

## 6. Portugal: from transformative to open constitutionalism

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### 1. INTRODUCTION

This chapter evaluates the specificity of the Portuguese pathway to constitution-making against the background provided by Bruce Ackerman's legitimacy pathway theory.<sup>2</sup> I claim that Portugal represents a case of 'truncated' revolutionary pathway because of the taming of revolutionary constitutionalism by 'open constitutionalism', favoured by European integration, and the ambivalent role of the Portuguese Constitutional Court.

Section 2 describes the long struggle of the opposition forces against the regime of Salazar. Section 3 illustrates the trajectory from the 1974 revolution to the 1976 Constitution, including the major revisions of 1982 and 1989. I describe how the Constitution evolved from its revolutionary transformative nature to an open and Western-style constitutional text and the role that the legal counter-revolution, which the Constitutional Court was part of, played in that process. European integration was the key factor underpinning the transformation of revolutionary constitutionalism into open constitutionalism.

Section 4 briefly explores the regime consolidation (1989-2008), a period in which Portugal poses as the 'good student of European integration', and the Constitution is framed as an obstacle in need of reforms. Finally, in section 5 Ackerman's intuition that the stabilization of a revolutionary pathway comes in the form of judicial supremacy is addressed. In the Portuguese context such supremacy gives rise to growing tensions between national constitutionalism and European integration. Accession to the EEC propelled the collapse of revolutionary constitutionalism and its mechanisms aimed at ensuring that Portugal would never succumb to another authoritarian oligarchization of the economy. When the revolutionary legacy of the welfare state was revived

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<sup>1</sup> I would like to thank the editors for valuable comments and suggestions.

<sup>2</sup> Bruce Ackerman, *Revolutionary Constitutions: Charismatic Leadership and the Rule of Law* (CUP 2019).

during the financial crisis, the Constitutional Court rose as the gatekeeper of said achievements, against European encroachments in the name of fiscal stability.

## 2. BUILDING RESISTANCE AGAINST THE ‘NEW STATE’

Salazar was appointed finance minister after the 1926 military coup that put an end to Portugal’s parliamentary republic and established a ‘dictatorship without a dictator’.<sup>3</sup> In 1933, one year after Salazar was appointed President of the Council of Ministers, the *Political Constitution*, approved by a plebiscite, institutionalized the *Estado Novo*, inspired by the Italian Fascist model. It entrenched an antiparliamentarian, illiberal, antidemocratic, corporatist and authoritarian philosophy, with some constitutionalist elements such as periodic elections and nominal freedom of association. A remarkable feature of Portuguese authoritarianism was its ‘almost obsessive concern’ with providing a legal framework to the restrictions on fundamental rights.<sup>4</sup>

Political parties were eliminated by regulation and only the single party (*União Nacional*) was allowed to run for office. The political police (*PIDE* after 1945) were a central instrument of violence and oppression against political opposition. Torture of opposition members was common and written publications were subject to prior censorship by bodies subject to government control.

Opposition to the dictatorship began right after its consolidation into power. Until 1943, it was broadly disorganized and weak. The main organized resistance to the dictatorship was developed by the Communist Party. In 1961, in response to insurgency movements in Angola struggling for independence, the Colonial War began, involving intense military action in what would later become the independent states of Angola, Guinea-Bissau, and Mozambique.

Students’ mobilizations became more frequent since the beginning of the 1960s and police violence and repression against university students catalyzed the political conscience of a generation that proved crucial in the resistance against the dictatorship.

The death of Salazar in 1969 reignited the opposition hopes for the democratization of the country. His successor, Marcelo Caetano, promised to adopt democratic reforms and to hold free and fair elections. Caetano included

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<sup>3</sup> Goffredo Adinolfi and António C. Pinto, ‘Salazar’s “New State”: The Paradoxes of Hybridization in the Fascist Era’, in António C. Pinto and Aristotle Kallis (eds.), *Rethinking Fascism and Dictatorship in Europe* (Palgrave Macmillan 2014) 154, 156.

<sup>4</sup> Pedro Magalhães, ‘Democratização e independência judicial em Portugal’ [1995], *Análise Social*, vol. XXX, 51, 55.

several liberal members in the single-party list, electing the ‘Liberal Wing’ that comprised prominent reformist democrats who joined the National Assembly in 1969. Despite the initial hopes for liberalization, the *Marcelist Spring* did not question the regime nor the Colonial War.

As Caetano embarked on a project of growing authoritarianism, the students’ contestation, which had been consistent since the 1960s, reached its higher peaks between 1972 and 1973.

