DOCUMENT CCPR/C/6/Add.6

Portugal

Initial report

[*Original: French*]
[*29 September 1980*]

Introduction

General

HISTORICAL BACKGROUND

I. On 25 April 1974, the Armed Forces Movement successfully carried out a military *coup d'état* in Portugal.

In an effort to reverse the previous situation, the Movement set itself the goal of putting an end to the country's difficulties resulting from 13 years of colonial warfare. The economic problems—inflation, increasing unemployment, emigration, insufficient economic growth—were serious and a satisfactory solution did not appear to be forthcoming.

The Movement also set itself the goal of creating the conditions necessary to institutionalize a democracy in which individual freedoms would be respected and which was fully integrated within the international community.

This involved the disbandment of the political police, the abolition of censorship and the preparation of general elections.

These tasks were accomplished.

II. On the day when the success of the revolution was assured, the Junta de Salvação Nacional (National Salvation Committee), through Act No. 1/74 of 25 April 1974, took over the government of the country, removed the President of the Republic from office, relieved the Prime Minister and all the members of his Cabinet of their duties, and dissolved the National Assembly and the Council of State [*document No. 1*].*

In addition, it disbanded the political police and the Portuguese legion, a territorial defence unit, by means of Decree-Law No. 171/74 of 25 April 1974 [*document No. 2*], under which the criminal police, *inter alia*, were made responsible for the investigation of crimes against the security of the State both within and outside the country.

Decree-Law No. 173/74 of 26 April 1974 [*document No. 3*] granted an amnesty for political crimes and disciplinary offences of a similar nature, and reinstated all persons who had been forced to leave their posts for political reasons.

During the transition period when power was exercised exclusively by the military authorities, government was maintained by delegates from the Junta to the various ministries (Decree-Law No. 174/74 of 27 April 1974; Decree-Law No. 192/74 of 7 May 1974) [*documents Nos. 4 and 5*].

Decree-Law No. 175/74 of 27 April 1974 [*document No. 6*] designated 1 May as Labour Day and made it a national holiday, in accordance with a desire which had long been felt by the population.

Furthermore and in accordance with its aims, the Armed Forces Movement (MFA), through the Junta, appointed the new President of the Republic, who entered office on 15 May 1974.

The first provisional Government began on 16 May of the same year.

III. Under Act No. 2/74 of 14 May 1984 [*document No. 7*], the Junta declared the National Assembly and the Corporative Chamber dissolved. Thus the political organs of the old régime were legally abolished and it became possible to prepare the promulgation of Act No. 3/74 of the same date [*document No. 8*], which provisionally established the new constitutional structure of the country.

Under Act No. 3/74 (art. 2) sovereignty was to be exercised by the Constituent Assembly, the President of the Republic, the Junta de Salvação Nacional, the Council of State, the provisional Government and the courts. Their respective spheres of competence were set out in that Act.

The Act also stated that the Constituent Assembly should be elected by universal, direct and secret suffrage, and that it must approve the new Constitution within 90 days, although that period could be extended (arts. 3 and 4).

The programme of the Armed Forces Movement (MFA) was annexed to Act No. 3/74 and set out the basic principles of the new democratic society to be established. Immediate measures included the amnesty of all political detainees and the reinstatement of public officials who had been removed from their posts on political grounds (para. (*f*)), the abolition of censorship and vetting (para. (*g*)), and efforts to combat corruption and speculation (para. (*j*)).

The short-term measures provided for the election of the new President of the Republic and the entry into office of a provisional civilian government which, *inter alia*, was to guarantee:

* The references in this report to documents Nos. 1-67 relate to documents submitted by the Portuguese Government; they are kept in the files of the Secretariat (see list in the annex).

(*a*) Freedom of assembly and association;

(*b*) Freedom of expression and thought;

(*c*) The abolition of the "special courts".

In addition, the Government was to prepare a new, more equitable and humane economic and social policy based on the elimination of the existing inequalities.

We shall subsequently see to what extent some of these objectives have been achieved.

IV. Article 4, paragraph 2, of Act No. 3/74 entrusted the provisional Government with the preparation of the new law governing election of the Constituent Assembly. The committee entrusted with the task completed its work on 22 August 1974. After submission to the Council of State, the draft legislation was subsequently enacted as Decree-Laws Nos. 621-A/74 (counting of votes), 621-B/74 (ineligibility to vote) and 621-C/74 (electoral law, second part), all dated 15 November 1974.

The elections to the Constituent Assembly were held on 25 April 1975 and the new Constitution entered into force on 25 April of the followng year.

That entire period was not devoid of political confrontation. Six provisional Governments succeeded one another before the first Constitutional Government began its work. All these Governments endeavoured to define the new legal framework of the country, but too many problems were involved: changes in the economy resulting from new institutional concepts, decolonization, trade union movements, unrest within the revolutionary military movement. The Junta de Salvação Nacional and the Council of State were abolished under Act No. 5/75 of 14 March 1975 [*document No. 9*], which set up the Council of the Revolution and the MFA Assembly following an attempted *coup d'état*.

On 25 November of the same year, a further *coup d'état* was attempted, and this led to a number of far-reaching changes in the course of the revolution. In order to ensure a minimum of agreement between the various political forces on the future of Portuguese society, MFA proposed an attempt at political understanding, the "platform of constitutional understanding", which was accepted and signed on 26 February 1976 by five of the six political parties represented in the Constituent Assembly [*document No. 10*].

The platform designated the sovereign organs for a transitional period of four years, and outlined the competence of the President of the Republic, the Council of the Revolution, the Legislative Assembly, the Government and the courts during the entire period (which ends in 1980). The principles consistently upheld by the platform formed the basis for the political framework of the new Constitution and established the balance essential for the effective and intensive institutionalization of democracy in Portugal.

The country's new legal framework

V. The provisional Government endeavoured to regulate some of the basic sectors of national life: labour law, press law, new principles relating to the rights of association, assembly and expression.

Efforts were gradually made to outline a new economic system, a new type of society and new, more humanitarian and democratic legislation. Some reference will be made to this in connection with each of the articles of the Covenant considered below. It will then become clear that some of the new constitutional principles had already been regulated by some of the provisional Governments. However, the entry into force of the Constitution on 25 April 1976 raised delicate problems involving conflicting legal provisions. What was to be done about the previous legislation? Should it be expressly abrogated?

The authors of the Constitution were more pragmatic. Article 293, paragraph 1, of the Constitution, [*document No. 11*] stated that the previous law continued in force except in so far as it was directly contrary to the new Constitution.

Furthermore, it entrusted the ordinary legislative authorities with the task of preparing appropriate regulations relating to the exercise of the rights, freedoms and safeguards laid down in the Constitution. That task was to be completed by the end of the first legislative session (art. 293, para. 3), i.e. by 15 June 1977 (see art. 177, para. 1).

It fell to the first Constitutional Government to carry out that task. The Civil Code, the Code of Civil Procedure, the Penal Code, the Code of Penal Procedure, the Commercial Code and the Civil Registry Code therefore underwent profound changes.

But the authors of the Constitution went further. Within that time-limit they brought about the revision of the legislation on the organization of the courts and the status of judges (art. 301, para. 1). The first Constitutional Government complied with that wish, but did not stop there. It undertook to prepare a legal reform, which was completed by the second Constitutional Government, including a new organic law for the Ministério Público (State Counsel Division), redistribution of the territory for judicial purposes, the establishment of people's judges, etc. The system of criminal justice also underwent a thorough change. All these changes were mentioned in the report submitted by Portugal to the United Nations concerning observance of the conclusions of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders [*document No. 12*].

Reference will, however, be made to some of these innovations in this report.

The new political Constitution and fundamental human rights

VI. The Constitution defines Portugal as a sovereign republic based on the dignity of the human person and the will of the people (art. 1), and the Portuguese State as a democratic State based on the sovereignty of the people, on respect for and the safeguarding of fundamental rights and freedoms, and on plurality of democratic expression and democratic political organization (art. 2).

The State is subject to the Constitution and based on democratic legality (art. 3, para. 4).

In its international relations, the State is governed by the principles of national independence, the right of peoples to self-determination and independence, equality among States, the peaceful settlement of international disputes, non-interference in the internal affairs of other States and co-operation with all other peoples for the emancipation and progress of mankind (art. 7, para. 1). Furthermore, Portugal supports the abolition of all forms of imperialism, colonialism and aggression, simultaneous and controlled general disarmament, the dissolution of political and military blocs, and the establishment of a system of collective security with a view to creating an international order capable of safeguarding peace and justice in relations between peoples (art. 7, para. 2). Portugal further recognizes the right of peoples to revolt against all forms of oppression, in particular colonialism and imperialism, and will maintain special bonds of friendship and co-operation with Portuguese-speaking countries (art. 7, para. 3).

With regard to international law, the rules and principles of general or ordinary international law are an integral part of Portuguese law (art. 8, para. 1). Rules derived from international conventions duly ratified or approved apply in municipal law following their official publication, in so far as they are internationally binding on the Portuguese State (art. 8, para. 2).

This means, as will be seen below, that there is no need to transform an international convention that has been duly ratified or approved into a law or administrative regulation for it to take effect. Official publication is sufficient for that purpose (see art. 122, para. 2 (*b*), of the Constitution).

VII. Part I of the Constitution concerns fundamental rights and duties (arts. 12-79). It is divided into three sections:

I. General principles (arts. 12-24);

II. Rights, freedoms and safeguards (arts. 25-49);

III. Economic, social and cultural rights and duties (arts. 50-79).

Far from establishing largely formal protection of human rights, the authors of the Constitution have endeavoured to ensure the complete and effective implementation of such rights. They have made the various sovereign organs responsible for safeguarding the true equality of citizens with regard not only to their traditional fundamental rights, but above all to their economic, cultural and social status.

In this connection the formal declaration of a transition to a new classless society (arts. 1, 2, 9 (*c*), 81 (*a*), (*c*), (*d*) and (*i*), 105, para. 1, 106, para. 1, 107, para. 1, etc.) should be borne in mind.

This whole legal framework entrusts the ordinary legislative authorities with far-reaching reforms, already begun by the first two Constitutional Governments and continued by their successors, which should ultimately make it possible to transform the text of the Constitution into something more than a simple wish: it will become the genuine guarantee of the true enjoyment of all these rights.

That was, in fact, the idea underlying article 17 of the Constitution: "The general system of rights, freedoms and safeguards shall cover the rights set forth in title II, the fundamental rights of workers, and other freedoms and rights of a similar type, as provided for under the Constitution and by law".

Let us now take a look at the legal system of fundamental rights and duties (arts. 12-24).

Legal system of fundamental rights and duties

VIII. All citizens enjoy the rights, and are subject to the duties, laid down in the Constitution (art. 12, para. 1), have the same social dignity and are equal before the law (art. 13, para. 1).

No one may be privileged, favoured, treated unfavourably, deprived of any right or exempted from any duty because of his ancestry, sex, race, language, place of origin, religion, political or ideological convictions, education, economic situation or social condition (art. 13, para 2).

Portuguese citizens temporarily or permanently resident abroad enjoy the protection of the State in the exercise of their rights and remain subject to such duties as are not incompatible with their absence from the country (art. 14).

Foreigners and stateless persons temporarily or permanently resident in Portugal enjoy the same rights and are subject to the same duties as Portuguese citizens (art. 15, para. 1), except with regard to political rights, the performance of public duties not of a predominantly technical nature, or the rights and duties restricted to Portuguese citizens under the Constitution and by law (art. 15, para. 2).

The right of asylum is guaranteed to foreigners and stateless persons persecuted as a result of their activities in support of democracy, social and national liberation, peace between peoples or individual freedom or rights (art. 22).

IX. The fundamental rights enunciated in the Constitution do not exclude any other rights deriving from the law and the applicable provisions of international law (art. 16, para. 1). The provisions of the Constitution and laws relating to fundamental rights (and to the other rights enunciated in art. 17) must be interpreted and applied in accordance with the Universal Declaration of Human Rights (art. 16, para. 2).

The constitutional provisions relating to rights, freedoms and safeguards (see again art. 17) are directly applicable and binding on public and private juridical persons (art. 18, para. 1). Rights, freedoms and safeguards may be restricted by law only in those cases expressly provided for in the Constitution (art. 18, para. 2). Laws restricting rights, freedoms and safeguards must be general and abstract in character and must not limit in extent and scope the essential content of constitutional provisions (art. 18, para. 3).

The sovereign organs may not, jointly or separately, suspend the exercise of rights, freedoms and safeguards except in the event of a state of siege or a state of emergency declared in the form laid down in the Constitution (art. 19, para. 1). The declaration of a state of siege or emergency must be adequately substantiated and must specify the rights, freedoms and safeguards whose exercise is to be suspended (art. 19, para. 2). The declaration of a state of siege shall in no circumstances affect the right to life and security of person (art. 19,

para. 3). The declaration of a state of emergency may at most give rise to the partial suspension of rights, freedoms and safeguards (art. 19, para. 4). The declaration of a state of siege or emergency empowers the authorities to take the necessary steps for the prompt restoration of constitutional normality (art. 19, para. 5).

This subject will be discussed further under article 4 of the Covenant.

Information in relation to individual articles of the Covenant

Article 1

1.1 The Constitution establishes the duty to respect the principles of national independence, and the right of peoples to self-determination and independence (see Constitution, art. 7). To this end, Portugal supports the abolition of all forms of imperialism, colonialism and aggression, and recognizes the right of peoples to rebel against all forms of oppression, in particular colonialism and imperialism.

In this connection, the programme of the Armed Forces Movement, annexed to Act No. 3/74 of 14 May 1974 [*document No. 8*], had already clearly stated (B. Short-term measures):

8. The policy of the Provisional Government towards the overseas territories shall take account of the fact that its definition is the responsibility of the nation and shall be based on the following principles:

(*a*) Recognition of the fact that the solution of the wars being fought in the overseas territories is a political and not a military matter;

(*b*) Creation of the conditions for a frank and open discussion, at the national level, of the overseas problem;

(*c*) Establishment of the foundations for an overseas policy capable of promoting peace.

1.2 Act No. 7/74 of 27 July 1974 [*document No. 8-II*] clarifies the scope of chapter B, paragraph 8, of the programme of the Armed Forces Movement. The Act contains the following provisions:

Art. 1. The principle embodied in the programme of the Armed Forces Movement, chapter B, paragraph 8 (*a*), in accordance with which the solution of the wars being fought in the overseas territories is a political and not a military matter, implies, in accordance with the Charter of the United Nations, recognition by Portugal of the right of self-determination of peoples.

Art. 2. Recognition of the right of self-determination, with all its consequences, includes acceptance of the independence of the overseas territories and the abrogation of the corresponding part of article 1 of the Political Constitution of 1933.

Art. 3. It is for the President of the Republic, after consultation with the Junta de Salvação Nacional, the Council of State and the Provisional Government, to carry out the acts and conclude the agreements relating to the exercise of the right recognized in the foregoing articles.

