



PROVEDOR DE JUSTIÇA

Discussion of the 5th and 6th Portuguese reports on the implementation of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Contribution of the Portuguese Ombudsman

15.07.2013

The Portuguese Ombudsman, in his capacity as National Human Rights Institution, would like to stress the importance he attaches to the collaboration with UN monitoring bodies in the area of human rights and to welcome, in particular, this opportunity to share with the Committee against Torture his experience and views in the domains covered by the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

This contribution focuses on question addressed in the Convention, as well as in the List of Issues drafted by the Committee.

The mandate and powers of the Portuguese Ombudsman

The *Provedor de Justiça* is both Portugal's Ombudsman and National Human Rights Institution with A-status accreditation since 1999, in full compliance with the Paris Principles. The most recent reaccreditation took place in 2013 and covers the period of 2012-2017.

The main function of the Portuguese Ombudsman is to defend and promote the rights, freedoms, guarantees and legitimate interests of the citizens, ensuring, through informal means, that public authorities act fairly and in compliance with the law.

The Ombudsman's broad mandate includes both the protection and the promotion of all fundamental rights, in relation to all citizens, naturally with a particular attention to the most vulnerable ones.

While the main scope of the Ombudsman's action relates to public authorities, he can also intervene with regard to private entities, to the extent that they exercise public



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powers, provide services of general interest or, in the case of relations between private entities, there is a special relationship of power and the case relates to the protection of rights, freedoms and guarantees of citizens.

In order to carry out his mission, the Portuguese Ombudsman has, *inter alia*, the powers to issue legislative and administrative recommendations, to act on his/her own initiative, to request a review by the Constitutional Court and to carry out inspection visits, with or without prior warning, to any area of activity of the central, regional and local administration – including civil and military prisons, police stations and other areas of detention.

As will be detailed in the next point, over the years the Ombudsman has often made use of these powers of inspection, either to investigate specific complaints or to carry out general actions of inspection on his own initiative.

On 9 May 2013, the Ombudsman was appointed National Preventive Mechanism under the Optional Protocol to the Convention against Torture. Prior to this, in February, and pursuant to a proposal from the Ombudsman himself, a law came into force amending the Statute of this institution, to include, *inter alia*, a new provision explicitly stating that it may carry out the function of independent national institution for the monitoring of the implementation of international treaties and conventions on human rights, whenever appointed to that effect.

In what specifically concerns the Portuguese Ombudsman's scope of competence in torture cases, while he is not be able to intervene from a criminal law perspective (i.e. to investigate/prosecute acts with criminal relevance), the Ombudsman does have the competence to take all measures falling within his powers to ensure that the competent authorities act in a timely and adequate manner, so as to prevent or halt the situation and to initiate the due criminal and/or disciplinary proceedings in relation to the offender. The Ombudsman may also suggest or recommend to the public authorities concerned the means that he deems adequate to prevent or remedy the situation and to ensure compensation and rehabilitation of the victim. If sufficient evidence of criminal, disciplinary or regulatory offences arises in the course of the proceedings, the Ombudsman will inform, as the case may be, the Public Prosecutor or the hierarchically superior authority competent to initiate disciplinary or regulatory proceedings.



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Main complaints and own-initiative investigations

1. Penitentiary system and rights of inmates

From January 2007 to June 2013, the Portuguese Ombudsman received around 1000 complaints concerning the penitentiary system, most notably on access to healthcare, implementation of security or disciplinary measures and transfer to a different prison. Here is a breakdown of those complaints, by year and subject:

	2007	2008	2009	2010	2011	2012	2013*
Food	4	4	2	6	8	6	1
Accommodation	3	3	9	6	13	7	2
Correspondence / Telephone	4	5	6	5	3	11	3
Flexibility of the penalty	21	13	15	9	9	23	0
Occupation	5	4	3	12	3	11	7
Prison Organization	5	5	6	8	12	14	0
Health	20	18	22	22	25	22	22
Security and Discipline	22	15	17	21	18	21	7
Transfer	27	42	28	13	16	21	14
Violence	9	5	13	16	17	14	8
Visits	7	9	5	13	17	13	9
Other fundamental rights	2	1	0	0	2	3	1
Other issues	26	23	16	15	11	15	12
	155	147	142	146	154	181	86

* From 1 January to 30 June.

In addition to dealing with complaints, the Ombudsman carried out *ex officio* inspection visits to prisons, without prior warning. Annually, he visited all central and special prisons, as well as some regional prisons, covering between 80% and 90% of the overall population of detainees. The visits included the analysis of randomly chosen inquiry proceedings concerning the exercise of disciplinary power over the detainees.

