

SUBMISSION BY FORUM PENAL - ASSOCIAÇÃO DE ADVOGADOS PENALISTAS

REGARDING THE FIFTH PERIODIC REPORT OF PORTUGAL

TO THE UN HUMAN RIGHTS COMMITTEE

FOR CONSIDERATION AT ITS 128TH SESSION (MARCH 2020)

FORUM PENAL - ASSOCIAÇÃO DE ADVOGADOS PENALISTAS (FORUM PENAL – ASSOCIATION OF CRIMINAL LAWYERS) is a non-profit association that aims to provide a forum for promoting an open discussion concerning criminal law, criminal advocacy and the protection of fundamental rights in criminal proceedings. **FORUM PENAL** is fully independent from any political party or sovereign organ. Due to its interest in matters related to legislative policy, the association provides cooperation in order to develop and discuss legal drafts or proposals in its area of expertise.

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This submission follows the structure of the “List of issues in relation to the fifth periodic report of Portugal” (CCPR/C/PRT/Q/5 13 August 2019, hereafter: List of Issues) and deals with some of the issues included therein. The choice of issues was made according to the area of expertise of Forum Penal (criminal law) and those issues on which we believe our contribution could bring some added value.

CONSTITUTIONAL AND LEGAL FRAMEWORK WITHIN WHICH THE COVENANT IS IMPLEMENTED (ARTICLE 2)
LIST OF ISSUES, §§1, 2

1. There is a structural problem in Portugal with reference to the publication of case law of higher Courts, since not all judgments are published and there are no clear criteria for the selection of those that are indeed published (on www.dgsi.pt and more recently on <https://jurisprudencia.csm.org.pt>). Forum Penal believes all Judgments of higher Courts should be published since lack of publication hinders access to information on the law and also the case law, hence hindering the right to judicial reviews and to an effective remedy in general.
2. Nonetheless, a quick search of the case law reveals a few cases making reference to the CCPRⁱ.
3. It must be noted, however, subject to some exceptions, that the majority of such cases do not discuss the content or the implications of the rights contained in the CCPR in detail, or any decisions of the HRC, merely referring that such rights mirror the protections of the Portuguese Constitution, or the European Convention on Human Rightsⁱⁱ.



4. In regards to the effective implementation of the CCPR, there are no effective remedies available to the parties, in particular criminal suspects or victims.
5. In this regard, we use as an example a recent Judgment of the Supreme Court on Article 14, para. 5 (right to an appeal in criminal matters)ⁱⁱⁱ, stating (our highlight):

"17. In this regard, it is important, first of all, to recall the relevant standards of the international system for the protection of fundamental rights in force in the domestic legal order (International Covenant on Civil and Political Rights (ICCPR), European Convention on Human Rights (ECHR) and Protocol No. 7 to that Convention).

18. Article 14, para. 5, of the ICCPR states that "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". This provision was considered in Constitutional Court ruling No. 595/2018 (supra, 18), only as a "framing" for the analysis of the right to appeal (point 11).

According to the Human Rights Committee's interpretation, the expression "in accordance with the law" is not intended to "leave the very existence of the right of review to the discretion of the States parties, since this right is recognized by the Covenant", and the reference to compliance with the law should be interpreted as referring to "modalities by which the review by a higher tribunal is to be carried out, as well as which court is responsible for carrying out a review in accordance with the Covenant". In this interpretation, Article 14(5) is infringed not only when the convicted person has no right to an appeal against a conviction imposed "by the court of first instance, but also where a conviction imposed by an appeal court or a court of final instance, following acquittal by a lower court, according to domestic law, cannot be reviewed by a higher court", regardless of the seriousness of the offence (from the Committee's "General Comment No. 32" to Article 14 of the ICCPR of 23.08.2007, 45 and 47, quoting Communications 1095/2002, Gomaríz Valera c. Spain, 64/1979, Salgar de Montejo c. Colombia, and 1073/2002, Terrón c. Spain, accessible at <https://tbinternet.ohchr.org>).