### 3. FROM REVOLUTION TO CONSTITUTION (1974–1989)

#### 3.1 From Coup to Revolution

In 1974, Portugal was the first Southern European country to initiate its path to democracy. Contrary to the Spanish transition, characterized by a ‘process of negotiation between the [former regime] and the democratic opposition’,<sup>5</sup> the Portuguese process was prompted by a ‘golpe’,<sup>6</sup> a rupture with 48 years of authoritarian rule. The Portuguese coup (the *Carnation Revolution*) inaugurated what Samuel Huntington called the third wave of democratization (the ‘Catholic wave’).<sup>7</sup> On 25 April 1974, the Movement of the Armed Forces (MFA), attracting a vast popular support, launched a successful non-violent coup that ignited a peaceful uprising and grassroots movements, and put an end to the longest Western European dictatorship.

This bloodless coup prompted a swift regime change. At the legal level, a revolutionary act declared the rupture with the previous constitutional order.<sup>8</sup> At the factual level, the MFA programme provided for the purge of the public administration and the recognition of the responsibility of officials who had committed illegalities or serious acts of collaboration with the dictatorship. This programme enshrined the progressive political agenda of the revolution, based on an ‘anti-monopolist strategy aimed at the defense of the working classes’.<sup>9</sup>

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<sup>5</sup> Juan J. Linz, ‘Some Comparative Thoughts on the Transition to Democracy in Portugal and Spain’, in Braga de Macedo and Simon Serfaty (eds.), *Portugal Since the Revolution. Economic and Political Perspectives* (Routledge 1981), 25, 45.

<sup>6</sup> Phillippe C. Schmitter, ‘Liberation by Golpe; Retrospective Thoughts on the Demise of Authoritarian Rule in Portugal’ (1975) 2 *Armed Forces and Society*, 5.

<sup>7</sup> Samuel Huntington, ‘Democracy’s Third Wave’ (1991) 2 *Journal of Democracy*, 12.

<sup>8</sup> Miguel Galvão Teles, ‘O problema da continuidade da ordem jurídica e a Revolução portuguesa’, *Escritos Jurídicos*, vol. II (Almedina 2014), 243.

<sup>9</sup> *Id. ib.*, 315.

With the 25 April coup and the revolutionary process that followed, a world of promises was opened to the Portuguese population, symbolized in the MFA's three Ds: (to) Democratize, (to) Decolonize and (to) Develop. These three emancipatory promises and mandates of the MFA programme embodied the longing of the Portuguese people for freedom.

The transition process was supervised by a military *Junta de Salvação Nacional*, a revolutionary body comprised of high-ranking officials, and the MFA, which played an important role in the initial structure of the state after the overthrow of the authoritarian regime, and was later entrenched in a political body – the Council of Revolution (March 1975).<sup>10</sup> This Council provided military tutelage to the political transition and later became a constitutional body.

It was a non-democratic organ added to the democratization process, founded on revolutionary legitimacy. It held advisory powers to President of the Republic and was competent 'to guarantee compliance with the Constitution and fidelity to the spirit of the Portuguese Revolution of 25 April 1974' (Article 142 of the Constitution).

Its entrenchment in the Constitution strengthened the dualistic nature of the sources of its legitimacy: the revolutionary and the democratic principles. Even after the democratic elections of 1975, 1976 and 1980, the military retained sufficient power to label Portugal a 'diarchal' system of government.<sup>11</sup>

On 25 April 1975, the first free elections were held to choose the members of the Constituent Assembly.<sup>12</sup> The Assembly was given the sole mandate to approve a new constitution under strict time-limits. During this period, two legitimacy principles coexisted: the *revolutionary legitimacy*, symbolized by the military government, holding the responsibility for governing the country and exercising revolutionary and temporary constituent power; and the *democratic (electoral) legitimacy*, responsible for drafting and enacting the new constitutional text. An 'ideological galaxy'<sup>13</sup> submerged Portugal with a strong anticapitalistic overtone. There were two coup attempts during this period, one from the left and one from the right.

<sup>10</sup> Law 5/75, of 14 March extinguished the *Junta* and the *Conselho de Estado* and created the Council of Revolution and the Assembly of the MFA.

<sup>11</sup> Alfred Stepan, 'Paths toward Redemocratization: Theoretical and Comparative Considerations', in Guillermo O'Donnell et al. (eds.), *Transitions from Authoritarian Rule: Comparative Perspectives* (John Hopkins University Press 1991), 64, 78.