The Prison of Monsanto – the first high security prison, opened in May 2007 – was monitored in a particularly close manner, especially at the beginning of its operation. A lot of the stronger security aspects that surrounded its opening have been eliminated or softened.



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Until 2012, the Ombudsman carried out 84 visits to prisons, a number which does not include those visits that were specifically aimed at hearing complainants or interested persons in pending proceedings.

At the beginning of 2013 a general action of inspection to all 51 Portuguese prisons was initiated, replicating similar actions carried out in 1996, 1998 and 2002. The drafting of the final inspection report is still underway.

Except in 2008, when the numbers were lower, each year there have been several cases of allegation of violent acts, both between detainees and by vigilance personnel.

We would highlight a particularly relevant one, which was handled at the end of 2010 and concerned an intervention of the Group of Prison Intervention and Security to remove a detainee from his cell using a Taser gun. A taping of this intervention was received from an anonymous source and preliminary comments were addressed to the General Directorate of Prison Services, which led to the opening of inquiry proceedings. Aside from pointing out the contradiction between the version told by the concerned entities and the images, in more abstract terms the Ombudsman considered that monitoring should be strengthened as regards the way in which coercive means are used. The Ombudsman underlined several operational aspects that could make this easier. In addition to clarifying the rules on intervention and gun use, the Ombudsman put forward criteria to be used with regard to collection of image and sound to allow for *ex post* control, with the control mechanism being automated. The Government, through the Minister of Justice (order 5801/2011, of 4 April 2011¹), adopted these proposals of the Ombudsman.

2. Police activity and rights of detainees

As regards police violence, the following complaints were received between January 2007 and June 2013:

YEAR	NUMBER OF COMPLAINTS
2007	3
2008	9
2009	9
2010	8

¹ Available at <http://dre.pt/pdf2sdip/2011/04/066000000/1552315524.pdf>



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2011	8
2012	9
2013*	5

* From 1st January to 30th June.

In addition to these, we would highlight the following own-initiative interventions:

1. A case about violence involving fans of football clubs. In this case different police forces involved in the matter were heard, namely as regards the methods used and the results achieved. The Ombudsman closed the case, considering that the conduct of the police had been adequate.
2. An inspection carried out to police stations of the Public Security Police (PSP), territorial units of the National Republican Guard (GNR) and detention areas of the Judiciary Police (PJ), to assess the conditions in which the detention of citizens takes place and also the level of compliance with procedures for reception of complaints, detention and protection of citizens. Final inspection reports for three police stations have been published, providing an overview of the situation and several conclusions addressed to the competent authorities. The conditions of detention found in those stations were, in general, adequate, except for the PSP stations in Comando do Porto, where the cells are all gathered in one building (“Bela Vista”), in Antas area, that does not provide adequate conditions of salubrity, temperature and humidity.

Further to this, the Portuguese Ombudsman has over the years ensured the protection and promotion of human rights in the context of peaceful protests. The most significant interventions date back to the 90s of the 20th century, when the Ombudsman intervened in several situations of conflict that opposed protesters and police forces and in relation to which there were allegations of excessive use of force. In more recent years, the number of complaints concerning this type of issue has not been high. Nevertheless, over the past couple of years, as a consequence of the austerity measures adopted by the Government, some large strikes and protests have taken place, mostly in a peaceful manner. The Portuguese Ombudsman received 5 complaints concerning some of the larger protests, which dealt with issues like illegal detentions, excessive use of force and inability to contact a lawyer. The Ombudsman investigated those cases, inquiring police authorities about the situation. All of the cases have since been closed: 2 due to the opening of criminal proceedings to investigate the situation; 1 after the Ombudsman drew the attention of the public authorities to the fact that the requirements for coercive identification had not been respected; yet another 2 after the Ombudsman was informed



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by the competent authorities (PSP and General-Inspectorate for Internal Affairs) that internal investigations were pending, the results of which must now be awaited.

3. Temporary installation of foreigners not admitted into Portugal or undergoing a return procedure

In 2010 the Portuguese Ombudsman carried out an inspection to assess the conditions of temporary installation of foreigners who do not meet the legal requirements to enter or remain in Portugal.

While the Ombudsman did make several suggestions on specific issues, no cases of mistreatment or serious lack of conditions were identified.

This was also true specifically with regard to the children staying in those centers, to which the Ombudsman devoted specific attention, despite their numbers remaining low – with even fewer cases of non-accompanied children.