In accordance with these provisions, Portugal has recognized the independence of the territories of Guinea-Bissau, Cape Verde, Angola, Mozambique, and Sao Tome and Principe.

So far as the territory of Timor is concerned, article 307 of the Constitution states:

1. Portugal shall continue to assume its responsibilities, in accordance with international law, to promote and safeguard the right to independence of Timor.

2. The President of the Republic, assisted by the Council of the Revolution, and the government shall be responsible for performing all acts necessary to achieve the aims set forth in the foregoing paragraph.

As is well known, the question of this territory has been submitted to the United Nations in order that its right to independence may be fully respected.

1.3 A people's right of self-determination naturally includes the possibility of freely determining its political status.

This subject will be considered in detail in connection with article 25 of the Covenant.

Article 2

2.1 The legal system of human rights provided for in the Constitution has already been described above (Introduction, sects. VII and VIII). It will subsequently be seen that these rights correspond to a large extent to those specified in the Covenant and, in addition, to those provided for in the International Covenant on Economic, Social and Cultural Rights.

Any discrimination is absolutely forbidden, specifically on grounds of ancestry, sex, race, language, place of origin, religion, political or ideological convictions, education, economic situation or social condition. All citizens have the same social dignity and are equal before the law (art. 13).

This system is applicable to foreigners and stateless persons temporarily or permanently resident in Portugal (art. 15), except with regard to political rights, the performance of public duties not of a predominantly technical nature, and the rights and duties restricted to Portuguese citizens under the Constitution and by law.

2.2 The ratification of the International Covenant on Civil and Political Rights signifies Portugal's desire to guarantee to every individual the enjoyment of these basic rights.

For this purpose, the Government submitted the Covenant for consideration and approval to the Assembly of the Republic (Constitution, arts. 164 (*j*), 167 (*c*) and 200 (*b*)), knowing in advance not only that most if not all of the rights which it set forth had already been adequately protected by the Constitution, but also that any guarantee which was lacking was in fact being prepared by the Ministry of Justice and would be completed before the formal ratification of the Covenant.

As has already been stated, it fell to the first Constitutional Government to ensure that ordinary legislation concerning rights, freedoms and guarantees was brought in line with the Constitution. This task, which was completed by the second Constitutional Government, enabled us confidently to envisage complete compliance with the International Covenant on Civil and Political Rights, since the rights which it embodies were already in force within the domestic legal system.

However, should it become apparent that one of these rights is not sufficiently protected by national legislation recourse may be had to the actual text of the Covenant: its official publication (by Act No. 29/78 of 12 June 1978) [*document No. 13*] ensures its complete effectiveness *vis-à-vis* article 8 of the Constitution.

Moreover, the fact that the Portuguese Government has prepared a report of the kind mentioned in article 40 of the Covenant and has subsequently submitted that report to the Human Rights Committee demonstrates the interest which it takes in the Committee's decisions.

It will always be prepared to enact appropriate legislative measures for the stricter observance of the provisions of the Covenant should that prove necessary.

2.3 In accordance with article 20 of the Constitution, in the event of the violation of recognized individual rights, any person may have recourse to the courts for the defence of his rights, and justice may not be withheld from him for lack of financial means. Moreover, everyone has the right to resist any order that infringes his rights, freedoms or safeguards and to repel by force any form of aggression if recourse to public authority is impossible.

Let us now consider in somewhat more detail various hypothetical cases of violation of fundamental rights, in order to determine what remedies are available to safeguard those rights.

This will enable us to establish precisely the importance of the courts in the settlement of disputes arising from the violation of fundamental rights.

A. Violation by means of legal regulations: the law and respect for the Constitution

2.4.1. As the State is subject to the Constitution and is based on democratic legality (Constitution, art. 3, para. 4), it has an obligation not to infringe any constitutional provision.

Article 115 of the Constitution states: "The validity of the laws and other acts of the State, the autonomous regions and the local authorities shall depend on their conformity with the Constitution".

It is thus readily apparent that any legal provision which violates the system of rights embodied in articles 25 and 79 (see art. 17) of the Constitution infringes article 115 of the Constitution and is therefore invalid or, more precisely, unconstitutional.

Under the Portuguese Constitution the examination of unconstitutionality is a somewhat complex process. It is, in fact, one of the subjects dealt with in the platform of constitutional understanding [*document No. 10*], which has already been mentioned (Introduction, sect. IV), and is regulated in a somewhat unusual manner.

The platform set out (sects. 3.7, 3.8, 3.9, 3.10, 3.11 and 3.12) a system for the examination of unconstitutionality which was subsequently ratified by the Constitution.

Let us briefly consider its most important characteristics.

Examination of constitutionality: (a) *Preventive examination*

2.4.2. As will be seen, there are three types of organ which can undertake an examination of constitutionality: the Council of the Revolution (Constitution, arts. 146, 277 and 278), the Constitutional Commission (art. 284) and the courts (arts. 207 and 282).

The first of these organs, in accordance with article 142, acts as guarantor of the proper working of the democratic institutions and respect for the Constitution. For this purpose, it is competent to state its opinion, on its own initiative or at the request of the President of the Republic, on the constitutionality of any texts before they are promulgated or signed.

This system of consultation is provided for in detail in articles 277 *et seq.* of the Constitution; paragraphs 1 and 4 read as follows:

> 1. All instruments transmitted to the President of the Republic for promulgation as a law or decree-law and all instruments ratifying international treaties or agreements shall simultaneously be transmitted to the Council of the Revolution and may not be promulgated until five days have elapsed following their receipt by the said Council.
>
> . . .
>
> 4. If the Council of the Revolution decides, or the President of the Republic requests, that it should examine the constitutionality of a particular instrument, the Council shall be required to give its opinion within 20 days, which period may be reduced by the President in urgent cases.

Article 278 stipulates the effects of a decision of unconstitutionality:

> 1. If the Council of the Revolution rules that an instrument is unconstitutional, the President of the Republic shall exercise his right of veto and shall not promulgate or sign the instrument.[1]
>
> 2. In the case of a decree originating from the Assembly of the Republic, it may not be promulgated unless the Assembly has approved it by a majority of two thirds of the members present.[2]
>
> 3. In the case of a government decree, it may not be promulgated or signed.

Examination of constitutionality: (b) *Active unconstitutionality*

2.4.3. In addition to this preventive examination, the Council of the Revolution is required to scrutinize any accusation of unconstitutionality brought before it under article 281 (see also Constitution, art. 146 (*c*)). In this respect, its functions are similar to those of the courts. The latter, however, assess unconstitutionality only in connection with the case brought before them and their decision is valid only *inter partes*.

The Council of the Revolution, however, may declare unconstitutionality with general binding force (art. 280, para. 2), in the case of the material, organic or formal unconstitutionality of a provision of law, if the provision has been referred to it by the President of the Republic, the President of the Assembly of the Republic, the Prime Minister, the Provedor de Justiça,[3] the Procurator-General of the Republic or, in the cases provided for in article 229, paragraph 2, by the assemblies of the autonomous regions (art. 281, para. 1).

In addition, it may make a generally binding declaration that a provision is unconstitutional if the Constitutional Commission has judged it unconstitutional in three specific cases, or in only one case if it is organically or formally unconstitutional, without prejudice to cases already judged (art. 281, para. 2).[4]

[1] See also article 139, paragraph 4, of the Constitution.

[2] With regard to the political veto, see article 139, paragraphs 1, 2 and 3, of the Constitution.

[3] See section 2.5.5. below (article 24 of the Constitution).

[4] The Statute of the Constitutional Commission was approved by Decree-Law No. 503-F/76 of 30 June 1976 and amended by Decree-Law No. 731/76 of 15 October 1976 [*documents Nos. 65-I and II*].

2.4.4. It sometimes happens, however, that the Council of the Revolution does not rule unconstitutional a legal provision which a citizen considers to be at variance with the provisions or principles laid down in the Constitution (art. 280, para. 1).

That citizen may then assert his opinion in any legal application which he decides to make, but only where the problem of constitutionality (indirect action of unconstitutionality) arises in connection with the application of this provision of law to the specific case.

The Constitution stipulates that unconstitutional provisions may not be applied by the courts (art. 280, para. 2) and that the latter are competent, for this purpose, to determine the existence of unconstitutionality (art. 207).

Article 282 goes on to state:

1. Whenever the courts refuse to implement a provision of a law, decree-law, enactment, regional decree, or any equivalent instrument on the grounds that it is unconstitutional, and after the ordinary remedies have been exhausted, recourse is available to the Constitutional Commission for final judgement on the case in question; such recourse shall be free of charge, shall be compulsory in the case of the Ministério Público,[5] and shall be limited to the question of unconstitutionality.

2. Recourse shall also be available to the Constitutional Commission against any decision that applies a provision previously judged unconstitutional by the Commission; such recourse shall be free of charge and shall be compulsory in the case of the Ministério Público.

3. In the case of the provisions of instruments not covered by paragraph 1 above, the judgement of the courts as to constitutionality shall be final.

2.4.5. It is more difficult to establish whether the Constitution allows of direct scrutiny of the constitutionality of a provision of law.

Nowhere is such a right laid down. The organs which scrutinize the validity of provisions of law act either *ex officio* (e.g. Council of the Revolution) or because the question is submitted to them by other organs (in particular, the Constitutional Commission—art. 284).

A citizen may, however, have recourse to the rights of petition and popular action set out in article 49 of the Constitution and may appeal to the competent organs, in an effort to draw their attention to the lack of conformity of a provision of law with the Constitution.[6]

As far as their own rights are concerned, citizens are always entitled to appeal to the courts. Such cases involve not a direct problem of unconstitutionality, but the violation of legally protected rights and interests or, at most, a conflict between public and private interest (Constitution, art. 206) which the judge has to settle.

In this connection it must not be forgotten that the constitutional provisions concerning rights, freedoms and safeguards (or the rights set out in art. 17) are directly applicable (art. 20). If a contradiction exists between the text of the Constitution and another law, it is of cource the Constitution which prevails.

As we have seen, the courts may not implement unconstitutional provisions. This guarantees respect for the rights of every citizen, and the judge must, if necessary, cause these rights to be recognized before any authority. In this connection, article 210 states:

1. The decisions of the courts shall be binding on all public and private bodies and shall prevail over the decisions of all other authorities.

2. The conditions of enforcement of the courts' decisions in relation to any authority and the penalties for failure to enforce such decisions shall be regulated by law.

Examination of constitutionality: unconstitutionality by omission

2.4.6. The Constitution also provides for another type of unconstitutionality: that arising from the need to adopt legislative measures necessary to ensure the implementation of a constitutional provision.

If such measures are not taken, the Council of the Revolution may recommend to the competent legislative organs that they shall take such measures within a reasonable time (Constitution, arts. 146 (*b*) and 279).

Even in this case, it is acting as a guarantor of total observance of the Constitution.

The problem of the primacy of international law over the internal legal order

2.4.7. The problem of how to resolve the conflicts between provisions of internal law and those of international law coming under article 8 of the Constitution is somewhat delicate.

Earlier in this report, an attempt was made to define the machinery which is available to the citizen in order to prevent an infringement of his rights by means of a legal regulation.

It is not certain that he may be able to bring a direct action for unconstitutionality, but he can always appeal to the courts to ensure respect for his fundamental rights.

In this instance, what is at issue is a provision of law infringing the rights prescribed in articles 25-79 of the Constitution. In view of article 280, paragraph 1, this rule is unconstitutional and the courts cannot apply it in this particular case (arts. 280, para. 2, and 207).

Another case may, however, arise. Let us assume that a right prescribed in the Covenant is not provided for in the Constitution and that a provision of law supervening after the entry into force of the Covenant[7] infringes one of its provisions. *Quid juris*?

The provisions in question may have the same standing, and this may justify the abrogation of the provision of international law by the provision of internal law supervening subsequently. This, however, would probably entail an infringement of article 8 of the Constitution. Paragraph 2 of this article states that, provided certain conditions are fulfilled, the provisions of international conventions shall have effect internally in so far as they are internationally binding on the Portuguese State. If they can be abrogated by subsequent internal

[5] In accordance with article 224, paragraph 1, of the Constitution, the Ministério Público is competent to represent the State, to take criminal proceedings, and to defend democratic legality and such interests as are stipulated by law.

[6] The citizen is always entitled to recourse to the Ministério Público, which is competent to defend democratic legality (art. 224, para. 1). As was stated earlier, the Procurator-General of the Republic may request the Council of the Revolution to examine the constitutionality of any provision (art. 281, para. 1).

[7] If this provision of internal law precedes it, the repeal of the provition can always be defended by the supervening provision of international law.

legislation, would this not be tantamount to denying that such provisions have effect?

In any event, the solution is rather questionable. The Constitution is not explicit enough on this point, with the result that there are many explanations and interpretations of it. Part of case law nevertheless recognizes the primacy of the provision of international law over that of internal law.

With this end in view, it defends the principle of immediacy: the national judge automatically applies international law, regardless of any change or acceptance effected by an internal legislative act. According to this interpretation, international law, by reason of its inherent validity, is part of the internal legal order and its conversion into internal law, by whatever change or acceptance, is not determined by the way in which it is adopted.

The general provision embodied in article 8 concerning the acceptance of international law is, according to this argument, entirely unrelated to the problem outlined, because it does not permit the inference that this law is automatically integrated on account of the way in which it has been adopted.

Article 8, paragraph 2, establishes only one requirement for effectiveness, namely, official publication (see Constitution, art. 122, para. 2 (*b*)), which alone would not permit the inference that international law becomes internal law.

The inherent validity of international law therefore precludes it from being challenged by internal law. Accordingly, if a provision of the Covenant was called in question by a provision of internal law supervening subsequently, it could nevertheless be invoked in the national courts.

B. Acts of the administrative authorities which infringe the provisions of the Covenant and the fundamental rights embodied in the Constitution

2.5.1. Possible breaches of fundamental rights will usually arise not from the legislative activity of a sovereign organ, but from the exercise of the daily activities of the administrative authorities.

Because of their number and scope, administrative acts constitute a permanent danger to the rights of citizens. This is, in fact, the view of the authors of the Constitution, who repeatedly made a point of ensuring respect for democratic legality and the rights of citizens (Constitution, arts. 2, 3, para. 4, 9 (*b*), 18, 19, 20, 115 and 267).

Furthermore, they unequivocally established the responsibility of the members of the sovereign organs in order to define more accurately the restrictions they considered indispensable for the exercise of political power.

In the words of article 111 of the Constitution, this power lies with the people (see also Constitution, arts. 1, 2 and 3), and this duly emphasizes the primacy conferred on the will of the citizens with regard to the sovereign organs.

Responsibility of holders of political office

2.5.2. Article 120 of the Constitution reads:

1. Holders of political office shall be politically, civilly[8] and criminally responsible for acts and omissions in the performance of their duties.

2. The offences for which holders of political office shall be liable, the applicable penalties and their effects shall be laid down by law.

