **Article 15**

#### ***Nulla poena sine lege, nullum crimen sine lege***

15.1 The provisions of article 15 are applied in full in Portuguese law. As the latter has not changed in this respect, we would refer readers to the second periodic report (see paragraphs 574 et seq.).

### **Article 16**

#### **Right to recognition as a person before the law**

16.1 Article 26, paragraph 1, of the Constitution of the Portuguese Republic recognizes that everyone has the right to personal identity. The right of everyone to recognition as a person before the law also derives from the principle of non-discrimination. This recognition is of capital importance, since it is the foundation of the enjoyment of all rights.

Articles 26 and 27 of the Portuguese Civil Code provide that the beginning and end of legal personality, and everything concerning its existence, supervision and restricted use are contained in the rules governing the personality of the individual. Only the protection of aliens and stateless persons is recognized in Portuguese law.

16.2 Personality is acquired when a person is fully born and alive and ceases when the person dies (articles 66 and 68 of the Civil Code).

16.3 Since Portuguese legislation has not changed in this respect, we would refer the reader to the second periodic report, paragraphs 584 et seq..

16.4 One item of case law may be of interest, however: the Court of Appeal of Lisbon, on 9 November 1993, recognize that an individual who had changed sex could alter the sex and name entered on his birth certificate. The Court referred in particular to article 16 of the International Covenant on Civil and Political Rights.

### **Article 17**

#### **Rights of the person**

17.1 Under article 26, paragraph 1, of the Constitution, everyone is recognized as having the right to personal identity, personality development, civil capacity, citizenship, good name and reputation, over his own likeness, the right to speak and the right to the protection of privacy and family life, as well as to protection against all forms of discrimination. According to paragraph 2, “the law shall establish effective guarantees against the misuse, or use contrary to human dignity, of information concerning individuals or families”.

17.2 The right to protection against interference with the home or correspondence is guaranteed by article 34 of the Constitution, amended in the course of the fourth and fifth constitutional revisions (in 1997 and 2001 respectively). The fourth revision already extended the scope of paragraph 4 (which forbade interference by public authorities with correspondence and telecommunications), by extending this prohibition to all other means of communication. Entry into a person's home at night, which used to be expressly and totally forbidden, in any circumstances, until 2001, is now admitted in cases of *flagrante delicto* or subject to a judicial warrant in the event of particularly violent or highly organized crime, including terrorism and trafficking in persons, arms and narcotics (article 34, paragraph 3, in the draft produced by the fifth constitutional revision).

17.3 Article 35 of the Constitution refers to the use of computing:

“1. All citizens have the right of access to any computerized data that concern them. They may demand that such data be corrected and updated and have the right to be informed of the use to which the data will be put, in accordance with the law.

2. The law defines the concept of personal data, as well as the conditions that apply to the automatic processing, connection, transmission and use thereof, and shall guarantee their protection, through the services of an independent administrative body.

3. Computing may not be used for the treatment of data concerning philosophical or political convictions, affiliation to a party or trade union, religious faith, private life or ethnic origin, except with the express consent of the person concerned, subject to the conditions provided by law guaranteeing non-discrimination and in the case of statistical data to data not being individually identifiable.

4. Access to personal data of third parties is forbidden, except in exceptional circumstances provided by law.

5. Citizens must not be attributed a single national number.

6. Every citizen has the right to free access to public information networks. The law shall determine the rules applicable to transborder circulation of data and shall establish appropriate forms of protection for personal data and for other data which may need safeguarding in the national interest.

7. Personal data stored on non-computerized files shall benefit from the same protection as that provided in the paragraphs above, in accordance with the law.”

### **The right to protection of personal and family privacy**

17.4 The right to protection of personal and family privacy is guaranteed under the above-mentioned constitutional provisions.

### **Under the Penal Code**

17.5 The Penal Code deals with this matter in the chapter on offences against privacy. Thus article 190 punishes any person who, without authorization, enters the dwelling of another person or remains there after being ordered to leave. The disclosure of facts related to intimate family or sex life, with the intention of revealing a person's private life, is punishable by deprivation of freedom (art. 192).

17.6 Under the same article, the recording of words spoken by a third party that are not intended to be heard in public, or the use thereof, as well as the photographing, filming or recording in any way of the private lives of other people, or the use thereof, without proper justification and without the consent of the persons concerned, are considered offences (art. 192).

17.7 With regard to interference with privacy, article 192 also punishes the interception, listening, recording, use, transmission or dissemination of a private conversation or communication without the consent of the participants thereto (para. 1 (a)); the recording, fixing or dissemination of peoples' likenesses without their consent (para. 1 (b)); and any hidden observation of persons in private premises (para. 1 (c)), as well as the dissemination of any facts concerning the private life or serious illness of persons (para. 1 (d)).

17.8 Article 193 deals with interference by means of computing, making it an offence to create, maintain or use a computerized file of individually identifiable data concerning the political, religious or philosophical convictions of people, their membership of a party or trade union, their private life or their ethnic origin.

17.9 As mentioned in the previous report, this article was inspired by the provisions of the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, which has already been signed and ratified by Portugal (9 July 1993). Act No. 67/98 of 26 October 1998 incorporates in Portuguese law the European Union's Directive 95/46 of the European Parliament and the Council of 24 October 1995, expressly listing offences involving the failure to respect obligations regarding the protection of data (in particular the supply of false information or the introduction of undue modifications), undue access, the modification or destruction of personal data and violation of the duty of secrecy. According to article 9, paragraph 2, of the Religious Freedom Act (Act No. 16/2001 of 22 June 2001), computing may not be used either for the treatment of data concerning personal convictions or religious faith, except with the express consent of the person concerned, or in the case of the treatment of statistical data which are not individually identifiable.

### **Under the Code of Penal Procedure**

17.10 As mentioned earlier with reference to article 7 of the Covenant, according to article 125, paragraph 3, of the Code of Penal Procedure, any evidence obtained as a result of the interference with privacy, the home, or through the violation of correspondence or telecommunications, without the person's consent (except in cases provided by law) is considered void.

17.11 According to article 172 of that Code, personal searches carried out by police officials, with a view to checking whether an offence has left any vestiges likely to harm other persons, must respect the dignity and, as far as possible, the sense of propriety of the person searched. A judge may order such searches if a person tries to avoid or prevent a search or refuses to give up an object that needs examining.

### **The right to inviolability of the home**

17.12 According to article 34 of the Constitution, the home is inviolable. Entry to the home of citizens against their will is subject to an order by the competent judicial authority, in cases and in the manner prescribed by law. No one may enter another person's home at night without the latter's consent, except in cases of *flagrante delicto* or by judicial order in cases of specially violent or highly organized crime, including terrorism and the traffic of persons, arms and narcotics, under conditions provided by law (this exception to the prohibition of night entry to a person's home was introduced with the fifth constitutional revision - Constitutional Act No. 1/2001 of 12 December 2001). See also paragraph 17.2 above.

### **Under the Penal Code**

17.13 The Penal Code punishes the violation of another person's home under article 190.

17.14 In the section on abuse of authority, article 378 of the Penal Code penalizes officials who, by abusing the powers conferred on them by their office, violate another person's home.

### **Under the Code of Penal Procedure**

17.15 According to this Code, the criminal police may conduct searches without prior authorization.

Such searches are subject to subsequent monitoring by the judicial authority, in the event of the risk of imminent flight and in the case of searches in premises occupied by suspects, except where home searches are concerned.

Such searches are carried out if there are grounds for believing that objects connected with an offence, which may provide significant evidence and which may disappear, are located on the premises (art. 251).

17.16 Under article 177, paragraph 1, of the Code of Penal Procedure, a search in an inhabited dwelling or closed premises belonging to that dwelling must be subject to a court warrant and must take place between 7 a.m. and 9 p.m.

17.17 Under paragraph 2 of that article, in exceptional situations, such as those referred to in article 174, paragraphs 4 (a) and 4 (b), involving terrorism, violent crime, imminent perpetration of a crime endangering the life or integrity of a person, or when there is written evidence of the consent of the person concerned, searches may be ordered by the Public Prosecutor's department or conducted by the criminal police. In the latter case, the court must immediately be informed of such searches in order for them to be validated.

17.18 With regard to searches carried out in a lawyer's office, a doctor's surgery or a public health-care establishment, paragraphs 3 and 4 of article 177 stipulate that they must be personally supervised by the judge, who must give prior notification thereof to the President of the Council of the Bar Association or Medical Association or the management of the public health-care establishment, as appropriate, so that these persons or their representatives may attend the search.

### **Decree-Law No. 433/82**

17.19 Under the terms of Decree-Law No. 433/82 of 27 October 1982 (amended by Decree-Laws Nos. 356/89 of 17 October 1989 and 244/95 of 14 September 1995, and by Act No. 109/2001 of 24 December 2001) concerning administrative offences (*ilícito de mera ordenação social*), evidence drawn from an individual's private life, from body searches or blood analyses is admissible only with the consent of the person concerned (art. 42).

### **The right to inviolability of correspondence**

17.20 According to article 34 of the Constitution, "all interference by the public authorities with correspondence, telecommunications and other means of communication is forbidden, except in cases laid down by the law relating to penal procedure".

### **Under the Penal Code**

17.21 The violation of the secrecy of correspondence and telecommunications is considered an offence under article 194 of the Penal Code. Any person who, without authorization, opens a parcel, a letter or enclosed writing which is not addressed to him, or who, by some technical process, discovers their content, or violates or acquires knowledge of the content of a telephone or telegraph communication is liable to punishment. The penalty will be increased if the content of the illegally obtained letters, telephone calls or telegrams is publicly disseminated or if the offences concerned have been committed to obtain reward or gain or to harm a third person.

17.22 The violation of the secrecy of correspondence or telecommunications by officials of the postal, telegraph, telephone or telecommunication services is punishable under article 384. Under that article, officials found guilty of suppressing, removing, opening, revealing or disseminating all or part of the content of letters or parcels or other communications are liable to a sentence involving deprivation of freedom.

### **Under the Code of Penal Procedure**

17.23 Article 179 deals with the seizure of correspondence, which can only be ordered by an examining magistrate. Subject to annulment, the seizure of correspondence may be authorized or ordered by a judge only if there are serious grounds for believing that (para. 1):

“(a) The correspondence was sent by the accused or addressed to the accused, but under another name or through a third person;

“(b) An offence punishable by a maximum prison sentence exceeding three years is involved;

“(c) The act is important for uncovering the truth or evidence.”

17.24 The seizure of or other means of inspecting correspondence between the accused and his counsel is prohibited, unless the judge has good reason to believe that such correspondence is material to the offence (art. 179, para. 2).

17.25 The judge who has ordered or authorized the seizure of correspondence shall be the first to take cognizance of its content and determine whether it is important as evidence. If not, he shall arrange for the correspondence to be returned to the rightful owner. The magistrate must remain bound by the requirement of confidentiality in respect of any material of which he has taken cognizance and which is not relevant as evidence (art. 179, para. 3).

17.26 Under articles 180 and 181, seizures conducted in the office of a lawyer or physician or in a banking institution must be supervised personally by the judge. If any seizure is made in a lawyer's or a doctor's office, the judge in charge must send prior notification to the President of the Council or the Bar Association or Medical Association, as appropriate, so that they or their representative may be present at the seizure.

#### **Decree-Law No. 433/82 (governing administrative offences) and penitentiary law**

17.27 Since there have been no changes with regard to the inviolability of correspondence in either of the above laws, we would refer the reader to the second periodic report (paras. 619 and 634).

Some changes have taken place, however, in administrative practice. These affect internal rules concerning the violation of correspondence, as outlined below.

Circular No. 3/94/DEP/1 of 11 November 1994 was aimed at introducing uniform procedures and harmonizing the rules of Decree-Law No. 265/79 of 1 August 1979 (as amended by Decree-Law No. 49/80 of 22 March 1980 and Decree-Law No. 414/85 of 18 October 1985) with constitutional rules guaranteeing fundamental rights. With regard to the interception and seizure of correspondence, the circular stipulates as follows:

(a) That where an inspection is carried out, in order to detect objects which are not allowed under the law or under internal regulations, the objects must be opened by the security service in the presence of the detainee;

(b) That only if there is a suspicion that an offence has been perpetrated or for justified reasons of order and security may correspondence be read, by the education and training department, subject to certain conditions: an order must be signed by the governor of the establishment and notified to the detainee, and a report must subsequently be drawn up

(reference should also be made to Circular No. 23/86/DCSDEPMS - 16 of 30 October 1986, dealing with the question of correspondence drafted in unknown languages); and that any reading of correspondence should not give rise to effacing or curtailing any part of it;

(c) That correspondence between the detainee and certain public authorities, such as the Ombudsman, the European Court of Human Rights, the President of the Parliament, the Prime Minister, consular and diplomatic missions, the judge responsible for the enforcement of sentences, the Director-General of prison services, as well as all correspondence between the detainee and his counsel shall not be interfered with.

Circular No. 5/DGD/96 of 6 December 1996 gives guidelines for dealing with situations in which correspondence is rejected by the detainee to whom it is addressed and situations where correspondence needs to be forwarded on account of a transfer.

### **Telephone tapping**

#### **Under the Code of Penal Procedure**

17.28 Article 187 forbids the interception and recording of conversations or telephone calls, except under a court order or authorization in the case of the following offences:

- (a) Those punishable by prison sentences of up to three years;
- (b) Those related to drug trafficking;
- (c) Those involving the use of firearms, or explosive or similar substances or devices;
- (d) Contraband;
- (e) Insults, threats, coercion and interference with privacy, if committed by telephone;

when there are reasons to believe that the action may help to uncover the truth or supply evidence.

A court order may be requested to undertake telephone tapping in the following circumstances: terrorism; violent or highly organized crime; conspiracy; crimes against peace and humanity; crimes against State security; drug production and trafficking; counterfeiting of money; or offences referred to in a convention on the safety of aerial or maritime navigation.

Under paragraph 3, it is forbidden to intercept or record conversations or calls between an accused and his counsel, unless the court has good reason to believe that such exchanges are material to the offence.



## **Professional secrecy**

### **Under the Penal Code**

17.29 Any person who, owing to his condition, occupation, employment, profession or art, takes cognizance of a secret and, without authorization, reveals or derives gain from that information (thereby causing prejudice to the public interest or to third parties) shall be liable to imprisonment (arts. 195 and 196).

17.30 Under the terms of article 31, however, such acts cease to be illegal if the secret is revealed in the performance of a legal duty imposed by law or by legitimate order. If any conflict arises between the performance of legal duties or legal orders, the duty with the greater value must take precedence (art. 36). Thus the conflicting interests must be assessed by the person according to circumstances, in order to determine whether the breach of confidentiality is justified.

17.31 Any official who, without authorization, reveals or attempts to reveal a secret known to him or entrusted to him in the performance of his duties, for the purpose of gain, either for himself or for a third party, or with the intention of causing prejudice to the public interest or to third parties, is punishable under articles 383 et seq.

17.32 Any official of the postal, telegraph, telephone or telecommunication services who destroys, removes, opens or gains knowledge of the content of a letter, a parcel, a telegram or any other communication entrusted to those services and which is accessible to that official in the course of his duties, or who records or reveals to third parties in whole or in part the content of communications between certain persons which has come to his knowledge in the course of his duties, is punishable under article 384.

### **Under the Code of Penal Procedure**

17.33 Under the terms of articles 135 and 136, ministers of religion or religious persuasion, lawyers, physicians, journalists, members of banking institutions, officials having knowledge of facts covered by professional secrecy or in the course of their duties, or any other persons who may or must observe professional secrecy by law may request exemption from having to bear witness to the facts related to that secret (para. 1).

17.34 In the event of doubts regarding the legitimacy of such a request for exemption, the judicial authority may proceed with inquiries and, in the event of an illegitimate request, inform the court, which may then order the statement to be made (arts. 135 and 136, para. 2).

17.35 Article 135, paragraph 3, deals with the possibility of ordering a person to give evidence, despite the duty or right to maintain secrecy, on a decision by a higher court than that dealing with the matter or by the Supreme Court, in plenary session of the criminal sections, and after hearing the organization representing the profession involved in the matter of secrecy. The only exception concerns religious secrecy (para. 4).

17.36 According to article 137, witnesses cannot give evidence on matters classified as State secrets.

17.37 Documents covered by professional secrecy may not be seized, subject to nullification, unless they are material to the crime (art. 180, para. 2).

17.38 A seizure may take place in a banking establishment only if the judicial authority has substantial grounds for believing that the seizure may yield objects or documents connected to an offence which are essential for uncovering the truth (art. 181, para. 1).

17.39 The judge and officials who assist him during the seizure remain subject to a duty of secrecy with regard to all facts which have come to their knowledge and which are not relevant for the purposes of evidence.

17.40 According to article 182, the persons referred to in articles 135 to 137 (ministers of religion or religious persuasion, lawyers, physicians, journalists, members of banking institutions and any person for whom the law allows or imposes a duty of confidentiality) must surrender to the judicial authority, if ordered, whatever objects or documents are in their possession and are liable to seizure, unless they expressly claim a duty of secrecy as civil servants or the protection of State secrets.

17.41 In its general observations on the second periodic report of Portugal, the Committee enquired about the conditions under which journalists were obliged to reveal their sources of information. Under the terms of Act No. 1/99 of 13 January 1999 (Status of the journalist), without prejudice to any applicable rules of penal procedure, journalists are not obliged to reveal their sources of information and their silence cannot be penalized.

### **Other legal provisions**

17.42 According to Decree-Law No. 433/82 of 27 October 1982 concerning administrative offences (*ilícito de mera ordenação social*) the use of evidence based on the violation of professional secrecy is forbidden (art. 42, para. 1).

17.43 Under the penitentiary law (Decree-Law No. 265/79, art. 45), prison officials legally gaining knowledge of the content of prisoners' correspondence must not divulge that knowledge.

17.44 In the same connection, article 28 of Act No. 30/84 of 5 September 1984, amended by Act No. 4/95 of 21 February 1995 concerning the Republic's information system, stipulates that any person who, in the course of his duties, has access to classified material which is used by the intelligence services must strictly observe the duty of secrecy.

17.45 Act No. 6/94 of 7 April 1994 lays down rules for classification of information as a State secret.

17.46 Banking secrecy is governed by the terms of Decree-Law No. 298/92 of 31 December 1992 (amended by Decree-Law No. 246/95 of 14 September 1995).

The principles that govern the rule of secrecy are in the first place the duty of secrecy, stipulated by article 78 of the above Decree-Law. The members of administrative or monitoring bodies of credit institutions, their employees, their representatives, clerks or other persons providing them with services on a permanent or occasional basis, may not reveal or use any information regarding facts or elements related to the activities of the institution or its relations with its customers, to which they may gain access solely in the performance of their duties or services. In particular, the names of clients, and information concerning their accounts and banking operations are subject to secrecy. Supervisory authorities are also bound by a duty of secrecy (article 80 of Decree-Law No. 298/92 of 31 December 1992).

The duty of secrecy may be waived in the event of the client's authorization, orders from the Central Bank, the Security Market Commission, acting within its powers, the Deposit Guarantee Fund, acting within its powers, in accordance with the terms of the Penal Code or Code of Penal Procedure (article 79 of Decree-Law No. 298/92 of 31 December 1992, article 181 of the Code of Penal Procedure).

