# THE IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE LEGAL AND POLITICAL SYSTEMS OF MEMBER STATES OVER THE PERIOD 1953-1998 - PORTUGAL

*João Madureira*
*Gabinete de Documentação e Direito Comparado*

## A. INTRODUCTION

1. Six months after the approval of its democratic Constitution, Portugal signed, in 22 November 1976, the European Convention on Human Rights, the same day it was admitted as a new member state of the Council of Europe.

The Convention was approved for ratification by law 65/78 of 13 October 1978 and the ratification procedure was completed in 9 November the same year **[1]** .

2. In the beginning of 1979 Portugal recognised the competence of the Commission, according to articles 25 of the Convention and 6.2 of the Fourth Protocol, as well as the jurisdiction of the Court, in the light of articles 46 of the Convention and 6.2 of the said Protocol **[2]** .

The text then approved included the modifications introduced by protocols 2, 3 and 5, the ratification being extended to the first and fourth Protocols to the Convention.

3. Along with the deposit of the instrument of ratification, eight reservations were made **[3]** , concerning articles 4.3-b, 5, 7 and 10 of the Convention and articles 1 and 2 of the first Additional Protocol.

Seven of them were directly based on provisions of the Constitution while one arose from the ordinary law, in the case the disciplinary code of the military forces.

4. One of the reservations concerned the principle of the compensation due for expropriation and the possibility of excluding its application in certain cases, as foreseen by article 82 of the Constitution.

This was the only reservation that gave place to reaction of the international community. On the 7th of February of 1979, the representative of United Kingdom addressed a letter to the Secretary General of the Council of Europe reaffirming the view of its government that the "general principles of international law require the payment of prompt, adequate and effective compensation in respect of the expropriation of foreign property".

In view of this letter, the Secretary General replied that due to the fact that the statement in the representative's letter didn't constitute a formal objection to the Portuguese reservation, it was to be "communicated for information to the governments of Member States of the Council of Europe as well as to the organs created under the Convention".

The same reaction was endorsed by the Federal Republic of Germany and France, to which the Secretary General replied in a similar form **[4]** .

The reservation was withdrawn in 1987, together with five other **[5]** .

5. At the present moment only two reservations are still in force: the one concerning article 5 of the Convention and its consideration in the framework of the disciplinary arrest of the military personnel, and the other concerning article 7 of the Convention as to the indictment and trial of agents of the political police of the regime in place before the 1974 revolution, as a result of article 294 of the Portuguese Constitution.

To the present date, Portugal has ratified Protocols 6, 8,9,10 and 11 **[6]** . It is not yet bound by protocol 7.

## B. THE STATUS OF THE CONVENTION IN DOMESTIC LAW

6. In Portugal, the European Convention on Human Rights is incorporated in the internal legal order and, in accordance with the prevailing school of legal thought and the Constitutional Court's case law it ranks above the ordinary law. However, it stands below the Constitution **[7].**

7.Having been incorporated into the Portuguese law **[8]** , the European Convention on Human Rights allows individuals to invoke its provisions directly before the national judge. Thus, the judge must apply the Convention and it is for him/her to interpret the provisions of this instrument.

8. The European Convention created a legal system for the protection of human rights and fundamental freedoms to be enforced by the Convention's organs - the Commission and the Court. It is incumbent upon both organs to interpret the Convention's provisions, several of which have an autonomous status, i.e. their extent or scope is independent of the interpretation given by each Member State. By interpreting and implementing the Convention, the organs of Strasbourg ensure an effective harmonisation of the Member States' legislation, regarded as a whole, despite the different legal systems involved, with a view to creating a true Human Rights European Law.

9. The European Convention on Human Rights law is mostly a "jurisprudential" law, as evidenced by the great number of decisions emanating from the above-mentioned organs year after year. Such decisions are continuously disclosing "new rights" or enlarging the scope of existing ones in the Convention, as well as "new situations" to which the Convention is to be applied.

10. At the domestic level, the responsibility for the application of the law rests with the national courts, where the provisions of the European Convention on Human Rights are sometimes interpreted in a manner that may not take into account the interpretation adopted by the Strasbourg organs. Such situation is mainly due to the fact that the Strasbourg's case law is as yet insufficiently known by Portuguese members of the legal profession **[9]** .

In these circumstances, the Convention's provisions may be interpreted by the Portuguese judge in an autonomous, "domestic" manner that risk, most likely, not to coincide with the interpretation adopted by the Commission and the Court.

11. However, the importance accorded by national courts to the case law of these organs may depend on other factors. For instance, it may depend on the sort of court which examines such provisions, and therefore on the Convention being itself acknowledged, or not, as relevant applicable law in a case pending before a given court with a special jurisdiction.

By way of example, and as far as the Constitutional Court is concerned, does this Court have jurisdiction to consider and decide cases involving the conformity of the Portuguese law with the European Convention on Human Rights?

12. That matter falls within the jurisdiction of the ordinary courts; until today, no clear-cut jurisdiction has been conferred on the Constitutional Court in this field, bearing in mind that, under the Constitution, it is vested with powers to rule solely on the conformity of laws with the constitutional provisions **[10].**

Nevertheless, as regards the case-law of the Constitutional Court, even if the question has not been directly addressed in a case brought before it, it is apparent that a breach by an internal law of the European Convention on Human Rights may entail a judgement of unconstitutionality on the ground of violation of the principles enshrined in the Constitution, such as pacta sunt servanda and the supremacy of international treaty law over domestic law**[11]** .

13. And it still remains to be addressed the question as to whether the European Convention on Human Rights should be granted a privileged status in the domestic hierarchy, in view of the particular reception recognised by Article 16.1 of the Constitution **[12]** and of the recognition by this provision of the rights enshrined in the international instruments on human rights, namely the European Convention on Human Rights **[13]** .

In other words, according to the Constitution, should it be conferred on the Convention, and on other treaties in the field of human rights, a constitutional rank or should at least the Convention be accepted

as an autonomous and direct criterion to be used in assessing the constitutionality of internal legal provisions?

So far, such a question remains unsettled **[14]** .

## C. THE STATUS OF THE CONVENTION IN PARLIAMENTARY PROCEEDINGS

14. It is rather difficult to ascertain the direct influence of the European Convention in the process of drafting new legislation. In fact, there is apparently no evidence of recent quotations of the Convention among parliamentary debates. On the other side, one can never ascertain to which extent the Convention has influenced legislation, proposed by the Government, on Fundamental Rights.

We could always mention, however, two examples described in the course of the present study, which have to do with the Code of Criminal Procedure and its provisions concerning the free costs of interpretation **[15]** and the means to accelerate the proceedings **[16]** .

These two examples will have a more detailed consideration in part D and G, of this study, respectively.

## D. LEADING HUMAN RIGHTS CASES DECIDED BY THE NATIONAL COURTS

15. In view of its nature and of the matter at stake, the Constitutional Court would often feel the need for an application of the provisions of the European Convention on Human Rights.

It is true, as stated in a Constitutional Court's judgement, that "in the field of human rights, having regard to the density and the extension of the standard of guarantees provided by the Portuguese Constitution, there will be few situations in which a violation of the international provisions relating to basic rights will not be consumed by the violation of the fundamental rights enshrined in the Constitution, thus resulting in a question of unconstitutionality." **[17]**

But, in fact, references to the European Convention on Human Rights are not rare, since the Constitutional Court held that it was not prevented from taking into account "any contribution, as regards legal thought or case-law (relating to the application of the Convention), that could be instrumental in elucidating the nature and the scope of the provisions of the Constitution, or of those of the Universal Declaration of Human Rights" **[18]** (which has an important role to play in the interpretation and application of the constitutional and legal provisions in the field of basic rights and freedoms, as expressly provided for in the Constitution) **[19]** .

16. Accordingly, the Constitutional Court recognises, in view of that decision, the importance of the Strasbourg case law as a reference to be taken into account in interpreting the constitutional provisions relating to fundamental rights. Such importance is currently illustrated by the fact that the Constitutional Court acknowledges the usefulness of the Convention **[20]** . Should the Constitutional Court establish its own jurisdiction for assessing the compatibility of internal law with the European Convention on Human Rights **[21]** , then the case-law of the Strasbourg organs would surely constitute, more than a useful element, a basic, quasi-compulsory, reference source for its rulings.

17. The same is not necessarily true in relation to the remaining courts. In their decisions we can often see the provisions of the European Convention on Human Rights being directly applied. Yet, the references to the "text" of the Convention are vast when compared with those made to the Strasbourg case law; this seems to reveal a lack of awareness of such case law, probably by reason of its insufficient dissemination among the Portuguese judiciary and members of other legal professions.

