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Migrations, citizenship and legal status of foreigners in Portugal

REPORT BY

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– A few brief notes*

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I – Introductory note

Although it began around two years earlier, the current refugee/migrant crisis reached a breaking point in 2015, causing clear and present problems in terms of the immediate issues linked to providing the refugees with a place to live in the European countries that take them in, but also generating reflection and public debates about the future of this particular immigration in the host countries – a discussion predicated on the assumption that a return to the countries of origin will not be easy or immediate, and will not encompass a substantial part of the universe of displaced persons. All these doubts and debates are also being echoed to some extent in legal reflections on these people's human/fundamental rights, and on how the law should treat the questions that are arising out of this situation.

Portugal – the country at the western tip of Europe, currently (perhaps) coming out of a very recent economic and financial crisis, and subject to European Union deficit-reduction procedures – is not an attractive country for these migrants, and this is reflected in the numbers. Portugal is offering to take more than its quota of refugees under the European agreement,¹ but very few are interested. It is said that the reason for this lack of interest is that the refugees prefer rich countries without employment problems, and it is clear that Portugal is not a member of the rich nations' club and does have serious unemployment issues.² It is thus natural that these circumstances, which are common knowledge internationally, are putting off, or at least not favouring a positive decision by, people who not only want to escape deplorable living conditions, but would also like their fresh start to happen in the best possible way.

Portugal has traditionally been a country of emigration. The “International Migration Report 2015 – Highlights (Advance copy)”³ cites Portugal as among the twenty countries or areas of origin with the largest diasporas, and the Portuguese Emigration Observatory's (OE)⁴ 2015 Statistical Report on Portuguese Emigration⁵ says that: “*Portugal is currently the European Union country with the highest ratio of emigrants to the resident population. More than two*

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*** Text translated from the Portuguese by Richard Rogers.

¹ During a visit to the Eleonas refugee camp in Greece on 11.04.2016, the Portuguese Prime Minister said that this country is willing to take 9,000 refugees, with 1,250 places available straight away. However, so far Portugal is thought to have only actually received 149 persons seeking international protection, who were reallocated here from Greece and Italy (data from the Refugee Support Platform [PAR] – www.refugiados.pt/ – with reference to 12.04.16. PAR is a network of Portuguese civil-society organisations that is seeking to complement state support for refugees).

² According to data from Statistics Portugal (INE), in Q1 2016 the overall unemployment rate was 12.4%, with youth (age 15-24) unemployment at 31.0%.

³ ST/ESA/SER.A/375, United Nations Department of Economic and Social Affairs, New York, 2016.

⁴ An entity created on the basis of a protocol between the Directorate-General of Consular Affairs and the Portuguese Communities (DGACCP) and the Centre for Research and Studies in Sociology (CIES/ISCTE) at ISCTE – Lisbon University Institute (ISCTE-IUL). Its main goals are to produce information about Portuguese emigration and contribute to the definition of public policies in this field. See <http://observatorioemigracao.pt/np4/observatorio.html>. Last accessed on 27/05/2016.

⁵ *Relatório Estatístico de 2015 sobre a Emigração Portuguesa*, available in Portuguese on the Emigration Observatory's website:

http://observatorioemigracao.pt/np4/?newsId=4447&fileName=OEm_EmigracaoPortuguesa_RelatorioEstatistic.pdf. Last accessed on 26/05/2016.

million Portuguese are emigrants, which means that more than 20% of all Portuguese live outside their country of birth". The Portuguese represent large immigrant contingents in various countries in and outside Europe. One example is Luxembourg, which is a country with a lot of immigration and where in 2011, persons born in Portugal represented 30% of all immigrants and 12% of the country's entire population.⁶

We can see that the emigratory peaks in Portugal's recent history⁷ first occurred in the 1960's, and then from 2010 onwards. The profiles of the emigrants differ quite considerably between these two periods, and the second emigratory wave has attained much more substantial numbers than its predecessor. Whereas the first wave was characterised by economic emigrants with low or very low levels of qualification, the second, which has been generated by the economic and financial crisis in the Eurozone, was (and still is) characterised by people with high or even very high levels of academic achievement. In terms of numbers, the second wave has been more than double the size of the first. According to figures from PORDATA,⁸ 32,318 individuals left the country to live abroad in 1960, whereas the figure for 2014 was 134,624.⁹

However, while Portugal has been and continues to be a country of emigration, these days its migratory profile is a mixed one, in that it currently also displays some of the features of a country of immigration. In the recent past there have been successive immigratory waves, starting with that of the "returnees"^{10,11} in the 1970's, and then that of people from the Eastern European countries in the 1980's and '90's (in the wake of the collapse of the Soviet bloc). Brazilian and Chinese immigration has also increased.¹² Having said this, the appearance of the Eurozone crisis led many immigrants to return to their countries of origin, or move on to others they thought could offer them a better future. This was especially true of Brazilians and Ukrainians, although the political situation in both those countries is now causing some of them to come back to Portugal.

Despite the country's economic and financial situation within the global context, both before and after the Eurozone crisis Portugal has always been a good host to its immigrants. Even though we should remember that a substantial proportion of immigrants come from Portuguese-speaking countries,¹³ which decisively facilitates their immigration, and also that this country

⁶ 2015 Statistical Report, as above.

⁷ Strictly speaking, Portugal has been a country of emigrants since the 15th century, when the Discoveries began and Portuguese then started settling in the territories they discovered (in European terms).