<sup>12</sup> These were the founding elections of the new regime that involved 72 per cent of the population and 91.65 per cent of the electorate.

<sup>13</sup> Eduardo Lourenço, 'A galáxia ideológica no pós-25 de abril e as suas raízes culturais', in Mário Baptista Coelho (ed.), *Portugal: O sistema político e constitucional – 1974-1987* (Instituto de Ciências Sociais 1989), 71-77.

### 3.2 Organizational Charisma

Between 1974 and 1976, the country experienced a tumultuous phase of provisional governments and absence or collapse of state authority. This was a period of profound state crisis sustained by powerful social movements during which ‘the power fell on the streets’. The main political actors were the radical left parties and the Communists, supported by the MFA. Profound tensions emerged in Portuguese society which deepened with the nationalization of large economic groups, urban and rural property occupations, purges in the public administration and in private companies, and the agrarian reform.

That level of intense social mobilization amounted to the sort of ‘organizational charisma’ identified by Bruce Ackerman as a feature of revolutionary constitutionalism, when ‘activists at the grassroots level come to identify deeply with their movement party’s struggle for political ascendancy’.<sup>14</sup> Portugal provided an extreme example of spontaneous ‘outpouring of egalitarian solidarity and enthusiasm’.<sup>15</sup> Popular movements, most of them spontaneous,<sup>16</sup> prompted a wave of social transformations.

This was a phase of intense politicization where the people were the main source of legitimacy (‘O povo é quem mais ordena’).

### 3.3 Between Socialism and Liberal Democracy: The Transformative Constitution

At that time the great question was whether the Portuguese revolution would lead the country to the Western bloc of liberal democracies or to the Eastern bloc of the socialist countries. Despite the peaceful character of the Portuguese coup, the revolutionary process would soon reveal deep cleavages at ‘the bargaining table’.<sup>17</sup> While the results for the elections to the Constituent

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<sup>14</sup> Ackerman, *Revolutionary Constitutions*, cit., p. 35.

<sup>15</sup> Guillermo O’Donnell and Phillippe Schmitter, ‘Resurrecting Civil Society and Restructuring Public Space’, in id. *Transitions from Authoritarian Rule: Tentative Conclusions About Uncertain Democracies* (John Hopkins University Press 1986), 48, 54.

<sup>16</sup> Some observers imply the social mobilization was in part politically stimulated. See Miguel Galvão Teles, ‘A revolução portuguesa e a teoria das fontes do direito’, in id. *Escritos Jurídicos*, vol. II (Almedina 2014) 277, 288. Boaventura de Sousa Santos says that, even if that were to be true, the popular movements emerging in Portugal during that period cannot be reduced to political strategies and neither can the military’s unilateral decision to ally with the people. ‘Os três tempos simbólicos da relação entre as forças armadas e a sociedade portuguesa’ (1985) *Revista Crítica de Ciências Sociais*, 11, 26.

<sup>17</sup> Ackerman, *Revolutionary Constitutions*, cit., p. 33.

Assembly favoured the political parties that embraced political pluralism and the realization of democracy, the military and the Marxist-affiliated political parties radicalized their positions and supported the grassroots social movements pushing for more radical social change. A first pact had been imposed by the MFA on the political parties, prior to the elections to the Constituent Assembly and conditioning its future workings,<sup>18</sup> determining, in part, the content of the Constitution. Accordingly, the Constitution should safeguard the ‘achievements legitimately obtained throughout the process, as well as the developments of the programme imposed by the revolutionary dynamics that openly and irreversibly committed the country to a Portuguese socialism’.<sup>19</sup>

This two-staged process led to moments of great tension, symbolized in the siege of the Constituent Assembly (12-13 November 1975). An anticommunist and antileft military intervention on 25 November 1975 heralded the decline of the revolutionary mobilizations. In February 1976, following the defeat of the radical military faction, a new pact was struck between the MFA and the political parties, replacing the previous one.<sup>20</sup> Polarization only began to subside after the legislative and presidential elections in 1976, following the enactment of the Constitution.

### 3.3.1 A Weimar constitutional moment

The Portuguese Constitution of 1976 embodied a programme of social transformation through law and represented a Weimar Constitutional Moment.<sup>21</sup> The normative programme of the Constitution was oriented towards the emancipation of the Portuguese society from more than forty years of political repression and economic poverty through public institutions and legal structures.