The formulation of Article 14, para. 5, inspired by the Anglo-Saxon approach, has led some European States to make reservations to this provision (cases of Germany, France, Belgium, Luxembourg and Norway, at https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&clang=_en). Since Portugal has not made a reservation that could alter the meaning and scope of this provision, questions will necessarily arise as to the obligations arising from the binding nature of this instrument of international law, since, although they do not have the binding nature of a Court decision, communications from the Human Rights Committee, by virtue of the functions assigned to it, are of decisive value in interpreting the Covenant, which must be done in good faith, in the light of its object and purpose and taking into account the agreement of the parties on the application of its provisions (cf. Articles 14, 21 and 31 of the Vienna Convention on



the Rights of Treaties of 23.05.1969 - RAR No 67/2003 and DPR No 46/2003 of 7 August).

It is important to note, however, that although the Pact is in force in the domestic legal order, through ratification (Article 8, no. 2 of the Constitution, which contains a rule of full general reception of international law – in this sense, Jorge Miranda / Rui Medeiros, ob. cit, p. 89), imposing the obligation to respect and guarantee the rights recognized therein (Article 2, para. 1), Article 14, para. 5, expressly requires the adoption of legislative measures regulating the right to appeal, in accordance with the obligation resulting from Article 2, para. 2, which states that “each State Party” “undertakes” to “take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant and that are not yet guaranteed by legal or other provisions”. It follows that, since it is not required that it be directly applicable by the Courts, if there are inconsistencies between the domestic law and the provisions of the Covenant, they should be resolved by the legislative measures necessary to guarantee the right of appeal as guaranteed by Article 14, para. 5 (as clarified in the Human Rights Committee's "General Comment No. 31" of 29.03.2004, where it reads in the original: “13. Article 2, paragraph 2, requires that States Parties take the necessary steps to give effect to the Covenant rights in the domestic order. It follows that, unless Covenant rights are already protected by their domestic laws or practices, States Parties are required on ratification to make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant. Where there are inconsistencies between domestic law and the Covenant, article 2 requires that the domestic law or practice be changed to meet the standards imposed by the Covenant’s substantive guarantees. Article 2 allows a State Party to pursue this in accordance with its own domestic constitutional structure and accordingly does not require that the Covenant be directly applicable in the courts”. For further development, see Anja Seiber-Fohr, "Domestic Implementation of the International Covenant on Civil and Political Rights Pursuant to its article 2 para.2", Max Planck Yearbook of United Nations Law, Vol. 5, 2001, J.A. Frowein and Wolfrum (eds.), 2001, Kluwer Law International, Netherlands, pp. 399-472).

Accordingly, it must be concluded that, despite the non-conformity between Article 400(1)(e) of the PPC and Article 14(5) of the Covenant, by not admitting the right to appeal the decision condemning the Relationship handed down in an appeal for an acquittal at first instance, there is no legal basis in this provision of international law for admission of the present appeal to the Supreme Court of Justice.”

6. This position is also referred in secondary sources (v.g. Albuquerque, Paulo Pinto de, *Comentário do Código de Processo Penal*, 4.ª Edição, 2011, commentary to Art. 449, §23, with an additional reference).



NON DISCRIMINATION (ARTS. 2, 7, 24 AND 26) LIST OF ISSUES, §§10, 15

7. Police violence is still an issue in Portugal. Recent reports in the media have again raised attention to the disproportionate use of force^{iv}. It is often connected with racist attitudes. Demonstrations occurred just this weekend, asking for the end of such violence.
8. Forum Penal believes it would be important to establish more effective measures to prevent, investigate and, if applicable, punish officers who abuse their duties. In this regard, measures such as the use of body cams, cameras in police vehicles, the effective operation of the right to access to a lawyer from the outset of deprivation of liberty, as indicated below, and the streamlining of investigative proceedings, as well as the establishment of specialized bodies or departments to investigate such cases, which are sufficiently independent of those involved, could be adequate steps.

