



## Portugal Rule of Law Overview

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*This report on the rule of law in Portugal, written by an expert in cooperation with Democracy Reporting International, is the second in a series that will cover all 27 EU member states.*

### Summary

Portugal's judiciary was comprehensively reformed after the transition to democracy in 1974. It is generally considered to be independent and providing relevant checks and balances. In the context of the euro crisis and the demands of the Troika (European Commission, European Central Bank, and International Monetary Fund) for cost-cutting from 2011 to 2014, the court structure across the country was significantly overhauled and centralised. As a consequence, the speed of judicial proceedings has improved, although the reform also meant that more remote areas of Portugal are now further removed from the courts.

While Portugal receives positive marks in international indices for its rule of law, public perception of judicial performance in the country is relatively weak. This is due to several high-profile corruption cases involving national politicians and big business, which have so far not been resolved. In one such case, Portugal's former prime minister José Sócrates is charged with money laundering of an estimated 20 million euro. This and other high-profile cases suggest a need to strengthen the justice system's ability to uncover and process complex cases where financial and political power intersect. The way that these pending cases are treated and resolved will be an important indicator of the state of rule of law in the country.

### Portugal's legal and political landscape

Portugal began democratising with the Revolution of 25 April 1974, after 48 years of dictatorship (Estado Novo), when the country was ruled by António de Oliveira Salazar under one-party rule. Portugal today is a consolidated parliamentary democracy. A parliamentary model of government predominates, with some characteristics which are close to presidential-type forms of government. Considering the political system from a holistic perspective, it is more appropriate to define Portugal as a "light" parliamentary model,<sup>1</sup> where the President has an important role, characterised generally by what is known in Portugal as a "magistracy of influence", that is, the President exercises power by trying to influence other political actors to achieve political consensus on important subjects and/or to intervene in social problems. The government is led by a Prime Minister. The Prime Minister and the other members of the government are nominated by the President, taking into account the parliamentary election results. The President, under certain circumstances, has the power to dismiss the Government and dissolve Parliament.

After the elections of 6 October 2019, Portugal reaffirmed the centre-left Socialist Party (PS) as the governing party. However, the PS continues to need agreements with other parties to ensure a parliamentary majority. The left political block (PS, Left Block and Unified Democratic Coalition, comprising the Communist Party and the Green Party) still represents the majority. In these elections, these three parties accounted for around 53% of the votes.

<sup>1</sup> Democracy Reporting International, "[Systems of Government: Semi-Presidential Models](#)," Berlin, March 2012.

During the dictatorship, judicial power was used as an instrument of political control and repression. In the democratic period, especially in the early 1980s, many structural reforms of the judicial system were implemented (democratisation of courts, elimination of political courts, implementation of basic principles of the rule of law, and openness of judicial professions to women), to renew its bodies (judges, public prosecutors, judicial clerks and lawyers) and to transform the judicial culture with the establishment of the Judicial School.

In the following decades, judicial reforms were mainly aimed at reducing inefficiencies and delays. However, Portuguese justice still suffers from slow proceedings, a high workload, opacity and bureaucracy, due to: legal complexity; a lack of human resources, appropriate training and facilities (including court buildings and technology); and organisational problems (low levels of efficiency, efficacy, and qualified personnel). The financing of the judiciary suffered from the austerity measures implemented in the context of the euro crisis. Portugal ranks in the middle range on the 2019 EU Justice Scoreboard<sup>2</sup> and the 2018 CEPEJ reports.<sup>3</sup>

The Portuguese Constitution establishes the following courts: the Constitutional Court, the Supreme Court of Justice, judicial courts of first and second instance, the Administrative Supreme Court, administrative and fiscal courts of first and second instance, and the Court of Auditors. It also allows for the creation of arbitration courts (either institutional or ad hoc), as well as justices of the peace.

The Portuguese legal system contains two jurisdictions: ordinary and administrative/fiscal jurisdiction. The judicial courts deal with ordinary criminal and civil matters, whereas administrative and fiscal matters are heard in the separate, administrative court system. The judicial hierarchy comprises courts of first and second instance and the Supreme Court of Justice. The Constitutional Court is responsible for constitutional matters and, since its establishment, has played an important role in strengthening the rule of law by declaring unconstitutional some laws that restricted rights and guarantees.

