

Portugal

Portuguese Ombudsman

Independence and effectiveness of the NHRI

International accreditation status and SCA recommendations

The Portuguese Ombudsman was last [reaccredited](#) with A status in November 2017. While acknowledging that the selection and appointment process is governed by the Parliament's rules of procedure, the SCA recommended the formalization of the process in relevant legislation. Also, the SCA encouraged the NHRI to advocate for the legal provision for an independent and objective dismissal process of the NHRI's deputies.

Developments relevant for the independent and effective fulfilment of the NHRI's mandate

No significant changes took place.

All guarantees of Independence are still in force.

According to the Constitution (Article 23 (3)) and the Statute (Article 1 (1)), the Ombudsman is an independent State body elected by the Parliament. This means that the Ombudsman cannot receive instructions from any other body, institution or entity, including the Government. The practice confirms the complete respect, namely by public authorities, regarding the independence and integrity of the Ombudsman institution in the performance of its duties.

The Ombudsman's budget is part of the Parliament's budget and the Ombudsman reports its activities annually to the Parliament. However, even as for the relationship between the Ombudsman and the Parliament, it should be underlined that the Portuguese Ombudsman does not incorporate the legislative power – it is neither a parliamentary body, nor an ancillary body to the Parliament.

As far as the avoidance of conflict of interests is concerned, the Statute determines that the appointment as Ombudsman may only fall upon a citizen who, besides meeting the conditions required for being elected a Member of the Parliament (MP), enjoys a well-

established reputation of integrity and independence. Moreover, Article 11 of the Statute stipulates that the incumbent shall be subject to the same incompatibilities that apply to court of law judges in office (paragraph 1) and prohibits him/her from holding any position within the bodies of political parties or associations, as well as from engaging in any public political party activities (paragraph 2).

The Portuguese Ombudsman is also endowed with a set of other important personal, institutional, functional and organisational guarantees, provided for by the law and that cement and strengthen the independence and autonomy of the institution.

References

- Portuguese Republic Constitution
- Legal Statute of the Portuguese Ombudsman
- <http://www.provedor-jus.pt/?idc=81>

Human rights defenders and civil society space

The Portuguese Ombudsman considers that there are no laws, measures or practices that could negatively impact on civil society space and/or reduce human rights defenders' activities in Portugal.

After the establishment of democracy in Portugal, fundamental rights to freedom of expression (Art.37) , freedom of assembly and of association (Art. 46) , freedom of demonstration (Art. 45), and right to participate in public life (Art. 48) were enshrined as rights, freedoms and guarantees in the Constitution.

Civil society participation gained a strong dynamism in several areas through the foundation of unions and solidarity, humanitarian, cultural, sports and recreation associations. With the entry of Portugal into the then European Economic Community, there was an increase in the number of organisations, namely associations, foundations and cooperatives. In more recent years, Portuguese society has experienced the increase of social movements (organic and inorganic), although less expressive than in other countries.

Portugal has a deep-rooted democracy and it is safe to affirm that the political context doesn't present particular risks to the autonomy and security of NGO's operating in the country and for human rights defenders. However, regarding the economic context – being Portugal a peripheral economy within the EU, and, for that reason, more exposed to

negative shifts that may occur in the region – the **availability of public and private funding and the reduced diversity of funding sources** represents a very important challenge for NGOs .

NGOs which are qualified as “cooperation and development NGOs”, are especially protected by the Portuguese Law, due to their recognized role in the design and implementation of social, cultural, environmental, civic and economic programs, namely in humanitarian assistance, emergency aid and protection and promotion of human rights. They have a special legal statute.

NGOs which are duly registered may be inspected by the government, namely in what regards the use of public funds and tax obligations. Specific legislation on associations representative of women, migrants, youth, persons with disabilities and involved in environmental protection was also enacted. This recognition is particularly evident in the relevance given to these associations in the establishment of national action plans and strategies that provide concrete measures to fulfil State’s responsibilities under the Constitution, international obligations and the law. Some of these plans set forth important tasks and measures for NGOs. There are several examples action plans that considerably rely on the participation of NGOs and in the work developed by human rights defenders in order to accomplish their goals.

Universities enjoy full academic autonomy and freedom of speech is fully protected by the Constitution.