**RIGHT TO LIFE, PROHIBITION OF TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT, CONDUCT OF THE SECURITY FORCES AND TREATMENT OF PERSONS DEPRIVED OF THEIR LIBERTY (ARTS. 6, 7 AND 10)
LIST OF ISSUES, §15**

9. In this respect, the same applies as stated in §8 above.
10. In addition, it would be helpful in order to make the rights of persons deprived of their liberty more effective, to facilitate the right to access to a lawyer in prison establishments by setting up a scheme of legal consultation and orientation, provided by lawyers registered at the Portuguese Bar Association who would attend to the establishment in person regularly (similar schemes exist, for example, in Spain).
11. Currently the right to access to a lawyer for those persons deprived of their liberty who cannot afford a lawyer, especially after they have been finally convicted, is not guaranteed in an effective and practical manner. This has been outlined in a Judgment of a lower Court^v (local criminal court of Paços de Ferreira) of May 2018, affirmed by the Porto Court of Appeals in December 2018.
12. Establishing such a system would help persons deprived of their liberty to know their rights and to be able to make effective complaints (even using the scarce remedies available).
13. Otherwise, although some complaint mechanisms are established by law (which need strengthening), persons in prisons are not able to avail themselves of such mechanisms, due to lack of proper legal assistance. Setting up such a system has not been possible up to this day, despite a proposed draft bill for amending the law on legal aid having been drafted recently.



14. In terms of inadmissibility of statements or confessions obtained under torture, Portugal has a strong protection, namely a constitutional exclusionary rule that has been introduced in 1976 with the new Constitution and states: “All evidence obtained by torture, coercion, infringement of personal physical or moral integrity, or improper intrusion into personal life, the home, correspondence or telecommunications is null and void”.
15. The Portuguese Code of Criminal Procedure (hereafter CCP) has a corresponding rule: “Article 126 - Forbidden Methods of Evidence 1- Evidence obtained by torture, coercion, or, as a general matter, infringement of personal physical or moral integrity, is null and void and may not be used.
16. The fruit of the poisonous tree doctrine applies, with the limitations of the “attenuation of the taint”, “inevitable discovery” and “independent source”. The Constitutional Court has explicitly recognized the doctrine in its Judgment no. 198/2004, of 24.03.2004.^{vi} The decision dealt with the constitutionality of Article 122(1) CCP.^{vii}

RIGHT TO LIFE, PROHIBITION OF TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT, CONDUCT OF THE SECURITY FORCES AND TREATMENT OF PERSONS DEPRIVED OF THEIR LIBERTY (ARTS. 6, 7 AND 10)

LIST OF ISSUES, §17

17. In relation to solitary confinement of juveniles up to 16 years old serving a measure depriving him or her of their liberty according to the juvenile regime established in Law 166/99, of 14.09^{viii}, the regime applicable is different than that established in Law 155/2009.
18. Preventive isolation (for good order) may be applied for a maximum of 24h (Article 183, para. 2, Law 166/99, of 14.09) and must be accounted towards any disciplinary measures of the same nature.
19. Isolation as a disciplinary punishment (i.e. “suspension, whenever possible partial, of conviviality with the companions”) may be imposed for certain disciplinary offences, up to a maximum of 3 or of 7 days (see Article 196, lit. (g), and 197, lit. (f), Law 166/99, of 14.09).
20. In the event of cumulative sanctions, the juvenile may not remain longer than 3 days in a “disciplinary room”, nor may be deprived of conviviality with his or her companions for a period longer than 7 days, or longer than 3 days, if the suspension of conviviality is not partial.
21. Juveniles between 16 and 18 years old, serving a prison sentence, are subject to the regime of Law 105/2009.