⁸ PORBASE: Database on Contemporary Portugal, organised and developed by the Francisco Manuel dos Santos Foundation, accessible at <http://www.pordata.pt/Home>. Many official entities, including Statistics Portugal (INE), work with PORDATA.

⁹ <http://www.pordata.pt/Portugal/Emigrantes+total+e+por+tipo-21>. Last accessed on 24/05/2015.

¹⁰ The "returnees" were Portuguese who settled in Portugal after the decolonisation of the country's overseas territories, following the Revolution on 25 April 1974. Their number is uncertain, varying between five hundred thousand and a million depending on the source. Some of them didn't actually "return", in the sense that they were born in the colonies and their strongest ties were to those territories. However, the fact that many of them had family in Portugal on whom they were able to rely for support made their reintegration process much easier. See Carolina Peixoto, "*Por uma perspectiva histórica pós-colonial, um estudo de caso: A 'descolonização' de Angola e o retorno dos 'nacionais'*". Accessible at http://www.cd25a.uc.pt/media/pdf/Biblioteca%20digital/Artigos/APP_Cx23_30_Por%20uma%20perspectiva%20historica%20pos-colonial_Carolina%20Peixoto.pdf. Last accessed on 25/05/2016.

¹¹ In a country that then numbered less than 9 million inhabitants, the arrival of the returnees represented a population increase of around 10%. See J. Manuel Nazareth, "Conjuntura demográfica da população portuguesa no período de 1970-80: aspectos globais" in *Análise Social*, vol. xx (81-82), 1984 nos.2-3.

¹² In 2014, the Chinese overtook the Angolans to become the fifth most numerous foreign community in Portugal; the largest continues to come from Brazil (data from *Relatório de 2014 de Imigração, Fronteiras e Asilo do Serviço de Estrangeiros e Fronteiras* [2014 Report on Immigration, Borders and Asylum by the Portuguese Immigration and Borders Service] [SEF]). According to data from INE at

https://www.google.pt/?gws_rd=ssl#q=numero+de+estrangeiros+residentes+em+portugal, at 21 March 2011 the resident foreigners in Portugal represented 3.7% of all the country's residents. The tendency towards a fall in the number of foreign residents, which began in 2010, is continuing. See *Relatório de 2010 de Imigração, Fronteiras e Asilo do Serviço de Estrangeiros e Fronteiras* (SEF).

¹³ In 2014 (SEF Report, as above), they represented 45.4% of the total.

benefits from the fact that the relatively modest number of immigrants does not put our social structures under as much stress as those of other places, the majority of immigrants are from nations that don't have a common language and do have major cultural differences with this one. Even so, Portugal has not experienced any notable problems when it comes to integrating immigrants. The Migrant Integration Policy Index (MIPEX) ranks Portugal second among the thirty-eight countries whose immigrant integration policies were analysed: *"Immigrant residents in PT still benefit from the 2nd most favourable integration policies in the developed world, ahead of most Nordics and traditional countries of immigration and leading the new destinations"*.¹⁴

II – Nationals and foreigners

From the point of view of their rights, how does the Constitution of the Portuguese Republic (CRP) distinguish between Portuguese nationals and foreigners?

Until not long ago (and notwithstanding the recent nature of both concepts),¹⁵ the notion of nationality¹⁶ was a core element of the idea of a nation state. There were nationals and there were foreigners – human dignity apart, they were different realities.

Long after the various international declarations and conventions on human rights were signed, it seems the distinction still makes sense.

Constitutions like the 1976 Portuguese one recognise that every citizen is equal before the Law (Art. 13, CRP), and that natural persons are all citizens. Collective persons have nationality but are not citizens. However, our Constitution does distinguish between Portuguese, foreign and stateless persons, albeit it enshrines a principle of equivalence in the form of a general principle that permits exceptions.¹⁷

In one Portuguese constitutional Ruling (599/05^{18,19}) – on a specific question regarding the then requirement for the grant of Portuguese nationality by naturalisation, that foreigners who wanted to acquire Portuguese citizenship had to be capable of providing for their own

¹⁴ See <http://mipex.eu/portugal>. Last accessed on 25/05/2016.

¹⁵ E. J. Hobsbawm, *"Nations and Nationalism Since 1780"*, Canto Classics, 2nd edition, 2012.

¹⁶ Given the modest nature of this text, I will not even try to reflect on what nationality is, or on the ethical legitimacy of the concept in a globalised society and at a time when the dignity of the human person (of all human persons, and not just some) and its recognition are – and should be – the touchstone of a democratic state based on the rule of law. Here I use the term "nationality" in the simple sense – the one we turn to when someone asks us who we are, and when we reply that we are Italian, Norwegian, Portuguese, Chinese or whatever the case may be, we are not saying *"something that is irrelevant or bizarre ... it does not say that we are rationally required to make our nationality a constitutive part of our personal identity, or that having a national identity excludes having collective identities of other kinds. Nor does it say that a person's national allegiances must always have a single object... It says simply that identifying with a nation, feeling yourself inextricably part of it, is a legitimate way of understanding your place in the world"*. See David Miller, *"On Nationality"*, Clarendon Press, Oxford, 1995. On the essence/nature of the term "nation", at the beginning of the 20th century Georg Jellinek already said: *"Das Wesen einer Nation festzustellen, gehört, wie alles Fixieren von Erscheinungen, die in den ununterbrochenen Fluß des geschichtlichen Geschehens gestellt sind, zu den schwierigsten wissenschaftlichen Aufgaben. Es läßt sich nämlich kein feststehendes, für alle Nationen passendes Merkmal angeben"*. (Identifying the essence of a nation is a task that falls within one of the most difficult scientific fields – something that is also true of understanding the manifestations that appear in the uninterrupted flow of historical events. In truth it is not possible to point to a certain, stable characteristic that can be adapted to every nation. Retranslated from the author's Portuguese translation.) See Georg Jellinek, *"Allgemeine Staatslehre"*, 5th reprint of the 1914 edition, Berlin Verlag von Julius Springer, 1929.