Under the terms of article 81 of Decree-Law No. 298/92 of 31 December 1992, the Central Bank (Banco de Portugal) can cooperate with all bodies holding authority in the banking system, counterpart bodies in the member States of the European Union, and counterpart bodies in third countries, provided that equivalent conditions of legal secrecy prevail there. A system of information concerning risks is provided under article 83.

17.47 In addition, Act No. 5/2002 of 11 January 2002 (measures for combating organized and economic and financial crime) relieves the duty of secrecy to which members of the corporate bodies of credit institutions and financial companies are bound, together with their employees and any persons working for them, as well as the duty of secrecy in the case of officials of the inland revenue service, if any of the following offences are involved:

- Drug trafficking;
- Terrorism and terrorist organizations;
- Arms trafficking;
- Passive corruption and embezzlement;
- Money laundering;
- Conspiracy;
- Contraband;

- Trafficking in and modifying stolen vehicles;
- Procuring or trafficking of minors;
- Counterfeiting of bank notes and similar securities.

Thus, in the course of enquiries, pre-trial investigations or trials involving such offences, the duty of secrecy to which the above-mentioned professionals are bound may be waived, if there are serious reasons for believing that the information they hold may help uncover the truth. In such cases, the waiver must be authorized by substantiated judicial order issued by the judge in charge of the case.

Article 4 of the same legislation introduces a new system for monitoring bank accounts, subject to court authorization or order, whereby banking institutions have to report all movements of funds on the accounts concerned to the judicial authority or to the criminal police, within 24 hours. The banking institution's own officials and assistants are themselves bound by secrecy regarding all investigations about which they become acquainted, and they are expressly forbidden to give notification thereof to the persons whose accounts are being monitored or about whom information or documents have been requested.

## **Article 18**

### **Freedom of thought, conscience and religion**

#### **Constitution and legal restrictions**

18.1 Freedom of conscience, religion and worship is protected under article 41 of the Constitution. Such freedom is inviolable and no one may be prosecuted, deprived of rights or exempted from civil obligations or duties on the grounds of his convictions or religious practices.

18.2 Portuguese legislation contains no provision expressly restricting the free practice of a religion and there are ample guarantees against any pressure being brought to bear on the free choice of religion.

On 22 June 2001, the Religious Freedom Act (Act No. 16/2001) was adopted, expressly establishing that "freedom of conscience, religion and worship is inviolable and guaranteed for all in accordance with the Constitution, the Universal Declaration of Human Rights and applicable international law".

#### **International treaties which Portugal has approved and ratified**

18.3 The above rights are all protected by the Universal Declaration of Human Rights, the European Convention on Human Rights, the Constitution of the International Labour Organization (ILO), the Convention for the Protection of Human Rights and Fundamental

Freedoms, Protocols I and II additional to the Geneva Conventions of 12 August 1949 relating to the protection of victims of international armed conflicts (approved and ratified by Portugal and published in the Official Bulletin on 1 April 1992) and the United Nations Convention on the Rights of the Child (Parliamentary resolution 20/90 of 12 September 1990).

### **The Concordat between the Holy See and Portugal**

18.4 The Concordat between the Holy See and Portugal dates from 1940. A Protocol additional to the Concordat was, however, signed in the Vatican on 15 February 1975, inter alia allowing divorce between spouses marrying in the Catholic church. Nowadays, the political tendency is to wish to revise the Concordat in order to improve the defence and promotion of religious freedom (for instance, by removing the presence of Catholic priests in the armed forces, or with the intention of establishing greater equality between religious denominations). The Council of Ministers resolution 67/2001 of 6 June 2001 set up a Commission, attached to the Ministry of Foreign Affairs, responsible for negotiating a revision of the Concordat between the Holy See and Portugal of 1940.

For details concerning the Concordat, see the second periodic report, paragraphs 651 et seq.

### **Ensuring religious freedom**

#### **Framework law on religious freedom**

18.5 The new Religious Freedom Act (Act No. 16/2001 of 22 June 2001) rests on the principles of equality (between believers and between churches); of the separation between the State and the churches and their freedom to organize and exercise their duties and their worship; of the non-denominational character of the State; of State cooperation with the churches and religious communities settled in Portugal; and lastly of tolerance. The law also establishes (in article 6) that the only restrictions on freedom of conscience, religion and worship stem from the need to safeguard constitutionally protected rights and interests, with the proviso that such freedom does not allow criminal activity.

18.6 Article 6, paragraph 5, reaffirms the precept enshrined in article 19, paragraph 6, of the Constitution, which includes freedom of conscience and religion among irrevocable rights, even in the event of state of siege or state of emergency.

18.7 In accordance with article 8 of that Act, freedom of conscience, religion and worship includes the following rights:

- (a) To have, not to have, or to cease to have a religious belief;
- (b) Freely to choose, to change or to relinquish one's religious belief;
- (c) To celebrate or not to celebrate acts of worship, in private or in public, pertaining to one's chosen denomination;

(d) To profess one's own religious belief, introduce new believers, and to express one's thoughts regarding religious matters and disseminate them freely through speech, images or any other means;

(e) To inform or be informed about religion, to learn or to teach a religion;

(f) To congregate, to demonstrate and to associate with others according to one's religious convictions, with no restrictions except as provided under articles 45 and 46 of the Constitution;

(g) To act or not to act in conformity with the rules of the professed religion, subject to the observance of human rights and the law;

(h) To choose for one's children the religious names derived from the chosen religion;

(i) To produce scientific, literary or artistic works related to religion.

Other rights that are recognized are the right to join a church or religious community, to participate in the church's activities and in jointly celebrated religious rites and to receive the religious assistance of one's choosing; to celebrate marriage and to be buried according to the rites of one's religion and to commemorate that religion's festivities in public (art. 10); and the right to conscientious objection (art. 12).

18.8 With regard to the religious education of minors, it is established that "parents have the right to bring up their children in accordance with their religious beliefs, respecting their moral and physical integrity and without harm for their health." After the age of 16, minors have the right to make their own choices with regard to freedom of conscience, religion and worship.

18.9 Recognition is given to the civil effects of all marriages celebrated religiously before the minister of a church or religious community established in the country (and not only for Catholic marriages, as was the case hitherto).

18.10 Article 9 further establishes that no one may be: obliged to profess a religious belief, to celebrate or attend acts of worship, to receive religious assistance or religious propaganda; to belong to, to remain in or to leave a religious association, church or religious community, without prejudice to the latter's rules regarding membership or the exclusion of members. Moreover, no one may be questioned by an authority regarding his religious belief or practice, except for the purpose of collecting non-identifiable statistical data, nor be penalized for refusing to reply, or be obliged to take a religious oath. Under paragraph 2 of the article, no computer records may be kept of personal beliefs or religious faith, except with the express consent of the person concerned, or for the purposes of processing non-identifiable statistical data.

18.11 This Act also specifies the conditions under which religious entities may acquire legal personality, entitling them to a series of privileges and benefits (such as tax relief, religious broadcasting time on public television and radio broadcasting services and the ownership or disposal of assets). It also set up the Commission on Religious Freedom as an independent consultative body of the Assembly of the Republic and the Government, with duties including the study, information, preparation of opinions and proposals on all matters related to the application of the Religious Freedom Act, including the development, improvement or any revision of that Act and, in general, relating to legislation on religions in Portugal and scientific research conducted by churches and religious communities and movements in Portugal.

18.12 To take account of the specially representative character of the Catholic church in Portuguese society, article 58 accords special status to the Catholic religion, by safeguarding the Concordat between the Holy See and the Portuguese Republic of 7 May 1940, the Protocol additional to that Concordat of 15 February 1975, and legislation applying specifically to the Catholic church, which is not subject to the provisions of Act No. 16/2001 on churches or religious communities registered or established in the country, subject to the adoption of subsequent arrangements between the State and the Catholic church or to repeal of the legislation.

18.13 With regard to religious secrecy, article 16, paragraph 2 establishes that ministers of religion may not be questioned by magistrates or any other authority about any facts or matters which have come to their knowledge in the course of their religious duties. Religious secrecy, in fact, takes precedence over all other forms of professional secrecy and ministers of religion may never be compelled to make statements, even under court order (see the rules introduced under article 135, paragraph 4, of the Code of Penal Procedure - in 17.36 above).

18.14 Article 195 of the Penal Code penalizes the violation of a duty of secrecy in the following terms: “any person who, without authorized consent, reveals a secret which has come to his knowledge as a result of his status, occupation, employment, profession or skill, shall be liable to a prison sentence of up to one year and a fine of up to 240 days’ earnings”.

### **Conscientious objection**

18.15 Act No. 7/92 of 12 May 1992, amended by Act No. 138/99 of 28 August 1999, contains the legislation concerning conscientious objection to military service, laying down conditions for exemption from military service in peacetime and in wartime. The Act is applied through Decree-Law No. 191/92 of 8 September 1992. It should be pointed out, however, that conscientious objection does not in fact apply only to military service. A doctor who does not agree with abortion may, as mentioned earlier (see paragraph 6.20 above), refuse to carry it out on the ground of conscientious objection.

Under article 12, the Religious Freedom Act recognizes the right to conscientious objection, by establishing that this includes “the right to oppose the implementation of laws that conflict with the undeniable feelings of conscience, within the limits of the duties and obligations

imposed by the Constitution and in the light of the legislation regulating the enjoyment of conscientious objection". Feelings of conscience are deemed undeniable if their violation implies a serious impairment of moral integrity making any other form of behaviour unenforceable.

The most common application of conscientious objection is clearly in relation to military service.

The status of conscientious objector is based on personal convictions regarding the use of violent means. Such convictions may be of a religious, moral or philosophical kind and imply that objectors cannot use violent means, even in self-defence.

18.16 The law establishes the type of service to be rendered, its equivalence to military service, and gives the abstract and practical definition of tasks to be performed for community service. Organizationally speaking, community service is unconnected with the military.<sup>14</sup> Furthermore, the Religious Freedom Act establishes that conscientious objectors to military service, including objectors to community service, are entitled to conditions of community service that respect the feelings of their conscience, in accordance with the principle of equality.

18.17 Community service must be made up of humanitarian, cultural and social solidarity services which are useful to the community while improving the person who performs them. The areas for community service include: assistance in hospitals; sickness diagnosis and public health work; prophylactic actions against drugs, smoking and drinking; assistance to the disabled, children and the elderly; fire prevention and fire fighting and help to the shipwrecked; assistance to communities affected by floods, earthquakes, epidemics and other public disasters; assistance to road casualties; the supervision and upkeep of national parks and reserves; the maintenance and construction of locally used roads or paths; protection of the environment and the heritage; work on civil statistics, literacy and cultural promotion; activities in non-profit social, cultural or religious institutions; assistance to prisons and participation in social rehabilitation work.

18.18 Apart from regular community service work (which may be replaced in the following cases), the objector may cooperate with Portuguese-speaking countries, territories under Portuguese administration or countries within the European Community in accordance with the principle of mobility. If the conscientious objector refuses to perform or relinquishes community service, he becomes liable to penal sanctions. Community service is considered to have been relinquished whenever the objector is absent, without justification, for 5 consecutive days or 10 non-consecutive days from his place of work.

18.19 For the status of conscientious objector to be acquired, the prescribed administrative procedure must be observed. A consequence of acquiring the status of conscientious objector is that the person concerned may never more exercise public or private duties implying the use or carrying of arms, or involvement in the arms trade or manufacture (art. 13).

18.20 The status is lost if the objector receives a prison sentence of more than one year for offences against life, physical integrity, the freedom of persons, peace and humanity, public peace and the State, as well as for theft and common danger offences, whenever such criminal



behaviour entails or presupposes intent contrary to the conscientious convictions expressed beforehand by the objector and to the duties arising from his status, on account of the fact that the objector has practised activities which are forbidden under article 13 and in cases provided by law. The loss of status leaves the objector liable to normal military service, for the duration of which the effective community service performed is taken into account.

18.21 Conscientious objectors are registered with the Office of Community Service by Conscientious Objectors.

18.22 Nowadays, recognition of the status must be given by the National Commission on Conscientious Objection, which is non-judicial, although it is made up of a judge, a reputable citizen named by the Ombudsman and the director of the Office of Community Service by Conscientious Objectors.

This decision may be appealed against before the administrative court of first instance (*de círculo*).

### **Religious participation in education**

18.23 Under Portuguese law, the course on personal and social development in schools may be replaced by religious education, which is not restricted to the Catholic religion but extends to other religious denominations.

18.24 Act No. 46/86 of 19 October 1986, the framework Education Act, amended by Act No. 115/97 of 19 September 1997, is applied, for primary and secondary education, by Decree-Law No. 286/89 of 29 August 1989.

18.25 With regard to personal and social training, article 7 stipulates that: "All the components of primary and secondary school programmes must contribute systematically to the personal and social training of students, helping them, at the different stages of their development, to acquire a spirit of criticism as well as spiritual, aesthetic, moral and civil values."

18.26 As a consequence, article 7 institutes the discipline of personal and social development.

18.27 Under paragraph 4 of that article, students may instead of personal and social development opt for moral and religious education as a subject, whether Catholic or related to other denominations. This approach has been confirmed by Decree-Law No. 329/98 of 22 November 1998.

18.28 According to article 24 of the Religious Freedom Act, churches and other religious communities may apply to the member of the Government responsible for such matters for an authorization to offer religious teaching in selected primary and secondary schools of the public education system.

### **Religious assistance to prisoners**

18.29 See comments under article 10 (para. 10.3).

### **Religious assistance in the armed forces**

18.30 Under Decree-Law No. 93/91 of 26 February 1991 (amended by Decree-Law No. 54/97 of 6 March 1997), religious assistance may be offered in the armed forces. Such assistance is the same for the three branches of the armed forces (land, air and sea).

18.31 According to article 1, the objectives of religious assistance are:

- To provide religious assistance for military, militarized and civil personnel, for their families and for any other person subject to military jurisdiction;
- To cooperate in the training of command and senior staff, especially in moral, cultural and social aspects;
- In conjunction with the military command, to promote the human and religious training of military, militarized and civil personnel wishing to undergo such training, by organizing courses and other activities to that effect.

18.32 Religious assistance to the armed forces is provided in accordance with the spirit of freedom of conscience enshrined in the law.

18.33 The Service of Religious Assistance in the Armed Forces (SARFA) may be extended, in conjunction with appropriate religious ministers, to military personnel belonging to denominations other than the Catholic religion.

18.34 The Religious Freedom Act further stipulates expressly that serving in the armed forces must not constitute an obstacle to the exercise of religious freedom and, in particular, to the right to religious assistance and the practise of acts of worship (art. 13). As far as ministers of religion are concerned, the law establishes that they must perform their military service in the armed forces in units dealing with religious assistance, health and welfare, unless they express the wish to perform regular military service.

## **Article 19**

### **Everyone can have the right to hold opinions without interference**

#### **Under the Constitution**

19.1 Article 38 of the Constitution deals with freedom of the press. This is undoubtedly the most striking aspect of freedom of expression and is related to several areas connected with fundamental rights, such as the above-mentioned area of religious freedom.

19.2 Freedom of the press implies freedom of expression and creativity for journalists and contributors, and the involvement of journalists in the editorial policy of the mass media, except where doctrinal or denominational opinions are concerned.

19.3 It also stipulates that journalists have the right, in accordance with the law, to have access to information sources and to protection of their professional independence and confidentiality, as well as the right to elect editorial committees.

19.4 It further stipulates the right to found newspapers and other publications, without prior administrative authorization, deposit or qualifications.

19.5 Still under article 38 of the Constitution, the law requires, in general terms, the disclosure of ownership and the means of financing of media operators. The State guarantees the freedom and independence of the mass media from political and economic pressure, and insists on the special character of media operators, treating them and providing support on a non-discriminatory basis and preventing any tendency towards their concentration, especially through multiple or cross-shareholdings. The State guarantees the existence and operation of a public radio and television service. The structure and mode of operation of public sector media must be such as to ensure their independence in relation to the Government, the Administration and other public authorities, and to guarantee the possibility of expressing and confronting different currents of opinion.

Radio and television broadcasting stations may operate only under licence, which must be issued by public competition under the terms of the law.

19.6 Article 39 of the Constitution institutes the High Authority for the Mass Media, as an independent body in charge of supervising the freedom of the press and freedom of information. It is made up of 11 members, including 1 judge, appointed by the Superior Council of the Judiciary, 5 members elected by the Assembly of the Republic, 1 member appointed by the Government and 4 members representing public opinion, the mass media and culture.

The duties of the High Authority include:

- Issuing licences for radio and television broadcasting stations, in accordance with the law;
- Appointing or dismissing the directors of public media operators.

The status of the High Authority is also established by law (see paragraphs 19.49 et seq. below).

19.7 Article 40 of the Constitution deals with the broadcasting rights of political parties, trade unions, professional and economically representative organizations, as well as other social organizations with national coverage, in the public radio and television services.

## **Freedom of the Press**

### **Legislation**

19.8 Act No. 1/99 of 13 January 1999 governing the status of the journalist and Act No. 2/99 of 13 January 1999, the Press Act, confirmed the rules of press freedom while repealing all previous legislation.

19.9 Under article 6 of the former Act, journalists enjoy the following fundamental rights: freedom of expression and creativity; freedom of access to sources of information; professional secrecy; independence, and participation in the policy of the media operator concerned.

19.10 Freedom of the press includes the right to inform, to obtain information and to be informed, without any let or hindrance, and particularly without any form of censorship (article 1 of the Press Act). It implies the recognition of journalists' fundamental rights and freedoms, the right to found newspapers and other publications, independently of any administrative authorization, deposit or prior qualifications, and the right to the free printing and circulation of publications, subject to no opposition by means not provided by law.

19.11 The right of citizens to be informed is safeguarded in particular by means of anti-monopoly measures, the publication of the editorial position of news publications, the identification and accuracy of advertising, recognition of the right of reply, access to the High Authority for the Mass Media, with a view to ensuring the impartiality and accuracy of information and respect for professional standards in journalism (article 2, paragraph 2 of the Press Act).

19.12 The press is considered to include all reproductions printed for the purposes of publication, except business circulars, reports, statistics, listings, catalogues, maps, advertisement leaflets, posters, loose sheets, programmes, notices, communications, official forms and those currently used for social and commercial purposes (art. 9).

19.13 Publications are considered either informative or doctrinaire, the latter type being intended to disseminate an ideology or a religious belief (art.13)

19.14 According to article 5 of the Press Act, press, publishing and news agencies may be set up freely. The State ensures the prior, compulsory and public registration of national periodicals and national newspapers, indicating the ownership of the capital of such undertakings and national news agencies.

19.15 The Act also provides for free competition, while banning monopolies.

19.16 The law also covers advertising, the publication of official bulletins and the right of reply. It also indicates the mandatory components and management of enterprises operating in the sector.

19.17 Criminal liability is one of the more striking aspects of the law, since it involves a limitation on press freedom. The rules governing such liability are nowadays contained in article 180 of the Penal Code. Defamation, for instance, consists in attributing to another person a fact which is likely to harm that person's dignity and reputation. Paragraph 2 of the article does allow grounds for justification, which are important for journalists: no criminal liability arises if the public interest is at stake, or if the content of the statement concerned is true or if there are strong indications, at the time the statement is made, then the latter is true. Other offences listed in the Penal Code include libel (art. 181), publication and slander (art. 183), disrespect for the memory of a deceased person (art. 185), disrespect for a corporation, organization or service (art. 187), invasion of privacy (art. 192) and illegal recordings and photographs (art. 199).

