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

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN **PORTUGAL**

IN 2005

Submitted to the Network by **Professor Vital MOREIRA**[*]

On December 2005

Reference: CFR-CDF/PT/2005

The E.U. Network of Independent Experts on Fundamental Rights was set up by the European Commission upon request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union

[*] This report was prepared, under the supervision of Professor Vital Moreira, by Carla de Marcelino Gomes, with the collaboration of a team of experts, within the Human Rights Centre of *Ius Gentium Conimbrigae*, at the Faculty of Law of the University of Coimbra,.

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Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice, liberté et sécurité), 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.

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Les documents du Réseau peuvent être consultés via :
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The EU Network of Independent Experts on Fundamental Rights is composed of 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 (substitute Birgitte Kofod-Olsen) (Denmark), Henri Labayle (France), Rick Lawson (the Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), François Moyse (Luxembourg), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ilvija Puce (Latvia), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czech Republic), and Edita Ziobiene (Lithuania). The Network is coordinated by O. De Schutter, with the assistance of V. Van Goethem.
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PRELIMINARY REMARKS:

Acknowledgements:
The Portuguese report has been elaborated under the supervision of Professor Vital Moreira, Director of the Human Rights Centre of *Ius Gentium Conimbrigae,* Faculty of Law of the University of Coimbra, and the coordination of Carla de Marcelino Gomes, researcher of the same Centre, with the contribution of several experts who, with their commitment and enthusiasm, helped us to perform this task. We would like to particularly thank Ms. Alexandra Aragão, Mr. André Pereira, Ms. Catarina Castro, Ms. Dulce Lopes, Mr. Geraldo Ribeiro, Ms. Joana Vicente, Professor Jónatas Machado, Ms. Mafalda Castanheira Neves Miranda Barbosa, Ms. Matilde Lavouras, Mr. Miguel Ângelo Manero Lemos, Ms. Milena Rouxinol, Mr. Rodrigo Gouveia, Ms. Rosa Martins, all of them being Professors, Lecturers, Assistant Lecturers or Researchers of the Faculty of Law of the University of Coimbra, and also Ms. Ana Isabel Santos (researcher), and Ms. Vânia Magalhães (Lawyer).
Nevertheless, the final responsibility for the totality of the report lies on the supervisor and coordinator.

Data Gathering Methodology:
As in previous years, the Human Rights Centre/*Ius Gentium Conimbrigae,* Faculty of Law of the University of Coimbra, has sent an invitation letter to a great number of addressees, namely, State entities/departments, Courts, international organisations operating in Portugal, NGOs, Political Parties, Unions, Foundations, etc. The content of this letter gave some background information on the EU Network and urged the addressees to participate actively on the elaboration of the Portuguese report, by sending us information, developments or reasons of concern.
There has been a positive evolution regarding the feedback to this initiative. We received relevant information (e.g. Fundação Oriente and CIDM – *Commission for Equality and the Rights of Women*) and valuable contributions from APAV-Associação Portuguesa de Apoio à Vítima *(Portuguese Association for the Support of Victims),* APD-Associação Portuguesa de Deficientes *(Portuguese Association of Persons with Disabilities),* Conselho Português para os Refugiados (*Portuguese Council for Refugees),* Secretariado Nacional para a Reabilitação e Integração das Pessoas com Deficiência *(National Bureau for the Rehabilitation and Integration of Persons with Disabilities)* and IAC – Instituto de Apoio à Criança *(Institute for the Support of Children),* to whom we deeply thank. We intend to continue the fruitful collaboration with the entities mentioned above and to lobby others in order to have them also actively participating in the elaboration of our future annual reports.
Despite the lack of response from some other sources, we have overcome this difficulty by enhancing our personal contacts and researching on the websites of these Institutions. However, it has been quite difficult to insert statistics, as the ones referring to the period under scrutiny are not yet available or simply do not exist.
Apart from that, we have established a group of specialised experts who have gathered much information concerning the rights under their fields of expertise and have produced written contributions to our commentary.

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CHAPTER I. DIGNITY

Article 1. Human dignity

Legislative initiatives, national case law and practices of national authorities

Human dignity is at the basis of the Portuguese constitutional bill of rights as well as the EU Charter of Fundamental Rights. Art. 1 of the Portuguese Constitution considers the dignity of the human person as one of the foundations of the Republic.
Therefore, human dignity is not only a principle that should lead the interpretation of every fundamental right (right to life, freedom of conscience, etc.) but also a foundation of protection for certain dimensions of human dignity that are not specifically protected in the constitutional bill of rights.
The case law of the Constitutional Court provides good examples of this role of the human dignity clause. In a decision of 2005 (decision 306/05), the Court considered that it is against human dignity to deprive a person from part of his/her disability pension (even with the aim of paying for his/her son's alimony) when that deduction means that the person loses the basic income needed to his/her own subsistence[1].
In the sphere of legislation, it was the human dignity argument that the Government used to justify the reform of the law on "social insertion income", which guarantees to everyone in need minimum social security revenue aimed at providing the basic means of subsistence.

Good practices

The immediate measures taken by the Government to remediate a situation brought to public knowledge by a television report showing the appalling conditions in which a number of illegal foreigners were waiting for the decision of the authorities about their fate in the country. (See also note to art.19)
The decision to criminally prosecute the authors of shameful practices by senior students against "freshers" (caloiros) in some higher education institutions (although very common and tolerated by the academic authorities).

Article 2. Right to life

Legislative initiatives, national case law and practices of national authorities

In 2005, there were no major developments concerning this fundamental right.
With specific regard to *active euthanasia* and *assisted suicide*, both are criminally punished. There are no cases to report in the case law.
In Portugal, it is also under the banner of the right to life that the restrictions to *abortion* are justified. Currently the Portuguese law is quite restrictive, allowing for a legal abortion only in the cases of malformation of the foetus, risk to the woman's health or pregnancy resulting from rape. In 2005, a proposal for a new referendum to allow the possibility of abortion in the first ten weeks of pregnancy, irrespective of justification, was considered unconstitutional by the Constitutional Court on procedural grounds (not on substantial reasons). A new referendum is foreseen to take place late this year.

Domestic violence

Legislative initiatives, national case law and practices of national authorities
The II National Plan Against Domestic Violence (2003-2006) is still in the process of being implemented.

[1] http://w3.tribunalconstitucional.pt/acordaos/acordaos05/301-400/30605.htm.

It should be noted that the case law on domestic violence is scarce, especially due to the emotional proximity of aggressor and victim, which often leads to the withdrawal of the complaint (except in those cases in which the crimes have a public nature).

Positive aspects

There has been a consistent effort on training several sectors of society on "Equality of Opportunities", with a special reference to domestic violence in its programme.

Good practices

There has been an effort to increase the number of shelters for victims and of treatment programmes for the aggressors. In addition, there is the intention to create centres of support for dysfunctional families in order to prevent domestic violence.
The *Commission for Equality and the Rights of Women (*CIDM*)* has a special telephone number for victims of domestic violence.

Reasons for concern

Despite the measures taken, domestic violence still constitutes 88,6% (10041 cases)[2] of the help provided by APAV-Associação Portuguesa de Apoio à Vítima *(Portuguese Association of Support to the Victim)*. Domestic violence includes the crimes of ill-treatment (physical and psychological), threats, coercion, defamation, child kidnapping, non-compliance with alimony obligations, rape, sexual abuse and homicide. According to the statistics above, psychological ill-treatment is the most prevalent type of domestic violence (32,4%=3248 cases) and the great majority of cases of domestic violence occurs between couples (70,7%=7096 cases), with the man being the aggressor in 93,2% of the cases.

Article 3. Right to the integrity of the person

Rights of the patients

Legislative initiatives, national case law and practices of national authorities

In 2005, the National Committee on the Ethics for Life Sciences published two important opinions:
- Persistent Vegetative State (45/CNECV/05):
The Committee accepted the possibility of refusal of feeding and hydratation as long as such option is in accordance with the patient's expressed (in a living will) or presumed desires.

- Refusal of treatment (blood transfusions for religious reasons) (46/CNECV/05):
The Committee accepts the refusal of treatment if there is a free and informed refusal. In case the patient is unconscious, strict rules should apply concerning the legality of no-blood cards.[3]

Other relevant developments:

-Genetic issues:

In January 2005, the Parliament enacted Legislation concerning **health information and genetic information:** Law 12/2005 (26 January)[4] regulates the use, storage, property and circulation of genetic information and of biological samples, both for testing and research purposes. This law regulates:

[2] http://www.apav.pt/pdf/totais_nacionais_2005.pdf
[3] In relation to medical research, see *infra* commentary to art.13.
[4] In relation to this Law, see also *infra* commentary to art.7.

- collection, storage, transmission and analysis of personal genetic information for the purpose of public health and/or medical research including applications including medical registers and biobanks;
- use of genetic testing and genetic information in employment and obligatory public health insurance.

Law 12/2005, of 26 January:

Defines health information as any information directly or indirectly linked to the present or future health status of a person, either living or deceased, including clinical and family history.

Health information is the property of the person to whom it pertains (though access to it is made through an authorized physician) and cannot be used for any other aims than health care and research, or those defined by law.

Defines medical information as the health information used for medical intervention.

Defines genetic information as the health information linked to genetic characteristics of one or more related persons (excluding, for the purposes of the law, identity and forensic testing, as well as somatic mutations), obtained through any means, including molecular genetic, cytogenetic, biochemical, physiological tests or imagiology, and pedigree information. Genetic information is considered medical information only when used for the confirmation or exclusion of a clinical diagnosis, in prenatal or preimplantation diagnosis or for pharmacogenetics purposes, excluding presymptomatic or susceptibility testing.

Only information with immediate interest for the patient's current status of health (diagnostic and pharmacogenetic information) can be entered in general hospital records. Information from presymptomatic, susceptibility, prenatal, preimplantation forensic and identity testing can only be registered in records of genetic services that keep separate files (and these cannot be accessed by other professionals of the same or of other health institutions).

Defines a genetic database as any register, either in an informatics support or not, containing genetic information on persons or families; if a database or a genetic registry includes any kind of family information it should be curated by a medical geneticist.

Diagnostic or pharmacogenetic testing should follow the general principles of all other health care intervention.

Carrier, presymptomatic and susceptibility testing should be preceded by genetic counselling and written informed consent, and requested through a medical geneticist.

Presymptomatic, susceptibility and preimplantation diagnosis should only be performed in persons that can fully appreciate all their implications and give their consent.

In case of risk for a severe, late-onset disease that has no effective treatment, any predictive testing should be preceded by a psychosocial evaluation and followed after result delivery.

Insurance companies cannot ask for a genetic test or use any kind of genetic information already available (including pedigree information) to refuse life or health insurance or establish a higher premium.

Employers cannot ask for or use any kind of genetic information, even with the workers' consent, except for their health protection (in case of hazardous environments), and only if done in the context of genetic counselling and if their employment is not put at risk; the exception could be made in case of serious risk to public security or public health, in which case genetic testing should be conducted by an independent entity.

No genetic testing or any kind of genetic information can be requested in case of adoption, both to the adoptees or the prospective parents.

In the case of minors, genetic testing should be done only for their benefit, after written consent from their parents or legal tutors, but also procuring the minors consent.

Nevertheless, in the case of severe and untreatable diseases, with onset usually in adult life, predictive testing cannot be performed in minors; and prenatal testing should not be done just for information of the parents but only with the aim to prevent the birth of an affected child (termination of pregnancy is legal for genetic reasons within the first 24 weeks, and up to term in case of early lethality, e.g. anencephaly).

The government must now regulate the offer of genetic testing, in order to avoid its direct marketing to the public or by public or private laboratories, outside of the context of genetic counselling.

In case of population screening, the rights of the population or groups of the population should also be protected, in addition to the rights of individuals.

Collection, conservation and usage of biological samples for genetic testing should be subject to an informed consent separate for health care and biomedical research, including its purposes and duration of storage.

If consent for a different purpose cannot be obtained, e.g. in case of death, stored samples can be used in the context of genetic counselling in order to enable treatment or the prevention of a genetic disease in a relative (but not for the purpose of identifying the genetic status of other family members).

Biological samples cannot be used for any commercial purposes; commercial entities cannot store or use identified or identifiable samples; if absolutely needed, coded samples can be used if the identifying codes are kept in a public institution.

A biobank is defined as any collection of biological samples or its derivatives, previously accumulated or prospectively performed, obtained through health care provision, population screening or research, with or without any identification, and with or without a time limit.

Previous authorization must be requested from the health authorities and, in case of identified or identifiable samples, from the national personal data protection agency.

A biobank must have a health care or a (basic or applied) health research purpose; if communication of results can be foreseen, a medical geneticist should be involved.

When consent is not possible (proband deceased) or easily obtainable (e.g. large amount of samples needed), samples can be used for family studies, or can be processed for epidemiological or statistical purposes, only if previously and irreversibly anonimised.

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

Conditions of detention and external supervision of the places of detention[5]

Penal institutions and institutions for the detention of persons with a mental disability

Legislative initiatives, national case law and practices of national authorities

There are 57 prisons in Portugal, three of which are in the process of being built or refurbished. They are classified according to several criteria, namely the type of detainees, security level and autonomy. According to the first classification, there are 3 types of prisons: Regional (for preventive detainees or convicted to imprisonment for less than 6 months), Central (for imprisonment over 6 months) and Special (detainees with special needs, that is, between 16-25 years, women, prison hospitals, prison psychiatric hospitals).

When it comes to security criteria, there are prisons of Maximum Security, Closed, Open and Mixed. It is possible to create special sectors of security inside any other prison. The classification of each prison is the competence of the Minister of Justice, upon proposal of the Director of Prisons. Most prisons are mixed.

Central and Special prisons have administrative autonomy. Regional prisons are dependent on Central Services.

Positive aspects

In June 2005, the Minister of Justice created a Commission of Experts in order to evaluate the conditions, identify the problems and present recommendations related to the prison system.

[5] For further information related to this issue, see commentaries on article 6.

Resolution of the Council of Minister n.º 138/2005 created the "Penal Reform Mission Unity" ("*Unidade de Missão para a Reforma Penal"*), which aims at presenting some recommendations, namely the framework law on the reform of the prison system.

Reasons for concern

The press has reported the death of three detainees, during one weekend, in Custóias Prison. It was said that all of them were being submitted to a treatment against drugs addiction. Authorities are investigating these deaths.
Health aspects and overcrowding continue to be areas of major concern, within Portuguese prisons.
There has been a television report on the detention of persons with a mental disability. Physical conditions of the institution in question were good but there were many concerns related to some of the detainees, who, despite having already finished their penalty, refused to leave, as they had no family connections or any chance of surviving in the society outside.

Centres for the detention of foreigners

Legislative initiatives, national case law and practices of national authorities

According to art. 15 of the Portuguese Constitution, in principle foreigners have the same rights as nationals. Furthermore, article 207 of Decree-law 265/79, 1st August, expressly obliges equal treatment of both to nationals and non-nationals, as far as detention is concerned. Besides, national authorities are also obliged to promote the communication between the foreign detainee and his/her embassy or consulate.

Protection of the child against ill-treatment

Positive aspects

There is, finally, some advocacy against corporal punishment as a methodology of education. Slowly, some awareness is rising regarding bullying at schools.