22. Hence, for reasons of good order, he or she may be placed in a “separation cell” (subject to review by the Director every 72h, and control by the Court – see Article 92, Law 105/2009). After 30 days, if it cannot be lifted, the Director must propose the placement of the person in security regime pursuant to Article 15.
23. For mental health reasons, a “security room” may be used, up to a maximum of 10 days, after which he or she must be transferred to a medical facility (prison or civil).
24. Isolation as a disciplinary punishment - i.e. “compulsory permanence in the cell for up to 30 days” or “internment in a disciplinary cell for up to 21 days” is established in Article 105, para. 1, lit. (f) and (g), respectively.
25. In case of cumulative sanctions these periods may go up to 60 days (Article 105, para. 4), but the execution without interruptions may not exceed 30 days in case of “internment in a disciplinary cell”. Any period in excess may only be served after an interruption of 8 days (Article 113, para. 4).
26. Solitary confinement in a single cell may also be imposed in the remit of disciplinary proceedings as a preventive measure and may last up to 30 days, according to Article 111, para. 3. It will be counted towards disciplinary sanctions imposed pursuant to Article 105, para. 1, lit. (f) and (g) (see Article 111, para. 5) (Article 113, para 3).

LIBERTY AND SECURITY OF PERSON AND ADMINISTRATION OF JUSTICE (ARTS. 9, 14 AND 24)

LIST OF ISSUES, §§25

27. The *practical operation* of the right to legal assistance in the earliest stage of proceedings from the outset of detention could be improved^{ix}.
28. If an arrested person does not instruct a private defense lawyer, a legal aid lawyer should be appointed immediately from the outset of detention, rather than only at the moment in which the interrogation is to take place.
29. This would promote two fundamental safeguards: (a) the defence lawyer’s role as a safeguard to prevent ill-treatment in line, *inter alia*, with the standards recommended by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment;^x and (b) the right to an effective defence and to a fair trial, by giving the defence lawyer more time to prepare the arraignment or first interrogation.
30. There are some more specific legal safeguards ensuring that detained persons are entitled to access to a lawyer even during the 48h period following their arrest (in Portuguese “detenção”: (a) Article 124, para. 3, of the Code of Execution of Criminal Sanctions and Measures Depriving a Person of their Liberty^{xi}; (b) Article 8, para. 1, of the General Regulation on Prison Establishments^{xii}; (c) Article 15, para. 2, of the Regulation on Material Conditions of Detention in Police Establishments^{xiii}).



31. The combination of those rules with the rules in the CCP establishing the rights of the accused and the requisite of a formal declaration as an accused (*arguido*) – namely Articles 1(e), 57, 58, 59, 60, 61 and 62 – with rules on mandatory legal assistance, means that normally *a person in detention* not only has the right to assistance of counsel but is *de facto* assisted by counsel *during any interrogation*.
32. In relation to the right to counsel for indigent persons, financial legal aid is available for the accused in any criminal case, irrespective of the severity of the offences they have been charged with. There is a means test established in the Law on Access to Law and to Courts,^{xiv} and further legal aid regulations.
33. In practice, at the latest from the moment he or she is interviewed, the accused deprived of his or her liberty always enjoys the benefit of legal assistance by a defence lawyer appointed *ex officio*, if a private defence lawyer has not been instructed. This defence lawyer is paid for by the state and the accused will only bear the respective costs if convicted.^{xv}
34. To this end, the Portuguese Bar Association organizes lists of duty lawyers (*escalas*). The authorities make a request to the SINOA computer system and the name of a lawyer registered for legal aid and included in the randomly assembled duty list for the respective day is provided. This lawyer will be called in and has to attend within 1 hour from the moment he or she is called (Article 4, para. 3, Decree 10/2008, of January 3).
35. In certain (dedicated central) police stations or Courts, the duty lawyers are present and are called in order of arrival to the premises of the court/police.
36. Whenever a legal aid lawyer represents the accused, the latter is not free to choose her own defence lawyer. One will always be randomly drawn from the rosters by the computer system managed by the Portuguese Bar Association (PBA) from any name registered in “criminal law”. The impossibility of choosing the defence lawyer is in our view clearly a violation of the principle of equality and minimum guarantees of defence, particularly in cases of high complexity or specialization of the matter, or even in cases where the defendant does not speak Portuguese and intends to be defended by a defence lawyer with whom s/he can communicate directly.^{xvi}
37. The above-described legal framework does not, however, ensure access to a lawyer *in practice from the outset of detention*.
38. This happens because, if someone relies on legal aid, authorities usually only appoint a defence lawyer at the moment the accused requests it – typically before the interview starts and not at the outset of detention.
39. This is likely the reason why authorities will only appoint the lawyer at the moment when it becomes *mandatory* which only applies “*at the interviews of detained persons*” (Art. 61, para. 1, lit. (a), CCP, emphasis added) and not “*from the outset of deprivation of liberty*”.