All matters relating to the oversight of judges and public prosecutors are run by their councils. These

councils are composed of a majority of judicial actors elected among themselves (the remaining members, according to the High Councils, are nominated by the President, Parliament and/or Ministry of Justice). The councils are responsible for appointments (following established application procedures), evaluation and disciplinary action. Judges and public prosecutors are selected through a national exam (writing and oral test and interview), followed by a two-year training period at the Judicial School. The presidents of the higher courts are elected among and by the court judges. The judge-presidents of county courts (first instance) are nominated by the High Judicial Council, according to criteria established by law, and through an application process.

## Recent developments on the rule of law in Portugal

The Portuguese judicial system has not been seen as a priority for recent governments, in terms of financial investment in public policy, and it has attracted an average spending of 0.35% of the gross domestic product (GDP),<sup>4</sup> which stands in the middle of the European range. Nevertheless, in the World Justice Project Rule of Law Index 2019, Portugal is in 22nd position in the world ranking, with stable performance in the majority of the criteria evaluated.<sup>5</sup> At the European level, as observed on the European Justice Scoreboard, Portugal often appears in the middle of the table.<sup>6</sup>

In the last few years, the Government has aimed to consolidate the judicial reform, including the new decentralised management structure, by making small improvements in several areas, such as the opening of new vacancies for judges, public prosecutors and judicial clerks that were suspended during the Troika years. In 2019, the number of professionals working in the courts was the same as in 1999. The most significant reform took place in 2014, changing the judicial organisation that had been in force for several decades. It was based on agreements made with the Troika (Memorandum of Understanding (MoU) signed on 17 May 2011) as part of the three-year financial bailout for Portugal. This agreement was signed by a PS-led government, which then resigned. It was therefore implemented by a newly-elected governmental coalition formed

2 European Commission, "[The 2019 European Justice Scoreboard](#)," Luxembourg, 2019. Thereafter: European Commission, "The 2019 European Justice Scoreboard".

3 European Commission for the Efficiency of Justice (CEPEJ), "[European judicial systems: Efficiency and quality of justice](#)," Strasbourg, October 2018.

4 European Commission, "The 2019 European Justice Scoreboard".

5 World Justice Project, "[World Justice Project Rule of Law Index 2019](#)," Washington, D.C., 2019.

6 European Commission, "The 2019 European Justice Scoreboard".

by the Social Democratic Party (PSD) and the Popular Party (CDS-PP) in the three years that followed. Among the measures it introduced was a section devoted to the justice system. The 18 measures for improving the functioning of the justice system can be grouped under three main headings:

- management and organisation of the courts;
- simplification of procedures and court fees in civil and fiscal cases;
- measures to combat the backlog of cases.

However, the main goal was to reduce costs and increase the efficiency of courts on economic issues, as set out in the MoU, by:

- ensuring effective and timely enforcement of contracts and competition rules;
- increasing efficiency through a restructuring of the court system and the introduction of new court management models; and
- speeding up the system by eliminating the backlog of court cases and facilitating out-of-court settlement mechanisms.

It was within this context that, in 2014, a major reform of the ordinary judicial organisation took place, dividing the country into 23 main/county courts (first instance courts). These courts were divided into Central Sections with specialised competence sections for different areas (central civil, criminal, criminal investigation, family and juvenile, labour, commercial and judgment execution); Local Sections, which include general sections (local civil, local criminal and minor crimes); and Proximity Sections. Essentially, the government opted for a model based on one court per district with various sections functioning in different locations within the district. Courts with wider territorial jurisdiction are divided according to responsibilities – intellectual property; competition, regulation and supervision; sea issues; enforcement of penalties; central criminal instruction – meaning that they have specialised competence and can hear cases involving specific matters. Their territorial competence is more extensive than the county courts since they can hear cases in several districts or specific areas stipulated by law.