Article 5. Prohibition of slavery and forced labour

Fight against the prostitution of others

Legislative initiatives, national case law and practices of national authorities

The Government programme includes research on the causes, consequences and prevention of prostitution. According to the Portuguese Criminal Code, prostitution itself is not a crime. Instead, the exploitation of prostitution of others is a crime.

There has been some recent advocacy in order to "legalise" prostitution, mainly for public health reasons. If "legalised", prostitutes would become regular taxpayers, have special health care and, therefore, better working conditions and would be less exposed to violence and ill-treatment.

Trafficking in human beings

Legislative initiatives, national case law and practices of national authorities

Decree Law 34/2003, of the 25th February 2003, which regulates some aspects of human trafficking is still in force.
Portugal has become part of the ILO Programme Against Human Trafficking and Forced Labour. Portugal is represented by the Ministry of Labour and Social Solidarity and many initiatives have derived from this partnership.

Positive aspects

On March 2005, the I Seminar of the Project CAIM *(Cooperação, Acção, Investigação, Mundivisão)* on prostitution and women's trafficking in Portugal took place.
During this action, it was announced that Portugal will have an Observatory on Human Trafficking for Sexual Exploitation by 2007, as well as a shelter for trafficked women and a registry of denunciations for the use of authorities.

Good practices

In February 2005, the programme EXIT (End Exploitation and Trafficking), a campaign founded by MTV Europe Foundation, which aims at preventing, alerting and informing young people on this subject, was broadcast in Portugal. Portuguese partners are RTP (Public Radio and Television) and Lusomundo (a private news business group).

Reasons for concern

There has been notice of the existence of organised *mafias* operating in Portugal, especially with regard to the trafficking of immigrants (mainly from Eastern Europe, Brazil and Africa).

Protection of the child

Legislative initiatives, national case law and practices of national authorities

Law 52/2005, 31st August (Government Action Plan for 2005-2009), which approves the main governmental strategies for 2005-2009, expressly underlines the need to identify a focal point for the matters related to sexual exploitation of children and adolescents.

Positive aspects

The 8th Conference "Eurojustice", which gathered Prosecutors from EU members and other invited States, included in its Final Conclusions a special reference to sexual exploitation of children, stressing that procedural rules dealing with these cases should be followed by special measures of emergency and witness protection.

Reasons for concern

The very high profile case of 2002, which involved public figures in extensive cases of sexual abuse and exploitation of children in a public institution ("Casa Pia case") has not finished yet, since the court hearings are still going on, which is quite negative.

Exploitation of undocumented workers

Legislative initiatives, national case law and practices of national authorities

The Judiciary Police has been working in cooperation with other entities, national and international, in order to dismantle *mafias* which exploit immigrant workers, especially undocumented workers. Sometimes, these immigrants arrive in Portugal without documents; other times, their documents are taken from them by the exploiters themselves.

Positive aspects

There has been some publicity on cases of exploitation of undocumented workers, which raised the awareness and concern of public opinion for this problem within Portuguese society.

Reasons for concern

This is an environment of secrecy, in which victims have difficulties in asking for help, due to their irregular situation related with residence permits, forged documents, etc.

CHAPTER II. FREEDOMS

Article 6. Right to liberty and security[6]

Pre-trial detention

Legislative initiatives, national case law and practices of national authorities

The Government announced the intention to introduce some changes to the Criminal Code. A special commission has been set up in order to conduct its reform. This is expected to affect the right to liberty, with regard to pre-trial detention.

A study released by a Government department (Legal Policy and Planning Office of Ministry of Justice – *Gabinete de Política Legislativa do Ministério da Justiça*) in 2005 on Court Criminal Procedures sustains that the Criminal Code should be modified in order to reinforce and make explicit the fundamental requirements for the imposition of a pre-trial detention measure, or any other alternative measure. Only such details would guarantee an efficient use of the Superior Court appeal of such decisions[7].

Reasons for concern

By the end of 2005, the official numbers concerning pre-trial detention, deprivation of liberty and alternatives to deprivation of liberty did not concern 2005, but only 2003 (and are still not final numbers). Very little information upgrades last year's available data.

In 2003, there were 3510 people submitted to pre-trial detention, 18 of them in a psychiatric - but non-detention - establishment. The total number of detained persons in Portuguese prisons in December 2003 was 13817[8].

Unfortunately, the official statistics publicly available on the length of pre-trial detention still concern 2002. It refers to an average length of duration of 9 month, which is considered excessive.

A Report of a special Commission on the Reform of the Prison System published in 2004 shows that in 2002 only 21,3% of the persons submitted to pre-trial detention were condemned to imprisonment measures after trial[9]. It draws the attention to the fact that a significant number of persons are convicted on a deprivation of liberty measure with the same length of the pre-trial detention already imposed, which may indicate that if another alternative measure had been imposed, perhaps a shorter deprivation of liberty measure could have been determined.

The Report also suggests the expansion of the use of measures such as the obligation to stay at home controlled by electronic surveillance - already in use as alternative measure to pre-trial detention - as alternative measures to convictions to short deprivation of liberty.

Detention following a criminal conviction

The Report of the Commission on the Reform of the Prison System reveals that in the last few years the detention following a criminal conviction is falling[10].

[6] http://opj.ces.uc.pt/pdf/RelatCEDERSP.pdf
http://opj.ces.uc.pt/portugues/relatorios/relatorio_14.html
[7] http://www.gplp.mj.pt/home/conferencias/SistemaRecursos/RelatrioFinal20050512.pdf.
[8] Information published by the Legal Policy and Planning Office of Ministry of Justice:
http://www.gplp.mj.pt/estjustica/pdfs/Dados_Provisórios_2003/DGSP_Corrigido20041025.pdf.
[9] http://www.gplp.mj.pt/home/projectos%20em%20curso/processopenal/RelatórioCEDERSP.pdf.
[10] http://www.gplp.mj.pt/home/projectos%20em%20curso/processopenal/RelatórioCEDERSP.pdf.

Reasons for concern

The Report of the Commission on the Reform of the Prison System also shows that since 1984 Portuguese prisons have been overcrowded. The rate was 120% in 2003.The most important reason given is that the State did not make enough investment on prisons.

It emphasises that since the Criminal Code Reform of 1995, optional release on parole is more difficult to be decided by the courts namely because this option is now available only after 2/3 of the execution of the deprivation of liberty measure, and not after ½ of it, as before.

Deprivation of liberty for juvenile offenders[11]

A study of the Permanent Observatory on Portuguese Justice (*Observatório Permanente da Justiça Portuguesa*, OPJ) released in 2004 notes that by the end of 2003 there were 294 juvenile offenders (16 years old or less) submitted to deprivation of liberty in a juvenile centre. This number has been growing since 2000. Only 6,1% of these juvenile offenders were female and 93,9% were male. 54% were between 16 and 17 years old, 34,7% between 14 and 15, and 4,4% between 12 and 13 years old. 14% of them were secluded for preventive reasons, and 84,7% have been submitted to deprivation of liberty in an educational centre which is the most serious measure imposed to a juvenile offender under 16 years[12]. 32 of them were submitted to an open regime, 181 to a semi-open regime, and 36 to a closed regime. 78% of these juvenile offenders were institutionalised due to the practice of crimes against property.

In April 2003, the length of the measure of deprivation of liberty in such cases was 24 months in 46% of the cases.

The study also shows that between 2001 and 2002, in the universe of juvenile offenders between 12 and 16, only 9,4% were submitted to deprivation of liberty in an educational centre (adding both years, 259 people from a total of 2746 convicted juvenile offenders).

Public statistics of 2003 also inform that in December 2003, in a universe of 13635 people in prison, there were 189 juvenile offenders between 16 and 18 years old detained[13].

Deprivation of liberty for foreigners

During this period, there were no legislative initiatives on this subject, but a study released in March 2005 by the Immigration Observatory (*Observatório da Imigração*) has a positive contribution to this issue[14]. It demonstrates that the common idea according to which foreigners are responsible for most part of the crimes committed in Portugal is not correct.

Reasons for concern

Nevertheless, the above-mentioned Report informs that foreigners are submitted to pre-trial detention more often than national citizens are, the legislation being appointed as the reason. According to the study, the obligation imposed on the Courts by Criminal Procedure Code to maintain a foreigner in pre-trail detention when he/she has entered illegally into the territory, the higher danger of escape, and some prejudice within the judicial system, may be responsible for the situation. The Report also sustains that it is more likely for a foreigner to be convicted than a national citizen, not only because of the nature of the crimes they commit, but also because of the poor official defence available to them. Furthermore, the report also states that foreigners are convicted to longer measures of deprivation of liberty.

[11] For further information, see commentaries on article 24 (rights of the child).
[12] It is a study conducted by *Centro de Estudos Sociais* of Coimbra University, available at: http://opj.ces.uc.pt/pdf/Tutelar.pdf.
[13] Information published by the Legal Policy and Planning Office of Ministry of Justice: http://www.gplp.mj.pt/estjustica/pdfs/Dados_Provisórios_2003/DGSP_Corrigido20041025.pdf.
[14] http://www.gplp.mj.pt/estatisticas/.

Article 7. Respect for private and family life

Private life

Criminal investigations and the use of special or particular methods of inquiry or research

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The European Court of Human Rights convicted the Portuguese Republic in the case *Reigardo Ramos v. Portugal (n.º 73229/01),* of 2nd November 2005, for a violation of Article 8 of ECHR, on grounds of failure to enforce a parental agreement on custody matters ratified by the Family Court.
Portugal was also convicted by the European Court of Human Rights in the case *Antunes Rocha v. Portugal* (n.º 64330/01), of 3rd May 2005, for a violation of Articles 6 §1 and 8 of ECHR, on grounds of collection of information by State services about the private life and the family life of a worker of the National Council for Civil Protection. This data collection occurred without her consent and against her will. It is worth referring to this decision because it was not taken in unanimity. In fact, the above-mentioned decision shows the difficulty of harmonising two valuable different interests: the right of respect for private and family life and the national security interest.

Legislative initiatives, national case law and practices of national authorities

Genetic Information and Health Information:
In January 2005, a law on Personal Genetic Information and Health Information (Law 12/2005 of the 26th January 2005) came into force [15]. This law states that the use of genetic information is an act between the genetic information holder and the doctor submitted to the deontological rules of medicine (article 6, §7). These rules also apply when there is a labour connexion between the doctor and an insurance company, an employer or a firm, which furnishes any kind of goods or services (article 6 n. 8). Citizens have the right to know if there is any record of their or their families' genetic information, what are the purposes and uses of that information, how is that information maintained and for how long. The law also establishes that the insurance companies cannot require nor demand or use any kind of genetic information of their customers or future customers and their families (article 12). In access to employment, it is forbidden for employers to require or demand genetic information about the employee or his/her family (article 13).
In case of adoption of a child, the demand or the use of genetic information about the child or about the future adoptive parents is also forbidden.
Concerning DNA banks, the law affirms that the respect of the intimacy and confidentiality must always be assured (article 19).

Voluntary termination of pregnancy

Legislative initiatives, national case law and practices of national authorities

In the annotation to art. 1, we remarked that in Portuguese legislation there are severe restrictions to voluntary abortion and that a referendum set to broaden these possibilities was struck down by the Constitutional Court on procedural grounds. The referendum is set to take place later this year.

Reasons for concern

Women continue to be investigated and brought to trial under accusations of the crime of abortion.

[15] In relation to this Law, see *supra* commentary to art.3

Family life

Removal of child from the family

Legislative initiatives, national case law and practices of national authorities

Media have reported an outcry in the case of two children who died in the region of Oporto, due to their parents' negligence. This case opened an intense debate on the mandate and powers of the Commissions of Protection of Children at Risk. It is predictable that some changes might arise next year. It should be underlined that the guiding principle is still to promote, as much as possible, the maintenance of the child within the family environment.

Right to family reunification

Legislative initiatives, national case law and practices of national authorities

Decree of Law 34/2003 of the 25th February 2003 is still in force. According to it, the automatic right to family reunion is conceded to those foreigners in possession of a valid "residence permit" (*autorização de residência*) for at least one year. No further developments have been registered.
The Observatory for Immigration, The High Commissioner for Immigrants and Ethnic Minorities and the Portuguese-American Development Foundation have organised a Seminar on Family Reunification and Immigrants in Portugal, in order to present a research study on this issue. This study is expected to be published soon.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

Respect for private life and family life and liberty of the press:
A decision of the Supreme Court (proc. n.º 05A945, 14th June 2005) ruled that the fundamental right of respect for private and family life prevails over the freedom of the press in cases of pictures or information related to the private and family life of public figures having no connexion with the professional or the public life of these persons. The above-mentioned decision of the Supreme Court convicted a newspaper for exhibiting photos and publishing information about the private and family life of a public figure without his consent.

Article 8. Protection of personal data

Independent control authority

Legislative initiatives, national case law and practices of national authorities

There have been no changes in what concerns the powers of the Comissão Nacional de Protecção de Dados (CNPD) – the Portuguese Data Protection Control Authority

The Portuguese Independent Control Authority has continued its work and, in 2005, published guidelines on some important issues including political marketing and electronic voting.
It also has conducted a public debate on electronic voting, with the participation of the Parliament, in which some difficulties of its implementation were discussed.

Using the power given by the law since 2004, the National Data Protection Authority approved the fees due in the cases of administrative proceedings dealing with registration or authorisation of personal data processing. In the case of registration, 50 euros must be paid. When the data processing depends on an

authorisation, the fee may vary between a minimum of 100 euros and a maximum corresponding to half of the minimum wage. Considering this, CNPD can determine the fee to be applied in every situation according to the difficulty and complexity of the case.

Positive aspects

The Data Protection Authority has finally put in place the national register of data processing, which may be consulted on-line.

Good practices

There are still many operative difficulties in the Portuguese Data Protection Authority, due to the lack of sufficient human resources, especially to carry out audits/inspections. In 2005, the CNPD continues to have only two technicians to go out in the field. This situation raises significant obstacles to its investigative powers, to its access to data undergoing processing and to the use of its powers to collect all the information necessary for the fulfilment of its supervisory duties.

Protection of personal data

Legislative initiatives, national case law and practices of national authorities

Video surveillance still takes a special place on data protection issues. In 2005, two laws were approved on this issue. One refers to the implementation of video surveillance systems on the roads, for the purpose of preventing traffic accidents and to insure the safety and security of the people (207/2005, of 29th November). The other concerns the use of video surveillance cameras in public places by police authorities for security reasons (1/2005, of 10th January). A large number of decisions of the CNPD are authorisations to the use of video surveillance systems.

Positive aspects

The increase in the number of applications to install video surveillance systems also demonstrates that people are more aware of the legal obligation to communicate their use to the Data Protection Authority.

Protection of the private life of workers

Legislative initiatives, national case law and practices of national authorities

There have been no relevant changes regarding the protection of the private life of workers. No new legislation was proposed or approved.

A court decision was issued on the use of a biometric fingerprint scheme to control employees' absences[16], but it merely refers to the penalty imposed by the Portuguese Data Protection Authority, because of the lack of notification of the data processing facility.

The National Data Protection Authority has been authorising employers the use of biometric data – fingerprints – to control the presence of employees[17].

Reasons for concern

The number of video surveillance cameras – operating legally or illegally - has increased in many places, many of which are places of employment. Consequently, the risk of using them to put workers under surveillance increases too.

[16] It may be found on: http://www.cnpd.pt/bin/legis/juris/decisoes/tribunal_judicial_olhao.pdf.
[17] An example may be read at: http://www.cnpd.pt/bin/decisoes/2005/htm/aut/aut193-05.htm.