19.18 The Press Act also covers the civil liability and criminal liability of press agents. It no longer refers to abuse of press freedom but still maintains the liability - for joint authorship of and participation in the offence - of the person in charge (art. 31). Offences committed by using the press give rise to liability to sentences increased by one third in the minimum and maximum limits (art. 30, para. 2).

## **Television**

19.19 Under Act No. 75/79 of 29 November 1979, radio and television broadcasting had to be State owned. In 1990, the principle of exclusive State control of television programming was finally abandoned.

19.20 According to article 1 of Act No. 31-A/98 of 14 July 1998 (amended by Act No. 8/2002 of 11 February 2002), repealing Act No. 58/90 of 7 September 1990, the purpose of the Act is to regulate the use of television on Portuguese territory. Television is defined as "the transmission, codified or otherwise, of transitory images and sounds by means of electromagnetic waves or any other appropriate medium, propagated in space or by cable, open to reception by the general public but excluding telecommunication services available only by individual request".

19.21 Television broadcasting may not be conducted or financed by political parties or associations, local authorities, trade unions, employers' or professional organizations, either directly or indirectly, through entities in which they hold capital or which are subsidized by them (art. 3).

19.22 The general rules protecting and promoting competition apply to television operators, particularly with regard to forbidden practices, especially the abuse of a dominant position and the concentration of operators.

19.23 Television broadcasts can cover the whole or part of the national territory. Channels may be general or specialized and access to them may be subject to conditions or not. The purpose of general-purpose channels is to inform, educate and entertain the public; to promote the right to inform and to be informed, accurately and independently, without hindrance or discrimination; to encourage the development of a spirit of conviviality appropriate for a democratic State and to favour political, social and cultural pluralism; and to promote the Portuguese language and values expressing the country's identity.

19.24 Access to television broadcasting is subject to the issue of a licence by public competition, depending on whether the intended broadcasts use the terrestrial radio spectrum or not. The main objective of television operators must be to conduct such broadcasting, as corporations. They must be constituted as limited companies or cooperatives if their channels are intended for national coverage.

19.25 The issue of licences depends on the technical quality and viability of projects. Applicants are classified according to aspects such as the content of their programming schedule, especially the number of hours given to news; the duration and times of broadcasting; the field of coverage; the number of hours devoted to broadcasting recent works produced in-house or independently and original works in the Portuguese language; and the inclusion of programming accessible to deaf people, particularly through interpretation in Portuguese sign language.

19.26 The High Authority for the Mass Media is responsible for issuing licences and authorizations for television broadcasting. The procedure for obtaining licences or authorizations is determined by the Institute for the Mass Media, in consultation with the Institute for Portuguese Communications for a technical opinion regarding applications.

19.27 Freedom of expression on television includes the fundamental rights of citizens to free, pluralistic information, as a vital element of democracy, the defence of peace and the country's economic and social progress.

19.28 The programming of television broadcasts is an independent activity, and neither the administration nor any sovereign institution, except for the courts of law, can prevent, condition or impose the broadcasting of a programme.

19.29 Television operators may acquire exclusive rights, except with regard to events of a political nature. In the event that television operators, emitting subject to conditioned access or without national coverage, should acquire exclusive rights for the transmission, in full or in part, live or recorded, of other events of general public interest, the holders of such television rights must, on non-discriminatory terms and taking account of normal market conditions, facilitate access to another operator or operators wishing to transmit by terrestrial radio waves and having national coverage with unconditioned access.

19.30 The law establishes the principles of protecting the Portuguese language, providing a news service and identifying and recording programmes.

19.31 Programmes which are likely to have negative effects on the education of children and young people or on particularly vulnerable audiences, for instance by exhibiting very violent or disturbing images, must be preceded by an express warning and the programme must carry an appropriate identifier at all times. Such programmes may not be shown before 10 p.m.

19.32 The public television service is subject to specific obligations, such as the broadcasting of messages requested by the President of the Republic, the President of the Assembly of the Republic or by the Prime Minister, and allowing broadcasting time for political parties, the

Government, trade unions, professional or economically representative organizations and environmental and consumer protection associations, as well as allowing broadcasting time for religious denominations in the pursuit of their activities, taking account of their degree of representativeness.

19.33 Advertising is governed by the Advertising Code (Decree-Law No. 330/90 of 23 October 1990, amended by Decree-Laws Nos. 6/95 of 17 January 1995, 61/97 of 25 March 1997, 275/98 of 9 September 1998, 51/2001 of 15 February 2001 and 332/2001 of 24 December 2001). Advertising must not take up more than a certain proportion of broadcasting time; it must be identified as such and must clearly mention sponsors.

### **Broadcasting right and right of reply**

19.34 These two rights are fundamental guarantees of freedom of expression. The broadcasting right is governed by articles 49 to 52 of Act No. 31-A/98 of 14 July 1998. The right of reply is stipulated in articles 53 to 57, while article 58 allows that right to political opposition parties.

19.35 In the public television service, the right to broadcast is granted to political parties, trade unions, professional and economically representative organizations and environmental and consumer protection organizations. Broadcasting time is considered to be actual programme time, for which the beneficiary of the right is responsible. It must be clearly indicated at the beginning and end of each programme that the right is being exercised. The amount of broadcasting time allowed varies according to the degree of representativeness of the political party concerned (art. 49, para. 2 (a)).

19.36 The right to broadcasting time is subject to restrictions. For instance, it is not available on Saturdays, Sundays or national holidays. It is suspended one month before an electoral period, and during electoral periods it is governed by the Elections Act. Finally, electoral propaganda contracts with a television operator, whether the public or private, are forbidden.

19.37 The right of reply is guaranteed under article 53. Any private or legal persons who consider they are affected by television broadcasts, which constitute direct insult or a reference to an untruthful or mistaken fact likely to affect their good name or reputation, have a right of reply. Such reply must be included free of charge in the same programme or, if that is not possible, at an equivalent time of broadcasting. The reply must not be preceded or followed by comments, except whatever comments are necessary to draw attention to some inaccuracy or error of fact, which might give rise to a further reply or rectification. Any refusal by the operator to allow a right of reply is open to appeal before the High Authority for the Mass Media or the courts.

19.38 The responsibility and penalties related to television operators are covered in articles 59 to 70. Responsibility may be civil, criminal or administrative (*contra-ordenacional*) and penalties may include suspension of the broadcast or the withdrawal of the corresponding licence. The beneficiaries of the right of broadcasting will be held liable for any offences committed in the course of broadcasting, and may be subject to the accessory penalty of the loss of that right.

**Radio broadcasting**

19.39 The legal status of radio broadcasting is governed by Act No. 4/2001 of 23 February 2001, which repealed all previous legislation in this field (especially Act No. 87/88 of 30 July 1988 and subsequent amendments). Radio broadcasting consists in the unilateral emission of sound communications by means of radio waves or any other appropriate medium, for reception by the general public.

19.40 The operation of a radio broadcasting service requires the issue of a licence or authorization (article 3, paragraph 2 of Act No. 4/2001), subject to existing rights held by approved operators. The activities may be conducted only by entities legally registered as corporations specifically with broadcasting as their main purpose (art. 3, para. 1).

19.41 Under the terms of article 6, radio broadcasting activities may not be conducted or financed by political parties or associations, trade unions, employers' or professional organizations, or local authorities, either directly or through operators in which they hold shares or which they subsidize.

19.42 General-purpose radio broadcasting services must aim to promote the right to inform and to be informed, strictly and independently, without hindrance or discrimination. They must contribute to political, social and cultural pluralism, and to public education, by encouraging the recognition of citizenship as a fundamental value of democracy. They must promote the Portuguese culture and language and values expressing the national identity. Local general-purpose broadcasting services should also aim to produce and broadcast programmes specifically intended for listeners in the geographical area for which their licence or authorization has been issued. The broadcasting of topical programmes based on appropriate models will contribute to the diversity of broadcasting within the coverage area concerned.

19.43 Freedom of expression and opinion through radio broadcasting is guaranteed under article 34, paragraph 1, and includes the fundamental right of citizens to free, pluralistic information, considered vital for democracy and for the country's social and economic development.

19.44 The operation of broadcasting services is based on the principle of free programming and neither the public administration, nor any sovereign body, with the exception of the courts of law, may impede, condition or impose the broadcasting of any type of programme (art. 34, para. 2).

19.45 The right to broadcasting time on the public radio service is guaranteed for political parties, trade unions, professional and economically representative organizations, environmental and consumer protection associations and non-governmental organizations promoting equal opportunities and non-discrimination (arts. 52 et seq.). Operators may not, however, offer time for political propaganda (art. 35, para. 2). The right of reply, right of opinion for political opposition parties (art. 57) and the right of reply and rectification (arts. 58 et seq.) are also guaranteed.



19.46 The law includes rules relating to civil, criminal and administrative (*contra-ordenacional*) liability and to accessory penalties suspending the broadcast or withdrawing licences or authorization. The holders of broadcasting rights are responsible for any offences committed in the exercise of those rights, being liable to an accessory penalty involving suspension of the exercise of the right.

19.47 Broadcasting activity is subject to the issue of a licence, by public competition, or an authorization, depending on whether the programming services use the terrestrial radio spectrum or not. The High Authority for the Mass Media is responsible for issuing licences and authorizations, while applications are processed by the Institute for the Mass Media, which is also responsible for holding a register of radio broadcasting operators in the country.

### **High Authority for the Mass Media**

19.48 The responsibilities, powers and functioning of the High Authority are prescribed in Act No. 43/98 of 6 August 1998, which repealed Act No. 15/90 of 30 June 1990.

19.49 The High Authority's mission (art. 3) is to guarantee the right to information and to freedom of the press, to ensure the independence of the media from political and economic pressures, to safeguard freedom of expression, to further impartiality in the licensing of private radio and television transmitters, to take steps to ensure the accuracy and honesty of information, to contribute to the independence and diversity of the public sector media and to guarantee the right to broadcasting time, the right of reply and the right of political reply.

19.50 The High Authority's duties are as follows (art. 4):

- (a) To issue licences and authorizations required for the operation of television broadcasting and to discuss the renewal or cancellation thereof;
- (b) To issue licences for radio broadcasting and to issue or withdraw licences (*alvarás*) or authorize their transfer;
- (c) To assess conditions of access to broadcasting rights, rights of reply and rights of political reply and give opinions on complaints submitted to it;
- (d) To settle conflicts between holders of radio and television broadcasting rights, with regard to their general plans of operations;
- (e) To confirm any significant change in the policy regarding media operators, in cases where the conscience clause of journalists is invoked;
- (f) To help classify media operators in the light of applicable legislation;
- (g) To issue a prior, public and substantiated opinion regarding the appointment or dismissal of directors in charge of programming and information, and their deputy directors and sub-directors, at media concerns owned by the State or other public bodies or bodies subject to the direct or indirect economic control of the State;

- (h) To supervise the application of rules concerning the ownership of media concerns;
- (i) To supervise the application of rules obliging media concerns to publish prescribed data;
- (j) To perform duties related to the publication or dissemination of surveys and opinion polls, in accordance with applicable legislation;
- (k) To monitor the neutrality and impartiality of publicity campaigns run by the State, autonomous regions and local authorities;
- (l) To give opinions on legislative initiatives dealing with any matter related to its duties;
- (m) To propose to the Assembly of the Republic or the Government whatever legislative or regulatory measures it considers necessary with regard to constitutional principles concerning the media or the performance of its duties;
- (n) To assess, on its own initiative or on request and within the framework of its duties, behaviour likely to constitute a violation of legal rules applying to media concerns, to adopt appropriate measures, and to perform any other duties provided in other legal texts dealing with media concerns;
- (o) To promote any forms of study, research or publicity required for the performance of its duties;
- (p) To prepare general guidelines and recommendations.

Decisions taken in the performance of duties referred to in sub-paragraphs (a) to (f) have binding effect.

## **Article 20**

### **Incitement to war or hatred**

20.1 All armed military or paramilitary associations, as well as all organizations advocating racism or a fascist ideology are prohibited under the Constitution. In general, all incitement to violence by associations is forbidden.

As mentioned above under article 6, the Penal Code in its chapter on “crimes against humanity”, condemns genocide and racial or religious discrimination, war crimes against civilians, the wounded, the sick and prisoners of war, and torture.

20.2 The Penal Code also deals in the same connection with crimes against peace.

Article 236 punishes incitement to war by establishing that any person who, publicly and on several occasions, is guilty of incitement to hatred against a people for the purpose of starting a war is liable to a sentence of imprisonment.

The use of the Portuguese armed forces to conduct a war against a foreign State or territory, thereby jeopardizing friendly relations between peoples, is a crime punishable under article 237.

The recruitment of mercenaries for military service on behalf of a foreign State or for any national or foreign armed organization, seeking through violence to overthrow the lawful government of another State or to threaten its independence, territorial integrity or the normal functioning of its institutions, is a crime punishable under article 238.

20.3 With regard to crimes against the State - national sovereignty, independence and national integrity - the Penal Code inflicts heavy penalties for: treason (art. 308); military service on behalf of enemy armed forces (art. 309); collusion with foreigners to bring about war (art. 310); the performance of actions likely to bring about war (art. 311); collusion with foreigners to submit the Portuguese State (art. 312); assistance to enemy armed forces (art. 313); campaigning against the war effort (art. 314); and sabotage directed against national defence (art. 315). Several other crimes under the heading of incitement to war are punishable under this chapter, such as espionage (art. 317).

20.4 Penalties are also provided for incitement to civil war or to any violent change in the rule of law (art. 326) and for incitement to collective disobedience by persons bent on destroying, jeopardizing or overthrowing by violence the rule of law based on the Constitution (art. 330).

20.5 As mentioned earlier under article 6, the Penal Code, in articles 300 and 301, provides severe penalties for crimes of terrorism.

20.6 Article 132 characterizes homicide motivated by racial, religious or political hatred as aggravated homicide when the circumstances of the homicide show the perpetrator's act to have been particularly odious or depraved.

As regards particularly serious offences motivated by political hatred, see paragraph 22.4 below.

## **Article 21**

### **The right of peaceful assembly**

21.1 The right of peaceful unarmed assembly, even in places open to the public, without need for any authorization is established in article 45 of the Portuguese Constitution. The right to hold a demonstration is also recognized in respect of all citizens.

21.2 In articles 302 et seq. of the Penal Code, participation in revolts in which acts of violence are committed and failure to obey an order by a public authority to disperse a public meeting (art. 304) are characterized as offences. Involvement in an affray resulting in a fatality or serious injuries is classified as an offence in article 151 of the Penal Code. Revolts by prisoners are classified as offences in article 354 of the Code.

21.3 The legal regime relating to the right of assembly was established by decree-law No. 406/74 of 29 August 1974, which is still in force and was described in the first report submitted by Portugal (see CCPR/C/6/Add.6).

## **Article 22**

### **Freedom of association**

22.1 Article 46 of the Portuguese Constitution relating to freedom of association stipulates that citizens have the right to establish associations without need to request authorization, provided that the associations do not aim to incite violence and their purposes are not illegal. Articles 299 and 300 of the Penal Code relate to organized and violent crime. Under article 299, any person who establishes or joins a group, organization or association whose aim is the perpetration of crimes is liable to one to five years' imprisonment. Forming a terrorist organization and engaging in terrorism are also punishable offences.

22.2 Associations may freely pursue their objectives without interference by the public authorities. They may be disbanded and their activities suspended by the State only in the cases provided for by law and on the basis of a judicial decision (Constitution, art. 46 (2)).

22.3 No person may be forced to join an association or be compelled, by any means, to remain in it.

22.4. Armed organizations of a military character, militarized or paramilitary organizations, racist organizations or organizations subscribing to fascist ideology are not permitted. Act No. 64/78 of 6 October 1978 bans organizations which support fascist ideology. These organizations - a broader term than "associations", when recognized as such by the courts, are declared to be disbanded or forbidden to engage in their activities (in this connection, see the judgement of the Constitutional Court concerning the National Action Movement mentioned below in connection with article 25 - paras. 25.44 et seq.).

22.5 In accordance with article 51 of the Constitution, freedom of association comprises the right to establish political parties and associations and to be a member thereof, and through the political parties, to contribute democratically to the formation of the popular will and the organization of political power.

22.6 In cases where a state of siege or state of emergency has been declared, meetings of the statutory bodies of the political parties, trade unions and vocational associations may in no circumstances be banned, dissolved or made subject to the requirement of prior authorization (Act No. 44/86, art. 2 (2)(e), of 30 September 1986).

22.7 Decree-Law No. 594/74 of 7 November 1974 governs the right to freedom of association, which is guaranteed to every citizen for purposes consistent with public order and public morality.

A few examples of the State's concern regarding associations in certain areas are given below.

22.8 In article 77 of the Constitution, the law establishes the procedures for the participation of associations of teachers, students, parents, communities and scientific institutions in the determination of education policy.

22.9 Decree-Law No. 686-B/2000 of 30 August 2000 established measures in support of associations, notably financial support for the construction, purchase and adaptation of facilities for associations. Sectoral entrepreneurs' associations, the tourist regions, tourism associations, and trade unions are eligible for such support.

### **Students' and young people's associations**

22.10 Students' associations are independent of the State, political parties, religious organizations and other organizations and enjoy autonomy (Act No. 33/87 of 11 July 1987 and Decree-Law No. 91-A/88 of 16 March 1988).

These associations are entitled, inter alia, to have facilities in the educational establishments where they exist, and to technical and material support, radio and television broadcasting time, tax benefits and exemption from court fees.

It should be mentioned that these associations also have the right to participate in the determination of education policy and in the formulation of legislation relating to education, to be consulted on the deliberations of school management bodies, to cooperate in the management of school installations and to participate in school social-welfare activities.

22.11 Reference should also be made to the establishment, by Decree-Law No. 333/93 of 29 December 1993 (as amended by Decree-Law No. 70/96 of 4 June 1996), of the Portuguese Youth Institute (which replaced the former Youth Institute); one of its responsibilities is to support activities promoted by young people's associations.

22.12 Act No. 124/99 of 20 August 1999 regulates the free exercise of the right of association of minors and simplifies the procedure for the establishment of youth associations.

22.13 The associations entered on the National Register of Youth Associations, as established by Ministerial Decree No. 841-A/90 of 15 September 1990, receive State support in the areas of training, information, documentation, legal assistance, and the organization and management of their activities.

**Parents' associations**

22.14 Decree-Law No. 372/90 of 27 November 1990 governs the establishment, and lays down the rights and duties, of parents' associations aimed at safeguarding and promoting the interests of members as regards the education of their children. The rights accorded to these associations include the right to express an opinion concerning education policy, the right to participate in the formulation of laws relating to education and teaching, and the right to participate in decision-making by school bodies (notably in school management and administration). For their representatives there are special rules relating to justified absence from work (the two latter amendments were introduced by Decree-Law No. 80/99 of 16 March 1999).

**Women's associations**

22.15 Act No. 95/88 of 17 August 1988 (as amended by Act No. 33/91 of 27 July 1991) guarantees the rights of women's associations with the aim of eliminating any form of discrimination and promoting equality between men and women.