¹⁷ See Art. 15, CRP.

¹⁸ Ruling of 2.11.2005, handed down in a concrete review case.

¹⁹ All the Constitutional Court's Rulings are accessible at <http://www.tribunalconstitucional.pt/tc/acordaos/>. The English version of the Court's website at <http://www.tribunalconstitucional.pt/tc/en/acordaos/> includes a selection of translated case law, mostly in the form of summaries, but with a few full texts.

subsistence (which was not found to be unconstitutional) – the Constitutional Court made a number of observations on the concepts of nationality and citizenship. In particular, it noted that whereas the right to a nationality (the right not to be deprived of a nationality)²⁰ is a fundamental right, the right to acquire Portuguese nationality for those who don't possess it as nationality of origin has to be positively granted any other citizen who wants to obtain it, and is “*subject to the fulfilment of certain preconditions*” which the domestic legislator sees as revealing the existence of a tie that constitutes effective integration into the Portuguese community. In the Court's view, what such citizens enjoy is not a right, but rather a legal expectation.

Is nationality a leftover remnant of an idea that no longer makes sense today? At a time of global citizenship and a global economy, are the terms citizenship and nationality synonymous, as they are indeed very often used in practice?²¹ Taken to the extreme, the principle of non-discrimination based on national origin could imply that these two concepts are synonymous. However, possession of a nationality is internationally – and nationally – recognised as a right in itself, and so that right must be attributed a content of its own.

Almost the first thing the Universal Declaration of Human Rights (UDHR) does (in the first part of Article 2) is to proclaim that everyone – i.e. every human person, which is to say every citizen – is entitled to invoke the rights and freedoms enshrined in the Declaration, and that that right is independent of national origin (among other factors). In Article 14, the European Convention on Human Rights (ECHR) also says that enjoyment of the rights and freedoms recognised in the Convention must be ensured without any distinctions, namely in terms of national origin. Articles II and XIX of the American Declaration of the Rights and Duties of Man and Articles 2 and 12 of the African Charter on Human and Peoples' Rights say essentially the same thing.

Nevertheless, the UDHR is more specific with regard to the concept of nationality, in that it also says that every individual has the right to have a nationality, and cannot be arbitrarily deprived of either that right, or the right to change nationality.²² The ECHR, on the other hand, does not expressly refer to a right to nationality, but covers the question in another way, in that it lays down that States Party can place restrictions on political activity by foreign nationals, thereby implying that nationality is a relevant concept.²³

The Portuguese Nationality Law^{24,25} establishes various criteria for the attribution of Portuguese nationality of origin, which include being born in Portuguese territory and not possessing any other nationality. In other words, Portuguese legislation recognises that in principle, people need to possess a nationality.²⁶ It is also recognised that no one can be arbitrarily deprived of either their nationality, or the right to change nationality.²⁷ So nationality is a necessity, it adds

²⁰ As I have already noted, the Portuguese Constitution always uses the term “citizenship”.

²¹ See William Rogers Brubaker, “*Citizenship and Nationhood in France and Germany*”, Harvard University Press, 1992; Emma Jones and John Gaventa, “*Concepts of Citizenship: a review*”, Institute of Development Studies, University of Sussex, 2002, accessible at <https://www.ids.ac.uk/files/dmfile/Db19.pdf>. Last accessed on 27/05/2016.

²² See Art. 15.

²³ Art. 16.

²⁴ Law no. 37/81 of 3 October 1981, with subsequent amendments, the most recent made by Organic Law no. 9/2015 of 29 July 2015.

²⁵ Among the many learned works on Portuguese nationality law, see Rui Manuel Moura Ramos: “*A Evolução do Direito da Nacionalidade em Portugal (Das Ordenações Filipinas à Lei n.º 2098)*”; “*O novo Direito Português da Nacionalidade*” Estudos de Direito Português da Nacionalidade, Coimbra Editora, 2013; “*As alterações recentes ao direito português da nacionalidade: entre a reparação histórica, a ameaça do terrorismo islâmico e a situação dos netos de portugueses nascidos no estrangeiro*”, Revista de Legislação e de Jurisprudência, 145, no. 3994 (Sep-Oct. 2015).

²⁶ This is not to disregard the millions of cases of statelessness, but rather to note that it is commonly accepted that nationality is indispensable and that we should combat situations in which people don't have one. See the 1961 United Nations Convention on the Reduction of Statelessness, which entered into force in Portugal on 30 December 2012.

²⁷ Art. 15(2), UDHR; Art. 26, CRP.

something to the citizenship, it is not an inevitability, and it can also be a choice, albeit one that is certainly limited, in that a person is born with a given nationality, can keep it, cannot be arbitrarily deprived of it, and can change it, but not by a mere declaration of will in the shape of a voluntary act that is not subject to any conditions. People must fulfil conditions if they want to acquire a nationality other than that of origin, and those conditions are defined and imposed by the state whose nationality is desired.