In an interview on the Ministry of Justice website, the then Minister of Justice, Paula Teixeira da Cruz stated that “[t]he reform of the justice system and the new judicial map will save the country a lot of money and resources,” and that “it is 200 years since a reform on this scale has been undertaken”. By highlighting these statements rather than the main guidelines, it suggested that the main concerns underlying the reform were cutting costs and resources, as demanded by the Troika. Although the

reform was implemented within the framework of financial assistance and cost rationalisation, it was nonetheless based on three fundamental pillars which can be seen as reinforcing the rule of law in Portugal: broadening the geographical reach of the judicial districts; introducing specialised jurisdictions on a national level; and implementing a new management model for the districts/courts. Although the guiding principles had the potential to change the performance of the courts, issues related to the access of citizens to law and justice were not made a priority, introducing new barriers, such as increasing the costs to litigate and making it more difficult for people with lower incomes to access the courts.

The reform was controversial among legal professionals and local politicians from the smaller urban centres, mainly in low-density areas with citizen mobility issues, where courts were closed. Lawyers were more vocally against this reform, while judges and public prosecutors, despite some complaints, generally accepted the reform. Reforming the judicial system after three years of austerity measures had “worn out” public opinion made it easier to be implemented without major political battles. The PS government of 2015-2019 introduced only minor changes to the legal and judicial system in the area of justice, without interfering in the model of the previous reform. Its major concern was to strengthen the geographical access of citizens to courts.

## Key ongoing cases

In our opinion, developments in several high-profile cases are crucial for the evaluation of the rule of law in Portugal. The judicial system needs to address several challenges, including efficiency and swiftness of procedures, balancing procedural guarantees and investigative efficiency, technical competence to properly assess the evidence in highly complex cases and how it can “neutralise” the potential charges of the politicisation of justice. In the past, many of these processes were “lost” with multiple appeals on minor legal aspects and the questioning of evidence which made cases drag through the courts for many years, with a very low conviction rate at the end.

Three cases of international impact and relevance can be highlighted.

The first deals with the former prime minister, José Sócrates (Operação Marquês), who led the country between 2005 and 2011 (Socialist Party), until he resigned after signing the MoU with the Troika and approval, by the Parliament, of a new austerity package of cuts to public spending. According

to information published by the media, Sócrates, using tax legislation that his party had adopted, allegedly laundered at least 20 million euros of illicit gains from corruption with the support of a close friend, who is also accused of benefiting from the friendship to gain easy access to public contracts totalling millions. Sócrates has been awaiting trial since 16 October 2015 on suspicion of corruption offences, tax fraud and money laundering, after having been under house arrest for about a month (between September and October 2015) and previously in custody for nine months (from November 2014 to September 2015). With this case, much other relevant information was released which shocked the public by the way in which business and governance were mixed without any ethical standards, combined with the inaction of public and judicial authorities. The speed and manner in which this case will be resolved will have a significant impact on Portuguese public perceptions of the rule of law, although the current covid-19 situation will naturally slow down the work of courts.

The second case relates to the fall of the Banco Espírito Santo (BES), the most important private bank in Portugal, which was bailed out by the Bank of Portugal in 2014. In the aftermath of the bailout, prosecutors charged managers with crimes such as fraud, corruption, trafficking in political and economic influence, and harmful management. These actions had a serious impact on the state budget due to the injection of millions of euros, and the loss of millions of euros from customers who were victims of financial deception. The Bank of Portugal justified the injection of capital saying it was to avoid a domino effect on the banking system. Currently, several former bank managers have been formally charged by the Public Prosecutor, but the case is still in its early stages and its complexity, dimension, as well as the involvement of economic and politically powerful actors, suggest that it will be a long time before an outcome is reached.

The third case has to do with the theft of weapons from a military warehouse (Tancos) in June 2017, which raised concerns that they could be sold on the black market for terrorist purposes. The theft was investigated by the Judiciary Police, against the wishes of the Military Police who claimed to be responsible for the investigation. The weapons were recovered by the Military Police in what turned out to be a scam after arranging their return with the thieves (who included a former military man). The Judiciary Police discovered the plot. It is suspected

that the Minister of Defence, who resigned a few months after the theft, and other high military and political actors, knew about the scheme, without having reported what they knew to the Public Prosecutors. The accusation of the Public Prosecution was released the week before the elections and was much discussed before election day. The former Minister of Defence is accused of covering up relevant information and joining others accused of falsifying and masking evidence. Several members of the Military Judicial Police and the former Minister of Defence were made defendants in the preliminary phase of the criminal investigation.