We can however bear witness to the importance of the influence of the Strasbourg's case-law on the decisions of the Constitutional Court, law courts and administrative courts, whenever the European Convention on Human Rights is directly applied for the determination of cases submitted to them.

A survey of the application of the European Convention on Human Rights by the Portuguese courts would clearly demonstrate that, of all the Convention's provisions, Article 6 (and its respective case law) is the most applied **[22]** .

## NO COSTS PAYMENT OF INTERPRETATION: FIRST DIRECT APPLICATION OF THE CONVENTION

18. It was in fact by directly applying Article 6.3.e, in the light of the consistent case law of the European Court **[23]** that the Portuguese courts recognized the right of the accused to the free assistance of an interpreter in criminal proceedings **[24]** .

Today, the same position is reflected in the Code of Criminal Procedure **[25]** which enshrines that specific right; but the influence of the European Court's guidance on the effective recognition by the Portuguese courts of such a right is undeniable.

## EQUALITY OF ARMS: PRIVILEGES OF THE STATE COUNSEL IN CIVIL PROCEEDINGS

19. Several decisions relate to the equality of arms **[26]** .

Following the entry into force of the European Convention on Human Rights in 1978, one school of legal thought maintained that provisions of the Code of Civil Procedure, which allowed for some exceptions to the general rule, in relation to the role of the State Counsel when acting as a party in civil proceedings **[27]** , had been abrogated by Article 6.1 of the Convention. This opinion was re-iterated by a court's judgement **[28]** . But nearly all courts concluded that the provisions on this issue, contained in the Code of Civil Procedure, had not been abrogated by the Convention, since the situations resulting therefrom did not infringe the principle of equality of procedural arms, as recognised by Article 6.1 of the European Convention on Human Rights **[29]** .

It must be noted that in interpreting the above-mentioned provision those courts - with a few exceptions - did not necessarily take into account the case law of the Strasbourg organs in this field.

They interpreted, instead, this provision of the Convention in the light of the Portuguese legal reality.

In fact, bearing in mind the role played by the State Counsel in the representation of certain persons - the State, juveniles and other individuals deprived of legal capacity -, it was recognised that the granting of a special treatment was justified inasmuch as "the law, rather than aiming at benefiting one of the parties, is designed to afford a safeguard for the rights of that party which the State Counsel has the duty to protect, since he or she cannot by himself or herself appear before the court" **[30]** .

## EQUALITY OF ARMS: VISTA OF THE PUBLIC PROSECUTOR

20. The Constitutional Court **[31]** was also called to examine the compatibility with the principle of equality of arms of the provision of article 664 of the Code of Criminal proceedings 1929, according to which, appeals shall be presented for visa ("vista") to the Public Prosecutor, before the final decision is taken by the Court.

Referring to the Portuguese school of legal thought and examining this principle also in the light of article 6 of the Convention, the Constitutional Court concludes that the position of the Public Prosecutor in the Portuguese criminal procedure is not the one of a simple party. Its conduct must rather be guided by strict criteria of legality and objectivity. Thus, the question of equality of arms should not be raised in such a framework and the above mentioned provision is therefore not unconstitutional **[32]** .

## PARTICIPATION OF THE SAME JUDGE BOTH DURING THE CRIMINAL INVESTIGATION PHASE AND TRIAL

More recently and based on the Strasbourg case-law, the Constitutional Court declared unconstitutional a provision of the Code of Criminal proceedings allowing for the intervention of the same judge both during the criminal investigation, deciding on the preventive detention of the accused, and later in the judgement phase. The decision that declared article 40 of the above mentioned Code unconstitutional refers to the de Cubber and Haushildt judgements of the European Court **[33]** ().

## EXCESSIVE LENGTH OF THE PROCEEDINGS: LIABILITY OF THE STATE FOR UNLAWFUL ACTS PERTAINING TO THE JURISDICTIONAL FUNCTION - BREACH OF ARTICLE 6 AS THE UNLAWFUL ELEMENT

21. Again, with regard to Article 6.1 of the European Convention on Human Rights, it is important to mention a question that was brought before the Supreme Administrative Court**[34]** : the case involved the liability of a law court for the excessive length of proceedings, in the framework of the State's non-contractual liability for unlawful acts pertaining to the jurisdictional function **[35]** .

In order to ascertain the unlawful fact forming the basis of the civil liability, the Supreme Administrative Court had to rely on Article 6.1 of the European Convention on Human Rights.

Actually, legal provisions governing time limits of proceedings aim at the discipline of the procedural activity, and the failure to observe a time limit is not deemed to be an unlawful act. However, a breach of Article 6.1 of the European Convention on Human Rights does constitute an unlawful act **[36]** .

Hence, the Court relied on that provision of the Convention for the purpose of assessing the civil liability of the respondent court for the damage sustained by the applicant as a result of the excessive length of the proceedings instituted by it.

In its reasoning, the Supreme Administrative Court referred not only to the wording of the said provision, but also to the case-law of the European Court of Human Rights, as far as the reasonableness of the length of proceedings was concerned.

Later, in 1995, the Supreme Administrative Court recalled the right to a decision within a reasonable time, according to article 6.1 of the European Convention on Human Rights, impose obligations on every power within the States parties to the Convention, including the judicial power. The judges should adopt all necessary measures, while bearing in mind the need to preserve the rightfulness of its decisions, in order to speedily solve the conflicts before the court **[37]** .

## RE-EXAMINATION OF THE FACTS IN A SECOND JURISDICTION: NO SUCH RIGHT ENSHRINED IN THE CONVENTION

22. According to the Code of Criminal Procedure, once the case has been examined in the first instance by a collegial court, an appeal may be lodged before the Supreme Court, which is to decide solely on the legal grounds of the decision. As a rule, factual elements may not be re-examined by this Court **[38]** . The question raised was whether the principle of double degree of jurisdiction was constitutionally recognised **[39]** .

During the appreciation of the matter concerning the recognition or not of this principle in article 32 of the Constitution [40] , the question was also examined in the light of article 6 of the Convention, as the infringement of this text would entail the violation of the principle pacta sunt servanda and, consequently, the violation of the Constitution **[41]** .

Several later decisions confirmed the interpretation of this provision of the Convention in the sense that it does not provide for the right to appeal or the right to a double degree of jurisdiction **[42]** .

## THE RIGHTS OF DEFENSE

23. The importance of article 6 of the Convention, in the application of domestic law, is also shown in a decision of the Supreme Court recognising the influence of article 6.3-d in the declaration of unconstitutionality of article 439 of the Code of Criminal Proceedings of 1929. Such provision, that allowed for the reading, in the Court's hearing, of the depositions of non present witnesses, which the accused had not had the legal possibility to previously examine, was contrary to the right of the examination of the witness, enshrined in article 6.3.d of the Convention **[43]** .

And this is also true in what concerns the interpretation given by the European Court to the scope of the rights enshrined in the Convention. It was in fact by referring to the Artico case, concerning article 6.3-c of the Convention, that the Constitutional Commission based its arguments leading to the

declaration of unconstitutionality **[44]** of the provisions that imposed, in the speedy criminal proceedings, the lodging of an appeal immediately after the reading of the sentence **[45]** . This situation violated the right of the accused to have adequate time for the preparation of his defense, enshrined in article 6.3.b of the Convention, which must be recognised in its substance and not in a mere formal way.

The provision of article 6.3 of the Convention gives no absolute right of the accused to defend himself in person. The Supreme Court of Justice considered, referring to the interpretation given to the said provision by the Strasbourg organs, that States may, by law or judicial decision, impose the defense being held by a lawyer **[46]** .

## ACCESS TO THE ELEMENTS OF THE CRIMINAL FILE DURING INVESTIGATION

24. Also based on the Strasbourg case-law, the Constitutional Court more recently ruled unconstitutional the legal provisions that prevented the access to the criminal file by the accused during the investigation phase in order to prepare the appeal from the decision on the preventive detention taken during that phase **[47]** .

## MOTIVATION OF THE DECISION ON THE FACTS

24. Article 469 of the Code of Criminal Procedure 1929 didn't allow for any declaration by judges of collegial court on the grounds of their decision on the facts.

Examining this provision in the light of the principles enshrined in the Constitution **[48]** , the Constitutional Court found that article 6 of the Convention makes no explicit nor implicit mention to the motivation of the decision on the facts. To that respect, article 6 "is completely neutral", stated the court **[49]** . Although this appreciation seemed to be made by reference to the text of article 6, no specific case-law has been mentioned in the decisions concerning this subject.