The Portuguese Constitution was drawn out of conflicting views of the world: it envisaged a peaceful transition to socialism in the context of an open democracy. Article 1 expressed the transformative nature of the constituent moment, aimed at establishing a society without classes.

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<sup>18</sup> Jorge Miranda, *A Constituição de 1976. Formação, estrutura, princípios fundamentais* (Petrony 1978) 24.

<sup>19</sup> Paragraph 2, First Constitutional Platform MFA/Political Parties.

<sup>20</sup> Miguel Galvão Teles, ‘A segunda plataforma de acordo constitucional entre o Movimento das Forças Armadas e os Partidos Políticos’, in *Escritos jurídicos*, vol. I (Almedina 2013), 183. This second pact will be decisive for the design of constitutional review as we will see.

<sup>21</sup> Matthias Goldman and Agustín José Menéndez, ‘Weimar Moments: Transformations of the Democratic, Social, and Open State of Law’ (*Max Planck Institute for Comparative Public Law & International Law Research Paper No. 2022-12*) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4141137](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4141137) accessed 13 February 2023.

One of the essential tasks of the State was the socialization of wealth and the means of production. Article 10, under the title *Revolutionary process*, commanded the alliance between the MFA and the parties and democratic organizations to guarantee the peaceful course of the revolutionary process, and established that the development of the revolutionary process imposed, on the economic side, the collective appropriation of the main means of production. Significantly, Article 83 established the irreversible nature of all the nationalizations conducted after the revolution as conquests of the popular classes.

The economic constitution entailed a system of central planning and public property of the means of production which was not common in the EEC member states (although planning and nationalizations had also been frequent, in earlier decades, in other EEC countries). A long list of economic and social rights was also enshrined as directly enforceable through judicially reviewable yardsticks.<sup>22</sup>

This legal innovation would later become a current trend in the transformative constitutionalism proposed by Karl Klare,<sup>23</sup> as an understanding of constitutionalism that strives to overcome extreme social inequality and has set the social transformation of society and the state as its goal.

At the same time, several parts of the Constitution were imbued with the democratic spirit, evident in a detailed catalogue of civil and political rights. The Portuguese constitutional process was therefore the outcome of an ambiguous compromise between transformative and classic constitutionalism, that would be scholarly framed as ‘open constitutionalism’, as we will see below.

### 3.3.2 The Anti-oligarchic<sup>24</sup> constitution

The entrenchment in the constitutional text of the revolutionary achievements and the MFA’s mandate to remain their political guardian requires contextualization in the intellectual and political discourses of the late opposition to *Estado Novo*. What came to materialize during the revolutionary period as ‘socializations’, ‘expropriations’, ‘purges’, formed part of an anti-oligarchic narrative that the progressive opposition had been building since the beginning of the decade. Under different tags, which varied in accordance with the ideological inclination of the opposition movements, Socialists, Communists,

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<sup>22</sup> Mónica Brito Vieira and Filipe Carreira da Silva, ‘Getting Rights Right: Explaining Social Rights Constitutionalization in Revolutionary Portugal’ (2013) 11 *International Journal of Constitutional Law*, 898.

<sup>23</sup> Karl Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *South African Journal on Human Rights*, 146.

<sup>24</sup> Joseph Fishkin and William E. Forbath. *The Anti-Oligarchy Constitution. Reconstructing the Economic Foundations of American Democracy* (Harvard University Press 2022).

and liberals had been developing a critical discourse of the ‘oligarchization of power’,<sup>25</sup> claiming that a small ruling class controlling economic power also entailed a questionable command over political power.

Importantly, this critique was not only waged by Marxist movements. Other leftist forces, and even politicians who had taken part in the ‘Liberal Wing’ of Caetano articulated an anti-monopolist discourse close to the more radical movements. These liberal thinkers called for a comprehensive planning of the economy and the collective property of undertakings as apt anti-oligarchic tools.<sup>26</sup>

The correspondence between ‘capitalist economy and political oppression’<sup>27</sup> was not exclusive to the Communist Party. Also the Socialists, highly influenced by the French socialist radicalization of the 1960s and 1970s, and the Chilean *Unidad Popular*, expressed a visible anticapitalistic tone in their writings.<sup>28</sup> Progressive Catholic economists and scholars, autonomous from Marxist or leftist movements, also linked monopolist capitalism with political oppression and invoked the public planning of economic activity.<sup>29</sup> These groups advocated the ‘construction of an anti-capitalistic order, necessarily socialised or socialist, as the only way to eradicate the causes of economic and social backwardness’.<sup>30</sup> They claimed, ‘if this is socialism, so be it, it is what we seek’.<sup>31</sup>

The belief that the dictatorship was based on an economic and political oligarchy cut across ideological and partisan lines and penetrated the popular movements that energized the country after the 25 April coup.

