FUNDAMENTAL RIGHTS SERIES

E.U. NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
(CFR-CDF)
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN PORTUGAL IN 2003

January 2004

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[*] submitted to the Network by Professor Vital Moreira within the Human Rights Centre of *Ius Gentium Conimbrigae*, at the Faculty of Law of the University of Coimbra.

Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice et affaires intérieures), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Elvira Baltutyte (Lituanie), Florence Benoît-Rohmer (France), Martin Buzinger (Rép. Slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (Danemark), Henri Labayle (France), Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Dean Spielmann (Luxembourg), Pavel Sturma (Rép. Tchèque), Ineta Ziemele (Lettonie). Le Réseau est coordonné par Olivier De Schutter, assisté par Valérie Verbruggen.
Les documents du Réseau peuvent être consultés via :
http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_fr.htm

The **EU Network of Independent Experts on Fundamental Rights** has been set up by the European Commission (DG Justice and Home Affairs), upon request of the European Parliament. Since 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. A Report is prepared on each Member State, by a Member of the Network, under his/her own responsibility. The activities of the institutions of the European Union are evaluated in a separated report, prepared for the Network by the coordinator. On the basis of these (26) Reports, the members of the Network prepare a Synthesis Report, which identifies the main areas of concern and makes certain recommendations. The conclusions and recommendations are submitted to the institutions of the Union. The content of the Report is not binding on the institutions.

The EU Network of Independent Experts on Fundamental Rights is composed of Elvira Baltutyte (Lithuania), Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (Denmark), Henri Labayle (France), Rick Lawson (The Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Dean Spielmann (Luxembourg), Pavel Sturma (Czech Republic), Ineta Ziemele (Latvia). The Network is coordinated by Olivier De Schutter, with the assistance of Valérie Verbruggen.
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CONTENTS

PRELIMINARY REMARKS

The portuguese report elaborated under the coordination of the Human Rights Centre of *Ius Gentium Conimbrigae* is the product of the joint efforts of several people. Upon writing it, we, Vital Moreira, Director of the Human Rights Centre of *Ius Gentium Conimbrigae* and Ana Luísa Riquito, Vice-Director, have counted with the invaluable contribution of several colleagues with special expertise on some rights, who have helped us managing the latest developments and refining our argument: Catarina Castro (LL.M), Assistant Lecturer of the Faculty of Law of the University of Coimbra, Mr. André Pereira, Assistant Lecturer of the Faculty of Law of the University of Coimbra Mrs. Alexandra Aragão (LL.M), Faculty of Law of the University of Coimbra, Ms. Carla Gomes, Executive Director of the Human Rights centre of *Ius gentium Conimbrigae* , Mrs. Helena Moniz (LL.M.), Assistant Lecturer of the Faculty of Law of the University of Coimbra. To all we would like to express our deepest gratitude. The writing and final outlook of the totality of the report is the entire responsibility of Vital Moreira and Ana Luísa Riquito. Any errors are ours alone.

Data Gathering Methodology:
The Human Rights Centre, in due time, has sent a letter to countless NGOs operating in the Human Rights field, accounting for the task it was accomplishing within the Network and urging them to send us their contributions, thus, opening up a direct channel of communication so that they could express before us their particular concerns. With the exception of the Portuguese Committee on Refugees (*Comité Português para os Refugiados*) and the portuguese Section of Amnesty International, no other answers were received, which is, we believe, partially the result of the relative degree of underdevelopment of the civil society sector in our State, on this field, and of the fact that the position of the few organisations which are indeed active and less amateurish is easily known of the public at large and, therefore, of us too. We do hope, however, that, in the future, they will gain the habit of making a specific contribution to our annual report.

No answers were received from any of the political parties or unions contacted, either.
Likewise, from the many public institutions we tried to liaise with, only two provided us with a very short reply and on very general terms; this is partially overcome by the fact that many do practice a policy of transparency and account themselves for some of the problems faced in their websites and other institutional advertisement material.

The same occurs in relation to the most important national institutions, playing a key role in human rights, which all publicise their activities and decisions, though sometimes with a delay that has made it impossible for us to account for all developments. In relation to the Constitutional Court (*TC-Tribunal Constitucional)*, the Ombusdman (*Provedor de Justiça*) and the High Commissioner for Immigration and Ethnic Minorities (*ACIME-Alto Comissário para a Imigração e Minorias Étnicas)*, however, we would like to confess our task has been made easier by the fact there is a nice healthy practice of "inside trading" between each one of them and our own Human Rights Centre.

In relation to statistics, sometimes they simply did not exist at all, were unavailable in relation to the year under review or were too unreliable to become sources of our report. In relation to some structural problems, which persist throughout the years, we have, at times, referred to anterior statistical figures, which we have deemed to be still representative of the dimension of the realities they point out to.

2003 in its outlook:
2003 has already been named a *annus horribilis* for Portugal; in fact, besides a moment of huge economic crisis, with the unemployment rate raising exponentially and the consumers' power decreasing rapidly, the whole country has now spent months in a state of shock, with the permanently televised news about a case involving massive crimes against the sexual self

determination of children and adolescents, under the custody of a public care institution. In the context of this mega process, known as the *Casa Pia case*, prominent state figures, such as a former Minister of State, a very popular TV entertainer, a retired Ambassador and others have been put for months under remand custody. The contours of the case are terrible, but they were aggravated by the extreme length of justice in producing even an accusation, as well as, by the constant public disclosure of the content of phone tapping, which included the private phone of the leader of the major party of the opposition, a state counsellor to the President, etc. This has drawn attention to many practical problems in the Administration of Justice, in particular of criminal justice, and there is no Portuguese who, by now, is unable, to state her own opinion about the constitutionality of certain means of obtaining evidence, the devastating effects for presumption of innocence of anonym letters…

2003, thus, is a year marked by the discussion around the right to a fair trial and by a popular cry for a revolution in the unbearably lengthy system of administration of justice.

This atmosphere became even cloudier with the recent publication by the office of the Ombudsman (*Provedor de Justiça)* of an exhaustive and utterly well documented report of over 900 pages on the situation of every and each one of the 55 portuguese jails[1]. In his presentation of the report to the media, the Ombudsman has not spared his words, qualifying the situation as dramatic, in relation to overcrowding, excessive and unnecessary use of remand custody, inter-prisioner violence, incidence of HIV and other infectious contagious diseases amongst detainees, generalised trade of drugs, etc. Nor has he hesitated propounding drastic and polemical measures such as the creation of rooms, with free access to drugs for addicted convicts.

The year also brought about a significant change in the regulation of labour relations and workers' rights, with the approval, following strong contestation by Unions and a legal dispute, which involved an important decision of the Constitutional Court, of a new comprehensive Labour Code, aimed at rendering more flexible the employment market.[2]It was indeed contended that the former regulations, besides their piece meal approach, which had to combine very old norms and successive newer ones, were too guarantistic, contributed greatly to the rigidity of economic life and, therefore, were an obstacle to modernization of enterprises, namely in industry and the tertiary.

Although a change in the immigration policy – one of a restrictionist character - was also announced at the beginning of the year with the enactment of a new immigration law, the shift has been less dramatic than foreseen, partially because the law remains unregulated, but also because Portugal, busy with building up the stadiums for the Euro 2004, still has jobs to offer. Nevertheless, the precarious situation of many migrants, the high number of clandestines, coupled with an unusually "nationalistic"- to say the least – tone in the discourse adopted by some, has consolidated integration and non-discrimination matters as serious issues of concern, in a society, traditionally of emigration and relatively homogeneous.

Finally, in 2003, two very important reports on the human rights situation in Portugal were launched. After a ten-year silence, Portugal resumed its obligation of reporting under the ICCPR; although it has done so, in written, by a submission describing only the formal legal framework for the enjoyment of first generation rights, the Concluding Observations of the Human Rights Committee[3], of the 5th July 2003, accurately voiced, in anticipation, many of our own concerns, which stem, most of them, from notorious flaws in the implementation of rights. The same occurs with the excellent and straightforward report of Mr. Gil Robles, Commissioner for Human Rights of the Council of Europe, on a three-day visit he carried out

[1] http://www.provedor-jus.pt/publicacoes/Rel2003Prisoes/RelPrisoes2003.pdf
[2] http://www.msst.gov.pt/doc/Cod_Trabalho.pdf
[3] http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.PRT.En?Opendocument

to Portugal, of the 19th December 2003[4]. More than a source of inspiration, both these documents confirmed most of the priorities we elected in writing this report and comforted our intuitions.

[4] http://www.coe.int/T/F/Commissaire_D.H/Unit%E9_de_Communication/CommDH(2003)14_F.pdf

CHAPTER I : DIGNITY

Article 1. Human dignity

No significant developments to be reported.

Article 2. Right to life

National legislation, regulation and case law

Fight Against Human Trafficking:

Decree of Law 34/2003, of the 25th February 2003, besides introducing substantial changes to the rules on entry, permanence, stay, removal and expulsion of aliens from national territory, by amending Decree of Law 244/98[5], was also enacted with the purpose of transposing to the portuguese legal order Directives 2001/51/CE and 2002/90/CE[6]. Thus Decree-Law 244/98 made already aiding illegal immigration a crime punishable by up to three years imprisonment. This legislation is now supplemented with the criminalization of the conduct amounting to assisting the continued presence of irregular migrants and aiding the irregular transit of migrants with gainful intentions. Act 99/2001, amending article 169ª of the Portuguese Penal Code, already criminalized the trafficking of prostitutes for foreign consumption and the slavery provisions of article 159, also relevant in this context, provide for a maximum sentence of 15 years.

Moreover, Article 21º of Decree-Law 34/2003 establishes the responsibility of the carrier, who is obliged to promote the return in the shortest possible delay to the place where the illegal alien started using the means of transport or, in case this has become impossible, to the place where the travelling document was emitted. While that does not occur, the passenger is taken care of by the carrier himself, who must also pay for his/her stay at the centre of temporary accommodation. Most importantly, the affirmation of this responsibility, which was already known of the portuguese law, has now been completed, by Chapters X and XII of

[5] Decree of Law 34/2003 constitutes the third amendment to the Act on Entry, Permanence, Stay, Removal and Expulsion of Aliens from National Territory, following the changes successively introduced by Law 97/99, of the 26th July 1999 and Decree of Law 4/2001, of the 10th of January 2001; the latter had instituted a special temporary work permit for aliens, designed at facilitating their access to the labour market, which has now been revoked. Throughout the text, I shall refer to the articles with the numeration they got after the insertion in Decree of Law 244/98, that is, to an updated version of this document, as it now rules, condensing all the changes in force, suffered throughout the time.

[6] According to article 165º of the portuguese Constitution, all acts relating to fundamental rights fall within the exclusive competence of Parliament, which can, however, trough a Law of Legislative Authorization, and within the limits set by it, allow the Executive to legislate on the topic. In the latter case, the Law of Legislative authorization must, according to art. 165º 2 of the Constitution, define the object, the scope and the extension of the permit granted to the Executive, as well as set a deadline or time limit, for the executive to make use of it. In the present case, Decree of Law 34/2003, follows Parliament Act of Legislative Authorization 22/2002 of the 21st August 2002, which complied with the "minimum content" constitutional requirement for acts of such nature, namely by giving the Executive 120 days, following its entry into force, to enact the subsequent Decree of Law. There are no signs that the authorization has been prorogued, which would have been a possibility, according still to art. 165º2. The Executive has, then, clearly exceeded the time frame imposed by the Parliament and, therefore, Decree of Law 34/2003 is both illegal and vitiated by an organic and a formal unconstitutionality. The sanction corresponding to the non-compliance with this requirement is the nullity of all the Decree of Law. Since the latter has not been the object of a preventive control of constitutionality, the problem has not been raised, so far. However, taking into consideration Portugal has a mixed system of control of the conformity of legislation to the Constitution, the unconstitutionality of Decree of Law 34/2003 can still be argued, at all times, both before the common courts, through the mechanism of judicial review, or directly before the Constitutional Court, by the President, the President of Parliament, the Prime Minister, the Provedor de Justiça (*Ombudsman),* the Procurador-Geral (*General Attorney)*, or one tenth of the members of Parliament.

the new act; the first regulates individual and corporate criminal liability for the crimes of aid to illegal migration, association to aid illegal migration and the entry, permanence and illegal transit in the territory of Portugal. Chapter XII, on its turn, creates a system of fines, which may be imposed upon both the unauthorized migrant, the carrier and the legal person employing him or her.

On 11th of July 2003, Portugal and Brasil have signed a Cooperation Agreement for the Prevention and Repression of the Unlawful Traffic of Migrants (*Acordo de Cooperação entre a República Federativa do Brasil e Portugal para a Prevenção e Repressão do Tráfico Ilícito de Imigrantes)*, which, bearing in mind both States are parties to the Additional Protocol to the UN Convention Against Organized Transnational Crime and the high influx of migration flows between the two countries, opens up channels for the exchange of information, experience and *know how* in the field. The two entities responsible for the implementation of the agreement will be, for Portugal, the Aliens and Frontiers' Service (*SEF- Serviço de Estrangeiros e Fronteiras)* and, for Brasil, the General-Coordinator of the Immigration Police of the Department of Federal Police (*CGPI- Coordenação-Geral da Polícia de Imigração)*.

They will develop schemes, *inter alia,* for exchanging information, in relation to criminal procedures and control of migration, detection of false documentation, within the Mercosul and the European Union and for providing people working on the field with adequate training on these matters. Mutual technical visits to the border control authorities of each State are also envisaged, as well as the reinforcement of the connection between all public bodies intervening in migration flows.

It is hoped this cooperation will help stop the phenomenon of trafficking, in particular, of brasilian women for prostitution purposes, which goes on being often reported by the media.

Protection of Victims of Human Trafficking (in particular, vulnerable witness protection):
Decree of Law 190/2003, of the 22nd of August 2003 aims at finally regulating Law 93/99, of the 14th July 1999, which already foresaw the protection of witness of violent crimes, such as trafficking, especially when they require the secrecy of their identity. It is now determined the public prosecutor will be responsible for a preliminary checking of the elegibility of the witness to keep the secrecy of its identity and the concession of this measure will be decided upon the investigation magistrate (*juiz de instrução).* In case it is granted, confidentiality is assured throughout the whole process by means of attribution of a different name, address, to which only one designed judge will have access. The person may also be granted special protection by the police or be moved to a prison where her safety is ensured. Moreover, special security programs *(programas especiais de segurança)* are created and will be decided upon by the Commission for Special Security Programs, which will have the power to decide who can qualify for them. Such programs may go as far as removing a person from her habitual life, attributing to her a different identity and promoting her insertion in professional life elsewhere, in order to guarantee her security.

Though notable, on a negative note, the regime of witness protection may pose problems, in what concerns "declarations for future memory" and "deposition through teleconference", as they might conflict with the right of the accused to face his accuser and the cardinal principle of the presumption of innocence. This problem has already been raised in the context of the investigation relating to a major case of crimes against the sexual self-determination of minors[7].

[7] See, *infra,* in detail, commentary to art. 48º

Domestic Violence:

A *Second National Plan Against Domestic Violence*, covering the period *2003-2006*, was adopted in June this year. It starts out by revealing that available statistics suggest **5 women a week die in Portugal as a direct or indirect result of several forms of domestic violence**: spanking, rape, sexual abuse, incest and house imprisonment. 11,765 cases of domestic violence, (1.19 per 1000 inhabitants), were recorded by the police in 2002 and the number of unreported incidents is, as in most countries, certainly higher still. The issue of domestic violence in Portugal has since the late 90's finally aroused in public debate, which has resulted in many legislative and practical initiatives. Unfortunately the majority of these initiatives have been either poorly implemented or are still rarely applied. The *Second National Plan on the Eradication of Domestic Violence* approved in 2003, for the forthcoming three years, tries to address flaws in implementation: it requires, for instance, the greater training of judges in the use of restraining orders and repeats the objective of the creation of a national network of support centres laid down in Law No. 129/99. It also foresees a revision of the compensation procedure for victims of domestic violence foreseen by Law No. 129/99. Portuguese legislation on domestic violence is, certainly, exemplary. Domestic violence is an offence under criminal law defined as the "physical or psychological ill-treatment of a spouse, minor or disabled person[8]" and carries a sentence of between one and five years. Law No. 61/91, the first major piece of legislation devoted exclusively to domestic violence, provides for a raft of preventive and awareness-raising measures as well as numerous protection mechanisms for female victims of domestic violence. Subsequent legislative developments notably include Law No. 59/98, introducing the possibility of barring assailants from the family home into article 200 of the Code of Criminal Procedure[9], and Law No. 129/99, which requires the state to provide compensation to victims in the event of the assailant being unable to do so. Law No. 7/2000 has made domestic violence a public offence (*crime público*), placing an obligation on the prosecution service to investigate allegations of domestic violence brought to its attention.

Practice of National Authorities:

As suggested above, this excellent legal framework is not always respected: compensation and restraining orders, in particular, are still quite rarely applied.

Implementation has also been a problem for the many of the practical initiatives announced over the last decade. The creation, for instance, of police units specialised in the treatment of victims of domestic violence foreseen in Law No. 61/91 has not happened. The most obvious failure, however, arises in respect of the creation of a network of reception and assistance centres for victims of domestic violence, foreseen in the 1st National Plan against Domestic Violence of 1999. Law No. 129/99 subsequently required the establishment of such centres in each administrative district of Portugal. According to the *Commission for Equality and Women's Rights* a total of 22 are currently operational; however, these are perceived by the NGO community as largely insufficient to respond to a problem of such social weight.

Notable success has, however, been achieved through the INOVAR programme, which was launched in 1999 to improve the responsiveness of the police to victims of crime. Similarly, effective training programmes are widely acknowledged to have resulted in the increased sensitivity of police officers to the complexities of domestic violence cases.

[8] A subsequent amendment to article 152 of the Criminal Code has extended this provision to persons living together as husband and wife

[9] 152 of the criminal also provides for the imposition of restraining orders

Article 3. Right to the integrity of the person

National legislation, regulation and case law

Portugal signed on the 21st February 2003 the Additional Protocol to the European Convention on Human Rights and Biomedicine on Human Organs and Tissue Transplantation.

Non-Conventional Medicine:

Law 45/2003, of the 22nd August 2003, also called the General Act on Non-Conventional Medicine has come to cover an important gap, regulating, for the first time in Portugal, non-conventional medicine, such as acupuncture, homeopathy, osteopathy, naturopathy, fitotherapy e quiropraxis (Art. 3, 2). Art. 10, 1 prescribes that only professionals with legally recognized habilitations may perform this medicine, following due authorization. For criminal effects, alternative medicine is equivalent to conventional medicine (Art. 18). The Act also reiterates rules on "informed consent" and "informed choice" by the patient (Art. 13).

Parliament's Resolution 64/2003 obliges the Government to regulate in detail the practice of osteopathy.

Clinical Trials:

Directive 2001/20/EC is at the moment in the process of being transposed into national law. The most important change that will probably occur is the process of authorization of the clinical trials, since a National Ethics Committee, and not the local Ethics Review Boards will be in charge of all clinical trials. Research with children and incapable adults will also be less restrictive: law in force still prohibits all kind of non-therapeutic research; the forthcoming legislation will allow, in well regulated circumstances, some non-therapeutic research with children and incompetents.

Stem cell research, Embryo protection:

Stem cell research and Embryo protection has been an issue of debate in the Portuguese legal and scientific community, this year. The government, thus, created a Committee in order to study this subject and to publish a Report.[10] Some parliamentary Parties are preparing Draft-legislation on Embryo protection, stem cell research and medically assisted procreation.

The Right to Integrity of the Person at Work:

Art. 15 ff. of the New Labour Code provides for the enjoyment of personal rights by the worker.(e.g., freedom of speech and opinion, privacy, data protection). In particular, art. 18 protects the right to respect for physical and mental integrity of the worker and Art. 19 forbids, as a general rule, medical examinations at the working place not regulated by law, except if those are necessary for the protection of third parties or of the worker herself. Pregnancy tests are absolutely forbidden.

Art. 30 has a special rule concerning genetic inheritance: it prohibits or limits jobs that may create a risk for the worker's or his descendant's genetic inheritance.

Decree-Law 30/2003, 14 February, regulates *medical devices*, and implements into national order Directive 92/42/EEC, 97/79/EEC, 2000/70/EC and 2001/104/EC.

[10] Daniel Serrão, *Livro Branco Sobre Uso de Embriões Humanos em Investigação Científica*, Ministério da Ciência e do Ensino Superior, Fevereiro de 2003.

Article 4. Prohibition of torture and inhuman or degrading treatment or punishment

Practice of national authorities

Serious Overcrowding of Prisons[11]:

The conditions in Portuguese prisons have been a concern of the Committee for the Prevention of Torture (CPT) for some time, with visits in 1992 and 1995 already identifying shortcomings with respect to material conditions, drug abuse and inter-prisoner violence in a number of Portuguese prisons. Its 1999 report recorded some progress on previous years and noted the sincere attempts of the Portuguese authorities to address these problems. It is obvious, however, that several difficulties remain in 2003.

Many of the problems faced have their origins in serious over-crowding. On the 1st September 2003, the total prison population was 14,060 compared to a capacity of 11,603 (an over-crowding, therefore, of 21.2%). At approximately 130 detainees per 100,000 inhabitants, Portugal's prison population is well above the European Union average (of about 80), whilst its crime rate, by contrast, is amongst the lowest. It is clear, therefore, that policies to reduce the number of prisoners and increase the capacity of the prison service are of the utmost urgency.

The 30% increase in the prison population since the early 1990s has primarily been accommodated by reopening old facilities and stretching the capacities of existing establishments to the limit, with several now being used to detain categories of inmate they were not originally intended for. A three-fold increase in the infrastructure budget and a doubling of the budget for running costs between 1995 and 2001 has certainly secured a significant improvement in the living and material conditions in existing prisons in recent years. The construction of new detention facilities has not, however, received the necessary attention.

New prisons, variously foreseen in previous action plans, have either never been started or remain incomplete. The construction of a new prison for 550 persons in Carregueira, for instance, was authorised in 1997, but it only recently opened with a provisional capacity of 94 persons and has a population of 288 inmates already[12]. A special prison for juveniles in Viseu, foreseen by the same act, has not even been begun. The construction of a new wing in Paços de Ferreira prison is at least nearing completion and is intended to house the overflow from the central Oporto prison, which has been the object of particular criticism by the CPT. The fact that Paços de Ferreira is itself overpopulated by 50% gives an indication of the scale of the problem and the urgency of releasing additional funds for the completion of new detention facilities, the necessity of which has been already acknowledged for some time[13].
Extremely high rates of drug addiction and HIV bearers:

The situation in Oporto Central Prison, whilst an extreme example, highlights the problems that have arisen within the Portuguese prison service. Over-crowding in prisons ill adapted to the types of inmate detained has made it difficult to control drug abuse and the resulting inter-prisoner violence. Drug abuse is estimated to extend to 50% of the prison population and is

[11] This Chapter draws almost entirely on the report of the Ombudsman on the situation of the 55 portuguese jails, available http://www.provedor-jus.pt/publicacoes/Rel2003Prisoes/RelPrisoes2003.pdf
As stated before it is an extremely exhaustive and well documented report of over 900 pages. Upon releasing it for the public at large, the Ombudsman has stressed that, even though the dramatic situation experienced was already well-known, now that such a study had been carried out, it would be inadmissible that public authorities and namely the Minister of Justice would turn a blind eye on it.
[12] On 1st September 2003. Since then the capacity has increased to 300 beds and is due to rise to a final capacity of 610 by the end of the year.
[13] The new wing in Paços de Ferreira has recently opened, increasing its current capacity to 300 beds.

now a serious problem. In addition to the security concerns that result (4 persons died as a result of inter-prisoner violence in 2002), the pervasive consumption of drugs is becoming a serious health hazard. Some 300 persons are already known to be HIV positive and its further spread is inevitable unless attempts are made to address this problem. High suicide rates (20 in 2001) reflect these concerns. On a more positive note, the ill-treatment of inmates by prison staff is widely acknowledged to have declined significantly over the last decade, though a number of complaints are still recorded each year by the Ombudsman and Bar association.