Other relevant developments

In 2005, some court decisions on data protection issues have been taken (7, between December 2004 and November 2005)[18]. All of them concern the CNPD's use of penalties to punish the violations of the data protection Act. The majority of these court decisions agree with the penalty applied by CNPD and endorse it (5 of 7). However, in most cases, it only maintains it partially (4). Most of the penalties discussed in court were imposed to private or public entities due to the lack of notification to CNPD of data processing schemes that requires it (a large majority does). They concern either video surveillance data (4) or other data.

Although CNPD has the power to impose penalties since the Data Protection Act of 1998, only in 2000 it has begun to make effective use of this power. That is the reason why only since 2001 there are court decisions on this issue.

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

Legislative initiatives, national case law and practices of national authorities

Published in the Official Journal of the Portuguese Republic, 18th February 2005, was the decision of Constitutional Court 486/2004, which declares as unconstitutional the rule of the article 1817 n. 3 and 4 of the Portuguese Civil Code. This disposition establishes a deadline for the judicial investigation of paternity, which runs contrary to the fundamental right to found a family (article 36 n. 1 Constitution of the Portuguese Republic) in the interpretation given by most authors[19], including not only the right to procreate but also the right to establish the paternity and maternity affiliation[20].

Marriage and control of marriages suspect of being simulated

Reasons for concern

There have been reports of cases of marriages suspected of being simulated. There is the case of Portuguese women marrying foreigners, namely Pakistani and Indian men in England, and there is also the case of forged marriages in Portugal between Portuguese women and non-nationals. The Conservatories of Civil Registry are the ones responsible for the celebration of these marriages and until recently, they were not aware of this problem. Still, even when they have suspicions, for lack of evidence it is very difficult to refuse the celebration of the marriage. Nevertheless, national authorities are now more aware of this practice. According to the television reports, payment for "false brides" varies between 1000€ and 4000€.

Legal recognition of same-sex partnerships and recognition of the right to marry for transsexuals

Legislative initiatives, national case law and practices of national authorities

In 2005, there were no developments concerning this aspect. Portuguese legislation does not allow for same sex marriages, though it acknowledges some marriage-like rights to same-sex "de facto" unions. Gay movements keep fighting for same-sex marriages, especially taking into consideration the recent developments on this issue in Spain.

[18] They are available in: http://www.cnpd.pt/bin/legis/juris/jurisprudencia.htm.
[19] COELHO, Francisco Pereira, OLIVEIRA, Guilherme, *Curso de Direito da Família. Direito Matrimonial,* vol. 1, p.
[20] The Constitutional Court had already judged the rule of article 1817 n. 2 Portuguese Civil Code unconstitutional in 2003 (Acórdão n.º 456/2003 of 14 th October 2003).

Article 10. Freedom of thought, conscience and religion

Incentives and reasonable accommodations provided in order to ensure the freedom of religion, including the right to conscientious objection

Legislative initiatives, national case law and practices of national authorities

Ratification of a new Concordat between Portugal and the Holy See

On the 16th of November 2004[21], just two weeks before the period of analysis of the current report, Portugal ratified the new Concordat signed between the State of Portugal and the Holy See on May 18th 2004. This new Concordat maintains the long-held tradition of regulating the relationship between the Portuguese State and the Holy See by means of an international law agreement, although in a way that conforms both to constitutional and international law developments concerning the provision of full and equal liberty of religion to all religious groups and denominations, without discrimination. The Concordat builds on the deep historical relationship between the Catholic Church and Portugal, and recognizes shared responsibilities, in the realm of religious freedom, in the service of common good and in building a society based on human dignity, justice and peace. At the same time, the new Concordat acknowledges the role of the previous Concordat of 1940 in the strengthening of the historical ties between the State of Portugal and the Holy See. This is very important, since the regulation of religion can hardly ignore the concrete historical, cultural and religious reality of a given country. However, the need for a new Concordat is justified because of the important constitutional, international and communitarian normative transformations in the domains of religious freedom and democracy, as well as on the grounds of the transformations that have taken place within the Catholic Church, which affected the way it understands its relationship with the political community.

Reasons for concern

Given the constitutional controversy that has always surrounded the legal institute of the Concordats in general, it will be important in the future to monitor to what extent this Concordat, while being true to religious history and tradition, will serve the constitutionally substantive goals of promoting equal religious freedom and separation between the State and the different religious denominations, as stated in article 41º of the Constitution and articles 1º to 4º of the Law of Religious Freedom of 16 June 2001, or whether it will become a hindrance to the attainment of these goals.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

The legal status of religious ministers

Another important development in the field of religious freedom comes from a 2004 decision of the Portuguese Supreme Court related to the legal status of the activity of religious ministers[22]. This is a very important decision from the point of view of the right of religious self-determination of churches and other religious denominations. It privileges the spiritual dimension of the activity of religious denominations, respecting the religious nature of their decisions on the selection and removal of religious ministers. The Portuguese Supreme Court has held that when a religious community and one of its religious ministers (e.g. Pastor, Priest, Bishop) arrange their mutual relationship without any contractual intent, the mere existence of factual elements that might suggest the existence of a labour law contract (e.g. salary; place and time of work; subjection to orders) is not sufficient to establish the existence of a contractual employment relationship. The Court held that when the minister accepts to exercise a given religious mission and be a part of the organic structure of the religious denomination,

[21] Resolução da Assembleia da República n.º 74/2004 e Decreto do Presidente da República n.º 80/2004, de 16 de Novembro.
[22] Acórdão do Supremo Tribunal de Justiça (Proc. 04S276), of 16-06-2004.

his rights and duties derive from a strictly religious statutory position and not from a labour law contractual relationship of service.

Positive aspects

This orientation may prove very important for the protection of religious denominations decisions against possible legal challenges based on non-discrimination principles and criteria adopted by labour law.

Article 11. Freedom of expression and of information

Freedom of expression and of information

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Freedom of expression and public discussion

Freedom of expression still faces some hurdles in Portugal, as the recent "article 10º" case *Urbino Rodrigues v. Portugal*[23] of the European Court of Human Rights (second chamber) demonstrates. Although the communicative rights of freedom of expression, information and press are protected by articles 37º and 38º of the Portuguese Constitution, national courts still have some difficulty in understanding the important role these rights play in creating a "robust, uninhibited and wide-open" sphere of public discourse, as a necessary element of a free and democratic fundamental order.

This is not the first time that European Court of Human rights is called to remind Portuguese courts of basic tenets of the freedom of expression, such as the notion that "political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society"[24]. In the above mentioned case, involving the director of a regional newspaper *A Voz do Nordeste,* the applicant appealed against his conviction by the Portuguese Courts for defamation of the director of another regional newspaper *Mensageiro de Bragança*, when discussing the professional credentials of a local Socialist Party leader nominated to an official position in the Ministry of Education by the government of that same political party. The European Court of Human Rights had to remind the Portuguese Courts that "journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation".

Reasons for concern

The several "article 10º" cases involving Portuguese Courts suggest that there is still a lot to be done in this country in promoting the notion that all national courts should understand themselves and operate as *human rights courts in a broad sense*, with the task of interpreting and applying national law taking into due account the text of the European Convention of Human Rights and the decisions of European Court of Human Rights.

[23] *Urbino Rodrigues v. Portugal* (just satisfaction), nº 75088/01, ECHR 2005-II.
[24] *Lopes Gomes da Silva v. Portugal*, nº 37698/97, ECHR 2000-IV.

Media pluralism and fair treatment of the information by the media

Legislative initiatives, national case law and practices of national authorities

Media Regulation

An important development that took place in the field of the regulation of the media was the statutory creation of a *new regulatory body for the media*, the Entidade Reguladora da Comunicação Social (ERC)[25]. In 2004, the Portuguese Constitution was amended and article 39º was entirely rewritten, as to provide for the creation of a new independent public agency for media regulation[26]. Its role would be to ensure respect for the right of information and freedom of the press, prevent concentration of media ownership, guarantee media political and economic independence, protect fundamental rights from violation through the media, promote compliance with regulatory norms, provide for the possibility of expression and confrontation of different opinions, and guarantee the right to reply.
The creation of ERC, which replaced the former High Authority for the Mass Media (*Alta Autoridade para a Comunicação Social*), came as a result of the aforementioned constitutional amendment. The new regulatory body has been conceived of as an independent administrative agency, promoting the constitutional goals of freedom of expression and pluralism in a politically independent way. ERC is competent to regulate all media outlets, regardless of the technological platform they are based on (press, radio, television or even Internet). Among the main regulatory goals are the promotion of cultural pluralism and diversity of expression of different lines of thought, the protection of the freedom of broadcasting of media content, the protection of vulnerable audiences, such as children, the promotion of journalistic professional standards and editorial responsibility, and the protection of individual rights. Its regulatory powers extend to the areas of freedom of information and freedom of the press, media concentration, media political and economic freedom, protection of fundamental rights, promotion of pluralism and media competition, protection of the different rights of access to the media, participation in the formulation of spectrum management policies, control of government advertisement. ERC is also responsible for encouraging co-regulation and self-regulation by the media.
The organic structure of ERC includes a regulatory council, a consultative council and a financial controller. The main regulatory functions are performed by the regulatory council, a body composed by five members, four of whom are designated by the Parliament, by two-thirds majority of the votes, and the other one is co-opted by these four. The members of the regulatory council serve for a non-renewable term of five years with institutional guarantees of independence.

Article 12. Freedom of assembly and of association

Freedom of association

Legislative initiatives, national case law and practices of national authorities

During year 2005, there was no relevant news related to the right of association in Portugal, either in the legislation or in the case law of the Constitutional Court. In addition, there is no news of complaints regarding violations of this right. A remark should be made regarding the line in the programme of new government that announces forthcoming legal regulation of the right of association of the Maritime Police (it is the only security force awaiting the recognition of the right to associate), as well as the approval of the legal statute of the leaders of associations of the military personnel.
The only discussions on the political agenda related to this topic are related to the limitations that the Constitution and the law establish to the right of association of the military and the security forces, as well as the constitutional and legal prohibition of fascist and racist organizations.
As regards the **associations of the military**, the Government prohibited a demonstration convened by a number of them to protest against government decisions aimed at reducing some professional benefits,

[25] Lei n.º 53/2005 of November 8th.
[26] Lei Constitucional n.º 1/2004 of July 24th.

but that prohibition was upheld by the judiciary on the basis of the limitations set by the Constitution itself to the associations of the military. Anyway, in this case, one could speak more precisely of a limitation of the right to demonstrate and not directly of a limitation of the right of association.
In the case of the **fascist and racist organizations**, they are explicitly prohibited by the Constitution, and the law provides for the implementation of the constitutional prohibition. Nevertheless, during the year 2005, two demonstrations were called by well-known racist and fascist-type organizations, against gays, immigrants, etc. The government did not prohibit those demonstrations, which took place without any violence, under very obvious security measures taken by the government. However, some concerns were produced regarding the very existence of the organizations that called the demonstrations; some voices suggested that such groups should not be allowed to go on organizing their hate-speech and extremist right-wing propaganda.
In the Portuguese case law, two recent court decisions addressed the issue of whether there is an individual right of becoming a member of an established association and a right to remain as a member of an association. In one case, the Supreme Administrative Court ruled that a firemen's association may refuse the accession of a person who wished to become a member on the grounds of the lack of "moral idoneity" (as established in the association's statutes); in the other case, the Lisbon Civil Appeals Court ruled that a pharmacist's association could not expel a member on the grounds that the latter had disobeyed a mandatory collective decision of the association, because the court holds the opinion that the right to association comprises the right to remain in an association and not to be expelled by the association except for extremely serious reasons.

Article 13. Freedom of the arts and sciences

Freedom of the arts

Reasons for concern

The media conveyed to the public one situation that can only be defined as censorship based on moral grounds: in Mirandela, a small town in the interior of the country, two nude paintings were removed from an exhibition, located in municipal premises, by the local authorities, on the allegation that they might be disturbing to children. One has to state that the paintings were in fact of non explicit content, since one portrayed two bodies embracing, seen from behind, and the other portrayed a woman's body holding a piece of fruit. Moreover, the removal was executed without any kind of previous consultation with or even informing of the artist. The artist, also a local person, disagreeing, put them back on display, and, eventually, removed all of her paintings from the exhibition herself, after the two paintings in discussion were taken out a second time, again without any of prior warning.
However, despite the obvious seriousness of the situation itself, it cannot be seen as faithfully representing the national reality, as it was an isolated case, promptly condemned by the media and the public opinion in general.

Freedom of research and academic freedom

Legislative initiatives, national case law and practices of national authorities

The National Committee on Ethics for Life Sciences published an important opinion concerning medical research (Stem Cells, 47/CNECV/05), according to which the Committee refuses the creation of embryos for research (Portugal has ratified the European Convention on Human Rights and Biomedicine (see Art. 18)). Research with stem cells arising from adults, placentae, umbilical cords, spontaneous aborts, and similar tissues is ethical if some requirements are fulfilled (e.g., informed consent, ethical and technical control of the research).

Article 14. Right to education

Access to education

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

Executive Order 19 737/2005 (Despacho nº 19 737/2005) created a working group in charge of studying and presenting proposals for the guidelines concerning programmes of sexual education in schools. The group has a mixed nature and presented a preliminary report in October 2005[27]. According to the report, sexual education is a matter of Public Health, thus being a major priority for the Ministry of Education. It urges the participation of students, parents, teachers, NGOs, etc. and advises for the changing of curricula in order to include topics on sexual education.

Legislative initiatives, national case law and practices of national authorities

In 2005, the Government took the initiative to expand the operating hours of basic education schools, until 5:30 pm, in order to allow children to stay longer at school. This will ease the life of working parents who could not afford to retrieve their children at earlier hours.

Following Executive Order n. 14753/2005, (*Despacho n.º 14753/2005*) the Government is implementing its programme of introducing the English language as a mandatory discipline in primary schools.

Positive aspects

In March 2005, the Minister of Education issued a study on "Special Educational Needs"28, following the proposal of a decree-law of the previous government. According to this study, that concept "includes pupils of all capacity levels who may have needs in cognition and learning, communication and interaction, sensory or physical aspects, and/or behavioural, emotional and social development." There are three categories under this concept: students with disabilities (audition, vision, etc.), students with difficulties (e.g. hyperactive, dyslexic, etc.) and students with socio-economic disadvantages (e.g. immigrants, Roma). It concludes for the urgent need to revise Decree-Law 319/91 and related legislation, preferably with the participation of all interested parties, subject to regular monitoring of effectiveness, and the training of professionals.

Good practices

The Ministry of Education announced its intention to include Portuguese for non-native speakers in the curricula of schools as a means of integrating non-national students.
The Ministry of Education is working on the elaboration of a catalogue of school equivalences for students who have attended schools abroad. The tables of credits equivalences with China, Ukraine, Russia, Germany and United Kingdom are almost ready. This measure intends to ease procedures, thus facilitating the integration of foreign students.

Reasons for concern

Although school canteens tend to have a balanced diet, schools often have plenty of sweets and non-healthy food to sell, which students end up eating, which contributes to the existence of childhood obesity as an emerging problem within our society.