The Penal Code [*document No. 15*] makes provision (arts. 284-327) for abuses of authority by public officials[9] and lays down the corresponding penalties.

Apart from this generic provision, the Constitution also expressly establishes the responsibility of:

(*a*) The President of the Republic in article 133, which states:

1. The President of the Republic shall be answerable to the Supreme Court of Justice for offences committed in the performance of his duties.

2. It shall be the duty of the Council of the Revolution to initiate proceedings, which however shall not take their course unless the Assembly of the Republic so decides by a majority of two thirds of the deputies in office.

3. Conviction shall involve dismissal from office.

4. The President of the Republic shall be answerable after the end of his term of office for offences not committed in the performance of his duties.

(*b*) The Deputies in article 160, which states:

1. Deputies have no civil, criminal or disciplinary liability for the votes they cast and the opinions they express in the performance of their duties.

2. No Deputy shall be detained or arrested without the Assembly's authority, except for a crime punishable by a major sentence[10] when he is caught *in flagrante delicto*.

3. If criminal proceedings are taken against a Deputy and he is indicted or similarly charged, the Assembly shall, except in the case of a crime punishable by a major sentence, decide whether or not he should be suspended to enable the proceedings to take their course.

(*c*) The Members of the Government in article 199, which states:

1. Members of the Government shall be civilly and criminally liable for the acts they perform or legalize.

2. If court proceedings are taken against a Member of the Government for any crime and he is indicted or similarly charged, where the crime carries a major sentence, the proceedings shall take their course only if he is suspended from office.

(*d*) The judiciary in article 221, which states:

1. Judges shall be irremovable and may not therefore be transferred, suspended, retired or dismissed except as provided for by law.

2. Judges shall not be held liable for their decisions except as provided for by law.

In connection with article 221, paragraph 1, reference should also be made to articles 4, 5, 6 and 8 of Act No. 85/77 of 13 December 1977 [*document No. 67*] containing the new provisions relating to the Judges' Statute, and to articles 63 *et seq.* of the same instrument.

The criminal responsibility of judges is provided for in particular in articles 284, 286, 291, paragraph 5, and 302 of the Penal Code.

[8] See articles 483-510 of the Civil Code [*document No. 14*] and, in particular, articles 483 and 501.

[9] The new draft penal code [*document No. 16*] deals with abuses of authority in articles 442 *et seq.*

[10] See article 55 of the Penal Code.

Responsibility of the staff of the administrative authorities

2.5.3.1. The Constitution has, however, gone further. Holders of political office are not the only persons who are capable of infringing the rights of citizens. This may also happen as a result of the activities of organs and staff of the administrative authorities.

Articles 267 and 271 read as follows:

Art. 267. 1. The public administrative authorities shall seek to promote the public interest, while observing the individual rights and interests protected by law.

2. The organs and staff of the administrative authorities shall be subject to the Constitution and the law, and shall perform their duties fairly and impartially.

Art. 271. 1. Officials and staff of the State and other public bodies shall be liable to civil, criminal or disciplinary proceedings in respect of actions and omissions which result in infringements of those individual rights or interests that are protected by law. Action or proceedings against an official shall at no stage be subject to the authorization of officials senior to the official in question.[11]

2. An official or staff member who acts in accordance with orders or instructions on an official matter from his legitimate superior shall not be held liable provided that he has previously requested or required that they should be given or confirmed in writing.[12]

3. The duty of obedience shall cease whenever the execution of orders or instructions involves committing a criminal offence.[13]

4. The conditions in which the State and other public authorities shall be entitled to redress against office-holders, officials and other staff shall be established by law.

In order to guarantee more effectively the protection of individual rights or, at least, compensation resulting from their infringement, the authors of the Constitution further determined (art. 21, para. 1):

1. The State and other public bodies shall be jointly and severally liable under civil law with the members of their organs, their officials or their staff members for actions or omissions in the performance of their duties, or caused by such performance, which result in violations of rights, freedoms or safeguards or in damage to another party.[14]

This provision permits payment of the compensation due to the injured party, independently of the economic situation of the debtor. If the latter is unable to pay, the State must do so in his place.

2.5.3.2. Decree-Law No. 191-D/79 of 25 June 1979, contains new provisions concerning the disciplinary status of officials and staff of the central, regional and local administrative authorities [*document No. 19*].

This instrument seeks to guarantee respect for a number of constitutional provisions relating to the officials or staff of the public administrative authorities.

Article 24, for instance, prescribes the penalty of dismissal in the case of any official or staff member who, as the result of a serious offence or wilful misconduct, has infringed the obligation of impartiality in the performance of his duties (para. 2 (*c*)).

Article 25 prescribes the penalty of compulsory retirement and dismissal for any official or staff member who, in the performance of his duties, has committed acts clearly injurious to the institutions and principles established in the Constitution.

This instrument, in fact, contains a set of rules which quite reasonably reflect the aim of the legislative authorities. This aim is set down in article 267, already quoted, of the Constitution, namely, respect for the Constitution and for the individual rights and interests of the citizen by all staff and officials of the administrative authorities.

The citizen's safeguards in respect of the administrative authorities: administrative acts and challenges of such acts

2.5.4.1. Article 269 of the Constitution states:

1. Citizens shall be entitled to be informed by the administrative authorities, whenever they so request, of the progress of proceedings which directly concern them and of the final decisions taken concerning such proceedings.

2. All interested parties shall have access to the courts in order to plead the unlawfulness of any final and enforceable act of the administrative authorities.

Infringements of individual rights occur most frequently in the acts of the administrative authorities. The position of the official or staff member of the administrative authorities as the custodian of *jus imperii* sometimes causes him to infringe the rights of citizens, even if he does so for reasons arising out of the pursuit of collective goals.

The citizen therefore requires special protection in order to enable him to defend himself properly and even to have his rights vis-à-vis the claims of the administrative authorities recognized by an impartial body.

It is precisely this problem which will be considered later.

The administrative courts

2.5.4.2. Article 212, paragraph 3, of the Constitution makes provision for the establishment of administrative courts.

Consequently, the Government is to submit a new administrative courts organization bill (No. 248/I) [*document No. 20*] to the Assembly of the republic for its views.

Article 2 of this bill provides that these courts shall be responsible, in respect of the legal relations of the administrative authorities, for defending legally protected rights and interests, punishing breaches of democratic legality, and settling conflicts of public and private interests.

To this end, they enjoy complete independence (art. 3), and their decisions are binding upon every public and private body and prevail over the decisions of any other authority (art. 6, para. 1).

Claims may be made only on the ground of the unlawfulness of an administrative act and their purpose is to obtain the annulment or a declaration of invalidity or legal non-existence of the act against which the plea has been made (art. 14, para. 3).

[11] This was, in fact, one of the measures enacted by one of the early Provisional Governments. Decree-Law No. 74/75 of 21 February 1975 repealed the articles of the Administrative Code concerning the administrative guarantee [*document No. 17*].

[12] See article 10, paragraph 1, of Decree-Law No. 191-D/79 of 25 June 1979 [*document No. 19*].

[13] See article 39, paragraph 12, and article 44, paragraph 3, of the Penal Code, and article 10, paragraph 4, of Decree-Law No. 191-D/79.

[14] See article 501 of the Civil Code and Decree-Law No. 48,051 concerning the responsibility of the administrative authorities for acts of public management [*document No. 18*].

The competence of the various administrative courts is covered in article 29 (first section of the Supreme Administrative Court), article 31 (fiscal justice section of this Court), article 41 (Central Administrative Court) and article 51 (regional administrative courts) of the above-mentioned bill.

The strengthening of the guarantees of administrative legality: Decree-Law No. 256-A/77 of 17 June 1977

2.5.4.3. As a result of the approval of the Constitution, the regulation of the system of administrative acts was made more stringent, for example with regard to the substantiation of such acts, failure of the administrative authorities to take action, procedure for legal remedies, etc.

The first Constitutional Government therefore decided to prepare an instrument dealing with all these matters within the time-limit specified in article 293, paragraph 3, of the Constitution. The result was Decree-Law No. 256-A/77 of 17 June 1977 [*document No. 21*], the main provisions of which we shall now attempt to outline.

Article 1 of the Decree-Law establishes the need to substantiate any administrative act which, wholly or in part:

(*a*) Denies, extinguishes, restricts or in any way affects rights, or imposes or makes more severe duties, responsibilities or penalties;

(*b*) Affects, in a similar manner and as a result of the exercise of discretionary powers, legally protected interests;

(*c*) Sets forth a decision on a claim or an appeal;

(*d*) Decides against a claim or argument put forward by the person concerned, or against an opinion, information or official proposal;

(*e*) Sets forth a decision at variance with the practice usually followed in the settlement of similar cases or in the interpretation and application of the same provisions of law;

(*f*) Implies the revocation, amendment or suspension of a previous administrative act.

Acts, must be substantiated by means of a brief statement of the factual and legal reasons for the decision (art. 1, para. 2). Substantiation which, because of its obscurity or contradictory or inadequate nature, does not elucidate the real reason underlying the act is deemed to be equivalent to a lack of substantiation (art. 1, para. 3).

The substantiation of verbal acts must, upon the request of the person concerned, be indicated to him in writing (art. 1, para. 4). However, if the person in question does not avail himself of this option, this will not prejudice any decision regarding the possible lack of substantiation of the act (art. 1, para. 5).

Final and enforceable administrative acts may be subject to appeal; such appeal must be addressed to the respective court and brought before the authority which has issued the act (art. 2, para. 1). The authority may, within a period of 30 days, revoke or maintain, wholly or in part, the act in respect of which an appeal has been lodged (art. 2, para. 2).

If within the legally prescribed time-limit (normally 90 days) no decision has been taken on a claim lodged with an administrative authority which is responsible for scrutinizing it, the claimant has the option of considering that his claim has not been submitted, in order that he may follow the corresponding impugnment procedure (art. 3). The law prescribes a time-limit of one year (art. 4, para. 1) for this purpose for as long as an express decision is not notified to the claimant.

The claimant may himself require the administrative authorities to carry out the ruling made in an administrative dispute if these authorities do not do so of their own accord (art. 5, para. 1) within a period of 30 days after the legal decision is declared to have entered into effect.

The administrative authorities must carry out the decision completely within a period of 60 days after the submission of the request, unless there are legitimate grounds for not carrying it out (art. 6, para. 1). As legitimate grounds for non-execution the law accepts only impossibility or serious prejudice to the public interest; these must, however, be duly notified to the claimant and must be precisely spelt out (art. 6, paras. 2 and 4).

Legitimate grounds for non-execution cannot, however, be invoked if the administrative authorities are required to pay a sum of money (art. 6, para. 5).

The claimant may either challenge the existence of legitimate grounds for non-execution invoked by the authorities or accept those grounds and request that the indemnity due to him should be determined in proportion to the prejudice caused by the act which is the subject of the annulment and non-execution of the ruling given (art. 7, para. 1).

Such non-execution, if not justified by legitimate grounds, constitutes the basis of civil, disciplinary and even criminal responsibility (art. 11).

Activities of the Provedor de Justiça (Ombudsman)

2.5.5. The authors of the Constitution made a point of establishing the post of Provedor de Justiça. In accordance with article 24:

1. Citizens may present complaints concerning actions or omissions by the public authorities to the Provedor de Justiça, who shall examine them without power of decision and shall make to the competent organs such recommendations as are necessary in order to prevent and make good acts of injustice.

2. The activities of the Provedor de Justiça shall be independent of any acts of grace or legal remedies provided for in the Constitution and laws.

3. The Provedor de Justiça shall be appointed by the Assembly of the Republic.

The Statute of the Provedor de Justiça, which was established by Decree-Law No. 212/75 of 21 April 1975, has subsequently been amended by Act. No. 81/77 of 22 November 1977 [*document No. 22*].

The Office of the Provedor de Justiça is a body whose main function is to defend the legitimate rights, freedoms, guarantees and interests of citizens (Act No. 81/77, art. 1).

Its activities are carried on *ex officio* or at the request of any citizen (*ibid.*, art. 22).

The competence of the Provedor is set out in article 18 of the Act and the limits of his powers in article 20.

He is required each year to submit to the Assembly of the Republic a detailed report on his activities, for publication in the Official Journal of the Assembly (*ibid.*, art. 21).

C. The European Convention on Human Rights

2.6. If a citizen believes that one of his rights has been violated, he accordingly has at his disposal a broad range of remedies intended to put an end to the violation or, at least, to determine the prejudice suffered.

However, it may happen that after all these remedies have been exhausted, the claim of the person concerned continues to be refuted, by reason, for example of domestic legislation.

In such a case, he may, in the last resort, appeal to the European Commission or to the European Court of Human Rights.

Act No. 65/78 of 13 October 1978 [*document No. 23*] ratified the European Convention on Human Rights, thus enabling Portugal to recognize the competence of the European Commission (art. 6 of this Act) and the compulsory jurisdiction, as of law and without any special convention, of the European Court (art. 7).

Any citizen may therefore have his claim scrutinized by a supra-national organ, and this organ may agree that the claim is just, even in defiance of the opinion of the State.

In such a case, the condemnation of the State may even result in the amendment of the domestic legislation challenged by the claim brought before either of the two above-mentioned organs.

Article 3

3.1. The Portuguese Constitution provides that all citizens shall enjoy the rights and be subject to the duties laid down therein (art. 12). In addition, they have the same social dignity and are equal before the law, which forbids all discrimination on grounds of sex, for example (art. 13).

To give effect to these articles, the Provisional Governments adopted a number of measures relating to the access of women to certain posts which had traditionally been reserved for men. For example, Decree-Law No. 251/74 of 12 June 1974 [*document No. 24*] permitted the access of women to the judiciary and the *Parquet*, and to any other post subordinate to the Ministry of Justice.

In addition, Decree-Law No. 266/74 of 21 June 1974 [*document No. 25*] permitted the access of women to the criminal police.

However, a great deal of work remained to be done in order to ensure equal status for women. Many provisions had to be amended, including, for example, those of the Civil Code concerning family law and labour legislation.

As we shall see later (in relation to art. 23 of the Covenant), substantial changes have been made in family law as a result of article 36 of the Constitution.

However, the right to work which was covered by many different legal instruments, proved more difficult to amend and required very extensive efforts which naturally took a long time.

The first Constitutional Government, conscious of the difficulties inherent in such a task as that imposed by article 13 of the Constitution, therefore decided to set up a Commission on the Status of Women subordinate to the Prime Minister and specifically responsible for proposing the amendments necessary for the complete fulfilment of this constitutional principle.

3.2 This Commission was extremely active in the protection of women's rights. It took part in the work of many committees specially entrusted with the preparation of amendments to basic instruments (for example, the Civil Code) and tried to give practical form to full equality of rights and duties for both sexes.

With regard to the right to work, it submitted to the Government preliminary draft legislation designed to prevent discrimination in work and employment.

The fourth Constitutional Government accepted this text as a basis for discussion and set up an interministerial commission responsible for improving it. The Commission on the Status of Women was, of course, represented on the latter commission.