One can talk about a conditional ability, but not a right. The state to which the desired nationality pertains cannot be forced to grant it to someone who does not meet the requisites laid down in its legislation for its acquisition at birth, or as a derived nationality acquired by mere declaration,²⁸ but who wants to acquire it by choice.

Nationality is the result of an intersection between external factors imposed on the state (*jus sanguinis*, *jus soli* and others, such as nationality derived from effective ties,^{29,30} the consequences of facts such as marriage or adoption, etc.) and voluntary factors regarding the national or would-be national in question. The latter represent a fairly small percentage of the full list of such factors. If an individual doesn't emigrate, has no effective ties to another national community that differs from his/her own, doesn't marry a foreigner, and isn't in any other situation that would make it possible to acquire another nationality (whether or not that of origin is retained as well), his/her will, in the sense of a mere desire, is more or less irrelevant. If we add to this the fact that the "external" factors which condition a state are actually to a large extent self-imposed, inasmuch as they result from its own domestic legislation, we can see that the determining factor in nationality issues is the will of the state.

Of course, in saying this we should not forget that a state's legislation is the product of the actions of those of its organs with the constitutional competence to legislate, and that when sovereignty pertains to the people,³¹ who exercise it through those constitutionally designated organs, the way in which a state regulates the question of nationality must be democratically legitimated.

²⁸ Portugal offers an example of such an acquisition by mere declaration, in that foreigners who have been married to a Portuguese citizen for more than three years can become Portuguese nationals by simply declaring their will to do so.

²⁹ This possibility is recognised in the Portuguese Nationality Law, when it attributes Portuguese nationality of origin to: individuals born abroad with at least one forebear in the second degree of the direct line with Portuguese nationality who has not lost that nationality and who, among other requisites, has effective ties to the Portuguese community; and "individuals who are born in Portuguese territory, are the children of foreigners who are not in the service of the respective state, and declare they want to be Portuguese, on condition that at the moment of birth one of the parents has resided here legally for at least five years" (see Art. 1[1][d] and [e], Nationality Law). In cases of nationality other than of origin (nationality by attribution), the Portuguese Nationality Law also attaches importance to the effective ties criterion. Nationality can be granted by naturalisation, with dispensation from the minimum required period of residence in the case of "*individuals who are born in Portuguese territory and are the children of foreigners who have habitually remained here in the ten years immediately before the application*" (Art. 6[5]). The effective ties criterion takes a different form in the case of the grant of nationality by naturalisation to descendants of Portuguese Sephardi Jews, who can be dispensed from the requirement to have resided in Portuguese territory for a minimum period of time, and even from that of adequate knowledge of the Portuguese language; what must be demonstrated is a tradition of belonging to a Sephardi community with Portuguese origins, in the shape of proof of a link to Portugal that is gauged with reference to a list of factors – particularly direct or collateral descent, and the language spoken by the family (see Art. 6[7]). This possibility is especially noteworthy in that it is available to modern descendants of people who were forced to leave Portugal half a millennium ago, in the 15th and 16th centuries.

³⁰ See Ayelet Shachar, "*Citizenship and Global Inequality*", Harvard University Press, 2009; Linda Bosniak, "*The Citizen and the Alien – Dilemmas of Contemporary Membership*", Princeton University Press, 2006; Sarah Song, "Rethinking Citizenship through Alienage and Birthright Privilege: Bosniak and Shachar's Critiques of Liberal Citizenship", in *Issues in Legal Scholarship*, Vol. 9: Iss. 1, Article 6, 2011; Noah Benjamin Novogrodsky, "*The use and abuse of jus nexi*", accessible at <http://id.erudit.org/iderudit/1012996ar>. Last accessed on 27/05/2016.

³¹ See Art. 2, CRP.

The links between the concepts of citizenship and nationality are piercingly evident at a time of a European migratory crisis that is at the forefront of all our minds, but do the two terms really reproduce identical concepts?³²

The notion of citizenship is intrinsically linked to that of human dignity, which is in turn one of the two fundamental principles on which the Portuguese Constitution is founded,³³ and all human persons are citizens. We know that in the first democracies, not all human persons were citizens – i.e. members of the people, the *demos*. Among others, slaves and women were excluded. Today, however, there is a generalised acceptance – or at least we aspire to its becoming generalised – that every human person is a citizen. This means that the consideration due to people's dignity inevitably requires states to respect their fundamental rights. A democratic state based on the rule of law is not allowed not to guarantee the essential core of those rights. However, this does not mean that a right to citizenship necessarily requires recognition of a right to a specific nationality.³⁴ In a recent article, and with regard to the migratory crisis that Europe is currently living through, Peter Häberle³⁵ argues that defending its borders is one of a state's fundamental tasks, and that a state's territory possesses a constitutional value. The Constitutional State must defend its frontiers, and must act to protect its own cultural identity when threatened, including when the danger comes from mass migrations; albeit in the process it must naturally take the dignity of the human person into account³⁶, and weigh up and fulfil the duties of solidarity that befall it to guarantee.