[27] http://www.netprof.pt/pdf/Relatorio_EduSexual.pdf
[28] In http://www.min-edu.pt/ftp/docs_stats/d_1110569553310.pdf

Article 15. Freedom to choose an occupation and right to engage in work[29]

The right to engage in work and the right for nationals from other member States to seek an employment, to establish themselves or to provide services

Legislative initiatives, national case law and practices of national authorities

Ministerial Decree nº 282/2005 (Portaria nº 282/2005, of the 21st March, DR, I – B Série, nº 56) introduced some changes to the Programme of Professional Internships, created by Ministerial Decree nº 268/97. According to this new Ministerial Decree, Engineer Interns now can also be beneficiaries of the internships promoted by the Institute for Employment and Professional Training, a possibility that was refused by the previous Ministerial Decree. The engineers statutory corporation has struggled for this change in order to avoid what was considered an unjust situation, especially taking into account that its engineers are often better qualified than other candidates to the Internship Programme.

According to a decision from the Administrative Supreme Court, (proc. nº 876/2003, of the 12th July 2005[30]) the freedom to choose an occupation implies, on the one hand, not to be obliged to or prevented from engaging in a certain profession. On the other hand, that freedom also implies the right to obtain the necessary skills in order to engage in a certain profession.

The National Plan on Employment 2003-2006 established by Resolution of the Council of Ministers 185/2003 (Resolução do Conselho de Ministros n.º 185/2003) is in the process of being implemented. Part of its objectives are to facilitate the full exercise of protected rights and the equality of opportunities in access to work and learning for immigrants.

The National Action Plan for Inclusion 2003-2005, established by Resolution of Council of Ministers 192/2003 (Resolução do Conselho de Ministros n.º 192/2003), has as one of its goals to include all persons, especially the most vulnerable, by promoting their access to work, resources, rights, goods and services, equality of opportunities and social participation.

Access to employment for asylum seekers

Good practices

The Portuguese Council for Refugees offers training to staff that have to deal with issues of integration of refugees in Portugal. In this Council, refugees can benefit from personalised counselling aiming at their integration in the labour market. This practice also facilitates a better communication between refugees, the centres of employment and the employers. There are no special procedures for refugees concerning employment. Refugees have the same rights of access to work as nationals. This measure allows awareness among public officers for these integration processes and avoids a discriminatory treatment of refugees.

Article 16. Freedom to conduct a business

Freedom to conduct a business

Legislative initiatives, national case law and practices of national authorities

Like the other EU member-states, Portugal is a market economy based upon freedom of enterprise and competition. Freedom of private initiative is guaranteed by the Constitution itself (art. 61º). Though the

[29] For the integration of members of religious minorities, see commentary to art. 10. For the integration of persons with disabilities, see commentaries to art. 26.
[30] www.dgsi.pt/.

law may impose restrictions to this right in the "general interest", the restrictions must be appropriately justified.
Although the Portuguese Constitution allows the law to define basic areas of economic activity that are closed to private initiative (art. 86º), the only industries in this situation, according to a law of 1997 (Law n. 88-A/97, of the 25th of July), are some traditional utilities like water for public use and sewage and waste collection, as well as railway transport under a public service regime, some sections of the postal service and the exploitation of seaports. Still, even in some of those areas (like the water industry) private enterprise may be allowed, under concession by the State or the local authorities. Besides that, in some of the activities that provide other "services of general economic interest" there are still public exclusives, namely in urban public transport. However, the process of liberalisation and opening to the market is advancing steadily in these sectors, according to the decisions taken at the EU level, in order to complete the "internal market" and guarantee the freedom of establishment and economic activity EU-wide in all areas of the economy.
Nonetheless, along with the freedom of (private) enterprise, the Constitution leaves room for State economic initiative, in accordance with the "collective interest". However, the public economic sector operates within the framework of market competition and has been decreasing its weight, due to an extensive programme of privatization in the last 15 years.
In the year 2005, the only sector that called the attention of the public opinion was the pharmacy sector. According to Portuguese law (a statute from 1965), there is no freedom of establishment of pharmacies. Only the holders of a degree in pharmacy are entitled to own pharmacies; the establishment of a new pharmacy is not allowed when the population ratio defined by a Government regulation has already been reached; and it is not possible to establish a new pharmacy less than 200 meters from one already existent.
Recently the Portuguese Competition Authority published a research study with strong evidence against this legal regime in terms of losses for the community and announced a recommendation to the Government and Parliament for the liberalization of the industry. The Government has already announced its willingness to eliminate the population and minimum distance restrictions to the establishment of new pharmacies, but not the ownership monopoly of the pharmacists. Still, if implemented, this reform could mean the end of decades of strong limitations to the freedom of enterprise in the pharmacy sector.
The Competition Authority has been very active in punishing violations of the competition rules. Recently it applied very heavy sanctions to producers of medicines and medical appliances, because of a cartel among them, as well as to professional associations of dentists and veterinarians because of the fixing of the professional fees. In the latter cases, the decision is all the more remarkable because those professional associations have a public law status, as statutory corporations or "public associations" (as they are known in Portuguese law). The Competition Authority considered them as business associations, to the effect of submitting them to the Competition Law.

Article 17. Right to property

The right to property and the restrictions to this right

Legislative initiatives, national case law and practices of national authorities

Recently the Portuguese parliament approved a new law regulating house rental. Among the many changes to the existing laws, the new statute puts an end to a decades-long situation of freezing of the rents paid by the tenants.

Positive aspects

The most positive aspect is the end of a situation of rent freezing that, due to long periods of inflation, amounted to an expropriation of the house owners. A period of transition is provided for, and a scheme of subsidies to the tenants who cannot afford the increases of the rents is also established.

Article 18. Right to asylum

Asylum proceedings

Legislative initiatives, national case law and practices of national authorities
Through the 21st of December, there have been 99 asylum requests in Portugal corresponding to 33 different nationalities. This represents an increase of 18%, when compared to the previous year, in which 84 asylum requests had been formulated. Surprisingly, the most represented nationality is Colombian.
There have not been legislative initiatives on the right to asylum, Law 15/98, *(Lei 15/98, de 26 de Março - Lei de Asilo)*being still in force. However, the introduction of changes to this law is expected due to the transposition into national law of Directive 2003/9/CE *(Directiva 2003/9/CE do Conselho, de 27 de Janeiro de 2003*), which establishes minimum standards for the reception of asylum seekers. There is then a project of decree-law, which intends to regulate the existing Law on Asylum.

Positive aspects

There was an outspoken case, Ramatulay, two years old, concerning a girl from Guinea, in risk of being subject to female genital mutilation. Her father, resident in Portugal, gave notice of the case and the intervention of the authorities of both countries saved, at the last minute, the little girl from the ritual. Unfortunately, her cousin could not be saved and was subject to female genital mutilation.

Reasons for concern

During the first quarter of 2005, of the 42 asylum requests presented to Portugal, only 7 have been admitted by the Aliens and Frontiers' Service (*SEF- Serviço de Estrangeiros e Fronteiras),* which represents an admissibility rate of 16%. Another 6 requests were admitted by the National Commission for the Refugees, through a procedure of review of negative decisions, requested by the asylum seeker or the Portuguese Council for Refugees, which represents an admissibility rate of 40%. The reasons found for these low rates are that some requests are false or manifestly unfounded and that the burden of proof can be a strong obstacle for asylum seekers, who usually have no documents with them due precisely to the emergency circumstances in which they left their country of origin.
A restrictive interpretation of certain concepts like "safe country", "alternative internal escape" and *non-refoulement* should be avoided. For example, when analysing the concept of "safe country" the concrete situation of the asylum seeker should be taken into consideration and not the situation of the country of origin in general.
The two phases of the asylum procedure, admissibility and eligibility, should be equally analysed and prepared. There is a tendency to concentrate all efforts on the first phase, thus eliminating many cases right away.

Recognition of the status of refugee

Legislative initiatives, national case law and practices of national authorities

During the first semester of 2005, there has been 1 recognition of the status of refugee and 3 residence permits for humanitarian reasons.

Good practices

Implementation of a network of interpreters by the CPR, in order to facilitate communication between asylum seekers/refugees and national authorities. Turkish, Mongolian and Nepalese languages are currently a problem. In 2004, CPR has promoted a course for these interpreters in order to train them on the specificities of these interviews with asylum seekers/refugees.

Reasons for concern

The National Commission for Refugees has undergone frequent and successive changes, which has caused some instability regarding administrative and procedural practices. The practice of personal interviews between the National Commission for Refugees and the asylum/refugee seekers is strongly recommended. Normally this practice only occurs upon request of the Portuguese Council of Refugees.

Unaccompanied minors seeking asylum

Good practices

The "Declaration on Good Practices", under the programme "Separated Children in Europe" ("Save the Children" and UNHCR) has been translated into Portuguese language. This programme aims at promoting and protecting the rights and best interests of separated children or adolescents who arrive or transit in Europe.

Article 19. Protection in the event of removal, expulsion or extradition[31]

Collective expulsions

Legislative initiatives, national case law and practices of national authorities

The press has been giving notice of "collective expulsions" of Brazilian women, allegedly prostitutes, found in bars and with no residence permits. No other cases of collective expulsions have been reported.

Subsidiary protection and prohibition of removals of foreigners to countries where they face a real and serious risk of being killed or being subjected to torture or to other cruel, inhuman and degrading treatments

No relevant news has been reported about this aspect.

Positive aspects

The Administrative Court responsible for appeal procedures has been frequently requesting the intervention of the CPR, the national partner of UNHCR, in order to help with documental research on the country of origin.

Legal remedies and procedural guarantees regarding the removal of foreigners

Legislative initiatives, national case law and practices of national authorities

It has been denounced that the facilities in Lisbon airport for those non-nationals who are in an irregular situation are degrading and inhuman, especially taking into consideration that these people may have to remain there for days or even weeks.

[31] See note 25.

CHAPTER III. EQUALITY

Article 20. Equality before the law

Equality before the law

Legislative initiatives, national case law and practices of national authorities

The Supreme Court of Justice (*Supremo Tribunal de Justiça*) has issued a decision (Acórdão de 27 de Janeiro de 2005) concerning the constitutional principle "equal pay, for the same work", stating the following conclusions:
"1. The principle "equal pay for the same work" derives from the general principle of equality.
2. There is violation of that principle only when the discrimination has a merely subjective basis.
3. The worker with a non-term contract has a legal status rather different from the one with a term contract.
4. The difference of their status justifies some disparities on the wages.
5. It is not the court's competence to inquire into the criteria and extent of the differentiation done by the employer."

The national Ombudsman requested of the Constitutional Court the declaration of unconstitutionality, for an alleged violation of the principle of equality, of a norm of the "Local Elected officials Statute" (*Estatuto dos Eleitos Locais*), stating that the norm does not distinguish among permanent local elected people, those who cumulate these functions with other activities and those working half-time, treating all these cases equally. The Ombudsman also alleges that a local elected official under a permanency regime, but not with exclusivity, gets exactly the same salary of a half-time town councillor (*vereador*), which means they get the same salary, even though the former works twice as much for the local government body. Nevertheless, this was not the understanding of the Court, which decided that the two situations could not be distinguished only by the criteria that one works the double number of hours, because there are other facts to take into consideration. The law under scrutiny itself differentiates the two regimes in several other aspects. The differentiation of status takes into account not only the payment aspect, but also a vast and complex set of rights and duties, and therefore the two positions cannot be compared this way –Decision nº 96/2005 (Acórdão do Tribunal Constitutional nº 96/2005, of the 23rd February, 2005.

Article 21. Non-discrimination

Protection against discrimination

Legislative initiatives, national case law and practices of national authorities

Decree Law nº 27/2005 (Decreto-lei nº 27/2005, of the 4th of February) has revised the internal structure of The High Commissioner for Immigration and Ethnic Minorities (ACIME – *Alto Comissariado para a Imigração e Minorias Étnicas)*, not only due to new principles on the rules applicable to the direct State administration, but also because dialogue with immigrant communities revealed the need of a new structure that permits easier and quicker contact of immigrants with the state administration, so that the non-national citizens get the right answers to their specific problems. The new model includes the creation of support centres, working with mediators, preferably immigrants themselves indicated by immigrant associations and other civil society institutions.

Good practices

Within the EU campaign "For diversity, against discrimination", the national Working Group created a brochure "Our differences make the difference" *(As nossas diferenças fazem a diferença*), informing the transposition of the relevant EU directive to national law and the way to act in case of discrimination.

Reasons for concern

In September 2005, the results of a research study, financed by the European Commission, were published under the topic of immigrant women in Portugal[32], which revealed several important conclusions. One of those conclusions is that, due to the long and bureaucratic legalization procedure, there is an increase in the number of illegal immigrants, as well as some difficulties in the process of family reunification.

Fight against incitement to racial, ethnic, national or religious discrimination

Reasons for concern

This year, Portugal has seen two racist demonstrations[33]. A group of skinheads and extreme right-wing groups organized a demonstration demanding the repatriation of immigrant citizens. Though the Portuguese Constitution prohibits fascist and xenophobic associations, there was not much the authorities could do, since the organizers fulfilled the legal requirement of announcing the meeting to the authorities, and also because they used neutral language, and disguised the true meaning of their protest under patriotic purposes of fighting against criminality, and the same document permits peaceful meetings.

Positive actions aiming at the professional integration of certain groups

Positive aspects

The mentioned study stresses the importance of the immigrant associations as a means of entering into contact with other people from the country of birth and also for gathering information on issues related to the immigrant community in Portugal, such as the legalization process, family reunification issues, as well as with other organizations and associations.

Good practices

Though it is still a provisional document, the General Labour Inspectorate created a diagnostic questionnaire aimed at becoming an instrument of management and self-evaluation of the social responsibility of the enterprises; some of the indicators relate to equality and non-discrimination as well as maternity/paternity and working time.

Reasons for concern

The authors of the study on immigrant women mentioned above have also concluded, in what regards the professional integration of these women, that "*the working situation of many immigrant women, mainly for those who came into Portugal through a process of family reunification, is quite hard. This visa does not allow them to work automatically, they have to apply for a working authorization to the Inspecção Geral do Trabalho (General Labour Inspectorate), which usually takes more than three months to be issued. To ask for this authorization they first have to have a promise of a working*

[32] "Immigrant women in Portugal: migration trajectories, main problems and policies", by Karin Wall, Cátia Nunes and Ana Raquel Matias, available at the website of the Immigration Observatory.
[33] In relation to this subject, see *supra* commentary to art.16.

contract with an employer, and this means they have no labour rights before the answer from the administrative services (the General Labour Inspectorate and the Department of Aliens and Frontiers)". This study focuses on the situation of three main groups of immigrants – Brazilians, Ukrainians and Cape Verdeans - and the conclusion of the authors on their situation within the labour market is that "*In all the three national groups, the majority works in low qualified jobs, which in many cases requires working in shifts and having unsocial working hours, such as in early morning or during the night. This is particularly true in the case of the Cape Verdean immigrant women who are alone in the receiving country, having left their children in their country of birth and who need to work more in order to send money for their family."* In addition, "*there are many practical problems regarding the recognition of qualifications and professional skills specifically in the case of Ukrainian immigrants, who generally have higher levels of education. Most of these immigrants end up working in economic activities for which they have very high qualifications compared to the ones that are required, as the equivalence process [of the educational qualifications] has not been put into practice effectively. Therefore, most of them work in areas that have little to do with their training and qualifications."*
One of the most important conclusions in this study concerns exploitation at the workplace, as in some economic sectors there are reports of discrimination based on nationality or ethnicity, which can assume different forms, including long and non-paid working hours, physical and verbal violence, sexual harassment. The same takes place within their own communities, in particular if they are women who came alone.