The final text [*document No. 26*] was subsequently submitted for public discussion and was again amended as a result of the suggestions made.

It provides, *inter alia*, for the establishment of a tripartite commission for equality in work and employment specifically responsible for identifying violations of the principle of non-discrimination on grounds of sex. Such violations will be judged according to the concept of a "comparable man"; this means that discrimination exists whenever a woman does not receive the same remuneration as a male colleague in the same occupation and grade working in identical conditions and for the same employer.

In addition, the text provides for the automatic amendment of discriminatory provisions in instruments for the collective regulation of work, such as those which provide for the creation of occupations and grades reserved solely for women or establish lower remuneration for them. Such provisions will, through the operation of the law, be replaced by the equivalent provisions relating to male workers who receive more favourable treatment.

The instrument is, however, still only at the draft stage: it will again have to be revised by the fifth Constitutional Government, which, it is believed, will draw up the final text.

3.3. The constitutional precept embodied in article 13 of the Constitution made necessary still other amendments.

In criminal law, for example, Decree-Law No. 474/76 of 16 June 1976 [*document No. 27*] repealed article 405, paragraph 1, and amended article 461, paragraph 1, of the Penal Code.

Moreover, this code was completely redrafted, as has already been indicated above, and in the special section of the Code an attempt was made to ensure the same responsibility, regardless of sex, for the commission of the various types of crime covered by it.

Article 4

4.1. Reference has already been made (Introduction, sect. IX) to article 19 of the Constitution. In accordance with paragraph 1 of this article, the exercise of rights, freedoms and safeguards shall be suspended only in the event of a state of siege or state of emergency declared in the form laid down in the Constitution (see also Constitution, art. 18, paras. 2 and 3).

To this end, article 137 of the Constitution provides that one of the intrinsic powers of the President of the Republic is:

(*c*) To declare a state of siege or state of emergency, with the authorization of the Council of the Revolution,[15] in all or part of the national territory in the event of actual or imminent attack by foreign forces, serious threat to or disturbance of the democratic order, or public disaster.[16]

It should be noted that for as long as the state of siege or emergency remains in force, the Assembly of the Republic may not be dissolved (Constitution, art. 175; see also art. 136 (*e*)). Failure to comply with this provision means that the dissolution order is without legal effect.

The state of siege or state of emergency may not be continued for more than 30 days without ratification by the Assembly of the Republic (see Constitution, art. 165 (*b*)), failing which it shall lapse at the end of that period.

Moreover, no act aimed at revising the Constitution may be undertaken while a state of siege or emergency is in force (art. 291 of the Constitution).

4.2. Act No. 2084 of 16 August 1956 [*document No. 28-A*], which regulates the system of national defence, is somewhat old and may be enforced only in accordance with the new constitutional principles (see Constitution, art. 293), such as those specified in article 19 of the Constitution.

This is the case, for example, with articles XXXI and XXXII of the Act, which provide for the possible restriction of certain freedoms and safeguards by virtue of the proclamation of the state of siege.

The Government therefore decided, in view of article 167 (*d*) and (*l*) of the Constitution, to prepare a bill (No. 243/I) [*document No. 28-B*], establishing a new system of national defence. This bill has not yet been discussed.

In chapter 4 of this instrument an attempt was made to introduce regulations concerning the state of siege and state of emergency (in particular, arts. 30-35). The content of these provisions will be considered later.

4.3. Under article 19, paragraph 3, of the Constitution, the declaration of a state of siege shall in no circumstances affect the right to life and security of person.

The same provision exists in article 31 (*a*) of Bill No. 243/I.

Article 19, paragraph 4, of the Constitution provides that the declaration of a state of emergency may at most give rise to the partial suspension of rights, freedoms and safeguards. Article 33 of the bill is identical with article 31 of the Constitution.

In any case, the declaration of either a state of emergency or a state of siege must be adequately substantiated and must specify the rights, freedoms and safeguards whose exercise is to be suspended (art. 19, para. 2, of the Constitution). Moreover, it empowers the authorities to take only the steps necessary for the prompt restoration of constitutional normality (art. 19, para. 5).[17] It should be borne in mind that in this whole field article 18 of the Constitution remains applicable. Paragraph 3 of this article reads: "Laws restricting rights, freedoms and safeguards shall be general and abstract in character and shall not limit in extent and scope the essential content of constitutional provisions".

This is not therefore a discretionary power. The declaration of a state of siege or a state of emergency is governed by specific conditions and must be sufficiently substantiated to enable the need for such action to be appreciated. The specification of the rights, freedoms and safeguards whose exercise is to be suspended is, therefore, teleologically restricted by the principle of the adoption only of the steps necessary for the prompt restoration of constitutional normality.

There are, nevertheless, some rights which are not susceptible of any restriction, such as those provided for in articles 25 and 26 of the Constitution.[18]

Moreover, it is difficult to imagine a situation in which the rights specified in articles 11, 15, 16 and 18 of the Covenant could justifiably be suspended by virtue of the declaration of a state of siege or emergency. It would seem that this is not compatible with the concept of adequate substantiation provided for in article 19 of the Constitution, which is the only means of justifying the need for their total or partial suspension.

Article 5

5. In the light of the Portuguese Constitution, there is little reason to fear a violation of article 5 of the Covenant. One has only to read article 16 of the Constitution in order to see that such a possibility has been averted once and for all by the authors of the Constitution:

1. The fundamental rights embodied in the Constitution shall not exclude any other rights resulting from the laws and applicable provisions of international law.

2. The provisions of the Constitution and laws relating to fundamental rights shall be interpreted and applied in accordance with the Universal Declaration of Human Rights.

Furthermore, the system of rights, freedoms and safeguards is applicable to rights of a similar nature established by law (Constitution, art. 17), including international law originating from international conventions duly ratified or approved (see articles 8, 164 (*j*), 167 (*c*) and 169, para. 2). Since it entered into force by virtue of its publication, the Covenant, and article 5 in particular, may be invoked before any authority. If there is any suggestion of an attempt to violate the article, it can quickly be prevented (cf. above under ar-

[15] See article 145 (*c*) of the Constitution.

[16] This act of the President of the Republic must be countersigned by the Government (Constitution, art. 141, para. 1) in order to acquire legal effect (art. 141, para. 3).

[17] See article 30, paragraph 3, of Bill No. 243/I.

[18] As we have seen, this is ensured by article 19, paragraph 3, of the Constitution.

ticle 2 of the Covenant regarding the remedies available for this purpose).

In any case, the provisions of article 5 of the Covenant are sufficiently clear.

Consequently, a restrictive interpretation of any of the rights set out in the Constitution could certainly not be defended by means of this article.

Article 6

6.1. Over 100 years ago Portugal decided to abolish the death penalty for civil crimes (Act of 1 July 1867).[19]

Naturally, the new Constitution could not fail to continue this long tradition, and article 25 accordingly states:

1. Human life shall be inviolable.
2. In no circumstances shall the death penalty be pronounced.

The latter provision involved a substantial modification of the Code of Military Justice. Even though it had not been applied for a long time, the death penalty was still prescribed as the punishment of certain crimes of a military nature. In view of article 25 of the Constitution, however, there is no doubt that the death penalty may not be applied even for crimes of that type. This was clearly upheld in the new Code of Military Justice (Decree-Law No. 141/77 of 9 April 1977) [*document No. 29*] in articles 24 *et seq.*

6.2. The right to life is naturally protected by law. The Penal Code still in force defines homicide and prescribes fairly harsh penalties for it in articles 349 *et seq.* (see article 55 of the Penal Code with regard to the range of major penalties prescribed in criminal law).[20] Life is the possession which criminal law regards as most deserving of protection.

Article 7

7.1. In accordance with article 26 of the Constitution:

1. The moral integrity and security of person of citizens shall be inviolable.
2. No one may be subjected to torture or to cruel, inhuman or degrading punishment or treatment.

Furthermore, the Penal Code defines the crimes of unlawful harshness towards prisoners (art. 293), the use of unnecessary force in the performance of public duties (art. 299), physical coercion (art. 329), unlawful detention (art. 330) and the use of violence by individuals against prisoners (art. 335).

It also defines the crime of unlawful arrest (art. 291).[21]

The Code of Penal Procedure likewise forbids any person or entity participating in penal procedure to interfere with the freedom of will or decision of the person charged through ill-treatment, physical violence, the administration of substances of any nature, hypnosis or the use of cruel or deceptive means. It prohibits the use of force against him except in the cases and within the limits expressly set out by law (art. 261, para. 1 (*a*) and (*c*), of the Code).

Statements made when these provisions have been violated may not be taken into consideration by the court or by the examining judge, even if the person charged gives his consent (art. 261, para. 2). Furthermore, article 306 of the Code categorically forbids the ill-treatment of prisoners or the use of insulting language or violence against them except in the event of resistance, escape or attempted escape. In such cases, however, violence may be used only to the extent strictly necessary to overcome resistance or to prevent escape.

7.2. In the report on the conclusions of the fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders [*document No. 12*], reference was made to the general outline of the new systems of criminal justice.

With regard to the new Penal Code, in particular, an attempt has been made to take account of the new institutional thinking about the scale of penalties: emphasis has been placed on the substitution of other penalties for imprisonment and the reduction of imprisonment to a maximum term of 20 years.[22]

Mention was also made of the current importance for prison life of the judge responsible for the application of penalties, which stems from the entry into force of Decree-Law No. 783/76. The fact that complaints may be made to this judge and that he intervenes in all matters of importance in the prisoners' lives makes it possible to prevent them from being subjected to abuses, ill-treatment or any form of torture.

The new Prisons Act (Decree-Law No. 265/79) of 1 August 1979 follows the same trend. Title XII on methods of coercion (arts. 122 *et seq.*) and title XIII on the application of disciplinary measures (arts. 128 *et seq.*) are good examples of this. The principle of observing due proportion is the rule in both cases (arts. 124 and 130).

Furthermore, title XIV is wholly concerned (arts. 138 *et seq.*) with the rights to be heard and to lodge a complaint or an appeal. The last-named right even includes the possibility of recourse to the European Commission on Human Rights and the European Court of Human Rights (art. 151).

In short, all these provisions constitute the practical application of the principle underlying article 26 of the Constitution.

7.3. Portuguese law also deals with medical experiments, including surgical operations.

By law the performance of such operations is dependent upon the consent of the patient, or of his family if he is not in a condition to give it at the appropriate time (see arts. 70 *et seq.* of the Code of Medical Practice, approved by Decree-Law No. 40,651 of 21 June 1956 [*document No. 36-I*] and still in force by virtue of article 104 of Decree-Law No. 282/77 of 5 July 1977, which contains new provisions relating to this Code [*document No. 36-II*]).

[19] The death penalty had already been abolished for political crimes by the Additional Act to the Constitutional Charter of 1852. A short history of the abolition of the death penalty in Portugal is appended [*document No. 35*].

[20] The new draft penal code, special section [*document No. 16*], deals with the subject of crimes against life in articles 134 *et seq.*

[21] See in this connection article 323 of the Code of Penal Procedure.

[22] See the new draft penal code, general part [*document No. 16*], articles 40 *et seq.*

The Penal Code concedes that the consent of a person against whom an offence is committed may confer exemption from criminal responsibility (art. 29, para. 5) in the cases specified by law.

The Civil Code provides for the consent of the injured party (art. 340) as a means of rendering lawful an act infringing his rights, a fact which has led to a certain degree of acceptance of such consent in doctrine and case law as a justification in criminal law under article 44, paragraph 4, of the Penal Code.

It is maintained that what is involved is the exercise of a right, this right being enshrined in civil law, and hence any illegality is excluded.

If, however, consent is not given, a person who performs a medical experiment is liable to prosecution under articles 359 *et seq.* of the Penal Code (offences against the person). His only defence would be article 340, paragraph 3, of the Civil Code: the hypothetical consent of the injured party. However, in that case, the person charged would have to prove that the injury had been made in the interests of the injured party and in accordance with his presumed wish.

7.4. Allied to this problem is that relating to the possibility of removing tissues or organs from the body of a deceased person with the object of transplanting them or for some other equally important therapeutic purpose.

The use of human organs and tissues has recently been regulated by Decree-Law No. 553/76 of 13 July 1976 [*document No. 36-III*]. Under this instrument any doctor who removes organs or tissues is liable to imprisonment (art. 9 (*b*)) if it comes to his knowledge, by any means, that the deceased person was unwilling to undergo such an operation.

Furthermore, mutilation or dissection beyond what is necessary in order to use the tissues or organs removed is forbidden (art. 7).

In any case, organs or tissues may not be removed until death has been certified by two doctors who are not members of the team responsible for removal.

Article 8

8.1. Even though the Portuguese Constitution does not expressly mention cases of slavery, the slave trade and servitude, there is no doubt about the thinking of the legislative authorities in this area. Articles 26 and 27 of the Constitution are quite clear: the violation of moral integrity or security of person is forbidden, and the right to freedom and security is guaranteed.

These rights are not compatible with the acceptance of slavery or any form of servitude. For the same reason, the Penal Code prescribes penalties (title IV, chap. I: "Crimes against the freedom of individuals"—arts. 328 *et seq.*) for the crimes of holding captive (art. 328) and unlawful detention (art. 330), and other crimes (see arts. 331 *et seq.*).

The new draft penal code, special part, also establishes penalties for the crimes of unlawful restraint (art. 166) holding in slavery (art. 167) and kidnapping (art. 168).

8.2. The criminal law states that a person who receives a sentence privative of liberty must work in accordance with his strength and abilities (Penal Code, art. 59). However, remuneration must be paid for the work done.

The new Prisons Acts deals with the work of prisoners in articles 63 *et seq.* The legislative authorities have devised a set of principles which cause work to be regarded as a means of vocational training aimed at the future reintegration of the offender in society.

All degrading features must therefore be removed from prison work. The prisoner may attend vocational training and advanced training courses, and try to determine the occupation to which he is best suited.

Furthermore, the work must reflect living conditions outside correctional establishments, thus enabling the offender to prepare himself for his future life as a free person.

8.3. The Act also makes provision for fines to be paid through the performance of work (Penal Code, arts. 123 and 124).

The new draft penal code, general part, establishes the same system in article 48.

However, what is involved is still an obligation stemming from a court decision. Only the judge may order such a procedure.

8.4. Bill No. 243/1 on the national defence system establishes, in articles 35 *et seq.*, the regulations governing military and civil mobilization.

Article 11 of the text refers to military service and states that it must be regulated by special legislation.

These regulations were prepared by a succession of Constitutional Governments, but they are still to be approved by the Assembly of the Republic (art. 167 (1) of the Constitution) [*document No. 30*]. Under article 1 of these draft regulations, military service is compulsory for all citizens, with the exception of those mentioned in articles 17, 18, 20 and 22, for example.

The text also makes provision for the possibility of conscientious objection (art. 48), which was the subject of special regulations prepared by the second Constitutional Government. This text is also in draft form and has to be considered by the Assembly of the Republic [*document No. 31*].