As a matter of fact, the principle of the dignity of the human person does not seem to imply that a state has to abdicate from its own sovereignty – namely in terms of the right to preserve its territorial integrity – by opening its borders under circumstances and in such a way as to possibly lead to serious internal harm. To quote Udo di Fabio, “*a duty to protect that was universally and unlimitedly guaranteed would blow up both the institution of democratic self-determination and, when it came down to it, the system of International-Law norms, whose ability to guarantee peace depends on states that are territorially delimited and capable of action*”.³⁷

In line with the fact that nationals – and not every citizen, in a global vision of the concept – possess special ties to the state to which they pertain, and that those ties and that belonging constitute the grounds for rights, is the additional fact that only they are the beneficiaries of an express and generalised prohibition on deportation from their national territory.³⁸

³² Article 9 of the Treaty on European Union (consolidated version) is an example of a fungible use of the two terms: “Every **national** of a Member State shall be a **citizen** of the Union. **Citizenship** of the Union shall be additional to and not replace national **citizenship**” (highlights added). The CRP does not expressly talk about nationality, but rather about citizenship. It employs the expression “national” with regard to “national defence”, “national independence”, “national scope” and “national territory”, but never the term “nationality”. [Translator's note: the Portuguese term “*nacional*” can often synonymously be translated as simply “Portuguese”.] In this context, the CRP also attaches relevance to terms linked to geographic location (“find themselves”, “remain”), and residence.

³³ The other is the will of the people. See Art. 1, CRP.

³⁴ On concepts that merge citizenship and nationality and thus say that immigrants, even illegal ones, should be deemed “citizens in waiting” of the country in which they find themselves, see Gonçalo Saraiva Matias, “Migrações e Cidadania”, in *Ensaios da Fundação Francisco Manuel dos Santos*, 2014.

³⁵ See Peter Häberle, “Fünf Krisen im EU-Europa - weltweite Implikationen, Möglichkeiten und Grenzen der Verfassungstheorie für Europa”, Archiv des Völkerrechts, Bd. 53, 2015.

³⁶ On the normative content – and its indeterminate nature – of the constitutional principle of the dignity of the human person, see Jorge Reis Novais, “A dignidade da pessoa humana”, Edições Almedina, 2015.

³⁷ “Eine universell verbürgte und unbegrenzte Schutzpflicht würde die Institution demokratischer Selbstbestimmung und letztlich auch das völkerrechtliche System sprengen, dessen Fähigkeit, den Frieden zu sichern, von territorial abgrenzbaren und handlungsfähigen Staaten abhängt”. Udo di Fabio, former Justice of the German Federal Constitutional Court, “Migrationskrise als föderales Verfassungsproblem (Gutachten im Auftrag des Freistaates Bayern)”, 8.01.2016. Retranslated from the author's Portuguese translation.

Accessible

http://www.bayern.de/wp-content/uploads/2016/01/Gutachten_Bay_DiFabio_formatiert.pdf.

³⁸ Art. 33(1), CRP: “The deportation of Portuguese citizens from Portuguese territory is not permitted”.

On a normative requirement that all persons, be they Portuguese or foreigners, had to have legally resided in Portuguese territory for at least a year in order to be entitled to the Social Insertion Income (RSI, a form of minimum social income), the Constitutional Court said³⁹ that inasmuch as Portuguese citizens possess a fundamental right to live in the territory which forms the physical and geographic support for the Portuguese community, no Portuguese can ever find him/herself in a situation in which he/she is illegally resident in this country. As such, the Court declared the applicable norm unconstitutional with generally binding force. Foreigners, on the other hand, do not enjoy a constitutional right to remain or establish themselves in Portugal, or even enter this country.⁴⁰ They can be arrested, detained or subjected to judicial control if they enter Portugal or remain here improperly, or if they are the object of pending extradition or deportation proceedings.⁴¹ The right to freedom of movement, which is absolutely guaranteed in the case of Portuguese citizens,⁴² can be subject to restrictions under the terms of Article 2 of Protocol no. 4 to the European Convention,⁴³ in the case of foreigners.

III – The legal status of foreigners in Portugal

As I have already noted, the general constitutional principle is that foreigners are treated in the same way as nationals, such that foreigners and stateless persons who find themselves or reside in Portugal enjoy the same rights and are subject to the same duties as Portuguese citizens. It is worth noting that international legal instruments do not require states to recognise the same rights in relation to foreign citizens as they do with regard to their nationals, but the fact is that the principle of the dignity of the human person, which is derived from the principle of equality, is gradually pushing states to reserve fewer and fewer rights solely to their own nationals.

I will not attempt to address the treatment of foreigners in detail here, but will limit myself to setting out some general ideas on the topic, albeit while noting that there are special statuses under which some non-Portuguese benefit from situations in which the degree of equivalence between their rights and those of Portuguese nationals is even greater: European Union citizenship; citizenship of the European Economic Area (EEA), or of countries with which the EU has an agreement on the free movement of persons; citizenship of the other Portuguese-speaking countries; and nationals of other states who reside in Portuguese territory as refugees, recipients of subsidiary protection under the provisions governing asylum, or recipients of temporary protection.

The Portuguese Constitution makes express reference to both EU citizenship and citizenship of the other Portuguese-speaking countries.

In general terms, foreigners do not enjoy: political rights; the right to exercise public functions other than those of a predominantly technical nature; and rights which the Constitution or infra-constitutional law specifically reserve to Portuguese citizens. Having said this, whenever these rights incorporate rights, freedoms or guarantees which are expressly enshrined in the Constitution, or which should be included in that category as a result of a non-typical or open clause which the CRP applies to fundamental rights in general,⁴⁴ the ordinary legislator must

³⁹ Ruling no. 141/15 of 25.02.2015. Abstract *ex post facto* review case.