Initiatives to tackle drug addiction in prisons have already been launched. At the Lisbon Prison Establishment an innovative programme consisting in the creation of drug free wings (*unidades livres de droga*). There are currently 5 such programmes running in different prisons throughout Portugal and the impressions gained by the team of the Ombudsman is that the experience was is being extremely positive. Problems are raised, however, regarding the fate of detainees following the completion of the course. Too often, it appears, they return to the ordinary prison regimes or find themselves restored to civil life with inadequate assistance or supervision. Whilst numerous protocols exist between the Prison service and public service providers regarding the employment of such detainees, real opportunities are apparently limited in practise. The continued supervision of such persons ought, however, to represent an important part of the work of the Institute of Social Reinsertion. More attention to the reintegration of detainees into the ordinary custodial regime or the outside world is vital if such excellent work is not to be wasted. It would also be desirable for the programmes to be extended to other particularly problematic prisons.

A Commission on the Study and Debate on the Reform of the Prison System has been established to examine all these issues in greater detail. The problems of the Portuguese prison service require more than piecemeal tinkering to resolve. It is to be hoped that the broad and structural recommendations currently being elaborated are implemented effectively.

Conduct of Law-Enforcement Agents:
A number of concerns continue to be raised regarding ill treatment and deaths in police custody, and the excessive use of force and fatal shootings by police officers on duty. It should be noted, however, that allegations and indications of police brutality have decreased markedly over the last decade. Considerable resources have, indeed, been spent on the improvement of police detention facilities and the increased training of police officers over this period.

The establishment, in 1996, of the Inspectorate General of Internal Administration (*IGAI - Inspecção Geral da Administração Interna*) has also contributed significantly to this development. The IGAI's three main functions are to carry out random inspections of police establishments, to investigate and suggest disciplinary measures in respect of improper police behaviour and, lastly, to make general recommendations regarding the respect for human rights by law enforcement agencies.

The IGAI inspected 63 police stations without warning in 2002 and was broadly content with its findings. Also in 2002, the IGAI opened 20 preliminary investigations into serious incidents leading to 11 acquittals, 3 full investigations and 5 disciplinary proceedings[14]. The IGAI conducted a total of 20 full investigations, which resulted in a further 6 disciplinary proceedings. Of the 34 disciplinary proceedings underway in 2002, 16 were completed, resulting in the application of disciplinary measures in 3 instances. A further 283 administrative proceedings for lesser abuses were initiated.

[14] With the twentieth case still pending at years' end

In the most serious cases, investigations are opened automatically: thus the 5 deaths as a result of police behaviour, the 6 woundings with firearms and the 3 suicides in police custody in 2002 all gave rise to investigations. In respect of the deaths in 2002, 3 cases were still pending at end of 2002 and 1 case resulted in acquittal. In the 5th case, the fatal shooting of Mr. Antonio Perreira in Bela Vista, Setúbal, disciplinary measures were suggested in the light of the conclusion that the officer in question ought to have been better acquainted with the possibly fatal consequences of shotgun fire over short-distances. This last case, the subject of considerable publicity, highlighted several inadequacies in the regulations and training given to officers regarding the use of fatal and, supposedly, non-fatal firearms such as shotguns. The IGAI has been sensitive to these shortcomings and recommended several measures that ought to implemented as rapidly as possible.

In general the IGAI investigations and disciplinary measures can be said to have had a positive impact on the respect for human rights by police officers. A number of improvements might be made, however, that would reduce impunity and improve the effectiveness of the IGAI's proceedings still further.

In principle the criminal investigations launched by the public prosecutor and the disciplinary proceedings launched by the IGAI are entirely independent. In practise, however, disciplinary proceedings have been suspended pending the outcome of criminal proceedings, and dropped altogether on the termination of criminal investigations. This is regrettable since internal investigators should be able to obtain more information, within a shorter delay, than public prosecutors are be able to. The continuation of internal proceedings is also important to the impression of a police force intent on addressing and resolving its problems itself. Reducing the duration of the IGAI's lengthy three-stage procedure, from initial investigation, to full investigation to disciplinary hearing, would also be desirable.[15]

Article 5. Prohibition of slavery and forced labour

National legislation, regulation and case law

On 11th of July 2003, Portugal and Brasil have signed a Cooperation Agreement for the Prevention and Repression of the Unlawful Traffic of Migrants[16] It is hoped this cooperation will help stop the phenomenon of trafficking, in particular, of brasilian women for prostitution purposes, which goes on being often reported by the media.

Reasons for concern

The most significant problem faced by Portugal in relation to the prohibition of forced labour would appear to be the exploitation of foreign labour by unscrupulous employers[17]. This is primarily, though not exclusively, a problem for the between 35 and 50,000 irregular workers remaining in Portugal, who are frequently employed in the construction industry for low wages and without health or accident insurance. Regular immigrants may also be affected however, since the requirement of a valid employment contract for the annual renewal of "permission to stay" (*autorização de permanência)* permits greatly strengthens the position of employers, particularly given the average length of employment cases. The need for effective supervision by the General Inspectorate of Labour (*Inspecçao Geral de Trabalho*), particularly in industries easily identified as employing foreigners is evident. The legal requirement that employees forward copies of contracts with foreign workers to the IGT is certainly a welcome provision, as are the reforms penalising the employment of irregular

[15] It is possible for the IGAI to proceed directly to a disciplinary hearing after the initial investigation.
[16] In detail, see *supra*, art. 2
[17] In relation to child labour, see *infra* commentary to art.32.

foreign labour However, whilst the quality of the IGT's work is generally respected, it is also clear it is under-funded and under-staffed to carry out its monitoring tasks effectively. Measures to reinforce this organ are, therefore, to be greatly encouraged.

In relation to the sexual exploitation of women, especially migrant women, the same need to multiply investigation and inspections applies.

Finally, 2003 has been the year in which child pornography and crimes against the sexual self determination of minors have been most discussed. It is believed that, not only authorities, but also the population in general is now much more aware of the need to denounce such practices. The provision of more investigative means to police authorities on this matter also appears to be mandatory.

CHAPTER II : FREEDOMS

Article 6. Right to liberty and security

National legislation, regulation and case law

Discussion on some subject matters relating to the right to security has already assumed the shape of a project/proposal of Law. Parliament has begun the discussion on the creation of joint investigation teams (Project of Law 250/IX)[18], and on night searches (Project of Law 212/IX[19] and Proposal of Law 209/IX[20]).

Police organisation has also been considered a future object of some changes: Parliament has presented Project of Law 366/IX, on local police, which establishes its assumption of criminal investigation powers[21].

News also came out on a future reform on the use of fire weapons by the police, but no official project has been publicised.

The will to introduce some changes to the information security services organisation has also been publicised by the Government, through the media.

Some reform will take place on private security: Parliament has given authorization to the Government to change the rules on private security, namely the conditions of its practice (Law 29/2003, DR I–A, 193/IX/1, 2003.08.22). The Law considers "private security", the activity intended to protect persons and goods, and to prevent crime, when developed by a private entity.

Parliamentary Law 36/2003 approved some rules on the implementation of Eurojust (DR I-A, 193/IX/1 2003.08.22)[22]. Parliament has also passed new legislation based on the Council Framework Opinion 2002/584/JAI, on the European arrest warrant (Law 65/2003, of 13th June)[23].

Law 52/2003, of 22nd August, on the fight to terrorism (DR I-A, 193/IX/1 2003.08.22), approved in connection with the Council Framework Decision 2002/475/JAI, of 13th June,

[18] The Project may be found on: http://europa.eu.int/eur-lex/en/lif/reg/en_register_193010.html.
[19] Available at http://www3.parlamento.pt/PLC/Iniciativa.aspx?ID_Ini=19493.
[20] Available at: http://www3.parlamento.pt/PLC/Iniciativa.aspx?ID_Ini=19475.
[21] Which can be found on: http://www3.parlamento.pt/PLC/Iniciativa.aspx?ID_Ini=19883.
[22] Available at: http://europa.eu.int/eur-lex/en/lif/reg/en_register_193010.html.
[23] Published at DR I-A, 194/IX/1, 2003.08.23.

introduces some changes on the Portuguese Criminal Code, by eliminating the main provisions concerning terrorist organisations and terrorism, and replacing it. It establishes the new definitions of "terrorist organisations" (article 2) and of "terrorism" (article 4), and includes "international terrorism" (article 5) as a new type of criminal offence. It also approves new rules on criminal responsibility of legal persons (article 6).

Law 52/2003 criminalises the creation, support, or the act of joining an organisation which aims to commit terrorist acts ("terrorist organisations"). "Terrorist organisations" are those who commit certain facts, like crimes against life, physical integrity or personal freedom, crimes against the telecommunications and transportation systems, sabotage, crimes with the use of nuclear energy, fire arms, explosives, fire devices and armed letters, or crimes committed by collapsing buildings, endangering people by causing fires, floods or explosions, releasing of dangerous substances like radioactive substances or toxic gas, by causing plagues, diseases, or by disseminating dangerous plants or animals, by the contamination of the water or food supplies. Differently from the previous rules, this Law also considers "terrorist organisations" those groups engaged on the development of biological or chemical weapons (article 1). All these activities are considered crimes. They will be a crime of "terrorism", if they are accomplished with the purpose of intimidating the population, a group of people or certain people, and also if they are committed with the intention to cause harm to national integrity and independence or to national constitutional entities, to persuade public authority to perform or abstain from performing any act or to admit a certain behaviour. It is also considered as "terrorism", the act of drawing up false administrative documents, or to use extortion or aggravated theft, with the intention to commit terrorist acts. Not only the acts committed with the purpose of damaging national independence, national institutions and national authorities are "terrorism": the actions aiming to compel a Government or international organisation to perform or abstain from performing any act, or to damage the independence or functioning of any Nation or international organisation are considered "international terrorism".

In relation to the right to freedom, although they have not yet been published, the Constitutional Court has publicised the general content of some decisions on criminal investigation rules: the Court has determined that the rule on the court's interrogation powers to a detained person must imply to the detained the right to know some of the facts that have determined the detention. The protection of the secrecy of the investigation, which is here at stake, said to be instrumental for the success, in particular, of complex cases, such as the ones relating to paedophilic organisations, cannot be absolute as the detained must keep the right to know on what grounds he is deprived of his freedom before a complete accusation is formed. The Constitutional Court also decided there was no violation of the constitutional guarantee of *habeas corpus* imposing a maximum delay of 48 hours to the detention without (article 28) a judge's interference, if a judge determines the hearing within the 48 hours, even if it begins only effectively when 49 hours have already passed[24].

An opinion of the General-Attorney Consultative Board (*Conselho Consultivo da Procuradoria-Geral da República)* touched liberty and security issues, too (Opinion 60/2003): it has expressed the view that prisoners can suffer special restrictions to their rights and freedoms if the restriction is imposed to ensure the purpose of the imprisonment, if it is necessary to guarantee other constitutional values and if it constitutes a proportionate measure[25]. The General-Attorney Consultative Board has considered that prisoners could be imposed some restrictions to their freedom of expression if necessary to keep justice's

[24] *Acórdão* 565/2003. The decision may be found on: http://www.tribunalconstitucional.pt/acordaos/acordaos03/501-600/56503.htm.
[25] http://www.dgsi.pt/pgrp.nsf/7fc0bd52c6f5cd5a802568c0003fb410/41231b5a76a2f9ff80256d28003d91a9?OpenDocument.

secrecy, discipline and security of the prison, and the aim of the condemnation. These restrictions could also be imposed to prisoners preventively arrested.

Excessive Duration of Remand Custody:

In relation to the right to freedom, the dramatic situation experienced in Portugal with the extreme length of remand custody *(prisão preventiva)* has not suffered any improvements this year. Lengthy detention on remand gravely prejudices the resumption of the ordinary lives of those acquitted. It can also delay the enjoyment by those subsequently convicted of advantageous custodial regimes. When both frequently applied and of excessive length, detention on remand can also place a considerable burden on prison services ill-equipped to deal with high numbers of remand prisoners.

On 1st September 2003, 4100 persons were being held on remand in Portugal. At 29% of the total prison population, this proportion well exceeds the European average. Whilst the number of persons held on remand at any given moment has, at around 4000[26], remained more or less constant over the last decade, the average length of remand custody has increased over this period.

In 1992, 54.2% of those detained on remand were held for less than 6 months and only 2.7% were held for more than 18. By 2001, the figures were respectively 31.4 and 5.8%. Indeed, by 2001, the most recent year for which statistics exist, the average length of detention on remand stood at 8 months, with 20% (528 out of 2501) of those tried that year spending in excess of 1 year remanded in custody. The fact some 94% of all persons detained on remand are subsequently convicted in no way detracts from the urgent need to reduce the length of remand detentions. Indeed, that an average of 150 innocent persons a year are faced with the real prospect of spending in excess of 12 months in custody is itself of concern.

Whilst examining these figures it ought, however, to be borne in mind that in Portugal detention on remand continues until all possible appeals have been exhausted. This is unlike the majority of European states where the sentence proper begins immediately upon conviction at first instance. Precise statistics regarding the proportion of persons detained on remand whilst awaiting the outcome of appeals do not appear to exist. Most of those spoken to estimated the figure at 25%, which would, in fact, put the proportion of remand to sentenced detainees at close to the European average. The rationale behind this system is that the accused enjoys the presumption of innocence until the last possible decision. It is debatable, however, whether this theoretical entitlement is, in all cases, preferable to the custodial regimes enjoyed by sentenced prisoners. Remand detainees may, for instance, face limitations in their visiting rights and their rights to freedom of speech. Remand prisoners are also unable to benefit from various drug addiction and employment schemes offered to sentenced prisoners, which may be prejudicial to those spending lengthy periods awaiting the outcome of appeals. These considerations apply particularly to the many whose sentences do not, ultimately, greatly exceed the length of time already spent on remand. Moreover, a reclassification would also ease the pressure on the prison service, which is finding it increasingly difficult to detain remand and sentenced prisoners separately.

Practice of national authorities:

Several commentators, moved primarily by the overcrowding in Portuguese prisons, have suggested that judges authorise detention on remand too readily, in a spirit contrary to the

[26] The number of persons detained on remand reached a high of nearly 5000 in 1996 and a low of around 3500 in 1992.

intention of existing legislation.[27] In fact, of the 103,623 individuals tried in 2001, only 2501, or 2.4%, were detained on remand. Judges point to the large increase in drug related offences in respect of which they felt they had little option, given the likelihood of continued offending, but to impose custodial restrictions. Indeed, the proportion of persons held in remand for drug related offences rose from 14 to 44% between 1991 and 2001, whilst the overall level of the application of remand has remained more or less constant. Moreover, whilst 3884 individuals were convicted of drug related offences in 2001, only 1055 (c. 25%) were remanded in custody.

Whilst it is always preferable to reduce the application of pre-trial detention wherever possible, and alternative measures[28] might certainly be encouraged further, the fact remains that the principle problem with respect to custody on remand in Portugal, both for the enjoyment individual rights and the administration of the prison service, is its excessive length. Significant efforts are required to increase the efficiency of the criminal justice system.

Article 7. Respect for private and family life

International case law and concluding observation of international organs

Portugal was convicted by the European Court on Human Rights, in the case *Maire v. Portugal (no. 48206/99), of 26th June 2003*, for a violation of Article 8 of ECHR, on grounds of failure to enforce a court decision awarding custody of a child. It is worth examining this decision, which besides accounting for an intolerable violation of the right to respect for family life and the adequate development of a child's personality, is also paramount of the extreme length of judicial proceedings in Portugal and of the lack of coordination between the judiciary and law enforcement agents, aggravated, in the circumstance, by the transnational nature of the case.

The applicant, Paul Maire, a French national, living in Larnod (France) married S.C., a Portuguese national with whom he had a son, Julien, born in 1995. On the 3rd June 1997, after the applicant had obtained a court order provisionally giving him custody of Julien, the boy's mother abducted him and took him with her to Portugal. In 1998 the Besançon *Tribunal de Grande Instance* granted the couple a divorce and made a residence order awarding custody of Julien to his father and an access order granting visiting rights to his mother. In addition, S.C. was found guilty of abducting a minor and was sentenced to one year imprisonment. A warrant was issued for her arrest.

On 5th June 1997, the applicant applied to the French Ministry of Justice to have the child returned to him. France's central authority duly contacted its Portuguese counterpart, and on 17th July 1997, State Counsel at the Oeiras District Court applied for a court order for the return of the child. The Portuguese authorities consequently took a number of steps to ascertain the child's whereabouts, but were unable to trace him. On 14th December 2001, Julien and his mother were found by the criminal investigation department. Later that day, the child was placed in a foster home.

[27] The current legal regime states that custody on remand should be an exceptional measure (article 28 of the Constitution) and used applied where other measures less restrictive of individual liberty are inadequate (article 193 Code of Criminal Procedure) for reasons of public safety or possible flight (article 204) and that the maximum penalty for the offence of which the defendant stands accused is at least three years imprisonment (article 202).

[28] Such as electronic tagging as foreseen by para 2 of art 201 of the Code of Criminal Procedure and elaborated on in Law nº 122/99. Electronic tagging, managed by the *Instituto de Reinserção Social*, was introduced in the Lisbon area on 1st January 2002 and in Oporto in October of this year. The success of this measure renders its more widespread application highly desirable.

Submitting that the child had settled into his new surroundings, State Counsel requested the Cascais Family Affairs Court to vary the order of the Besançon tribunal de grande instance and to award parental responsibility to the child's mother. On 21st December 2001 the court returned Julien to his mother and provisionally awarded her custody. Subsequently, in May 2002, the court granted the applicant access.

Relying on Article 8 (right to respect for private and family life) of the Convention, the applicant complained of the Portuguese authorities' inactivity and negligence in failing to enforce the judicial decisions awarding him custody of his child.

The European Court on Human Rights, then, reiterated that Article 8 of the Convention included a parent's right to have measures taken with a view to being reunited with his or her child, and an obligation on the national authorities to take such measures. The positive obligations imposed on the Contracting States by Article 8 of the Convention with regard to reuniting a parent with his or her children had to be interpreted in the light of the Hague Convention of 25th October 1980 on the Civil Aspects of International Child Abduction and the International Convention on the Rights of the Child of 20th November 1989.

In the present case, the Court had to determine whether the Portuguese authorities had taken all the steps that could reasonably be expected of them to enforce the decisions of the French courts. In that connection, the Court reiterated that in cases of this kind the adequacy of a measure was to be judged by the *swiftness of its implementation*. Custody proceedings required urgent handling as the passage of time could have irremediable consequences for relations between the child and the parent from whom he or she was unduly separated. Here, although no substantial periods of inactivity were attributable to the authorities dealing with the case during the initial stage of the proceedings, the Court found it hard to understand how those authorities had not managed to summon S.C. to appear.

The Court accepted that the difficulties in ascertaining the child's whereabouts had been chiefly due to the conduct of the child's mother, but considered that the authorities should have taken appropriate measures to punish her lack of cooperation. The lengthy period that had elapsed before the child had been found had created a factual situation that was unfavourable to the applicant, particularly in view of the child's tender age. In such circumstances, the Court considered that the Portuguese authorities had not made adequate and effective efforts to enforce the applicant's right to the return of his child. It therefore held unanimously that there had been a violation of Article 8 of the Convention and awarded the applicant EUR 20,000 euros for non-pecuniary damage and EUR 6,100 for costs and expenses.

National legislation, regulation and case law

Right to family reunion:

Rules on family reunion have become, this year, stricter – "more demanding", in the wording of the Preamble of the new regulation - than before. Decree of Law 34/2003 of the 25th February 2003 limits the automatic right to family reunion to those foreigners in possession of a valid "residence" permit (*autorização de residência*) for at least one year. In practice, this amounts to an exclusion of all foreigners in possession of a "permission to stay" (*autorização de permanência*) or work permits *(visto de trabalho)*, who may apply for "residence" permits only after 5 years of legal residence in Portugal. On the 31st March 2003, this was a universe of around some 179,165 persons For possessors of a "permission to stay permit", an automatic right to family reunion is, therefore, acquired only 6 years after arrival. Foreigners with "permission to stay permits" may be granted family reunion, but on less advantageous terms than those with residence permits, as their family members will only be awarded temporary stay visas. Moreover, the granting of such visas is to be decided upon by

Portuguese consular officials in accordance with criteria to be defined by a directive which is foreseen by article 38(1)c of Decree-Law 34/2003, but which, at the time of writing, had still not been prepared.

Workers' Right to Privacy:

Workers data protection was also an important issue in 2003. A new labour Act has passed, bringing with it some new rules on workers data protection[29]. The Project of Law on the basis of it was submitted to the Data Protection Authority opinion (8/2003)[30], which, among other commentaries, has criticised the possibility for the employer to collect personal information on the worker's health and/or pregnancy, when necessary "due to the particular nature of the work". The non determinability of this rule – which does impose neither safety nor health reasons to the information demand – was considered a violation of privacy.

The President has decided to argue the Project of Law's violation of the Constitution before the Constitutional Court, namely on this argument. The Constitutional Court hasn't entirely agreed. It has considered that the rule does not violate the worker's privacy (on the basis of article 26 of the Portuguese Constitution, protecting, among other rights, the right to privacy): by sentence of 25th June 2003 (*Acórdão* 306/03)[31], the Constitutional Court has considered that health data or pregnancy data of job applicants concern their private life, but has decided that the rule admitting their recollection exclusively "due to the particular nature of the job" does not violate article 26 of the Constitution: the "particular nature" of the task would, by itself, explain the collection of data. Nevertheless, the Constitutional Court has considered that the rule violated the principle of proportionality, when it admitted the employer to have knowledge on those health or pregnancy data. It has declared that it would be enough for the labour doctor to know these particular data, and that the employer should only be given access to the "fit"/"unfit" result.

The Data Protection Authority has also criticised the new labour legislation on behalf of its omissions: it does not rule on the use of workers biometrics, or on the Internet use control. Nevertheless, the legislation has introduced special rules on workers' privacy (article 16 imposes to the employer the respect for employees' private life), data protection (article 17) and video surveillance (article 20)[32].

Data protection rules reinforce the general rules: any data processing must only use the necessary and proportional data, the employee has the right to be informed on the processing, on data involved and on its purpose, and he has the right to up date and correct its own personal information. In what concerns health data, legislation now respects the Constitutional Court decision.

In what concerns video surveillance, the Law forbids its use to control employers' performances at work. However, it may be used for safety and security reasons, if information is given to the worker.

The confidentiality of employees' messages, including e-mail messages, is now guaranteed by law (article 21 of the New Labour Code).

[29] The previous traditional data protection regime is described, in English, by CASTRO, Catarina, "Portuguese Report", *Employment privacy law in the European Union: surveillance and monitoring*, Intersentia, Antuérpia, 2002; and also, «Portuguese Report», *Employment privacy law in the European Union: human resources and sensitive data,* Intersentia, Antuérpia, 2003.
[30] Which may be found on: http://www.cnpd.pt/actos/par/2003/par008-03.htm.
[31] It is published on http://www.tribunalconstitucional.pt/jurisprudencia.htm.
[32] The final version of the Law, which has entered into force on the 1st December 2003, is available at: http://www.msst.gov.pt/doc/Cod_Trabalho.pdf.