Women's associations have the right to participate in the determination of legislative policies relating to the promotion of women's rights and enjoy the right of representation on bodies concerned with the status of women, such as the Office of the High Commissioner for Equality and the Family.

These associations also have the right to request information relating to the enforcement of legislation concerning the rights of women.

The law recognizes their right to submit claims to the Ombudsman and to exercise the public right of action.

Act No. 10/97 of 12 May 1997 (as amended by Act No. 128/99 of 20 August 1999) reinforces the rights of women's associations, recognizing that those associations which enjoy a "generic representative character" and those which are represented in the Consultative Council of the Commission for the Equality and Rights of Women, have the status of "social partner" with the right to representation in the Economic and Social Council, and stipulating that regional and local women's associations have the right to a hearing in the course of the formulation of their development plans. Women's associations have also been granted the right to radio and television broadcasting time and the right to support from the central, regional and local authorities for the purposes of the pursuit of their goals.

**Immigrants' associations**

22.16 Act No. 115/99 of 3 August 1999 lays down the rules for the establishment of associations representing immigrants and their descendants and the rights and duties of such associations. These associations are defined as non-profit associations of national, regional or local scope whose statutes set out the objective of protecting the specific interests and rights of immigrants and their descendants resident in Portugal. These aims include:

- (a) Defending and promoting the rights and interests of immigrants and their descendants in all matters relating to the enhancement of their status, with a view to enabling them to become fully integrated;
- (b) Developing support activities for immigrants and their descendants with a view to improving their living conditions;
- (c) Promoting and encouraging the cultural and social capacity of communities of immigrants and their descendants as a fundamental element of the society in which they are integrated;
- (d) Proposing action necessary for the prevention or cessation of acts or omissions by public or private entities which constitute racial discrimination;
- (e) Establishing exchanges with comparable foreign associations or promoting joint information or training activities.

Decree-Law No. 75/2000 of 9 May 2000, which lays down regulations relating to this Act, establishes the right of participation in the determination of immigration policy; the right to broadcasting time; the enjoyment of all rights and benefits granted by law to legal persons of public interest; the right to financial support from the State for their activities, notably activities aimed at contributing to the integration of immigrants and technical training for the development of cultural and entrepreneurial activities; the right, for three representatives of associations representing immigrant communities, to membership of the Consultative Council for Immigration Affairs, which participates in the drafting of legal instruments relating to immigrants and the determination of measures to improve immigrants' rights.

### **Disabled persons' associations**

22.17 Act No. 127/99 of 20 August 1999 regulates the right of associations of disabled persons to participate in consultations, and intercede, with the central, regional and local authorities with the aim of eliminating all forms of discrimination and promoting equality between disabled persons and other citizens. These associations have the right, in particular, to participate in the determination of policies and the main features of legislation in the area of the rehabilitation and social integration of disabled persons.

Associations of disabled persons having a generic representative character have been granted "social partner" status for all legal purposes, notably that of representation in the National Rehabilitation Council. In the event of an offence being committed against a disabled person, and because of that person's disability, these associations have the right to bring criminal indemnification proceedings in relation to the relevant criminal proceedings.

22.18 Employed persons who are leaders of associations represented in the National Rehabilitation Council may be released from duty in order to participate in meetings of the Council or working groups established in their field.

### **Trade-union freedom**

22.19 Article 55 of the Portuguese Constitution recognizes trade-union freedom for workers as a condition and guarantee of their unity for the purposes of the defence of their rights and interests. In the context of trade-union freedom, workers are, in particular, guaranteed, without any discrimination, freedom to form and join trade unions at all levels.

22.20 In accordance with article 56, trade unions have the right to participate in the formulation of labour legislation and in the management of social security institutions and other organizations whose purpose is to further the interests of workers, to express an opinion on economic and social plans, to be represented in social security organizations and to participate in company restructuring processes, in particular in relation to training activities and the modification of working conditions.

22.21 The constitutional provisions are supplemented by the Trade Union Act, as approved by Decree-Law No. 215-B/75 of 30 April 1975.

22.22 The freedom to form trade unions is not subject to any kind of administrative authorization. Workers have the freedom to organize trade unions and to adopt rules of procedure for them.

Accordingly, the statutes of trade unions, freely adopted by the workers, do not require any ministerial approval and are subject only to verification of their legality, which takes place after their adoption and is a legal procedure.

22.23 After registering their statutes with the Ministry of Labour, trade unions acquire juridical personality.

The statutes must state the criteria governing the membership of workers, in other words, the geographical and personal scope of the statutes.

Trade unions are independent of employers, the State, religious faiths, parties and other political associations.

22.24 The law sets no limitation on the number of trade unions which may exist within each occupation or category or branch of activity. Workers thus enjoy complete freedom to form any trade union they consider necessary for the protection of their rights.

22.25 Trade-union freedom, as embodied in the Constitution, includes the worker's freedom to join a union of his choice, the freedom not to do so since no worker may be compelled to pay dues to a union of which he is not a member, and of course the freedom to leave a union.

22.26 Foreign workers enjoy, on terms similar to those relating to nationals, not only the right to form and join trade unions, but also the right to participate in union activities.



The possibility of forming trade union federations or confederations under union law is also recognized. The Constitution also recognizes that “trade unions have the right to establish relations with and join international trade union organizations”.

22.27 The right to strike is established by article 57 of the Constitution, which grants workers competence to determine the scope of the interests which may be defended by means of strike action; this scope may not be limited by law.

22.28 This constitutional provision has been supplemented by Act No. 65/77 of 26 August 1977, as amended by Act No. 30/92 of 20 October 1992 and Act No. 118/99 of 11 August 1999 (Strike Act).

22.29 The main provisions of the latter instrument are listed below:

The right to strike may not be revoked (art.1 (3));

A decision to strike shall be taken by a trade union or, in certain conditions, by an assembly of workers (art. 2);

Picketing shall be allowed, subject to the right to work of persons not participating in the strike (art. 4);

At least five days' notice of a strike must be given (art. 5);

The replacement of striking workers by workers not participating in the strike in the enterprise or service where the strike is taking place is forbidden (art. 6);

During a strike, the trade unions and the workers are required to guarantee the continuation of services necessary to meet certain basic social needs (e.g. medical, hospital and pharmacy services, power and water supply, posts and telecommunications, etc.). Failure to respect this obligation may result in civil conscription of the workers by the Government under Decree-Law No. 637/74 of 20 November 1974 (this Decree-Law was amended by Decree-Laws Nos. 23-A/79 of 14 February 1979 and 123/80 of 17 May 1980);

Any form of discrimination on the basis of a strike is prohibited (art. 10).

## **Restrictions**

22.30 Article 270 of the Constitution reads: “The law may, to the strict extent of the requirements relevant to the exercise of the functions in question, impose restrictions on the exercise of the rights of expression, assembly, demonstration, association and collective petition and on the passive electoral capacity of serving permanent members of the armed forces and military staff, and also on the exercise of these rights by members of the security services and forces; in the case of the latter, the law may forbid them the right to strike, even though the right

of trade union association is recognized.” This article was amended on the occasion of the most recent revision of the Constitution in order to expressly provide for the possibility for security services and forces personnel to avail themselves of the right of trade union association, while the possibility of restricting the exercise of the right to strike by these personnel was retained.

22.31 The National Defence and Armed Forces Act (No. 29/82) of 11 December 1982 (as amended by Acts Nos. 41/83 of 21 December 1983, 111/91 of 29 August 1991, 113/91 of 29 August 1991, 18/95 of 13 July 1995 and 3/99 of 18 September 1999), Act No. 6/90 of 20 February 1990, relating to the regime governing the exercise of rights by members of the Public Security Police, and Decree-Law No. 161/90 of 22 May 1990 relating to the Republican National Guard, a special military corps having police functions, set out the restrictions imposed on the right of association and regulate the exercise of this right by these personnel (e.g. serving military personnel have the right to form associations, notably vocational associations, unless they are of a political, party or trade union nature).

### **Article 23**

#### **Family. Right to marry and found a family**

##### **Equality of rights and responsibilities of the spouses**

###### **Constitution**

23.1 The general principle of non-discrimination established in article 13 of the Constitution also holds good for marriage. Article 36 guarantees the right of everyone to found a family and enter into marriage in conditions of full equality. The rights and duties relating to the civil and political capacity of the spouses and to the maintenance and education of the children are equal.

23.2 On the occasion of the consideration of the second report, the question was asked whether a form of family not based on marriage could exist. In this connection, it should be stated that there is a trend towards strengthening the effects of consensual union if the persons in question have been living together for two years in conditions similar to those of a married couple. On 28 August 1999, the Government adopted Act No. 135/99, in accordance with which the surviving member of a consensual union has the right to the proceeds of the estate of the deceased, to the protection of the family domicile under the terms of the law, to benefit from the legal regime relating to leave, absence and official holidays, and to the tax regime in conditions equivalent to those applicable to married persons. Death benefits are granted to a survivor whose financial status was considered jointly for the purposes of the social security regime; the survivor has the right to succeed to the deceased person's status as a tenant. These rights have been retained (and extended to de facto consensual union situations involving persons of the same sex) by Act No. 7/2001 of 11 May 2001. Article 7 of this Act further recognizes that persons of different sexes in a de facto consensual union have the right of full adoption (without prejudice to the legal provisions relating to adoption by unmarried persons).

Act No. 6/2001 of 11 May 2001 provides for protective measures with respect to persons living in consensual unions (by this is meant persons who have been living together for two or more years and have established a household involving mutual assistance and the sharing of resources; the family union may be constituted by two or more persons, provided that one of these persons is of full age). Persons in this situation are recognized as having the following rights: the benefit of the legal regime relating to leave, absence and official holidays and preference in the placement of civil servants in conditions similar to those applicable to married persons; similar tax regime to that applicable to married persons; protection of the matrimonial domicile; and transmission of the rental contract in the event of death.

Children born of a consensual union are in no way discriminated against and have the same rights as children born within a marriage. There is also no discrimination against children of a married person who were born out of wedlock. They have the right to necessary maintenance and education and to a name. See observations below concerning article 24 (24.1 et seq.).

23.3 Article 67 of the Constitution provides that the family, as the basic element of society, has the right to the protection of society and the State and to the creation of all the conditions that permit the personal fulfilment of each of its members.

23.4 The State has the following specific duties vis-à-vis the family:

Promoting the social and economic independence of the family;

Promoting the establishment of a national network of assistance for mothers and children, and a national network of day-care centres and other family support facilities, together with a policy on older persons;

Cooperating with parents in the upbringing of their children;

Promoting, by such means as are considered necessary, the dissemination of information on family planning methods and organizing the legal and technical structures that permit the exercise of conscientious parenthood;

Regulating assisted parenthood in conditions which safeguard human dignity;

Adjusting taxes and social benefits in the light of family responsibilities;

Determining, after consultation with associations representing families, and implementing a global and integrated policy on the family.

23.5 Parents have the right to the protection of society and the State in the performance of their irreplaceable role vis-à-vis their children, notably regarding their upbringing, with a guarantee of occupational development and participation in the civic life of the country.

23.6 Women have the right to special protection during pregnancy and after childbirth; this includes the right of working women to be released from work for an adequate period without loss of remuneration or other benefits.

23.7 Article 72 relates to older persons. In relation to the present report, it affirms the right of older persons to family life.

### **Civil Code**

23.8 Article 1576 of the Civil Code of 1966 sets out the sources of family relationships. These are marriage, family relationship, affinity and adoption.

23.9 Article 1577 defines marriage as the contract concluded between two persons of different sexes who wish to found a family by means of a fully shared life, under the terms of the provisions of the Code.

23.10 Marriage may be Catholic or civil (art. 1587). In accordance with article 19 of Act No. 16/2001 of 22 June 2001, the civil effects of marriages concluded before a minister of a church or religious community established in Portugal are also recognized. A promise of marriage has no legal effects. The only possible consequence of such a promise is the duty of an engaged person who, without justification, terminated the engagement to compensate the other engaged person for any expenditure he or she may have incurred in connection with the preparation of the marriage (art. 1594).

23.11 The conclusion of a marriage is conditional upon the verification of the capacity of the intending spouses to marry and of the non-existence of any absolute impediment to the marriage; verification is ensured by means of the publication of banns. Any person having knowledge of a limitation of such capacity or impediment is required to make the relevant information known during the period when the banns are published.

23.12 The impediments to a marriage are: being under 16 years of age, blatant mental disorder, declaration of legal incapacity by reason of psychological anomaly, family relationship or affinity (arts. 1600 to 1602).

23.13 There is another category of impediment - impediments which do not render the marriage void, and these may be annulled. Thus they do not impede the marriage when annulment is granted, generally by means of judicial proceedings initiated for this purpose.

These impediments are: lack of permission for a minor over the age of 16; minimum legal period of viduity (between the dissolution of a first marriage and the conclusion of a second); relationship in the third degree of the collateral line (marriage between cousins); link of guardianship or legal administration of assets; link of ordinary (not full) adoption; justified suspicion as determined by a judge of the offence of premeditated homicide, even where it has not been perpetrated, against one of the intending spouses, until such time as this suspicion has been removed or the case has been dismissed by a decision which has attained the force of *res judicata* (arts. 1604, 1605, 1608 and 1609).

23.14 Marriage may be without effect; it is then considered non-existent (e.g. in the case of a lack of desire to marry on the part of one of the intending spouses - art. 1628 (c)) or invalid, the stipulated form of invalidity being voidability (in the case of impediment entailing nullity, for example - arts. 1631 et seq.).

23.15 Marriage entails acceptance of its effects by the spouses except with regard to the regime governing property, which may be determined by means of a prenuptial agreement between the spouses.

23.16 Prenuptial agreements establish the property regime by which the spouses will be bound. The suppletive regime is community of after-acquired property (arts. 1689 and 1721), the spouses having the possibility of opting for community (art. 1732) or separation of property (art. 1735).

23.17 In marriage, the spouses are equal and have mutual duties of respect, fidelity, cohabitation, cooperation and assistance, the choice of family residence being made jointly. Cooperation and assistance entail the duty to contribute to the expenditure incurred in the course of cohabitation and to provide each other with assistance in any situation requiring it (e.g. sickness or accident - arts. 1671 to 1676).

23.18 This duty of assistance is deeply rooted in Portuguese law. In accordance with article 250 of the Penal Code, a person who is legally obliged to provide maintenance and is in a position to do so but does not do so, thereby jeopardizing the satisfaction of the basic needs of those who are entitled to it, is liable to the stipulated penalty, namely, two years' imprisonment or a fine of up to 240 days' income. This offence is, however, considered to be semi-public in nature and criminal proceedings are dependent on the lodging of a complaint.

23.19 As regards the custody of children after divorce, Act No. 84/95 of 31 August 1995 amended the Civil Code, permitting the joint custody of children by the parents.

23.20 The use of the name of the other spouse is regulated by the provisions of articles 1677 to 1677-C; the exercise of an occupation by one of the spouses cannot be prevented by the other (art. 1677-D).

23.21 The administration of the couple's property is exercised jointly, each spouse being individually able to perform acts of ordinary administration. The non-gratuitous or gratuitous transfer of movable property, the transfer of immovable property or a commercial undertaking and rental thereof are dependent on the consent of the two spouses (arts. 1678 to 1682-B).

23.22 Donations in consideration of marriage also affect the sum total of the family's assets. Each spouse may make a donation to the other or a third party may make a donation to one of the spouses (art. 1753).

23.23 The dissolution of a marriage may be partial, in the case of judicial separation of persons and property (in this case there is, properly speaking, no dissolution of the marriage) or total, through divorce by consent or contentious divorce (arts. 1767, 1770, 1773 and 1789).

### **Protection of maternity and paternity**

23.24 See observations above relating to article 3 (3.25 et seq.).

### **Exclusion of unlawfulness of voluntary termination of pregnancy**

23.25 See observations above relating to article 6 (6.18 et seq.).

### **National Commission for the Family**

23.26 Decree-Law No. 163/96 of 5 September 1996 established the National Family Council, which originated from the merger of the Interdepartmental Commission for the Family and the Consultative Council for Family Affairs (both established by Decree-Law No. 303/82 of 31 July 1982). The Council was a consultative body under the aegis of the High Commissioner for questions relating to the promotion of equality and the family, which contributed to the development and enhancement of the family.

23.27 Decree-Law No. 150/2000 of 20 July 2000, which repealed Decree-Law No. 163/96, established the National Commission for the Family. This is a consultative body within the Ministry of Labour and Solidarity. The Commission is responsible, inter alia, for participating in the determination and execution of global policy on the family, and measures aimed at remedying discrimination against families, and single-parent families in particular, and promoting a fiscal policy favourable to low-income families.

23.28 These measures include the following: promoting and supporting family associations; supporting measures aimed at family reunification and developing efforts to integrate immigrant families and ethnic-minority families; evaluating sectoral draft legislation concerning the family; monitoring the execution of measures within the Plan for a Global Policy on the Family, as approved by Council of Ministers decision No. 7/99 of 15 January 1999; promoting the sensitization of public opinion to family questions; working with international cooperation in the field of family policy, without prejudice to the specific competence of the ministries involved in the area of international relations, and the other services and organs within the Ministry of Labour and Solidarity which are involved in this area.

23.29 The Commission prepares an annual report on its activities and the status of enforcement of legislation relating to the family and its implications, making such recommendations as it deems appropriate. The Commission is composed of representatives of public entities, NGOs and persons of acknowledged expertise in the area of family questions. The Commission also comprises up to 12 organizations, mostly nationwide in scope, representing families; these are designated biannually by the Ministry of Labour and Solidarity, on the recommendation of the Commission's president.

### **Project in support of the family and the child**

23.30 The project in support of the family and the child was instituted by Council of Ministers decision No. 30/92, which was published in the official gazette (first series) of 18 August 1992. This project was prompted by the consideration that, since an ill-treated child is separated from his family, the parents begin to suffer loss of esteem; this results in the break-up of the family and creates risks of violence against children who have not been separated from it or who were born subsequent to the ill-treatment. Consequently, the purposes of the project are, inter alia, to detect situations in which children are ill-treated, to undertake a rigorous diagnosis of family dysfunction which gives rise to ill-treatment of children, to notify such cases to the competent authorities in accordance with the law, and to adopt the necessary measures to ensure that any risk to the child is averted, by taking action vis-à-vis the families so as to ensure their successful integration.

23.31 The following measures are used under this project: psychosocial support of the family of the ill-treated child, who are helped to organize themselves and gradually begin to fulfil their parental functions, with a growing sense of responsibility and affectivity; therapeutic support for the family and the child; medical, psychological and educational support for the child; coordination and integration of the activities of all services which, at the local and national levels, may or should be involved in the resolution of each case.

23.32 Action under the project is taken in respect of child victims of physical and/or psychological violence who have been treated in health centres or hospitals, whether or not they are kept there for further treatment. See annexes 12 to 15 for statistical data on this question.

### **Article 24**

**Every child shall have, without discrimination, the right to such measures of protection as are required by his status as a minor on the part of his family, society and the State**

#### **Constitution**

24.1 Article 13 of the Constitution (principle of equality) is also applicable in this area: a child may not be discriminated against because he or she is a child; unequal treatment resulting from differences does not constitute discrimination and must be favourable to the child.