## INDEPENDENT TRIBUNAL

25. In another case, concerning the competence of a Commission created by law to set the fiscal value of private real estates, the Supreme Court referred to article 6 of the Convention and to the Strasbourg case-law, to examine the question of the independence of such an organ. It concluded that an organ whose members could be replaced on the basis of a free decision by the administration, could not, according to article 6, have the power to determine any civil rights or obligations **[50]** .

## APPLICATION OF ARTICLE 6 TO PROCEEDINGS CONCERNING NON DISCIPLINARY ADMINISTRATIVE SANCTIONS

26. In what concerns the autonomy of the concept of "criminal charge", it is interesting to note a decision of the Administrative Supreme Court by which it declared itself incompetent to consider an appeal of a decision taken by the administration, which, according to the clear punitive nature of the sanction, should be lodged and examined before a court with full jurisdictional power, as stated by article 6 of the Convention, and not by a court such as the Administrative Court, which has the mere competence to nullify the decisions brought before it**[51]** . Referring to the principles resulting from article 6 and reflected in the pertaining case-law of the European Commission and Court, the Supreme Court underlined the characteristics of an independent court.

27. The examples **[52]** above given clearly show what has been pointed out -. the importance attached by Portuguese courts to article 6, in the whole set of the convention's provisions.

Other provisions of the Convention (or the relevant case-law) have, however, here and there been applied. Hereafter a quick survey is presented of what can be mentioned in this respect.

## SEX CHANGING AND THE RECTIFICATION OF BIRTH REGISTRATION ACT

28. The legal implications of transsexuality, often analysed by the Strasbourg organs, were also subject to the appreciation of national courts decisions. During the proceedings, reference was made to article 8 of the Convention and the case-law of the Commission and Court, while consideration was given to the condition of a transsexual and the inherent legal problems of someone who changes sex and wants to live his or her life according to that new condition**[53]** . Particular attention was paid to the right to the rectification of the birth registration act.

## CONSCIENTIOUS OBJECTION

29. The Supreme Court also referred to the Convention to deny the recognition of the right to the conscientious objection to military service. According to the case-law of the Commission, mentioned by the Supreme Court in its decision **[54]** , this right is not as such enshrined in article 9 of the Convention [55] .

## COMPULSORY INSCRIPTION IN THE BAR ASSOCIATION

30. In the light of the European Court's interpretation of article 11 of the Convention the Supreme Court examined the question of the compulsory inscription in the Bar Association. It stated that the obligation imposed to Portuguese lawyers to become members of the Bar Association in order to exercise their profession as an advocate lawyer was not contrary to the right to freedom of association, bearing in mind the specific nature and aims of this type of institution **[56]** .

## THE CONDITION OF RESIDENCE AND THE RIGHT TO VOTE

31. The condition of residence as a pre-requisite for active electoral capacity, doesn't entail a violation of article 3 of the first additional protocol to the Convention, the Constitutional Court concluded, referring to the relevant case-law of the European Commission **[57]** .

Some other examples **[58]** concerning the application of the Convention could nevertheless be also mentioned.

32. What has been described illustrates the Convention's important role, recognised in the internal legal order. The references made to the decisions of the Strasbourg organs support the idea that the interpretative approach of this instrument rests with the Commission and the Court. Domestic courts do not take benefit, however, as frequently as it would be desirable, of the effort of these organs in the innovative process of the Convention's interpretation.

Quoting a Portuguese judge, in a decision applying the European Convention on Human Rights, we could as well recognise that "an orientation came into existence for every State that signed the Convention. A strong orientation that must be acceded to" **[59]** .

## E. CASES BROUGHT BEFORE THE EUROPEAN COMMISSION AND COURT OF HUMAN RIGHTS

33. All the cases brought before the European Court concerned article 6 of the Convention, the majority of which addressed the question of reasonable time. This reality reflects, once again, the importance of this provision of the Convention in the whole set of the fundamental rights in domestic law.

In all of those decisions, concerning the hearing within a reasonable time, the Court held the State responsible for the violation of article 6.1, with the exception of one case, where the Portuguese Government reached an agreement with the applicant, during the time when procedure was pending before this organ.

Let us focus, now, on what it seems to be the most innovating aspects of the interpretation of the Convention by the Court, in the decisions concerning the Portuguese cases.

The Guincho case **[60]** , the first one to be brought before the Court, concerned a civil suit for compensation, following a car accident.

## FROM THE DECLARATORY PROCEEDINGS TO THE ENFORCEMENT PROCEEDINGS: FOR THE PURPOSE OF ARTICLE 6 THERE IS ONE AND SINGLE PROCEEDINGS

34. The first question raised concerned the end of the period which should be taken into consideration for the purpose of the reasonable time appreciation. Should it be, as was defended by the Government, the final decision in the declaratory phase of the proceedings, where the request for compensation was established, or, as the Commission held in its opinion, the subsequent decision in the enforcement phase, where the amount of the compensation had been fixed?

The Court considered that the final decision is to be the one that fixes the amount of the compensation requested, regardless of the fact of it being taken during the declaratory or the enforcement proceedings.

This position, of crucial importance in a civil procedure system as the one in force in Portugal, was subsequently and confirmed in the Martins Moreira **[61]** and Silva Pontes **[62]** cases. The Court stated, in the decision concerning this latter case, "if the national law of a State foresees makes provision for proceedings consisting of two stages - one when the court rules on the existence of an obligation to pay and another when it fixes the amount owed - it is reasonable to consider that, for the purposes of article 6.1, a civil right is not 'determined' until the amount has been decided. The determination of a right entails deciding not only on the existence of that right but also on its scope or manner in which it may be exercised, which would evidently include the calculation of the amount due." **[63]**

## DOMESTIC REMEDIES TO BE EXHAUSTED IN CASE OF DELAY IN THE PROCEEDINGS

35. The Guincho case was also important in what concerns the application of the previous exhaustion of domestic remedies' rule, in the light of article 26 of the Convention.

The Government had argued before the court, in what concerned the question of the applicant's conduct, that he should have complained about the unreasonable delay before the Conselho Superior da Magistratura (High Judicial Counsel) **[64]** .

The court considered that even if the applicant had made such a complaint, the duration of the proceedings would not have been reduced. The most that the said organ could do would be to take disciplinary measures against the magistrates or personnel responsible for the delays**[65]** .

The Commission, in its decision concerning admissibility **[66]** , had already stated that such complain couldn't be considered, strictly speaking, as a remedy. It could only be taken into consideration for the purpose of assessing the applicant's conduct when the question of the reasonable time was examined **[67]** .

And as far as the administrative action for extra-contractual civil liability of the State, due to its responsibility in the delay of the judicial procedure, the Commission also considered that it couldn't be considered as an adequate remedy, to be exhausted according to article 26, since it was not clear "whether it had a chance of succeeding and whether it could have rectified speedily the situation complained by the applicant". Moreover it was "not clear in what stage such an action could have been brought, and in particular whether it could have been brought during the proceedings or only after the judgement had become final" **[68]** .

## THE INFLUENCE OF THE REVOLUTIONARY PERIOD IN THE JUDICIARY - THE THEORY OF THE "TEMPORARY BACKLOG "(ENGORGEMENT PASSAGER)

36. The reasoning adopted by the Portuguese Government in the Guincho case, according to which the proceedings had suffered the consequences of the difficult conditions resulting from the appropriateness of the judicial system to a revolutionary process as the one endured in Portugal, didn't

convince the European judges. The Court referred to its precedent case-law **[69]** , according to which a temporary backlog in a court causing delay in the proceedings doesn't entail the State's international responsibility under the Convention, if prompt adequate measures have been taken to address such situation. In this case, however, the Court concluded that the situation had a more structural nature and the measures adopted by the Government seemed to be insufficient and taken at a late stage. They surely reflected the willingness to solve the problems, but they could not, by their nature, reach satisfying results**[70]** .

37. In the following case brought before the Court, the Baraona case **[71]** , the applicant complained about the damage flowing from his arrest, based on a warrant issued in 1975, during the above mentioned revolutionary period. To that purpose he sued the State, in the administrative court, for compensation. This procedure lasted six years and had not yet been decided by the time the European Court took its judgement.

The court, referring to the Guincho case and reaffirming the recognisance of the efforts made by the Portuguese people to consolidate democracy **[72]** , ruled that it was "not for the court to assess either the merits of the applicant's claim under Portuguese legislation or the influence that the revolutionary situation resulting from the events of April 1974 may have had on the application of that legislation."

Such questions, concluded the court, fall within the exclusive jurisdiction of the Portuguese courts **[73]** .

## LIABILITY OF THE STATE FOR ACTS OF PUBLIC ADMINISTRATION: ADMINISTRATIVE PROCEEDINGS FALLING UNDER ARTICLE 6

38. The question addressed in the Guincho case was whether the time taken by the administrative court to deliver a judgement was reasonable or unreasonable, under article 6.1 of the Convention.