Private Life and Criminal Investigation:

Phone tapping may be ordered or authorized by the judge in the case of crimes punishable by a prison sentence of more than three years, or for crimes relating to the trafficking of drugs, arms, explosive materials or the equivalents; smuggling; crimes of libel, threat, coercion, the invasion of private life and disturbance of the peace, when committed by means of telephone. In these cases, phone tapping may only be used when "there are reasons to believe that the use of it will be revealed to be of great interest for the discovery of the truth or for proof" (Art. 187º, No. 1). Nevertheless, the interception of communications between the defendant and his attorney is prohibited, except in cases where there are grounds to believe that this constitutes the object or element of crime (No. 3).

A transcription of the recording, together with the recorded tapes (or equivalent) is handed to the judge who ordered or authorized the investigation (cf. Art. 188º). Material that is considered relevant is attached to the case file and all the rest is destroyed. All parties in the process are subject to secrecy.

This regime is equally applicable to conversations held by means other than by telephone; for example, by electronic mail or any other form of transmission of data by telemetric means (Art. 190º).

Practice of national authorities

In the context of the mega process of investigation of children victims of sexual abuse, phone tapping has been used, in relation to several suspects and also non-suspects, including the leader of the major opposition party and counsellor of State. Moreover, irrelevant information was not destroyed, as it should, before it was published in every newspapers front page and heard at every news service in TV, with devastating effects to the image and honour of those concerned. Suggestions have been made to create a mixed commission, which would include representatives from Parliament, with direct democratic legitimacy, to control the legality of all phone taping authorised and the use made of it. So far, however, the situation has not changed and disclosure of secret information happens almost daily.

Reasons for concern

It is important that flexible criteria are established promptly with due regard to the right to a family life[33]. It also gravely conflicts with the right to protection of family life the fact that those in possession of a "permission to stay" must wait for 6 years to apply for family reunion.

The practice of phone tapping as described is also a major issue of concern.

Article 8. Protection of personal data

National legislation, regulation and case law

In what concerns data protection issues, some relevant facts took place between December 2002 and December 2003, in Portugal.

[33] The Commissioner has since been informed of a draft directive which would grant temporary stay visas for the same duration to the immediate family of holders of permission to stay permits, who have spent one year in Portugal. This would certainly be a positive development. The Office has not received information on the precise criteria involved.

Directive 2002/58/EC, concerning the processing of personal data and the protection of privacy in the electronic communications sector (*Directive on privacy and electronic communications*), of 12th July, imposed to Member countries a dead line to be transposed - 31st October 2003 - but, it has not yet been transposed into the national law**.** Nevertheless, some projects have already been presented to Parliament: Government has presented proposal of Law 96/IX[34], and the opposition major party presented Project of Law 208/IX[35]. They are meant to revoke Law 69/98, on privacy of the telecommunications (*Telecommunications Act*), and to transpose the rules of the Directive. Both projects intend to apply not only to natural persons, but also to corporate entities (unlike data protection legislation). Proposal of Law 96/IX does not transpose, however, article 13th of the Directive, leaving the unsolicited messages to be ruled by the future Act on Electronic Commerce. Project of Law 208/IX determines an opt-in system for unsolicited commercial messages, with the exception of the use of a personal contact collected with a contractual purpose: in this case, an opt-out system is established: the data subject must be given the chance to refuse to the processing of the contact[36].

Parliament has already given Government the power to approve the *Electronic Commerce Act* (Law 7/2003 of 9th May) and the Government will present a Decree-Law on the subject to develop Parliament's Law[37].

The Project on the Electronic Commerce Act has very important rules on unsolicited commercial messages - it establishes the opt-in system, which determines that consent must be given, except when the message is intended to achieve a corporate entity, or when it is sent by a non-profit organisation (in this situation, an opt-out system is introduced).

Data retention has emerged as an important issue, in 2003. Today, retention of any telecommunication users' data is admissible only when used for transmission of the communication or for billing purposes (article 6 of Telecommunications Act). These data should be kept for no longer than necessary for the purposes for which they were collected or for which they were further processed (general rule of article 5. 1.*e* of the Data Protection Act). But some of the above mentioned projects, and another one related to digital evidence (217/IX), intend to rule on this subject.

The Portuguese Data Protection Authority has adopted some opinions referring to the above mentioned Projects of Law 208/IX and 217/IX.[38]. The authority criticises the traffic data retention periods proposed: a minimum retention period of 1 year (217/IX), and, a minimum of 6 month (208/IX). None of these projects establishes any maximum period for traffic data retention, and these periods were considered excessive by the Data Protection Authority. The opinions have also recalled that Council of Europe's Convention on Cybercrime– and some initial versions of the European Directive on electronic communications - did not impose traffic data retention[39]. The Projects also diverge from Council of Europe Convention on

[34] Some data on the process and the text of the proposal may be found on: http://www3.parlamento.pt/PLC/Iniciativa.aspx?ID_Ini=19879.
[35] http://www.assembleiadarepublica.pt/legis/inic_legis/20030122.09.1.0208.1.08.
[36] The Portuguese Data Protection Authority has issued the opinion 12/2003 on Project of Law 208/IX. This opinion is available at http://www.cnpd.pt/actos/par/2003/par012-03.htm.
[37] The Portuguese Data Protection Authority has issued the opinion 6/2003 (not yet published) on the Proposal of Law 44/IX - this Proposal has been approved has Law 7/2003 (DR I-A 107/IX/1, 2003.05.09) -, and opinion 13/2003, on Government Project of *Electronic Commerce Act*. This opinion is available at: http://www.cnpd.pt/actos/par/2003/par013-03.htm.
[38] These opinions have been published on the internet: Opinion 10/2003, about the Project of Law 217/IX: http://www.cnpd.pt/actos/par/2003/par010-03.htm
Opinion 12/2003, about the Project of Law 208/IX: http://www.cnpd.pt/actos/par/2003/par012-03.htm.
[39] This reference is made on the Opinion about Project of Law 217/IX. It also remembered that Article 29 Data Protection Working Party had issued some opinion considering that there should be no systematic traffic data retention, and that it should always respect proportionality and necessity (see, namely, opinion 4/2001, about Cybercrime Convention, defending that there should be no traffic data retention).

Cybercrime by admitting traffic data retention not only for criminal investigation, but also for preventive effects.

Article 9. Right to marry and right to found a family

National legislation, regulation and case law

Recognition of same-sex marriage:
In 2003, a portuguese national lawfully married to a dutch citizen of the same sex, in the Netherlands, his country of habitual residence, in conformity with the *Staatsblad van het Koninkrijk der Nederladen*, 2001, N.º 9 sought to alter his marital status in his Identity Card and in his "Civil Record" (*Registo Civil*) – from "single" to "married" - before the Portuguese General Consulate in Rotterdam. The consulate verbally informed him that a marriage between two persons of the same sex was legally inexistent under portuguese law and, therefore, could not be registered by the Consulate. The portuguese citizen in question presented a claim to the Ombudsman, on grounds, *inter alia,* that the alleged inability to register his wedding and have his marriage recognised in Portugal could even amount to opening up a door to the legal acceptance of a new type of polygamy.

The Ombudsman (*Provedor de Justiça*) dealt with this question in Opinion R-170/02, of the 27th of August 2003[40]. He started out by recalling Portugal had not remained alien to a european movement of rights' recognition to homosexual couples, as evidenced with the enactment of Law 7/2001, granting some degree of protection to *de facto* co-habitants. He, then, dealt with the question of the recognition of the same sex marriage celebrated by the plaintiff in the Netherlands, firstly, in classical private international law terms.

In principle, then, according to art. 25º of the portuguese Civil Code, matters pertaining to family relationships are governed by the legal order of the personal statute of the individual, which is, primarily and preferably, that of nationality, according to art. 31 of the same Code: *in casu,* then, the portuguese legal order would be competent to decide upon the validity and effects of the marriage. Art. 49º of the Civil Code is also relevant, as it provides that the preconditions of validity of the wedding – including matrimonial capacity, expression of consent – shall be regulated by the personal statute of each party. The portuguese law can, then, doubtless be considered competent to deal with the issue. Having said this, the Opinion goes on recalling that according to art. 1577ª of the Civil Code, the different sex of the married remains an essential substantive prerequisite of the valid celebration of matrimony: a wedding between two persons of the same sex is not merely void, it is inexistent, as set forth by articles 1628º e) and 1630º of the Civil Code.[41]Thus, the rules of the Code of Civil Record (*Código de Registo Civil)* providing for the transcription of a marriage celebrated by a portuguese abroad, which can be made in the official book of the Consulate, determine that: "the transcription shall be denied, when the marriage has been celebrated under any impediment or invalidity that renders it void" (art. 185º 3 and 187º 3 of the *Código de Registo Civil).*

[40] Available at http://www.provedor-jus.pt/ultimas/pareceres/casamentocivilpessoasmesmosexo.htm
[41] At this point, the Opinion, besides referring that the contract of marriage has always been, a realm where the ability of the parties to freely conform the relationship is shrunk by imperative rules, relating, e.g. to succession and patrimonial aspects, adds up that even if the portuguese national in question had asked Portugal to emit the certificate of matrimonial capacity, prior to the wedding, foreseen by the 1980 Convention Relating to the Certificate of Matrimonial Capacity, the State would only be obliged, according to art.1º of the Convention to emit the certificate if the person in question qualified for all the preconditions necessary for the celebration of marriage, according to his law of nationality – thereby implying the certificate could be denied for the purpose of the celebration of a same-sex marriage.

However, art. 31º of the Civil Code, after determining that the personal law is the one of nationality, creates a derogation to this rule in number 2, honouring the principle of the *favor validitatis negotii*: according to it, in relation to the celebration of contracts, the legal system of the country of habitual residence of the contractor *(lex domicilii)* may be the applicable law, if it considers itself competent to regulate the relationship at stake. So, the Opinion goes on analysing if applying, in the circumstance, the dutch law and "rescuing" the validity of the marriage is possible, which required deciding on whether such an application contends or not with the portuguese clause of *ordre public*. In fact, art. 22 of the Civil Code rules that "a foreign law which is competent shall not be deemed applicable if its application *in concreto* amounts to an offence to the fundamental principles of the international public order of the portuguese State". In this context, the Ombudsman highlights that the public order clause has merely a "defensive" nature[42]: it cannot serve to actively promote the values underlying the national legal order, nor can it imply a judgement upon the inherent goodness of a foreign legal system; its purpose is simply to protect the core of the fundamental principles of the national legal order from concrete solutions, which shock clamorously the national legal conscience and are, thus, repulsive from the perspective of the essential social conceptions of the State of nationality. It is also further clarified that it is a porous and evolutionary concept: so, "what today may be deemed to be part of public order, may tomorrow cease to be so". In light of this reasoning, bearing in mind, in particular, the above cited provisions of the civil code, and especially the civil sanction of inexistence for same-sex marriages, the Ombudsman has considered that recognising the wedding celebrated by the plaintiff *qua tale*, as a wedding, and promoting the correspondent change in his civil record of his marital status, would indeed conflict, *at the present stage* of the portuguese legal system, with its public order, as the difference in sex remains an absolutely essential substantive matrimonial prerequisite.

Having taken this position, the Ombudsman adds, however, that the impossibility of recognising such a relationship as matrimony for the purpose of attributing the correspondent civil status does not entirely proscribe its recognition for other purposes, *e.g.* for patrimonial ends[43], as the latter solution may be less or not at all in conflict with the fundamental values of the national legal system.[44] The Opinion also stresses that the refusal by the portuguese authorities to transcribe the wedding into official documents remains contestable before the judiciary, and the final word as to its recognition in Portugal lies with the courts and will ultimately depend on their choice of the applicable law, first, and on the way the public order clause can/cannot be erected by them as a bar to the application of the dutch law.

Having reached this stage of his reasoning, the Opinion dares, in its own words, "exploring other argumentative venues", and, therefore, an analysis of the compatibility of such refusal to recognise the wedding with the human rights regime, as set forth in the portuguese constitution and in international human rights law is further undertaken by the Ombudsman[45]. The first relevant precept is article 36º 1 of the portuguese Constitution which protects the right to found a family and contract matrimony: the Ombudsman asserts, following a generally accepted opinion, the article protects all kinds of families, including *de facto* partnerships; however, the legislator or the courts are not thereby obliged to recognise same-sex marriages: the request that the parties be of a different sex is not deemed to be a disproportionate and unconstitutional restriction on the right to marry. The same conclusion

[42] The characterization of the public order clause and of its *modus operandi* in Portugal by the *Ombudsman* follows closely the reasoning – not the conclusion - of the portuguese contribution to Avis nº2 of the 30th June 2003 of the EU Network of Experts of Fundamental Rights.

[43] Which is clearly in conformity with the idea that: when what is at stake is less the application *Anwendung)* of a foreign law, than the mere recognition of one of its effects (*Berücksichtigung)*, the public order clause can only have an attenuated impact.

[44] The example is provided by the Opinion itself. One can, then, fearlessly, deduce from this reasoning of the Ombudsman that this attenuated strength of the public order clause would allow for the recognition of such marriage, for the purposes of the enjoyment of the right to family reunion, a solution which would further be required by the need to ensure, in such context, the right to respect for family life.

[45] On this point, again, following the reasoning in the above-cited Opinion.

flows, according to the Ombudsman, from an analysis of art. 12º of the European Convention on Human Rights and of the relevant case-law relating to it, namely the cases *Rees vs. UK*, *Goodwin vs. UK*, as well as, from the decision taken in *Joslin vs. New Zealand* by the Human Rights Committee, monitoring compliance with ICCPR. The Opinion ends up with a reference to the EU Annotated Charter – by the Praesidium – which, in its article 9º, is deemed, neither to impose, nor to prohibit the consecration of same-sex marriages, still honouring the "margin of appreciation" member-States have kept on these matters and to the refusal by the Commission to include, for the purposes of defining those entitled to freedom of movement and of residence within the Union, same-sex partners. One final citation goes to one decision, running in the same sense, of the European Court of Justice: *D. and Kingdom of Sweden vs. Council*.

On a more inclusive tone, the *Ombudsman* stresses the now unanimous acceptance that "sexual orientation" may not be one reason for discriminating, and the normative evolution, from a European comparative perspective, growingly to accept conferring a legal status to same-sex partnerships, even though the consecration of same sex marriages remains, for the time being, an option confined to a well-defined geographical territory.

On the face of the particular mandate of the Ombudsman, he has issued this opinion, but has archived the process, as he could not intervene for the purpose of recommending to the General Consulate transcribing the wedding.

Adoption by homosexual and heterosexual partnerships:
One relevant fact, in this context, in 2003, is related to the new law on adoption[46]. During the discussion of the latter, the possibility of *de facto* couples engaging in adoption has been expressly ruled out by the parliamentary majority, currently supporting Government. The rejection was particularly vehement in relation to homosexual couples. The legal solution amounts, in practice to a somewhat paradoxical outcome, as a single person is eligible to adopt children. This will keep, like in the past, paving the way for the accession of *de facto* partnerships to adopt.

Article 10. Freedom of thought, conscience and religion

National legislation, regulation and case law

In order to the implement the Law of Religious freedom (Law nº 16/2001), and a two year delay, Decree-Law nº 134/2003 was published, regulating the mechanism of the official registration of religious associations and other religious institutions. Registration is required for the purpose of acquiring legal personality and for a church to be able to interact as a collective person. This will be made before the *Registo Nacional de Pessoas Colectivas* (National Record of Collective Entities) and in order to ensure full transparency and impartiality, registration, and namely situations of refusal of it, will be monitored by the Commission on Freedom of Religion.

Practice of national authorities

The principle of separation of church and State, implying, on the one hand, the religious neutrality or indifference of the State and, on the other, the non-interference of the State in the organization of the church and in the exercise of the cult had not been realized[47] at the infra-

[46] In detail, see *infra,* commentary to art. 24º.
[47] Motivating harsh criticism on the part of doctrine, see, *e.g.* MOREIRA/CANOTILHO, *ob. Cit,* pp. 244-245. CANOTILHO/MACHADO, "Bens culturais, propriedade privada e Liberdade Religiosa", *Revista do Ministério Público,*64, 1995. MACHADO, *A Liberdade Religiosa numa Comunidade Constitucional Inclusiva,* Coimbra, 1996 e MACHADO, "A Constituição e os Movimentos Religiosos Minoritários", *Boletim da Faculdade de Direito,* 1996.

constitutional level until the year 2001, with the Act on Religious Freedom nº 16/2001. It is, therefore, no surprise that reports about the recent resurrection of the crucifix in the classroom of public schools, namely primary schools, are heard of, after having been banished in the aftermath of the democratic revolution. This is explicitly proscribed by the Framework Law on the Educational System (*Lei de Bases do Sistema Educativo*), but no litigation on this basis has yet reached the courts, neither has the Ombudsman been seized on grounds of the unconstitutionality of this practice.

Article 11. Freedom of expression and of information

National legislation, regulation and case law

With the goal of reforming an economically unviable public service of television, the Government has taken the lead in drastic changes on this sector, making the parliamentary majority supporting it, vote for a series of legislative acts. The first is *Law 30/2003, of the 22nd August 2003*, which entered into force on the 1st of September 2003 approving the fundamental philosophy underlying the new model of financing public television; the latter used to have strong recourse to commercial profits and still be highly dependent and ruinous for public finances. According to the new law, the main sources of financing of public TV shall be the contributors' contribution for the audiovisual and the compensatory lump sums paid by the operator. The profit made by the latter shall, first, be consigned to the payment of consolidated debts and, only afterwards, will they be available for future investments. The public contribution for the TV, namely its proportionality, shall be closely scrutinised by an external monitoring entity, appointed by the High Authority for the Media (*Alta Autoridade para a Comunicação Social)*, the regulator of the sector. With the purpose of avoiding future financial calamities, the operator exploiting TV's public service will not be allowed to contract debts, less for a short and very well defined period of time.

On the very same, 22nd of August, Parliament approved Law 32/2003, the new Law on Television. Art. 4º clarifies that rules on competition and concentration apply, as in general, to television and reinforces the power of the independent regulator to control fusions, acquisitions, declare abuse of dominant position in the market. Art. 5º sets out some transparency rules, in relation to transfer of property over television: all actions have to be nominal; the requirement of the identification of the real owner is essential to avoid unlawful concentration, which might jeopardise the constitutional requirement of pluralism in the media. Other measures are foreseen in this context, such as the annual publication of the list of all those, who are entitled to special ownership rights.

On a more programmatic tone, art. 7 sets out the principle of cooperation between private operators and the State, for the promotion of democracy, the inherent dignity of all human beings, the rule of law and the portuguese idiom. The Law contains detailed regulation on licensing and registration, which ensures respect for a due process, transparency and monitoring of pluralism: in relation to events of a political nature, the acquisition of absolute rights of transmission over the latter is totally illegal and, therefore, void. It also deals, in terms not distant from the previous ones, on the broadcasting of European production, the maximum amount of commercial advertisement allowed for, proscription of publicity to certain products, at certain times of the day, in compliance with european rules on the matter.

Finally, Law 33/2003 approves the restructuring of the commercial sector of the State in the audiovisual: the Rádio Televisão Portuguesa S.A., which was a business corporation of public capitals becomes now a mere *holding*, whose statutory end is the management of her share in other societies, which exercise their activity in the area of broadcasting and multimedia. The former corporation is now extinguished and is succeeded by the holding which, for the time being, keeps her position as the major share holder in the new structure. The social capital of

the new holding is of € 297 540 805. Law 33/2003, then, annexes the structure, composition, decision-making process of the new holding, in terms, which seem to be transparent and ensure a responsible exercise of its functions.

On the 30th October 2003, the High Authority for the Media (*Alta Autoridade para a Comunicação Social)*, in the face of public criticism to the appointment as director of an important newspaper of a journalist, who had just ceased to exercise important high functions, near a Minister, stated the following: a) such an option could have a negative impact on the trust of the public at large in the impartiality of the media concerned; b) the regulator had decided to brief this short note merely out of principle, as the question of the professional deontology of the journalist concerned had not been the object of any complaint to the AACS; c) such a problem can be posed in more general terms and it is recommended that legislative measures are studied and possibly undertaken, in order to avoid future similar situations.
Reasons for concern

Further retreat of State:

In practice, the new model of public TV had, as primary collateral effect, the suppression, on the second channel – the one, which provided for quality programs and which was, therefore, more deficitarian – of a daily 15 minutes news on cultural events, which was, in fact, transversal and one rare case of success of non-trashable emissions. Civil society strongly protested and, so far, this measure remains highly contested. On the other, this second TV channel has now been devolved to civil society: in conformity with the legislative reform referred above, the State now has only a small part in the direction of programs of this channel; for that purpose, several protocols with NGO's, universities, private companies have been celebrated and, among them, they shall ensure the continuation of this second channel, for which a 4,0% of share will signify a success. The fear in relation to this, as voiced by many sociologist, who rightly point out that never is the further ghettoization and absence of a true public television service.

Growing inter-media concentration:

Despite the apparent diversity of offer, generated by cable television, growingly more widespread and by the internet, there is clear evidence that ownership and power are effectively controlled by the same economic groups. In this sense, submission to normal competition rules may, in the future, not be enough to avoid concentration, detrimental to the so necessary pluralism, both external and internal, in a democratic society
Secrecy of journalistic sources:

Because a very important part of the *Casa Pia* process, relating to massive sexual abuse of children, has been reported by the news and investigation was carried out by journalists themselves, public discourse has, at times, called out for the disclosure of journalistic sources. Journalists were accused either of violating or of being an accomplice in the violation of the secrecy of justice and it is true a good part of the content of phone tapping has been widely publicised by the press.However, for the time being the protection afforded to it by the law on freedom of expression remains untouched.

Abuse of freedom of expression and Professional Deontology:

According to the Ombudsman of the Reader (provedor do leitor) of a very serious daily newspaper, there has been a month, this yea,r in which around 300 titles, all relating to the Casa Pia case turned out to be proved absolutely false. This has called out for a serious reflection on the part of journalists themselves and for tighter deontological self-regulation and healthy self-restriction. No prosecutions for the crime of abuse of freedom of expression have been filed; by contrast, it is most likely that, at this point, there is still one media

operator, who hasn't been sued for defamation. Many complaints were also filed to the Media Regulator, who has sought to act wisely and serenity, on every case. In most cases, these news have been nothing less than murderous to the reputation, honour and image of prominent public persons.

Protection of journalist during armed conflict

Following the kidnapping and the injuries suffered by a pool of portuguese journalist, who travelled to Iraque to cover the portuguese participation in the pacification of the region, the question of the duty of the sate to protect journalists, who are further its nationals, emerged. The journalists in question were transported by the force of the GNR on the day they travelled to Iraque, but the latter left them at the boarder, explaining they were not in the position to "embed" the journalists and offer them protection. Recent developments in the law of armed conflict, coupled with the obligations towards civilians, but above all the essentiality of media coverage of hostilities, for the good information of the public, namely of the true nature of the tasks carried out by its armed forces abroad, would advice to rethink the responsibility of the State in relation to this.

Article 12. Freedom of assembly and of association

National legislation, regulation and case law

In 2003, the most important developments that are worth referring to in the field of the freedom of association regard the new law on political parties (Organic Law nº 2/2003). There were two main contentious aspects, namely: (i) one clause that required the adoption of secret ballot for the election of the members of the party representatives and executive bodies; and (ii) a provision that established the compulsory dissolution of political parties that failed to fight two successive parliamentary elections.

During the discussion of the draft law in Parliament, the first aspect was challenged as unconstitutional by some opposition Parties (namely by the Communist Party and the Left Bloc), on grounds that it ran against the freedom of internal organization of the parties. Before promulgating the law, the President asked the Constitutional Court to rule on the question. The Court decided that provision was not incompatible with the Constitution, since the fundamental law states explicitly that the political parties have to respect themselves the principle of democratic organization and government (Decision nº 304/2003).