24.2 Article 36 relating to the family, marriage and filiation establishes the equality of the spouses with regard to the upbringing of their children; the power which is conferred on them also constitutes a duty of the parents vis-à-vis their children, a functional duty or power which binds them with regard to the healthy and balanced development of their children (para. 3).

Article 36, paragraph 4, prohibits any discrimination against children born out of wedlock and does not permit the use of discriminatory designations by the law or the authorities relating to filiation.

The right and duty to bring up and maintain children is reaffirmed in paragraph 5 of this article.

Children may not be separated from their parents except in the event of the parents' failure to perform their fundamental duties relating to the children; in all cases separation must be on the basis of a judicial decision.

The adoption regime is covered by the law, but this must of course be in conformity with the Constitution.

24.3 Under the terms of article 69, children are entitled to the protection of society and the State with a view to their full development. They are, in particular, protected against any form of abandonment, discrimination and oppression, and against abuses of authority within the family and in other institutions. Orphans, abandoned children and children who are in any way deprived of a normal family environment are entitled to special protection by the State.

24.4 Young people also have rights relating to education, vocational training, culture, starting their first job, employment and social security, housing, physical education and sport, and use of leisure time.

24.5 The priority objectives of youth policy must be the development of the personality of young people and the creation of conditions which will enable them to become effectively integrated in active life, while encouraging free creativity and a sense of service to the community.

24.6 The State has the duty to encourage and support young people's organizations which pursue these objectives, and also international exchanges between young people, in cooperation with the families concerned, schools, enterprises, residents' organizations, cultural associations and foundations, and cultural and leisure groups.

### **Convention on the Rights of the Child**

24.7 Parliamentary decision No. 20/90 and Decree No. 49/90 of the President of the Republic, of 12 September 1990, incorporated into domestic law the Convention on the Rights of the Child, which had been signed in New York on 26 January 1990. The Portuguese Prime Minister signed the two optional protocols to the Convention in New York on 7 September 2000.

24.8 Two reports on the implementation of the Convention in Portugal have been prepared. They describe current Portuguese legislation and law on this question, and give information on the practical situation. The first report (CRC/C/3/Add.30) was submitted in 1994 and the second (CRC/C/65/Add.11) in 1997; the latter report was discussed at the twenty-eighth session of the Committee on the Rights of the Child in October 2001. In December 2000, Portugal also submitted to the Secretary-General of the United Nations a report on the implementation of the Declaration and Plan of Action of the World Summit for Children, which is available on *web site: <http://www.gddc.pt/>*.



## **Filiation**

24.9 The establishment of filiation is important since this determines who the child's parents are and hence the first persons from whom the child can directly claim the support required by his or her status.

The effects of filiation are set out in article 1874 of the Civil Code, which establishes the duties of respect, help and assistance by the parents for children and by children for the parents. There is specifically a duty to provide maintenance and to contribute to the responsibilities of family life during cohabitation, in accordance with each person's means (art. 1874, paras. 1 and 2).

A natural effect of filiation is the attribution of parental authority, a power and duty to which reference has already been made.

Another effect is the conferment on the child of the name of the parents, whether one or both of them, or even of the name of the mother's husband.

24.10 Since filiation has such important effects, it is important to know the major principles which determine filiation in Portuguese civil law.

24.11 The Civil Code provides for recognition of maternity, on the application of the mother, the court or the child; recognition of paternity, as a presumption; recognition of paternity by the father in respect of children born out of wedlock; determination of paternity by the court and determination of paternity by the court on the application of the child.

24.12 As to the mother, the Code bases itself on the principle *mater semper certa*; since attendance at the birth is possible, it is always possible to affirm maternity, at least in principle.

24.13 Filiation results from the birth and is established through a declaration by the mother at the time when the birth is notified to the registry officials (arts. 1796 and 1803).

24.14 If the declared birth occurred less than one year before notification, maternity is considered as established (art. 1804). If the birth is declared more than one year after it occurred, maternity is deemed to be established if the mother makes the declaration.

24.15 As to paternity, article 1826 establishes presumption of paternity: the father is the husband of the woman at the time of the birth. Under article 1827, the annulment of a civil or Catholic marriage does not exclude presumption of paternity.

24.16 Recognition of paternity by the father is valid for children born out of wedlock. Under article 1847, the father may recognize the child or such recognition may be effected by judicial decision.

24.17 Recognition by the father is possible at any time; in the case of sons of full age, recognition may be effected only with their agreement, such recognition being irrevocable (arts. 1854, 1857 and 1858).

24.18 Unofficial recognition exists in cases where the entry in the register mentions only the mother. The competent official is required to transmit the entry to the court in order that the latter may conduct the relevant inquiry. Unofficial recognition is not possible if the mother and the alleged father are related, if direct-line affinity exists or if such recognition occurs two years or more after the birth of the child.

24.19 The child may himself institute proceedings for recognition of paternity if maternity is established or if joint recognition of maternity and paternity is sought (art. 1869).

### **Civil register**

24.20 Decree-Law No. 131/95 of 30 March 1995 (as amended by Decree-Laws Nos. 36/97 of 31 January 1997, 375-A/99 of 20 September 1999, 228/2001 of 20 August 2001 and 113/2002 of 20 April 2002) contains the Civil Register Code. As regards children, birth, filiation and adoption are recorded in the civil register<sup>15</sup> (art.1).

24.21 This register possesses strong probative value, which can be nullified only by a status action or a registration action.

24.22 Birth on Portuguese territory must be declared orally within 20 days in the competent registration district. The parents, a legally capable parent, the director of the establishment where the birth took place, the doctor or attending midwife or any other person who attended the birth must notify the event to the register office.

24.23 If no declaration is made, the administrative or police authorities are required to notify the public prosecutor's office in order that it may verify the facts necessary for registration and initiate proceedings against the persons who were required to register the birth but did not do so.

24.24 The birth certificate must contain the day, month, year and, if possible, time of birth; the constituency or administrative district in which the birth occurred; the child's sex, first name and other names; the full names, civil status, habitual residence and place of birth of the parents; and the full names of the grandparents.

24.25 In addition to these normal situations, abandoned children also have to be registered, in particular newborn children of unknown parents who are abandoned in all kinds of places, minors under the age of 14 and children suffering from a mental disorder whose parents' whereabouts are unknown and who have been left in a helpless situation. If the birth occurred more than 14 years ago, the declaration (by one of the parents, by the person responsible for the child or by the child himself) must be preceded by authorization proceedings for the purpose of the late registration of the birth.

24.26 Any person who discovers an abandoned child is required to bring him within 24 hours, with the clothes and items worn or carried by him, to the police or administrative authorities, who are responsible for obtaining the birth certificate if necessary.

24.27 An abandoned child must be given a name, chosen from among ordinary names or names deriving from a particular characteristic of the child or the place where he was found; ambiguous names or names tending to indicate that he was a foundling must in all cases be avoided.

24.28 In the case of children born while the mother is travelling, the senior officer on board is required to draw up a record of the birth and transmit this record to the nearest consulate on arrival (arts. 109 et seq.).

### **Legislation on minors**

24.29 Act No. 147/99 of 1 September 1999 (Protection of Children and Young Persons at Risk Act) and Act No. 166/99 of 14 September 1999 (Guardianship Act) laid the foundations for the reform of legislation on minors, establishing the “justice model” in lieu of the “protection model”, which had underlain the old legislation setting up the Guardianship of Minors Organization.

24.30 The administration of justice vis-à-vis children who have committed a criminal offence is based on different principles according to the age of the child, whether under 16 or over 16. Under Portuguese law, children under the age of 16 are not criminally liable and cannot therefore be sentenced to a penalty. It may nevertheless be said that, generally speaking, the age of the child is always taken into account and that the aim of action taken - exclusively in the case of minors under 16 and primarily in the case of other young persons - is educational and geared to social reintegration.

24.31 The Guardianship Act applies to young persons between the ages of 12 and 16 who commit an act categorized as a criminal offence. Under article 2 of this Act, the purposes of the measures taken are the civic education of the child and his integration, in a dignified and responsible manner, in the life of the community. The provisions of the Code of Criminal Procedure are applied on a subsidiary basis.

24.32 The concept of protection is being abandoned and the minor is considered as a person possessing rights; an educational approach is accordingly being adopted. The principle of minimum intervention has been established, and such intervention must respect the best interests of the child. The aim is not to punish the child but to instil in him a sense of responsibility for his acts and his position in society.

24.33 The principle of legality applies: no measures other than those provided for by law and ordered by a court may be applied. These measures comprise reprimand; deprivation of the right to ride a motorcycle or to obtain a licence to ride a motorcycle; compensation for the injured party; community work or service; imposition of rules of conduct or duties; participation in training programmes; monitored learning; attendance at an education centre (open, semi-open or closed regime). Such attendance is regularly reviewed by the judge who ordered it, the maximum period of attendance being two years. Education centres are non-judicial institutions for the protection of minors and operate in conjunction with the courts.

For statistical data, see annex 16 (N.B. data still relate to earlier legislation).

24.34 Implementation of these measures may continue until the young person reaches the age of 21, at which point they are terminated.

24.35 The courts dealing with cases relating to minors are the family and juvenile courts, whose function is to provide judicial protection for minors and to defend their interests. They generally function with a single judge, but in more serious cases they become collegiate in character, being composed of one professional judge and two “social judges”.

24.36 Judicial action is inherently aimed at safeguarding the rights and interests of children. The law expressly empowers the representative of the public prosecutor’s office to safeguard the rights of minors and to ensure that their interests are served. A minor must be represented and mediation is used as much as possible.

24.37 The judicial procedure is very simple and informal. The inquisitorial system is practised in the trial. Any evidence which the judge considers necessary and orders or allows to be produced is admitted, not only for the purpose of uncovering the facts, but above all for the adoption of measures providing the best possible protection for the minor’s rights and interests.

24.38 From the age of 16, the Penal Code is applicable, albeit with certain limitations, as provided for in Decree-Law No. 401/82 of 23 September 1982. When the defendant is a young person under the age of 18 in a case which would involve a prison sentence of under two years, the judge may, having regard to the offender’s personality and the circumstances in which the offence was committed, order the measures provided for in legislation applicable to minors under 16.

In accordance with article 83, paragraph 4, of Act No. 3/99 of 13 January 1999 (as amended by Act No. 101/99), a minor over the age of 16 may be tried by the juvenile court if the offence is not a serious one. Under paragraph 5 of the same article and article 28, paragraph 2, of Act No. 166/99 of 14 September 1999, the competence of the juvenile court ceases when the minor attains his or her majority.

24.39 Under the terms of Decree-Law No. 401/82 (which provides for special penalties, of a more educational nature, for young people aged between 18 and 21), the judge is required to specially reduce the penalty when he has good reason to believe that such a reduction would benefit the social rehabilitation of the offender and when a sentence of imprisonment is applicable to a young person under the age of 21. Young people are, more frequently than adults, given alternative sentences other than imprisonment, in particular reprimands and community service. Sentences involving imprisonment or fines of young people are also suspended more frequently.

24.40 The Protection of Children and Young Persons at Risk Act is aimed at promoting the rights and protection of children and young people at risk, so as to guarantee their well-being and full development, and applies to children and young people under the age of 18 (or under 21 in the case of those who request continuation of a measure initiated before the age of 18). Action is

taken when the parents, the legal representative or any other person exercising custody in practice jeopardizes the safety, health, upbringing, education or development of the child or when this risk results from the action or inaction of third parties or from the child or young person himself when those responsible for him do not take adequate action to eliminate this risk. The child or young person is considered to be at risk when he is subjected to ill-treatment or is left in a situation of abandonment or helplessness liable to jeopardize his health, safety or upbringing.

24.41 Responsibility for action lies with the bodies having competence in the area of children and young people, the commissions for the protection of children and young people, and the courts. Action is taken in agreement with the parents, the legal representatives or any person who in practice has custody of the child or young person, as appropriate; the opinion of a child or young person over the age of 12 is taken into consideration. If consensual action is not possible, action by the family and juvenile courts becomes applicable.

24.42 The commissions for the protection of children and young people are non-judicial official institutions which are functionally autonomous and are aimed at promoting the rights of children and young people and preventing or terminating situations liable to affect their safety, health, upbringing, education or full development.

24.43 These commissions are broad-based, being composed of representatives of the relevant municipality, the social security system, the Ministry of Education, private social solidarity institutions or similar NGOs, parents' associations, private associations or organizations which, in the area covered by the commission, organize sports, cultural or recreational activities for children and young people, and young people's and police associations, and also four persons designated by the municipal assembly, technicians and a doctor representing the health services. The public prosecutor's office monitors the commissions' activities with a view to assessing the legality and appropriateness of the decisions taken, supervising their procedural activities and promoting the appropriate judicial procedures (Act No. 147/99, art. 72).

24.44 In 1999, in the sphere of the protection of minors, the public prosecutor's office dealt with 2,453 persons, initiated 1,019 proceedings and took action in thousands of other cases.

24.45 In 2000, Parliament decided to promote a broad debate on risk factors and behaviour in adolescents and to prepare a "green book" on these risks, defining needs for diagnosis, pointing to solutions and evaluating implementation needs, in particular in the spheres of health, education and primary prevention concerning the consumption of tobacco, alcohol and drugs.

### **Adoption**

24.46 The legal regime relating to adoption underwent far-reaching changes when, in 1990, Portugal approved and ratified the European Convention on the Adoption of Children of 24 April 1967 (approved by Parliament on 31 January 1990 and ratified by the President of the Republic on 20 February 1990).

In accordance with the Convention, adoption is valid only if it is granted by a competent judicial or administrative authority, if there is consent by the parents - unless they have been deprived of parental authority, and if there is consent by the spouse of the adopter. Legislation permits adoption by a single adopter but he or she must have a spouse by marriage. A second adoption is permitted only in certain cases. The adopter must be aged between 21 and 35.

The competent authority will grant adoption only if it is convinced that adoption will ensure the good of the child and following an appropriate inquiry concerning the adopter, the child and his family. The inquiry will relate, *inter alia*, to the following matters:

- (a) The personality, health and means of the adopter, his family life and household, and his ability to bring up the child;
- (b) The reasons why the adopter wishes to adopt the child;
- (c) Where only one of the two spouses applies to adopt a child, the reasons why the other spouse has not associated himself or herself with the application;
- (d) The mutual suitability of the child and the adopter, and the length of time that the child has been in the adopter's care;
- (e) The personality and health of the child, and, unless prohibited by law, his background;
- (f) The view of the child with respect to the proposed adoption;
- (g) The religious persuasion, if any, of the adopter and of the child.

Adoption confers on the adopter parental rights and duties with respect to the adopted child.

24.47 In 1993, Portugal decided to introduce a number of amendments to the adoption regime and thereby terminate one of the reservations to the Convention, namely, that relating to the provision whereby the biological mother could not give her agreement until at least six weeks after the birth.

Accordingly, on 22 May 1993, Decree-Law No. 185/93 was adopted, making amendments to the Civil Code, modifying the Guardianship of Minors Organization and providing, in article 3, for the intervention of social security bodies, the placement abroad of minors resident in Portugal for purposes of adoption and the adoption by residents in Portugal of minors resident abroad. This regime was subsequently modified on 8 May 1998 by Decree-Law No. 120/98 (which made substantial amendments to the Civil Code, to Decree-Laws Nos. 314/78 of 27 October 1978 and 185/93 of 22 May 1993, and to the Civil Register Code).

24.48 Portuguese law permits two types of adoption: full adoption and restricted adoption (according to the extent of their effects). Adoption may be granted only by order of a court and only in cases where adoption has real benefits for the adopted child, is based on legitimate reasons and entails no unjust sacrifice vis-à-vis other children of the adopter, and where it may reasonably be assumed that a link similar to that of filiation will be established between the adopter and the adopted child. The adoption process begins with an application which will mention the personality and health of the adopter and the child to be adopted, the suitability of the adopter as a person to bring up and educate the adopted child, the family situation and means of the adopter, and the reasons that have prompted the application to adopt.

24.49 The regime relating to placement of the child for adoption was established through the reform of 1993 and stipulates that the court may place the child with a couple, a physical person or an institution in the following situations:

- (a) When the child is the son or daughter of unknown or deceased parents;
- (b) When there is prior consent to the adoption;
- (c) When the parents abandon the child;
- (d) When the parents, through an act or omission, endanger the safety, health, moral upbringing or education of the child in a manner which, in view of its seriousness, gravely jeopardizes the emotional links characteristic of filiation;
- (e) When the parents of a child who is fostered by a private individual or institution show a manifest lack of concern for their child, such that it may seriously jeopardize the emotional links characteristic of filiation, at least during the six months prior to the application for placement.

However, children living with and in the charge of a collateral ascendant up to the third degree or a guardian may not be granted for adoption unless this relative or guardian seriously endangers the safety, health, moral upbringing or education of the child or if the court concludes that the situation does not adequately meet the best interests of the child (this restriction does not apply to the case of prior consent to adoption).

The following are empowered to apply for judicial placement of the child: the public prosecutor's office, the competent social security body in the area of the minor's place of residence, the person with whom the child has been placed by administrative decision, the director of the public establishment or private institution in which the child has been cared for, and the candidate for adoption selected by the competent services who, under an earlier judicial decision, has the child in his charge.

24.50 For the purposes of adoption, the consent of the following is necessary:

- (a) The child to be adopted if he is over the age of 12;
- (b) The adopter's spouse if he or she is not the subject of a decree of judicial separation;
- (c) The parents of the child to be adopted, even if they are minors and do not exercise parental authority, in the event of the child not having been placed in care by judicial order;
- (d) The ascendant, collateral up to the third degree or guardian in cases where the child's parents are deceased and this person has responsibility for and lives with the child.

The consent of the mother cannot be given until six weeks after the birth.

24.51 In the adoption proceedings, the views of the following must also be taken into account:

Any children of the adopter aged 12 or over;

The ascendants or, if there are none, the siblings of full age of the deceased parent when the child to be adopted is the son or daughter of the adopter's spouse and his or her consent is not necessary, unless they are suffering from severe mental disorder or, for any other reason, it is very difficult to obtain their views.

24.52 The period of marriage necessary for adoption is four years and each of the spouses must be aged 25 or over. If adoption is applied for by just one person, he or she must be 30 or over or, if the child to be adopted is the son or daughter of the adopter's spouse, be 25 or over. The maximum age is 50 at the time when adoption of the child is granted (or 60 in exceptional circumstances), unless the child is the son or daughter of the adopter's spouse.

24.53 The adopted child must be under 15 years of age, or under 18 if the adopters have fostered the child for 15 years.

### **Fostering**

24.54 There was only limited provision for fostering before the entry into force of Decree-Law No. 190/92 of 3 September 1992. Fostering is a form of social cooperation whereby the child is temporarily placed in a foster family. It is organized by supervisory institutions and the natural family is monitored in order that it may as soon as possible take back the child who has had to leave it. Fostering is in fact one of the measures which may be taken with respect to a child in the circumstances described above, notably in relation to Act No. 147/99 of 1 September 1999 (Protection of Children and Young Persons at Risk Act, arts. 46 et seq.).



## **Child labour**

24.55 When Portugal submitted its second report on the implementation of the Covenant, questions were asked about child labour in Portugal. The analysis of cases detected by the Labour Inspectorate has produced a number of indicators which enable the practice to be described as it exists in Portugal. See annex 17 for statistical data.