Conscientious objection had, in fact, already been provided for in the Constitution in article 41, paragraph 5, and article 276, paragraph 3. The first of these provisions states: "5. The right of conscientious objection shall be recognized, conscientious objectors being required to perform civilian service for a period identical with that of compulsory military service".

8.5 Decree-Law No. 637/74 of 20 November 1974 (amended by Decree-Law No. 23-A/79 of 14 February 1979) [*documents Nos. 32-I and II*] defines the principles governing conscription. This can be ordered only in particularly grave circumstances, and covers the public services and enterprises listed in article 3 of the text.

Article 4 defines the conditions for the proclamation of conscription, which may cover all persons over 18 years of age (art. 7).

Decree-Law No. 78/75 of 22 February 1975 [*document No. 33-I*] set up a national civil defence service to prepare protective measures, limit hazards and

minimize the damage caused by natural disasters or emergencies due to war or any other circumstance representing a threat to, or causing the destruction of, public or private property or natural resources.

Decree-Law No. 63/79 of 30 March 1979 [*document No. 33-II*] established the operational centre for civil defence which will increase the effectiveness of measures in this field.

Article 9

9.1. In accordance with article 27 of the Constitution:

1. Everyone shall have the right to freedom and security.

2. No one shall be deprived of his freedom except as a result of a court judgement convicting him of an offence punishable by law by a prison sentence or as a result of the judicial application of a security measure.[23]

3. An exception to this principle shall be deprivation of freedom in the following cases for a period and on conditions to be laid down by law:

(*a*) Remand in custody, where a person is caught *in flagrante delicto*, or where there is strong evidence that he has wilfully committed an offence punishable by a major sentence;[24]

(*b*) The arrest on detention of a person who has unlawfully entered the national territory or against whom extradition or deportation proceedings have been instituted.[25]

4. Any person deprived of his liberty shall be informed without delay of the reasons for his arrest or detention.[26]

9.2. With regard to remand in custody, the Constitution states in article 28:

1. Detention without charge shall be subject to a court order within 48 hours confirming or continuing detention. The court shall hear the reasons for detention, shall inform the prisoner of them, interrogate him and give him the opportunity to defend himself.[27]

2. Remand in custody shall not be continued if it can be replaced by bail or by a measure of provisional release provided for by law.[28]

3. A court order for a measure involving deprivation of freedom or for its continuance shall be made known immediately to a relation of the prisoner or to a person in whom he has confidence.[29]

4. Remand in custody before and after the charge, shall be subject to the time-limits laid down by law.[30]

9.3. The Constitution also established the principle of *habeas corpus*, article 31 stating:

1. The remedy of *habeas corpus* shall be available before a court of law or court martial, according to the case, against any wrongful use of power in the form of unlawful detention.[31]

2. *Habeas corpus* may be applied for by the prisoner or by any other citizen qualified to exercise his political rights.[32]

3. The court shall rule on the application for *habeas corpus* within eight days at a hearing attended by both parties.[33]

Any person arrested or detained therefore has the right to lodge an appeal with a court in order that the latter may rule on the lawfulness of his detention and order his release if the detention is unlawful. (Code of Penal Procedure, art. 319.)

Under article 323 of the Code of Penal Procedure, any person who does not comply with the decisions handed down by the Supreme Court of Justice regarding an application for *habeas corpus* is subject to the penalties provided for in article 291 of the Penal Code (see Constitution, art. 210, para. 2).

9.4. In the event of unlawful arrest or detention, a claim for redress may be filed before a court against all persons who ordered or carried out such arrest or detention. (See in particular article 690 of the Code of Penal Procedure.)

This is laid down, in particular, in articles 21 and 271 of the Constitution. Articles 291 and 292 of the Penal Code impose penalties for abuse of authority, as in the case of unlawful arrest or detention. And the Code of Penal Procedure (arts. 2 and 29) requires the judge to determine indemnity for the victim, in the event of a conviction, even if the victim has not applied for such indemnity.

Article 10

10.1. The new Prisons Act (Decree-Law No. 265/79 of 1 August 1979) [*document No. 37-I*] contains several references to the principle that a person deprived of his or her liberty must be treated with humanity and with respect for the inherent dignity of the human person (see above, sect. 7.2).

The general principles embodied in articles 2 *et seq.* of this instrument are sufficient indication of the new institutional philosophy embodied in this instrument (see also arts. 122 *et seq.*, 128 *et seq.* and 194 *et seq.*).

The protection guaranteed by the law against any abuse of authority is another example of this. A prisoner is considered to be a human being who enjoys his fundamental rights like any other citizen, with the exception of those rights which the sentence restricts or even suspends (see art. 4).

10.2. The criteria for committing a prisoner to a correctional institution must take into account sex, age, legal status (remanded pending trial, convicted, first offender, habitual offender), length of sentence, physical and mental condition, special needs regarding treatment, proximity of the family's place of residence, together with security, training and labour considerations, which are important for the social rehabilitation of the prisoner (Decree-Law No. 265/79, art. 11).

The same instrument guarantees (art. 12) complete separation of detainees according to sex, age and legal status. Separation of first offenders from habitual offenders is to be encouraged (see also arts. 13-15).

Information on the Portuguese prison system, submitted to the French Centre for Comparative Law, is

[23] See Penal Code, arts. 1, 15, 18, 28, 54, 70, 113 and 115.

[24] See Code of Penal Procedure [*document No. 66*], arts. 269, 270, 271, 286, 288 and 291.

[25] See later in the report the analysis of article 13 of the Covenant. See article 4 of Decree-Law No. 582/76 of 22 July 1976 concerning the expulsion of foreigners from the national territory (annexed to the Code of Penal Procedure). See articles 11, 12, 13 and 14 of Decree-Law No. 437/75 of 16 August 1975 concerning the new legal régime governing extradition (annexed to the Code of Penal Procedure).

[26] See Code of Penal Procedure, arts. 250, 251, 253 and 254.

[27] *Ibid.*, arts. 250 *et seq.*, 290, 291 (*a*) and 311.

[28] *Ibid.*, arts. 270, 273 (*a*) and 291 (*b*).

[29] *Ibid.*, arts. 291 (*a*).

[30] *Ibid.*, arts. 273, 308, 309 and 310.

[31] The remedy of *habeas corpus* was regulated under Decree-Law No. 320/70 of 4 May 1970, which is referred to in the commentary on article 315 of the Code of Penal Procedure. See also articles 312 and 315 of the Code of Penal Procedure.

[32] See Code of Penal Procedure art. 316.

[33] *Ibid.*, arts. 313, 314, 317, 318 and 319.

appended to this report and describes the most important aspects of the current régime governing correctional institutions [*document No. 37-II*].

10.3. The new Prisons Act also guarantees to persons held in custody pending trial a different system appropriate to their status of non-convicted persons. This régime is set out in articles 209 *et seq.* In addition, juveniles held pending trial are separated from adults (art. 210, para. 4).[34]

The main aim of the treatment of convicted prisoners is their reformation and social rehabilitation, as can clearly be seen from articles 2, 3, 9, 63, 65, 79, 80 and 83 of Decree-Law No. 265/79.

Convicted persons under 25 years of age receive special treatment and are interned in detention centres where they may be given accelerated vocational training (arts. 201 *et seq.*). See also the bill concerning this subject prepared by the fourth Constitutional Government [*document No. 37-III*].

Article 11

11.1. In accordance with article 27, paragraph 2, of the Constitution, no person may be deprived of his liberty except as a result of a court judgement convicting him of an offence punishable by law by a prison sentence or as a result of the judicial application of a security measure.

Article 114 of the Penal Code stipulates that no prison sentence shall be imposed for non-payment of legal dues, the costs of proceedings or stamp duty (see also Code of Penal Procedure, arts. 642, para. 1, and 640, para. 1).

Article 123 of the Penal Code was amended to bring it into line with the constitutional provision referred to above (Decree-Law No. 371/77 of 5 September 1977). Now only fines for criminal offences may be replaced by a prison sentence. However, the penalty of deprivation of liberty is applied only as a last resort. A person convicted may even be exempted from a penalty if he succeeds in proving that no blame can be attached to him for non-payment of the fine.

A prison sentence may never be imposed in place of a fine for an administrative or disciplinary offence.

11.2. The law makes no provision whatsoever for the possibility of arrest simply for non-payment of debts. Only the perpetration of an act defined by the law as a crime can justify the arrest of the person concerned (see Penal Code, arts. 1, 8, 15, 27 and 54).

Accordingly, no one may be imprisoned merely on the ground of inability to fulfil a contractual obligation (see in particular Civil Code, arts. 817 *et seq.*).

Article 12

In accordance with article 44 of the Constitution, the right to travel and to settle freely anywhere in the national territory (para. 1), and the right to emigrate or to leave the national territory and return to it (para. 2) are guaranteed to every citizen.

These rights are also applicable to foreigners under article 15 of the Constitution.

The Constitution does not restrict the exercise of these rights in any way (see art. 18, paras. 2 and 3).

Furthermore, it forbids the extradition and deportation of Portuguese citizens from the national territory (art. 23, para. 1).

Article 13

13.1. Article 23 of the Constitution states:

2. No person shall be extradited for political reasons.

3. No person shall be extradited for crimes which carry the death penalty under the law of the applicant State.

4. Extradition and expulsion shall be ordered only by a judicial authority.

13.2. Bill No. 175/I [*document No. 38*] submitted by the second Constitutional Government for consideration by the Assembly of the Republic was intended to establish temporary regulations governing aliens entering or leaving the national territory.

It has not yet been considered.

13.3. The supervision and control of the entry, temporary residence and activity of aliens in the national territory are now the responsibility of the Aliens Service, a body directly subordinate to the Minister of the Interior and set up under Decree-Law No. 494-A/76 of 23 June 1976, as amended by Decree-Law No. 377/78 of 4 December 1978 [*documents Nos. 39-I and II*].

The Aliens Service is responsible for co-ordinating activities concerning aliens in Portuguese territory so as to be able to detect any criminal, dangerous or even political activity which might jeopardize the security of the State.

It is also responsible for organizing the proceedings necessary for the possible expulsion of an alien from the national territory.

13.4. The expulsion of aliens was dealt with in Decree-Law No. 582/76 of 22 July 1976.

Expulsion may be ordered only in cases of illegal entry, activity likely to endanger national security, public order or morality, or political activity without prior authorization from the Government (art. 1).

However, an alien must not be deported to a country in which he may be persecuted for political reasons. He has the right to specify the country in which he wishes to settle (art. 4).

An expulsion order must be issued by a judge, following a decision on the application submitted by the Aliens Service (arts. 6 and 7).

The costs incurred as a result of the alien's departure from the country may be met by the State if he proves that he is unable to defray them (art. 16).

Penal procedure is applicable in a subsidiary fashion (art. 15), particularly with regard to the safeguards for the defence of an alien in respect of whom an application for expulsion is made.

The second Constitutional Government decided to submit to the Assembly of the Republic for consideration draft legislation on the subject of expulsion, with a view to improving Decree-Law No. 582/76 of 22 July

[34] The separation of young offenders from adults is also guaranteed by this Act (art. 12).

1976. This is contained in Bill No. 176/I, which has not yet been discussed [*document No. 41*].

13.5. Extradition has also been regulated. Decree-Law No. 437/75 of 16 August 1975 defined the new legal system governing this matter [*document No. 42*].

Extradition may not be granted, for example, in the case of a political crime, on grounds relating to the race, religion, nationality or political opinions of the person whose extradition is sought (art. 3 (*e*)), in the case of a military crime for which no provision is made in ordinary criminal law (art. 3 (*f*)), in the case of an application from an emergency court (art. 3 (*g*)) or when the person concerned will be subjected to a procedure lacking the necessary safeguards for his defence or will serve a sentence in inhuman conditions (art. 3 (*h*)).

Reference has been made above to the constitutional provisions on this subject. Decree-Law No. 437/75, although enacted before the adoption of the Constitution, fully respects these provisions (see, for example, arts. 4 and 26 *et seq.* of this Decree-Law).

13.6. Article 22 of the Constitution guarantees the right of asylum to aliens and stateless persons persecuted as a result of their activities in furtherance of democracy, social and national liberation, peace between peoples, or individual freedom and rights, and provides that the status of a political refugee shall be defined by law.

To this end, the second Constitutional Government submitted to the Assembly of the Republic draft legistion (Bill No. 173/I) [*document No. 43*], which endeavoured to define the formal conditions governing requests for asylum.

The Socialist Party later decided to submit Bill No. 184/I governing the right of asylum and refugee status [*document No. 44*] to the same Assembly.

The fourth Constitutional Government prepared Bill No. 235/I on the same subject [*document No. 45*].

Unfortunately, none of these texts has yet been discussed.

Article 14

14.1. The principle of the complete equality of citizens before the law has already been examined in connection with article 2 of the Covenant (cf. also Introduction, sect. VIII).

It is the responsibility of the courts, in administering justice, to ensure the defence of those rights and interests of citizens that are protected by law, to punish violations of democratic legality and to resolve conflicts of public and private interests. For this purpose, the courts are fully independent *vis-à-vis* the other sovereign organs and are subject only to the law (Constitution, arts. 206 and 208).

Article 6 of the Civil Code, in particular, states that the courts must not refrain from pronouncing judgement on the pretext of some obscurity in the law or insurmountable doubt concerning the facts in dispute. Moreover, the obligation to obey the law may not be evaded on the pretext that the content of the applicable provision of law is unjust or immoral.

14.2. On the subject of safeguards in criminal proceedings, article 32 of the Constitution states:

> 1. Criminal proceedings shall comprise all necessary safeguards for the defence.
>
> 2. Any person charged with an offence shall be presumed innocent until a conviction has acquired the force of *res judicata*.
>
> 3. The person charged shall have the right to be assisted by counsel at all stages of the proceedings. The cases in which such assistance shall be compulsory shall be specified by law.[35]
>
> 4. A judge shall have jurisdiction throughout every preliminary investigation, and the cases in which this investigation shall involve the hearing of both parties shall be specified by law.[36]
>
> 5. Criminal proceedings shall be accusatory in structure, and the trial shall be governed by the principle that both parties are to be heard.[37]
>
> 6. Any evidence obtained through torture, coercion, violation of the moral integrity or security of person of the individual, or wrongful interference in private life, the home, correspondence or telecommunications shall be null and void.[38]
>
> 7. No case shall be withdrawn from a court which has jurisdiction under existing law.[39]

14.3. The accusatory structure of criminal proceedings imposed by the Constitution implies the acceptance of a number of principles, which are outlined below.

(*a*) Responsibility for instituting proceedings does not devolve on the court which is to judge the offence. Under the terms of article 224, paragraph 1, of the Constitution, the Ministério Público, and not the judge, is competent to institute criminal proceedings.[40]

(*b*) It is the presumption that a charge may be brought which has the effect of initiating the trial of the case and the reaching of a decision.[41] The judge who is to deliver the sentence will not be acquainted with the material evidence in the case until later, so as to designate a day for the hearing (Code of Penal Procedure, art. 400).