In fact, art. 51º § 5 of the Constitution stipulates that: "Political parties shall be ruled by the principles of transparency, democratic organization and governance and the participation of all their members.»This paragraph was added to the Constitution in 1997, on the 4th amendment of the Constitution, and one of the reasons that was invoked for this new requirement was precisely the intention to demand that parties respect the fundamental principles of democratic organization. The idea is that in a democracy founded upon party competition, where the government is in the hand of political parties, these should be themselves democratic in their internal organization and government.

The Court considered that «the constitutional imposition [of the secret vote] is justified on the one hand by the concern to guarantee the fundamental rights of the party members, because the secret ballot offers without doubt a greater level of authenticity and truth of the vote, and on the other hand, it adds democratic genuinity to the democratic participation of the political parties in political life.»

As to the second aspect (i. e., the dissolution of the parties failing to put forward candidates in two successive legislative elections), the Court found that it is not compatible with the

freedom of the parties to set their own political agenda. It runs counter namely to the constitutional provision that ensures to every association, comprising political parties, the «right to pursue freely their aims without interference from the public authorities» (art. 42º, § 2 of the Constitution). Therefore, this measure was considered unconstitutional and was taken off from the final text of the statute law.

Another decision of the Constitutional Court that is relevant from the point of view of the right of association, broadly considered, is Decision nº 360/2003, which dealt with the trades unions' right to participate in the preparation of the labour legislation, which is recognized by the Constitution (art. 56º § 2-b). By request of the President of the Republic, the Court was called to decide whether that right had been violated by a law, actually the law that approved the State budget for 2003, that established a new regime of retirement pensions, without the workers unions having had the opportunity to make known their opinions on that subject. The Court, following an ancient orientation of its own case-law, ruled that the regulation of pensions falls under the notion of "labour legislation" and that therefore a violation of the Constitution took place, because the unions were not given the opportunity to give their opinion on the draft legislation.

As far as new legislation on associations goes, there are some notes for the record in year 2003.

In order to the implement the Law of Religious freedom (Law nº 16/2001), Decree-Law nº 134/2003 was published, regulating the mechanism of the official registration of religious associations and other religious institutions.

Decree-law º 294/2003 regulates the creation and registration of associations of individual securities investors, which had been recognized by the Securities Code (Decree-Law nº 486/99). These associations are entitled to defend the interests of the securities investors, having the right to be represented at the Securities Market Commission (CMVM), the watchdog of the sector, as well as being able to go to the courts to defend the legal rights of the investors (through a type of *class action*) and to participate in mediation mechanisms to solve conflicts. The associations are required to register before the CMVM.

Finally Law nº 34/2003 recognized the popular collectivities and associations (namely cultural, recreative, and sport associations) as a "social partner". This status will be implemented and regulated by the Government and will include most certainly the right of the federations of these associations to participate in the preparation of the legislation and the public policies that concern them.

Article 13. Freedom of the arts and sciences

No significant developments to be reported.

Article 14. Right to education

National legislation, regulation and case law

Framework Law 27/2003, of the 22nd August 2003, on the Financing of Higher Education (*Lei de Bases do Financiamento do Ensino Superior)* has sought to redefine and clarify the sources of financing of the costs of higher education. According to it, the financing is governed by objective criteria of performance and quality and it respects three partners: the state, higher education institutions and the students. The main innovation of the law is, on the one hand, to make it clear that productivity and efficiency, will be fundamental to the continual of the level

of financing by the State and, on the other hand, that students must participate in the sharing of the burdens. The State further seeks to enhance the autonomy of the universities by determining only the minimum and the maximum, between which university fees may vary, and leaving to the latter the actual decision of the concrete amount to be paid. The Law also rephrases former programmatic provisions in relation to social aid to students in need.

Practice of national authorities

The new Law arouse tremendous contestation by students, who locked universities up for several days and, in some cases, led to major changes in the leadership of higher education institutions. Many Rectors, because the new law was regulated only, after the school year had started and, in the face of protests, decided to apply only the minimum legally foreseen.

Reasons for concern

The main reasons for concern expressed by the students relate, first and foremost, to the inequality of the tax system, with the generalised ability of independent workers and liberal professions to declare very low income and dependent workers, who constitute the majority of the middle class, paying the heaviest taxes. This reflects upon the determination of the universe of those who must pay fees or of those who are entitled to scholarships and social aid, as these should be those with lower income. The other set of arguments put forward by the students justly relates, at least in the case of some institutions, to the lack of good facilities, the shortage of social aid and a very high ratio students/teacher.

Article 15. Freedom to choose an occupation and right to engage in work

National legislation, regulation and case law

With so many migrant workers having entered Portugal[48] and found work irregularly, the previous Government launched a regularisation process in 2001, which resulted in the granting of annually renewable "permission to stay" permits (*autorizaçoes de permanência*) to some 179,165 persons by 31st March 2003. The current government, concerned by the exponential increase in immigration and fearing an imminent economic recession, passed a new immigration law, **Decree-Law 34/2003 of 25th February 2003**, halting the granting of new "permission to stay" permits, and replacing this regime with a system of work permits (*vistos de trabalho)* valid for one year and obtainable at Portuguese consulates prior to arrival[49]. The refusal to award new "permission to stay" permits obviously represents a tightening of immigration policies.

On the 20th October 2003, the *Agreement Between Portugal and the Federal Republic of Brasil on the Reciprocal Hiring of Nationals of Both States* was published, aimed mainly at rendering less burdensome the obtaining of work permits on both States; for stays shorter than 90 days, permits shall no longer be required. Because of this agreement that follows the

[48] Portugal has historically been a country of net emigration. This trend has, however, been dramatically reversed over the last decade, with the number of foreigners (legally) residing in Portugal quadrupling from 107,767 in 1990 to 419,600[48] 2003. In addition to the traditional influx of migrants from former Portuguese colonies, the last few years have seen the arrival of large numbers of migrant workers from Eastern European countries; so much so, indeed, that the 60,000 Ukrainians legally residing in Portugal constitute the largest foreign community. The vast majority of these immigrants have been attracted by easy entry, abundant jobs (particularly in the poorly regulated civil construction industry) and the tolerant, indeed generally warm, welcome provided.

[49] There is inevitably an element of the arbitrary in the termination, from one day to the next, of any given immigration policy. Flexibility has, however, been shown with respect to tardy applicants; permission to stay permits may, as a result, be granted to those capable of proving residence in Portugal prior to the cut off date and currently in possession of a valid employment contract.

Agreement of the 11th July 2003 for the Facilitation of Movement Between Portugal and Brasil, and starting 30 days past the date of publication, Portugal decided to regularise all undocumented brasilian nationals, who have entered the territory before the 11th July 2003, so that these will be on equal footing with those who will from now on come to Portugal. In order to avoid the customary long chaotic queues, the authorities have required that all interested make a "previous registration", after which, they will be contacted by post, and called for the following formalities: the agreement hasn't set a time limit, knowing the practical impossibility of implementing it in a short delay. The payment of fines for the previous illegal stay in Portugal was not amnestied; however, if it is done on a voluntary basis and on grounds of need, it may be reduced by up to 50%. Against the expectations of the competent Minister, who had estimated around 14 000 brasilians would register, around 29 486 brasilians have already applied for the previous registration. This process of exceptional regularisation is welcome and will certainly improve the enjoyment of the right to engage in work by brasilian migrants.

Reasons for concern

Right to engage in work: the case of migrant workers

The requirement of a current work contract for the annual renewal of "permission to stay" permits places considerable pressure on immigrant workers. Calls have been made to extend the renewal period to at least two years to grant more time to those losing their jobs to find alternative employment. Another possibility requiring a less substantial change to the current regime, would be to consider allowing a period of grace of, say, six months following the loss of employment, which might extend beyond the formal expiry date of the "permission to stay" permit. So, for instance, if an individual's permit is due for renewal in December, but he loses his job in October, he might have until April of the following year to secure alternative employment before forfeiting his permit definitively. Such a provision would reduce the precariousness of such foreigners' residence in Portugal, diminish their dependence on their current employers and reflect the reality of an employment market with a rapid turnover[50].

Foreigners' associations also frequently complained of the length of time taken by the Aliens and Frontiers Service (*Serviço de Estrangeiros e Fronteiras*) to process requests for obtaining and renewing "permission to stay" and other permits, which may imperil their continuation at their posts. Certainly, the four-fold increase in the number of foreigners over the last 10 years has placed a considerable burden on the SEF's staff and resources. The administrative delays that may result are often extremely prejudicial to the enjoyment by foreigners of other rights, since the legality of their stay in Portugal, on which the exercise of these rights depends, may temporarily lapse. Complaints were still made to the Commissioner by immigrant groups regarding delays and difficulties in obtaining documents, but significant improvements have been made in this area over the last 18 months, which have helped to overcome many of the problems arising from the glut of applications following the recent regularisation process. The SEF has, for instance, introduced public attendance posts in Citizen's Bureaus, a computerised waiting system and a special appointment system in areas of high demand for the renewal of "permission to stay" permits, enable same day renewals for those applying through this system. "Residence" permits, which formerly took 6 months to be granted, are issued, on average, within 60 days of the request and renewed within 30.

Complaints were also raised regarding the 75 euro fee for the annual renewal of "permission to stay" permits. This fee is out of all proportion to the cost of the administrative service provided. Exemptions are foreseen for those facing economic difficulties, however, for a family of 4 on a modest income 300 euros a year represents a notable financial burden. A

[50] The Commissioner has since been informed by the Serviço de Estrangeiros e Fronteiras that a draft directive along these lines has already been elaborated and is scheduled to be approved by the Council of Ministers shortly

reduction in this fee, which far exceeds the cost of obtaining other official documents, would certainly be greatly welcomed by the immigrant community.

A similar problem is experienced by the brasilians who wish to regularise, but still have the pay the fines, which vary according to the length of the period of illegal stay and may amount to over 500 €.

Article 16. Freedom to conduct a business

No significant developments to be reported.

Article 17. Right to property

No significant developments to be reported.

Article 18. Right to asylum

Practice of national authorities

Portugal receives an extremely low number of asylum applications per year. 202 and 180 persons requested asylum in Portugal in 2001 and 2002 respectively[51]. 7 persons were granted refugee status and 34 persons temporary residence permits for humanitarian reasons in 2001. The corresponding figures for 2002 were 14 and 18. Data on 2003 is still unavailable.

Asylum seekers are currently assisted, advised and, initially, housed by the Portuguese Refugee Council (CPR), an NGO recognised by statute as having a central role to play in the reception of asylum seekers. This arrangement appears to function soundly, with the reception centre run by the CPR in Sacavém being a very model of its kind. Concerns have, however, arisen regarding both the ability of potential applicants to request asylum in Portugal and the procedural guarantees available during the admissibility phase of asylum applications.

Applicants are required to file asylum requests within 8 days of their arrival in Portugal and the initial decision on their admissibility is taken by the SEF within 20 days, unless the request is filed at a border point in which case the decision must be taken in an accelerated procedure of 5 days.

Reasons for Concern

Appeals against negative decisions by the SEF can be made to the National Commissariat for Refugees, and from there to the Administrative Supreme Court. However, appeals against admissibility decisions are not suspensive, which enables the deportation of asylum seekers rejected by the SEF before a final decision has been reached. Though deportations are rare, it would nonetheless be preferable to guarantee the suspensive effect of appeals against admissibility decisions[52]. As it takes nine months on average, and in certain cases has taken two years, for the administrative court to decide an appeal, asylum seekers are in practice not entitled to appropriate social or medical assistance during this period and are not allowed to work. They are thus totally dependent on help from voluntary organisations and are tempted to work illegally.

[51] No data are available in relation to 2003 yet.
[52] Especially since 12% of appeals were successful in 2002

Question marks have, lastly, been raised over the impartiality of the National Commissariat for Refugees. Whilst the independence of the Commissariat is not in question, (two magistrates of 10 years service are appointed by the Supreme Magistrates Council), it has, nonetheless, proved reluctant to summon applicants for interviews except where specifically requested by the CPR to do so, leading to the suspicion of an excessive reliance on the initial findings of the SEF. A reversal of this practise would certainly contribute to dispelling such doubts.

Extra-territorial Controls and Rejection Upon Arrival:

Concerns have also been raised regarding the admission of potential asylum seekers on to Portuguese soil. It has been suggested that the decline in asylum applications made at Lisbon airport from 44 in the first half of 2002 to only 9 in the second six months is due to the strategic placement of Portuguese immigration officials in sensitive foreign airports. Such suggestions are, however, somewhat difficult to corroborate[53]. However, the practise is by no means unheard of and it is worth recalling that extra-territorial controls must not be conducted to the detriment of rights guaranteed by the Geneva Conventions on asylum.

Equally worrying, but more easily addressed, are the suggestions that potential asylum seekers are increasingly being returned immediately upon arrival, in violation of the first essential dimension of the cogent *non-refoulement* principle: "non-rejection" at entry. The compulsory presence of a lawyer at Lisbon airport to avoid this has been called out for both by the CPR, SOS Racism and the Bar Association itself, which has proved available to accept this task on the basis of an agreement with the competent authorities and the Ministry of Justice, who would be responsible for paying its costs.

Female Genital Mutilation:

In 2003, and for the first time in Portugal, the media have covered a case of a Kenyan citizen, of *Mungiki* origin, who fled her country to avoid being subject to genital mutilation before her impending forced wedding with the brother of her deceased husband. Her application for asylum was rejected by the administrative authorities, on several grounds, namely that she had failed to present her request in the 8 days following her arrival, that she was not being persecuted by state authorities and that she had passed the age in which women generally endure such tribal ritual practices. The case, however, has been accepted on appeal for reconsideration by the competent administrative court. It is to be hoped that a flexible interpretation of the public/private divide, and of the "particular social group clause" will entitle her to enjoy refugee status.

Article 19. Protection in the event of removal, expulsion or extradition

National legislation, regulation and case law

Following consistent case-law of the Constitutional Court, an accessory penalty of expulsion may not be imposed on a resident alien when the person concerned was born and lives in Portugal, or exercises parental authority over under-age children residing in Portugal, or has been in Portugal since he/she was less than 10 years old. However, these limitations do not apply to non-resident aliens and, namely they do not apply to the holders of a "permission to stay permit", who may have been living in Portugal for a period of over 5 years. A case arguing for the unconstitutionality of expelling someone who effectively carries his family life in Portugal is now pending before the Constitutional Court. In this context, legislation

[53] The report by the Commissioner for Human Rights of the Council of Europe also enlists this as a possible regrettable practice.

should be amended in order to ensure that the family life of resident and non-resident aliens sentenced to an accessory penalty of expulsion is fully protected.

CHAPTER III : EQUALITY

Article 20. Equality before the law

No significant developments to be reported.

Article 21. Non-discrimination

National legislation, regulation and case law

Non-Discrimination at Labour:

Art. 22 ff. of the New Labour Code contains rules against discrimination of any kind, notably on grounds of genetic inheritance, reduced labour force, handicap, and chronicle illness. Law No.134/99 August 28th prohibited already discrimination in the exercise of rights on the grounds of race, colour, nationality or ethnic origin.[54] The New Labour Code complements this legislation establishing further rules against negative discrimination in the working place and, namely art. 23 §3 establishes the reversal of the burden of proof: it is up to the worker, who pledges being the victim of unjustified discrimination to point out those in relation to which he is differently treated, but it is up to the employer to prove discrimination does not stem from one of the grounds prohibited in number 1. Read in conjunction with Law 134/99, it is considered that Directive 2000/43/EC and Directive 2000/78/CE are already implemented into national law.

[54] Law No.134/99 of 28 August 1999 prohibits discrimination in the exercise of rights on the grounds of race, colour, nationality or ethnic origin. Racial discrimination is defined in Article 3 as a distinction, exclusion, restriction or preference based on race, colour, ancestry or ethnic or national origin with the intention or the result of preventing or restricting the equal recognition, enjoyment or exercise of rights, freedoms and guarantees or economic, social and cultural rights. Discriminatory practices are defined as actions or omissions, including attempted and negligent actions, carried out on the above-mentioned grounds. Article 4 of the law gives a detailed list of these practices, particularly in the area of employment, access to goods and services, the performance of an economic activity, the sale or rental of property, access to public buildings, health and education. These practices include actions by bodies, officials or employees of the direct or indirect administration of the state, autonomous regions or local authorities, which condition or limit the exercise of any right. They also cover official documents in which an individual or a legal entity makes a statement or conveys information, publicly or with the intention to disseminate, in which a group of persons is threatened, insulted or denigrated for motives of racial discrimination. Law No.134/99 makes provision for administrative sanctions, which may be applied both to public and to private individuals and legal entities. Discriminatory acts are punished by means of a fine, without prejudice to the offender's civil liability or the application of other appropriate penalties. Under Article 10 of Law No.134/99 and Article 4 of Legislative Implementing Decree No. 111/2000, persons found guilty of discriminatory acts may be liable to ancillary penalties in addition to a fine depending on the seriousness of the offence. These penalties include *inter alia* the publication of the decision, withdrawal of public authorisation to carry out a profession or activities governed by this type of authorisation, a ban on competing for a public procurement contract, or withdrawal of a licence. If the offences in question are also liable to criminal sanctions, the offender is only given a criminal sentence.
Anyone who is aware of a situation which may constitute an offence should either notify the general inspectorate of the relevant ministry directly, or the High Commissioner for Immigration and Ethnic Minorities or the Commission on Equality and Racial Discrimination established by Law No. 134/99, which will refer the case to the relevant general inspectorate. The latter will examine the case and then forward it to the Commission on Equality and Discrimination, along with a final report. The decision to impose a fine and ancillary penalties lies with the High Commissioner for Immigration and Ethnic Minorities, who is advised by the Commission on Equality and Racial Discrimination. This decision is subject to an appeal before the ordinary court of the location where the offence was committed. Under Law No.134/99, such decisions must be interpreted and applied in accordance with the relevant international instruments for the protection of human rights.

Discrimination against HIV/ AIDS patients and chronicle disease carriers:

Draft-law 385/IX, to be voted by Parliament, prohibits any kind of negative discrimination against HIV/AIDS and chronicle disease carriers. It provides for special protection in the field of labour contract, goods and services' providers, lease contract, insurance contract, and public places or places open to public access, including schools, and others.

This draft-law prescribes that the Government shall regulate credit-market in respect to buying a house. In fact, for the purposes of obtaining a mortgage, banks usually lead a life insurance policy. Insurance companies, for their part, demand clinical tests (including HIV test) to be carried out before undersigning the contract. In this context, the Ombudsman (*Provedor de Justiça*) had already, in 2000, made a recommendation to the Minister of Finance[55]. Indeed, individuals testing positive for HIV have been most subject to discrimination in Portugal, which is an obvious intolerable violation of the principle of equality and also runs counter to Recommendation nº R (89)14, of 24th October 1989 of the Council of Ministers of the Council of Europe. Moreover, a Committee against HIV/AIDS and chronicle disease carriers discrimination should be established.

Practice of national authorities

In 2003, 6 cases were brought before the Commission on Equality and Racial Discrimination, all of which are still pending decision. All cases relate to acts committed by private individuals such as refusing access to employment or refusing to rent accommodation.

Reasons for concern

Discrimination of the Roma/Gypsie Community:

There are currently about 50,000 Roma/Gypsies living in Portugal. They are primarily sedentary, poorly integrated and remain, for the most part, in the lowest income categories. It cannot be said, however, that Roma/Gypsies suffer widespread or systematic discrimination in their daily lives. Nonetheless, isolated incidents of overt racial barracking by local politicians continue to occur and Roma/Gypsies continue to face difficulties with respect to housing, education, employment and, occasionally, in their relations with the police. Recent reports, shameless before TV cameras, account for the parents´ association of one primary school locking up the school gate, in order to protest against the integration of group of gypsie students in the school. Prejudice is evident also in the way Gypsies are stereotyped as criminals, in the minds and pervasive language of the mainstream population

The greatest challenge faced by Roma/Gypsies is the gradual disappearance of the local markets, in which they have traditionally made their living as travelling salesmen. The unwitting victims of shifting economic realities, Roma/Gypsies are in real danger of being left behind; poorly educated, and with little to no professional training, many Roma/Gypsies are finding it difficult to adapt to the demands of the modern labour market. Serious efforts will be required to assist Roma/Gypsies in making this transition.

However, the real long-term challenge is the provision of adequate education and training to young Roma/Gypsies arriving on the labour market. At present, cultural factors and poorly adapted schools, continue to result in high-levels of non-attendance and dropout rates, particular amongst girls, for whom the necessity of a formal education, beyond the acquisition

[55] Recommendation nº 4/B/00 by the Ombudsman has not called into question "the need to establish conditions and limits involving insurances' operations so as to safeguard the companies", bearing in mind the stability of the insurance sector. The suggested course is that of "the legal creation of a *public fund* to guarantee situations regarded by insurance companies as being of high risk", and which financial concerns would make them reject them as a rule. This *Fund* could be activated subsidiary, against real established guarantees.

of basic literacy, is still not generally recognised within the Roma/Gypsy community. There is, moreover, a widespread reluctance amongst parents to sanction the daily departure of post-pubescent girls whose assistance around the house is appreciated and for whom travelling to school alone is considered inappropriate.

Relations with certain public authorities continue to given rise to concern. Every so often, particularly in rural towns, local councils can be seen disparaging and disadvantaging local gypsies in attempts to encourage their relocation. Such declarations and practises tend to be firmly condemned both by central authorities and the national press. However, they serve as a warning against complacency and the need to supervise the respect for the rights of Roma at the level of local administrations. Tensions have also been known to flare up between the police and certain Roma/Gypsy communities. The overwhelming majority of Roma/Gypsies spoken to refused to accuse to the police of systematic discrimination, stating instead that relations varied greatly from area to area, depending largely on the amity or enmity between the local Roma/Gypsy leader and the regional chief of police. Additional training and strict disciplinary measures would, however, appear to be required to eliminate incidents of arbitrary harassment and discriminatory treatment.

Article 22. Cultural, religious and linguistic diversity

Reasons for concern

Non-Implementation of Measures aiming at better integrate the Roma/Gypsie Community:

The Institute of Employment and Vocational Training has introduced specific training schemes for Roma/Gypsies and signed a protocol with the High Commissioner for Immigration and Ethnic Minorities to promote the access of Roma/Gypsies to the labour market. The establishment of a network of socio-cultural mediators to liase between parents and schools was originally intended to overcome many of the difficulties in relation to education of Roma children. Such officers have, indeed, been shown to contribute greatly to the attendance and performance of Roma/Gypsy children in those schools where they have been introduced and they were extremely welcome in schools where problems of integration were experienced. The problem, however, is that there are far too few of them, owing to the almost total impossibility of earning a living in this profession. Moreover, the career continues to be unregulated: socio-cultural mediators have to wait for their final placement until sometimes past two months the beginning of the school year.

Article 23. Equality between man and women

Practice of national authorities

In the field of workers' rights and employment, there exists since 1979 the *Comissão para a Igualdade no Trabalho e no Emprego*, Commission for the Equality in Work and Employment, within the Ministry for Social Security and Employment, composed of Governments' representatives, social partners from Unions and employers associations, which produces opinions on situations of potential violation of equality. This body has seems to acquired new breath, at the end of the 90's, launching a series of publications on the topic and appreciating a series of complaints mainly relating to the rights of women in connection to maternity[56]. The trend has followed in 2003, though recommendations have not been publicised yet.

[56] See commentary to art. 33º.

Reasons for concern

Portuguese society seems to be increasingly egalitarian. In higher education, at the University level, in many subjects such as Law, women have taken so much the lead that men have become in many schools an almost under-represented sex. That is not yet the case in the scientific and technological field, where male supremacy is still the tone. In economic life, as in Academia, the trend is followed; however, higher posts of management in the tertiary (banking, insurances) are still predominantly held by men.