In the Rule of Law Index 2019, Portugal scored 78% of civic participation, 81% of freedom of expression, 86 % of freedom of association. Limits of freedom of expression are enshrined in the Criminal Code, and are limited to hate crimes. As for freedom of association, the Constitution does not allow armed or military associations, nor racists or fascists organisations.

In State of Emergency any limitation of freedom of press must respect the proportionality principle and cannot evolve any form of censorship. Also, the freedom of association of political parties cannot, under any circumstance, be limited.

References

- Provedor de Justiça, "Impact on NGO activities, particularly humanitarian efforts targeting refugees and other migrants, of changing criminal law approaches or provisions in Council of Europe Member States", 2019, available at: http://www.provedor-jus.pt/site/public/archive/doc/Criminalisation_of_NGOs_Activities2.pdf
- Provedor de Justiça. "Questionnaire to Special Rapporteur on the situation of human rights defenders", 2018, available at: http://www.provedor-jus.pt/site/public/archive/doc/2018_Human_Rights_Defenders.pdf
- World Justice Project, Rule of Law Index, 2019, p. 124.
- State of Emergency Law, <https://dre.pt/application/conteudo/552035>

Checks and balances

The Portuguese Constitutional system provides a **strong and serious regime of checks and balances** between the several sovereign branches. The judiciary, through the Constitutional Court, controls the constitutionality of Law. The Government may respond politically before the Parliament. The Parliament may be dissolved by the President of the Republic when it is justified on the grounds of rule of law and the democratic principle, and the Council of State must always be heard. The same applies to the Governments destitution. The Government holds legislative powers (through Decree-Laws), but there are certain subjects there are reserved to the Parliament's legislative competence. The Constitutional Court may declare the constitutionality of governmental acts that have breached this division of competences.

The Portuguese Ombudsman has the competence to **request a constitutionality review of laws** – either enacted by the Parliament or by the Government. It may proceed to such requests either due to breach of a competence norm or legislative processes' norm, or because a certain law may be considered as substantially unconstitutional. The Ombudsman has indeed exercised this competence several times – namely because of substantial reasons (e.g., data protection law and principle of privacy).

Moreover, the Ombudsman has also the competence to make **recommendations to the Parliament**. This competence has been used lately, namely as regards possible amendments of laws, on the grounds on fundamental rights.

According to the Portuguese State of Emergency Law, during the declaration of a state of emergency, the Ombudsman remains fully in functions. The Ombudsman is, then,

particularly vigilant as regards any possible abuse of power due to the special scenario were the Executive branch's powers are strengthened.

In the Rule of Law Index, Portugal has the following scores on constraints on Government Powers:

- Limits by legislature – 84%
- Limits by Judiciary – 77%
- Independent Auditing – 76%
- Non-governmental checks – 81%
- Lawful transition of power – 93%

Its global "Rule of Law" rank is of 22/126.

References

- Portuguese Constitution
- Legal Statute of the Portuguese Ombudsman
- <http://www.provedor-jus.pt/?idc=81>
- Act on the State of Emergency: <https://dre.pt/application/conteudo/552035>
- Request to the Constitutional Court on data protection in the context of electronic communication systems - https://www.provedor-jus.pt/site/public/archive/doc/2019_08_26_Q_7746_2017_Tribunal_Constitucional.pdf
- World Justice Project, Rule of Law Index, 2019, p. 124.

Functioning of justice systems

The Ombudsman has competence to intervene in what concerns administration of Justice. This encompasses access to courts, legal aid, access to lawyers, delays on judicial procedures, etc. The Ombudsman does not intervene as amicus curiae, nor can it challenge or make any recommendation or suggestion the merits of judicial decisions.

During 2018, the Ombudsman received 488 **complaints** as regards administration of justice. Of these, 276 were related to **delays in justice**, mainly due to the judiciary (there were also complaints as regards Public Prosecution, Solicitors, Insolvency administration, Forensics Medicine). Citizens often complain also about **justice costs and denial of legal aid**.

Indeed, one of the more serious problems in Portugal is, as confirmed by the 2019 Rule of Law Index, 2019, **delays in the justice system**. In this context, Portugal was already convicted several times by the European Court of Human Rights for breaching Article 6 of the European Convention on Human Rights. The Ombudsman intervenes, in particular, in cases where there were no doubts as to the unreasonability of the justice delay.