Consequently a very important issue was brought before the court for consideration: the applicability of that provision to such an administrative procedure. The court stated " As to whether the right is a 'civil' right, the court refers to its established precedents. From these precedents it emerges among other things that the concept of 'civil rights and obligations' is not to be interpreted solely by reference to the respondent State's domestic law and that article 6.1 applies irrespective of the status of the parties, as of the character of the legislation which governs how the dispute is to be determined and the character of the authority which is invested with jurisdiction in the matter; it is enough that the outcome of the proceedings should be 'decisive for private rights and obligations'. It is therefore not decisive that, with regard to the State's civil liability, Portuguese law distinguishes between acts of 'private administration' covered by article 501 of the civil code and acts of 'public administration' dealt with in the legislative decree 48051 of 1967; or that disputes concerning the

latter come within the jurisdiction of the administrative courts. In any case, the Portuguese State's liability for acts of 'public administration' is based on the general principles of civil liability set out in the civil code, and the administrative courts follow the code of civil procedure in the matter. The right to compensation asserted by the applicant is a private one, because it embodies a 'personal and

property' interest and is founded on an infringement of rights of this kind, notably the right of property. The arrest warrant complained of caused Mr. Baraona to flee to Brazil with his family, abandoning his house, all his property and his business, which was eventually declared insolvent" **[74]** .

Justification concerning complexity of the case was raised and accepted by the court to a certain extent, but not in terms that could justify the whole delay. As to the several extensions of time requested by the State Counsel to present its reply, the court ruled that the fact that domestic legislation allows it "does not exclude the State's responsibility for resultant delays. State Counsel could have refrained from making such applications, or the administrative court could have refused them." **[75]**

39. The third case, the Neves e Silva case **[76]** , concerned a minority shareholder of an enterprise who complained of an arbitrary decision of the State not authorising the manufacture of plastic fibres. That arbitrary decision would have caused to his corporation and to himself considerable damages.

The administrative procedure lasted 13 years and the court reached the decision that the applicant's right was already statute-barred.

The main question in this case concerned also the application of article 6 to the above mentioned procedure. And this because, as was pleaded by the Government, there had not been any determination of rights, in the sense of article 6.1, since the decision of the administrative court rejected the substantive appreciation of the existence of the applicant's rights and was only founded on procedural grounds.

The European Court referred to precedent case-law: "article 6.1 extends to 'contestations' (disputes) over (civil) 'rights' which can be said, at least on arguable grounds, to be recognised under domestic law, irrespectively of whether they are also protected under the Convention"

In bringing an action before the administrative court, stated the European Court, the applicant "claimed essentially that the fraudulent and unlawful conduct of a public official, acting from questionable motives, entailed the civil liability of the State. Various preliminary and substantive objections were raised by that State. A 'contestation' therefore arose between them. It no longer concerned the 'right' to manufacture plastic fibres, but the right to receive compensation for culpable conduct on the part of the administrative authorities... The Court must ascertain whether the applicant's arguments were sufficiently tenable and not whether they were well founded in terms of the Portuguese legislation. The National Commission of Inquiry expressed the opinion that the Directorate General for Industry misused its powers. For its part, the administrative Court recognised that the applicant had locus standi; it did indeed find that the right was statute-barred, but in doing so it determined the 'contestation'. The right claimed by the applicant consisted in financial reparation for pecuniary damage. It was therefore a 'civil right', notwithstanding the origin of the dispute and the jurisdiction of the administrative courts" **[77]** . Accordingly, article 6.1 was applicable to this case.

On the other hand, what the European Court had to ascertain was whether the case was heard within a reasonable time. The fact of the applicant being minority shareholder was immaterial in this connection **[78]** .

40. The fourth case, Martins Moreira **[79]** , concerned the length of civil proceedings for damages resulting from a car accident.

We have already mentioned some aspects of this case, when we referred to the Guincho case. Two more questions, however, deserve to be considered.

**THE RESPONSIBILITY OF THE STATE EXTENDS TO ACTS OF DIFFERENT AUTHORITIES.**

41. First, in the framework of the reasonable time concept, the State is responsible, not only for the functioning of the courts, but also for the actions and omissions of different authorities involved.

"In ratifying the Convention, the Portuguese State undertook the obligation to respect it and it must, in particular, ensure that the Convention is complied with by its different authorities. In this instance, the various institutions which were prevented through inadequate facilities or an excessive workload from complying with the requests of the Evora court were all public establishments. The fact that they were not judicial in character is immaterial in this respect..... In any event, the examination in question was to be effected in the context of judicial proceedings supervised by the court, which remained responsible for ensuring the speedy conduct of the trial" **[80]** .

**DURATION OF PROCEEDINGS: COMPARING WITH THE DURATION IN OTHER MEMBER STATES?**

42. Secondly, arguments that lead to the comparison of the duration of the proceedings as in the case under consideration with the duration of proceedings in other Member States of the Council of Europe, are not to be accepted as valid by the Court.

"An argument of this nature, which is moreover not supported by precise statistics, is unconvincing. It could lead to the acceptance of unsatisfactory practices if they are sufficiently general, whereas,

according to the case-law of the Court, the circumstances of each case must be taken into account and, in any event, compliance with article 6.1 must be ensured" **[81]** .

43. In the fifth case, Oliveira Neves **[82]** , concerning the length of proceedings in a labour court, the Government and the applicant reached an agreement during the proceedings before the European court.

## THE "ASSISTENTE" IN CRIMINAL PROCEEDINGS AND THE DETERMINATION OF HIS "CIVIL" RIGHT TO COMPENSATION

44. The sixth case, Moreira Azevedo **[83]** , concerned the duration of a criminal proceedings and its effects in the compensation of the "assistente". The question raised was centered in the application of article 6. Since the applicant had the position of "assistente" ( assistant of the prosecuting authority in the preliminary investigation) in the proceedings, the court could not 'determine his civil rights and obligations'.

The European Court, refused to accept the position, presented by the Government, according to which the fact of being an "assistente" didn't imply a request for compensation. Thus it concluded that " the impact on civil proceedings of the status of "assistente", which attached to the applicant during

the criminal proceedings, is subject of controversy among legal writers. Clearly the applicant could have used the right made available to him under article 32 of the Code of Criminal Procedure to submit a formal claim for damages, but the Court cannot disregard the principles laid down by the Supreme Court in its 'ruling' judgement (assento) of 28 January 1976. In the light of these principles

it appears that to intervene as an "assistente" is equivalent to filing a claim for compensation in civil proceedings" **[84]** . Therefore, the case concerned the determination of the right of such an "assistente". It was also decisive to his right. In conclusion, article 6.1 was applicable to it.

## FROM THE ENFORCEMENT PROCEEDINGS BACK TO THE DECLARATORY PROCEEDINGS

45. In the judgement **[85]** of 23 March 1994 concerning the reasonable time framework, the Court returned to this question, curiously the same dealt with in the very first case against Portugal.

The applicant, Mr. Silva Pontes, had been co-demandant in a law-suit , in a civil court, for compensation for damages resulting from a car accident, caused to him and Mr Martins Moreira, by a third party. The duration of these proceedings had already been appreciated, as it concerns the other co-demandant, Mr. Martins Moreira, in the fourth case referred to the European Court.

Mr. Silva Pontes, however, had not presented, at that occasion, the necessary complaint to the Commission. He let the declaratory stage of the proceedings be concluded, which took a period of nine years, waited for the decision of the Court concerning Mr. Martins Moreira, and only two years after the "final" decision of that first stage (in fact, already in the last part of the enforcement stage),

Mr. Silva Pontes seized the Commission with a complaint concerning the length of the whole proceedings, covering both stages.

The Government argued that the application was out of time in so far as it concerned the length of the declaratory proceedings, but the Court, confirming its previous ruling in the Martins Moreira case, considered that the appreciation of the duration of the proceedings should extend from the beginning of the declaratory stage, even though the complaint had only been presented in the last part of the enforcement stage.

"It is not for the Court to express a view on the difference of opinion among legal writers as to whether under Portuguese law enforcement proceedings are autonomous. As the Delegate of the Commission observed at the hearing, the moment at which there was a 'determination' of a civil right and therefore a final decision within the meaning of article 26 has to be ascertained with the reference to the Convention and not on the basis of national law **[86]** .

**RENDERING THE "DESPACHO DE PRONÚNCIA" AND SUBSEQUENTLY PRESIDING THE CRIMINAL COURT: IMPARTIALITY OF THE JUDGE**

46. On April 1994, the European Court rendered a decision concerning Otelo Saraiva de Carvalho **[87]** , who had brought a complaint before the Commission "of a breach of his right to have his case heard by an impartial tribunal, within the meaning of article 6.1 of the Convention in that the same judge had both initially issued the "despacho de pronúncia" and subsequently presided over the criminal court" **[88]** .