On the other hand, this mainly "urban", modern, young picture of the status of women in Portugal contrasts with a pervasive scenario of underpayment of women in industry, and textile industry in particular, systemic and structural discrimination from the part of employers and extreme levels of domestic abuse.

Article 24. The rights of the child

International case law and concluding observation of international organs

On the 26th June 2003, the Eur.Ct. HR considered that Portugal violated article 8 of the ECHR on the case *Maire v. Portugal (Nº 48206/99, Section III)* for the " inadequacy of measures taken by authorities to secure return of children to father"[57].

On the 31st July 2003, the European Committee on Social Rights received complaint No. 20/2003, *World Organisation Against Torture (OMCT) v. Portugal*, which relates to Article 17 (the right of children and young persons to social, legal and economic protection) of the Revised European Social Charter. It alleges that "Portuguese law has not effectively prohibited corporal punishment of children, nor has it prohibited other forms of degrading punishment or treatment of children and provided adequate sanctions in penal or civil law"[58].

National legislation, regulation and case law

Portugal has ratified the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography on the 16th May 2003. Portugal has also ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict on the 19th of August of 2003.

Child Trafficking: There is a new project of Law (Projecto de Lei n.º 218/IX) related to the prohibition of the sale of children (for any purpose), which so far does not exist as an autonomous crime in the Portuguese Penal Code[59]. This legal omission is in contradiction with the obligations assumed upon the ratification of the Optional Protocol to the Convention on the Rights of the Child on the sale of children. This project will be under discussion in 2004.

Adoption: There is a new law on Adoption, which aims at reducing the length of the adoption from 38/39 months to 18 months. Besides, it creates a national network for adoption and it changes the age limit for adopting which is now 60, instead of the previous 50, as long as the difference of ages between the adopting person and the adopted does not exceed 50 years. It has been created a Commission for monitoring the implementation and for evaluating the

[57] See, *supra,* detail, commentary on the right to respect for private and family life.
[58] Unfortunately, no other details on this claim were available at the time of writing.
[59] Article 159 0f the Portuguese Penal Code punishes the sale and acquisition of a person in case the sold person is submitted to slavery.

results of the application of this new law. This Commission entered into office last November and shall release a report by the end of the second semester of 2004.
According to article 46 of the Statute of the Non-university Student (*Estatuto do Aluno do Ensino Não Superior*, Law N.º 30/2002, of the 20th December 2002), the student shall always be heard if there is a disciplinary procedure against him. 2003 has been the first year of implementation of this new Law and so far there are reasons to believe that this principle is being respected.

Practice of national authorities

No statistics were found on the frequency and the kinds of situations where children were removed from their family home in 2003. Instead, we found statistics related to 2002 but the trend during 2003 has probably been following. Therefore, we found it relevant to include the following table, which shows that the institutionalisation (7,82%) of the child is the second most used measure taken in relation to a child in danger. Still, the great majority of children are accompanied within their natural, familiar environment (87,78%)

Measures applied to children and young people with a process in CPCJ – Commission of Protection of Children and Juveniles- 2002

Measures	Number	%
Support in child's environment	5344	87,78
Entrust of the child to a serious and trusting person	123	2,02
Put the child under the custody of a serious and trusting person selected for adoption	21	0,34
Institutionalization (Foster home and temporary foster centres)	476	7,82
Entrust to Families	124	2,04
Total	**6088**	**100**

Source: Activity Reports of the Commissions for the Protection of Children and Juveniles in the year of 2002, National Commission of Protection of Children and Juveniles in Danger (CPCJ) .

Reasons for concern

There are around 12.000 children in institutions and temporary foster families, 44% of them between the age of 13 and 18 and 39% between the age of 7 and 12, which makes a total of 83% of children with a very small probability of being adopted. Only 6% of those children have a project of adoption. Furthermore, very few institutionalised children follow university studies or reach a reasonably high level of formal education.

Article 25. The rights of the elderly

National legislation, regulation and case law

Ministerial Decree (*Portaria)* 1362/2003 of the 15th December 2003 raised the amount of the pensions to be received in 2004, as shown in the following table. According to it, depending on the years of contribution to the Social Security, the General Regime of Pensions states that the minimum amount to be paid can vary between €151,84 and €325,31, per month. An amount of 28,91€ (extraordinary complement of solidarity) can be added to the basic value in case the pensioner is older than 70 years. So, the minimum to be paid to someone older than 70 years is €180,75 per month, which is an extremely low amount.

Most of the case law found gives elderly a special treatment recognising they need particular protection. It can go up to the point of favouring the author of a crime of sexual abuse on a minor due to his age. That is the case of the decision of the Supreme Court of Justice (SJ200307080021555, 08/07/2003), which stated the following: "it is accepted that in a crime of sexual abuse on a child, committed by a 70 year old person, without criminal antecedents, the sentence shall be reduced from 5 years to 3 years and six months"). Most of the cases found in case law indicate elderly as victims of theft, burglary, robbery and involved in cases of lending rights.

Practice of national authorities

In Covilhã, in the interior of the country, a pioneer Protocol has been signed between the Municipality, the Social Security and the Hospital. This Protocol enables elderly to make yearly medical check-ups for free. This is a way of acting preventively towards elderly health. This is a good practice, which should be enlarged to other regions.

National policies encourage elderly to stay at home as long as possible, rather than institutionalising them. The National system has been developing a multidisciplinary net of services to be delivered at elderly's home.

Reasons for concern

Pensions are extremely low – therefore, sometimes called even by prominent politicians "misery pensions" - and it is easy to find elderly living in extreme poverty, especially in the interior of the country. This obliges elderly to work hard to guarantee their survival. There is a good net of services to the elder but this net is manifestly insufficient or even virtually inexistent in the inner part of the country. Therefore, some elder people can be found living in extreme solitude and with lack of basic survival goods in those regions. Their isolation also leaves them extremely exposed and vulnerable to criminal acts, which have sometimes made the news of the day (especially in the region of Alentejo, Beira Interior and Trás-os-Montes). Cases of illegal foster homes for elderly keep on arising. It is crucial to keep on inspecting these situations and to better regulate their activities.

If one analysis the tables below, one can conclude that the Portuguese population is clearly ageing: Portugal has, at the moment, one of the lowest birth rates of the whole European Union. This means that in some years, the elderly will be a very wide group in society. It is then imperative to start re-thinking the role of the elderly in society, by giving them a pro-active statute.

Ageing in Portugal between 1972 and 2021

Year	Rate of ageing
1972	34 elderly for 100 juveniles younger than 14 years
1998	90,3 elderly for 100 juveniles younger than 14 years
2021	127,4 elderly for 100 juveniles younger than 14 years

Source: National Institute of Statistics (INE)

Evolution and prevision for the elderly and young population in Portugal (in %)

Year	65-74 years	> 74 years	Total of elderly	< 15 years
1960	5,4	2,7	8,1	28.8
1970	6,5	3,2	9,7	28.1
1980	7,6	3,9	11,5	25.3
1991	8,3	5,5	13,8	19.7
2000	9,3	5,9	15,2	16.8
2010 *	9,7	6,8	16,5	15.3
2020 *	10,1	7,6	17,7	13.6
2030 *	10,6	8,3	18,9	13.2
2040 *	11,5	9,1	20,6	12.6

Source: National Institute of Statistics (INE)

* - Eurostat Previsions

Article 26. Integration of persons with disabilities

National legislation, regulation and case law

The new Act on Television (Law 32/2003, of the 22nd August 2003) refers as a specific obligation of public television the guarantee that emissions can be followed by deaf persons or persons with a hearing disability, through recourse to subtitles or interpretation by gesture, as well as, the obligation to emit specific programs for such an audience.
In order to facilitate access to justice by deaf persons or persons with a hearing disability, a Protocol between the Ministry of Justice and the Portuguese Federation of Persons with a Hearing Disability has been celebrated that provides for the presence of an interpreter of gesture language at any judicial act, in which a deaf person takes part.

Resolutions of the Council of Ministers 107/2003 and 110/2003, of the 22nd August 2003, have set forth the National Initiative for Citizens With Special Needs in Information Society (*Iniciativa Nacional para os Cidadãos com Necessidades Especiais na Sociedade da Informação*) with the generic purpose of helping such persons benefit fully from the advantages of new information and communication technology and aiming, in particular, at using the latter as a factor of social integration and improvement of the disabled persons' quality of life.

The new Framework Law on Social Security (*Lei de Bases da Segurança Social* nº 32/2002, of the 20th December 2002), which contains the general principles upon which the public system of social security and private initiatives with analogous ends shall be premised has condensed formerly dispersed provisions covering the eventual occurrence of disability or a professional illness, namely the granting of special allocations in such cases.

Law 13/2003, of the 21st May 2003, which created the *Rendimento Mínimo de Inserção* (Minimum Social Integration Allocation), following the extinction of *Rendimento Mínimo*

Garantido[60]*,* provides for the concession of special support for families, with disabled members or chronicle disease carriers. The RMS may grow up to 50% of the social pension in question for each heavily physical or mentally disabled person, carrier of a chronicle disease or elder person highly dependent on others.

The New Labour Code (Law 99/2003 of the 27th August 2003) also contains relevant generic provisions in relation to disabled persons (art. 71 and ff.), which shall be supplemented and developed by specific regulations in relation to each type of disability[61]. Articles 74 to 77, in particular, guarantee the access, exercise and progression in employment, as well as specific professional training, immunity from night shifts and non-subjection to supplemental work.

In relation to case law, two decisions of the Constitutional Court have dealt with the rights of disabled persons[62]. Decision 173/2003, of the 28th March 2003, stemmed from reference to the court by a couple, one member of which was an ambulant disabled, of articles 1º, 4º and 7º of Decree of Law 202/96, of the 23rd October 1996, as amended, in respect of art. 4º, by Decree of Law 174/97. The latter amendments introduced a different procedure of evaluation of the degree of disability, namely through the requirement that it be attested by a set of accredited doctors for that purpose (*Junta Médica)*, in a medical certificate, of a certain type. In view of the requirement of such medical certificate, the plaintiffs, who did not present it, but sought to use a different kind of evidence allowed for under the previous regime, were unable to enjoy some fiscal benefits the law provides for disabled persons. The plaintiffs contended that such a change implied also a change in the *legal concept of disabled person for fiscal purposes* and, therefore, this could only have happened through a legislative act of parliament or through an act of government duly authorized by the Parliament, as the regulation of the tax system is part of the "exclusive competence" of Parliament. The amendments to the former provisions suffered, thus, from an organic unconstitutionality, as the changes in the requirements on the procedure of determination of the disability had been set forth merely by an executive act *(decreto-lei)*. Even though the plaintiffs also mentioned articles 18 and 71 of the portuguese Constitution, dealing respectively with the strict preconditions in which restrictions to fundamental rights can occur and with the rights of disabled people, they did not invoke any substantial incompatibility with the Constitution of the new measures. The Court unanimously decided such changes did not imply a new concept of disabled persons for fiscal purposes; the concept remained the same - *whoever suffers from a degree of permanent incapacity, duly verified by the competent authority, equal or superior to 60%* - as the changes were merely destined at rendering the process of verification of the disability more credible and the new norms were a technical improvement, which did not alter the tax system the nature of the positive discrimination in favour of disabled contributors, nor did it restrict the circle of beneficiaries.

The Ombudsman also seized the Constitutional Court on the issue of the compatibility with the Constitution, and namely with the principle of equality, of art. 2§1 of Decree-Law 103-A/90, containing the definition of "ambulant disabled", for the purposes of the enjoyment of a special car tax exemption. The definition at stake stated that "shall benefit from the car tax exemption ambulant disabled, whose mobility difficulties concern their arms and legs". The doubts of the Ombudsman had to deal with the phrasing of the definition, which could lead to the understanding that it comprised only ambulant disabilities, the cause of which lied

[60] The adjective "guaranteed" was suppressed, though the new subvention aims, basically, at covering the same subjective circle of beneficiaries as before.

[61] Most of which exist already; the new Labour Code provides, therefore, only a general, uniform interpretative framework, which does not regulate the matter *ex novo*, as rules existed already under prior labour legislation.

[62] On the topic, in general, and, in particular, on the potential of the Constitution to oblige the legislator keeping in mind the need to set up measures of positive discrimination, in relation to disabled persons, and on how constitutional litigation and case-law referring to disabled people should look like, from a human rights' maximizing perspective, see ARAÚJO, António, *Direitos Humanos das Pessoas com Deficiência – Da Utopia à Realidade,* 2002.

exclusively on the upper and lower members, thereby excluding the same type of disabilities – affecting ambulatory capacities – but whose cause lied elsewhere, *e.g* .in the central nervous system or spinal medulla. The Ombudsman (*Provedor de Justiça)* joined to his request to the Constitutional Court, an Opinion he obtained from the Medical Professional Association (*Ordem dos Médicos)*, clearly stating that ambulant disabilities could stem from a cause situated outside the affected members themselves. By Decision 188/2003, of the 8th April 2003, the Constitutional Court considered the precept in question was not unconstitutional because its correct reading and interpretation did not leave out of the universe of beneficiaries of the special car tax regime those ambulant disabled whose disability was caused by a problem external to legs and arms, though the impact was felt upon the latter. The Decision doubtless had the merits of clarifying the norm and of leaving no room for authorities to exclude from the enjoyment of that particular fiscal regime, in the future, all those ambulant disabled or wheelchair bound, whose disability has its origins elsewhere other than in their upper or lower members. The *origin of the lesion* is irrelevant, what counts, then, for the application of this measure of positive discrimination, is that the disability has its *functional expression* in the person's diminished mobility.

Practice of national authorities

Some Universities are now following the example of the pioneer Office of the University of Coimbra for Students with Special Educational Needs *(Gabinete de Apoio ao Estudante com Necessidades Educativas Especiais)*. The Office is in charge of improving life quality of all disabled students. For that purpose, it contacts all faculty responsible and teaching staff, providing them with an accurate description of the special educational needs of those students; it further ensures recorded or in Braille learning material for blind students, partially having recourse to the voluntary aid of other students, appoints a tutor to deaf and ambulant disabled students and draws attention to necessary adjustments in logistics and architecture. It also directs disabled students, upon graduation, to possible market prospects of employment.

Reasons for concern

A number of legislative acts have been enacted, this year, in the field of labour and social security, with relevance for disabled persons. However, this legislative fever does not correspond to a material improvement or the raising of the standard of protection of disabled people, as the new laws merely condense and rephrase what existed already. Many initiatives and public debates were promoted in 2003 on the issue of the rights of disabled persons, mainly because of the 10th anniversary of the UN General Assembly Resolution on the Equality of Opportunities for Disabled Persons and the commemoration of the European Year of Disabled Persons. It is to be hoped such a profusion of promises made at those occasions and commitments undertaken, then, by public authorities will indeed see the light of the day, moving beyond the customary statements of good intentions.

Despite the unavailability of statistical data, it is notorious that integration of disabled children and young persons in education is only very poorly achieved in Portugal. It is also commonly heard of that the bureaucratic hurdles on hiring a disabled person and getting the employer to enjoy the support foreseen by law to make the necessary architectonical adaptations are insurmountable and render the whole process unbearably lengthy. Assistive technology is either outdated or unaffordable by the families of disabled persons[63] and reimbursement schemes work imperfectly and are slower than desirable.

[63] It is, in this context, a pity Portugal was not one of the countries monitored in relation to the availability and accessibility of assistive technology within the European Union, of June 2003: http://europa.eu.int/comm/employment_social/disability/assistive_technology_study_en.pdf

Architectonical barriers are visible everywhere, and inaccessibility, also for the elderly or simply for walking a baby car, may even be described as one key feature of portuguese towns: to give but one further example, we have never come across a tactile map, in Portugal. Even though awareness has certainly increased in relation to disabled people's rights, much remains to be done, if Portugal is to match the ambitions of the European Union for 2010[64], in fostering both the autonomy and the integration of disabled persons. It looks particularly imperative that construction products are monitored closely by the State and that the latter develops a strategy of pro-active involvement of business, private owners and decentralised public bodies in the improvement of disabled peoples lives.

CHAPTER IV : SOLIDARITY

Article 27. Worker's right to information and consultation within the undertaking

National legislation, regulation and case law

Article 503º of the new Labour Code draws on former legislation and may be said the key provision in relation to this right, although the workers' right to information and consultation is, again, explicitly mentioned in the context, *e.g.*, of collective dismissal, structural organic readjustments, etc. According to art. 503º union's representatives have the right to information in respect of all matters within their field of action and of all those other, as defined by law or in the relevant collective working conventions. Beyond that, they have the right to information in what concerns: a) the recent evolution and the probable evolution of the company's situation and economic condition; b) the present and foreseeable employment situation, particularly, in circumstances of threat to the security and continuity of posts; c) all changes capable of affecting the employment structure. Union's representatives have kept their rights, in relation to absence for the purpose of fulfilling their tasks and the employer has a duty to respond in a maximum of 10 days to all requests for information, from the part of the worker.

It is to be noted the regime set out by article 503 does not apply to smaller units, with less than ten employees.

Reasons for concern

Violations to these rights have been, throughout this year of economic crisis, well documented and frequently reported by the media. Many employers have shut down their premises in Portugal, on grounds labour force has become relatively expensive in this corner of Europe, and have left to Manchuria, Africa…Very often, they engaged in the practice of *lay off* and took the occasion of the workers' absence of the working place to empty it of machines and tools, and they never reopened again. This often occurred without them ever having notified the relevant Union. Workers were further chocked in those cases, in which they knew the company was going through a moment of economic comfort, with a stabilised set of clients.

[64] http://europa.eu.int/comm/employment_social/index/final_report_ega_en.pdf

Article 28. Right of collective bargaining and action

National legislation, regulation and case law

Article 606º of the original version of the new Labour Code foresaw that collective conventions could establish, for the period of their validity, limitations on the right of Unions to declare strike – which could go as far as renouncing to it – for motifs relating to the content of the collective convention. This was one of the draft provisions, whose conformity with the Constitution was discussed by the Constitutional Court, before its entry into force, in its Decision 306/2003, as art. 57º of the Constitution elevates the right to strike to the status of a fundamental guarantee of all workers. The draft provision ended up being considered unconstitutional. However, there 5 dissents on this point, which all were unanimous in considering that: a systematic interpretation of the precept suggested that it should be read in conjunction with art. 591º of the new Labour Code, establishing the non-disposable nature of the right to strike. In that context, the questioned article 606º should be interpreted as opening up the possibility for the Unions to renounce, in the collective convention, to the right to declare a strike, aimed at modifying the terms of the Convention or, when a fundamental change of circumstances renders compliance with it impossible or unbearably unjust. Dissents stressed that art. 606º provided for the inclusion, in the collective conventions, of the so called *clauses of relative social peace*, known in other legal systems, as opposed to the pacts of absolute social peace, and that the former could be considered a mere normal manifestation of the principle of good faith in the execution of contracts. The other 7 judges, however, read the proposed precept more broadly: they considered that though it is up to the Unions to declare strike, the fundamental right to strike belongs to the individual worker and the representation of the latter at the table of negotiations of a collective convention is not a sufficient credential to habilitate the former renouncing to it, even if its abdication is only temporary (for the time the convention is in force) and relative (limited to reasons relating to the content of the agreed convention). This was further justified by the onerous consequences to the individual worker if she decided nevertheless to strike, despite what was agreed by the union, as the sanction would be the subjection of that action to the regime of unjustified absence from work, which includes suspension of remuneration and possibly the opening of an inquiry for disciplinary purposes, on grounds of violation of the duty of assiduity.

The compatibility with the Constitution, more precisely with the right of collective bargaining, of the new norm resulting from the joint reading of article 557 § 2,3,4 of the Labour Code was also discussed by the Constitutional Court in Decision 306/2003. According to it, "when collective conventions have lived through their period of efficacy, they are prorogued, according to their own terms. If the collective convention is silent on this point, then the convention shall continue to bind successively for periods of one year; in case one of the parties denounces it, it will bind for one single period of one more year and, in case the parties are negotiating, for another year. If all these deadlines expire, the collective convention may still continue to bind, if conciliation or mediation have started, until their conclusion, but it may not continue to bind for more than 6 months. Once all these delays have expired, the convention ceases all its effects." The fact that collective conventions may ultimately cease to bind, without having been followed by a new collective agreement, would mean they are expurgated of the legal order, on the terms of the legislator, in contradiction with the constitutional recognition that collective conventions are sources of law. Their cessation, in case of expiry of all extension deadlines, and before mediation or arbitration had produced results, would be imposed by the code, not by the expressed consent of the parties; thus, it would constitute an interference of the legislator in the realm of collective autonomy. This could conflict with the constitutional guarantee of the right to collective bargaining, as situations where intentionally one of the parties successively prevents agreement, for the purpose of ensuring the cessation of the convention are possible. With 4 dissent opinions, the Court ended up considering the new legal regime was a pondered, reasonable one and would

only be applied in rare cases and, therefore, the new provisions could not be considered unconstitutional.

Still in the context of the right to collective bargaining and action, and of the same decision, the Constitutional Court ruled on the compliance with this right of article 15 §1 a), b), c) of Parliament's Decree 51/IX, providing for a transitional regime of harmonisation of the collective regulation of work. According to a) those workers not affiliated with the union which negotiated and signed the collective convention, may still choose, in written, the regulatory instrument they wish to apply to them: the convention may, therefore, extend its benefits to them. The Court was unanimous in considering a), *per se,* did not pose any problem of constitutionality and followed an already accepted solution, under previous legislation, where several situations of non-coincidence between union's affiliation and enjoyment of the collective convention were foreseen.

According to b), when, after a minimum of three months after the entering into force of the new collective convention, the majority of workers benefits from it or has expressly chosen to have it applied to them, all previous instruments of the same professional ambit applied by the *employer* cease the production of effects. Further, according to c) when, after a minimum of six months after the entering into force of the new collective convention, the majority of workers benefits from it or has expressly chosen to have it applied to them, all previous instruments of the same professional ambit applied by the *sector* cease the production of effects. According to §2, these two rules would apply only if the Union that signs the collective convention is sufficiently representative and has recognised negotiating capacity, which occurs namely and alternatively when: a) it represents 5% of the workers of that sector of activity; b) it has a minimum of 1500 affiliates; c) it is affiliated with an association that has standing before the Permanent Commission on Social Dialogue (*Comissão Permanente de Concertação Social);* d) it disposes of an adequate financial capacity, stemming from the payment of its affiliates' quotas. This time with only 2 dissents, the Constitutional Court considered these provisions violated the right to collective bargaining and action, as they entailed the cessation of collective conventions, against the will of the parties, who kept an interest in their production of effects and validity. The Court emphatically added that it also constituted a violation of the unions' autonomy and an unconstitutional expropriation of the right to collective bargaining of "minority unions", who are afforded by the constitutional text the same degree of protection as any other.

Article 29. Right of access to placement services

Practice of national authorities

There is in Portugal, since 1979, the *Instituto do Emprego e da Formação Profissional* (*Institute for Employment and Professional training*), a division within the dependency of the Minister for Social Security and Labour, competent to set up the employment and professional training policies decided yearly or on a longer term by the Executive. Its aims are to contribute to the widespread knowledge and diffusion of the problems in the labour market, contributing to the adoption of a global policy capable of improving employment rates and the good use and management of the productive capacities of the country. It is especially designed to provide information, orientation and guidance in education and rehabilitation for the market of young people coming out of the educational system. It also suggests, in conjunction and consultation with economic operators, both nationals and aliens, the organising of specific training in certain underdeveloped areas in Portugal. Unions' representatives have a seat and occasion to have their voice heard at the *IEFP*, which has 5 regional delegations and comprises now 86 centres of employment, 31 centres of professional training and 7 centres for supporting the creation of new economic operators.