As for the Rule of Law index 2019, Portuguese legal experts pointed out the following achievements as regards Courts' work:

- Accessibility and affordability – 69%
- No improper government influence – 78%
- No unreasonable delay – 42%
- Effective enforcement – 52%

Recently, the Ombudsman has been advocating for an **effective access to justice for migrants who are detained**. Lawyers who had to visit their clients in the detention centres located in the international area of the airport have to pay a fee of 11 euros. The Ombudsman considered that this practice would amount to a breach of the right to access to lawyer, and has developed a dialogue with the airport authority to overcome this obstacle. A solution however could not be found. The right to Justice is also severely impaired in the context of detention of migrants as regards access to Courts to ask for the judicial review of detention. Any deprivation of liberty that lasts for more than 48 hours has to be duly authorized by a judge. However, the practice in these airports is to simply inform the Court, by fax or email, on the detention. The Court authorizes this detention by the same means, without hearing the detainee. The Ombudsman has already claimed as well that this practice may go against the right to justice, namely before UN bodies.

References

- Portuguese Ombudsman Annual Report, 2019, http://www.provedor-jus.pt/site/public/archive/doc/Relat2018_0.pdf
- Alternative Report of The Portuguese Ombudsman on the Implementation of the Convention on the Rights of the Child in the Process of Review of the Fifth and Sixth Periodic Report of Portugal, 2018, http://www.provedor-jus.pt/site/public/archive/doc/Rel_Alternativo_CRC.pdf

Media pluralism

Freedom of Speech and of Press are fundamental liberties deeply guaranteed in the Portuguese Constitution. According to the Study on “Journalists without borders”, Portugal ranks the 10th place in the study 2020 World Press Freedom Index, among other 180 countries.

The Portuguese Ombudsman has not intervened in any case as regards freedom of press.

Freedom of expression is classified with an achievement of 81% in the Rule of Law index. Nonetheless Portugal has already been condemned several times by the European Court of Human Rights for sanctions applied for press publications on grounds of the **law on defamation**. The most recent ruling dated September 2019, where Strasbourg Court considered that the Portuguese authorities had not struck a fair balance between the right to freedom of speech and the right to private life.

Also in this context, the UN Human Rights Committee recommended, in 2020, to Portugal to consider decriminalizing defamation and, in any case, resorting to criminal law only in the most serious cases, bearing in mind that imprisonment is never an appropriate penalty for defamation.

References

- 2020 World Press Freedom Index, <https://rsf.org/en/2020-world-press-freedom-index-entering-decisive-decade-journalism-exacerbated-coronavirus>
- Human Rights Committee, Concluding observations on the fifth periodic report of Portugal, 2020, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/PRT/CO/5&Lang=En
- ECtHR, Antunes Emídio v. Portugal and Soares Gomes da Cruz v. Portugal (applications nos. 75637/13 and 8114/14)

Corruption

The Ombudsman is part of the National Network for Open Administration, which belongs to the Open Government Partnership (OGP) - a multilateral initiative, formally launched on September 2011 by the Heads of State and Government of eight countries (South Africa, Brazil, United States of America, Philippines, Indonesia, Mexico, Norway and United Kingdom). The OGP aims to push forward for concrete commitments from governments to

promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen participatory democracy. The Portuguese action plan features commitments related to improving citizen control over their data, open legislation, open administrative and environmental data and open contracting.

As for corruption, the Portuguese Ombudsman does not intervene, as this is a matter of criminal responsibility. In 2017, the Portuguese Courts convicted 112 person for having practiced this crime, whereas in 2018 the number of convictions was of 73.

According to the 2019 Rule of Law Index, the following scores were achieved as regards absence of corruption:

- In the executive branch – 66%
- In the judiciary – 88%
- In the police / military – 87%
- In the legislature – 48%

References

- World Justice Project, Rule of Law Index, 2019, p. 124.
- Open Government Partnership, <https://www.opengovpartnership.org/members/portugal/>

In-focus section on COVID-19 measures

Most significant impacts of measures taken in response to the COVID-19 outbreak on the rule of law in the country

On the 18th March 2020, the President of the Republic enacted the first state of emergency declaration. According to the Constitution, the State of Emergency has the maximum duration of 15 days, renewable.