This is the procedure followed for the most serious crimes. For other crimes,[42] which are tried by the correctional court at the request of the Parquet, the judge will not designate a day for the hearing until there is a presumption, based on the conclusions of the preliminary investigation, that there is sufficient evidence of the responsibility of the person charged (Code of Penal Procedure, art. 390, para. 2).

However, there can be no abrogation of the aforementioned principle, in view of article 2, para-

---

[35] See article 49 of Decree-Law No. 35007 of 13 October 1945 (referred to in the commentary on article 22 of the Code of Penal Procedure), and articles 22, 26, 70, 98, 253, 264 and 416 of the Code of Penal Procedure.

[36] See articles 159, 172 and 330 of the Code of Penal Procedure, and article 37 of Decree-Law No. 35007 (annexed thereto). See also article 327 of the Code of Penal Procedure, and articles 34, 35 and 36 of Decree-Law No. 35007.

[37] We will examine below the scope of the latter provision.

[38] See article 2, paragraph 1 (*a*), of Decree-Law No. 605/75 (text contained in Decree-Law No. 377/77, both instruments being annexed to the Code of Penal Procedure), and articles 178, 193, 203, 204, 208-210, 255, 261 and 306 of the Code of Penal Procedure.

[39] See article 3 of Decree-Law No. 377/77.

[40] See also article 1 of Decree-Law No. 605/75 (text contained in Decree-Law No. 377/77), article 5 of the Code of Penal Procedure, and article 1 of Decree-Law No. 35007.

[41] See articles 349, 353, 358 and 365 of the Code of Penal Procedure.

[42] See article 1 of Decree-Law No. 605/75 (text contained in Decree-Law No. 377/77), and articles 62 *et seq.* of the Code of Penal Procedure.

graph 1 (*b*), of Decree-Law No. 605/75 (version given in Decree-Law No. 377/77). Evidence is submitted only at court hearings (Code of Penal Procedure, art. 530).

(*c*) It is the charge which determines the subject of the proceedings and this in turn delimits the final decision.[43] In other words, the court may judge, in principle, only the facts alleged in the charge.

14.4. The principle that both parties are to be heard is set forth several times in the Code of Penal Procedure. Proclaimed in article 415 of that text, it occurs again in numerous provisions such as articles 417, 419, 422, 423, 429, 433, 435, 443, 465, 467, 468, 530, 533 and 534.

In any hearing, the defence always has the last word.

14.5. The hearing is conducted in accordance with the following principles:

(*a*) It shall be public—article 211 of the Constitution stipulates that court hearings shall be public, except when the court itself decides otherwise by means of a substantiated decision, in order to safeguard personal dignity and public morality or to ensure that it may function normally.[44] The sentence must, however, always be pronounced at a public hearing (Code of Penal Procedure, arts. 407, 449 and 534).

(*b*) Continuity—the deliberations may not be interrupted and must continue until the case has ended with a decision (Code of Penal Procedure, art. 414).

(*c*) Both parties shall be heard (see section 14.4 above).

(*d*) Mandatory presence of the accused and his counsel (Code of Penal Procedure, arts. 416, 417 and 418).[45]

(*e*) Evidence at the hearings shall be given orally (Code of Penal Procedure, arts. 460 and 530).

In addition, the Ministério Público makes its statements to the court, and the accused and his counsel present their case for the defence, orally (Code of Penal Procedure, arts. 467 and 533).[46]

14.6. Sentences pronounced may be annulled in the event of violation of the law by means of a high court appeal by the Ministério Público or by the injured party (Code of Penal Procedure, arts. 473, 525, 536, 645, 646, 647 and 667).

The accused also has the right to appeal against other court decisions (Code of Penal Procedure, arts. 336, 371 and 390, para. 2).

14.7. The law accords the accused further safeguards for his defence, in particular, the following rights:

(*a*) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;[47]

(*b*) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;[48]

(*c*) To be tried without undue delay (see above, under section 9.2);

(*d*) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed if he does not have legal assistance of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;[49]

(*e*) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;[50]

(*f*) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;[51]

(*g*) Not to be compelled to testify against himself or to confess guilt.[52]

14.8. Under article 29, paragraph 5, of the Constitution, no one may be tried more than once for the same offence.[53]

Article 21 provides that citizens unjustly convicted have the right to retrial and to compensation for the damage suffered, on conditions to be laid down by law.[54]

These are the general principles proclaimed in the Constitution on the subject of criminal proceedings. Legislators have endeavoured to give effect to these principles in the provisions of the Code of Penal Procedure examined above. There is every reason to believe, therefore, that the legal provisions which we have described fully comply with article 14 of the Covenant.

Article 15

Article 29 of the Constitution states:

1. No one shall be convicted under criminal law except by virtue of existing legislation making the action or omission punishable, and no one shall be subjected to a security measure involving deprivation of liberty for reasons that do not warrant such a measure under existing legislation.[55]

2. The foregoing paragraph shall not prevent the punishment, within the limits of municipal law, of an action or omission which, at the time it was committed, was regarded as criminal by virtue of the commonly accepted general principles of international law.

---

[43] See, in particular, articles 446, 447, 448 and 494 of the Code of Penal Procedure.

[44] See also article 407 of the Code of Penal Procedure.

[45] See article 98, paragraphs 4 and 8, of the Code of Penal Procedure.

[46] An exception to this principle is set out in article 532 of the Code of Penal Procedure.

[47] See articles 250, 253-262, 268, 290, 291 and 311 of the Code of Penal Procedure.

[48] See articles 254, 255, 261, 327, 335, 352, 363, 370, 371, 379, 380, 391, 404, 406, 415, 416, 423, 425 and 443 of the Code of Penal Procedure, and article 46 of Decree-Law No. 35007. See also article 49 of Decree-Law No. 35007, and articles 22, 25 and 26 of the Code of Penal Procedure.

[49] See the previous footnote and articles 416, 418 and 425 of the Code of Penal Procedure.

[50] See articles 222, 257, 258, 331, 360, 361, 381, 384, 393, 394, 422, 429, 433, 435, 443 and 465 of the Code of Penal Procedure.

[51] *Ibid.*, arts. 260 and 425.

[52] *Ibid.*, arts. 174, 254 and 425.

[53] *Ibid.*, arts. 148-154.

[54] *Ibid.*, arts. 673 *et seq.* and 690.

[55] See articles 1, 5, 15 and 18 of the Penal Code.

3. No sentences or security measures involving deprivation of liberty shall be applied that are not expressly provided for in existing legislation.[56]

4. No one shall be subjected to a sentence or security measure involving deprivation of liberty that is more severe than those provided for at the time the act was committed. Criminal laws more favourable to the offender shall apply retroactively.[57]

The above-mentioned rules in the Penal Code adequately reflect the concern which was felt by legislators about questions of this type even before the new Constitution had entered into force.

Article 16

Under article 66 of the Civil Code, recognition as a person before the law is acquired at the time of a complete and live birth and ceases only with death (Civil Code, art. 67).

Article 70 states that the law shall protect individuals against any unlawful attack or threat of attack on their security of person or their existence as a person.

All citizens are accordingly entitled to their legal personality, which must be accorded to them in all places.[58]

Article 17

17.1. Under article 33 of the Constitution:

1. Everyone shall have the right to his personal identity, to his good name and reputation, and to privacy in his personal and family life.

2. Effective safeguards against the wrongful use, or use contrary to human dignity, of information concerning persons and families shall be provided by law.

The rights relating to recognition as a person are protected under civil law even after death (Civil Code, arts. 70 and 71), in particular, the right to have a name (art. 72), the right to a good reputation (art. 79), and the right to privacy in his personal life (art. 80).

17.2. Article 34 of the Constitution states:

1. The individual's home and the privacy of his correspondence and other means of private communication shall be inviolable.[59]

2. A citizen's home shall not be entered against his will except by order of the competent judicial authority, and in the cases and in accordance with the forms laid down by law.[60]

3. No one shall enter the home of any person at night without his consent.[61]

4. Any interference by a public authority with correspondence or telecommunications, apart from in the cases laid down by law in connection with criminal procedure, shall be prohibited.[62]

Portuguese legislation provides that, according to the seriousness of the offence, the investigation may be of a preliminary or preparatory nature.

The preliminary investigation procedure was established under Decree-Law No. 605/75 of 3 November 1975 and subsequently modified under Decree-Law No. 377/77 of 6 September 1977.[63] It is initiated only when the offence is punishable by a penalty provided for in article 56 and article 57, paragraphs 2 and 3, of the Penal Code, unless the accused has been arrested (Penal Code, art. 1, para. 2) and, in that capacity, interrogated by the judge.

A preparatory investigation is conducted in all other cases (art. 1, para. 3).

The preliminary investigation is conducted by the Ministério Público, which must, however, request permission from the examining judge in order to carry out searches, seizures, post-mortems, inspections or examinations which may offend the sense of decency of the person under investigation (art. 2, para. 1 (*a*)).

The preparatory investigation is always conducted by the examining judge, as required by article 32, paragraph 4, of the Constitution.

Thus, only the examining judge may order that a citizen's home should be entered.

17.3. Under article 32, paragraph 6, of the Constitution, any evidence obtained through torture, coercion, violation of security of person or moral integrity, individual or wrongful interference in private life, the home, correspondence or telecommunications is null and void.

It may not therefore be considered by the court, nullity (Code of Penal Procedure, art. 98, para. 1), or at any rate a procedural irregularity (*ibid.*, art. 100), being involved.

17.4. The Penal Code contains provisions, in title IV (Crimes against persons), chapter V (crimes against honour), concerning defamation (art. 407), slander and libel (art. 409) and abuse (art. 410).

Furthermore, the Press Act (Decree-Law No. 85-C/75 of 26 February 1975, amended by Decree-Law No. 181/76 of 9 March 1976 and Act No. 13/78 of 21 March 1978)[64] defines civil and criminal responsibility arising from unlawful acts committed through the medium of the press or any other means of publication (see, for instance, arts. 24 *et seq.* of Decree-Law No. 85-C/75). This declaration of responsibility is aimed at preventing any infringement of the legal rights protected by law, in particular, the rights relating to recognition as a person.

Article 18

18.1. Article 41 of the Constitution deals with the problem of freedom of conscience, religion and worship. It stipulates:

1. Freedom of conscience, religion and worship shall be inviolable.

2. No one shall be persecuted, deprived of rights or exempted from civil obligations or duties because of his convictions or religious practices.

3. The churches and religious communities shall be separate from the State and shall be free to organize and exercise their own ceremonies and worship.

[56] See articles 54, 85 and 115 of the Penal Code. See also article 30 of the Constitution concerning limits on sentences and security measures.

[57] See article 6 of the Penal Code.

[58] See article 30 of the Constitution and articles 122 *et seq.* of the Civil Code concerning juridical incapacity provided for by law.

[59] See articles 75-78 of the Civil Code.

[60] See article 294 of the Penal Code.

[61] See article 204 of the Code of Penal Procedure.

[62] See articles 208 *et seq.* of the Code of Penal Procedure, in particular article 210. However, such action may be ordered only in exceptional cases (art. 210, para. 2).

[63] These two texts are annexed to the Code of Penal Procedure.

[64] This Decree-Law is annexed to the Penal Code, in the commentary on article 407 of that Code [*documents Nos. 48-I, II and III*].

4. The freedom to teach any religion within its own denomination and the use of its own means of public information for the pursuit of its activities shall be safeguarded.

5. The right of conscientious objection shall be recognized, conscientious objectors being required to perform civilian service for a period identical with that of compulsory military service.

In addition, article 43 of the Constitution states:

1. The freedom to learn and teach shall be safeguarded.

2. The State shall not arrogate to itself the right to plan education and culture in accordance with any philosophical, aesthetic, political, ideological or religious guidelines.

3. Public education shall not be denominational.

18.2. Act No. 4/71 of 21 August 1971 [*document No. 46*], which promulgated the basis for religious freedom, is still partly in force.[65] It also affirms the separation of the State and the various religious faiths (art. II, para. 1), the equality of treatment of the latter (art. II, para. 2), the freedom to have or to adopt a religion or a belief of one's choice (art. III (*a*)), and the freedom to manifest one's religion or belief (art. III (*b*)), both in public and in private, through worship and the performance of rites, practices and education (art. III (*c*) and (*d*)).

No one shall be obliged to declare whether or not he has a religion or to reveal the religion which he professes (art. IV, para. 1). No one may be persecuted, deprived of or exempted from a duty by reason of his religious beliefs, which may never justify discrimination in access to public posts (art. IV, para. 2).

The freedom of assembly for the joint practice of worship and the performance of rites is assured (art. V).

Chapter III (régime relating to religious faiths) of Act No. 4/71 concerning recognition of their juridical personality has, however, been abrogated by Decree-Law No. 594/74 of 7 November 1974, which will be considered in connection with article 22 of the Covenant.

18.3. In the light of article 43, paragraph 3, of the Constitution, there is no doubt that article VII of Act No. 4/71 has been abrogated by the entry into force of the new Constitution.

As a result, the freedom of parents[66] to ensure that their children receive a religious and moral education in keeping with their own beliefs can be fully respected.

For this purpose article 1878 of the Civil Code provides that it is the responsibility of the father and mother to direct the education of their children. Furthermore, article 1885 of the Code states that it is the responsibility of the father and mother to promote the physical, intellectual and moral development of their children. With regard to religious education, however, the father and mother may take decisions only with regard to their children aged under 16 years (Civil Code, art. 1886).

18.4. The Constitution also confirms the freedom of cultural creation. Article 42 reads:

1. Intellectual, artistic and scientific creation shall be unrestricted.

2. This freedom shall include the right to invention, production and dissemination of scientific, literary or artistic works, including legal protection of copyright.

As an important manifestation of the right to freedom of thought, intellectual creation is now protected by Decree-Law No. 46980 of 27 April 1966, known as the Copyright Code [*document No. 47*].

Article 19

19.1. The Constitution also guarantees freedom of expression and information. In this connection article 37 states:

1. Everyone shall have the right to express and make known his thoughts freely by words, images or any other means, and to obtain information without hindrance or discrimination.[67]

2. The exercise of these rights shall not be prevented or restricted by any type or form of censorship.[68]

3. Offences committed in the exercise of these rights shall be punishable under ordinary law, the courts of law having jurisdiction to try them.[69]

4. The right of reply shall be equally and effectively guaranteed to all natural and juridical persons.[70]

However, the authors of the Constitution went further, knowing that there could never be real freedom of expression and information without the simultaneous affirmation of freedom of the press. Article 38 of the Constitution states:

1. Freedom of the press shall be safeguarded.[71]

2. Freedom of the press shall involve freedom of expression and creation for journalists and literary contributors and a place for the former in giving ideological orientation to information organs not belonging to the State or to political parties, without any other group or category of workers having power to exercise censorship or prevent free creativity.[72]

3. Freedom of the press shall involve the right to found newspapers and any other publications without prior administrative authority, deposit or qualification.[73]

4. Periodicals and non-periodical publications may belong to any non-profit-making bodies corporate, journalistic enterprises and publishing houses in company form or natural persons of Portuguese nationality.[74]

5. No administrative or fiscal system, credit policy or foreign trade policy shall affect the freedom of the press, directly or indirectly, and the means necessary to protect the independence of the press against political and economic powers shall be safeguarded by law.[75]

6. Television shall not be privately owned.

7. The public information media, in particular those belonging to the State, shall be regulated by law through an information statute.