⁴⁰ I am talking about foreigners in general, in the knowledge that there are particularities in specific cases, such as the free movement of European Union citizens; but even for them, there are restrictions linked to questions of public order, security, safety and health.

⁴¹ See Art. 27(3)(c), CRP.

⁴² See Art. 44 (1), CRP.

⁴³ Strasbourg, 16.09.63.

⁴⁴ See Art. 16, CRP. This clause means that the fundamental rights which are expressly enshrined in the Constitution are not an exhaustive list. Among other things, this in turn means that rights which the UDHR and other International-Law statutes and principles consider can also enjoy this additional protection.

comply with the requirements⁴⁵ which the CRP imposes on any law that restricts constitutional rights, freedoms or guarantees: such laws must respect both the principle that the legislation about these matters is reserved to a certain type of legislator and a certain type of normative format, and the principle of proportionality; they cannot violate the essential content of the applicable constitutional precepts; and they must obey the prohibition that such laws cannot have retroactive effects.

The Constitution reserves one position – that of President of the Republic – to citizens with Portuguese nationality of origin.⁴⁶

Examples of rights that are excluded from the principle of equivalence include the aforementioned political rights: the rights to vote (except in EU and local elections, in the case of EU citizens), form political parties, submit petitions,⁴⁷ and engage in popular action.⁴⁸ They cannot hold the positions of President of the Republic, President of the Assembly of the Republic (Parliament), Prime Minister, or President of any of the Supreme Courts; nor can they serve in the armed forces or the diplomatic service,⁴⁹ be judges or public prosecutors,⁵⁰ or perform public functions that do not possess a predominantly technical nature. Nor are foreigners entitled to the diplomatic protection Portugal provides to its nationals. They do have all the other rights which the Constitution and the ordinary law do not specifically reserve to Portuguese citizens, as well as one right which nationals intrinsically cannot possess – that of asylum.

The following are some rights and related provisions that can be particularly relevant to foreigners:

– **The right of asylum:**⁵¹ the Constitution says that this right is: “*guaranteed to foreigners and stateless persons who are the object, or are under grave threat, of persecution as a result of their activities in favour of democracy, social and national liberation, peace among peoples, freedom or the rights of the human person*”.⁵²

– **The right not to be extradited** or handed over under any pretext for political reasons, or for crimes that are punishable under the law of the requesting state by death or any other penalty that results in irreversible injury.

The extradition of foreigners is subject to very restrictive criteria, and can only be ordered by a judicial authority.

(Until the fourth revision of the CRP,⁵³ the extradition of Portuguese citizens was absolutely prohibited. In the light of the need to adapt the constitutional text to the provisions of the Convention on Extradition between Member States of the European Union, this revision admitted the possibility of extraditing Portuguese citizens, albeit subjecting it to very restrictive

⁴⁵ See Art. 18, CRP.

⁴⁶ See Art. 122, CRP.

⁴⁷ However, foreigners and stateless persons residing in Portugal do always enjoy the right to petition **in defence of those of their rights and interests that are protected by law** – see Art. 4(2), Law no. 43/90 of 10 August 1990, as republished and renumbered by Law no. 45/2007 of 24 August 2007 (highlight added).

⁴⁸ Legal doctrine has been arguing that, as with the right of petition, foreigners are entitled to resort to popular action on condition that the purpose is to defend their own legally protected rights and interests, and not for essentially political ends.

⁴⁹ These exceptions are specifically laid down in the CRP.

⁵⁰ Exceptions to the principle of equivalence set out in the respective Statutes.

⁵¹ The Asylum Law – Law no. 27/2008 of 30 July 2008, as amended by Law no 26/2014 of 5 May 2014 – lays down both the conditions and procedures for granting asylum or subsidiary protection, and the statuses afforded to applicants for asylum, refuge and subsidiary protection. The Law also transposes the applicable European Directives.

⁵² See Art. 33(8), CRP.

⁵³ Constitutional Law no. 1/97 of 20 September 1997.

conditions and requisites that include limiting it to cases of terrorism and highly organised international crime.)

– **The right not to be arbitrarily deported:** applicable to persons who have properly entered or remain in Portuguese territory, hold a residence permit, or have submitted an asylum application that has not been refused.

This right is recognised in the CRP,⁵⁴ and deportation can again only be ordered by a judicial authority.

– **The constitutional prohibition on inevitable effects of legal penalties,** including those handed down for committing certain crimes, is reflected in the grounds on which applications for Portuguese nationality can be refused.⁵⁵

Although the CRP does not allow the inevitable effects of legal penalties to include the loss of any civic, professional or political right, the Nationality Law does say that one of the grounds on which requests for Portuguese nationality can be refused is conviction (albeit only following transit of the sentence *in rem judicatam*) for any crime punishable under Portuguese Law by a maximum prison term of three years or more.⁵⁶

In its recent Ruling no. 106/16,⁵⁷ the Constitutional Court handed down an interpretative decision⁵⁸ in which it said that it is not constitutionally permissible to interpret the norm in question⁵⁹ in such a way as to ignore the legislator's judgement that, after a certain period of time, the effect of a penal conviction which has been included on the person's criminal record must cease, the record must be cancelled and the person must be deemed legally rehabilitated. The Court considered that any other position would run the risk of being intra-systemically contradictory.

– Access to the law and to effective jurisdictional protection

Every citizen residing in Portugal is entitled to access to the law and the courts in order to defend his/her rights and interests.