The court pointed out that "the impartiality must be determined according to a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect." **[89]**

The personal impartiality of the judge was not disputed, so the Court continued to determine whether there were grounds that objectively could lead to a conclusion of partiality. "When it is being decided whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be held to be objectively justified...And the fact that a judge has already taken decisions before the trial cannot in itself be regarded as justifying anxieties about his impartiality. What matters is the scope and nature of the measures taken by the judge before trial" **[90]** .

The court found that the "despacho de pronúncia" was not equivalent to a committal for trial, but aims to determine "whether the file amounted to a prima facie case such as to justify making an individual go through the ordeal of a trial. The issues which the judge has to settle when taking this decision are consequently not the same as those which are decisive for his final judgement" **[91]** . The court held then that there had been no breach of article 6.1 of the Convention **[92]** .

**ROLE OF THE ATTORNEY-GENERAL'S REPRESENTATIVE IN THE SUPREME COURT: NOT A PARTY TO THE DISPUTE, BUT THE PARTIES SHOULD HAVE ACCESS TO COPY OF AND BE ABLE TO REPLY TO ATTORNEY-GENERAL'S OPINIONS THAT MAY INFLUENCE THE COURT'S DECISION.**

In the case of Lobo Machado **[93]** , the European Court focused on the Attorney-General's role in a Supreme Court of Justice's judgement concerning a dispute over the amount of a retirement pension of the applicant. The Strasbourg Court considered that the Attorney-General's representative in the Supreme Court was not a party to the dispute, while the law gives no indication as to how he should perform his role. The Court considered further that the opinion given by the Attorney-General's representative on the cases before the Supreme Court, while mainly focused on the need to ensure the consistency of the case-law, is nevertheless intended to advise and accordingly influence that Court. Since the outcome of the appeal could have affected the amount of Mr. Lobo Machado's retirement pension, he should have had the opportunity - in accordance with his right to adversarial proceedings - to obtain copy of the Attorney-General's Representative opinion in his case and reply to it before judgement was given. This right, as enshrined in article 6.1, - the European Human Rights Court concludes in its decision of 20 February 1996 – "means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced, or observations filed with a view to influencing the Court's decision".

Administrative decisions affecting for a long period of time the ordinary enjoyment of the right over a land: No decision on expropriation was made, nor compensation was granted – unbalance between the requirements of general interest and the individual right.

In a judgement of 16 September 1996, the Court considered weather the rights of peaceful enjoyment of possessions of the applicants, Mr. Matos e Silva and others, had been violated. The applicants owned a land, which had been affected for 13 years by a public interest declaration, a preliminary step to the expropriation, in order to set up a nature reserve.

The Court considered the difficulties faced by the applicants in order have access to the administrative courts for appeal of the decisions and concluded that, as it was conceded by the Government, there had been an unreasonable delay in the proceedings. But the main focus of the judgement was on the consideration of the case in light of article 1 of Protocol 1.

While considering that the administrative decisions had not amount to a formal or de facto expropriation, they had, however, had serious and harmful effects that have hindered the applicant's ordinary enjoyment of their rights for more than thirteen years during which time virtually no progress had been made in the administrative proceedings. The long period of uncertainty, both as what would become of the possessions and as to the question of compensation, further aggravated the detrimental effects of the administrative decisions.

As a result – concludes the Court – the applicants have had to bear an individual and excessive burden which had upset the fair balance which should be struck between the requirements of the general interest and the right of peaceful enjoyment of one's possessions. Hence, there had been a violation of article 1 of Protocol 1.

## REVIEW OF THE DECISION CONCERNING THE DETENTION OF A MENTALLY ILL PERSON

In the case of Silva Rocha the applicant, a person prosecuted for homicide and found not to be criminally responsible on account of his mental disturbance, was detained pursuant to a decision that, according to the Court was both a conviction by a competent court, within the meaning of article 5 par 1 a)of the Convention and a security measure taken in relation to a person of unsound mind, within the meaning of article 5 par 1 e) of the same Convention. Both situations coexisted in this case.

The Court held that the review required by article 5 par 4 of the Convention was incorporated in the decision by the national court, which imposed a detention for a period of 3 years. It was only after that period that a review could be required to ascertain weather the mental state of the applicant, which was the base for the decision, had improved, thus allowing for the lifting of the measure. The Court noted however that the legislation applied to Mr. Silva Rocha (article 93 of the Criminal Code) provided for a periodic and automatic review after two years and made it possible for the person detained to apply to the court at any moment to have the detention measure lifted.

## RIGHT TO AN EFFECTIVE LEGAL ASSISTANCE, NOT A FORMAL LEGAL ASSISTANCE

In a judgement concerning a criminal procedure, Mr. Daud, a foreigner who had been sentenced to imprisonment for drug trafficking and use of false passport, the European Court focused on the failure by the Portuguese Court to comply with the requirements of article 6 par 3 c) concerning the right to legal assistance. The Court noted that the first officially assigned lawyer had not taken any steps as counsel for Mr. Daud, who tried unsuccessfully to conduct his own defense. As to the second lawyer assigned after the first reported sick, the Court considered that she had not had the time she needed to study the file, visit her client in proison and prepare his defense. The time between notification of the replacement of the lawyer and the hearing had been too short for a serious, complex case in which there had been no judicial investigation and which led to a heavy sentence.

## ENFORCEMENT PROCEEDINGS BASED ON A NOTARIAL DEED: EVEN IF THERE IS NO APPARENT "CONTESTATION" (DISPUTE) ARTICLE 6 PAR 1 IS APPLICABLE – SUBSTANTIVE MEANING OF THE WORD "CONTESTATION"

The most relevant part of the decision concerning the case Estima Jorge **[94]** focused on weather an enforcement proceedings based not on a previous judgement but on another form of authority to execute, namely a notarial deed providing security for a specific debt. The sole object of the enforcement proceedings had been the recovery of a debt over which there was no "contestation" (dispute).

The Court reaffirmed that in conformity with the spirit of the Convention the word "contestation" should not be construed too technically and that it should be given a substantive rather than a formal meaning. The Court underlined that, irrespective of weather the authority to execute took form of a judgement or a notarial deed, the Portuguese law provided that it was to be enforced through the courts and the enforcement procedure had been decisive for the effective exercise of the applicant's right. Consequently the Court held article 6 par 1 applicable to the proceedings that, in this particular case, had taken too long to be concluded.

## THE USE OF "AGENTS PROVOCATEURS" OR UNDERCOVER AGENTS AND THE FAIRNESS OF THE INVESTIGATIVE PROCESS

In the case of Teixeira de Castro **[95]** the Court considered in substance the decision taken by the portuguese court by which the applicant had been sentenced to jail on account of drug trafficking. The Court reviewed the investigative process led by the police and concluded that the police officers acting as agents provocateurs had incited the commission of the offence. The Strasbourg Court concluded that their action "went beyond those of undercover agents because they instigated the offence and there was nothing to suggest that without their intervention it would be committed". "That intervention and its use in the impugned criminal proceedings mean that, right from the outset, the applicant was definitively deprived of a fair trial"

47. Many of the cases **[96]** lodged before the Commission were not later on forwarded to the Court. Most of them concerned the length of different proceedings and the question of reasonable time according to article 6.1 of the Convention.

It is interesting to notice that there is a vast representation of the different sorts of proceedings in these cases: civil, criminal, labour, administrative and enforcement proceedings. The cases brought before the Court, examined above, somewhat reveal this situation.

These cases however didn't raise new legal questions before the Commission.

48. Reasonable time was measured in the light of the precedent case-law criteria established by the European Court. It is important, though, to underline some of the questions that were brought again before the Commission and its standing regarding these questions, which represents a confirmation of the legal principles already applied in previous Portuguese cases.

In the line of what had been decided by the Court in Guincho and Martins Moreira cases, article 6 apply to the enforcement proceedings even if they are not based on a previous judgement, as in the mentioned cases, but on another writ (banker's draft) **[97]** .

The Commission saw no reason to conclude differently. In this case the means offered to the debtor to oppose to the debt's enforcement are even wider than in the enforcement proceedings based on a declaratory judgement. The object of these proceedings is, undoubtedly, the determination of civil rights and freedoms **[98]** .

49. In its opinion concerning another case **[99]** submitted before it, the Commission reaffirm the previous ruling according to which in the determination of a person's civil rights and obligations, the right to a fair and public hearing within a reasonable time must be respected even if the tribunal has reached a solution without taking a decision on the substance of the case **[100]** .