These three cases call into question the strength and credibility of Portuguese rule of law by exposing the (in)capacity of the judicial system to investigate, prosecute, judge and convict important political and economic actors. The judiciary is very capable of prosecuting cases of minor importance and complexity, but in the past has often failed to deal with larger cases, due to the complexity of legislation, the abundance of possible judicial reviews, the fragility of investigative and prosecution structures and the lack of a strong judicial culture capable of confronting the vested interests in Portuguese society. These cases are an opportunity to reach different judicial results.

## Domestic, regional and international public opinion

Social perceptions surveys of citizens that have been conducted in Portugal, namely by the Centre for Social Studies, show, on the one hand, the importance that citizens attach to law and justice but, on the other, the low confidence in the functional performance of the courts to guarantee the real enforcement of rights. This undermines the rule of law. The main cause of this negative perception is the inefficiency and slowness of justice.<sup>7</sup> The Eurobarometer on the Rule of Law reinforced these conclusions, underlining the relevance that Portuguese citizens attribute to all aspects of the rule of law, with 89 out of 100 considering them as very important in assuring a quality democratic ruling.<sup>8</sup>

The Portuguese judicial system, nevertheless, has been able to reduce the number of pending court cases since 2012 and court cases take less time than the European average. This contrasts with the public perception, influenced by the intense media coverage of the cases mentioned above. The system

7 Boaventura de Sousa Santos, João Pedroso, Maria Manuel Leitão Marques, and Pedro Lopes Ferreira, "Os Tribunais nas Sociedades Contemporâneas: O Caso Português," Porto, 1996. José Manuel Mendes and João Paulo Dias, "Inquérito à opinião pública sobre o funcionamento dos tribunais em Portugal - Relatório Preliminar," Coimbra, 2004.

8 European Commission, "Special Eurobarometer 489: Rule of Law Report," July 2019.



has also benefited from the specialisation of court services, with a reduction in new cases every year and a resolution rate of more than 100% per year. The improvement in the functional performance of courts is generally considered to be a consequence of the reform of the judicial organisation referred to above. Indeed, one of the programme objectives of the reform was to increase the efficiency of court performance and procedural speed. The previous territorial distribution of courts (233) did not allow sufficient scale to support measures aimed at increasing the quality and efficiency of courts, including specialised courts. The reform therefore gained broad social and political consensus, both from judicial actors and from organisations in society at large, despite some protests from the mayors of the smaller urban centres where courts were closed.

From another perspective, the reform has broadened the scope of the powers of the judiciary concerning the administration and management of the courts, which are still mostly within the sphere of the executive branch (by defining the budgets, the investments on courts and IT or, among other issues, by restricting the entrance of new judges or public prosecutors), and deepened the preconditions for self-government. Thus, several more steps were taken to provide greater administrative and financial autonomy for the courts, which is generally understood as reinforcing their independence and is a central principle of the rule of law.

In public debate, the rule of law, nevertheless, remains strongly challenged in its quality, accountability, liability, capacity and performance by high-profile cases that involve powerful economic or political actors in corruption or other economic crimes. The public's expectations have not been met, contributing to a slow but gradual erosion of the credibility of the rule of law in public opinion. These cases increased the feeling among the public that there is one "law for the poor and another law for the rich". And the facts of the past decades have helped to entrench that idea.

One specific domain in which, more recently, challenges to the rule of law have been particularly noted, both in the media and internationally, is regarding freedom of speech. Several journalists have been convicted by Portuguese courts as a result of complaints against them for writing in the press about certain facts or behaviour often related to politically or economically powerful people. The journalists have appealed to the European Court of Human Rights (ECHR), which condemned the Por-

tuguese state after the decisions of the Portuguese courts were found incorrect. Instituto Superior de Ciências do Trabalho e da Empresa and Democracy Reporting International found that Facebook pages that emerged in the context of high-profile judicial cases spread significant political disinformation.<sup>9</sup>

At the international level, Portugal is regularly seen as a good example of a stable and well-functioning democracy. Nonetheless, cases brought against Portugal in the international courts demonstrate some weaknesses in the rule of law, particularly concerning delays in Portuguese justice and limits on freedom of the press. These have led to appeals against not obtaining a decision in due time and to a continuation of the fight at the international level, which have made concerns over the rule of law more prominent.