The last available study on the efficacy of professional training provided by the IEFP or by the entities he collaborates with relates to 2002[65]: according to the inquiries undertaken, 52, 1% of those who attended courses have estimated they had contributed to them getting a job, in 55% of the cases, there is a direct relationship between the present occupation and the training carried out. Curiously, the theoretical component of the training has been the one to be estimated to be better and most useful: this is partially explainable by the fact theses courses are generally attended by people who have not gone beyond a very low degree of formal education. Field trips and activities of the kind are marked negatively by the trainees, who often find them useless and ill-organised. The courses, which are most sought for relate to: textile and shoe industry, construction, mechanics and computational science. 66% of the trainees have been able to find of job, even if in most cases of a precarious nature, 9 months after the conclusion of the training.

Reasons for concern

It is still an underdeveloped domain the interplay of markets in the international arena and the *IEFP* is only very scarcely prepared to provide information on how to operate or seek a job outside the country.

Article 30. Protection in the event of unjustified dismissal

National legislation, regulation and case law

One of the provisions of the new Labour Code, whose constitutionality was questioned - article 436§2 - allows for the reopening of the disciplinary process by the employer, when its nullity was the basis upon which dismissal was challenged judicially. In his requirement to the Constitutional Court, the President argued that, because such reopening will, in practice, occur, over one year past the events that gave cause to the dismissal, this would greatly offend the guarantee of security and legal certainty in the life of the worker, so essential for rule of law, as results clearly from article 2 of the Constitution. A new edition of the disciplinary process would, further, constitute both a stimulus to the employer for not complying with the formalities and steps required by a due disciplinary procedure in the first place, and a dissuasion to the workers' right to argue before the courts unjustified dismissal, on grounds of lack of compliance with rules governing the exercise of disciplinary power. In its decision, the Constitutional Court started out[66] with stressing that the possibility of reopening disciplinary proceedings does not exist, neither where the process is simply lacking (had not existed), nor when the "inculpation note" (*nota de culpa*) is not been emitted. The primitive note of inculpation delimits the object of the process, in such a way that a possible sanctioning decision, as the outcome of the second disciplinary process may not invoke any new facts not enlisted by it, as results clearly from article 415 §3. It would be, in fact, highly unfair and would open the door to fraudulent firing if the employer could now impute to the worker guilty facts, which he did not consider as susceptible of rendering unviable the persistence of the labour relationship, in the first place. So, not only is the new process barred from invoking new facts, but also the employer may not retroactively apply the effects of the second dismissal, namely suspension of pay, to the date of the first. Therefore, with one dissent opinion, the Court has considered this possibility is not unconstitutional: it does not offend the substantive prohibition of unjustified dismissal, as the employer remains bound to prove the employee incurred in a disciplinary fault that rendered the subsistence of the contract immediately and practically impossible and it does not offend the procedural dimension of the

[65] http://www.iefp.pt/OEVA/Relatorio2002.doc

[66] After reporting this was already questioned under previous legislation, object of controversy on the part of the doctrine and had recently been considered not unconstitutional by a decision of the Supreme Court of Justice.

guarantee, as the reopening of the process is aimed at comply with the formal conditions aimed at ensuring the defence rights of the accused.

The Court added the provision did not violate the principle of *ne bis in idem*, as the nullity of the first decision implies its disappearance from the legal order.

Another norm, whose constitutionality was discussed, still in relation to the right of protection against unjustified dismissal, was article 438, §2, 3,4 of the new Labour Code, which permits the non-reintegration of the worker of a microcompany (maximum of 8 employees), or of the worker, occupying a post of administration and direction, even though her dismissal has been judicially declared unlawful, when her return might be considered, following the court's decision, highly damaging and troubling for the continuation of the entrepreneurial activity. The employer may, however, never oppose reintegration, neither when the unlawfulness of the dismissal has resulted from political, ideological, ethnic or religious motifs, even when the reasons invoked where others, nor when the judge considers that the justification for opposing reintegration was intentionally created by the employer.

The President drew the court's attention to the following outcome of the new legislative proposal: the fact the employer may, in certain circumstances, oppose reintegration leads to the worker loosing, in practice, his job, in violation of the protection against unjustified dismissal, foreseen by article 53º of the Constitution.[67]

On this point, and with 5 dissent opinions, including that of the *rapporteur* of the decision, the Court has ruled that: the fact the norms under analysis expressly forbid opposition to reintegration, when the unlawfulness of the dismissal resulted from political, ideological, ethnic or religious motifs, and concern only microentreprises or posts of direction, significantly limits the universe of its addressees. Moreover, in relation to the payment of compensation owed in such cases, a more beneficial criteria for situations in which opposition to integration by the employer succeeds applies, when confronted with the compensation owed, when the employee himself chooses not to reintegrate. The Code sets out the general principle of reintegration, as an advanced guardian of stability at work and protection against unjustified dismissal, but carefully allows for some exceptions. The fact that opposition to integration is compulsorily scrutinised and decided upon by the judge, though pledged upon the initiative of the employer, subjecting its decision to the principle of contradictory, where the burden of proof on the damaging character of reintegration lies with the employer, are sufficient guarantees that the new norms do not contend with the right to protection against unjustified dismissal.

Article 31. Fair and just working conditions

National legislation, regulation and case law

Chapters II and IV of the new labour code draw on former legislation relating to working conditions. Chapter II has kept the maximum limit of hours at 40 per week and 8 a day, further regulating pauses, the right to holidays and paid rest, supplemental work, etc. In Chapter IV, hygiene and security matters are regulated. The level of protection does not appear to have been either lowered or improved.

[67] Under the legislation the Code is meant to substitute, only the worker has the possibility of choosing, instead of reintegration, a compensation for the years of labouring (*indemnização de antiguidade)*. The employer may never oppose reintegration, except in the contract for domestic labour *(contrato de trabalho doméstico)*, in respect of which, and because of the very close relationship necessarily entailed by the parties, reintegration is naturally unsustainable.

In Decision 306/2003, of the 25th July 2003, the Constitutional Court has ruled on the compatibility with the Constitution of one norm, which was contained in the original version of the Labour Code (Projecto de Código do Trabalho): art. 1§ 4, which provided that the so-called "regulations on minimal conditions"(*regulamentos de condições mínimas*) could derogate to those provisions of the labour code, which did not envisage that such matters would be primarily regulated by collective instruments, therefore, with the expression of consent of both employers and employees. Underlying the discussion around such draft provision was the fear that the minister of the sector would unilaterally not respect the minimum standard of protection or would enact technical regulation, without the prior hearing of workers; however, the question was not dealt with on these substantive terms: the draft provision has been declared unconstitutional and was excluded afterwards from the Code, on grounds it infringed art. 112º 6 of the Constitution, according to which, no Act of Parliament may create legislative acts other than those foreseen by the Constitution, nor can it confer upon acts of a different nature the power of, with external effects, interpreting, integrating, modifying, suspending or derogating to any of its provisions. The principle of *numerus clauses* of legislative acts and that of the intangibility of their normative strength was the framework that allowed to overrule a provision, which could open the door to non-compliance with vital norms in relation to security in labour and working conditions. The final version of the Code, not only prevents such regulation from derogating to the Code, but also ended up foreseeing in art. 579 that all regulations on minimum conditions should be preceded by preparatory studies, in the elaboration of which workers' representatives should be heard before the technical commission, whenever possible.

Sexual and Moral Harassment:

Art. 24 of the new Labour Code prohibits and punishes all forms of sexual and moral harassment, both in hiring and at the work place, verbal or non-verbal. Besides the repressive sanction, the right to a compensation is always owed to a victim of harassment.

Reasons for concern

It is commonly reported that compulsory rules relating to the maximum of labour hours are not respected: this happens at the initiative of the employer, but sometimes also of the employee, who is tempted to work longer, in order to compensate for his low wage. Reports of this kind are usual in the tertiary and in transportation industry: in the latter case, exposing the worker and third persons to the risks involved by the lack of concentration in driving. Security rules, mainly in the construction sector, are also often turned a blind eye, not infrequently either with the connivance of the worker, who trusts luck for protection. In this sense, more monitoring of compliance and inspections are certainly not enough to counter a general culture of risks' underestimation: intensive education and sensitization for security should be introduced, on the basis of a sector by sector approach.

Article 32. Prohibition of child labour and protection of young people at work

National legislation, regulation and case law

In May 2003, ILO opened up an office in Lisbon, which, since then, has been working closely with the Portuguese authorities on the issue of child labour. It should be highlighted, as a positive point, that Portugal is one of the ten greatest donors of the ILO programme for Statistical Information and Monitoring Programme on Child Labour.

On the 1st of December 2003, a new Labour Code entered into force, which has introduced significant alterations to the child labour regime. One of the greatest changes has been the criminalization of child labour, which before and *per se* was not considered to be a crime.

According to article 55 of the Labour Code, the rule is that it is only permitted to employ a child if she has reached the age of admission (16 years), if she has concluded the compulsory schooling and if she has the adequate physical and psychological conditions for that work. Article 60§2 forbids all sorts of works, which may be prejudicial for the psychological, physical and moral development of the child. According to article 608 of the Labour Code, in case of violation of these rules, the perpetrator may be sentenced to imprisonment up to 2 years or a fine up to 240 days (the author will be given the least favourable treatment, in case there is another law ruling this conduct). The sentence may be harder in case the child has not reached the age of admission and has not finished the compulsory schooling or if there is reiteration of the employer in this kind of conduct.

Article 609 of the Labour Code classifies as a crime of qualified disobedience the fact that the employer keeps on maintaining the labour link with the child after having been notified by the Labour Inspection to cess it. Legal persons will also be criminally responsible in case of practice of the forbidden conducts above identified. They can be punished with fines, temporary interdiction of their activities or prohibition of receiving subsidies. In article 70 of the new Labour Code, it is said that the participation of children in entertainment and other activities shall be regulated in special legislation.

Practice of national authorities

The Plan for Eliminating the Exploitation of Child Labour (PEETI) is still the most comprehensive set of measures in the fight against child labour in Portugal. It depends on the Ministry of Labour and Solidarity and it has several multidisciplinary teams working on the field, at present.

In parallel to PEETI, the National Council against the Elimination of Child Labour (CNETI), which is composed by several governmental and non-governmental entities is charged with giving expert counselling on these matters.

In November 2003, 54 new Labour Inspectors were appointed and although there is no information on whether some will be specifically working in the area of child labour, it is to be expected this allocation of human resources will help eradicating this practice.

Still, statistics show that there have been several "flash" inspections to enterprises with the specific aim of acknowledging the situation of child labour. According to the results of these inspections, the number of children detected at working places was very low, varying between none and a maximum of 3.

Reasons for concern

The situation of child labour, especially in the fields of entertainment and sports has been, so far, under-regulated and not subject to any monitoring or study. A new wave of child labour, the urban child exploitation, resulting from an increased number of homeless and immigrant children used as beggers, in drug-trafficking and in prostitution, is also of grave concern. Parallel to this, despite visible improvements, traditional fields of child labour exploitation such as shoe manufacturing, continue to be hard to track, as most of the children work at home, with the conscious complicity of the family.

Article 33. Family and professional life

National legislation, regulation and case law

Art. 33º to 52º of the new Labour Code deal with the protection of fatherhood and motherhood, without, however, once more, bringing any substantial improvements to it. The Chapter entails the special protection of motherhood and fatherhood, recognising their irreplaceable function in relation to children and the need to ensure professional fulfilment in connection with family life. Well aware of traditional practices of discrimination of women for reasons relating to pregnancy and child birth, it states their right to special protection by the law, including leave for the adequate period and without loss of any benefits. The period of maternal leave was kept: 120 consecutive days, 90 of which must be taken after the childbirth, as well as all other rights relating to reduced labour schedule for breast feeding and assistance to the child.

It is new the fact that 6 weeks are now of compulsory enjoyment by the woman; they cannot be renounced: the *rationale* of rendering this period non-disposable lies probably with the worry for the caring needs of the newly born child; however, it is hard to see how that can be imposed by decree and it is not clear what the sanction could be if the woman freely decided to work during that time. Fathers kept their right to 5 days in the first month after the child was born or for the same period the mother would enjoy in the case of death, inability or joint decision of the couple; a special regime of absence for medical assistance, excuse from night shifts, during pregnancy and after birth is also provided for. In case of adoption, the period is shorter, of 100 days only. In legislative terms, there are no doubts that the framework is set to effectively provide parents with protection and the means to carry out their carriers, and combining them with family life.

Reasons for concern

Endemic discrimination by employers towards women, allegedly on grounds of the higher cost they represent, continues to be a well-known deplorable practice. Refusal to hire women in some sectors is accompanied by discouraging men from enjoying their right to five days of leave, by excluding them from qualifying to productivity prices. Because the level of salaries is also extremely low, many women take up more than one job, when they have a child. An important growth in the offer of day care centres happened in the last few years, under the aegis of municipalities, however, the web of pre-primary schools remains insufficient and costly to respond to the needs of a working female population.

Article 34. Social security and social assistance

National legislation, regulation and case law

On the 20th December 2002, a new Framework Law on Social Security has been enacted (Lei nº 32/2002, *Lei de Bases da Segurança Social)*, aimed at condensing principally the subdivisions between the different contributory an non-contributory schemes. The New Law, however does not bring about an elevation in the material standard of protection. According to article 3 of the New Law: the clauses of an individual or collective contract allowing for the waiving of the rights provided for in this Act are null and void. Art. 4 sets out that The social security system aims at carrying out the following objectives: a) To guarantee the achievement of the right to social security; b) To promote the improvement of the conditions and levels of the social protection and the strengthening of the respective equity; c) To protect workers and their families in situations of lack or reduction of their working capacity, of unemployment and of death; d) To protect people who are in a situation of lack or reduction of their subsistence means;e) To protect families by compensating them for their family

charges; f) To promote social efficacy of the benefits schemes and the quality of their management, as well as the financial efficiency and sustainability of the system.

The social security system integrates the public social security system, the social aid system and the supplementary system, the public social security system comprises the insurance subsystem, the solidarity subsystem and the family protection subsystem, the social aid system is carried out by public institutions, namely by local authorities, and private non profit-making institutions. The general principles of the system are the principles of universality, of equality, of solidarity, of social equity, of positive discrimination, of social subsidiarity, of social inclusion, of intergenerational cohesion, of the primacy of public responsibility, of supplementarity, of unity, of decentralisation, of participation, of efficacy, of maintenance of the acquired rights and of those in course of acquisition, of legal guarantee and of information.

Art. 65 sets out the "elegibility criteria" for non-nationals: The law may lay down that the social protection guaranteed under this section to foreign residents not treated as nationals by international social security instruments, refugees and stateless persons is dependent on certain conditions, namely minimum periods of residence.

On the 7th of March 2003, the Ombudsman, in a two-page note[68], insisted in bringing to the attention of the Prime-Minister Decision 474/2002, of the 18th December 2002, of the Constitutional Court, according to which the fact civil servants (public workers) were not eligible, under previous legislation, to unemployment benefits, in situation of involuntary loss of work, constituted an unconstitutionality by omission. In fact, by not enacting the necessary legislative acts to ensure the enjoyment by civil servants of the right to material support by the State in case of involuntary unemployment, foreseen by art.59 1e) of the Constitution, the government was violating the later precept by its inertia, further creating a discrimination in relation to the other categories of workers, highly detrimental to those formerly employed by the State. The note of the Ombudsman, who had seized the Constitutional Court on this issue in 1994, sought to ensure the need to alter this state of affairs would be explicitly addressed in the drafting of the new legislation relating to labour and social security. The fact that the system of social security is premised on the principles of universality as previously mentioned should be enough to guarantee public workers now have right to the respective unemployment benefits.

Article 35. Health care

National legislation, regulation and case law

Law no 27/2002, of 8th November 2002, approved the juridical regime of hospital management. It permits the creation of health care units with the juridical nature of *business corporation of public capitals* or also private institutions, which can establish contracts with the National Health System. However, this legislation does not change the essential structure of the NHS: a universal, general and predominantly free health care system. In 2003, the government started implementing this policy, creating a different administration model for 31 hospitals, which became *business corporations of public capital*s. Although these entities are government based funded, they follow private law; administrative legislation and administration methodology is not applicable.

On the other hand, the government created *partnerships* with private investors in health-care system. The most important legislation is: Decree-Law 185/2002, August 20th (partnership with private investment and administration entities on health-care services); Decree-Law

[68] http://www.provedor-jus.pt/ultimas/Outras_Decisoes/ApoioNoDesemprego.pdf

188/2003, August 20th (regulates Public Hospitals); Decree-Law 281/2003, November 8th (on long-term health-care services); Decree-Law 60/2003, April 1st (on basic health-care services); Decree-Law 309/2003, December 10th (creates an independent Entity to regulate health-care services).

Reasons for concern

High Costs for the Patient:
Portugal has a universal, general and predominantly free National Health Service, since 1979 (*Beveridge model*), the funding of which comes from the national budget[69]. There are also other sub-systems that provide health care to 25% of the population (the civil servants scheme (14%), bank employees scheme (5%), armed forces scheme (2,5%), post employees, and others); topping-up health insurance is used in partial coverage by 5% of the population[70]. However, private medicine and private investment in medicine is one of the greatest in the OECD - in 1996, private expenses were 3,4% of the GNP.[71] This is particularly detrimental of the access to health care, in a country of relative low incomes, when compared to other European States and effectively generates a great inequality in the enjoyment of this right.

Waiting Lists:

One pervasive problem relates to the (in)famous waiting lists, in particular for surgeries, which may be, sometimes, of a relative urgent nature, with patients having to wait for months for a free bed in a hospital.

Doctors' shortage and Geographic Inequity in the distribution of medical staff:

Because for already many years, an eugenic system of *numerus clauses* has governed access to medical studies, there aren't enough portuguese doctors to respond to the need of the population and it is, therefore, not infrequent to find Spanish and other nationality doctors exercising their profession in Portugal. One particular problem is posed less by the shortage of doctors and more by the geographic inequity in their distribution, with the inner land being particularly disadvantaged, in relation to as basic care as pediatrists and family doctors.

The Economic "rationale" of privatisation:

The dramatic changes in the Health-care sector create the fear of future privatisation and a possible subsequent discrimination of the lower economic classes. It is, in particular, feared that hospitals and health care centres, run as business corporations of public capitals will privilege those patients, who can afford a private health insurance. Should such a violation of the principle of non-discrimination occur and that would be a typical case for referral to the new health regulator. It is unanimously recognised that the National Health Service (created in 1978) improved the living conditions of millions of citizens; however, its permanent deficit demanded new administration methods. The implementation of the later must not work to the detriment of those in need and must not permit a "selection" of patients and diseases on economic grounds.

[69] Art. 64 Portuguese Constitution.
[70] CORREIA DE CAMPOS, *Yellow light at the crossroads: wait for green or cross the yellow – uncertaities about the future of the portuguese NHS*, Associação Portuguesa de Economia da Saúde, Documento de Trabalho 3/96, Lisboa, 1996, p. 6. However, with the exception of the civil servants scheme, none of the others is technically self-sustainable, relying on the NHS for higher levels of care.
[71] SIMÕES/ LOURENÇO, "As Políticas Públicas de Saúde em Portugal nos Últimos 25 anos", in BARROS/ SIMÕES (Orgs.), *Livro de Homenagem a Augusto Mantas*, Lisboa, 1999, p.127. In 1996 the global costs of health care represent 8,2% GDP, being 40,24% private and 59,76% public expenses.

Very high percentage of HIV infections:

In Portugal, AIDS' epidemics is still growing. According to AIDS-UNO there are around 50.000 HIV-infected persons; however, there are only 22.000 notified carriers by the *Infectious Disease Epidemiological Surveillance Centre*. 89% of these citizens are between 15 and 45 years old. Unfortunately Portugal has the highest rate of HIV carriers in the European Union and is the 6th among all European countries. The situation is severe and demands urgent action. It is the contention of the authors of this report that it also proves the insufficiency and possibly the inadequacy of the prevention campaigns so far launched.

Article 36. Access to services of general economic interest

National legislation, regulation and case law

In 2003 some of the services of economic general interest underwent relevant changes, as far as the so-called *obligations of public service* are concerned. To begin with, in the electricity sector, new legislation was published (Decree-Law n.º 185/2003) to the effect of opening completely the sector to market competition. From next summer onwards, everyone will be able to choose his/her supplier of electricity; the prices of the electricity will be freely established in the market, as well. Thus a danger would arise for the people living in isolated places and small villages not to have electricity available to them, at least at affordable prices. To prevent that risk, the above-mentioned law establishes that one of the electricity traders will be appointed as a "last resort" provider, at regulated prices, for all those who might be unable to find a suitable supplier in the free market of electricity. Art. 6ª, § 3 of the above mentioned decree-law states that: "after hearing the independent energy regulator, the Directorate-General of Energy (ministry of the Economy) may appoint any electricity trader as a last resort trader, in order to guarantee the universal service of electricity». And art. 9, § 3, adds that "the last resort traders have to supply electricity to any client in case their provider fails to do so or to other clients whenever there is no trader willing to supply electricity to them in dully justified commercial conditions».

It remains to be seen whether this scheme is appropriate to ensure the provision of electricity to everyone under regulated conditions and affordable prices.

In the field of railway transport – another traditional "public service" or "utility" – a new piece of legislation Decree-Law nº 270/2003 made the transposition of the so called "Railway package I" of the EU into the Portuguese legislation, initiating the liberalization of the sector, towards the introduction of competition in the sector. But for the time being the liberalization will comprise only the transport of goods. The transportation of passengers will continue to be considered a "public service", though provided by a third party, through the mechanism of public concession, whereby the State allows a company, either public or private, by way of a contract, to provide in exclusivity a general interest service, for a long period of time (10, 20, 30 years), in the terms agreed upon by the State and the company. The contractual terms will include necessarily the obligations related to the fulfilment of the public service (connections, fares, quality of the service, etc.).

In the field of telecommunications, which has been entirely liberalised, a new piece of legislation (Decreto-Lei n.º 31/2003) replaced the previous "bases of the concession of the public service of telecommunications", which cares for the guarantee of the universal service in this important sector. The incumbent company, PT Telecomunicações, SA, a former state owned company, is nowadays the owner of the basic network of telecommunications, which was recently sold by the State. But the incumbent company has to provide access to the network, on a non-discriminatory fashion, to all the competing companies on the market. As far as the "universal service" is concerned, the new legislation didn't change the legal

obligations, as defined by the previous legislation on the matter. Therefore, the incumbent company continues to provide, among other services, a fixed telephone connection under regulated conditions (including prices) to everyone who cannot find a suitable offer in the market. An independent regulator, Anacom, has the powers to supervise and ensure that the legal duties of the incumbent are cared for.

A different case is the postal service – one of the most traditional "public services" –, which is still to a certain extent (ordinary letters and parcels under certain weight) a non liberalized market, that is provided by a state owned undertaking, the *CTT – Correios de Portugal*. The full liberalization of this sector is to be accomplished only within some years.

Recently, in September 2003, the state postal company agreed a deal with the association of "freguesias" (undermunicipal local communities) in order to transfer to them the responsibilities of running the postal services, closing down the postal stations namely in the villages and small towns. The postal service would be run afterwards by the "freguesias" themselves. The agreement is not mandatory to the individual "freguesias", which are free to accept the new responsibility. But there are many complaints in some areas of the country against the deal, with the argument that the local communities are not prepared to run the postal service, lacking expertise and personnel. Thus there might be a real risk of jeopardizing the "universal service" as well the quality of the postal service.

A number of "freguesias" have refused to implement the agreement but many others have accepted the new arrangement. The near future will show whether the experience can be respectful of the public service obligations in the postal sector. It is up to the independent regulator of the sector, Anacom, to ensure that it is so.