50. In another case the Commission recalled the precedent case-law according to which there are no effective remedies in case of an excessive length of civil proceedings in the Portuguese legal system **[101]** . In particular, the petition for reinitiating the proceedings that were suspended under the applicant's request, is not a legal remedy for the delay of the proceedings. It has more to do with the exercise of the initiative power recognised to the parties in civil proceedings, and must, as such, be examined in the context of the conduct of the applicant and its influence on the reasonable time question, in the appreciation on the merits of the application **[102]** .

51. The question of the extension of time, requested by the State Counsel to reply in civil proceedings was examined not under its eventual implication in the equality of arms **[103]** principle, but having into account its influence in the delay of the proceedings **[104]** .

52. The fact that the applicant had reached an agreement, a transaction with the other party, during the proceedings in the domestic court, was raised to justify that it could no longer prevail himself of being a victim under the Convention. The Commission, reaffirming its precedent case-law **[105]** , stated that to that purpose the internal transaction should have taken into consideration the compensation for the delay of the proceedings. If not the applicant may still claim to be a victim of the breach of the Convention **[106]** .

The Committee of Ministers in this case, which was the first one taken before it, couldn't manage to attain the majority of two-thirds, required by article 32 of the Convention, to decide in the light of the Opinion submitted by the Commission. It therefore decided that it could take no further action in the case and removed accordingly the examination of this case from its agenda [107] .

53. This situation, which challenged the system of protection of Human Rights, leaving without solution an individual complaint on the violation of one of the rights enshrined in the European Convention, pave the way to the modification of the qualified majority of two-thirds to the simple majority, introduced by Protocol 10 to the European Convention **[108]** .

54. In several other cases **[109]** , the applicants reached an agreement with the Government under the supervision of the Commission.

## F. REMEDIAL ACTION TAKEN BY THE GOVERNMENT IN RESPONSE TO BEING HELD TO BE IN VIOLATION OF THE CONVENTION

55. What measures have been taken in Portugal in consequence of the above mentioned judgements **[110]** , having regard to its obligations under article 53 of the Convention to abide by the judgements of the Court?

The Committee of Ministers considered itself satisfied by the fact that the sums awarded under article 50 of the Convention had been paid. It has also requested, in some cases, information concerning the measures that had been taken to prevent, in the future, similar situations of undue delay in the proceedings.

Two of those cases, Martins Moreira and Moreira Azevedo, concerned, respectively, civil and criminal proceedings.

In both of them, Government referred to the enlargement of the number of judges and administrative staff in the courts involved in the mentioned case's situation, as an effective means to expedite those proceedings **[111]** . Measures that could be envisaged as of conjunctural or formal type, resulting from the normal adaptation of the judicial system to the growing needs of its users.

56. Two types of more structural or substantive measures have been, however, adopted as a consequence of those judgements.

The first one concerned the reform of the Forensic Medicine Institutes, which the Government deemed necessary to undertake with a view to enable a prompt response of these Institutes to requests presented before them **[112]** .

These Institutes play indeed an important role in some civil and criminal proceedings, influencing their duration, as shown by the cases brought before the European Court.

57. The other substantive measure concerned the new procedural incident to expedite criminal proceedings, introduced by the Code of Criminal Proceedings of 1987, which, given its importance, deserves a more detailed consideration.

According to article 108 of that Code, "when the time-limits set by the law for the duration of each phase of the proceedings have expired, the Public Prosecutor, the accused, the "assistente" or the parties claiming damages may request expedition. The decision on this request is to be taken either by the Republic's General Prosecutor, if the case is under direction of the Public Prosecutor, or by the Superior Council of the Judiciary if the case was brought before a court or a judge" **[113]** .

58. Article 109 of the same code determines the procedure to be followed when dealing with a request for expedition. In particular, paragraph 5 of article 109 states "the decision taken may be either to

declare the request inadmissible, as being ill-founded, or because the delays found were justified; or to request further information, which must be provided within a maximum of five days; or to request that an inquiry be conducted within a period that cannot exceed fifteen days; or to suggest or determine the disciplinary sanctions, management, organisational or rationalisation measures called for the situation" **[114]** . According to paragraph 6 of article 109, "the decision is immediately communicated to the court or the entity in charge of the case, as well as to the authorities who have disciplinary jurisdiction over the persons responsible for the delays found." **[115]** The effectiveness of this mechanism, to be proved by the results of a decade of implementation, will certainly confer to it the nature of a domestic remedy to be exhausted within the meaning of article 26 of the Convention.

Most of the Portuguese cases where the Court found that there had been a violation of the Convention, concerned the reasonable time question. The Court awarded, in all of them, certain sums to the applicants representing, in the Court's view, what it considered to be the just satisfaction in each of these cases. The Government adopted the necessary measures to pay them, and further measures were, where appropriate, also adopted in order to fully comply with the Court's decisions.

60. Up to the present moment, there has been no decision that, for its full application, would have implied the revision of the domestic judgement. It is undeniable that the revision of the internal decision may, in certain circumstances, be considered necessary to better redress the situation.

Pursuant to the Portuguese law, however, the revision of a court's decision may only be admitted in extremely strict conditions and grounds **[116]** . The revision's procedure implies an extraordinary remedy to be taken before the Supreme Court.

The possibility of revision of the judgement of a national court, following a decision of the Strasbourg Court considering it violates the Convention, would not, therefore, differently to what it seems to happen in some other State Parties **[117]** , have any chances of success in Portugal, taking into account the internal legal requirements to its admittance. It seems that such a revision would not find any support in the adequate domestic provisions.

## G. ASSESSMENT AND PROSPECTS

The importance attached by the members of the legal profession to the European Convention on Human Rights is clearly undeniable.

At the Constitutional level, it is possible to foresee some new steps on the question of the privileged status to be granted to the European Convention , as well as to other treaties in the field of Human Rights. Attention will probably also be paid to the development of the Constitutional Court's case-law on the question of its competence to examine the compatibility of the domestic law with the provisions of the European Convention on Human Rights.

The delay of the proceedings, an area where the European Convention has definitely had the largest application by the legal profession, will surely be a question at stake. This is so, possibly due to the fact that the right to have a judicial decision within a reasonable time is not, as such, clearly enshrined in the Constitution, among the procedural rights recognised therein.

In this framework, the Administrative Supreme Court may also play an important role in reaffirming its case-law, according to which the violation of article 6 may entail the responsibility of the State for the unreasonable delay in the proceedings. This could lead to the recognition of a new remedy to be exhausted, in accordance with article 26 of the Convention. This could, therefore, confer a new relevant status to the Supreme Administrative Court, that would, thus, be called to examine the cases concerning an excessive length of proceedings, before they reach the European Commission.

The European Convention will surely continue to influence court decisions and even administrative practices in the field of Human Rights. It will surely have a key role in certain domains where the legislation could be more restrictive, thus limiting the level of enjoyment of the individual Fundamental Rights. One of these domains where the legislation recently enacted is clearly restrictive, if compared to the prior legislation in force in Portugal, is the one concerning aliens. The Strasbourg organs' case-law will surely play an important role in this framework, in particular in what it concerns admission to and departure from the national territory. The right to respect for family life and the notion of family

reunification, as well as the actions on racial discrimination and degrading treatment are questions to which the European Commission and Court have given a wide content in their consideration in the framework of the European Convention.

But the recent developments in the Strasbourg's case-law, which have held the State responsible for violations of the provisions of the European Convention by third States to which aliens were or are to be expelled, bring to light again the international responsibility Portugal has undertaken upon its ratification of the European Convention. Portugal, being an entry State to the European Union territory, will surely be submitted to a strong pressure of the number of entry requests and expulsion measures that will put to proof its capacity of reassuming its international responsibility in the field of Human Rights, which Portugal decisively embraced when, in 1978, it ratified the European Convention on Human Rights.

**THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

**THE IMPACT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE LEGAL AND POLITICAL SYSTEMS OF MEMBER STATES OVER THE PERIOD OF 1953 – 1998**

**PORTUGAL**

**JOÃO MADUREIRA**

**LEGAL ADVISER**
**OFFICE OF DOCUMENTATION AND COMPARATIVE LAW**
**(ATTORNEY-GENERAL'S OFFICE)**

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[1] Aviso of the Ministry for Foreign Affairs, Diário da República (DR), I Série, of 2 January 1979. See Judgement of the Constitutional Court 219/89 of 25.2.89 (DR II Série of 30.6.89 p. 6476) referring to the 2nd January 1979 as the date of entry into force of the Convention at the domestic level.