24.56 Action to combat child labour is a campaign which must be undertaken by society as a whole. In the content of the examination of cases of child labour, this action is under the responsibility of the Labour Inspectorate and the courts.

24.57 The first concept to be defined is precisely that of child labour. The Labour Inspectorate considers as child labour any activity undertaken, in the context of an employment relationship, by children below the minimum age established by Portuguese law for employment (age 16, see para. 24.82 below).

24.58 A broader definition of child labour may be used encompassing child labour in the strict sense mentioned above and also all types of legal or illegal situations involving persons under the age of 18 who are party to an employment relationship. Most references are, however, made to child labour in the strict sense.

24.59 Action by the Labour Inspectorate in connection with this problem has, generally speaking, increased, a fact which is reflected in the growing number of inspections of workplaces carried out in recent years.

24.60 In Portugal, child labour is concentrated in certain regions (north), sectors of activity (clothing, textiles, footwear, construction, hotel industry) and age groups. Most cases of child labour occur in small-scale enterprises.

24.61 Children are generally employed on light, simple but repetitive work requiring little or no training.

24.62 It should be mentioned that pictures of children breaking stones for road-building or working at home (sewing shoes) have been widely published. Such situations are not based on an employment relationship; most cases of child labour occur in the context of the families of the children concerned.

24.63 The Labour Inspectorate has examined the causes of child labour, and these have been discussed within the Standing Council for Social Consultation, which is a consultative body composed of representatives of the Government and confederations of employers and workers.

### **Cultural causes**

24.64 Many parents, teachers and employers of child labour were child workers themselves in their day and are reluctant to speak out against situations of this type.

24.65 There are family traditions whereby a child practises a trade before the minimum legal age. There is resistance to change or a lack of understanding of what change must entail.

24.66 There is social pressure in support of the view that the best way forward for young people who refuse to study is employment in any suitable kind of work, regardless of age.

### **Economic causes**

24.67 Children are employed as a cheap labour force. The wages they are paid generally amount to about two thirds of the national minimum wage.

24.68 Children are employed on simple and largely repetitive tasks on which skilled personnel would be regarded as wasting their time.

24.69 Recruitment difficulties on the labour market. Unskilled labour is available only on an irregular or seasonal basis.

24.70 Regional limitations on alternative employment requiring greater or higher qualifications.

### **Poverty-related causes**

24.71 Low-income families having a large number of dependants.

24.72 In analysing these causes, account must be taken of the fact that they coexist and interact, influencing each other to a large extent.

24.73 The problem continues to receive the full attention of the Government, which is determined to gradually reduce and, if possible, eliminate the problem.

### **Legislation on child labour**

24.74 ILO Convention No. 138 was ratified by Portugal in 1998. Convention No. 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, adopted by the ILO General Conference in June 1999, was ratified on 1 June 2000.

24.75 Before the adoption of Decree-Law No. 396/91 of 16 October 1991, labour legislation permitted work from the age of 14; today the minimum age for work is 16. Children aged 16 who have already completed their nine years of compulsory schooling are permitted to perform light work which does not jeopardize their safety, health, psychological or moral development, education or training. A young person aged 16 or more who has not satisfactorily completed compulsory schooling or has no vocational qualification is allowed to work only if he is

attending an education or training institution which will provide him with compulsory schooling and a vocational qualification if he has not completed his schooling, or a vocational qualification if he has completed it. The duration of the contract of employment must not be less than the total duration of training; the normal working hours include a part reserved for training which corresponds to at least 40 per cent of the applicable maximum; the working hours must not prevent him from participating in the education or training programme; he must have the written authorization of his legal representatives (in this case, only if he has not completed compulsory schooling). The new regime relating to the protection of vocational training was introduced by Decree-Law No. 58/2002 of 15 March 2002.

24.76 As regards the Constitution, article 69 establishes a legal prohibition of work by children during their years of schooling.

24.77 Legislation is imposing increasingly stringent requirements concerning working conditions for minors. Decree-Law No. 396/91 of 16 October 1991, as last amended (Act No. 58/99 of 30 July 1999), enables young people to perform light work, and only light work, and stipulates that their working hours should not jeopardize their schooling. Act No. 61/99 of 30 June 1999 establishes regulations for exemption from working hours and, inter alia, provides for the modification of working hours for juvenile workers.

24.78 Night work is totally forbidden for minors under the age of 16 and is subject to tight restrictions for minors over the age of 16. Working hours are subject to other restrictions.

24.79 In the context of labour legislation determining working conditions, account must be taken of Decree-Law No. 441/91 of 14 November 1991 establishing the legal regime for supervision of safety, hygiene and health in the workplace. Working conditions and the organization of work have to be modified in cases where minors are employed, and minors are required to undergo a medical examination prior to recruitment.

24.80 The two above-mentioned decrees have been superseded by Decree-Law No. 107/2002, which establishes the types of light work that may be performed by minors under the age of 16 who have completed their compulsory schooling, and the activities and work that may not be undertaken by any minor or may be undertaken only by minors aged 16 or over. In this respect, the regime currently in force is maintained.

24.81 Thus light work is considered to be any simple and specifically defined task not requiring physical or mental efforts liable to endanger the person, health or physical, psychological or moral development of a minor.

24.82 Heavy work is forbidden. Consequently, minors are not allowed to perform activities which expose them to physical, chemical or biological agents used in banned manufacturing processes or in which working conditions are particularly arduous. Decree-Law No. 107/2001 contains an annex listing the activities, processes and types of work in which no minor may be involved and also the activities and work which may be performed only by minors over the age of 16.

24.83 The recruitment of minors is regarded as a very serious administrative offence and guilty companies may be forbidden to conclude contracts with the State or public entities or apply for Community funding for a period of one year. Decree-Law No. 170/2001 establishes the administrative offences (*contra-ordenacões*) represented by violation of the new legislation applicable to work by minors, exemption from working hours and the modification of working hours for particularly vulnerable workers.

24.84 In the knowledge that the elimination of child labour is not only dependent on the punishment of those responsible for it, the Government, in 1998, initiated the Plan for the Elimination of the Exploitation of Child Labour. Its execution is overseen by the National Council to Combat the Exploitation of Child Labour, which is a multidisciplinary body and hears the views of representatives of parents, given that this form of labour has economic but also cultural causes.

24.85 The aim is to gain a precise knowledge of child labour and to undertake a series of activities with the sole aim of shedding light on the practice and increasing the awareness and participation of schools, families and enterprises in action to combat child labour. The ultimate objectives are the elimination of child labour and the prevention of early school dropout.

24.86 In the case of families with limited means, minors are entitled to a training grant under the integrated education and training programme (1999).

24.87 The number of cases of child labour has decreased in Portugal. One reason is undoubtedly the grant of the already mentioned guaranteed minimum wage, whose receipt by families may be made conditional upon school attendance by minor children. This has the effect of averting dropout and child labour (see observations concerning article 3 above - 3.45). According to a study undertaken in 1998, 75 per cent of child labour is unpaid and occurs within the family.

### **The protection of children under other programmes or legislation**

24.88 In 1995, the “Being a child”<sup>16</sup> programme was set up with the aim of developing integrated activities in the areas of education, health, solidarity and social security, and in particular providing support for disabled children or children at great risk and their families. Institutional monitoring of the programme has been sought through the establishment of the National Commission for the Protection of Children and Young People at Risk and refuges for emergency situations.

24.89 By Council of Ministers decision No. 4/2001 of 9 January 2001, the “Choice” programme was approved. This programme is aimed at the prevention of crime and the integration of young people in the most vulnerable districts of the cities of Lisbon, Porto and Setúbal and was formulated by the above-mentioned National Commission. The programme is focused mainly on young people between the ages of 12 and 18 and has the following priority objectives: the prevention of crime and the integration of young people in the most vulnerable districts of the cities mentioned; their personal, social, educational, vocational and parental training; the stimulation of partnerships between public services and the communities of the districts selected with a view to enhancing school and vocational training and the parental

training of young people and preventing them from committing crimes; contributing to coordination, in each of the selected districts, between the activities undertaken by the entities concerned and all activities aimed at the integration of young people; coordinating its activity with the commissions for the protection for young people and other local partnerships.

The “Choice” programme comprises three strategic areas of action: social mediation, leisure activities and community participation. It is due to continue until December 2003.

## **Article 25**

### **Participation in public life**

#### **Portuguese electoral system**

25.1 Act No. 13/99 of 2 March 1999 (as amended by Act No. 3/2002 of 8 January 2002) governs the registration of electors. This is the operation which enables the number of electors to be established; an elector is able to vote only if he is included on the registration lists contained in the electoral rolls.

The Electoral Registration Act provides for the registration of resident European Union citizens in order that they may be able to vote in the elections in which they are entitled to do so, namely municipal elections (Act No. 3/89 of 28 February 1989).

Electoral registration is an official, compulsory, permanent and one-time operation for all elections held on the basis of direct and universal suffrage and referendums.

It is universal in that all citizens enjoying active electoral capacity must be entered on the lists. The one-time principle applies to registration: the name of every elector must be entered only once. Registration is optional for: Portuguese citizens resident abroad; non-Portuguese citizens of the European Union resident in Portugal; citizens of countries having Portuguese as their official language resident in Portugal; all other foreign citizens resident in Portugal.

25.2 Electoral capacity is presumed; such presumption can be withdrawn only on the basis of a document attesting to the elector’s death or a change in his electoral capacity.

25.3 The registration unit is the smallest unit administered by the local authorities, the *freguesia*, one of which will be the habitual place of residence of every elector.

25.4 The law also provides that any person who commits an offence in relation to registration (e.g. fraud in the registration of electors such as to modify the result of the vote) is liable to a penalty of imprisonment, which may be accompanied by suspension of political rights for a period of six months to five years.

### **Election of the President of the Republic**

25.5 The election of the President of the Republic is governed by Decree-Law No. 319-A/76 of 3 May 1976, as amended, inter alia, by Act No. 3/2000 of 24 August 2000, which permits voting by Portuguese resident abroad. This was not possible before the latter date.

Active electoral capacity is the presupposition for passive electoral capacity. Citizens over the age of 35 possessing Portuguese nationality may be elected President of the Republic; when elected they are required to relinquish any other function previously exercised (arts. 5 and 6).

Portuguese nationals who are also citizens of another State do not thereby forfeit the right to vote in elections.

25.6 Article 3 establishes various forms of electoral incapacity, notably a declaration of legal incapacity which has attained the force of *res judicata*.

25.7 The law stipulates that there shall be just one electoral board sitting in Lisbon, which constitutes a single electoral college.

25.8 The electoral process, candidacies, the publication of lists of candidates, their immunity, the establishment of voting assemblies and the electoral campaign are governed by law. An important feature of these various activities intended to determine the President of the Republic through voting is freedom of expression and information; in the electoral campaign, no limit may be imposed on the free expression of political, economic and social principles. This does not affect the civil and criminal responsibility of voters.

During the electoral campaign, no sanction may be applied to media enterprises or their personnel, irrespective of any civil or criminal responsibility they may incur. This will not become effective until after the campaign (art. 48).

25.9 Electoral propaganda is permitted and provision is made for the right to make broadcasts.

### **Law relating to parliamentary elections**

25.10 Parliamentary elections are extremely important since an elected majority makes up the Government which will execute the laws enacted by Parliament. On 22 June 1999, Institutional Act No. 1/99 amended Act No. 14/79 of 16 May 1979 relating to parliamentary elections without, however, changing the electoral system.

25.11 The provision relating to electoral incapacity to which reference has been made on two occasions, in connection with registration for elections and the election of the President of the Republic, reappears in Act No. 14/79.

25.12 This Act was amended in 1990 (by Act No. 18/90 of 24 July 1990) with respect to the number of deputies. They now number 230, of whom 226 represent all the constituencies within the national territory. Their distribution is proportionate to the number of electors in each constituency, in accordance with the highest Hondt average. There are two deputies for each constituency outside the national territory (Europe and outside Europe)

25.13 The procedures for holding elections are established in articles 14 et seq. of the above-mentioned Act. The deputies are elected from lists of candidates in each constituency; electors have the right to vote for only one person on the list.

25.14 The electoral process is organized on the same basis as other electoral processes, with the specific characteristics deriving from the nature of this election, which is often termed a "legislative election".

25.15 Article 125, which established the supplementary penalty of suspension of political rights in the event of a conviction for electoral fraud, as provided for in the Assembly of the Republic (Elections) Act, was abrogated by Act No. 10/95 of 7 April 1995, following Constitutional Court judgement No. 748/93 of 23 December 1993, which ruled unconstitutional, with general binding force, the provisions contained in article 3 (c) of the Election of the President of the Republic Act, in article 2 (1) (c) of the Assembly of the Republic (Elections) Act, in article 2 (c) of the Azores Legislative Assembly (Elections) Act, and in article 3 (c) of the Local Authorities (Elections) Act, in the part which established the active electoral incapacity of persons sentenced by final decision to imprisonment for an offence involving fraud (or an infamous offence involving fraud) before they have served their penalty, and the provision contained in article 29 (1) of Act No. 69/78 of 3 November 1978 (Electoral Registration Act). In accordance with this ruling, all these enactments have been amended to provide henceforth that only deprivation of political rights by a final judicial decision entails active electoral incapacity (the same applies to declaration of legal incapacity, also by final decision, and blatant mental disorder - in the case of persons who are interned in a psychiatric institution or are declared to be suffering from a mental disorder by a medical panel composed of two doctors).

### **Referendum**

25.16 The question of the use of a referendum arose on the occasion of the ratification - following approval - of the European Union Treaty. However, the Constitution did not, before the most recent revision, permit a referendum on a treaty, such as the European Union Treaty, which contains matters within the exclusive competence of Parliament.

25.17 A special law would have to be enacted to permit a referendum if the content of such a treaty was to be submitted to a referendum (Constitution, art. 164 (j), Act. No. 45/91, art. 3 (b) of 3 August 1991). Referendums on international treaties are now possible following the 1997 revision of the Constitution.

25.18 The institutional law relating to referendums is therefore Act. No. 15-A/98 of 3 April 1998, which revoked Act No. 45/91 and gave effect to article 115 of the Constitution. In future, it will be possible for a European question (e.g. a decision on a treaty, such as the Amsterdam Treaty) to be decided by referendum. A proposal to this effect was made in 1998, but the Constitutional Court considered that a referendum on the Amsterdam Treaty was not possible.

25.19 The subject of a referendum must be a question of general and national importance to be decided by Parliament or by the Government through ratification (in Portugal, approval and ratification) of an international convention or a legislative act.

25.20 There can be no referendum on an amendment of the Constitution, the questions provided for in articles 161 and 164 of the Constitution, budgetary, fiscal or financial questions or acts, or questions relating to the organization or operation of Parliament, the Government, the courts, the public prosecutor's office or its law officers.

25.21 The new Act also sets time limits: there can be no referendum between the dates of convening and conduct of parliamentary or local elections or elections to the European Parliament. No referendum can be held during a state of siege or state of emergency.

25.22 The initiative in proposing a referendum lies with the deputies, parliamentary groups, the Government or groups of electors; a preliminary examination of the constitutionality and legality of the proposal by the Constitutional Court is undertaken on the initiative of the President of the Republic.

25.23 A campaign may be organized in connection with a referendum through which the electorate will be called upon to vote. This campaign would be conducted by political parties which have expressed to the National Electoral Commission their interest in taking part in it. Groups of electors may also participate in the campaign.

25.24 A referendum has the effect of compelling Parliament and the Government to comply with its results when the number of voters is greater than half the number of registered electors. If the vote is favourable, the relevant act must be adopted within the following 60 to 90 days. There cannot be a political vote or a vote on the grounds of unconstitutionality. In the event of a negative vote, the relevant act cannot be adopted without a new parliamentary election or the formation of a new Government.

25.25 Institutional Act No. 4/2000 of 24 August 2000 established regulations for local referendums.



### **Incompatibilities and responsibilities of persons holding public or political office**

25.26 Acts Nos. 24/95, 25/95, 26/95, 27/95 and 28/95 of 18 August 1995 (amendments to the statutes relating to deputies, public examination of the assets of holders of public office, remuneration of holders of political office, financing of political parties and electoral campaigns, and the legal regime concerning incompatibilities and impediments for holders of political office or other important public office) constitute a set of measures aimed at achieving transparency in the exercise of political and public office.

The Statutes relating to Deputies (Act No. 7/93 of 1 March 1993, as amended by Acts Nos. 24/95, 55/98, 8/99, 45/99 and 3/2001) establish several incompatibilities with the exercise of this office: the office of deputy may not be exercised concurrently with office in another sovereign body; a deputy may engage in a professional activity (which he must notify to the Constitutional Court) but may not be a member of a body within a public legal entity, may not serve as a remunerated expert or arbitrator in any proceedings to which the State is a party and may not hold any government-appointed office without the permission of the competent parliamentary commission for incompatibilities and impediments. In his professional activities a deputy is not permitted to: conclude contracts with the State or public legal entities, participate in public competitive bidding for the provision of goods or services, bring a civil action against the State, act as sponsor for foreign States, personally benefit from acts or participate in contracts in which organs or services influenced by him are involved or participate in any way in acts of commercial publicity. Deputies require the authorization of the Assembly of the Republic in order to intervene in a court with a jury or act as experts or witnesses.

When introducing draft legislation or participating in any work of the Assembly, deputies must make a prior declaration of any personal interest.

25.27 A register of interests has been set up in Parliament. This consists of a book in which deputies must record any activities liable to give rise to incompatibilities or impediments and any acts liable to give rise to financial benefits or conflicts of interest. The register is public and may be consulted by any person who so requests.

The Parliamentary Ethics Commission verifies cases of incompatibility, incapacity and impediments involving deputies, considers and records cases of conflict of interest, and assesses the degree to which interests are affected in such conflicts.

25.28 Act No. 64/93 of 26 August 1993 (as amended by Acts Nos. 28/95 of 18 August 1995 and 42/96 of 31 August 1996) deals with the regime relating to incompatibilities and impediments of holders of political office or senior public office. It defines these offices, the exclusivity rules with regard to certain cases (senior political offices and senior public offices) and incompatibilities on termination of office, and establishes a register of interests in Parliament.

The incompatibilities and impediments of holders of office in local authorities are governed by Act No. 12/98 of 24 February 1998.

25.29 Act No. 25/95, in the same body of transparency legislation, amends Act No. 4/83 relating to the public examination of the assets of holders of political office.

Holders of political office are required to declare their earnings and assets to the Constitutional Court within 60 days of the date on which they take office. More than a declaration of earnings, this is a declaration of wealth since it also covers the assets and social security contributions of the holder. There is no specific procedure for this declaration, which must be renewed on the occasion of the holder's termination of office or re-election.

25.30 Act No. 26/95 amended Act No. 4/83 of 9 April 1983 relating to the remuneration of holders of political office. It amended the conditions relating to annuity grants (the period of office was increased from 8 to 12 years) and the resumption of work grant, which is provided for a period of so many months for every half-year of exclusive political activity, the grant being equal to the monthly remuneration at the time of termination of office.

25.31 The various political groups have reached agreement on eliminating certain provisions of earlier legislation such as those relating to the concurrent holding of political and private office, which is not abolished but is the subject of more precise rules, annuities and the resumption of work grant, and the lack of information concerning the assets of holders of political or public office before and after they took up such office.