Protection of Gypsies / Roma

Legislative initiatives, national case law and practices of national authorities

According to the speech given by the new Commissioner for Immigrants and Ethnic Minorities on the occasion of his entrance into office, the social discrimination of the Roma community is still a major concern, as is their access to economic, social and cultural rights.

Positive aspects

The National Platform for the Rights of Women was created in November 2004 and its Statutes have been published in the Official Journal in January 2005. This Platform includes the Association for the Promotion of Portuguese Roma Women and Children.

The Coimbra Gypsy's Association has forwarded a complaint to the High Commissioner for the Immigrants and Ethnic Minorities, against a comedian who represented the Gypsy community in a negative and stigmatising way, suggesting links with drugs trafficking, prostitution, theft, burglary and the use of weapons and knives. The Association considered this as discriminatory. The comedian immediately apologised publicly.

Reasons for concern

Many children from the Gypsy community are still not attending school.

Article 22. Cultural, religious and linguistic diversity

Protection of religious minorities

Legislative initiatives, national case law and practices of national authorities

The Resolution of the Council of Ministers 4/2005, of the 6th of January, created a Structure for Dialog with Religions, dependent on the member of Government in charge of Immigration and Ethnic Minorities issues.

Decree Law 27/2005, of the 4th of February, on the High Commissioner for Immigration and Ethnic Minorities, created the "immigrants support groups". These structures are due to employ mediators, preferably immigrants themselves, indicated by civil associations and institutions, with the specific task of improving the contact between immigrants and public officers and agencies, for instance by removing language problems or cultural differences.

Good practices

Religious diversity:
The media gave notice that the Ministry of Education issued instructions to public schools on the subject of the removal of remaining crucifixes shown in classrooms
One can say that is the only solution compatible with the 1976 Constitution, the Religious Freedom Act, Law 16/2001, of the 22nd of June and the Framework Law on the Educational System, Law 46/86, of the 14th of October. In fact, these require the State to be separate from any church or religious community and public education to be non-confessional and independent of any religious directive.
Discussion was raised about the possible aggression of religious feelings of the members of dominant religion (Roman Catholic). However, what the law demands is neutrality from public institutions in general, and schools in particular, as far as religious questions are concerned. By no means does it discourage or diminish the use of any religious symbols whatsoever by the students themselves.
The presence of religious symbols in a public institution, the more so in a character-building one, and in a country where it is mandatory to attend school up to the age of 15 and private schools are in the reach of very few students, has to be considered as discouraging of free expression and a threat to the development of minority religions or ethnic beliefs, reasons why the instruction must be viewed as a good practice, only criticisable for being some 30 years late.
One must point out, however, as a reason of concern, that this is a mere beginning, hence the Ministry later issued communications stating that the removal ought to be made on a case by case basis and only following complaints, which should be seen as a clear setback in what should, otherwise, be the prompt compliance with general legal demands.

Protection of linguistic minorities

Good practices

Portugal has recognized the *Mirandês* as official language by Law 7/99, of the 29th of January. It is believed to be spoken by around 7000 people in a region located on the northeastern part of the country.
Private institutions have supported the use of written Mirandês. For instance, this year the first translated edition of Astérix was published and promptly sold out.
Public local institutions have also supported, on a regular basis, the use of the language in the population's everyday life but there was yet no registry of significant specific action taken by national authorities. This year, a national authority, *Instituto de Estradas,* the public agency in charge of the roads nationwide, surprised by publishing on its internet site a study on environmental impact, written in that minority language, about a main road (IC 5) that is to be constructed in the region.
It is a good practice, as even the Mayor of Miranda do Douro stated that the local population seldom uses the language in official written acts due to the fact that they speak it better than they write it.

Article 23. Equality between men and women

Gender discrimination in work and employment

Good practices

One of CITE's attributions is raising awareness and information. Therefore, in partnership with the Labour and Social Security Ministry (*Ministério da Segurança Social e do Trabalho*) there were some

seminars on issues related to gender equality and non discrimination at work directed to superior and manager boards of the Ministry and its tutored entities.

Reasons for concern

The press has reported that women cannot integrate Special Forces Troops. There is no constraint on the access to Air Force, but women are not able to join Rangers (Army), Marines (*Fuzileiros*) or Submarines, although the National Defence Law prohibits gender based discrimination on the access to the armed forces. Authorities explained this fact (according to the press) on logistics, in the case of submarines, and physical demand on the others cases.

The Bank of Portugal (*Banco de Portugal*) has published a Research study, in the Autumn Economic Bulletin, concerning the wages on the Public Administration Sector, and has reached the conclusion that there is a strong payment segmentation in comparison with the private sector and that public servants face more adverse conditions to enter and to progress in the different professional positions. This same study also concluded that, although women may get higher salaries than men, they have an inferior return compared to men in what concerns individual characteristics, which increases when we move up the hierarchical scale, which does not compensate their major endowment in terms of human capital, especially higher qualifications/studies. In addition, they concluded that there is a greater predominance of men in the positions connected to the attribution of pay awards (better relative remuneration for a certain level of qualifications). This constitutes the existence of a glass ceiling in the salary progression of women, which means, for higher salaries the return is greater for men.

Positive actions seeking to promote the professional integration of women

Good practices

The prize "Equality is Quality" awarded every year to enterprises and other entities promoting gender equality and non-discrimination at work, by CITE (Commission for the Equality at Work and Employment) was selected to be presented as a good practice on the conference "High Performance workplace event: people mean business", organized within the British Presidency of EU, held last September in London.

CITE and ILO signed a Cooperation Protocol having as its main aims the promotion of gender equality and non-discrimination, in domains considered of common interest for both entities. ILO is seeking to mainstream gender issues in all its policies and programmes, aiming at the creation of jobs, promotion of qualifications and progress on the access to labour market under fair and equal working conditions, and CITE works for the promotion of gender equality and non-discrimination on the grounds of sex in work and employment. We must wait for the practical results of this formal compromise.

Reasons for concern

Authorities shall pay attention to the escalating phenomena of female unemployment, due to several factors, one of which is the closure of several textile industries, considered a highly feminized sector. In November 2005, the National Statistics Institute (*INE – Instituto Nacional de Estatística*) announced a rate of 8,9% for female unemployment, which means more than 230000 unemployed women, and 53,4% of the total. This means also an increase of 1,1% when compared with last year's corresponding period.

Participation of women in political life

Reasons for concern

Local elections, which took place last October give room to analyse the number of women who were elected. According to data provided by the Technical Bureau for Electoral Issues – (STAPE –

Secretariado Técnico dos Assuntos para o Processo Eleitoral) only 6,2% of women were elected as presidents of municipalities, which corresponds to 19 women among a total of 308 posts. Moreover, the comparison with previous results (2001) show an increase of just 0,8%. If we take into consideration the data of the 30 years of Portuguese democracy, we conclude that there has not been significant progress. In 1976, the percentage of women in that position was 1,6%, it increased in 1989 to 2,3%, decreasing to 1,6% in 1993, rising again, in 1997, to 3,6%. Political parties' policies and Government measures reveal themselves as ineffective in the struggle for gender parity in the political life. Women are still apart from decision-making positions, and appear more represented in the deliberative organs, rather than the executive boards.
We can reach the same conclusions when considering the participation of women in trade unions. Though their participation has been increasing considerably over the last few years, representing 59,1% of the new filiations, they are still apart from decision-making positions. According to data published by the General Confederation of Portuguese Workers (CGTP – *Confederação Geral dos Trabalhadores Portugueses*), among 1150 leaders within the trade unions, the percentage of women is 29,1%, which reveals that discrimination and inequality between men and women is still a strong reality.

Article 24. The rights of the child

Possibility for the child to be heard, to act and to be represented in judicial proceedings

Legislative initiatives, national case law and practices of national authorities

Law n.º 166/99 of the 14th of September, Lei Tutelar Educativa, in its article 171 enshrines the right for the child/adolescent to be heard before any disciplinary measure is taken against him/her. It should be highlighted that, according to the Portuguese penal code, criminal liability starts with the age of 16 (art. 19 Penal Code). Children/adolescents under the age of 16 who have practiced acts considered as crimes are, hence, subject to measures of assistance, protection and education. Children between 16 and 18 are criminally liable but subject to a special system of penal correction (DL 401/82, of the 23rd of September), based on flexibility and principles of integration.
According to a study elaborated by the Portuguese Ombudsman[34] in February 2005, there were 295 children/adolescents detained in Detention Centres, of which 280 (95%) were boys and 15 (5%) girls. The majority was in a semi-open regime (66%), 19% were in open regime and 15% in closed regime.[35]
There are reasons to believe that the right of the child to be heard in person is respected.

Other relevant developments

Legislative initiatives, national case law and practices of national authorities

It is worth noticing that the new Portuguese government has created in 2005 a specific Ministry for Social Security, Family and Child matters (Decree Law 5/2005 of the 5th January 2005).
The Portuguese government established in 2005 the "Programa Ser Criança" (*Project Being a Child)*. This programme is based on the principles of the child's best interest and minimum State intervention. It aims at the social integration of children and youngsters at risk (Despacho 6580/2005, 2.ª Série, of 2nd March 2005, published in the Official Journal of the Portuguese Republic of 30th March 2005).

Good practices

The regional government of Azores has established in 2005 the Foster Child's Ombudsman (Regional Decree Law 2/2004/A) in order to face the demands of the concrete effectiveness of the best interest of the child.

[34] http://www.provedor-jus.pt/restrito/publicacoes/uploads/Relatorioinfancia.pdf
[35] For further information on this issue, see commentaries to art. 6.

Reasons for concern

The long waiting time for institutionalised children to be adopted is still a matter of concern.

Article 25. The rights of the elderly

Participation of the elderly in the public, social and cultural life

Legislative initiatives, national case law and practices of national authorities

The Government has included in its programme as one of its objectives to combat poverty among the elderly.
The Government has been introducing some changes related to the age for retirement of public officers, which has caused a wave of criticism. But one of the aims of this measure is precisely to treat the workers from public and private sectors equally [36].
The Government has presented its Plan on Stability and Growth 2005-2009, which includes several references to the difficulties and measures to be taken concerning a balanced aging in Portugal.

Good practices

The Municipality of Rio Maior has promoted "flight baptism" to the elderly who apply to participate in the programme. Elderly travel by bus from the city to the Lisbon Airport, where they get a flight to Faro in the South, in the Algarve. There they have a free lunch in a pre-booked restaurant, after which they take the train and return to Santarém and finally by bus to Rio Maior, at the end of the day.
Reasons for concern

The possibility for the elderly to stay in their usual life environment

Positive aspects

Day Care Centres represent a good alternative to avoid permanent institutionalisation of the elderly. In addition, it offers them a good set of activities and company with other elderly.

Reasons for concern

There has been a special concern on inspecting foster houses for the elderly and closing down the ones that are illegal, this being a good practice. The problem arises because there is not a corresponding opening of new foster houses, thus making families face problems with the accommodation for their elderly.

Specific measures of protection for the elderly

Positive aspects

Especially in the interior of the country, isolation can be a problem. Authorities are trying to overcome that problem by enhancing transport programmes and mobile health services.
The University of Trás-os-Montes e Alto Douro, together with the Centro de Engenharia de Reabilitação em Tecnologias de Informação e Comunicação, supported by the Minister of Science, Technology and the Universities have organised a workshop on geriatrics in order to promote the use of technology by the elderly as a way of improving their participation in social life and avoiding their isolation.

[36] For further information, see commentaries on article 34.

Reasons for concern

There has been notice of thefts, many of them violent, to elderly who live isolated.

Article 26. Integration of persons with disabilities

Protection against discrimination on the grounds of health or disability

Legislative initiatives, national case law and practices of national authorities

Resolution of the Council of Ministers adopting and approving the regiment of the Council of Ministers of the present Government refers to the need to assess the impact of each legislative project on the prevention, habilitation, rehabilitation and participation policies on behalf of people with disabilities, enabling a transversal approach to the issue.

The National Secretariat for the Rehabilitation and Integration of People with Disabilities (NSRIPD) has carried out initiatives with the National Commission on Elections and the Technical Secretariat for Electoral Affairs in order to raise awareness within local Municipalities to keep the voting assemblies in venues of easy access to the overall electors with reduced mobility. Still, the National Association of Persons with Disabilities says that many electors with disabilities were not able to vote, during 2005 Municipal elections, due to lack of accessibility to election venues.

Positive aspects

Executive Order nr. 536/2005, from 22nd June, has approved new rules for Examination Tests. One of those was the replacement of the word *"Deaf-Mute"* by *"deaf*", taking into consideration that mute is someone who cannot express his/her thoughts and that is not the case for most deaf people, as they can express themselves by sign language, by emitting some sounds or by writing.

Good practices

"2X1 Agreement", based on a Protocol signed with the National Portuguese Railways (CP), according to which the escort of a person with a disability greater than 80% is entitled to benefit from a free ticket in long course trips, urban and sub-urban trains. Also, for the users with a disability over 60% who are at risk of social exclusion, there is the possibility of tariff reduction in railway trips.
On the other hand, CP has created the *Ombudsman for clients with disability*, whose main objectives are to identify the needs concerning accessibility and to improve the relationship among people with disability and other entities/authorities of the sector.

"Alert School Programme" is meant to raise the awareness within secondary schooling for the existence of severe problems regarding the integration of children with special needs. Moreover, this programme aims at adapting schools and respective environments with regard to the elimination of physical and architectural barriers. This is a national level project, which integrates a competition with a prize awarding the best works of pupils and schools, and involves Civil and Regional Governments, Education and School Regional Directorates.

SNRIPD has republished the **"***Guide of Institutions and Programmes for People with Disability"*.

Reasons for concern

According to the National Association of Persons with Disabilities (APD), the transposition of Directive 2000/78/CE, 27th November, into national law (Lei n.º 99/2003, de 27 de Agosto) has been weakened as the language used in Portuguese is softer than the one used in the Directive (e.g. takes/shall take).

There has been notice of criticism towards the diminution of State co-payment on medicines, as this measure will directly and negatively affect the people with the disabilities quite dependent on the use of drugs.

Professional integration of persons with disabilities: positive actions and employment quotas

Good practices

The "National Catalogue of Technical Aids on Line" has been issued with the support of the NSRIPD, Institute of New Technologies (INOV/INESC) and Agency for the Knowledge Society (UMIC). Its objective is to provide citizens with disability, duly accredited, with technical assistance for the Internet and to enable them to seek information on the existing programmes.

The Instituto do Emprego e da Formação Profissional-IEFP (*Institute for Employment and Professional Training*), uses the Braille language in the sender address of its letters.

Reasons for concern

According to national law, there is a quota of 5% for people with disabilities whenever there is an external tender for more than 10 vacancies. Taking into consideration that there has been a drastic diminution in these kinds of tenders, consequently, there has also been a small impact of the quota system for people with disabilities.

Reasonable accommodations

Good practices

The programme "Accessible Beach – Beach for All", which aims at making the coast and inland urban beaches fully accessible to people with disabilities. It includes pedestrian access with ramps, properly designed parking places, access to the bathing area, pathways throughout the sand, adapted toilets, access to first aid stations, amphibious sea aids for bathing wherever the sea conditions are favourable, bars and restaurants.