40. In addition to the circumstances described above, persons deprived of their relying on legal aid do not always fully understand that they may call a lawyer immediately and during the detention period, which can last up to 48h (and not only in relation with an interview) and waivers are made in a bureaucratic manner, without full understanding of the consequences.
41. Finally, the practical implementation of this right is not always ideal, since, even if contacted, the defence lawyer will often not visit the person in detention, but only meet her shortly before the interview takes place – sometimes due to lack of experience or due to the inadequate remuneration of the fees paid for urgent assistance in the legal aid scheme, but also when it comes to privately instructed lawyers.
42. In this framework, the role of the defence lawyer as a safeguard to the prevention of ill-treatment is weakened as it should imply the presence of the lawyer from the outset of detention and not just at the moment of interrogation.^{xvii}
43. Besides this, there might be shortcomings in the preparation of the interview, due to the short time that the defence lawyer has before being summoned for the interview and the start of the latter (the law determines that the person is to be brought before a judge 48h after detention at the latest).
44. This is the reason why we believe that there should be a defence lawyer in prison establishments, premises of the judicial police and other police stations, or at least one should be immediately appointed once a person is arrested and does not instruct a lawyer.

FREEDOM OF EXPRESSION (ART. 19)

LIST OF ISSUES, §§25

45. Forum Penal is not aware of any legislative projects, or otherwise, in relation to a possible abolishment of its criminal defamation laws.

Lisbon 3 February 2020

The Board of Forum Penal – Associação de Advogados Penalistas



ⁱ For example, 199 cases for the Supreme Court; 19 for the Porto Court of Appeals; 20 for the Lisbon Court of Appeals; 4 for the Coimbra Court of Appeals; 11 for the Évora Court of Appeals; 7 for the Guimarães Court of Appeals, on www.dgsi.pt (keywords “Pacto Internacional dos Direitos Cívicos e Políticos”);

ⁱⁱ For example: - Article 9 (Judgment of 14-11-2019, case 1589/19.6PKLSB-A.S1, 3rd Section) (no violation, mere argumentative reference, no discussion), available at

<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/8071da3792750b79802584b2005be815?OpenDocument&HighLight=0,pacto,internacional,dos,direitos,civis,e,pol%C3%ADticos>; Article 14, para 3 (impartiality of the court) (Judgment of 28-11-2019, case 282/16.6GALNH.L1-A.S1, 5th Section) (no violation, mere argumentative reference, no discussion),

<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/9b292680bb2838c580258434005b0554?OpenDocument&HighLight=0,pacto,internacional,dos,direitos,civis,e,pol%C3%ADticos>

ⁱⁱⁱ Judgment of 30-10-2019, case 455/13.3GBCNT.C2.S1, 3rd Section,

<http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/b6d54695bc7a58e1802584a3005d70c3?OpenDocument&HighLight=0,pacto,internacional,dos,direitos,civis,e,pol%C3%ADticos>

^{iv} See <https://poligrafo.sapo.pt/sociedade/artigos/violencia-policia-na-amadora-videos-ja-foram-vistos-mais-de-1-milhao-de-vezes-no-facebook> (a woman accuses police officers of excessive use of violence upon apprehension and also of violence during the transportation to the police station).