In the case of the water and sanitation services no major changes occurred in 2003. It is a sector that has not undergone the same process of liberalization of the other traditional utilities. These services continue to be a public responsibility, shared by the municipalities (the "retail" level of distribution of water to the users and collection of effluents and waste from households) and the State (the supramunicipal works of gross water provision to the municipalities and treatment of effluents and waste). But the municipal services may be transferred to private companies through the concession mechanism, whereas the State services may be managed only by Sate owned companies or mixed companies with a state capital majority.

The only legislative changes in this field (Decree-Law nº 103/2003 and Decree-Law nº 222/2003) touched only some partial aspects in the previous legislation – that dates back from 1993 and 1994 –, namely the obligation of public tender for the concession of the public services or for the participation of private capital in the incumbent public companies. Still, the new legislation continues to stress the "public interest" of this sector and specifies that the State multimunicipal schemes (and the same could be said of the municipal water and sanitation services), «having regard that they fulfil missions of public interest,may be awarded by Government special or exclusive rights" (art. 4ºA, § 3 of Decree-Law nº 103/2003 and art. 6º, § 3 of Decree-Law nº 222/2003).

Article 37. Environmental protection

International case law and concluding observation of international organs

During the period under review, Portugal has been judged and declared responsible twice by the European Court of Justice for breach of European Law. In one case, the reason was the failure to fulfil its obligations under Directives 92/43/EEC and 79/409/EEC on conservation

of natural habitats and wild birds. In the other case, the ground was the incomplete transposition of Directive 75/439/EEC on disposal of waste oils.
In both cases Portugal was blamed for not having taken appropriate legal or administrative measures necessary to implement the aforementioned directives in Portuguese domestic law.

National legislation, regulation and case law

Again in the year 2003 most of the environmental laws adopted in Portugal were intended to transpose EU directives. This was the case of the laws concerning: energy labelling of electric appliances[i], disposal of waste oils[ii], port reception facilities for ship-generated waste and cargo residues[iii], limitation of emissions of certain pollutants into the air from large combustion plants[iv], emission ceilings for certain atmospheric pollutants[v], end-of life vehicles[vi], quality of water intended for human consumption[vii] and measures against air pollution by emissions from motor vehicles[viii].

Exception to this were the laws on human exposure to magnetic fields[ix], on environmental tourism in protected areas[x] and on licensing of industrial activities[xi].

Still, two diplomas deserve special reference since they show the reactive nature of many environmental laws: the ministerial dispatch on dredging for mineral extraction[xii] and parliament's resolution on forest fire prevention and fight[xiii]. The first document was passed because of a major disaster that caused the death of almost 70 persons: the falling off of a bridge due to dredging activities in the margins of river Douro in March 2001. The second was a response to recurring disasters of summer fires.

In what concerns public access to environmental information, in spite of the legal recognition of a very wide right of access to environmental information[xiv], some public authorities still have a hard time in admitting it, thus forcing the Commission for Access to Administrative Documents to declare the disrespect of this right several times during 2003.

Besides the existing articles in the Penal Code on "crime of damages against nature", and "crime of pollution", no other major penal infractions were created.

With regard to fiscal instruments, in Portugal there are some environmental taxes (for instance, taxes associated with the issuing of an environmental permit in the context of integrated prevention and pollution control, taxes for waste water emission into water courses, and, of course, the tax on fossil fuels), there are more favourable tax regimes (like a special VAT regime for the use of renewable energies, a fiscal benefit in the income tax for environmental protection investments, or exemption of income tax for environmental NGOs), but none of them was created this year.
There is, of course, financial support to environmental protection supplied by the Structural Funds.

Tradable emission permits are the new market instrument being prepared as a tool for reducing emissions with greenhouse effects.

As for international environmental law, Portugal has approved three international conventions: the Convention on access to information, public participation in decision-making and access to justice in environmental matters[xv], the Agreement on the conservation of african-eurasian migratory waterbirds[xvi] and the Convention on assistance in the case of a nuclear accident or radiological emergency[xvii].

In national Supreme Courts there was no special reference neither to the prevention principle nor to the pollute-pays principle[xviii]. However, curiously enough, during 2003 there were several cases, in superior courts, on mineral extraction by dredging[xix].

The *right to a healthy environment* was declared in the Supreme Court of Justice decision[xx] (in appeal from the Second Instance court in Guimarães[xxi]) in the case of a partial expropriation of a land for road construction. It was proved that, before the construction of the road, the house (which was left in the remaining part of the land and still inhabited), was quiet, without any noise or smoke pollution, with good access, good sun exposure, wide and beautiful sights. When the highway was constructed, all this amenities faded away, because the option was to build a viaduct 40 meters high and just 30 meters away from the residence.Confirming the decision of the previous instance, the Court decided that the right to a healthy and balanced human environment[xxii] was at stake. In fact, the dwellers had lost all the tranquillity, quality of life and well-being that the residence could offer them. The expropriation of the land and therefore, a compensation for the loss of the house and the rest of the land had to be given.

Reasons for concern

The main reason for concern in Portuguese environmental law is still the gap between the law *in the books* and law *in action*. Indeed, most of the instruments (criminal, administrative, fiscal, economic) for environmental protection are created but, nevertheless, are not applied. Practical implementation of the law is poor, in part due to ignorance of the law by administrative (and, in some cases, judicial) bodies as well as to low awareness of individual rights.
Just to give an example, this is why Portugal has transposed the directive on public access to environmental information, adopting a law that grants the individuals more rights of access than those that are mandatory under the directive. However, the actual access is obstructed by a harsh application of the law.
In sum, misapplication of the law raises more serious questions than the absence of the law itself and this hasn't yet been noticed by the international bodies (at least to its real extent).

Article 38. Consumer protection

National legislation, regulation and case law

Consumer protection measures adopted by the legislature were modest during the course of 2003. Amendments made to the national laws governing consumer protection laws were few and rather a result of having to comply with community law requirements than of actual problems occurring in consumption. Exception is made to the announced transposition of Directive 1999/44/EC of the European Parliament and of the Council of 25 may 1999 on certain aspects of the sale of consumer goods and associated guarantees.

Therefore, reference is made primarily to the Decree of Law number 67/2003, of April 8, 2003, which transposed to national law the aforementioned directive and that simultaneously amended Law number 24/96, of July 31, 1986, which sets forth the general consumer protection regime in Portugal.

One of the main innovative aspects brought about by this law was the adoption in express terms of the concept of conformity with the contract, which is presumed not to be existent whenever one of the events described in the recently approved regime occurs. The incorrect installation of the consumer goods by the seller or under his responsibility or the incorrect installation due to a shortcoming in the installation instructions is deemed to be equivalent to the lack of conformity of the goods

The lack of conformity with the contract is determined by reference to the time of delivery of the goods to the consumer. However, a lack of conformity, which becomes known within two

or five years as from delivery of a movable or of an immovable asset, as the case may be, is deemed to be existent at such time.

On the other hand, the present legislature showed concern in not restraining the guarantees of the consumers and consequently the remedies currently set forth in Law number 24/96, of July 31, and namely the set of rights granted to the buyer of defective goods continued to be in force, which implied the amendment of the provisions that did not comply with the above named directive.

In respect to time limits, the law sets forth a period of guarantee, that is to say, the period of time during which the consumer may exercise his legal rights under national legislation, in case a lack of conformity becomes apparent.
This time limit is of two or five years as from the delivery of movable or immovable assets to the consumer, as the case may be. The consumer continues to have the obligation of pointing out the defects of the goods to the seller. However, the time limit for doing so was amended to two months as from the consumer becomes aware of such defects, in case of sale of movable assets.

This consumer protection regime remains mandatory. However, the partiers may agree that the period of two years is reduced to one, in case of sale of second-hand goods. The law sets out provisions on the guarantees which are freely offered by the seller.

The provision of direct liability of the producer to the consumer is also quite significant, thus compelling him to repair or replace the defective good.

On a sector-by-sector approach, the introduction of a set of legal provisions in order to reinforce consumers' rights in terms of *health* and *food safety* should be emphasized. Decree-law number 20/2003, of the 3rd of February 2003, which transposes to national law Commission Directive 2002/67 /EC of 18 July 2002 on the labelling of foodstuffs containing quinine, and of foodstuffs containing caffeine, is an example of this. It aims at increasing the guarantees of consumer's health protection in respect to these substances and to the side-effects they may cause, being part of a health promotion policy through the increase of information. The Decree-Law number 25/2003, of February 4, 2003, which transposes to national law Directive 2001/37/EC of the European Parliament and of the Council of 5 June 2001 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products and amends the Decree-Law number 226/83, of May 27, 1983, on tobacco use prevention is another statute which aims to put into effect this policy of consumers' health promotion through the reinforcement of their rights to information. In order to ensure the compliance of these rights, tobacco manufacturers or importers shall have to submit to the Directorate General of Health on an annual basis a list containing all the ingredients and the quantities of such ingredients used in the manufacturing of tobacco products on a brand-name by brand-name basis and on a type-by-type basis, the toxicity of tobacco products, as well as its effects on health, namely the risk of addictiveness caused by its consumption. All these data shall be regularly disclosed to the consumers. With the same purport, the use on tobacco product packaging of certain texts, such as "low-tar", "light", "ultra-light", "mild", names, pictures and figurative or other signs, which may mislead the consumer into the belief that such products are less harmful and give rise to changes in consumption is also restricted.

Decree-Law number 50/2003, of March 25, 2003, which transposes to national law Commission Directive 2002/86/EC, of 6 November and amends Decree-Law number 183/2002, of August 20, 2002, which transposed to national law the Commission Directive 2001/101/CE, of 26 November 2001 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for consumers and amended the Decree-Law number 560/99, of 18 December 1999 and the Decree-Law number

136/2003, of 28 de June 2003, which transposes to national law Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements are also examples of the above described policy which aims in this case to ensure the protection of the consumers in terms of food safety.

The aforementioned statutes evidence the privileged importance of the *right to information* as a mechanism, which is instrumental for the protection, not only of pecuniary interests, but also of personal interests and other rights of the consumers.

In what concerns national law, a final reference should be made to the amendments to the electronic documents and digital signatures legal regime introduced by the Decree-Law number 62/2003, of 3 April 2003.

In relation to case-law, we can state that the judicial decisions of the Portuguese courts were not able to resolve completely the problems experienced by consumers in daily life. However, we would like to emphasize that the lack of initiative of consumers is in a great extent responsible for such difference between the jurisprudence and the legal regime. Indeed, although consumers are becoming more aware of their rights, they continue not to react against abusive and harmful practices. This may explain that the few judicial decisions of our national higher Courts mostly concern to general contractual clauses.

Particularly interesting is the decision of the Constitutional Court, in case number 384/2003. The Court was asked to render a decision on whether paragraph number 22-B of the Advertising Code, which prohibits and sanctions publicity to "miraculous products" and activities, *in casu,* complied with the Portuguese Constitution or not, namely with the right to information and the right to conduct a business. Having been seized by an astrologist, who contended he should be able to freely advertise the virtues of her parascience, the Court considered that such prevision was not unconstitutional. Indeed, the Court has considered that the article only sets out acceptable limits to the exercise of those rights, as they do not conflict with the essential core of those rights and may be justified on grounds of general interest – "avoid the exploitation of ignorance, fear, believe, and superstition of consumers in respect to the offer of goods and services which are said to have, without scientific evidence, some particularly characteristics or effects claimed to be miraculous, in the area physical, emotional, economical and other of the human being". What could be read as a sentence of a unjustified paternalistic tone, may, in fact, be adequate, in the context of a population less informed and with relatively low levels of formal education.

Reasons for concern

Some serious problems experienced during this year in our country, in relation to food safety, were not caused by legislative gaps, but were due to the activity of economic agents, which, in their eagerness to obtain profits, do not comply with old prohibitions. We refer in particular to the situation caused by the use of nitrofurans in the feeding of chickens, discovered this year, which could cause serious damage to the health of consumers. Portuguese authorities responded relatively quickly, launching an intensive surveillance program, even though this has not prevented the reduction of birds' consumption almost to zero, for several months. This crisis reinforced the generalized idea that preventive controls are uncertain and that there exists a "dilution" of responsibility on these matters, caused by a lack of coordination and accountability between the many interveners in food chain distribution.

CHAPTER V : CITIZEN'S RIGHTS

Article 39. Right to vote and to stand as a candidate at elections to the European Parliament

No significant developments to be reported.

Article 40. Right to vote and to stand as a candidate at municipal elections

National legislation, regulation and case law

Recommendation 3/B/2003 of the Ombudsman *(Provedor de Justiça)*, issued on the 23rd of April 2003[72], refers to the need to allow for and organise the possibility for civil servants to exercise their active electoral capacity at the municipal level – and also, in legislative elections, elections for the President, regional elections[73] – in anticipation to the date foreseen to the scrutiny, if it is known they will have to be absent abroad, on duty, performing a task within their professional competence. Recalling that a similar recommendation had already been made by his predecessor, in 1999, and has only been adopted in relation to the absence caused by internment for illness and imprisonment, but not in what concerns the *absence on duty* by civil servants, the Ombudsman considered that: "the situation of a citizen, who is obliged, by his own State, to fulfil a mission outside his country during a period in which elections or a referendum will take place and, as a consequence of that, cannot vote, offends his fundamental right to vote, as enshrined in the Constitution, which is also, in accordance with the latter, a civic duty. It further violates one of the fundamental constitutional principles of the portuguese State: that of democracy." The Ombudsman, addressing himself to Parliament, through the person of its President, has, therefore, called out for the necessary amendments in the provisions of the relevant electoral laws.

Article 41. Right to good administration

No significant developments to be reported.

Article 42. Right of access to documents

No significant developments to be reported.

Article 43. Ombudsman

No significant developments to be reported.

Article 44. Right to petition

No significant developments to be reported.

[72] At http://www.provedor-jus.pt/ultimas/recomendacoes2003/r%2D3b03.htm
[73] The Ombudsman does not refer expressly to European elections, though one can infer his reasoning would apply to them to.

Article 45. Freedom of movement and of residence

National legislation, regulation and case law

On the 14th of March 2003, the General-Attorney's Consultative Board (*Conselho Consultivo da Procuradoria-Geral da República)* issued an Opinion aimed at clarifying that citizens of the European Union can only be expelled from Portugal for compelling reasons relating to public order, public security and public health, in conformity with Directive 64/221/CEE of the 25th February 1964 and with articles 12 and 13 of Decree of Law 60/93, which transposed the Directive into the portuguese legal order. Therefore, the fact that a citizen of one member State of the European Union finds himself on portuguese soil without being able to present his Identification Card or his Passport may render his/her stay *irregular*, but it cannot ground a derogation to freedom of movement within the Union, and therefore administrative expulsion is impossible. The Opinion continues stating that such an irregularity is *not sanctioned* in portuguese legislation. A *duty of identification* is imposed upon the person in question only in the situation and under the strict conditions foreseen by art. 250º, nº1 of the Code of Penal Procedure (*Código de Processo Penal*), which also applies to portuguese nationals: that is, by the criminal police, in case the person is found in an open public place habitually attended by criminals. The Opinion concludes that the requirement to a citizen of the European Union to fulfil this obligation of identification must be objectively justified in order to avoid what would be an intolerable restriction to freedom of movement within the Union.

Article 46. Diplomatic and consular protection

No significant developments to be reported.

CHAPTER VI : JUSTICE

Article 47. Right to an effective remedy and to a fair trial

International case law and concluding observation of international organs

In 2003, Portugal was convicted 13 times by the European Court on Human Rights, on grounds of undue delay in the administration of justice, in violation of art. 6 §1 ECHR:
- 10 times for length of civil proceedings: *Figueiredo Simões vs. Portugal (Nº 51806/99, 30th January 2003; Marques Nunes vs. Portugal (Nº 54212/99, 20th February 2003); Ferreira Alves vs. Portugal (Nº 53937/00, 27th February 2003);Dias da Silva and Gomes Ribeiro Martins vs. Portugal (Nº 53997/00, 27th March 2003); Esteves vs. Portugal (Nº 53534/99, 3rd April 2003); Costa Ribeiro c. Portugal (Nº 54926/00, 30th April 2003); Moreira e Ferreirinha, Ld. And others vs. Portugal (Nº 54560/00; 54567/00; 54569/00, 26th June 2003); Neves Ferreira Sande e Castro and others vs. Portugal (55081/00, 16th October 2003); Ferreira Alves II vs. Portugal (56345/00, 4th December 2003); Frotal Aluguer de Equipamentos vs. Portugal (56110/00, 4th December 2003), Pena vs. Portugal(57323/00, 18th December 2003).*
- 1 time for length of administrative proceedings: *Sociedade Agrícola do Peral vs. Portugal (55340/00, 31st July 2003)*
- 1 time for length of criminal proceedings: *De Sousa Marinho and Marinho Meireles Pinto vs. Portugal.*
- 1 time for length of labour proceedings: *Farinha Martins c. Portugal (53795/00, 10th July 2003*

One other case referring to length of administrative proceedings ended with a friendly settlement: *Ferreira Pinto c. Portugal (Nº 54604/00), 26th June 2003*

National legislation, regulation and case law:

Reform of Administrative Justice (*Contencioso Administrativo*):
On the 4th January 2004, delayed of almost two years, an ample Reform of Administrative Justice[74], deemed to be the slowest of all jurisdictions in Portugal, will finally enter into force.

The model of judicial reactions against unlawful acts of the administration or simply against its inertia upon which the portuguese system was premised was one of *justice retenue* (retained justice), as inspired by the French system of executive administration. This means, so far, administrative courts performed mainly the task of an objectivist control of the legality of the acts of the administration and could do very little more than declaring them void (*contentieux d'annulation)*. The citizen, then, had to wait for a change of conduct by the Administration or, alternatively, start up an extremely lengthy executive action against the State. The Reform brings about changes of a subjectivist token: the scope of administrative justice will now clearly be the protection of the subjective rights of the citizen before public bodies. Particularly significant will now be the possibility for the citizen to obtain, through a particular type of action (*acção de condenação à prática de acto legalmente devido*), foreseen in articles 66 and ff. of the new Code of Procedure of Administrative Tribunals (*Código de Processo dos Tribunais Administrativos*) a direct conviction of the Administration: a judicial sentence may condemn a public body to perform a certain act, which will, in practice, implement a right of the citizen, whenever this right is legally due and its content is clearly pre-determined by law.[75] This does not mean the court will replace the administration, as it cannot decide instead of it: the judiciary is still barred from taking a decision, whenever the act involves the use of discretionary powers by the administrative body at stake; however, even when the act is discretionary, the court will now have the injunctive power to impose upon the Administration a deadline for deciding[76].

This new type of action will have its field of application *par excellence* - and it is believed it will greatly improve – in the enjoyment by individuals of legally due *second generation economic and social rights* and will be an extremely useful mechanism in the reaction against administrative inertia (*e.g.* a typical envisaged case could be as follows: when the administered is legally entitled to a maternity allocation, the amount of which is calculated according to pre-established criteria of need, and the Administration either omits its payment or refuses to pay. Before the Reform, the administered had to seek, from the court, the declaration of nullity or the annulment of the silent or express act of denial; once the court assessed the latter was illegal and therefore void, the Administration could only be compelled to act through a new judicial executive procedure. Altogether, it could take 4 years for the individual to have his right effectively recognised. Through the new *acção de condenação à prática de acto legalmente devido*, the court can immediately order the Administration to pay, in due time, the allocation the person is entitled to by statute).

[74] A comprehensive study of its various innovations and improvements is the one by: ALMEIDA, Mário Aroso de *O Novo Regime do Processo nos Tribunais Administrativos e Fiscais,* Almedina, Fevereiro de 2003.
[75] As inspired by the german model of the *Verpflichtungsklage*. Another parallel could be traced to the british *writ of mandamus*. It is to be recalled that, since 1995, even the French system allows for some injunctive powers to administrative courts, precisely in situations when the act is legally due and its content flows absolutely predetermined from a previous legislative act.
[76] On the virtues of this type of action in the german system and on how it may have the ability to improve the protection of the administered in Portugal, in particular, in relation to a "silent Administration", see RIQUITO, Ana Luísa, "A Acção de Condenação à Prática de Acto Legalmente Devido: a verpflichtungsklage lusitana" *(forthcoming).*

Otherwise, new types of actions, aimed at covering situations of urgency of action from the part of the Administration are created and the possibility of combining several types of mechanisms of reaction is designed to better protect the rights of the citizen. Informal procedures of dispute resolution are encouraged, namely recourse to arbitration, in particular for contentious cases involving civil servants, in the hope of a quicker, more flexible and more efficient administrative justice. In short, the Reform aims at finally concretise the *principle of the full and effective jurisdictional protection of the administered*, as enshrined in article 268º 1 of the Constitution.

On the practical level – possibly the veritable key to the success of the reformed administrative justice - 14 new administrative courts of first instance (*tribunais administrativos de 1ªinstância)*, spread throughout the territory, have been created, in an attempt to render meaningful the *principle of proximity of administrative justice to the citizen*, as well as two courts of second instance, (*tribunais administrativos centrais*), in Oporto and Lisbon.

Reform of "Seizure" (*Acção Executiva*) Proceedings:

Decree of Law 32/2003 of the 17th February 2003 transposed to the portuguese legal order Directive 2000/35/CE, relating to undue delay in the payment of debts and it has allowed for injunction in debts resulting from a commercial transaction, independently of its amount. Almost simultaneously, Decree of Law 38/2003, of the 8th March 2003 has sought to simplify and de-judicialize civil executive proceedings, and namely seizure, one type of actions particularly responsible for the exponential growth in the last decades of court litigation and, therefore, also sharing an important part in the responsibility for the overburdening of the judiciary, with the grave consequence of extreme length in decision-making. This has happened namely as an effect of the generalisation of recourse to credit for consuming purposes and it is hoped that the new simplified procedures will be of benefit to justice, but also and foremost to economic life and, in particular, credit affairs. The agent of execution will now be a public officer, external to the court; the judges' intervention is now confined to all acts, which fall under the constitutional reserve of judicial activity, that is he will still control the activity of the agent of execution and he will decide upon the questions raised by the parties or third persons. The judge is now rid of all the material acts of seizure of goods and property. The creation of an informatic record of seizure procedures, identifying those who do not pay and the goods seized will hopefully avoid mistakes and litigation. The Decree of Law has, of course, been sensitive to the need to protect the right to privacy, in this context, and it therefore allows access to this record only by those who have a valid "executive title". A petition of execution by the creditor may, from now on, be filed via internet and in certain pre-defined situations, material seizure of movables and immovable goods may occur even in the absence of a prior judicial decision: that is the case, when the debt is evidenced in a document emitted by a public notary, which establishes a strong presumption in favour of the existence of the obligation. The person whose assets are subject to execution, however, still maintains mechanisms of reaction: he may oppose the execution and a judge will summarily appreciate his reasons. The payment of a compensation for damages caused by the abuse of the process of execution is also foreseen.

Its is not without a hint of apprehension that one can look upon the new regime, knowing the devastating consequences the apprehension of property and movables may have in a person's life; it is nevertheless true the burdening of courts with executions had become unbearable and reform was beyond doubt needed. The new system is not yet fully operative, for lack of the necessary accredited public officers of execution, so it is still to early to assess its impact in improving judicial life.

Practice of national authorities

Extreme Length of Judicial Proceedings:

The apparent inability of the Portuguese judiciary to deal with its current impossible caseload has led several experts and commentators to speak, and rightly so, of a veritable Crisis of Justice (*Crise de Justiça*), even though the impartiality of the judiciary and the independence of judges are not at stake. An indication of the gravity of the situation is easily given in the most recently available statistics.

	1992	**1997**	**2001**
Cases[77] entered during the year	823441	754557	716272
Cases resolved	721729	583579	652014
Cases pending on 1st January	566961	892174	1209373

It is notable, and worrying, that the number of cases pending has doubled since 1992 despite a reduction in the number of new cases entered each year. This is due to a decrease in the number of final judgements rendered annually as the average length of judicial proceedings continues to rise.