The first political manifesto of the Popular Democrats (later Social Democrats) accepted nationalizations and state planning as means to guarantee the subordination of the economic to the democratic power.<sup>32</sup> Similarly, the manifesto of the Socialist Party favoured nationalizations and economic planning to achieve the structural transformation of social relations in the framework of a transition towards a socialist society.<sup>33</sup>

<sup>25</sup> Camila Vergara, *Systemic Corruption. Constitutional Ideas for an Anti-Oligarchic Republic* (Princeton University Press 2020), 37.

<sup>26</sup> Joaquim Magalhães Mota, Oliveira Dias and José da Silva, *Encontro de reflexão política. Encontro um: Atualidade portuguesa* (Moraes Editora 1973).

<sup>27</sup> José Barreto, ‘As nacionalizações e a oposição ao Estado Novo’ [2000], *Análise Social*, 509, 524.

<sup>28</sup> Id. ib.

<sup>29</sup> Id., 525-526.

<sup>30</sup> Id., 527.

<sup>31</sup> Id., 537.

<sup>32</sup> Leite Viegas, *Nacionalizações e Privatizações. Elites e cultura política na história recente de Portugal* (Celta Editora 1996), 148.

<sup>33</sup> Id., 149.



Importantly, the idea of large public sectors and nationalizations was not at odds with the economic thought of Western Europe in the 1970s.<sup>34</sup> In the 1930s, and particularly after World War II, several countries had initiated nationalization programmes. Portugal came late to this trend as it had a very small public sector when the dictatorship collapsed, and only converged, on European terms, after the nationalizations process of the revolutionary period, when the Western countries were already under pressure to shrink their public sectors.<sup>35</sup> Two decades later, this process would be reversed when Portugal introduced one of the largest privatization programmes in Europe, becoming at the turn of the century one of the European countries with the smallest public sector.<sup>36</sup>

### 3.4 Revolutionary Legal Theory and the Legal and Economic Counter-Revolution<sup>37</sup>

Transition to democracy and democratic normalization were centred around the constitutional process. Up to now these original features have never abandoned the debates surrounding the interpretation of the constitution. However, in the decades following the enactment of the Constitution, the legal innovators and policymakers more intimately associated with the programmatic content of the Constitution's original text were removed from the centres of political decision-making, and thus were unable to push further the emancipatory programme. Conversely, some of the more vocal opponents of the 'socialist postulate'<sup>38</sup> would later come to play decisive and influential roles in the design and making of a constitution adapted to the requirements stemming from European integration.

On the other hand, a 'legal counter-revolution' emerged, advocating for objective conceptions of justice and values against the 'unlawfulness' of the

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<sup>34</sup> Luciano Amaral, *Em nome do pai e do filho... O Grupo Espírito Santo, da privatização à queda* (D. Quixote 2015), 52.

<sup>35</sup> *Id.*, 72.

<sup>36</sup> *Id.*, 73.

<sup>37</sup> I borrow this expression from de Sousa Santos who uses it in a different context to refer to a legal counter-reaction to progressive legal theory supporting social movements and the judicialization of constitutional rights that promote the expansion of legal protection to traditionally vulnerable categories of individuals. See *Por uma revolução democrática da justiça* (Almedina 2015), 133.

<sup>38</sup> Jorge Braga de Macedo, 'Princípios Gerais da Organização Económica', in Jorge Miranda (ed.), *Estudos sobre a Constituição I* (Petrony 1977) 189.

‘unjust revolutionary laws’, and upholding the ‘superiority of doctrinal rigour against pragmatic and emotional speech’.<sup>39</sup>

This ‘counter-revolution’ included the credo that justice belonged neither to the state nor to the revolution. The criteria of justice laid in general principles such as the liberal Western standards of human dignity,<sup>40</sup> judicial independence, due process, and the non-retroactivity of laws, and it was the task of lawyers to define their content in each particular case.<sup>41</sup> Doctrinal scholarship became ‘an effective sponge that absorbed and erased the revolution in the domain of the law’.<sup>42</sup> The purges and accountability mechanisms for the former members of the PIDE were one of the main targets of conservative doctrinal scholarship that failed to recognize that Portugal, alongside Greece, was the first country which, after World War II, succeeded in holding its own state officials criminally accountable for past human rights violations.<sup>43</sup>