Reasons for concern

Portuguese law does not oblige landlords and other tenants to allow housing facilities adaptations to be made due to health reasons.
The new law regulating house rental (*Regulamento do Arrendamento Urbano*) does not enshrine a mechanism that existed in the previous law, according to which landlords could not evict families with a person with a disability equal or over 60%.

CHAPTER IV. SOLIDARITY

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

Workers' information on the economic and financial situation of the undertaking

Legislative initiatives, national case law and practices of national authorities

After the entering into force of the new Labour Code, there have not been significant changes. The Programme of the XVII Government (Chapter II – New Social Policies) includes an express reference to the participation of workers in those decisions that concern them.
Decree-Law nº 215/2005 (Decreto-Lei nº 215/2005, of the 13th December) transposes Directive n.º 2001/86/CE, 8th October, from the Council, which completes the statute of the European Joint Stock Company (*Sociedade Anónima Europeia*) concerning workers participation, including their right to information. According to this Decree Law, participation of workers within the activities of a European joint stock company shall be safeguarded by the establishment of a Workers Council, of information procedures or the setting up of a regime for the participation of workers. These measures shall also be established within its branches and offices. Decree-Law 215/2005 establishes all the rules protecting these rights in case a European Joint stock Company has it head office in Portugal, including those cases of obligatory establishment of workers participation procedures.
Decision of the TJCE, referring to process C-55/02 (*Commission v. Portuguese Republic* [2002], Second Chamber, 12th October 2004, published in the *EU Official Journal* JO C 300 de 04.12.2004, pp. 4), condemned the Portuguese State for the incomplete transposition of Directive 98/59/CE, related to the concept of collective dismissal and consequent protection of workers. According to this Directive, this protection (at least the previous communication to workers associations or Unions) should be extended to all cases of collective unjustified dismissal, including the caducity of the contract. However, this condemnation has lost part of its relevance, since the new Labour Code has introduced the alterations in accordance with the above-mentioned Directive.

National case law referring to the worker's right to information and consultation within the undertakings is still linked with situations of collective dismissal. See, for example, Lisbon Appeal Court Decision 0211/2005 and Coimbra Appeal Court Decision of 18/05/2005[37], both stating that collective dismissal shall follow legal procedures, namely a phase of information and consultation.

Reasons for concern

There is still notice of many collective dismissals, which, apparently do not follow due legal procedures and there has not been any legislative reaction to that reality. Equally, the scarce case law on this matter is evidence that, in most cases, workers do not complain to the Courts. Portugal is still going through an economic crisis and there have been many cases of layoffs and collective dismissals. Often, workers are surprised by the closing of enterprises, therefore making imperative a greater governmental or Union lobby in order to guarantee the workers' right to information and consultation.

[37] www.dgsi.pt

Article 28. Right of collective bargaining and action

Social dialogue

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

FENPROF (Teacher´s association) complained against the Portuguese Government to the International Labour Organisation, on the grounds of disrespect of the duty to listen to Teachers Unions during the process of the approval of several measures related with the statutes of teachers.
The same Association has also presented a complaint to the Ombudsman regarding the violation of Law 23/98 on collective bargaining in Public Administration. It has also requested several meetings with the Commission on Education, Science and culture and the Commission on Rights, Freedoms and Guarantees.

Legislative initiatives, national case law and practices of national authorities

The Government's Programme shows some concerns related to social dialogue as well as collective bargaining and workers' participation. These government concerns are being reflected in the improvement of some rules of the Labour Code, especially the ones related with collective bargaining. This review reaffirms the principle of minimum rule (art.4 Labour Code) and the re-establishment of the principle according to which a Collective Regulation of Work shall not terminate while it is not replaced by another (art. 557º Labour Code). Unions are having an active role in this process due to a previous Agreement on Social Dialogue. Still, information on these aspects is not yet publicly known.

Positive aspects

On the 4th May 2005, the work of the Permanent Commission on Social Dialogue resumed. The Minister of Labour reinforced the importance of this dialogue and the consequent participation of social partners.
Ministerial Order nº 1052/2005 (Despacho conjunto nº 1052/2005 (DR, II série, nº 234, de 07/12/2005) created, within the Ministry of Education, a Commission in charge of negotiating, with respect for Law nº 23/98, (Lei nº 23/98, de 26 de Maio), with Teachers' Unions all measures to be taken in future projects.

Reasons for concern

The lack of minimum rules of Unions' representativity and the rule of the limited efficacy of the instruments of collective regulation of work conditions weaken these legal documents, since, this way, only a small part of workers is covered by their protection. Sometimes, within the same enterprise, there are several collective regulations of work conditions covering different groups of workers. Therefore, the Minister responsible for Labour issues takes the initiative, many times, in extending some conventions to workers who would normally not be covered by that convention, which is an administrative interference within an area where state interference should be minimal. Until August 2005, 240 collective labour instruments have been published, with 40 of those precisely administrative instruments extending the scope of collective agreements (*regulamentos de extension*).

The right of collective actions (right to strike) and the freedom of the enterprise or the right to property and the issue of the intervention of the judiciary into collective actions

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

FENPROF (Teachers Union) tabled a complaint against the Portuguese Government to the International Labour Organisation, for the government's alleged violation of the right to strike protected in the

European Social Charter. According to the Union, the Government had no right to impose "minimum services", obliging some teachers to work, due to the fact that Education should not be considered an "essential service", in relation to which the government could activate the mechanism of "minimal services".

Reasons for concern

Article 270 of the Portuguese Constitution allows some limitations, in reasonable terms, to the exercise of some rights, namely of expression, assembling, demonstration, association and collective action by the military and militarised agents, as well as agents belonging to security services and forces. In these latter cases, the right to strike can also be limited. Since the legal framework regulating these limitations is not clear enough, there was some controversy when police forces decided to demonstrate against some government measures.
The same controversy has also appeared in relation to the question of knowing whether magistrates and judges are entitled or not to the right to strike. Legislative intervention in these domains is therefore needed.

Article 29. Right of access to placement services

Access to placement services

Legislative initiatives, national case law and practices of national authorities

As stated in previous national reports, Portugal has the *Instituto do Emprego e da Formação Profissional-IEFP* (*Institute for Employment and Professional Training*), a division within the dependency of the Minister for Social Security and Labour. There are five general conditions for enrolment: 1) minimum age of 16 years; 2) compulsory schooling for persons under 18; 3) availability to work; 4) capacity to work; 5) updated identification card. This Institute offers a wide set of employment and training programmes, including support and incentives specifically targeted for the unemployed, vulnerable groups and persons with disabilities.

The Institute has 5 regional delegations responsible for the supervision of 86 Centres of Employment spread all over the country. There is a trend for a concentration of these Centres in the littoral, especially near Lisbon and Oporto. In the remaining regions, the distribution is more balanced. It is possible to enrol *online*, despite the obligation of presence a posteriori in the Centre of Employment of the area of one's residence.

The access to placement services is completely free.

Positive aspects

The most recent study concerning the effectiveness of professional training provided by the IEFP relates to 2004 and presents the following conclusions: 70,3% of those who have attended IEFP courses get a job within 3 months after the conclusion of the course, even if only a temporary job, as is the case of 49,1%. The great majority of former trainees states that the training/internship corresponded to their expectations (89,4%). 75% stated that the training/internship was decisive for them to (re)enter the labour market. Moreover, 75,9% said that they got the new job through the enterprise where they performed their internship. The major difficulties identified after the internship are lack of employment or of offers compatible with academic background (22,6%). There are some interesting shifts in different professions before and after the internships: from scientific and intellectual professions into office employees, and from the commerce sector into real estate activities. Amongst those cases of direct entrance into the labour market, 42% stated that this job did not correspond to their expectations, as they were looking for a better-paid job or even another profession.

Good practices

IEFP is implementing two very interesting programmes of recognition, validation and certification of skills *(Programa de Reconhecimento, validação e certificação de competências)*, for people who learned some skills and expertise, along their life, in a formal, non-formal education system or informally, but did not reach a school certificate. The other programme has the same objective but aims at certificating people in the profession that they learned by experience but for whose exercise they have no certificate.

Article 30. Protection in the event of unjustified dismissal

Reasons for dismissals

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

European Court of Justice: Case C-55/02 *Commission v. Portuguese Republic*[2002], Court Decision (Second Chamber), 12th October 2004, published in *EU Official Jornal Oficial* n.º JO C 300 de 04.12.2004, pp. 4.[38]

Legislative initiatives, national case law and practices of national authorities

According to article 429 of the Labour Code, the following grounds lead to an unjustified dismissal: 1) lack of disciplinary procedures; 2) dismissal on the grounds of political, ethnic or religious reasons; 3) absence of a fair reason for dismissal. In case the dismissal is imputable to the worker, it is also an unjustified dismissal in case of invalidity of disciplinary procedures and lack of respect for the due deadlines for the exercise of the disciplinary procedure. In case of unjustified dismissal, the worker is entitled to compensation or, within some limitations, to opt for the reintegration in the enterprise or even a compensation for the non-reintegration.

A Decision from the Supreme Court of Justice, 18th January 2005[39], confirmed the previous decision of other courts, giving reason to a worker who had been dismissed without the right to exercise his right to defence. The employer had issued its decision without having heard the witnesses that the worker had appointed to testify in his defence.

In the Oporto Court of Appeal Decision, 21st November 2005[40], the Court had to decide whether compensation instead of the reintegration of a worker, who is a Union leader, should always be aggravated or not. The court decided that this aggravation should occur whenever there is an unjustified dismissal, and not only an unjustified dismissal on the grounds of ideological or political reasons.

Reasons for concern

It is common practice to create successive temporary labour contracts, which is against the legal procedure of admissibility of term labour contracts. Consequently, there are many cases in Court related to "false" cessation of labour contracts, which, in reality correspond to real permanent labour contracts. However, courts have been revealing accuracy in distinguishing these irregular situations.

[38] On this Court Decision, see commentary to art. 27.
[39] www.dgsi.pt
[40] www.dgsi.pt

Article 31. Fair and just working conditions

Health and safety at work

Positive aspects

Although there are still an incredibly high number of fatal occupational accidents, it must be stressed that they are decreasing year after year. For the same period, January to November, in 2001 there were 252 fatal accidents, 140 of which in construction; in 2004, the number was 101 in the construction sector, in a total of 187.

Reasons for concern

The General Inspectorate at Work (IGT - *Inspecção-geral do Trabalho*) revealed that until the beginning of December 2005, there were 154 fatal occupational accidents, 82 of which in the construction sector, mainly due to smashing and falls.

Sexual and moral harassment at work

Reasons for concern

During year 2003, it seemed that IGT was paying attention to this issue, once 91 irregular situations concerning moral harassment at work were detected, resulting in the payment of significant fines. Nevertheless, that interest seems to be subsiding, since the activity report of IGT published this year, but referring to 2004, does not mention the topic. Also, during the same period, only 5 complaints reached CITE concerning sexual harassment. Harassment at work place is still a hidden phenomenon in Portugal, since there are no complaints and no studies/investigations is this area. Therefore, with no data, the means of fight and strategies of intervention, if any, are not adequate.

Working time

Reasons for concern

The General Inspectorate at Work (IGT - *Inspecção-geral do Trabalho*) has registered several situations of disrespect for the norms concerning daily and weekly resting pauses, with usual practices of working time extension, affecting the worker's plans on the conciliation of work, family life and leisure. During the first two quarters of 2005, IGT visited 2388 working places of various activities and 951 in the road transports sector, which gave rise to the application of 746 sanctions (372 of which on the transport sector).

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

Protection of minors at work and monitoring of the protection

Legislative initiatives, national case law and practices of national authorities

Law 52/2005, 31st August (Grandes Opções do Plano para 2005-2009), which approves the main governmental strategies for 2005-2009, expressly underlines the continuation of the implementation of the Programme for the Prevention and Elimination of Child Labour *(Programa para a Prevenção e Eliminação da Exploração do Trabalho Infantil-PETI),* approved by Resolution of the Council of Ministers 37/2004, 24th March. The same Law urges for the organisation of an International Conference on "Fight Against Child Labour in Portuguese Speaking Countries".

The National Plan for the Inclusion 2003-2005 (Plano Nacional Para a Inclusão 2003-2005 – Resolução do Conselho de Ministros n.º 192/2003, published on the 23rd December 2003), which aims at the elimination of child labour until 2010, is still being implemented
According to art 55 of the Labour Code, it is only permitted to employ a child if he/she has reached the age of admission (16 years), if he/she has concluded compulsory schooling and if he/she has the appropriate physical and psychological conditions for that work. Article 60§2 forbids all sorts of tasks that may be prejudicial for the psychological, physical and moral development of the child. No changes have occurred during the period under scrutiny.

Positive aspects

The National Confederation of Action Against Child Labour (*CNASTI – Confederação Nacional de Acção sobre o Trabalho Infantil*) has a telephone line for the denouncement of child labour.

Good practices

In September 2005, the Global March Against Child Labour organised, in Portugal, the European Convention on Child Trafficking, convening experts from 18 nationalities.

Reasons for concern

Due to the economic crisis that the country is facing, there is fear that child labour may increase.
In April, the Service of Aliens and Frontiers identified 66 Rumanians, adults and children, involved in the exploitation of children of their own ethnic group for mendicity.

Article 33. Family and professional life

Parental leaves and initiatives to facilitate the conciliation of family and professional life

Legislative initiatives, national case law and practices of national authorities

The National Institute of Statistics (*INE – Instituto Nacional de Estatística*), together with CITE (Commission for Equality at Work and Employment) and CIDM (Comission for the Equality and the Women's Rights) launched a database[41], in 2004, that collects the statistics of several indicators by sex, including some data concerning the enjoyment of parental leave. This year some results of this project were disseminated during a seminar.
The Labour Code (*Código do Trabalho*) established a period of 120 days for maternal leave, the law that regulates the Code *(Regulamentação do Código do Trabalho)* opened the possibility of increasing that period to 150 days, depending on the workers option. During the period under scrutiny, Decree Law nº 77/2005 (*Decreto-lei nº 77/2005, de 13 de Abril*) established that in case the worker opts for the 150 days leave, the amount of subsidy is 80% of the reference salary, both for the public and private sector. The same diploma also states that for public servants the period of leave is considered as effective work, mainly in what concerns full salary, years of work and the meal subsidy.

The Constitutional Court issued a Decision *(Acórdão nº 177/2005, de 5 de Abril)* concluding that the Constitution, though protecting maternity and family life in article 68º, does not impose the payment by the employer of the meal subsidy during the maternal leave. Therefore, it has not declared as unconstitutional a norm that states that leaves do not imply loss of rights, except in what concerns remuneration. The Court grounds its decision on the fact that the salary is replaced by a maternity subsidy, supported by the social security and not by the employer, changing this way the entity responsible for the payment to the worker.

[41] The database can be found at the following link: http://www.ine.pt/PI/genero/Principal.aspx

Positive aspects

The number of fathers enjoying paternity leave is increasing in a significant way year after year. In 1999, 112 men took parental leave, in 2003 the number increased up 40577, and in 2004 up to 41423, a number not so impressive when compared with the equivalent female beneficiaries of the leave – 78273, according to data available on the gender database already mentioned.

Good practices

The Commission for Equality at Work and Employment (*CITE – Comissão para a Igualdade no Trabalho e no Emprego*) has a free telephone line on Maternity and Paternity issues. During the year 2004 (the statistics currently available) the line registered a total of 6500 calls, mainly concerning doubts about paternity leave, parental leave, leave for breastfeeding and lactation and working time organization.