Several fundamental rights were suspended, such as: a) the right to freely move and settle anywhere in the national territory; b) ownership and private economic initiative; c) rights of workers (who can be asked to work in different conditions and to different entities, as it is the case of health sector workers; e) exercise the right to strike insofar as it may compromise the functioning of critical infrastructures or health care units, as well as in economic sectors vital to the production, supply and supply of essential goods and services to the population; f) international circulation; g) right to assemble and demonstrate; h)

freedom of worship, in its collective dimension and i) right of resistance. The second state of emergency declaration added the suspension of the right to learn and teach, authorizing the necessary measures to prevent and combat the epidemic, including the prohibition or limitation of face-to-face classes, the imposition of distance learning by telematics, the postponement or extension of school periods, the adjustment of assessment. Data protection rights were also suspended by this second declaration, but in a very limited manner, as allowing that public authorities can determine that telecommunications operators send their customers written messages (SMS) with alerts from the Directorate-General for Health or other related to the fight against the epidemic.

The State of Emergency has, naturally, reinforced deeply the Executive's branch's powers. The Government has been very active, adopting rapidly several norms. Some of them would require, in normal times, approval by the Parliament. However, since they are aimed at applying the State of Emergency declaration, there is not an unconstitutionality problem. Moreover, the Government has been adopting several measures aimed at protecting the economy, workers and families.

The Ombudsman, as already mentioned, maintains its full activity during the State of Emergency. And it has been particularly vigilant. It has already issued **several recommendations**, namely as regards support to independent workers, or suspension of tax enforcement measures. It has also suggested the enlargement of the family-support work leave for the purpose of providing help to elderly ascendants. It was also one of the first authorities recommending some measures for relieving overcrowding of prisons. The Ombudsman also recommended to the National Health Authorities that quarantines should not be decided at regional level, but rather with national criteria, in order to guarantee the principle of equality.

Most important challenges due to COVID-19 for the NHRI's functioning

On the 16th March, the Ombudsman Office's staff started to work from home. The transition was gradual and smooth, starting with the most vulnerable persons, followed by parents with children aged below 12 (after the schools' closure) and, finally, almost every worker. The Ombudsperson designated only a "task force" of very limited persons who still work from the Ombudsman Headquarters: besides the Ombudsperson herself, two members of the Cabinet, the two Deputy Ombudsmen, department coordinators, a public relations collaborator and two members of the accounting and staff departments.

All legal advisers that deal with complaints have remote access to their computers and, thus, to the IT program for complaints handling. Therefore, with some minor IT problems, the staff has been coping well with the new scheme. Staff is in permanent dialogue, so they can share technical difficulties and good practices. As for phone calls, staff have forwarded all phone calls received in their office to their personal cell phones. Whenever they need to speak to the public entities or to complainants, they may call the Ombudsman Office, and the limited staff that remains therein may forward the call to the legal advisers, who may then, in case of need, talk to the complainants. The same is happening with the Hotlines, whose staff are also working from home. However, staff with young children report that it is difficult to have the same productivity while home-schooling children and without domestic help. This situation can be even more difficult when there is only one computer in the household and children need to assist to their classes through internet platforms.

Due to the public health crisis, the National Preventive Mechanism had to cease its monitoring activity. So, currently, visits to all places of deprivation of liberty are suspended. The NPM has been accompanying remotely (by phone, by email) the conditions of detention.

References

- First declaration of the state of emergency: <https://dre.pt/application/conteudo/130399862>
- Ombudsman Recommendation on prisons: <http://www.provedor-jus.pt/?idc=136&idi=1824>
- Ombudsman Suggestion on extension to lawyers and solicitors of support measures similar to those of self-employed workers: <http://www.provedor-jus.pt/?idc=32&idi=18245>
- Communication from the Ombudsman on quarantines decreed by regional bodies, <http://www.provedor-jus.pt/?idc=32&idi=18246>
- Note of the Ombudsman on exceptional and temporary justified absences motivated by family assistance <http://www.provedor-jus.pt/?idc=32&idi=18232>
- Ombudsman Suggestion on suspension of tax enforcements: <http://www.provedor-jus.pt/?idc=136&idi=18254>