25.32 Act No. 27/95 of 18 August 1995, relating to the financing of political parties and electoral campaigns, was repealed by Act No. 56/98 of 18 August 1998 (as amended by Act No. 23/2000 of 23 August 2000, Institutional Acts Nos. 1/2001 of 14 August 2001 and 5-A/2001 of 26 November 2001). Parties may be financed from their own revenue (including public subsidies) and by private sources, but only private individuals (and not legal entities) may make contributions.

### **Law relating to local authority elections**

25.33 Local authority elections are governed by Institutional Act No. 1/2001 of 14 August 2001 (as amended by Institutional Act No. 5-A/2001 of 26 November 2001), which repealed Decree-Law No. 701-B/76 of 29 September 1976.

25.34 This law establishes a regime similar to that of other electoral processes but recognizes the active electoral capacity (right to vote) of not only Portuguese citizens aged 18 or over, but also citizens of States members of the European Union, citizens of States with Portuguese as their official language who have been legally resident in Portugal for at least two years and citizens of other States legally resident in Portugal for at least three years. The granting of this right to non-Portuguese nationals is subject to the principle of reciprocity (their States of origin are required to grant the same right to Portuguese citizens). Passive electoral capacity (right to be elected) is recognized on the same conditions, but the period of residence in Portugal for citizens of Portuguese-speaking States and other States is four and five years respectively.

### **Decisions of the Constitutional Court on electoral matters**

25.35 In the judgement of the Constitutional Court published on 1 June 1990, the question of the constitutionality of the Law regulating election of the Regional Assembly of the Azores and the Provisional Statute of the Autonomous Region of Madeira arose in relation to a common provision which made eligibility dependent on habitual residence and length of habitual residence in the region concerned.

25.36 The Constitutional Court divided the two questions: that of the obligation of residence or residence as a criterion for eligibility and that of the period of habitual residence.

25.37 It considered that habitual residence was not a non-necessary limitation as a condition for eligibility.

25.38 However, it considered that the imposition of a period of habitual residence prior to candidacy was unconstitutional.

25.39 The articles which incorporated this requirement were declared unconstitutional (law regulating election of the Regional Assembly of the Azores (Decree-Law No. 267/80), art. 24 (4) (c); Provisional Statute of the Autonomous Region of Madeira (Decree-Law No. 318-D/76), art. 9).

25.40 The judgement published on 23 December 1993 declared “the unconstitutionality with general binding force of the provisions of article 3 (c) of Decree-Law No. 319-A/86 of 3 May 1986 (Election of the President of the Republic Act), article 2 (1) (c) of Act No. 14/79 of 16 May 1979 (Election of Parliament Act), article 3 (c) of Decree-Law No. 701-B/76 of 29 September 1976 (law regulating election of local authority bodies), in the part where they establish the active electoral incapacity of persons who have been given a final prison sentence for a serious offence involving fraud or an infamous offence involving fraud) until such time as they have served the relevant sentence, and of the provision contained in article 29 (1) of Act No. 69/78 of 3 November 1978 (Electoral Registration Act)”.

25.41 The Procurator-General of the Republic requested an examination of the constitutionality of these enactments on the ground, inter alia, that article 30 (4) of the Constitution provides that “No sentence may involve, as a necessary effect, the loss of civil, professional or political rights.” In the case in question, the effect appears to be associated both with the nature of the offences committed (infamous offences involving fraud) and with the nature of the penalty imposed (imprisonment).

25.42 Consequently, all these legal provisions were repealed by means of successive revisions or new versions of the enactments in question and replaced by a provision determining the active electoral incapacity (suspension of the right to vote) of persons who have been deprived of political rights by a final judicial decision. In this connection, see paragraph 25.15.

### **Limitations on political activity in Portugal**

25.43 Portuguese law can hardly be said to impose limitations on political activity. Article 46 (4) of the Constitution imposes a limitation which is historically justified and consists of the prohibition of armed, militarized or paramilitary associations, associations of a military type and associations which endorse fascist ideology.

25.44 Reference has been made above (see para. 22.4) to Constitutional Court judgement No. 17/94, which was published in the second series of the official gazette of 31 March 1994. We shall refer to it again at this point and try to give a brief description of the case in question.

25.45 In this case, the Procurator-General requested a declaration of disbandment of the organization known as the "National Action Movement" (MAN) because of its support for fascist ideology.

25.46 The Procurator-General argued that a cultural association known as "National Action" had been founded in 1985 and published several periodicals, including the journals entitled "Action", "On the Offensive", "Manifesto", "Programme Points", "Statutes" and "Overcome". Its purpose was the establishment of a "nationalist State".

25.47 The cult of the national community, the primacy of this community's interests over those of individuals, the cult of racial and bodily purity, order, discipline and hierarchy, and inspiration by Hitler's Germany, Mussolini's Italy and Oliveira Salazar's Portugal were prominent features of this organization.

25.48 Its symbols were the raised arm salute, the Celtic cross and the swastika. It was racist and anti-Semitic in character.<sup>17</sup>

25.49 The organization advocated violent methods. Between 1985 and 1989 it grew in size, and associated itself with the totalitarian skinhead movement and with foreign parties subscribing to the same ideology.

25.50 The appeal for violence was the culmination of the organization's activity. The death of a known Revolutionary Socialist Party activist on 27 October 1989 was associated with the organization and was attributed to members of the organization.

25.51 The organization contested several of the arguments of the Procurator-General and stated that it had disbanded itself by a decision of its president in the early 1990s.

25.52 The Constitutional Court considered that the disbandment of the MAN was proven, on the basis of searches conducted in 1991 by the Judicial Police. It further considered as unproven the links with related parties abroad and the accusation that the organization committed acts of violence.

25.53 It considered that since the organization had ceased its activities, there were no longer any grounds for declaring it to be fascist. Its disbandment had preceded the declaration of fascism and rendered any declaration by the Court unnecessary, especially since such a declaration would constitute grounds for certain criminal proceedings which could not be brought and also for the disbandment of such an organization.

### **Right of democratic opposition**

25.54 The right of democratic opposition is established in the Constitution and in Act No. 25/98 of 26 May 1998, which establishes the relevant statutes (this Act repealed Act No. 59/77 of 5 August 1977).

25.55 Act No. 25/98 recognizes the right of minorities to establish and exercise a democratic opposition to the Government and to the executive organs of the autonomous regions and municipalities. This right may be exercised by political parties, but also by groups of citizens represented in a municipal body.

“Opposition” is understood to mean any activity monitoring, examining or criticizing the policies of the Government, or the executive bodies of the autonomous regions or municipalities. The law does not jeopardize the general right of democratic opposition of the political parties or other minorities unrepresented in any of these organs, in accordance with the terms of the Constitution.

25.56 One of the very important rights which this law establishes is the right to be regularly and directly informed by the executive bodies of the status of the principal relevant affairs of public interest, which, for the executive bodies, creates a duty to inform the opposition parties of the public affairs for which they are responsible.

25.57 An important aspect of this duty to give information, which is also governed by the law, is the right to be informed concerning affairs decided by the Government in the Council of Ministers in the context of the European Union. This is a very important duty since the Government, like all European Governments, exercises in the Council of Ministers powers which, at the national level, lie with Parliament.

25.58 This extremely important matter is governed by Act No. 20/94 of 15 June 1994. This Act provides, in particular, that the Government must consult Parliament on the positions to be adopted before the Community institutions, such consultation being obligatory whenever an act falling within the competence of Parliament is involved. In such cases, the Parliament’s Commission on European Affairs must express an opinion which will enable Parliament to take a position.

25.59 The opposition parties are entitled to express a view and intervene by constitutional and legal means on any question of public interest, and to be present at and participate in all official activities and acts which justify their presence and participation.

25.60 The opposition parties must be consulted prior to consideration of the following questions: setting the dates of local authority elections; general direction of foreign policy, national defence policy and internal security policy; draft legislation on major options within national plans and the national budget. They also have the right to express their views in the course of preparatory work for legislative initiatives by the Government on elections and political parties and associations.

25.61 The political parties are entitled to make statements in the commissions established outside the context of Parliament for the purposes of inquiries, inspections, reports or “white papers” on matters of national political interest. The law also establishes guarantees of freedom and independence for the media.

### **Recruitment of personnel by the civil service**

25.62 Under the terms of article 5 of Decree-Law No. 204/98 of 11 July 1998, the process of recruiting and selecting personnel for the civil service conforms to the principles of freedom of application and equality of conditions and opportunity for all candidates. In order to ensure that these principles are respected, the following must be guaranteed: information on the methods of selection, the system of final classification used, the series of tests of knowledge when such tests are necessary, the application of objective criteria and methods of evaluation, the neutral composition of the jury and the right of appeal must be published in good time.

25.63 Competitive examinations constitute the normal process for the recruitment and selection of personnel.

### **Equality of treatment for men and women within the Administration**

25.64 In accordance with article 1 of Decree-Law No. 426/88 of 18 November 1988, the purpose of this enactment is to guarantee equality of opportunity and treatment in admission to and in the exercise of public duties in consequence of the principle of equality and the right to work established in the Constitution.

25.65 Article 2 lists the officials and personnel to whom the law applies and article 3 gives a list of definitions: discrimination exists where there is any distinction, exclusion, restriction or preference based on sex which has the aim or consequence of compromising or denying the recognition, enjoyment or exercise of ensured rights.

25.66 Equal work is work where the responsibilities or functions exercised are equal or of an objectively similar nature or of an equal functional content.

25.67 Work of equal value is work where the responsibilities or functions exercised are equal but different, the equality resulting from the application of objective criteria for the evaluation of functions.

25.68 Article 4 prohibits discrimination: the right to work entails the absence of any discrimination based on sex, whether direct, or indirect, and notably by reference to civil status or family situation.

25.69 Temporary provisions which establish a preference by reason of sex, imposed by the need to rectify an inequality in practice, and measures aimed at the protection of motherhood as a social value are not discriminatory.

25.70 The Administration must ensure that female workers have the same opportunities and treatment as those granted to male workers with regard to working conditions, guidance and vocational training.

25.71 Regulations and administrative acts which in any way limit the access of women to the exercise of public functions or responsibilities are null and void (art. 5).

25.72 The principle of an equal wage for equal work is established in article 6, while article 7 establishes an equal right to a career for all.

25.73 Articles 8 and 9 permit discrimination based on actual inequality. Differentiated treatment may be practised in the case of different practical situations.

25.74 Work which is, by law, considered as involving effective or potential risks for the genetic function is prohibited, and the legal provisions for this kind of situation must be regularly updated (art. 8).

25.75 Announcements of competitive examinations, vacancy announcements and other forms of preselection or recruitment may not directly or indirectly contain any restriction, specification or preference based on sex.

25.76 Recruitment is effected exclusively on the basis of objective criteria; the stipulation of physical requirements unrelated to the functions to be performed or to the conditions of their performance is prohibited.

25.77 The law does not consider as discrimination the fact that recruitment is reserved for persons of a particular sex when this is essential because of the nature of the functions to be performed, such functions being qualitatively different when they are performed by a man or by a woman.

25.78 Article 10 stipulates that the onus is on the injured party to initiate proceedings to eliminate the source of discrimination. Conversely, it is the entity accused of engaging in discriminatory practices that is responsible for proving that there is no discrimination.

25.79 No employee may be subjected to reprisals for having brought proceedings in respect of a discriminatory practice by his employer. Under article 12, employers and employees who perpetrate an act of discrimination are liable to proceedings for a disciplinary offence.

25.80 Article 13 makes the Commission for Equality in Work and Employment responsible for verifying whether the law is enforced in the various departments of the Administration and for making suggestions for the improvement of working conditions as regards discrimination between the sexes.

25.81 The situation of women has improved considerably since the Covenant's entry into force in Portugal. Now, for example, women hold 50 per cent of posts in the Administration (for general statistical data, see the report entitled "Portugal - Situation of women (2001)" prepared by the Commission for the Equality and Rights of Women, appended to this report). It may be added that the fact that some women have had long careers in the civil service constitutes an indicator of the growing value attached to women and work by women. Portugal is among the States of the European Union which have taken measures to promote the recruitment of female civil servants.

## Article 26

### **All persons are equal before the law and are entitled without any discrimination to the equal protection of the law**

26.1 Article 13 of the Constitution provides that all citizens are equal before the law and have the same social dignity. The first part of this article stresses that all citizens have the same social dignity and are equal before the law. The general principle acquires its common meaning in the legal system. All persons must be treated equally, but when there are differences, the different situations must be treated differently.

In paragraph 2, article 13 affirms the principle of non-discrimination, providing that no one may be privileged, favoured, deprived of a favour or right or exempted from any duty because of his descent, sex, race, language, territory of origin, religion, political or ideological convictions, education, financial situation or social status.

26.2 This wording is very forceful. It prevents, for example, any differentiation in a person's access to social assets. But it will certainly not prevent any difference that may influence the acquisition of these assets arising from a legal situation acquired in conformity with the law.

This provision contains both a fundamental right and an element of interpretation of other fundamental rights. This holds both for the Portuguese Constitution and for the fundamental rights established in the Covenant. This is perhaps the reason why it appears in the part of the Constitution devoted to fundamental rights, which contains general provisions on the question.

26.3 As such, this provision has its place with all the provisions which recognize fundamental rights. And this place certainly belongs with the provisions which the Constitution declares to be directly applicable. In other words, they may be invoked before the courts.

These provisions are binding on both public entities and private entities, which gives a fairly broad sense to this fundamental right of non-discrimination and means that it may be invoked, for example, in purely private situations. In the sector of recruitment for employment, for example, a woman may be subjected to discrimination.

26.4 Article 16 of the Constitution provides that the fundamental rights established in the Constitution do not exclude any other fundamental right contained in the applicable laws and rules of international law.



26.5 In addition, according to this article, the constitutional precepts relating to fundamental rights must be interpreted and integrated in accordance with the Universal Declaration of Human Rights.

### **International conventions relating to non-discrimination**

26.6 As regards aspects of international law which provide for application of the principle of non-discrimination, article 8 (1) of the Portuguese Constitution provides that “the rules and principles of general or ordinary international law are an integral part of Portuguese law”. As regards the internal applicability of fundamental rights (and the right to non-discrimination, whether it derives from an international instrument or the Constitution, is a fundamental right), article 18 of the Constitution stipulates that the constitutional rules relating to rights, freedoms and guarantees are directly applicable and are binding on public and private entities.

Some examples may be given of the international instruments and conventions ratified by Portugal (since 1988). The list is not exhaustive.

Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, ratified by Decree No. 54/90 of the President of the Republic, of 27 September 1990;

Convention on the Rights of the Child, of 1989, ratified by Decree No. 49/90 of the President of the Republic, of 21 October 1990;

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, of 1984, ratified by Decree No. 57/88 of the President of the Republic, of 20 July 1988;

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, of 1999, ratified by Decree No. 15/2002 of the President of the Republic, of 8 March 2002;

Convention against Genocide, ratified by Decree No. 33/98 of the President of the Republic, of 14 July 1998;

ILO Convention concerning Minimum Age for Admission to Employment, of 1973, ratified by Decree No. 11/98 of the President of the Republic, of 19 March 1998;

Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, of 1999, ratified by Decree No. 28/2000 of the President of the Republic, of 1 June 2000;

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 1977, ratified by Decree No. 10/92 of the President of the Republic, of 1 April 1992;

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 1977, ratified by Decree No. 10/92 of the President of the Republic, of 1 April 1992;

Convention for the Protection of Cultural Property in the event of Armed Conflict, of 1954, ratified by Decree No. 13/2000 of the President of the Republic, of 30 March 2000;

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, and its Optional Protocols I, II and III, of 1980, ratified by Decree No. 1/97 of the President of the Republic, of 13 January 1997;

Protocol on Blinding Laser Weapons (Protocol IV to the above Convention), of 1995, ratified by Decree No. 38/2001 of the President of the Republic, of 13 July 2001;

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and their Destruction, of 1997, ratified by Decree No. 64/99 of the President of the Republic, of 28 January 1999;

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, ratified by Decree No. 64/99 of the President of the Republic, of 28 January 1999;

Rome Statute of the International Criminal Court, ratified by Decree No. 2/2002 of the President of the Republic, of 18 January 2002;

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, of 26 November 1987, approved by Parliamentary decision No. 3/90, of 30 January 1990;

Protocol 1 to the above Convention, of 4 November 1993, ratified by Decree No. 21/97 of the President of the Republic, of 5 May 1997;

Protocol 2 to the above Convention, of 4 November 1993, ratified by Decree No. 18/97 of the President of the Republic, of 30 April 1997;

Protocol 7 to the European Convention on Human Rights, of 22 November 1984, ratified by Decree No. 51/90 of the President of the Republic, of 27 September 1990;

Protocol 11 to the above Convention, restructuring the control machinery established thereby, of 1994, ratified by Decree No. 20/97 of the President of the Republic, of 3 May 1997;

European Social Charter, of 18 October 1961, ratified by Decree No. 38/91 of the President of the Republic, of 6 August 1991;

Additional Protocol to the European Social Charter providing for a system of collective complaints, ratified by Decree No. 72/97 of the President of the Republic, of 6 December 1997;

European Social Charter (Revised), of 1999, ratified by Decree No. 54-A/2001 of the President of the Republic, of 17 October 2001;

Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, of 1981, ratified by Decree No. 21/93 of the President of the Republic, of 9 July 1993;

European Charter of Local Self-Government, of 1985, ratified by Decree No. 58/90 of the President of the Republic, of 23 October 1990;

Framework Convention for the Protection of National Minorities, of 1995, ratified by Decree No. 33/2001 of the President of the Republic, of 20 February 2001;

Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Biomedicine, of 1997, ratified by Decree No. 1/2001 of the President of the Republic, of 20 February 2001;

Additional Protocol to the above Convention, on the Prohibition of Cloning Human Beings, of 1998, ratified by Decree No. 1/2001 of the President of the Republic, of 20 February 2001;

Regarding the European Union, Portugal, like all member States, is a signatory of the Charter of Fundamental Rights of the European Union.

Lastly, for further information on this subject, reference should be made to the web site of the Bureau of Documentation and Comparative Law, Office of the Procurator-General of the Republic: <http://www.gddc.pt>.

### **High Commissioner for Immigration and Ethnic Minorities**

26.7 Decree-Law No. 296-A/95 of 17 November 1995, establishing the Institutional Act of the thirteenth constitutional Government, provided for the establishment of the High Commissioner for Immigration and Ethnic Minorities, and made him subordinate to the Office of the President of the Council of Ministers. Decree-Law No. 3-A/96 of 26 January 1996 instituted the High Commissioner.

26.8 In the performance of his duties, the High Commissioner supports consultation and dialogue with the entities representing immigrants or ethnic minorities in Portugal, and the study of the question of the integration of immigrants and ethnic minorities, in conjunction with management and labour, the social solidarity institutions and other public or private entities involved in this sphere.

26.9 The High Commissioner is required to contribute to the improvement of the living conditions of immigrants in Portugal, so as to make possible their integration within society, while respecting their identity and their culture of origin. He must also help to ensure that all citizens legally resident in Portugal enjoy dignity and equal opportunities, so as to eliminate discrimination and combat racism and xenophobia.

26.10 The High Commissioner is also required to monitor the activity of the various civil service departments competent in the area of the entry, sojourn and departure of foreign citizens in Portugal, with due respect for their rights, and to cooperate in the determination and monitoring of active policies to combat exclusion, while at the same time encouraging horizontal action by the departments of the Administration and Government involved in this sector.