A protocol signed between CITE and the public TV Channel (Canal 2), in 2003, is still in force and CITE participates in several programmes concerning equality between men and women and conciliation of professional and family life, raising the awareness of the spectators on their rights on these issues. This is of particular importance, since there is a generalized ignorance of the worker's rights on family matters, which may explain the non-use of some benefits, and reveals a need to invest in raising awareness on people.

Reasons for concern

With average wages so low, part-time work, and retirement of work do not have expression in Portugal in the occurrence of maternity, since the salary of one member of the couple is not sufficient to support the family, in particular because a baby brings additional expenses to the family budget. Labour law foresees those possibilities, protecting flexibility at work, but families do not have means to support those losses of income.
Of the 53 complaints brought to CITE, during the year 2004, 25 concerned maternity. 10 of those reported to restrictions on the access to the toilets and 5 were due to the non-payment of productivity prizes; other 12 concerned Paternity issues: 5 were because of the non-payments of assiduity prizes, 3 of productivity prizes, 2 for the deduction of meal subsidy during the parental leave, and 1 due to the deduction of the leave on the length of service.

Protection against dismissal on grounds related to the exercise of family responsibilities

Legislative initiatives, national case law and practices of national authorities

One interesting provision of Labour Code (article 133º/3) obliges employers to communicate their intention not to renew term contracts of pregnant, recent mothers or breastfeeding workers to CITE. During 2004, 145 notices reached the Commission, including 154 workers, 100 of which were reported to the General Inspectorate at Work (*Inspecção-Geral do Trabalho – IGT*), once they raised doubts on the possible occurrence of discriminatory practices based on gender issues. The results of that inspection were quite different, but in some cases, the short-term contract was replaced by non-term contracts. The importance of this is that it permits the evaluation of the phenomenon and also the ability to analyse if there is a discriminatory practice behind the non-renewal intention. In addition, this obligation may dissuade some employers from not renewing the contracts.

Reasons for concern

Though there is no record of the numbers of women dismissed due to maternity issues, it is well know this is a constant practice in the most varied sectors of activity, and it seems that only the authorities are not aware of this phenomenon. The increase of the resources for inspections could be a positive measure.

Article 34. Social security and social assistance

Social assistance and fight against social exclusion

Legislative initiatives, national case law and practices of national authorities

During year 2005, there were not many changes in the domain of social protection. However, there are some relevant aspects that we should mention:

The social security system integrates the public social security system, the social aid system and the supplementary system. The guiding principles remain the ones established at the Law on Social Security (Lei nº 32/2002)[42]. In accomplishment of those principles, mainly the unity principle, the Portuguese Government is adopting some measures to eliminate the distinction between public and private workers in the access to benefits and the rules of the calculus of the amount of the pension, mainly the age criteria that will rule the relation between workers and the public social security system[43].

Measures established on the National Plan for the Inclusion 2003-2005 (*Plano Nacional Para a Inclusão 2003-2005 – Resolução do Conselho de Ministros n.º 192/2003*, published on the 23rd December 2003) are still being implemented. These measures aim at:

a) Decreasing unemployment and the exclusion of young people and non-national citizens;
b) promoting intergenerational aid and "active ageing";
c) Reducing poverty;
d) Eliminating child labour, by 2010[44].

During 2005, following the trend of 2004, there was an increase in the instalments of social support, being them unemployment subsidy and S.M.R. (Social Insertion Revenue – *Rendimento Social de Inserção*)[45].

Up to November 2005, there have been 328.712 requests (of which 13534 were from non-nationals) for unemployment subsidies, with a € 462,49 *per capita* average value of the subsidy. Economic reasons justify the increase of the instalments. For the same reasons, there has been an increase of requests for the Social Insertion Revenue (conferred to both nationals and non-nationals), with 145.263 beneficiaries. Up to August of 2005, the average amount attributed was €196,97 *per capita*.

Reasons for concern

The promotion of an equitable system and the need to improve measures that can assure the full respect for social rights inside EU countries have not been, indeed, assumed as a strategic objective. The principle of universality mentioned in Law nr. 32/2002 requires that the Government continue to establish norms that enable the promotion of an effective and equal protection to all citizens (residents).

Social assistance for undocumented foreigners and asylum seekers

Portugal will have its first shelter for homeless immigrants by February 2006, in Lisbon, with capacity for 25 non-nationals.

[42] Universality, equality, social equity, positive discrimination, social subsidiarity, social inclusion, intergenerational cohesion, primacy of public responsibility, supplementary, unity, decentralization, participation, efficacy, maintenance of the acquired rights and those on course of acquisition, legal guarantee and information.
[43] Until now, workers of the Public Sector were not submitted to the same system, authorities and legal rules that applied to the workers of the Private Sector. The transition will be partially fulfilled, and the new rules will be fully applied to the workers of the Public Sector after the 1st January 2006.
[44] Related to child labour, see commentaries to art. 32.
[45] www.seg-social.pt

Social security in favour of persons moving within the Union

Legislative initiatives, national case law and practices of national authorities

As far as the protection of non-national citizens is concerned, during the year of 2005 minimum levels of social protection established in the Law nr. 18/2004 (*Lei nº18/2004, 22 de Maio*) have been reached. This protection includes social security, health care, benefits, education and access to services and goods, including housing.

Article 35. Health care

Access to health care

Legislative initiatives, national case law and practices of national authorities
During 2005, the following legislation is of uppermost importance:

Law 44/2005, 29 August – Health Consumers' Associations Act
Health Consumers' Associations are provided some special rights, for example, the right to participate in legislative drafting, to participate in the administrative activity of the Health Ministry, right to broadcasting time, and procedural competence to represent some collective interests in the field of health law.

Resolution 84/2005 of the Council of Ministers
Identifies as a priority the reorganization of the health-care system, taking into consideration that the number of elderly people is increasing in Portuguese society, already 17% of the population in the Continent and 20% in the big cities.
A very recent study shows that there are 108.7 elderly people per 100 persons of 14 or less.

Decree-Law 93/2005, of 7 June
This Act transforms 31 Hospitals that were "Corporations of public capital" (according to Law 27/2002) into "State Enterprises". This Act has the political meaning that the new government is against any possible privatization of the Hospitals that belong to the National Health Service. In juridical terms, the Act on Public Enterprises is more demanding and allows a stricter intervention of the government in the management of those organizations.

Decree-Law 134/2005, 16 August
This Act establishes the conditions for selling drugs outside pharmacies.
First of all, this is only possible for drugs that can be sold without medical prescription. Secondly, there must be a pharmacist (or a pharmacy technician) supervising that activity. Moreover, the National Institute on Drugs and Pharmacy shall survey and control such activity.

Article 36. Access to services of general economic interest

Access to services of general economic interest in the economy of networks: transports, posts and telecommunications, water-gas-electricity

Legislative initiatives, national case law and practices of national authorities

In Portugal, the most common SGEI – water and sanitation, electricity and gas, basic telecommunications and postal services, urban and rail transport, public radio and television – are still conceived of as "public services", though in many cases they are no longer provided directly by the public authorities or by public enterprises but by private enterprises, under concession or other

contractual schemes with the public authorities, either the Central government, the regional governments of the Azores and Madeira Islands (which enjoy a large measure of devolution of legislative and administrative powers) or the local authorities.

Liberalization and privatization of the public sector have changed the landscape of the SGEI in Portugal, as in many other countries, in the last decade, particularly in the cases of telecommunications and electricity. Other sectors are under the same process of change. In addition, in the case of local services, many municipalities are abandoning the direct provision of public services, which are being delegated to private enterprises through concessions. Still, the provision of the traditional public services continues to be submitted to a public service regime, by way of the legal definition of "public service obligations" (universal service, etc.). Where the costs of the public services are not met by the revenue they get from their users, they are financed by funds from the state budget, or by other means of "pubic service compensations".

The law that regulates the public enterprise sector (Decree-Law n.º 558/99, of the 17th December) provides for a specific regime for the public enterprises that operate services of general economic interest, including the definition of the principles of public service they are bound to, and the participation of the users in the orientation of the public enterprises responsible for their provision. There is also a law (Law n.º 23/96, of the 26th of July) establishing more demanding requirements and obligations for the "essential public services", including the prohibition of the interruption of service without previous notice and of the imposition of minimum consumption by the service users. Initially the law comprised the services of water, electricity, gas and telephone. However, electricity and telephone services have been taken out of the sphere of protection of that law. In a decision from 2004, but published only in 2005, the Constitutional Court (Decision n.º 650/2004) declared the unconstitutionality of a legal provision of 1975 that exempted the public railway company from any responsibility related to damages caused to the passengers by delays, suppression of trains and lost connections.

Positive aspects and reasons for concern

In terms of geographic accessibility, the vast majority of citizens have access to all Services of General Economic Interest (SGEI). In the last decade, there has been a big improvement in the coverage of water and sanitation services, where the situation was not quite good. The main exception is the provision of natural gas, which still covers only part of the country, due to the fact that in Portugal this activity only started a few years ago (there are, however, alternatives for other types of gas supply). The other exception regards interurban public transport in some rural areas, due to the closure of several railways and the insufficiency of appropriate public service bus connections.

A major problem during 2005, which will probably last during the years to come, is the lack of water in some parts of the country, as a result of extreme and severe draught. Supply of water for human consumption is limited or even non-existent in certain areas in the interior and southern Portugal during the summer. Besides that, the lack of adequate water reserves also has negative effects for the quality of drinkable water. Moreover, there are no common, nation-wide, criteria for the tariffs of water. Local authorities set the prices according to local (sometimes political) concerns, which lead to large inequalities in the access of this essential public service.

Some recent measures and policies taken by the Government and regulators are causing some concern because of their impact on the accessibility of certain SGEI is still uncertain, such as the full liberalization of the energy markets in 2006. The public energy sector may face problems of financing public service obligations as a result of the possible change of consumers to private suppliers.

In the postal sector, the closing-down of postal stations in certain rural areas has led to a smaller geographic coverage of these services, which can be problematic if it continues. There are already problems regarding the quality of service provided because of the decreasing number of stations per capita.

Broad-band telecommunication services are not considered essential services and, even though they had a considerable growth during 2005, there are concerns that for a long time these services will be available only in large urban centers and not for the entire population.

In 2005 the launch of big projects such as the new international airport of Lisbon and the high-speed train connections between Lisbon and Madrid and Lisbon and Oporto have raised concerns that

the rest of the transport infrastructures may have less investment, therefore creating problems in terms of social and territorial cohesion and in terms of the quality of smaller local connections. 2005 has also been a year of constant and large increases in the price of transport services, mainly due to the rise of oil prices.

Article 37. Environmental protection

Right to a healthy environment

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

During the period under scrutiny, Portugal was judged three times by the European Court of Justice. In the three cases, this Court considered that the Portuguese Republic failed to fulfil its obligations under European Law. In the first case, Portugal was responsible for not transposing the 2000/76 Directive on waste incineration, in the second one for not giving a clear priority to the regeneration of waste oils as required by the 75/439 directive, and in the third, for not satisfying the requirements of the 80/778 directive on water for human consumption.

Legislative initiatives, national case law and practices of national authorities

The European Landscape Convention, the Convention on the Law of the Non-Navigational Uses of International Watercourses and the International Treaty on Plant Genetic Resources for Food and Agriculture were approved.

Once again, as in previous years, most of the laws adopted in 2005 were intended to transpose EU Directives. This was the case of the law on integrated management of electric and electronic equipment waste, the law on waste incineration, the law on nature conservation, the law on the protection of soil from agricultural use of sewage sludge, the law on water protection from nitrate pollution in the region of Azores, the law imposing restrictions on the marketing and use of certain dangerous substances and preparations, and the law on radioactivity monitoring. In the case of the law on genetically modified organisms, it was intended not only to transpose some directives but also to implement applicable regulations.

In a purely national initiative, a law on environmental taxation was passed (a tax on the environmental impact of vehicles, depending namely on the kind of combustible used).

During 2005 there were important judicial decisions on the crime of pollution, (articles 279 and 280 of the Portuguese Penal Code), on the admissibility of waste incineration in cement kilns, on the licensing of telecommunication antennae causing electro-smog, and on the balancing between the advantages of aeolic towers for energy production and nature conservation (whenever the aeolic park is located in a classified site for nature conservation, which is very often the case).

Positive aspects

The legal framework of the right to environmental protection is expanding. New environmental laws are adopted every month. A large number of directives have been transposed, and several international legal instruments were ratified.

Reasons for concern

The priority given to energy policy is putting too much pressure on the classified sites considered to be the ideal places to authorise aeolic parks.
There are no clear guidelines on the noxious nature of telecommunications antennae.
The political discussion on whether “to incinerate or not to incinerate dangerous wastes” is still undecided.

The right to access to information in environmental matters

Legislative initiatives, national case law and practices of national authorities

A few complaints were still presented before the Administrative Commission on the Access to Administrative Information due to illegal refusal of access to administrative information.
Some environmental databases now are accessible on-line through the Internet (for instance the databases on air quality, on the quality of drinking water and on the quality of bathing water) however, they are not regularly updated.
Both the laws on integrated prevention and pollution control and on environmental impact assessment were changed in order to enlarge the right to access to information and to correct some concepts like "public" or "interested public". At least in theory the system is now more protective of the individual's interest to access the environmental information.

Reasons for concern

Looking at the questions raised before the Commission on the Access to Information, it is easy to conclude that in spite of all the efforts made, the prevailing attitude is not favourable for free access to environmental information. Just to give an example, a national NGO ("Quercus") asked for a copy of the Inspection Report of an important nature conservation site ("Arrábida National Park") and the Inspector-General of the environment refused to disclose it. Changing the law is not enough to ensure an effective right to access to information. Formal compliance is only the first (and easiest) step. What is harder is changing mentalities.

Article 38. Consumer protection

Protection of the consumer in contract law and information of the consumer

Legislative initiatives, national case law and practices of national authorities

As a consequence of the increasing production of EU legislation, the Portuguese legislator needs to perform for the accurate transposition of some directives. This is the main reason for the few, but not less important, statutes conceived during the year of 2005 concerning consumer law. In fact, amendments made to the national laws governing consumer protection laws were more a result of having to comply with community law requirements rather than of actual problems occurring in consumption.

In this sense, we have to give notice of the Decree-law number 69/2005, of 17th March. It transposed to the national law the Directive 2001/95/CE, of the European Parliament and of the Council, of 3rd December, and strengthens the protection given by the general security obligation. The aforementioned obligation starts to enclose, to the side of the supply of goods, the provision of services. The statute also provides a more detailed list of duties that bind the professional and creates the Commission for the security of services and goods, which becomes responsible for the control of the conformity of those products and services with the parameters of security defined.

We should also refer the Decree-Law number 156/2005, of 15th September. It establishes the obligation for all the goods suppliers and services providers, which have contact with the public in general, of having a book where consumers could make their claims. As it is, the right to complain has been improved during the period under scrutiny. In fact, the consumer may complain in the exact local where the conflict occurred.

Though summarized, the analysis of the juridical practice within the area of the consumer protection seems to be interesting. Being a domain in which we have primarily seen the inertia of those injured, the truth is that during the year 2005 sentences, in comparison to that which was habitual, had appeared in very superior numbers,. The recurrent themes in Portuguese Courts seem to be, now, the

general conditions of contracts, problems related within contract of essential public services or within advertising.