Still, the Ombudsman deemed it important to suggest to the competent public powers that the procedure regarding non-accompanied children be improved, namely by:

- Making it mandatory to communicate the case to the competent Commission for the Protection of Children and Young People, which in turn shall take the necessary measures to protect them;
- Considering the possibility of authorizing visits to the children by family members, even those in an irregular situation (without prejudice to the security measures that might be needed).

4. Rights of children and cases of violence

At the Office of the Portuguese Ombudsman, a toll-free Children's Hotline has been in operation since 1993, to deal with complaints concerning children whose rights have been violated and/or who are in danger or at risk, submitted by the children or by adults on their behalf. The Hotline ensures specialised and personalised treatment, in the most informal and expeditious way possible.

In the table below we provide a breakdown of the calls received concerning violence against children (in a broad sense), by year and subject:



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Issues	1 Jan – 31 Dec 2007	1 Jan – 31 Dec 2008	1 Jan – 31 Dec 2009 *	1 Jan – 31 Dec 2010	1 Jan – 31 Dec 2011
Physical abuse	88	83	28	56	28
Psychological abuse			13	54	51
Sexual abuse	17	34	15	24	14
Bullying	10	29	4	6	4
Negligence	73	72	40	84	79
Exposure to dom. violence	19	14	10	25	24
Total / calls	981	883	558	856	740
Total / issues **	905	866	583	910	791

Issues	1 Jan – 31 Dec 2012	1 Jan – 30 Jun 2013
Physical abuse	40	6
Psychological abuse	38	7
Sexual abuse	13	9
Bullying	2	2
Negligence	44	15
Exposure to dom. violence	10	4
Total / calls	682	277
Total / issues**	688	257

* For administrative reasons, the operation of the Children's Hotline was suspended between 16 July and 31 October 2009.

** The total number of calls and the total number of issues relate to the overall amount of calls received by the Hotline, not just to calls concerning violence against children. The distinction between total of calls and total of issues derives from the fact that some of the calls received by the Hotline raise more than one issue, while others are "blank" and therefore raise no issues.



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Further to the operation of the Hotline, formal cases are opened to deal with complaints that are not received through the Hotline or that are too complex to be dealt with in the very informal and expeditious way in which the Hotline operates. They are also opened in cases of own-initiative interventions.

There are examples of formal cases concerning violence against children opened between 2007 and the present date, but they are not abundant (e.g. violence or discrimination in schools, illegal/deficient functioning of kindergartens that can endanger the situation of the children).

Looking at the Ombudsman's inspective powers, we should mention that two own-initiative inspections regarding institutional care for children were carried out: one in 2008, in the Autonomous Regions of Azores, and another in 2010, in the Autonomous Region of Madeira.

As regards disciplining measures, the Ombudsman identified cases of restriction of use of certain goods (e.g. television, videogames, mobile phone), schedule limitation, added daily chores or restriction of pocket money. There were also some cases of more serious punishments, such as sitting on a chair for a set period of time and restrictions of weekend home visits.

With regard to the latter, the Ombudsman stressed in the final inspection reports his utmost disagreement with any type of punishment involving deprivation of personal contacts with the biological family on weekends and urged competent authorities to adopt urgent measures to correct the identified practices.

As regards violent behaviour, in both inspections the Ombudsman identified some cases of violence against children. However, for the most part these cases were rather sporadic in nature and concerned mainly verbal aggressions amongst the children themselves. Some of the children in institutional care were also reported to be victims of bullying in school, sometimes due to discrimination based on the fact that they were in institutional care. One case was reported concerning discrimination by a teacher.

In the final inspection reports, the Ombudsman stressed the importance of the relevant legal remedies being used, namely the communication of criminal offences to the Public Prosecutor.



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We would also recall the information provided under the previous point with regard to children in temporary installation centers for foreigners who do not meet the legal requirements to enter or remain in Portugal.

5. Rights of women and cases of violence

The subject of violence against women, including domestic violence, has not usually been the subject of complaints to the Ombudsman, perhaps in part due to the existence of other entities providing assistance in this regard and also some level of awareness to the fact that the Ombudsman cannot deal with matters from a criminal law perspective. The issue is sometimes raised in a rather indirect manner, i.e. not as the main aspect of the complaint.