Lastly, he is required to propose measures, and notably prescriptive measures, in support of immigrants and ethnic minorities. The High Commissioner has the following web site: <http://www.acime.gov.pt>.

26.11 Act No. 134/99 of 28 August 1999 (regulated by Decree-Law No. 111/2000 of 4 July 2000) provides specifically for the prohibition, and contributes to the prevention, of racial discrimination in all its forms. It establishes penalties for any act resulting in the violation of fundamental rights or in the refusal or restriction of the exercise of any economic, social or cultural right by any person owing to his membership of a particular race, colour, nationality or ethnic origin; this law is binding on all public or private natural or legal persons. The law defines a discriminatory practice as any action or omission which, because of a person's membership of a particular race, colour, nationality or ethnic origin, involves a violation of the principle of equality and gives examples of such practices.

26.12 The provisions of this Act do not jeopardize the force or application of the legislative, regulatory or administrative provisions which benefit certain disadvantaged groups with the aim or guaranteeing the exercise, in conditions of equality, of the rights mentioned in them.

26.13 Enforcement of this law will be monitored by a Commission for Equality and against Racial Discrimination, which is responsible for compiling all information relating to the perpetration of discriminatory acts and to the imposition of the relevant penalties, recommending legislative, regulatory and administrative measures which it considers appropriate for the prevention of discrimination for reasons based on race, colour, nationality or ethnic origin; promoting studies and research on problems relating to racial discrimination; publicizing, by all means available to it, cases of effective violation of this law; and preparing and publicizing an annual report on the situation with regard to equality and racial discrimination in Portugal.

26.14 The above-mentioned Commission is composed of the High Commissioner for Immigration and Ethnic Minorities, who acts as president and represents the Government, and representatives of the Government, immigrants' associations, anti-racist associations, trade unions, and employers' and human rights associations.

26.15 Any discriminatory act perpetrated by a natural person constitutes an administrative offence punishable by a graduated fine of between one and five times the highest value of the monthly national minimal wage, without prejudice to possible civil liability or the imposition of any other applicable penalty.

26.16 Any discriminatory act perpetrated by a private-law corporation constitutes an administrative offence punishable by a graduated fine of between 2 and 10 times the highest value of the monthly national minimum wage, without prejudice to possible civil liability or the imposition of any other penalty applicable to such a case. In the event of a second or subsequent offence, the minimum and maximum limits are doubled.

26.17 Without prejudice to the other penalties applicable to the case, the judge may also impose the following penalties for acts of discrimination as provided for in this law: publication of the decision and public warning or reprimand of the perpetrators of the discrimination. It is also possible to order the surrender of property by the perpetrator, to prohibit the exercise of certain occupations or activities, to order exclusion from public benefits or subsidies, to prohibit participation in public competitive examinations, to close establishments or to suspend public authorizations or permits (Decree-Law No. 111/2001, art. 4, of 4 July 2000).

26.18 Any natural or legal person who has knowledge of a situation liable to be considered an administrative offence is required to report it.

26.19 The terms of the new Act are to be interpreted and integrated in conformity with the Universal Declaration of Human Rights, the European Convention on Human Rights and the International Convention on the Elimination of All Forms of Racial Discrimination.

#### **Non-discrimination in the articles of the Covenant**

26.20 In connection with each article, an attempt has been made in the present report to provide the relevant information.

#### **Non-discrimination as a duty imposed by the Covenant not limited to the articles of the Covenant**

26.21 The general rule has already been set out at the beginning of the analysis of this article of the Covenant (Constitution, art. 13). Several legal provisions apply the principle in their relevant sectors, notably Act No. 17/2000 of 8 August 2000 relating to the system of solidarity and social security. It should not, however, be forgotten that it establishes positive differentiation according to the needs and specific social characteristics of groups of citizens and the risks requiring protection.

26.22 Another example may be given: Decree-Law No. 387/99 of 28 September 1999 set up the National Agency for Adult Education and Training with the aim of promoting full involvement in society, ensuring equality of opportunity and combating social exclusion.

## Article 27

### Protection of minorities

27.1 We shall now review measures taken to facilitate the integration of gypsies and enable them to overcome their difficulties, bearing in mind the question put to the Portuguese experts on the occasion of the submission of the second report. In connection with the rights of persons belonging to minorities, the Portuguese delegation was asked to furnish information on practical measures which have been taken to protect the rights of gypsies and to preserve the Mirandês dialect in north-eastern Portugal.

### General measures adopted for the integration of gypsies

27.2 Portugal is a country which comprises a sizeable gypsy community. Very few studies have been undertaken on gypsies in Portugal. One relatively complete and interesting study, and certainly authentic as regards the language used by the gypsies among themselves, is contained in the book by Adolpho Coelho entitled "Gypsies in Portugal - Memorandum for the tenth session of the Congress of Orientalists", published by the Lisbon Geographical Society in 1892.

27.3 Mention should be made of the fortnightly publication Caravan, which styles itself as an "information organ for the gypsy people". The periodical contains important information on the life, activity and problems of gypsies.

Council of Ministers decision No. 38/93 of 15 May 1993, adopting measures in support of immigrants and ethnic minorities, nevertheless sets as an objective of the Government the development of a cross-cultural action project aimed at promoting multicultural education and integrating young people from minority ethnic groups in schools in order to give practical effect to the principle of equality of opportunity.

In the area of employment, general and vocational training and organizational measures are provided for, together with measures to promote employment. These measures include public information, work promotion units and job clubs intended for the long-term unemployed. In social terms, the measures provided for cover housing.

In areas with a high proportion of immigrants and ethnic minorities, the integration of the social, economic and cultural dimensions throughout the zones in question and in harmony with non-immigrant and non-ethnic minority inhabitants is set as an objective to be reached.

27.4 Council of Ministers decision No. 175/96 of 19 October 1996 established the Working Group for the equality and integration of gypsies, which has already published its report on this subject. Its aim is to analyse the difficulties involved in the integration of gypsies into Portuguese society and to draw up proposals for the elimination of situations of social exclusion. The mandate of this Group has been regularly renewed and its activities are continuing.

According to the Group's report, gypsies are already included in programmes to eliminate poverty in the following towns and cities: Braga, Porto, Viseu, Santarém, Lisbon, Setúbal, Almada, Évora, Beja, Faro, Olhão and Neiva Cávado.

These projects are generally carried out in conjunction with several partners - regional social security centre, prefecture, local communities - and comprise educational and other organized activities for children and housing measures.

27.5 The Horizon community programme also concerns itself with gypsies, as do the programmes initiated by the Gypsy Diocesan Pastoral Organization in Lisbon, which has also recently published its reports.

27.6 In 2001, the National Plan of Action for Inclusion (in force until 2003) was approved by Council of Ministers decision No. 91/2001 of 6 August 2001 with the following objectives: to promote employment and the access of all to resources, goods and services; to prevent risks of exclusion; to act in support of the most vulnerable; and to mobilize all protagonists. These objectives are pursued by means of several instruments and programmes in the various sectors (notably employment, education, housing, health and social security).

## **Housing**

27.7 Housing is also an important feature of measures adopted to help the gypsies. Decree-Law No. 73/96 of 18 June 1996 provided for the construction of low-cost housing and the integration of these measures in the Government's rehousing plans. The High Commissioner for Immigration and Ethnic Minorities concludes contracts with the municipalities and the State, with the aim of including gypsies in rehousing programmes.

27.8 An example of an initiative benefiting gypsies is to be found in an area on the outskirts of Lisbon. The freguesia (smallest local administrative unit) of Olivais - the area with the largest concentration of gypsies - has taken action to integrate them into society; results have been achieved in the areas of housing and education, and they have been well received by the non-gypsy population.

## **Education**

27.9 Normative decree No. 63/91 of 13 March 1991 (rescinded by normative decree No. 5/2001 of 1 February 2001) set up the Cross-cultural Secretariat, which is responsible for: designing, initiating and coordinating interdepartmental projects and programmes, notably in the context of the education system, aimed at promoting the values of social interaction, tolerance, dialogue and solidarity; ensuring specialized technical support for the execution of sectoral projects and programmes, in the context of the education system, at the request of agencies subordinate to the Ministry of Education, notably for the production of multicultural training materials. The Secretariat is composed, inter alia, of a representative of the member of the Government responsible for questions of equality, a representative of the Ministry of Education, a representative of the High Commissioner for Immigration and Ethnic Minorities, and three personalities of acknowledged expertise or experience in this field.

The Secretariat may, exceptionally, propose the establishment of working groups to deal with specific projects.

27.10 The Secretariat will be called upon to plan, initiate and monitor programmes to be proposed for approval by the member of the Government responsible for questions of equality and the Minister of Education. These programmes include:

(a) The promotion of initiatives contributing to knowledge and recognition of the diversity of the culture coexisting in Portuguese society, and contributing to the understanding of its historic, multifaceted and open character, in conjunction with parents' and students' associations and municipalities;

(b) The promotion of a campaign for cross-cultural dialogue and appreciation of ethnic diversity in schools, in conjunction with parents' and students' associations and municipalities;

(c) The organization of competitive examinations in schools on subjects relating to human rights and the values of solidarity and respect through difference;

(d) The organization of a national survey of the values of Portuguese schoolchildren as regards tolerance and cross-cultural multiracial interaction.

Similarly, the Secretariat is responsible, in particular, for preparing and producing training and information materials in the area of cross-cultural activity.

27.11 The Ministry of Education has contributed measures geared to the objectives of the Secretariat coordinating the multi-cultural action programmes. It has set up the cross-cultural education project within the Secretariat, which establishes the precise goals and determines which schools - in multi-ethnic areas occupied by minorities - will be responsible for attaining these objectives. These schools receive financial support for the attainment of the same objectives, which are listed below:

Cross-cultural education geared to the integration of young people within Portuguese society;

More dynamic relationships between school, families and local communities;

Application of the principle of equality of access to schools;

Factoring in knowledge, and the culture, of the communities targeted by this project;

One year's pre-school attendance for children in need of adaptation;

Social and psychological support for children covered by these measures;



Training teaching and non-teaching personnel for multicultural education;

Establishment of a permanent support system for the educational administration and management bodies of schools aimed at the diagnosis, design, execution and evaluation of multicultural action projects.

## **Employment**

27.12 The main difficulties encountered by gypsies involve finding work; most of them are unemployed.

There is an agreement between the Employment and Vocational Training Institute and the Santa Casa da Misericórdia in Lisbon. With the participation of the Secretariat coordinating multicultural education programmes, gypsy mediators have been trained and continue to receive training so as to put gypsies in contact with the existing institutions in society and to enable them to become better integrated.

Efforts are also being made to make gypsies eligible for the guaranteed minimum wage.

## **Judicial decisions relating to minorities**

27.13 Constitutional Commission decision No. 14/80 ruled unconstitutional the rural service regulations of the Republican National Guard on the ground that they infringed the principle of non-discrimination. These regulations permitted members of this police force to practise discriminatory treatment on the basis of gypsy origin. They were, in particular, permitted to search caravans at night.

27.14 Similarly, Constitutional Court judgement No. 452/89 ruled unconstitutional article 81 (2) of the Republican National Guard's service regulations. Article 81 of these regulations provided that the Guard should exercise particular surveillance of caravans and groups of travellers (this term is not considered unconstitutional by the Constitutional Court) habitually travelling by road, and living off trade and other activities associated with an itinerant lifestyle. The Guard exercises surveillance over them during their journeys with the aim of preventing crimes against property or against persons in the rural areas and public places where the caravans normally stop.

Article 81 (2) provided that, if suspicion was aroused, it was permissible to make searches of caravans on the road or in rest areas; the leaders of the groups involved must always be identified.

When the destination of the travellers was known to a Guard officer, he was required to notify the commander of the Guard station at the place of destination.

The Constitutional Court decided that night searches without a warrant were unconstitutional. In this respect, therefore, the regulations (art. 81 (2)) are unconstitutional.

27.15 A decision of the Porto administrative court of first instance concerned the regulation of the municipality of Vila do Conde which provided that any person of gypsy origin without an official residence within the municipality must be given notice to leave the municipality within eight days.

This decision aroused great indignation in the press and strong disapproval was voiced by the Procurator General of the Republic and the Ombudsman.

Following these reactions, the municipality repealed this regulation and replaced it by another, emphasizing that any person, whether or not of gypsy origin, who had erected a dwelling without permission must be notified. Any person in that situation was therefore required to destroy the dwelling and forbidden to rebuild it.

The public prosecutor contested the new provision, under which the act in question continued to be unlawful, on the grounds that its real target was the gypsies, and that fact infringed the principle of equality.

The court did not refer to the problem of the gypsies but to the question of the invalidity of the administrative act. It nevertheless decided that the essential problem was that of the persons affected by the act, the specific need to destroy the dwellings and the ban on rebuilding them in any other place within the municipality.

The main point of the decision was that the act was not normative despite its general and abstract nature, which was not sufficient to include the act in normative provisions because it was possible to identify the persons at whom the provision was directed. Thus the act was declared null and void: "An administrative act which does not relate to an individual situation and which does not in itself contain the individualization of the person at whom it is directed is null and void because the essential element of identification is lacking. The reference to persons who build dwellings does not correspond to the individualization required by article 124, second paragraph, of the Code of Administrative Procedure." Consequently, the gypsies were not expelled.

27.16 The judgement of the Supreme Court of Justice of 21 September 1994 is also important. The Lamego district court had convicted a gypsy woman for drug-trafficking. In the grounds for the decision it was stated, and this was put into effect by the latter court, that there must be aggravation of the penalty in view of the fact that the prisoner belonged to the gypsy ethnic group. The court, in fact, stated: "Gypsies have a natural tendency to engage in drug-trafficking: this is one of their habits and traditions."

In its judgement of 21 September 1994, the Supreme Court of Justice stated that an acknowledged fact was a question of law and could accordingly be considered by the Supreme Court. It went on to express the view that it was not a matter of common knowledge, and it was not self-evident, that the gypsy ethnic group was more inclined to engage in drug-trafficking than any other group. It therefore ruled that the decision at first instance was illegal in that it based part of the penalty on the fact of being of gypsy origin. The decision was revoked in respect of the penalty imposed by virtue of membership of the gypsy ethnic group.

Lastly, there have been incidents in the so-called cases of the Cervães and Francelos militias in the north of Portugal, where local people tried to cordon off camps belonging to gypsies on the ground that substantial drug-trafficking was going on there. The participants in these militias were sentenced to up to two years' imprisonment (Cervães) and two to nine years (Francelos). The offences with which the defendants were charged ranged from impeding access by the public authorities to conspiracy to commit terrorist offences. All these cases were brought to the attention of the Committee on the Elimination of Racial Discrimination, which considered Portugal's ninth report on 12 and 13 March 2001. On 2 March 2000, Portugal had recognized the competence of that Committee to consider communications submitted under article 14 of the Convention.

### **The Mirandês dialect**

In the north-eastern part of the country, people still speak a dialect known as Mirandês, which derives from vernacular Latin, although it is also influenced by the Castilian and the Leonese spoken in the Iberian peninsula eight centuries ago. At the present time some 15,000 people in this region speak Mirandês, especially country people, at work and in their homes. In order to conserve and safeguard this very rich and orally transmitted cultural heritage, optional courses have been instituted in primary and secondary schools in this region under the auspices of the Ministry of Education.

27.18 Act No. 7/99 of 29 January 1999 provided for official recognition of certain rights of the Miranda community. Thus this community has the right to cultivate and promote the Miranda language, the learning of Mirandês in schools and use of this language in any public institution in the commune of Miranda do Douro. Official documents are now written in Portuguese but are accompanied by a copy in Mirandês. Normative decree No. 35/99 of 20 July 1999 supplemented these provisions by allowing primary and secondary school pupils to attend Mirandês courses.

### Notes

- <sup>1</sup> An English version of the Constitution is given on the Portuguese Parliament's web site: [http://www.parlamento.pt/leis/constituicao\\_ingles](http://www.parlamento.pt/leis/constituicao_ingles).
- <sup>2</sup> Web site address: <http://www.gddc.pt> and e-mail address: [Decadadh@gdds.pt](mailto:Decadadh@gdds.pt).
- <sup>3</sup> Information is available on the Internet: <http://www.infocid.pt/mt/infocid/1353-1htm>; [http://hdl.pt/pub/main\\_GuiaUtente\\_3htm](http://hdl.pt/pub/main_GuiaUtente_3htm); [http://dgsaude.pt/guia\\_ut.htm](http://dgsaude.pt/guia_ut.htm).
- <sup>4</sup> Decree-Law No. 433/82 of 27 October 1982, which establishes rules governing administrative offences, forbids pre-trial detention.
- <sup>5</sup> Regarding the interrogation of the detainee, see also the comments in this report concerning article 14, paras. 2 and 3, of the Covenant.
- <sup>6</sup> This situation is very different from that of detention for the identification of a person under the terms of Act No. 5/95 of 21 February 1995. According to the latter, detention may never exceed two hours and the person, whether identified or not, must be released after that time. On that law, see point 12.37 below.
- <sup>7</sup> See paragraph 9.7 above.
- <sup>8</sup> See paragraphs 14.22 et seq. below in this respect.
- <sup>9</sup> See article 13 with regard to the expulsion of aliens.
- <sup>10</sup> Decree of 8 April 1992 by the Supreme Court of Justice. The Supreme Court refused to extradite an alien, who was liable to life imprisonment. The Court ruled that a letter by the Embassy concerned stating that, despite a sentence of life imprisonment, nobody remained imprisoned for life because there was always the possibility of being released on parole after 15 years' imprisonment or under the benefit of presidential pardon, was not sufficient ground for extradition. In a Decree published on 8 February 2001, the Constitutional Court changed the existing policy. According to this Court, extradition must henceforth be allowed if the requesting State has already commuted the death sentence, or other sentence which might lead to irreversible impairment of the person's integrity (Decree No. 1/2001 issued in case No. 742/99).
- <sup>11</sup> The law stipulates the principle whereby, for Portuguese nationals, a penalty must be enforced in Portugal, unless the convicted person refuses.
- <sup>12</sup> According to this principle, a court of second instance can overturn the legal ruling of a court of first instance, and the Supreme Court can overturn a judgement issued by a court of second instance. This double appeal facility is referred to as two-tier jurisdiction.
- <sup>13</sup> See comments under article 9 above.

<sup>14</sup> At the time of the presentation of Portugal's second periodic report, the question was raised of whether service as a conscientious objector conferred the same rights and benefits as regular military service. There is no connection between laws governing conscientious objection and military service, insofar as the military exert no influence over conscientious objectors, which protects the latter. It may also be worth pointing out that article 11 of Act No. 7/92 makes express provision for the principle of equality, by establishing that "conscientious objectors enjoy all the rights and are subject to all the duties provided by the Constitution and by the law for citizens in general, which are not incompatible with the situation of conscientious objector".

<sup>15</sup> Together with regulation of paternal authority, loss of parental authority, guardianship of minors and administration of a minor's assets.

<sup>16</sup> Available on the Internet - <http://www.seg-social.pt/>.

<sup>17</sup> We are describing the Procurator's application in the past because the Constitutional Court considered that the association had already been disbanded, even before the judgement, which was one of the bases on which it rejected the Procurator-General's application.

-----