Civil Proceedings:

This development is largely the result of increasing delays in civil proceedings, which accounted for 72.3% of all cases heard in 2001. The average length of civil proceedings increased from 13 to 20 months between 1995 and 2001. It is particularly worrying that the increase in the average length of civil proceedings cannot entirely be attributed to the explosion of small claims litigation between 1991 and 1997 and an incommensurate increase in judicial resources. The number of new civil cases entered each year has, rather, levelled out over the past 6 years. At the same time, the number of judges has increased from 10 to 14 per 100,000 inhabitants, and the number of support staff from 62 to 91, since 1992, which represents an increase of over 30%. The conclusion of a cumbersome and inefficient judiciary is hard to avoid; at any rate, the problems faced evidently go beyond the simple equation of supply and demand.

Criminal Proceedings and Labour Jurisdiction:

The average length of criminal and labour cases has, by contrast, remained more or less constant over the same period, averaging a lengthy 14 (at first instance) and 11 months respectively in 2001. The average length of employment cases in 2001, for instance, was 10 months – too long, perhaps, for an immigrant dependent on a contract for the annual renewal of his residence permit to risk litigating unfair contract terms or successfully to claim unfair dismissal. Similarly for a victim of domestic violence to wait 32 months[78] to sever their legal and economic ties with their aggressor is to significantly, and culpably, prolong distress. The rapid resolution of criminal charges is of obvious importance, particularly in the event of the accused being detained on remand.

[77] Total number of cases for all jurisdictions.
[78] 32 months was the average length of divorce and division of property proceedings in Loures, on the outskirts of Lisbon, in 2001

Reasons for concern

Easy explanations and, consequently, easy remedies are difficult to offer. Successive governments have already commissioned detailed studies and several recommendations, notably regarding the development of alternative dispute resolution mechanisms, have recently been implemented. It is evident, however, that further major structural and procedural reforms are required.

It is worth insisting on this point. The access to a fair and public hearing in *a reasonable time* is by no means a right of a secondary importance, but the actual state of affairs makes of it a mockery It is central to the confidence of the population in the judicial system that an emergency plan of massive investment and allocation of material and human resources to the judiciary occurs.

Many commentators also point out as a reason for concern the continued stress of the magistrates' education - and a general culture of the judiciary – on the formalistic aspects of the administration of justice, with its overemphasis on classical topics, ignoring the pragmatic need to decide quickly and refusing to acknowledge the importance of training in more contemporary areas, such as European or environmental law.

Article 48. Presumption of innocence and right of defence

Practice of national authorities

Problems have continued concerning the right to defence during the investigation phase (before any accusation has been formally made by the Department of Justice). Indeed, this matter has attracted considerable media attention as a result of the recent mega case involving crimes against the sexual self-determination of minors, committed on a large scale, against children and adolescents under the custody of an institution of social solidarity (known as the "Casa Pia" case). The issues involved may be divided into three:

1) the question of the defendant's access to the legal brief that is still in camera proceeding, thereby restricting the defendant's knowledge of the accusation, particularly as to the possibility of an appeal against the decision that decreed remand in custody.

2) the question of the need for the defendant to be informed of the allegations made against him which justify preventive detention;

3) the problem relating to the breach of in camera proceeding in order to allow the content of part of the existing briefs in the case to be revealed by the media.

As regards in camera proceeding, our Code of Criminal Procedure[79] stipulates that, until the decision is taken about the facts, or, if that does not take place, within 20 days[80] of notification of the order to prosecute or file the case, the criminal case is public. The problem that has been raised is of knowing whether the defendant, subject to preventive detention and wishing to appeal against this decision, may or may not have access to the facts that led to the judge's decision to impose custody. Access has recently been refused in the high-profile "Casa Pia" case. However, it has been understood that this refusal restricts the defendant's rights to a defence, since, in being refused access, the defendant has to appeal against the order that

[79] "At risk of being deemed null and void, the criminal process is public from the moment of the fact-finding decision, or, if that has not taken place, from the moment it may no longer be requested" (Article 86, No. 1, 1st part of the Code of Criminal Procedure).
[80] Cf. Article 287 of the Code of Criminal Procedure.

decreed preventive detention without having any knowledge of the facts that may exist against him in the case. This occurred as the result of an overly strict interpretation of the provisions of Article 141, No. 4, which determines that the fact-finding judge, during the first examination of the detained defendant, should inform him or her about the reasons for their being held in custody, explaining the allegations made against them. Indeed, recently, some defendants, formerly imprisoned (preventive detention), have had only a very general knowledge of the allegations made against them. As soon as the preventive detention order was confirmed, they appealed to the Constitutional Court[81] to request, in short, that they should be informed of the concrete facts imputed to them. That court considered the rule established in No.4 of Article 141 of the Code of Criminal Procedure, to be "unconstitutional, being in breach of Article 28, No 1 and Article 32, No. 1 of the Portuguese Constitution, interpreted as meaning that, during the examination of the detained defendant, the "explanation of the facts imputed to him" may consist of the formulation of general and abstract questions, without specifying the circumstances of time, manner or place in which the events that included the crimes occurred, nor communicating to the defendant the proofs that sustain the charges and, in the absence of any concrete consideration of the existence of grave inconvenience in specifying it or in the communication of specific proof in question"(judgment No. 416/2003); it was also decided to deem "unconstitutional, by breach of the provisions of Articles 28, No. 1, and 32, No. 1, of the Portuguese Constitution, the rule extracted from the joint consideration of Article 141, No. 4, and Article 194, No. 3, both of the Code of Criminal Procedure, according to which, during examination of the defendant, the "explanation of the facts imputed to him" and of the "reasons for detention" are enough, with the general indication to the defendant of the legal infractions of which he is accused, the identity of the victims as pupils, the date, of the *Casa Pia* in Lisbon, and others, but all minors under 16, with the court dispensed from the need to provide more details beyond those that result from the indication made in such terms, when the defendant, confronted with it, adopts the position of negating all the facts, and in the absence of any concrete appreciation of the serious inconvenience of specifying that information" (judgment No. 607/2003). This led to some of the defendants being heard again, to be informed of the allegations made against them (indicating circumstances of time, manner and place), and those defendants presented a counter-brief; on the basis of this, a new decision was made by the fact-finding judge, which in two cases, replaced the coercion measure of preventive detention with a term of identity and residence control[82].

As regards the media coverage of part of the contents of documents included in the trial (such as the transcription of tapped phone conversations made during the investigation), there has not yet been any judicial decision. However, our legislation is clear on the matter of it being subject to in camera proceeding, even more so as the content of the conversations falls within the ambit of the preservation of private life. Now, in these cases, it is only made public when it constitutes proof[83].

Following the publication by the press of part of the tapped phone conversations (under the provisions of Articles 187 to 190 of the Code of Criminal Procedure), there were requests for the rules on phone tapping to be altered, including the suggestion to create a special commission who would control the legality of the authorization to tap phone conversations, thereby making the judiciary, now fully responsible for this, share this burden. However, as it is unanimously accepted that criminal rules and procedure should not be modified during the

[81] We are at present unable to provide more information beyond the summaries given here. As none of the defendants have yet been formally charged, the Constitutional Court, in full session, decided that the full content of its judgments would remain in camera proceedings and could not be revealed until prosecution.
[82] Which means that the defendant have to inform the authorities of their home address or work address, and they may only be absent from this address for a period of no longer than five days following authorization by the local policy; in addition the defendant is obliged to appear periodically before the authorities.
[83] Article 86, No. 3 of the Code of Criminal Procedure.

contestation process, no concrete proposals have yet been made for the alteration of those rules.

In addition, this year, the order relating to witness protection[84] has also been regulated by Decree-Law No. 190/2003 of 22nd August. In this field, debate has largely centred on the possibility of witnesses being examined by teleconference, associated with the possibility of making declarations for future memory (Article 271º of the Code of Criminal Procedure). The problem arose with the attempt at an inquiry during the investigation phase of the "Casa Pia" victims; the inquiry would be undertaken by teleconference and according to a regime of declarations for future memory, which freed the victims from having to intervene further in the process, since the depositions presented by them would be read in the examining trial, and would count as evidence produced in trial. The scope of the inquiry would be extremely vast (since there were still no charges), and as it concerned minors, the examination would have to be undertaken with the mediation of a fact-finding judge; to this is added the fact that it was held in teleconference, with the possibility of distortion of image and voice and without any confrontation of victims and defendants. For this reason, it was opposed by parties supporting the defendants, whose principal argument centred upon the violation of the principles of orality and immediacy. Though rules on the special protection of victims of violent crimes are welcome, teleconference and the validation of evidence obtained outside the court room and unsubmitted to confrontation during trial do conflict with the essential right of the accused to face his accuser.

Another problem also arose in connection with the defendant's right to defence. As there are various defendants in the "Casa Pia" case, trials have not always run simultaneously. This means that, in the case of one of the defendants, the trial is much more advanced than in others; one of the defendants has been formally charged, while the others are still in the investigation phase. The cases appear, however, to deal to interrelated facts, since in some instances, it is held that all the defendants participated together in some actions. Thus, that defendant's attorney, considering that the right to defence would be better ensured with a common trial, has attempted to delay the trial, since according to Article 24º, No. 2 of the Code of Criminal Procedure, there may only be a connection between trials when they are at the same phase at the same time.

As regards the use of electronic surveillance (already set up in 1999) in order to ensure that house arrest is being respected[85], the geographical area in which the electronic monitoring system of defendants has been enlarged[86].

Article 49. Principles of legality and proportionality of criminal offences and penalties

National legislation, regulation and case law

In this domain, various statutes relating to the prosecution of acts of terrorism have appeared. Firstly, there was the prevention of terrorism law – Law No. 52/2003 of 22nd August – and Decree-Law No. 254/2003 of 18th October dealing with illegal acts committed on board civil aircraft.

The prevention of terrorism act enacted the Council Framework Decision No. 2002/475/JAI, intrinsic to the notion of terrorist organisation (Article 2, No. 1):

[84] Law No. 93/99 of 14th July.
[85] Article 201 of the Code of Criminal Procedure.
[86] Administrative rule No. 4/2003 of 27th January and the Resolution of the Council of Ministers No. 87/2003 of 18th June (published in the *Diário da República*, Series I-B, of 5th July 2003).

> "any group of two or more persons who, acting together, seek to harm national integrity or independence; prevent, alter or subvert the functioning of State institutions as laid out in the Constitution; oblige a public authority to commit a particular act, abstain from committing it or tolerate that it be committed; or intimidate certain persons, groups of people or the population in general, using the following means:

a) Crime against the life, physical integrity or freedom of people;

b) Crime against the safety of transport and communications, including computer networks, telegraph and telephone systems, radio or television;

c) Crime of production of common danger, by means of fire, explosion, the release of radioactive substances or of toxic or asphyxiating gases, flooding or avalanches, the destruction of buildings, contamination of foodstuffs and water destined for human consumption or the deliberate propagation of disease, pests, or harmful plants or animals;

d) Acts that, definitively or temporarily, destroy, cripple or misuse communication systems, public buildings or buildings destined for the provision and satisfaction of vital needs of the population;

e) Research and development of biological or chemical weapons;

f) Crimes involving the use of nuclear energy, firearms, biological or chemical weapons, explosive substances or devices, incendiary devices of any kind, booby-trapped letters or parcels; whenever these crimes are, by their nature or because of the context in which they are committed, capable of gravely affecting the State or the population that they seek to intimidate[87].

Anyone that promotes or founds a group with these characteristics is punishable with a prison sentence of 8 to 15 years (Article 2, No. 2), and the ringleader with 15 to 20 years. Committing such acts of terrorism results in a sentence of 2 to 10 years, or with a sentence corresponding to the crime committed, aggravated by a third in its minimum and maximum limits if it is equal or superior to that (Article 4, No. 1); in these cases, and in those covered by Article 2, Portuguese law will be applied (Article 8, No 2), even when the law of the country in which the deed has been committed is more favourable than Portuguese law. Portuguese criminal law is considered to be applicable to all these deeds even when they are committed outside national territory, with the exception of those relating to international terrorism in which case Portuguese law is only applicable "provided the agent is found in Portugal and may not be extradited or handed over by means of a European detention order" [Article 8, No 1, line b)].

Concerning deeds committed on board civil aircraft by "disordered passengers", new administrative sanctions have been created and the minimum and maximum limits stipulated in the Criminal Code have been aggravated by a third (Article 4, No. 2) when the deed creates a danger for aircraft security (such as in crimes against life, physical integrity, personal freedom, sexual freedom and self-determination, honour and property), although this may not exceed 25 years in the case of a prison sentence or 900 days in the case of a fine.
The following set of acts also constitutes administrative infractions, punishable with a fine of between € 250 and £ 3740 (Article 6) is, "*a*) Boarding a civil aircraft on a commercial flight

[87] These organisations are considered to be "any group of two or more persons who, acting together, seek to harm national integrity or independence; prevent, alter or subvert the functioning of State institutions as laid out in the Constitution; oblige a public authority to commit a particular act, abstain from committing it or tolerate that it be committed; or intimidate certain persons, groups of people or populations". (Article 3, No. 1).

when under the influence of alcohol, some psychotropic substance or any product with similar effect, and, in this state, threatening the security of the aircraft, its occupants or property; *b*) Consuming alcoholic beverages on board a civil aircraft on a commercial flight and, in that state, threatening the safety of the aircraft, its occupants or property; *c*) Smoking on board a civil aircraft on a commercial flight when it is forbidden to do so; *d*) Using a mobile phone or any other electronic device on board a civil aircraft on a commercial flight when it is forbidden to do so" (Article 5, No. 1).

A new type of crime of disobedience is created – Article 4, No. 3 ("Whosoever, on board a civil aircraft on a commercial flight, disobeys a legitimate order or instruction from the flight commander or any member of the crew acting in his name that is designed to ensure safety, order and discipline on board, will be punished with a prison sentence or up to 2 years or with a fine of up to 240 days") –, and the crime of "falsification of information" – Article 4, No. 4 ("Whosoever, on board a civil aircraft on a commercial flight, spreads false information about the flight, thereby causing alarm or concern amongst the passengers, is punished with a prison sentence of up to 1 year or a fine of up to 120 days").

There has also been an extension of territorial jurisdiction (Article 3) thus permitting the application of Portuguese law (except when there exists some treaty or convention to the contrary) in the case of an aircraft hired out to an operator based in Portugal, even when the act is committed in an aircraft registered in another State but when the next landing point is on Portuguese territory and the aircraft commander has handed over the presumed infractor to the Portuguese authorities.

As regards the principle of legality, these statutes do not appear to raise any problems. Even those referring to criminal frameworks do not appear exaggerated to us, taking into account that they deal with acts committed in closed spaces with special characteristics. Nevertheless, we could question the proportionality of the aggravation of the sentence, for example, in crimes against life: while, on the one hand, life has the same value irrespective of the place where it is harmed, on the other hand, the penal framework lies somewhere between the model of simple homicide (manslaughter) and qualified homicide (murder). However, these aggravations are justified as follows: "This aggravation is justified by the frequency with which these acts have been committed and by the risks that such acts entail for the *security of commercial air travel*" (introductory remarks of the statute). That is to say, it is justified by other values than it is desirable to protect.

Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence

National legislation, regulation and case law

No alterations have been made in respect of this. The principle is consecrated in the Portuguese Constitution (Article 29, No. 5), and in the Criminal Code (Article 6, No. 1) and also in the Law of International Legal Cooperation on criminal matters – Law No. 144/99 of 31st August (here all processes relating to the transfer of cases and the execution of foreign criminal sentences). This last statute was altered this year (Law No 48/2003 of 22nd August), introducing two rules relating to joint criminal investigations between different States.

[i] Decree-law no. 27/2003 and 28/2003 of the 12th February.
[ii] Decree-law no. 153/2003 of the 11th July.
[iii] Decree-law no. 165/2003 of the 24th July
[iv] Decree-law no. 178/2003 of the 5th August.
[v] Decree-law no. 193/2003 of the 22nd August.

[vi] Decree-law no. 196/2003 of the 23rd August.
[vii] Decree-law no. 243/2001 de 5th September
[viii] Decree-law no. 224/2003 of the 24th September and Decree-law n. 237/2002 of the 5th November.
[ix] Decree-law no. 11/2003 of the 18th January
[x] Decree no. 17/2003 of the 10th October.
[xi] Decree-law no. 69/2003 de 10-04-2003 and Decree n. 8/2003 of the 11th April.
[xii] Ministerial dispatch no. 14/2003 of the 14th March.
[xiii] Parliament Resolution no. 25/2003 of the 2nd-April.
[xiv] Law no. 94/99, of the 16th July 1999, modifying the Law no. 65/93 of the 26th August.
[xv] Parliament Resolution no. 11/2003 of the 25th February.
[xvi] Parliament Resolution no. 69/2003 of the 19th August
[xvii] Parliament Resolution no. 72/2003 of the 12th September.
[xviii] The polluter-pays principle was first referred to in Portuguese courts in 1990, in the *Coruche stork nests* case (Judicial Court of First Instance in Coruche, 23rd February 1990, process 278/89 Ministério Público vs. Landowners). The plaintiff was *Ministério Público* — the public prosecutor representing the State — and the defendants were the landowners of a farm located in Coruche.
The owners of a farm, called *Quinta Grande*, possessed three umbrella-pine trees where several stork nests, with their eggs, subsisted. The owners were well informed by the national environmental non governmental organization *Quercus*, that those storks were a legally protected species according to national and international law and additional information was posted in placards in the trunks of the trees. In spite of this, after two days the pine-trees were sold and cut down by timber-merchants. Both the nests and the eggs were destroyed. The placards had been ripped off from the trees. The public prosecutor charged the landowners for breach of a nature conservation law and asked for a civil compensation. The landowners plead not guilty and blamed the timber-merchants for the offence.
The polluter-pays principle was mentioned along with the legal norms applicable as framework to judge the violation and to assess liability and the penalty proportion.
As ground for damage repairing, the Judicial Court of First Instance in Coruche considered the polluter-pays principle to mean '*charging the costs of fighting and preventing pollution on the polluter*' as well as '*the effective responsibility of the polluter for the damages he causes (...)*'. Developing this last meaning, the judge went even further and explained that '*damage compensation, according to the general liability principles and also according with the principles in force in environmental law ("polluter-pays") imposes, in the first place, the reconstitution of the situation that would have existed if the fact that gave origin to the damage hadn't occurred (...)*'.
In conclusion, the offenders were condemned to 87 days imprisonment (replaced by a 130.000$00 fine or 650 Euros, approximately) and to payment of a civil compensation of 30.000$00 plus VAT (more or less 150 Euros) corresponding to the price of the construction of alternative artificial pedestals for the nests.
The polluter-pays principle was mentioned again in the *Cerveira scrap-ground case* (Judicial Court of Second Instance in Oporto, 8th February 2001, process 132-A/00, *Ministério Público* vs. *Scrap industry in Vila Nova de Cerveira*). In the village of Cerveira, a scrap-ground explorer is the owner of a 2400 m^2 site who is paid to accept scrap to be deposit there.
After having been condemned in a first instance Court, the Cerveira scrap-ground explorer appealed to the second instance Court. The public prosecutor asked the Judicial Court of Second Instance in Oporto to forbid the scrap-ground explorer from proceeding with his noxious activity.The judges considered the environmental degradation to be very likely and, on the basis of the prevention and the polluter-pays principles, granted an interim protection to the ground, maintaining the previous judicial decisions. Quoting the decision: '*The above mentioned specific principle of prevention establishes that actuations likely to have immediate or long term effects in the environment should be considered in anticipation, reducing or eliminating the causes rather then correcting the effects of those actions or of those activities likely to alter the quality of the environment; the polluter is obliged to correct or recover the environment, bearing the consequent charges and not being allowed to proceed with the polluting activity*'.
As to the principle of precaution, it was first relied on in 1998, in the Póvoa de Lanhoso landfill case (*Second Póvoa de Lanhoso landfill* - Judicial Court of Second Instance in Oporto, 12th June 2001, process 422/00, *Associação de Defesa do Ambiente- Terras de Lanhoso (ADA-TL)* vs. *BRAval)*. As requested by the plaintiff, a non governmental organization, the Court decided, in a provisional measure, to suspend any waste disposal activity developed by *BRAval*, the concessionary of the Portuguese State in the construction and exploitation of the municipal solid wastes management system in some northern municipalities. The Court decided to prohibit the resumption of the construction activities as well. This decisions were confirmed by the Supreme Courts.
BRAval has requested the replacement of this drastic provisional measure for another one, usually permitted according to the Portuguese Civil Process Code: the payment of a financial bond, considering the few probabilities that the construction and functioning of the sanitary landfill would cause any danger to the environment and also considering that it was holder of a civil responsibility insurance up to 100.000.000$00 (approximately 500.000 Euros).
Confirming the arguments of the plaintiff, the reasoning of the judge can be considered almost revolutionary, in the global context of the Portuguese jurisprudence:
'we have to learn with our mistakes and not get used to accept the consequences. It's not the time to cry over the spilled milk, it's better to be safe then to be sorry [the expression used in portuguese is closer to the french *mieux veux prévenir que guérrir*]. *It's urgent to correct the causes and not regret the effects because time is running and*

it's late [the judge goes on explaining the ozone layer hole problem as an effect of human activities in detail] *(...) the principle of prevention as well as of precaution are fundamental principles in the domain of environmental law, meaning that confronted with the imminence of a human activity which will confirmedly cause damage to environmental goods, in a serious and irreversible way, such intervention should be stopped. (...)*
The second principle (...) "means that the benefit of the doubt must be used in favour of the environment, whenever there is uncertainty, for lack of obvious scientific proof on the cause-effect relation between an activity and a certain form of pollution or of environmental degradation". One promotes on one side: the anticipation of preventive action although there is no certainty on its need; and on the other side, the prohibition of potentially damaging activities, even if that potentiality is not scientifically certain.
On the other side it has, from the procedural point of view, an important formulation, which is the inversion of the burden of the proof. (...)
This principle has the effect of preferring an anticipatory protection, aiming at preventing the ecological damage before its occurrence.
The duty to prevent environmental degradation is at the basis of all international regulation, even if this principle is not very often explicitly mentioned.
The European Community has a major formulation on this matter: the main reason for the importance of prevention is that, most times, the damage caused to the environment cannot be repaired, but only compensated and, on the other side, though reconstituting a degraded environment is physically possible, its costs can be prohibitive and it's a very long term process.
The principle of precaution has to be understood as resulting from a qualified interpretation of the prevention principle (the most environmental friendly interpretation) (...) imposing a serious balancing of the environmental interest namely before the other economic interests, considering article 174 no. 2 of the European Community Treaty, of which Portugal is a Member State.(...)
The response of the Court to the question raised is the confirmation, for precautionary reasons, of the decision of the previous instance, therefore upholding the values inherent to the protection of the environment, an essentially non-patrimonial right hard to repair or even impossible to repair considering the amounts at stake in the financial bond, and considering that this is neither adequate nor sufficient to the prevention of the damage or to its full compensation (...)'.
In a new action brought before the Constitutional Court (Decision of 8/7/1999, process no. 445/99) the plaintiff *BRAval* argued the unconstitutionality of this last decision without success.

[xix] For instance the judgement no. 1936 of the Supreme Administrative Court, with final decision on the 22nd January 2003 and the judgement no. 1877/02 also of the Supreme Administrative Court, with final decision on the 18th March 2003.

[xx] Judgement no. 3A339 of the Supreme Court of Justice, with final decision on the 6th May 2003.

[xxi] Judgement no. 601/2002 of the Second Instance Court in Guimarães, with final decision on the 9th October 2002.

[xxii] Protected by articles 65 no.1 and 66 of the Portuguese Constitution.