[2] Avisos of the Ministry for Foreign Affairs, Diário da República (DR), I Série, of 31 January and 6 February 1979, respectively.

[3] See articles 2 and 4 of Law 65/78, of 13 October.

[4] Yearbook of the European Convention on Human Rights, nº 22, 1979, p. 16-22. See also in Information Sheet nº 5 the reply of the Commission of the European Communities to a written question 302/78 on the reservation concerning article 1 of the first protocol.

[5] Law 12/87, of 7 April.

[6] Protocol 6: Resolução Assemleia da República 12/86 of 6 June and Aviso, (DR), I Série, of 8 November 1986; Protocol 8: resolução da Assembleia da República 30/86, of 10 December and Aviso (DR) I Série, of 13 April 1987; Protocol 9: Resolução Assembleia da República n. 11/94 of 7 March 1994; Protocol 10: Decreto do Presidente da República 18/94 and Resolução da Assembleia da República 16/94 of 2 April, and Aviso 303/94, of 19 October; Protocol 11: Resolução da Assembleia da República 21/97 of 3 May 1997.

[7] As regards the primacy of the international treaty law over the domestic law, see, inter alia, Decisions of the STJ of 11.01.77 (BMJ, nº 262, p.195), 73325 of 18.3.86 (BMJ 355, p.175), 76457 of 8.11.88, 73796 of 27.5.86 and as it concerns the Constitutional Court, judgement of 6.2.85 BMJ 410, p56 (plenary judgement).

[8] According to article 8(2) of the Constitution "rules provided for in international conventions duly ratified or approved shall, following their official publication apply in municipal law as long as they remain internationally binding with respect to Portuguese State." Once these two requisites are filled in, the provisions of the Conventions shall apply in domestic law as if they had been internally created, with no need to "convert" them into law or "transform" them into municipal law. See J. Gomes Canotilho and Vital Moreira, Constituição da República Portuguesa Anotada, I, p.91.

[9] In our opinion, efforts to disseminate at large the case-law of the Strasbourg organs are always required in order to contribute to a correct implementation of the European Convention on Human Rights by the Contracting Parties, in particular those, like Portugal, where the Convention forms an integral part of the national legal system and is therefore directly applicable.

[10] Constitution of the Portuguese Republic, articles 225 and 277.

[11] Judgement 219/89 of 25.2.89, DR II Série of 30.6.89, p.6476.

[12] According to article 16(1) of the Constitution "the fundamental rights embodied in the Constitution shall not exclude any other fundamental rights either in the statute or resulting from applicable rules of international law".

[13] Judgements 99/88 and 222/90 of 20.6.90, BMJ 398, p.225.

[14] Cardoso da Costa, *La hiérarchie des normes constitutionnelles et sa fonction dans la protection des droits fondamentaux*, RUDH, 1990, p.269 (274).

[15] Article 92

[16] Articles 108 and 109.

[17] Judgement 219/89 above mentioned (dissenting opinion).

[18] Judgement 222/90 above mentioned.

[19] Article 16(2) of the Constitution "The provisions of the Constitution and laws relating to fundamental rights shall be read and interpreted in harmony with the Universal declaration of Human Rights".

[20] See i. a. Judgement 124/90 of 19.4.90 BMJ 396 p. 142.

[21] See part B, supra.

[22] More than half of the decisions identified as referring to the European Convention concern article 6.

[23] Luedicke, Belkacem and Koç Judgement.

[24] Supreme Court Judgement 38035 of 8.1.86, BMJ 353, p.200.

[25] Article 92.

[26] See, on this subject, a comprehensive Annotations by Ireneu Barreto, in *Documentação e Direito Comparado*39/40, 1989, p.115, where several decisions are referred to.

[27] Such exceptions concern, inter alia, the possibility of a succession of extension of the time-limit granted by the court to the State Counsel to file its pleadings, which is not allowed to the other party, or the non-submission by the State Counsel of pleadings in reply to the originating application. This fact does not, of necessity, entail an admission of the facts, while the same does not apply to the other party.

[28] Decisions of the Court of Appeal of Lisbon, of 26 July 1984, Colectânea de Jurisprudência, Ano IX, tomo IV, 1984, p.103.

[29] See Attorney-General´s opinion 32/83 of 7 March, Decisions of the Court of Appeal of Porto of: 7 June 1983, Colectânea de jurisprudência Ano VIII, tomo 3, p.257; 3 November 1983, Colectânea de Jurisprudência, Ano VIII, tomo V, 1983, p.201. Decisions of the Court of Appeal of Lisbon of 12 April, 21 June and 7 July 1988, BMJ 376, p.644, 378, p.779, 379, p.631and decision of 26.4.95. Judgements of the Administrative Court 21447 in Apêncice ao Diário da República AP-DR of 30 November 1988. Judgement of the Supreme Court 71548 of 26 January 1984, BMJ 333, pp.393. Judgement of the Constitutional Court 324/86, of 19 November 1988, DR II Série, 19 March 1987 (all mentioned in Anotações, Barreto, Ireneu,

ibidem), 87062 of 9.5.95 BMJ 447, p.441.. And also Administrative Supreme Court 24151 of 5 February 1987 BMJ 364 p.607, 6023, of 7 March and 35434 of 3.2.95..

[30] Extract of a judgement (324/86 of 19 November 1986, DR II Série, of 19 March 1987) of the Constitutional Court, which considered the special treatment justified, and clearly reflects the position of the prevailing school of legal thought. See also note 71 on this question, in the framework of the conventional provision concerning reasonable time.

[31] Judgement of the Constitutional Court 495/89 of 13 July 1989, BMJ 389 p.265. See also Judgements of the Constitutional Court 398/89 of 18 May 1989 BMJ 387 p.209, 496/89 of 13 July 1989 DR II Série of 1 February 1990 and 356/91 of 4 July 1991 BMJ 409 p.162.

[32] This is true, even if the Public prosecutor, in the vista, has examined the object of appeal. However, the public prosecutor may not give an opinion that might in any way aggravate the position of the accused. In this event, unless the possibility of replying has been given to the accused, this would imply the violation of the principle of the contradictory. See ibid Judgement 495/91.

[33] Judgement of the Constitutional Court 186/98, DR I Série A, 20.3.98. See in this line a recent decision by the European Court of Strasbourg on the role of the Attorney-General´s representative in the Supreme Court (Lobo Machado v/ Portugal, of 20 February 1996).

[34] Judgement of 7 March 1989, case 26525.

[35] Pursuant to article 22 of the Constitution, the State is jointly and severally liable in civil law with other public bodies for actions or omissions in the performance of their duties, or caused by such performance, which result in violations of rights, freedoms and safeguards or in damage to third parties. (Also see DL 48051 on State liability).

[36] The Supreme Court of Justice, in an early decision of 8 January 1987, had superficially referred to the responsibility of the State for actions for which the court is solely responsible, entailing unduly delay in the proceedings (Judgement 74663, BMJ, 363, p.436).

[37] Judgement of 14 December 1995, 32237, summarized in BMJ, 452, p.473.

[38] Article 433 of Code of Criminal procedure 1987.

[39] Before the entry into force of the new Code, this same question had been examined under the Code of Criminal procedure of 1929 and its article 655. See judgement of the Constitutional Court 401/91 of 30.10.91, DR I Série A of 8 January 1992.

[40] Constitutional Court reached a decision where it stated that this right is foreseen in the Constitution. Ibid. 401/91.

[41] See part B.

[42] See Supreme Court 39856 of 25.1.89 BMJ 383 p.486, 40623 of 31.1.90 BMJ 393 p. 352, 40640 of 9.5.50 BMJ 397 p.332, 41167 of 25.10.90 BMJ 400 p.561, 41572 of 15.5.91 BMJ 407 p.321 and 42058 of 29.1.92 and 45690 of 9.2.94 BMJ 434 p.451. See also Judgements of Constitutional Court 340/90 DR II Série 19.3.91, 401/91 DR II Série 8.1.92. See also, concerning Code of Criminal Procedure 1929, judgement 401/91 declaring unconstitutional article 655 of this Code and putting an end to the divergent case-law on this issue. In certain circumstances article 655 did not allow for the factual re-examination in appeal. This situation was considered to be contrary to article 32 of the Constitution, which enshrines the principle of double degree of jurisdiction in criminal judgements. In civil matters, as well, the right of access to justice does not imply the existence of a double degree of jurisdiction (Judgement of the Supreme Court 163/90 of 23.5.90 BMJ 397 p.77 and see also Constitutional Court 330/91 of 2.7.91 BMJ 409 p.45 on expropriation proceedings).

[43] Quoted in Supreme Court 37516 of 30.10.84 BMJ 340 p.303, referring to the decision of the Constitutional Commission 146-A/81.