19.2. The authors of the Constitution sought to guarantee the independence of the press against political and economic power. That was the reasoning behind article 39 of the Constitution, which reads:

1. Public information media belonging to the State or to bodies directly or indirectly subject to its economic control shall be used in such a way as to safeguard their independence of the Government and public administrative authorities.[76]

---

[65] See article 293, paragraph 1, of the Constitution.

[66] See article 124 of the Civil Code concerning guardians.

[67] See article 1, concerning the right of information of Decree-Law No. 85-C/75, of 26 February 1975 (Press Act), which is referred to in the commentary on article 407 of the Penal Code.

[68] See article 4 of the Press Act.

[69] See article 36 of the Press Act and, earlier in the text, the analysis of article 17 of the Covenant.

[70] See Press Act, arts. 16, 53 and 54.

[71] *Ibid.*, arts. 4, 5, 6, 8, para. 2, and 71.

[72] *Ibid.*, arts. 22 and 23.

[73] *Ibid.*, art. 7.

[74] *Ibid.*

[75] See Press Act, arts. 8 and 9.

[76] *Ibid.*

2. The possibility of expressing and confronting the various currents of opinion in the public information media referred to in the foregoing paragraph shall be safeguarded.[77]

3. In the public information media referred to in this article there shall be established information councils comprising proportionate numbers of representatives appointed by those political parties that hold seats in the Assembly of the Republic.[78]

4. The information councils shall have powers to secure a general orientation in keeping with ideological plurality.[79]

19.3. Earlier in this report emphasis has already been placed on the protection which the law establishes for the rights relating to recognition as a person, particularly the right to honour and to a good name (see sect. 17.4 above).

Apart from the provision relating to crimes against honour in the Penal Code, the law sought to limit the freedom of the press in view of its influence and nature and in order to prevent abuses or even interference in the private life of citizens.

Article 4 of the Press Act affirms in this connection:

1. Freedom to express thought through the press shall be exercised without any subordination to any form of prior censorship, authorization, deposit or qualification.

2. Restrictions on the freedom of the press shall be imposed solely on the basis of the provisions of this Act and those imposed by general and military legislation with a view to safeguarding the moral integrity of citizens, guaranteeing the objectivity and truth of information, and defending the public interest and the democratic order.

3. The discussion and criticism of political, social and religious doctrines, the laws and acts of the sovereign organs and the public administration, and the conduct of its agents shall be lawful if undertaken in accordance with the present Act.

That was the reason underlying the drafting of articles 24-36 (chap. III—Forms of responsibility) of the Press Act. Besides civil liability, provision was made for criminal liability in the case of offences involving abuse of freedom of the press.

Nevertheless, it is always for the courts to establish whether an offence has been committed and to determine the appropriate penalties (see Press Act, arts. 36 *et seq.*).

19.4. Freedom of expression also comprises the right to express one's political convictions. Criticism is always salutary in democracy, and no one should be harassed on account of his opinions.[80]

In this connection the Constitution establishes the right of opposition.[81] In accordance with article 117, paragraph 2: "Minorities shall have the right of democratic opposition in conditions laid down by the Constitution".

Act No. 59/77 of 5 August 1977 [*document No. 50*] defines the scope of this right. Embodying the new Statute concerning the right of opposition, this Act provides *inter alia*, for the following rights: the right to information (art. 3), the right to participation (art. 4), the right to prior consultation (art. 5), the right of legislative collaboration (art. 6), the right to testimony (art. 7), the rights of broadcasting, reply and control of the information media belonging, directly or indirectly, to the State (art. 8).

Article 20

20.1. Article 148 of the Penal Code establishes the crime of incitement to war and of exposing Portuguese citizens to reprisals.

In addition, the new draft penal code, in its special part (title II), provides for crimes against peace and humanity (arts. 192-197):

These include incitement to war (art. 192), the inducement of members of the Portuguese armed forces to commit unlawful acts against foreign countries (art. 193), the recruitment of mercenaries (art. 194), genocide (art. 195), and war crimes against civilians, wounded and sick persons, and prisoners of war (art. 196).

Decree-Law No. 234-A/76 of 2 April 1976 [*document No. 51*] further stipulates that the political parties and their members shall be immediately punished with suspension of their right to access to television and radio for the dissemination of electoral propaganda if they use, during election campaigns and in the exercise of this right, expressions or images which may constitute the crime of defamation, slander, libel or insults, contempt of the democratic institutions and their legitimate representatives, appeals for disorder or insurrection, incitement to hatred, violence or war, or appeals which may endanger public order, social security or democratic normality.

20.2. The Penal Code punishes incitement or instigation to commit a crime against the security of the State (art. 171), incitement or instigation to collective disobedience (art. 174),[82] sedition (art. 179) and riotous assembly (art. 180).

It is therefore difficult for incitement to hostility or violence to remain unpunished. Moreover, an appeal to national, racial or religious hatred always comprises an attack on the established democratic and constitutional legality, and will involve one of the acts declared punishable by the Penal Code.[83]

It should be borne in mind that Portugal bases its international relations on the principle of the peaceful settlement of international disputes and that it supports general, simultaneous and controlled disarmament, the dissolution of political and military blocs, and the establishment of a system of collective security with a view to instituting an international order capable of ensuring peace and justice in relations among peoples (see Constitution, art. 8).

Article 46, paragraph 1, of the Constitution states: "Citizens shall have the right to form associations freely and without requiring any authorization provided that such associations are not intended to promote violence and that their objectives are not contrary to the criminal law".

[77] See Press Act, art. 7.

[78] See Act No. 78/77 of 25 October 1977 [*document No. 49*], arts. 1 and 2.

[79] See, in particular, articles 4, 5, 7 and 9 of Act No. 78/77, which created the information councils and defined their structure and competence.

[80] See section 21.1 below (analysis of article 45 of the Constitution).

[81] See also articles 2, 47, 48 and 290 (i) of the Constitution.

[82] See in particular paragraph 4 of this article: "Any person advocating political struggle through violence or hatred shall be punished".

[83] In particular in the light of provisions such as that contained in article 41, paragraph 2, of the Constitution.

Article 21

21.1. Article 45 of the Constitution establishes the right of assembly and the right to demonstrate:

1. Citizens shall have the right to meet peacefully and without arms, even in public places, without requiring any authorization.

2. The right of all citizens to demonstrate shall be recognized.

Decree-Law No. 406/74 of 29 August 1974 [*document No. 52*], prepared by one of the first Provisional Governments, contains the new provisions concerning the right of assembly.

Article 1 of this text guarantees to all citizens the free exercise, without need for authorization, of the right of peaceful assembly in places that are public, open to the public or private, for purposes not contrary to the law, morality, the rights of physical and juridical persons, or public order and peace.

Nevertheless, two days' notice must be given by the organizers of assemblies to the prefect (Civil Governor) or mayor (President of the Chamber) (art. 2).

The authorities may interrupt meetings, assemblies, demonstrations or marches in places that are public or open to the public only by reason of acts which are contrary to the law or morality or which seriously and effectively disturb public order and peace or the free exercise of individual rights (art. 5).

The authorities shall take all necessary measures to prevent any interference through counter-demonstrations (art. 7).

No agent of the authorities may be present at meetings taking place in closed premises unless a prior application has been submitted by the organizers for this purpose (art. 10).

Appeals may be lodged against decisions by the authorities contravening the provisions of this instrument (art. 14). It is for the courts to decide whether an appeal is justified.

Article 15 establishes the penalties applicable to persons who contravene these provisions. Any authority which illegally prevents, or seeks to prevent, the free exercise of the right of assembly will be liable to the penalty provided for in article 291 of the Penal Code (abuse of authority), irrespective of disciplinary responsibility.

Counter-demonstrators will be liable to the penalty provided for in article 329 of the Penal Code (physical coercion).

The organizers of demonstrations, meetings, assemblies or marches which contravene the provisions of this text are guilty of the crime of aggravated disobedience (Penal Code, art. 188).

Article 22

22.1. Provision is made for freedom of association in article 46 of the Constitution:

1. Citizens shall have the right to form associations freely and without any authorization provided that such associations are not intended to promote violence and that their objectives are not contrary to the criminal law.[84]

2. Associations may pursue their objectives freely without interference by any public authority. They shall not be dissolved by the State and their activities shall not be suspended except by judicial decision in the cases provided for by law.[85]

3. No one shall be obliged to join an association or forced by any means to remain in an association.[86]

4. Armed, military-type, militarized or para-military associations outside the aegis of the State and the armed forces, and organizations which adopt fascist idealogy shall be prohibited.[87]

Freedom of association had already been regulated by Decree-Law No. 594/74 of 7 November 1974, which was prepared by one of the first Constitutional Governments. It is still in force (see Constitution, art. 293, para. 1), since it is entirely in keeping with the Constitution.

22.2. Freedom of association also includes the right to establish, or become a member of, political parties. On this subject, the Constitution states (art. 47):

1. Freedom of association shall include the right to establish or join political associations or parties and through them to contribute in a democratic manner to formation of the will of the people and to the organization of political power.[88]

2. No one may be a member of more than one political party simultaneously or be deprived of exercise of any right because of membership, or cessation of membership, of a lawfully constituted party.[89]

3. Without prejudice to the philosophy of ideology underlying their programme, political parties shall not use names that contain terms directly related to religion or Church or use emblems that may be mistaken for national or religious symbols.

Political parties were also the subject of legislation under one of the first Constitutional Governments. Decree-Law No. 595/74 defined the principles governing their activities.

This instrument recognizes such parties as having legal personality and capacity (art. 1, paras. 2 and 6), and no prior authorization is required to establish them (art. 5, para. 1). It nevertheless requires a membership of at least 5,000 citizens for registration with the Supreme Court of Justice (art. 5, paras. 2 and 3).

Political parties must observe the principles relating to democracy (art. 7), propaganda (art. 8), direct association (art. 15) and single membership (art. 16). They may be dissolved only by judicial decision (art. 21), under the conditions set out in that article.

22.3. The Constitution also establishes trade union freedom (art. 57):

[84] See articles 158 and 167 of the Civil Code and articles 1, 3, 4 and 6, paragraph 2 (*d*) and (*e*), of Decree-Law No. 594/74 of 7 November 1974 [*document No. 53-I*] containing the new provisions on the right to freedom of association.

[85] See article 6 of Decree-Law No. 594/74 and articles 158-A and 182 of the Civil Code.

[86] See article 2 of Decree-Law No. 594/74.

[87] See article 3 of Decree-Law No. 594/74 and articles 274 and 275 of the Constitution.

[88] See articles 3, paragraph 3, 40, 117, 154, 190, 246 and 290 (i) of the Constitution, and article 2 of Decree-Law No. 595/74 of 7 November 1974 [*document No. 53-II*].

[89] See article 270, paragraph 2, of the Constitution and article 16 of Decree-Law No. 595/74.

1. Workers shall enjoy freedom to form trade unions, the condition and safeguard for establishing their unity in the defence of their rights and interests.[90]

2. In the exercise of trade union freedom, workers are expressly guaranteed the following without discrimination:

(*a*) Freedom to establish trade union associations at all levels;[91]

(*b*) Freedom of membership, no worker being required to pay dues to a union of which he is not a member;[92]

(*c*) Freedom in the organization and internal regulation of trade union associations;[93]

(*d*) The right to engage in trade union activity within an enterprise.[94]

3. Trade union associations shall be governed by the principles of democratic organization and management, based on the regular election of governing bodies by secret ballot, which shall not require any authorization or ratification, and on the active participation of the workers in all aspects of trade union activity.[95]

4. Trade union associations shall be independent of employers, the State, religious faiths, political parties and other political associations. The law shall define the safeguards of this independence, which is the basis of working class unity.[96]

5. In order to ensure unity and dialogue among the various currents of opinion which may exist in trade unions, workers are guaranteed the right to express different views within trade unions in the cases and forms laid down in the statutes.

6. Trade union associations have the right to establish relations with, and join, international trade union organizations.

22.4. By Act No. 45/77 of 7 July 1977 [*document No. 56*] Portugal stated its intention of ratifying Convention No. 87 of the International Labour Organisation concerning trade union freedom. Since the Convention has been approved for ratification, this Act sets out the necessary conditions for its future entry into force at the domestic level (see Constitution, art. 8).

Article 23

23.1. The right of the family has recently been revised considerably by Decree-Law No. 496/77 of 25 November 1977, which brought civil legislation into line with the new constitutional provisions (see Constitution, art. 293, para. 3).

An attempt has been made to describe most of the amendments made in the report on articles 10-12 of the International Covenant on Economic, Social and Cultural Rights.

A copy of the first draft report prepared by the Ministry of Justice is therefore annexed to the present report [*document No. 57*]. It deals basically with the right of the family and the right of minors, except with regard to the dissolution of marriage, which will be discussed subsequently.

23.2. The Constitution covers family matters, marriage and filiation in article 36:

1. Everyone shall have the right to found a family and to marry on terms of complete equality.

2. The conditions for, and effects of, marriage and its dissolution, through death or divorce, shall be determined by law, without regard to the form of solemnization.

3. Spouses shall have equal rights and duties with regard to civil and political capacity, and the maintenance and education of their children.

4. Children born out of wedlock shall not for that reason be subjected to any discrimination; discriminatory designations of filiation shall not be used by the law or by government departments.

5. Parents shall have the right and duty to bring up their children.

6. Children shall not be separated from their parents unless the latter fail to perform their fundamental duties towards them, and then only by judicial decision.

The right of filiation is examined in detail in the study "Filiation in the reform of the Portuguese Civil Code of 25 November 1977", published in the *Bulletin of the Ministry of Justice*, No. 285. We shall therefore refrain from making a further analysis of the subject, which would be superfluous since a copy of this study is appended to the present report [*document No. 58*].

23.3. Some of the amendments introduced into civil law as a result of the new constitutional provisions naturally concern the effects of marriage on the persons and property of the spouses (see Civil Code, book IV, chap. IX, title II, arts. 1671 *et seq.*).

Article 1671 of the Civil Code, for example, states that marriage is founded on the equal rights and duties of the spouses and that the management of the family is their joint responsibility.

Spouses are joined by the duties of respect, fidelity, cohabitation, co-operation and assistance (arts. 1672 *et seq.*). They must both fulfil the responsibilities of family life according to their respective possibilities, in particular through the allocation of their resources to these responsibilities, work in the home or the maintenance and education of their children (art. 1676).