As an example, in Ruling no. 316/95⁶⁰ the Constitutional Court found unconstitutionality in a norm that did not recognise the right of foreigners (except if the laws of the respective state attributed the same right to Portuguese citizens) or stateless persons to legal aid in order to contest in court a decision denying them political refugee status, in cases in which those persons either did not hold a valid permit allowing them to reside in Portugal, or did hold one, but had not resided here for at least a year.

It is worth mentioning that the constitutional jurisprudence on access to the law and related procedural rights and guarantees clearly approaches questions of constitutionality from a material and substantive perspective, rather than a formal one. An example of this is Ruling no. 347/02,⁶¹ which the Court gave in a concrete review case in which the appellant argued that a

⁵⁴ See Art. 33(2), CRP.

⁵⁵ See Art. 30(4), CRP.

⁵⁶ See Art. 9(a).

⁵⁷ Of 24 February 2016. This case arose when the Public Prosecutors' Office (MP) brought a concrete review request before the Constitutional Court because the court *a quo* had refused to apply the norm on the grounds that it was unconstitutional – a situation which the MP is responsible for asking to Constitutional Court to clarify.

⁵⁸ Under the competence given to the Court in its Organic Law – see Art. 80(3), Law no. 28/82 of 15 November 1982.

⁵⁹ Together with the corresponding norm contained in the Regulations governing Nationality (Art. 56[2][a], Executive Law no. 237-A/2006 of 14 December 2006).

⁶⁰ Of 20 June 1995.

⁶¹ Of 12 July 2002.

combined interpretation of a number of Code of Criminal Procedure (CPP) norms was unconstitutional. At stake were the adequacy of the time limit for submitting a procedural request in a criminal case, and an allegedly insufficient mastery of the Portuguese language on the part of the accused person, who was a foreigner. The Court disagreed that there was any unconstitutionality in this situation, finding that twenty days was enough time in which to request the procedural act in question (and that the fifty days the accused had asked for was manifestly excessive within a context that only involved European Union countries). It also found that there was no added linguistic difficulty in the concrete case in question, inasmuch as the accused's understanding of the Portuguese language was good enough not to hamper the organisation of her defence.

– **Right to health.** The Law governing the Bases of the Health System⁶² recognises that all EU citizens, all stateless persons residing in Portugal and, subject to reciprocity, all other foreigners living here, possess the status of National Health Service (SNS) beneficiaries.

However, following doubts as to this Law's pertinence, and even its constitutionality when interpreted restrictively in terms of access to the SNS, a 2001 Ministry of Health Order⁶³ specified that such access (to the healthcare and medicines provided by the institutions, departments and services that comprise the SNS) should be available to foreign citizens residing in Portugal, under the same terms and conditions as those applicable to Portuguese SNS beneficiaries. The same Order also granted access to the SNS to illegal immigrants who can provide documentary evidence that they have been in this country for more than ninety days. This solution makes it possible to balance the requirements imposed by the need to respect individuals' right to health (and even to life) and defend public health on the one hand, and the country's need for internal security – particularly by controlling the presence and activities of foreigners in Portuguese territory – on the other.⁶⁴

– **Right to education.** It is entirely clear that immigrants whose legal situation in Portugal is a lawful one are entitled to education. However, in order to prevent any indecision that might arise with regard to illegal immigrants, a 2004 Executive Law⁶⁵ formalised a practice that had already been unofficially implemented by schools, and created a national register of foreign minors whose presence in Portuguese territory is not in conformity with the law. The Law says that the record is intended solely to ensure that such minors have access to both healthcare and preschool and school education, and that its contents cannot serve as grounds for or evidence in any administrative or judicial procedure, while at the same time precluding their use as bases for the legalisation of either the minor, or the foreign citizen(s) who exercise(s) parental responsibilities in relation to him/her. Here too the division between the departments of state with responsibility for tasks linked to guaranteeing different fundamental rights and freedoms⁶⁶ – the Ministry of Education, and the Ministry of the Interior – makes it possible to maintain a compatibility between the different demands imposed by those rights in ways that respect the principle of proportionality.

As such, Law no. 23/2007 of 4 July 2007⁶⁷, which regulates the entry into, presence in and departure and removal of foreigners from Portuguese territory, says that the deadline for voluntary departure from that territory, which is normally between ten and twenty days, can be extended, particularly if the person in question has children who are going to school here.⁶⁸

⁶² Law no. 48/90 of 24 August 1990.

⁶³ Order no. 25360/2001 (Series 2) of 16.11.01, as published in Series II of the *Diário da República* of 12.12.01.

⁶⁴ See the Organic Law governing the Immigration and Borders Service (SEF, Executive Law no. 252/2000 of 16 October 2000, with subsequent amendments).

⁶⁵ Executive Law no. 67/2004 of 25 March 2004.

⁶⁶ See Art. 9(b), CRP.

⁶⁷ With subsequent amendments.

⁶⁸ See Art. 138(3).

- **Right to exercise public functions** whose nature is not predominantly technical.