^v Cited here: <https://www.publico.pt/2019/10/27/sociedade/noticia/ordem-processou-recluso-ajudava-presos-advogado-tribunal-absolveu-1891391>

^{vi} Constitutional Court Judgment No. 198/2004 of March 24, 2004, available at <http://www.tribunalconstitucional.pt/tc/acordaos/20040198.html> (accessed 12 August 2019).

^{vii} Art. 122 (1) CCP states that nullities render invalid the act in which they occurred, as well as the acts that depend on the former act and may be affected by those nullities.

^{viii} Available in Portuguese at

http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=542A0183&nid=542&tabela=leis&pagina=1&ficha=1&so_miolo=&nversao=#artigo

^{ix} This part of the text follows, Ramos, Vânia Costa/Abreu, Carlos Pinto/Cordeiro, João Valente, Confidencialidade da comunicação com o defensor como exigência de um processo penal justo e equitativo, in Armando Dias Ramos/António Amaro Rosa, Estudos em Homenagem ao Juiz Conselheiro António Henriques Gaspar, pp. 179-229 (188-192, 227-228).

^x European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 2011, available at <https://rm.coe.int/16806ccd25> (accessed 12 August 2019).

^{xi} “The arrested person shall have the right to contact his lawyer at any time of the day or night.” – see Portuguese version at http://www.pgdlisboa.pt/leis/lei_busca_assunto_diploma.php?buscajur=advogado&artigo_id=&pagina=1&ficha=1&nid=1147&tabela=leis&diplomas=&artigos=&so_miolo=

^{xii} Stating that upon admission “[t]he inmate is allowed to call a relative or a person of his or her trust and his or her lawyer free of charge” – available in Portuguese here:

http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=1317&so_miolo=&tabela=leis&nversao=

^{xiii} “Information on the rights to instruct a lawyer and to communicate with family members or persons of their trust, as well as the delivery of the information leaflet referred to in the preceding paragraph, shall be documented by drawing up a notice and delivery form”, available at <https://dre.pt/home/-/dre/67374133/details/maximized>

^{xiv} Law 34/2004, of July 29.

^{xv} The fees legal aid lawyers receive are established by a decree and are very modest in comparison to the fees of private lawyers.

^{xvi} The law guarantees assistance by an interpreter different from that of the court for confidential conversations with the defender. Nonetheless, such assistance is not identical and does not replace the possibility of communicating with the defence lawyer directly and without barriers. Also, there are practical barriers regarding the holding of meetings with a client with the assistance of an interpreter, as shown by the facts behind the Judgment of the Court of Appeals of Porto of 30.09.2015, case no. 347/10.8PJPT-E.P1, Rapporteur Maria Luísa Arantes, available at <http://www.dgsi.pt/jtrp.nsf/56a6e7121657f91e80257cda00381fdf/1d5953d3be1d6f4cf80257ee3002dae56?>

^{xvii} See in this regard European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 2011, available at <https://rm.coe.int/16806ccd25> (accessed 12 August 2019). The ECtHR also recognizes this function (see, for example, Judgment of 27.11.2008 [GC], *Salduz v. Turkey*, Appl. no. 36391/02, §54, available at <http://hudoc.echr.coe.int/eng?i=001-89893>; Judgment of 21.04.2011, *Nechiporuk and Yonkalo v. Ukraine*, Appl. no. 42310/04, §263, available at <http://hudoc.echr.coe.int/eng?i=001-104613>). Within the European Union, it was also explicitly recognised in Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (see recitals 28, 29 and Article 3(2)(c)).