Each spouse keeps his or her surname, but he or she may add the surnames of the other spouse, up to a maximum of two surnames (art. 1677).

Each spouse may pursue an occupation or activity without the consent of the other (art. 1677-D).

Each spouse manages his or her own property (art. 1678).[97]

Each spouse may lawfully contract debts without the consent of the other spouse (art. 1690).

As can be seen, the law has established a régime of full equality between the spouses during marriage.

Let us now turn to the law-maker's views of separation or the dissolution of marriage.

23.4. Either spouse may apply for the simple legal separation of property if he or she is in danger of losing his or her possessions owing to improper management by the other spouse (art. 1767).

[90] The exercise of trade union freedom was regulated by Decree-Law No. 215-B/75 of 30 April 1975 [*document No. 54-I*], as amended by Decree-Laws Nos. 773/76 of 27 October [*document No. 55-II*] and 841-B/76 of 7 December 1976 [*document No. 54-III*]. Employers' associations were regulated by Decree-Law No. 215-C/75 of 30 April 1975 [*document No. 55*].

[91] See Decree-Law No. 215-B/75, arts. 3, 4 and 10.

[92] See Decree-Law No. 215-B/75, arts. 16 and 21, and the final article in the text contained in Decree-Law No. 841-B/76.

[93] See Decree-Law No. 215-B/75, arts. 13 and 17.

[94] See Constitution, arts. 55 and 56, and Decree-Law No. 215-B/75, arts. 25 *et seq.*

[95] See Decree-Law No. 215-B/75, arts. 13 and 17.

[96] *Ibid.*, art. 6.

[97] The joint possessions of the married couple are in the ordinary way, managed jointly by both of them. Other forms of management cannot be undertaken without the consent of both spouses (Civil Code, art. 1678, para. 3).

The provisions concerning divorce are applicable, *mutatis mutandis*, to the legal separation of persons and property (art. 1794).

Divorce (arts. 1773 *et seq.*) may be applied for simultaneously by both spouses (divorce by mutual consent) or by one of them against the other (divorce by enforced consent) (art. 1773).

In the former case (arts. 1775 *et seq.*), the spouses must have been married for over three years (art. 1775, para. 1). They are not required to reveal the reasons for divorce but they must agree on maintenance, if needed by one of the spouses, on the exercise of parental authority with regard to their minor children, on what is to be done with the family home (art. 1775, para. 2).

A contested divorce can be applied for only if the other spouse is guilty of culpable neglect of his or her conjugal duties and such neglect, by reason of its seriousness or frequency, makes life together impossible. However, the court must take into account any blame which may be attributable to the party requesting the divorce and the degree of education and moral sensibility of the spouses (art. 1779).

A contested divorce may also be applied for on the following grounds (art. 1781):

(*a*) Actual separation for more than six consecutive years (see art. 1782);

(*b*) Absence of the other spouse, without any word, for more than four years (see art. 1783);

(*c*) Deterioration in the mental faculties of the other spouse lasting for more than six years and of a sufficiently serious nature to make life together impossible (see art. 1784).

It is felt that the provisions mentioned above adequately reflect the legislative authorities' respect for the complete equality of the spouses. Even in the case of separation or dissolution of marriage, this principle is respected.

Article 24

24.1. An account of the measures guaranteed by the law for the protection of children was given in the report concerning the International Covenant on Economic, Social and Cultural Rights annexed to this report [*document No. 57*].

The next point to be considered is therefore the national law concerning the right to a name.

Article 72 of the Civil Code establishes the right to a name and stipulates that a person has the right to use his name and to take action to prevent anyone else using it unlawfully.

Article 1875 of the Code states that a child must use the surnames of the father and the mother or one of them alone.

The Civil Registration Code [*document No. 60*] in turn affirms that the registration of birth and filiation is compulsory (arts. 1 and 2). Births must be announced within 30 days, by the father or mother for example, under penalty of prosecution (arts. 117, 118 and 119).[98]

The law thus guarantees the right of a child to a name, and where necessary the possibility of legal action to determine maternity or paternity.

24.2. The Constitution also provides for the right to nationality.[99] Article 4 states: "All persons are Portuguese citizens who are considered as such by law or under an international convention."

Act No. 2098 of 29 July 1959 [*document No. 61*], which is still partly in force, contains the provisions on this subject. Article I states that all persons born in Portuguese territory are Portuguese nationals if they are:

(*a*) Children of a Portuguese father;

(*b*) Children of a Portuguese mother and an unknown father who is stateless or of unknown nationality;

(*c*) Children of unknown parents who are stateless or of unknown nationality;

(*d*) Children of an alien father, unless he is in the service of the State of which he is a national;

(*e*) Children of an alien mother, unless the mother is in the same position as that referred to in the preceding paragraph, and of an unknown father who is stateless or of unknown nationality.

In addition, all children born in foreign territory of a Portuguese father or mother, if he or she is in the service of the Portuguese State, are Portuguese (art. II).

The law therefore places no restriction on the right of every child born in Portugal or born of Portuguese parents to possess Portuguese nationality.

Article 25

25.1. Article 48 of the Constitution states:

1. All citizens shall have the right to take part in political life and the control of the country's public affairs, either directly or through freely elected representatives.[100]

2. There shall be universal, secret and equal suffrage for all citizens over the age of 18 years, subject to incapacities as provided for in general law. Its exercise shall be personal and constitute a civil duty.[101]

3. Every citizen shall have the right to objective information about the acts of the State and other public bodies and to be informed by the Government and other authorities of the management of public affairs.

4. Every citizen shall have the right of access to public office in equal and free conditions.[102]

Furthermore, in accordance with article 112 of the Constitution, "The direct and active participation of citizens in political life is a condition and a fundamental instrument for consolidation of the democratic system."

25.2. The general principles of electoral law are set out in article 116 of the Constitution:

[98] See articles 1803 *et seq.* and 1826 *et seq.* of the Civil Code.

[99] Cf. article 30, paragraph 4, of the Constitution.

[100] See articles 1-3, 47, 111, 112, 216, 246 and 308 of the Constitution.

[101] See article 116 of the Constitution and articles 1-7 and 79 *et seq.* of Act No. 14/79 (below, in the text).

[102] See, however, article 308 of the Constitution.

1. Direct, secret and regular elections shall be the general rule in appointing the members of the elected sovereign organs, the autonomous regions and the local authorities.[103]

2. The registration of electors shall be compulsory . . . There shall be a single registration system for all elections by direct universal suffrage.[104]

3. Election campaigns shall be governed by the following principles:

(*a*) Freedom of propaganda;[105]

(*b*) Equality of opportunity and treatment for the various candidates;[106]

(*c*) Impartiality towards candidates on the part of public authorities;[107]

(*d*) Supervision of vote-counting.[108]

4. Citizens shall have the duty to collaborate with the elections administration in the form laid down by the law.

5. Votes cast shall be converted into effective suffrages in accordance with the principle of proportional representation.[109]

6. The courts shall be competent to judge the validity of electoral acts.[110]

Article 26

The principles of the law in this sphere have already been considered in this report (Introduction, sect. VIII, analyses of articles 2, 3, 14, 18, 20 and 24 of the Covenant).

The Constitution guarantees full equality of citizens before the law and prohibits any discrimination, in particular as regards sex, ancestry, race, language, place of origin, religion, political or ideological beliefs, education, economic situation or social status (see Constitution, art. 13).

The legislative authority has sought to guarantee everyone equal and effective protection against any attempt at discrimination (*ibid.*, arts. 18 and 20). Any person may appeal to the courts for the defence of his rights; he may not be refused justice for lack of means.

The decisions of the courts are, moreover, binding on all public and private bodies and prevail over those of any other authority (*ibid.*, art. 210).

These are clear indications of the legislative authority's observance of article 26 of the Covenant.

Article 27

There are in Portugal virtually no ethnic minorities, except perhaps the Gypsy population, which is almost fully assimilated into the community.

There are, however, religious minorities, comprising the Jewish, Muslim, Protestant and many other communities, but their right to worship and practice their own religion is fully recognized, as has already been pointed out in connection with article 18 of the Covenant (see also Constitution, art. 41).

As regards linguistic minorities, perhaps the only identifiable case is a dialect of the north-eastern part of the country, Mirandês, which the State is endeavouring to preserve on account of its ancient and mysterious origin. In this purpose, however, it is merely abiding by the principle set out in article 78 of the Constitution: "The State shall preserve, defend and enhance the cultural heritage of the Portuguese people".

[103] The electoral régime for the autonomous bodies is regulated by Decree-Law No. 701-B/76 of 29 September 1976 (amended by Decree-Laws Nos. 757/76 of 21 October, 765-A/76 of 22 October, 778-D/76 of 27 October, 778-E/76 of 27 October and 841-A/76 of 7 December 1976). The electoral law for the Assembly of the Republic was approved by Act. No. 14/79 of 16 May 1979 [*documents Nos. 62-I and II*].

[104] The law on electoral registration was set out in Act No. 69/78 of 3 November 1978 (amended by Act No. 72/78 of 28 December 1978 and Act No. 4/79 of 10 January 1979) [*document No. 63*]. See articles 2-5 of Act No. 69/78.

[105] See article 54 of Act No. 14/79.

[106] Act No. 71/78 of 27 December 1978 [*document No. 64*] set up the National Election Commission, an independent body under the Assembly of the Republic. The terms of reference of the Commission are set out in article 5 of this Act. See Act No. 71/78, art. 5, para. 1 (*d*), and Act No. 14/79, arts. 56 *et seq.*

[107] See Act No. 14/79, art. 57.

[108] See Act No. 71/78, art. 5, para. 1 (*h*).

[109] See Act No. 14/79, art. 16.

[110] *Ibid.*, art. 118.

ANNEX[a]

Document No.

1. Act No. 1/74 of 25 April 1974
2. Decree-Law No. 171/74 of 25 April 1974
3. Decree-Law No. 173/74 of 26 April 1974
4. Decree-Law No. 174/74 of 27 April 1974
5. Decree-Law No. 192/74 of 7 May 1974
6. Decree-Law No. 175/74 of 27 April 1974
7. Act No. 2/74 of 14 May 1974

8-I. Act No. 3/74 of 14 May 1974

8-II. Act No. 7/74 of 27 July 1974

9. Act No. 5/75 of 14 March 1975
10. Platform of constitutional understanding
11. Constitution of the Portuguese Republic, 1976*

[a] Documents Nos. 1-67 transmitted with the present report are kept in the files of the Secretariat; except where otherwise indicated, the documents are in Portuguese.

* In English.

Document No.

12. Report on the conclusions of the Fifth Congress on the prevention of crime and the treatment of offenders**
13. Act No. 29/78 of 12 June 1978
14. Civil Code
15. Penal Code
16. New draft penal code (general and special parts)
17. Decree-Law No. 74/75 of 21 February 1975
18. Decree-Law No. 48051 of 21 November 1967
19. Decree-Law No. 191-D/79 of 25 June 1979
20. Bill No. 248/I
21. Decree-Law No. 256-A/77 of 17 June 1977
22. Act No. 81/77 of 22 November 1977
23. Act No. 65/78 of 13 October 1978
24. Decree-Law No. 251/74 of 12 June 1974
25. Decree-Law No. 266/74 of 21 June 1974
26. Draft decree-law on non-discrimination in employment
27. Decree-Law No. 474/76 of 16 June 1976

28-A. Act No. 2084 of 16 August 1956

28-B. Bill No. 243/I

29. Decree-Law No. 141/77 of 9 April 1977 (Code of Military Justice)
30. Military service bill
31. Draft legislation concerning conscientious objection

32-I. Decree-Law No. 637/74 of 20 November 1974

32-II. Decree-Law No. 23-A/79 of 14 February 1979

33-I. Decree-Law No. 78/75 of 22 February 1975

33-II. Decree-Law No. 63/79 of 30 March 1979

34. Decree-Law No. 553/76 of 13 July 1976
35. Questionnaire concerning the history of the abolition of the death penalty in Portugal, submitted to the European Committee on Crime Problems**

36-I. Decree-Law No. 40651 of 21 June 1956

36-II. Decree-Law No. 282/77 of 5 July 1977—Code of Medical Practice

36-III. Decree-Law No. 553/76 of 13 July 1976

37-I. Decree-Law No. 265/79 of 1 August 1979

37-II. Information on the Portuguese prison system submitted to the French Centre for Comparative Law**

37-III. Draft legislation applicable to young offenders

38. Bill No. 175/I, containing regulations governing aliens entering or leaving the country

39-I. Decree-Law No. 494-A/76 of 23 June 1976

39-II. Decree-Law No. 377/78 of 4 December 1978 (Aliens Service)

40. Decree-Law No. 582/76 of 22 July 1976
41. Bill No. 176/I
42. Decree-Law No. 437/75 of 16 August 1975, annexed to the Code of Penal Procedure
43. Bill No. 173/I
44. Bill No. 184/I
45. Bill No. 235/I
46. Act No. 4/71 of 21 August 1971
47. Decree-Law No. 46980 of 27 April 1966

48-I. Decree-Law No. 85-C/75
48-II. Decree-Law No. 181/76 of 9 March 1976
48-III. Act No. 13/78 of 21 March 1978

} Annexed to the Penal Code in the commentary on article 407

49. Act No. 78/77 of 25 October 1977
50. Act No. 59/77 of 5 August 1977
51. Decree-Law No. 234-A/76 of 2 April 1976
52. Decree-Law No. 406/74 of 29 August 1974

53-I. Decree-Law No. 594/74 of 7 November 1974

53-II. Decree-Law No. 595/74 of 7 November 1974

54-I. Decree-Law No. 215-B/75 of 30 April 1975

54-II. Decree-Law No. 773/76 of 27 October 1976

54-III. Decree-Law No. 841-B/76 of 7 December 1976

55. Decree-Law No. 215-C/75 of 30 April 1975
56. Act No. 45/77 of 7 July 1977

** In French.

Document No.

57. Excerpt from the report concerning the International Covenant on Economic, Social and Cultural Rights**
58. "Filiation in the reform of the Portuguese Civil Code of 25 November 1977" (*Bulletin of the Ministry of Justice*, No. 285)**
59. Decree-Law No. 496/77 of 25 November 1977 containing new provisions concerning the Civil Code**
60. Civil Registration Code
61. Act No. 2098 of 29 July 1959
62-I. Decree-Laws Nos. 701-B/76 of 28 September, 757/76 of 21 October, 765-A/76 of 22 October, 778-D/76 of 27 October, 778-E/76 of 27 October and 841-A/76 of 7 December 1976
62-II. Act No. 14/79 of 16 May 1979
63. Act No. 69/78 of 3 November 1978 (Acts Nos. 72/78 of 28 December 1978 and 4/79 of 10 January 1979)
64. Act No. 71/78 of 27 December 1978
65. Decree-Laws Nos. 503-F/76 of 30 June and 731/76 of 15 October 1976
66. Code of Penal Procedure
67. Act No. 85/77 of 13 December 1977