Most of the sentences published refer to the period of prescription for the payment of the price of the services, showing the problematic nature of this matter. Actually, it has been in reference within the protection of the consumers of essential public services – and because of eventual abuses from the companies that provide those services – that the activity of the Institute of the Consumer becomes stronger. On 6/7/2005, a recommendation in the matter was sent to the EDP. Another subject that has deserved the attention of the institute is the control of advertising.

Also useful to the defence of consumers – and very concretely for whom the security of the products aforementioned regards in legislative terms – is the activity developed by the DECO, while association of defence of the consumer. Multiple tests were made to certify product safety.

Positive aspects

We can thus say that in Portugal consumer protection reaches sufficiently satisfactory levels. Concerning the law in books, the decrease of document production is justified, as pointed out, for the stabilization of the general picture of protection, which has already been considered exemplary.

As concerns the law in action, nowadays, we can find courts progressively more sensible and worried with these themes. And, of course, that contributes to a higher degree of protection, as is desirable.

In addition, we count on the vigorous development of the activity of the associations and institutes of defence of the consumer in the practical detention and combat of the abusive conducts against which each one separately does not react.

Reasons for concern

Some serious problems experienced in our country by consumers were not caused by legislative gaps, but were due to the serious financial and economic crisis that we face and due to the practice of some economic agents. We refer, in particular, to the over indebtedness of many consumers, which, seduced by advertising, enter into a consumer credit agreements. Due to the growth of taxes and interest rates, they must conclude, after, that they are not able to perform their obligations.

CHAPTER.V. CITIZENS' RIGHTS

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

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

Legislative initiatives, national case law and practices of national authorities

There are no relevant remarks to make regarding the right of participation of other EU member-states' nationals in the elections to the EP in Portugal, which is fully implemented in the Portuguese Constitution and legislation.
Though there are a relevant number of citizens of other EU member-states resident in Portugal, the number of them who have enrolled in the electoral register is relatively low (less than 9000, with more than a fifth being British[46]).

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

Right to vote and to stand as a candidate to municipal elections for third country nationals

There are no relevant remarks to make regarding the right of the EU citizens living in Portugal to participate in local elections, which is fully implemented in the Portuguese Constitution and legislation. In October 2005, local elections were held in the country. Besides the exercise of the right to vote by the citizens of other EU members who are resident in Portugal – who only need to enrol in the voters register, like Portuguese citizens --, there is notice that a few of them stood also as candidates in some municipalities.
Particularly in the Algarve region of southern Portugal there are relevant communities of resident nationals of other EU countries, mainly British. We know the number of registered voters among them (see annotation to the previous article), but there are no statistics available on the number of the actual voters, nor of candidates, let alone on the number of those who were elected (if any). The impression is that the degree of their participation in the elections they are entitled to participate in (EP and local election) is quite low.
One should add, however, that the scope of foreigners' participation in political elections in Portugal goes well beyond the EU citizens. According to the Portuguese Constitution, the citizens of other Portuguese-speaking countries (including Angola, Brazil, Cape Verde, East Timor, Guinea-Bissau, Mozambique and São Tomé e Principe), when resident in Portugal, may get the right to participate in all Portuguese political elections, including the presidential, parliamentary, regional and local elections. That includes the right to stand as candidates and to be elected in all elections, except for President of the Republic and the European Parliament. However, all these rights are conditioned to a reciprocity requirement, which only Brazil and Cape Verde meet (in limited terms in the case of the latter).
The number of residents in Portugal from other Portuguese-speaking countries is relatively high, particularly in the case of Cape-Verdians, Brazilians and Angolans, but the number of those who are listed in the electoral register is very low: less than 20000, most of whom are Cape-Verdians[47].
Therefore, besides the participation of EU citizens and the nationals of the Portuguese speaking countries in local elections, the Portuguese Constitution and legislation also provide for the participation of the citizens of other countries, on an ad hoc international treaty basis. The reciprocity requisite applies here too, so that the right of electoral participation exists only when the countries in consideration acknowledge the same right to the Portuguese nationals that live in their territory. In regard to other foreign nationals, a small number of countries have convened a reciprocity scheme with Portugal, thereby granting their nationals living in the latter the right to vote (although not to stand as

[46] http://www.stape.pt/html2005/RE_NOV_2005_Eleitores%20Estrangeiros.htm.
[47] http://www.stape.pt/html2005/RE_NOV_2005_Eleitores%20Estrangeiros.htm .

candidates, except in the cases of Peru and Uruguay) in local elections, namely Argentina, Chile, Iceland, Israel Norway, Peru, Uruguay and Venezuela.
Lately, NGOs and some minority political parties (particularly on the Left) are demanding the right to vote in local elections be extended to all foreign residents in Portugal after a certain permanence in the country, irrespective of nationality and reciprocity, for the sake of social and political inclusiveness of immigrants and with a view to the broadening of political participation of every people living in Portugal. However, thus far there are no signs of the majority parties or the Government to be moving in this direction.
This situation is made worse by the fact that the nationality laws in Portugal are quite demanding regarding the acquisition of Portuguese nationality, not only for foreign residents, but also for their children, even when Portuguese-born. Because of this, there are many people, particularly within the communities of Portuguese-speaking countries living in Portugal, who, although born in the country, do not enjoy Portuguese nationality, and therefore are not entitled to political rights because of the reciprocity requirement which is not met by most of the countries of which they are putative nationals. Meanwhile, this situation is slated for improvment since the current Government has tabled a draft law aiming at diminishing the number of years of residence that is required from the foreign parents, so that their children may become Portuguese nationals, thus enjoying full citizenship rights.
Still, this change does not eliminate the interest in acknowledging the right to vote to all foreign residents irrespective of the reciprocity requirement, since many of them could not in any way acquire the Portuguese nationality, or may not be interested in doing so.

Other relevant developments

Good practices

One should mention two examples of good administrative practices: (i) the website of the STAPE (Technical Office for Electoral Affairs), which contains good information about electoral rights and proceedings, including information for foreigners (although unfortunately only on Portuguese); (ii) the leaflet issued by STAPE and ACIME (High Commissioner for the Immigrants and Ethnical Minorities) with valuable information and instructions addressed to foreigners.

Article 41. Right to good administration

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 42. Right of access to documents

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 43. Ombudsman

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union..

Article 44. Right to petition

This provision of the Charter will only be analysed in the Report dealing with the law and practices of the institutions of the Union.

Article 45. Freedom of movement and of residence

Relevant developments:

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Recommendation 4/B/2005 of the Portuguese Ombudsman (*Provedor de Justiça*) issued on the 23rd of April 2003[48] stated that social assistance, namely for children (*abono de família - Decreto-Lei n.º 176/2003, 02/08*) and social integration benefits (*rendimento social de integração - Lei n.º 13/2003, 21/05*), should be extended not only to residents who have legal residence, but also to all who have valid authorization to reside in Portugal (*autorizações de permanência*). These rights should be extended also to persons who are in a similar position as those stated above, such as those that have a work permit, and in some cases also to the ones that are only temporarily present and that reside in Portugal for studying purposes.
The position taken refuses the restrictive interpretation of the concept "residence" taken by the *Direcção–Geral da Segurança Social, da Família e da Criança (Orientations n.º 6/2003 e n.º 2/2005).*
A communication made to the press, by the Ombudsman, recognized the obligation of the "*juntas de freguesia*" (local municipalities) to give residence certificates to nationals of a third country, even if they do not have a sufficient legal title for their presence. The reasons given were mainly because it was a competence of these administrative organs, and that they only gave a certification of an existent factual situation. Another reason was linked to the relevance given by law to this residence situation (e.g. *Decreto-Lei n.º 135/99, 22/04,* which refers to the right of foreign residents to access the National Health Services).

Despacho conjunto nº. 283/2005, 04/03 (Presidência do Conselho de Ministros e Ministérios das Actividades Económicas e do Trabalho e da Administração Interna) stipulates the procedures for the regularization of non-EU citizens who are in an irregular situation (even though they have legally entered the country), but integrated in the working market.

Revision of the law of Portuguese nationality is currently under discussion in Parliament[49]. The alleged need for the changes is due to a social revolution that has occurred in Portugal, which has become, in recent years, an immigrant country. So the proposal tends to give more relevance to the *ius soli* criteria, in order to achieve a positive effect on the integration of immigrants, especially of the second and third generation.

The sentence of the Supreme Court of 19/05/2005 confirmed the Opinion of the General Attorney's Consultative Board (*Conselho Consultivo da Procuradoria-Geral da República*) that European Union citizens 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 of February 1964 and with articles 12 and 13 of Decree of Law 60/93, which transposed the Directive into the Portuguese legal order.
The case law referred itself to a Spanish citizen who was condemned for drug trafficking, and was only passing through the country without having any specific link to Portugal. To be expelled the verification of the strict requirements referred above was necessary, because while being a European Union citizen, the mere condemnation for drug trafficking was not enough to justify the decision, unlike the case with non-European Union citizens. So, article 34º of the *Decreto-Lei n.º 430/83*, was rendered incompatible with article 3º, n.º 2 of the Directive, because the existence of a real risk to public order, public security or public health was not proved and, therefore, the Spanish citizen was absolved from de expel sanction.

[48] http://www.provedor-jus.pt/scripts/detalhes_recomendacao.asp?n=554
[49] http://www.portugal.gov.pt/Portal/PT/Governos/Governos_Constitucionais/GC17/Ministerios/PCM/MP/Comunicacao/Outros_Documentos/20050718_MP_Doc_Lei_Nacionalidade.htm

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

Access to a court and, in particular, the right to legal aid / judicial assistance

International case law and concluding observations of expert committees adopted during the period under scrutiny and their follow-up

The slowness of the Portuguese judiciary system continues to be one of its greatest problems. The most recent statistics indicate that there were 1.328.420 pending cases on the 1st of January 2005 against 1.250.236 on the 1st of January 2002[50]. In 2005, Portugal was convicted twice by the ECHR relating to delays in the administration of justice[51].

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To face this problem the new government has been preparing several measures, inserted in a Plan of Action to Relieve the Courts (*Plano de Descongestionamento dos Tribunais*).

One relevant measure was the alteration of the regime of the payment of insurance prizes by the Decree-Law 122/2005 of the 29th July. According to this Decree-Law, the efficacy of the insurance contract depends now, in general, on the payment of the premium or fraction, which aims to avoid the large amount of existing judicial cases due to an automatic renovation of the insurance, regardless of the payment.

Another relevant measure was brought by the Decree-law nº 107/2005 of the 1st July (with the redaction given by the Rectifying Declaration nº 63/2005, of the 19th of August), which now makes possible the use of the injunction procedure (fast and simple procedure undertaken by the offices of injunction (*1*)) to demand the execution of pecuniary obligations that emerge from contracts of value not greater than 14.963.94 euros. This represents an attempt to move cases from the courts to the referred offices of injunction. The information and communications related with these cases can, by request, be sent by electronic mail.

Also important is the modification of the regime of the uncovered cheque made by Law 48/2005 of the 29th of August that modifies the Decree-Law n.º 454/91, of the 28th of December, already altered by the Decrees-Law nos 316/97, of the 19th of November, 323/2001, of the 17th of December and 83/2003 of the 24th of April. The more relevant alteration is that the uncovered cheque which destination is not the payment of a value superior to 150 euros is no longer criminally protected, so just the emission and delivery of uncovered cheques with a value superior to 150 euros constitutes a crime (Article 11º/1/a)). In accordance, another alteration settles that credit institutions are obliged to the payment of uncovered cheques with a value inferior to 150 euros (Article 8º/1).

The judicial vacations regime was modified by the Law nº 42/2005, of the 29th of August, reducing from approximately 2 months to just one month the period of judicial vacations in the summer.

A relevant proposal is the conversion of the *transgressões* and *contravenções* still existing, whose procedure demands the intervention of a court, into *contra-ordenações* (administrative sanctions) whose procedure is of the administrative authorities' competence.

Another proposal aims at the creation of a specific judicial treatment for mass disputes, including judicial decisions that involve several cases. Due to a difficult economic period, there are a large number of debts that are not being fulfilled. In 2003, cases relative to debts in insurance processes were 12% of the total amount of solved cases and 70% of those cases were of debts of a value inferior to 500 euros.

[50] http://www.gplp.mj.pt/estjustica/pdfs/Dados_Provisórios_2003/mov_processos.pdf

[51] Antunes Rocha vs. Portugal (nº 64330/01 of the 31st March 2005) and Magalhaes Pereira vs. Portugal (nº15996/02 of the 20th December 2005. Another related case Alves vs. Portugal (nº 18065/02 of the 15th February 2005) ended up in a friendly settlement.

Concerning the right to legal aid/judicial assistance the Decree-Law nº 71/2005 of the 17th March, completed the transposition of the Council Directive 2002/8/EC of 27 January 2003.[52]

Article 48. Presumption of innocence and right of defence

Presumption of innocence

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In which regards the presumption of innocence there are no significant legislative alterations or case laws to report. To report briefly just one polemical situation that emerged after a speech of the President of the Republic in which he said that anyone who became rich without explanation would have to explain to the State *how* and *when,* and with this the proof onus would be inverted. This statement was widely criticised because it would imply that the defendant would have to prove his/her innocence in violation of the presumption of innocence. The Presidency Office soon cleared up the words of the President, saying that he did not mean something that would signify the violation of the guilt principle.

Regarding the right to defence, Decree-Law nº 71/2005 of the 17th March, completed the transposition (initiated with the Law nº 34/2004 of the 29th July) of the Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes. Relevant in this context is that now foreigners with a valid resident permit in another member state who are in an "insufficient economic situation" (*Portaria 1085-A/2004, 31 de Agosto, altered by Portaria 288/2005 of the 21st of March*) are also entitled to legal aid, including the payment of the specials charges of the cross-border disputes (e.g, payment to interpreters). The legal aid shall be requested in the country whose courts are competent to decide the case, and accordingly to that country's law. In Portugal, the competent authority to decide on the request is the Portuguese social security services.

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

Legality of criminal offences and penalties

Legislative initiatives, national case law and practices of national authorities

Regarding the principle of legality of criminal offences, it is relevant to report the last decision of the Supreme Court of Justice (SCJ) about a very polemical issue. The consumption of drugs was decriminalized by the Law 30/2000 of the 29th November. The nº1 of the article 2 of this Law states that "the consumption, the acquisition and the holding to self-consumption of plants, substances or preparations listed in the previous article table are *contra-ordenação"* (administrative offence). The nº 2 states that "for the effects of the present law, the acquisition and the holding to self-consumption of the substances referred in the previous number can not exceed the necessary quantity for a medium individual consumption during a 10 day period". The problem is determining if the acquisition or holding to self-consumption of more quantity than the necessary for a medium individual consumption during a 10 day period is a crime, a *contra-ordenação* or neither. The last rule of the SCJ (judgement 831/2005 of the 28th November) stated that it should be considered a *contra-ordenação*, stating that it can not be considered a crime, along with other arguments, because article 2º of Law 30/2000 of the 29th November revoked the previous provision that stated the punishment of the referred conducts can not be interpreted in a restrictive way. A restrictive interpretation would constitute not a restriction but an extension of the incriminating provision that therefore would remain although it was revoked.

[52] This Decree-Law is analysed in the comment to article 48.

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

No significant developments to be reported.