Characterising functions as predominantly technical or not can be an especially intricate task. However, in line with the idea that this is a fundamental right⁶⁹ and that any restrictions should therefore respect a principle of being kept to a necessary minimum, its interpretation has been expansive. For example, in Ruling no. 345/02⁷⁰ the Constitutional Court declared the unconstitutionality with generally binding force of a norm in the Statute governing the Career Structure of Kindergarten, Basic (primary) and Secondary Teachers, which subjected admission to the career to the possession of Portuguese nationality or the nationality of a country “*which, under a normative act of the European Economic Community, an international convention, or a special law,*” grants “*access to the exercise of public functions in Portugal*”. In an area that could be seen as especially touchy, particularly for reasons linked to national identity and linguistic skills, the Court unhesitatingly⁷¹ said that: “*in the education sector, the exclusion of nationals of other Member States from all the jobs in this sector cannot be justified by considerations regarding safeguarding national identity. The latter interest – whose protection is legitimate, as Article 6(3) of the Treaty on European Union recognises – can, however, be effectively safeguarded by means other than a general exclusion, and by the fact that, like Portuguese nationals, the nationals of other Member States must in any case fulfil all the conditions for recruitment, namely those concerning training, experience and linguistic knowledge*”.

– **Right to a family – right to children’s education**⁷²

In Ruling no. 470/99⁷³ the Constitutional Court found an Executive-Law norm regarding the accessory sanction of deportation of a foreigner for committing a crime to be unconstitutional when applicable to foreign citizens residing in Portuguese territory with their minor children who hold Portuguese nationality. This issue was given a normative solution when Law no. 23/2007 included the existence of minor children of any nationality who reside in Portugal, and in relation to whom the potential deportee effectively exercises parental responsibilities and provides for their upkeep and education, among the restrictions on coercive removal or deportation.⁷⁴

– **Right to social security.** Under the terms of the Constitution and the Law governing the Bases of the Social Security System,⁷⁵ everyone is entitled to social security. This right is subject to a number of general principles, including the principle of equality. Where social security is concerned, this principle consists of: “*non-discrimination against beneficiaries, particularly due to... their nationality, in the latter case without prejudice to conditions regarding residence and reciprocity*”.⁷⁶

In Ruling no. 354/97 the Constitutional Court found no unconstitutionality in an Executive-Law norm concerning the retirement pensions of former public servants in the overseas territories, when interpreted to mean that people who were civil servants or agents of the Public Administration in the ex-overseas provinces do not have to hold Portuguese nationality in order to be eligible for the award of the retirement pension for which they can apply under the Executive Law. The Court held that what was at issue was the grant of the right to the retirement pension applicable to persons who had performed public functions in that Administration, and that that right should be maintained even in cases in which the applicant had become a foreigner as a result of the decolonisation process.

⁶⁹ Included in the category of rights, freedoms and guarantees.

⁷⁰ Of 11 July 2002.

⁷¹ The Ruling was unanimous.

⁷² See Art. 36(5), CRP.

⁷³ Of 14 July 1999.

⁷⁴ See Art. 135(c).

⁷⁵ Law no. 4/2007 of 16 January 2007.

⁷⁶ See Art. 7 of the Law governing the Bases of the Social Security System.

IV – Final remarks

With these few words I have not sought to give more than a brief and thus necessarily incomplete overview of questions that are not only important in their own right, but are being made even more pressing by the times we are living in.

With geographic origins that lie mainly in Asia and Africa (in the latter case, particularly the sub-Saharan area), the current migratory crisis is generating the largest flow of migrants and applicants for refugee status in Europe since the Second World War, and is putting the values of European solidarity to the test. Many of them are desperately fleeing from especially violent civil wars, others from inhuman living conditions, while others still are economic migrants looking for a better life. The globalisation of the media and means of communication have made the flagrant differences between the life conditions in the various continents and countries evident for everyone in the world to see.

The EU is a combination of countries that want to establish “*an ever closer union among them*”; those countries have “*resolved to share a peaceful future based on common values*”; their Union, which “*is based on the principles of democracy and the rule of law*”, “*is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity*”;⁷⁷ and that Union proclaims that enjoyment of the rights it recognises in its Charter of Fundamental Rights “*entails responsibilities and duties with regard to other persons, **to the human community** and to future generations*” (highlight added).

Without prejudice to the fact that both International and National Laws admit some distinctions in the treatment of national and foreign citizens, those differences must be contained within quite tight limits.

Less than three months ago, Venice commemorated the five hundredth anniversary of its Jewish ghetto.⁷⁸ The original objectives of that quarter were ambivalent, inasmuch as the Venetian ghetto not only isolated, but also protected the Jews in a city state which, in particular, recognised their religious freedom and sheltered them from the Inquisition. We know all too well what other ghettos have represented.

The defence of its borders, its national identity, its fundamental constitutional and political structures,⁷⁹ and its cultural, religious and linguistic diversity⁸⁰ – all of which together constitute Europe’s cultural heritage – is the inalienable right of every state and its national citizens. However, no right – not even the fundamental rights of states and citizens – is absolute. Every right must be exercised with respect for the principle of proportionality. The exercise of its legitimate and even non-renounceable rights cannot mean that any national state can forget the dignity of any human person, or its duties of solidarity to and with all of them.

Lisbon, 4 June 2016

⁷⁷ See Preamble to the Charter of Fundamental Rights of the European Union.

⁷⁸ On 29 March 1516 the Venetian Senate passed a law confining Jews to a part of the city called “*ghèto*”, which they could only leave between sunrise and sunset.

⁷⁹ In particular, see Art. 3(3)§4 and Art. 4(2) of the consolidated version of the European Union Treaties.

⁸⁰ In particular, see Art. 22 of the Charter of Fundamental Rights of the European Union.