[44] In violation of article 32 of the Constitution.

[45] Constitutional Court judgement 5/87, 17/86, 8/87 DR II Série of 9.2.87, 40/84 of 3.5.84 BMJ 346 p.179.

[46] STJ 85315, of 17.10.95, BMJ 450, p..369.

[47] The judgement refers to case Lamy (Serie A 153). See comment of Ireneu Barreto, in Convenção Europeia dos Direitos do Homem, Anotada, 2º edição, Coímbra Editora, p. 51-52.

[48] I.a. article 210.

[49] Judgement of the Constitutional Court 219/89 of 25.2.89 BMJ 384 p.265. See also Judgements of the Constitutional Court 124/90 of 19.4.90 BMJ 296 p.142 and Supreme Court 38609 of 29.10.86 BMJ 360 p.494 and 40623 of 31.1.90.

[50] Supreme Court 74682 of 6.5.87 BMJ 367 p.457.

[51] Administrative Supreme Court 27832 of 8.5.91.

[52] Others could be mentioned: the decision of the Supreme Court of Justice, concluding that four days time-limits to lodge an appeal, in the framework of a freedom of the press criminal law proceedings, is sufficient to the preparation of the defense, according to article 6.2 b) of the Convention (Supreme Court 37613 of 5.6.85 BMJ 348 p.362); the possibility, in a law suit, of relegating to the enforcement phase of the proceedings the quantification of the amount that one part has to pay, is not contrary to article 6, once in that phase the principle of the contradictory is also observed (Supreme Court 81456 of 8.10.92); Article 6 (Access to Justice) and the increase of the amount of the costs of the proceedings: according to the Constitutional Court, in this question, article 6 goes no further than the constitutional provisions (352/91 of 4.7.91 BMJ 409 p.117). See also note 85.

[53] Decision of the Court of Appeal of Lisbon 16009 of 17.1.84 in Colectânea de Jusriprudência 1984, I, p.109. See also Supreme Court 74408 of 16.11.88 BMJ 381 p.578, decision and separate opinions, although not recognizing the condition of transsexual to the applicant.

[54] Judgement of the Supreme Court 74739 of 19.3.87.

[55] Conversely the right of medical doctors or paramedics to the conscientious objection in what concerns the fulfillment of their professional duties is foreseen in that provision, according to the interpretation given in this decision.

[56] Judgement of the Supreme Court 72732 of 23.5.85 of 23.5.85 BMJ 347 p.227. See also, on article 11 of the Convention, Attorney-General´s opinion 40/89. See Judgement 433/87 of 4.11.87 on the free legal assistance that lawyers have to provide in the framework of the legal aid system, although in the decision no reference has been made to the Convention.

[57] Judgement of the Constitutional Court 320/89 of 20.3.89.

[58] Judgement of the Supreme Court 30402 of 21.5.86 BMJ 357 p.235, stating that the suspension of the application of the criminal sanction conditioned to the payment of the compensation, is not contrary to article 1 of the fourth Protocol.

[59] Judgement of 3.5.82, pronounced by the Court of Cascais.

[60] Judgement of 10.7.84, Series A 81.

[61] Series A 143.

[62] Series A 286

[63] Ibid par 30.

[64] This Council is an independent body, composed mainly by judicial magistrates with full power as far as the appointment, promotion and discipline of judges are concerned.

[65] Series A 286, par 34.

[66] Decisions and Reports 29 p.135.

[67] Ibid. par.5.

[68] Ibid. par 9.

[69] Zimmermann and Steiner case, Series A 66. See also Buchholz case.

[70] Series A 81 par 40.

[71] Judgement of 8.7.87, Series A 122.

[72] Ibid. par 40.

[73] Ibid. par 41.

[74] Ibid. par 44.

[75] See Judgement of the ADM 27801 of 24.4.90 of 24.4.90 BMJ 396 p. 310.

[76] Judgement of 27.4.89, Series A 153.

[77] Ibid. par 37.

[78] Ibid. par 39.

[79] Judgement of 26.10.88, Series A 143.

[80] Ibid. par 60.

[81] Ibid. par 54.

[82] Judgement of 25.5.89 Series A 153.

[83] Judgement of 23.10.90, Series A 189.

[84] Ibid. par 67.

[85] Judgementof 23 march 1994, Series A 286.

[86] Ibid. par 29. The Court also took the view that " the enforcement proceedings were not intended solely to enforce an obligation to pay a fixed amount; they also served to determine important elements of the debt itself… Those proceedings must therefor be regarded as second stage of the proceedings, which began on the 22 December 1977. It flows that the dispute over the applicant's right to damages would only have been resolved by the final decision in the enforcement proceedings." (par. 33).

[87] Judgement of 22.4.94 Series A 286.

[88] Ibid. par 28

[89] Ibid. par 33

[90] Ibid. par 35.

[91] Ibid. par 37.

[92] By Judgement219/89 of 25.2.89 (DR II Série 30.6.89), the Constitutional Court found that article 365 of the Code of Criminal Procedure 1929, and other provisions allowing for the judge that rendered the "despacho de pronúncia" to decide the case was not unconstitutional (nor against article 6 of the Convention). This was so, according to the judgement, since the "despacho de pronúncia" went no further than the bill of indictment, having thus a simple guarantee function. At the most it may qualify in a different way the facts referred in the bill of indictment or describe differently, in secondary aspects, the conduct of the accused. But if, in the "despacho de pronúncia", the judge refers to other actions of the accused that could be envisaged by the law as criminal offences different from those identified in the indictment, the "despacho de pronúncia" has no longer the function of guarantee. In this case it will consist substantially in an accusation and so would be its function, making no longer possible the judge, author of the "despacho de pronúncia", to later decide the case (article 32.5 of the Constitution). See also Judgement of the Supreme Court 39856 of 25.1.89 BMJ 383 p.486 and Constitutional Court 124/90 of 19.4.90 BMJ 396 p.142.

[93] Judgement of 20.2.96.

[94] Judgement of 22.4.98.

[95] Judgement of 9.6.98.

[96] Over 50 till the end of 1998.

[97] See also case Estima Jorge cited above.

[98] Application 14926/89, S.A. Against Portugal, opinion of 10.2.93 par 41-42. See Judgement of the Supreme Court 81456 of 8.10.92 quoted in note 48: the possibility in a law suit of relegating to the enforcement stage of the proceedings the quantification of the amount that one part has to apply is not contrary to article 6, since in that stage, the principle of contradictory is also observed.

[99] Application 11724/85, Manuel Mendes Godinho e Filhos against Portugal, opinion of 11.10.90, par 106.

[100] See Neves e Silva case mentioned above, where similar question was decided by the European Court. opinion

[101] See Oliveira Neves, opinion of 15.12.88, Annex II. See also decision of the Commission of 6.7.82 in Dores e Silveira Case.

[102] Application 11498/85, Gomes v/ Portugal, decision of 10.7.89.

[103] See part B, note 27.

[104] Application 13388/87, Ribeiro de Mello v/ Portugal, opinion of 13.1.92, par 26. See also on this question Baraona case, quoted supra and note 71.

[105] Opinion of 13.12.78 (Preikhzas v/ Portugal, DR 16 p 29.

[106] Application 9346/81, Dores e Silveira v/ Portugal, Opinion of 6.7.83, par 90-91.

[107] Resolution DH(85)7.

[108] See note 6.

[109] Over 70 cases ended by an agreement during the proceedings before the Commission.

[110] See supra part E.

[111] See references in the appendix to the resolutions DH(89)22 – Decree Law 214/88 of 17 July, Ministerial Order 537/88, of 10 August, reinforcing in terms of judges and administrative staff the Evora's Court of first instance and the Court of Appeal. See also in the appendix to resolution DH(92)10, as it concerns the criminal procedure – Portaria 848/83 of 23 of August affecting a third judge to the Vila Nova de Famalicão Court, the creation of a Tribunal de Círculo in this judiciary district and the reinforcement of the administrative staff of that Court (Portaria 537/88 of 10 August).

[112] See appendix to the resolution DH(89)22.

[113] Appendix to Resolution DH(92)10 of the Committee of Ministers.

[114] Ibid.

[115] Ibid.

[116] See articles 449 of the Criminal Code of Procedure and 771 of the Code of Civil Procedure as to the conditions and grounds for revision.

[117] States that have legal provisions admitting explicitly the revision based on the decision of the European Court are, according to a study undertaken by the Council of Europe in 1991, Austria, Luxembourg, Malta, Norway and Sweden. Those countries where this type of revision could be admitted, according to the existing general legal provisions are Belgium, Cyprus, Denmark, Finland, France, Greece and Turkey.