One of the most important aspects of the rule of law is independence, both internal and external, of courts and judges. In Portugal, this is a subject that has not been particularly called into question in the political and social debate, but there have nevertheless been some cases regarding Portugal that have had important implications at the international level:

The case C-64/16 – Associação Sindical dos Juizes Portugueses (ASJP) (Portuguese Association of Judges) – before the Court of Justice of the European Union (CJEU) concerned a proposed reduction of salaries in the Portuguese public administration that would have reduced the remuneration of the judges of the Court of Auditors in Portugal. In its judgment, the CJEU emphasised Article 19(1) of the Treaty on European Union ("The Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.") According to the CJEU, Member States must ensure that national courts can exercise their judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever. National measures that infringe this standard "may now be found incompatible with the principle of judicial independence."<sup>10</sup> While largely a technical question as regards Portugal, the judgment has had broader consequences in the EU as a whole by ensuring effective judicial protection in the Union's legal system and for asserting the EU as a union of law. Some authors have argued that the landmark judgment encouraged the use of Union law to solve problems related to the judiciary of Member States (namely,

9 Instituto Superior de Ciências do Trabalho e da Empresa / Democracy Reporting International (Gustavo Cardoso, Inês Narciso, José Moreno and Nuno Palma), "[Online disinformation during Portugal's 2019 elections](#)," Berlin, November 2019..

10 José Igreja Matos, "Rule of Law in Europe – A decisive moment," 2018.

in Hungary and Poland) and underscored the potential of EU law to consolidate and defend the rule of law structures in EU Member States.<sup>11</sup>

In the European Court of Human Rights (ECHR), there are no relevant cases regarding the independence of courts related to Portugal. However, there is a case related to the interactions between actors of the Portuguese judicial system that is notable for concerning the internal independence of judges. In the case of Ramos Nunes de Carvalho e Sá vs. Portugal – Application no. 55391/13 and others (6 November 2018), the ECHR partially recognised the appeal. The Portuguese High Council of the Judiciary decided to open three sets of disciplinary proceedings against the applicant for allegedly making disrespectful remarks about a judicial inspector who was conducting her performance evaluation during a telephone conversation with him. According to the ECHR, in the circumstances of the case, the combined effect of two factors, 1) the insufficiency of the judicial review performed by the Judicial Division of the Supreme Court; and 2) the lack of a hearing either at the stage of the disciplinary proceedings or at the judicial review stage, meant that the applicant’s case was not heard within a reasonable time by an independent and impartial tribunal established by law.

Finally, within the jurisprudence emanating from the United Nations Treaty Bodies, there are no cases on Portugal. The 2019 UN Universal Periodic Review reports generally positively on Portugal.<sup>12</sup> It reports that: a) the Centre for Judicial Studies provides training on human rights to judges and public prosecutors; b) human rights educational programmes have increased in Portuguese universities, in particular in law schools; and c) Portugal’s efforts to

tackle its judicial backlog have produced positive results in recent years.

## Conclusion

While the overall assessment of the rule of law in Portugal is generally positive, with the recent judicial reforms delivering improvements in efficiency, the system has still to prove itself in the fight against corruption and economic crime in general, which will be crucial to restoring public confidence. To achieve that goal, there will need to be investment in: more human resources (judges, public prosecutors and judicial clerks, but also in the Judiciary Police and its investigative services); improved IT resources; and simplification and improvements in legislation in important areas such as criminal law. For these reasons, the Ministry of Justice needs a strong governing team and to consistently implement the new Governance Programme, approved in November 2019, which lists justice as one of the main priorities for improvement for the next four years.

11 Alessandra Silveira et al, “União de direito para além do direito da União – as garantias de independência judicial no acórdão Associação Sindical dos Juizes Portugueses,” May 2018. Michał Krajewski, “Associação Sindical dos Juizes Portugueses: The Court of Justice and Athena’s Dilemma,” May 2018.

12 United Nations, “[Universal Periodic Review – Portugal](#),” 2019.

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