Overall considerations – main successes and persisting challenges

- The Portuguese Ombudsman welcomes the ratification of the Optional Protocol to the Convention against Torture and his appointment as National Preventive Mechanism. In his view, this progress will contribute to strengthen the adequate monitoring and supervision of detention conditions and respect for the rights of inmates and detainees, as well as the role the Ombudsman already played in that regard.
- The Portuguese Ombudsman would like to highlight the positive effects of the new Code on the Execution of Sentences and Measures Involving Deprivation of Liberty (Law 115/2009, of 12 October 2009) and of the new General Regulation of Prisons (Decree-Law 51/2011, of 11 April 2011). Both took on board several of the Ombudsman's recommendations/suggestions, strengthening the protection of the rights of detainees. The new Code significantly increased judicial control of compliance with measures of deprivation of liberty, establishing the duty to communicate to the Court of Execution of Sentences and/or to the Public Prosecutor the practice of a broad set of actions, in particular those that most strongly restrict rights or create duties. Also, the number of cases in which it is possible to appeal to the Court of Execution of Sentences against administrative decisions, namely of disciplinary nature, was extended. The entry into force of the new Code, and also of the new General Regulation, provided the Portuguese penitentiary system with a new normative structure, potentially preventing local disparities regarding rights and duties.



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- The Ombudsman is also pleased with the fact that the reform of Substantive and Procedural Criminal Law in 2007 took on board his recommendation as regards the pre-trial detention regime, by improving the rules on the consideration of detention time in the applied penalty, as well as by extending the cases where pre-trial detention can lead to an obligation of the State to compensate.
- In contrast, the Ombudsman would like to express concerns about the increase of the prison population, particularly a significant increase in the number of male prisoners, which has created problems of overpopulation (currently at around 20%). This has led to the deterioration of lodging conditions and of access to a useful occupation, both in the present and as a view to future reintegration. The economic and financial situation faced by Portugal has not allowed for the renovation of prison facilities, contrary to what had been envisaged in the last decade. In more recent times, the lack of implementation of the plans to build new prisons in Vale do Tejo (Almeirim) and Grândola, meant that older prisons had to remain in operation – prisons like Estabelecimento Prisional de Lisboa, which have not undergone renovation, due to the prior plans for their closing.
- Also of concern is the lack of implementation of some legal solutions included in the aforementioned new Code and Regulation. While some of the cases were adequately solved through the Ombudsman's intervention (e.g. the rules on the replacement of uniforms with the inmates own clothes), in others a definition of action criteria is still awaited. Due to this, prisoners sometimes see the new legal regime as a catalogue of rights the implementation of which is not always ensured. Among the regulations that still haven't been adopted, we would highlight those concerning the establishment of study subsidies and the attendance of treatment programs, the duration of which is considered as work activity; the establishment of school prizes; the determination of which phone numbers are of public interest (and therefore authorized); the introduction of more flexibility with regard to allowed foods and to available goods for inmates in open regime; the definition of the allowed quantity and type of clothes, shoes and hygiene products; the list of products acquired at the canteen and their management procedures.
- Yet another point of concern is the repercussion in the conditions of detention of the recent labour disputes (strikes) involving the prison guards. This is a particularly delicate issue, not only because it poses problems of conflict of fundamental rights, but also because, in the absence of an agreement, the



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minimum services are determined through arbitration, thus excluding the matter from the scope of intervention of the Portuguese Ombudsman.

- The Ombudsman also notes with concern that pursuant to allegations of police misconduct, only on rare occasions do the internal investigations carried out by the competent authorities result in a change of procedures.
- Allegations of excessive and/or disproportionate use of force by the police do persist, showing that it is important to continue to seek to establish a culture of prevention before the adoption of sanctions, which will undoubtedly contribute to ensure that the measures established in the law are applied only to the extent that they are strictly necessary and proportionate.
- The Portuguese Ombudsman welcomes the fact that competent authorities seem to have recognized the difficulties existing at the level of judicial delays in criminal proceedings – a topic raised over the years by several entities, including the Ombudsman – by introducing some legislative amendments, namely to the Criminal Procedure Code.
- However, concerns persist over these issues. In particular, the Portuguese Ombudsman would like to draw attention to the situation of the Courts of Enforcement of Sentences in Lisboa and Porto, which have a high backlog of cases but a small number of court officials and judges. Since Courts of Enforcement of Judgments decide requests for probation, which as a rule can be submitted halfway through the duration of the sentence the inmate must carry out, such delays can be a particular hindrance, as they can prevent the timely analysis of cases that could lead to the release (albeit on probation) of inmates.
- As stated above, a further point of concern relates to the detention conditions found by the Ombudsman in the PSP stations in Comando do Porto, which are not adequate in terms of salubrity, temperature and humidity.
- Finally, the Portuguese Ombudsman notes that neither the PSP nor the GNR provide in all cases a proof of complaint to the person submitting it. In fact, when the complainants request copies of their complaint or statements, both police forces inform them that they are not authorized to provide them: they may only give citizens a notification document (which does not contain a copy of the complaint itself). The Ombudsman currently has a case pending on this matter.