Permanent criticism of the ‘ideological’ content of the Constitution was deliberately oriented towards the erosion of its legitimacy. Ten years later one of the most eminent Portuguese constitutional theorists, Gomes Canotilho, would bitterly acknowledge that the critics had fully achieved their intents.<sup>44</sup> An example of the fierceness of the criticism is provided by the writings of another leading voice among scholars, Braga de Macedo. In 1989, before the second constitutional revision, and even after the Constitutional Court cleared a full liberalization package that breached the constitutional ban of privatizations, he wrote that the Constitution still represented an economic blockage: ‘As long as *that document is there*, we have a symbol of impediments to open and competitive economic activity.’<sup>45</sup>

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<sup>39</sup> António Manuel Hespanha, ‘As transformações revolucionárias e o discurso dos juristas’ (1986) 18/19/20, *Revista Crítica de Ciências Sociais*, 311, 318.

<sup>40</sup> The leading author claimed that the ‘law is the order, and the revolution is the anti-order’, as he advocated for the ‘scientific neutrality’ of the jurists. Castanheira Neves, ‘A revolução e o direito. A situação de crise e o sentido do direito no atual processo revolucionário’ (1976), *Separata da Revista da Ordem dos Advogados*, 27.

<sup>41</sup> António Manuel Hespanha, *Cultura jurídica europeia. Síntese de um milénio* (Almedina 2012), 549.

<sup>42</sup> Hespanha (n 39) 330.

<sup>43</sup> Kathryn Sikkink. *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (W. W. Norton & Company 2011), 31.

<sup>44</sup> Gomes Canotilho, ‘A Constituição de 1976 dez anos depois: Do grau zero da eficácia à longa marcha através das instituições’ (1986) 18/19/20, *Revista Crítica de Ciências Sociais*, 269, 275.

<sup>45</sup> Jorge Braga de Macedo, ‘A Constituição como bloqueio da sociedade portuguesa: de uma interpretação jurídico-económica a uma perspetiva político-económica’, in Mário Baptista Coelho (ed.). *Portugal. O sistema político e constitucional – 1974-1987* (Instituto de Ciências Sociais 1989), 801, 811.

It was the call for the pruning from the constitutional text of all the references to ‘Marxist vulgarism’ and the completion of the transition to a conventional Western constitution, aligned with the canons of Western liberal democracy. After the constitutional revisions of 1989 and 1992, completed with the agreement of the political elites of the Social Democrats and the Socialists, the Constitution was extirpated of its ideological ‘charge’ contained in the Marxist wording, and Portugal became one of the EU countries where economic activity was less regulated.<sup>46</sup>

The counter-revolution was also visible at the level of economic theory and praxis. Recent research<sup>47</sup> has shown that influential domestic scholars, trained mostly in US elite schools, were able to develop a home-grown intellectual field, with the support of the IMF and the EU institutions.<sup>48</sup> Technical research provided by these institutions, as well as by academic fora such as the MIT, added the gravitas of symbolic status to reforms that were presented as ‘immune from political rhetoric’,<sup>49</sup> as opposed to socialism, which was presented as an ideology.<sup>50</sup> This intellectual environment allowed a process of ideological transfer similar to other neoliberal experiments in the Global South<sup>51</sup> and eventually influenced the Portuguese political right which, by the early 1980s, started to call for a more ambitious reform of the Constitution<sup>52</sup> in the direction of further liberalization of the Portuguese economy.<sup>53</sup>

### 3.4.1 The struggle for the meaning of the Constitution: The contested debate on ‘Constituição Dirigente’ and ‘Constituição Aberta’

The conflicting political views around the constitutional process were matched by an intense and polarized academic debate over the adequate constitutional theory of the 1976 Constitution.

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<sup>46</sup> João Rodrigues, *O neoliberalismo não é um slogan* (Tinta-da-China 2022) 249.

<sup>47</sup> Ricardo Noronha, ‘The Portuguese Road to Neoliberalism (1976-1989)’ (2022) 31, *Contemporary European History*, 113. Rodrigues, (n 46), 223 ss.

<sup>48</sup> During the late 1970s, the Portuguese economy was subject to several ‘economic experiments’ suggested by international economists.

<sup>49</sup> Noronha (n 47) 128.

<sup>50</sup> Jorge Braga de Macedo, ‘O socialismo como ideologia’ (1976) 1, *Revista de Nação e Defesa*, 2, 3.

<sup>51</sup> Juan Gabriel Valdés, *Pinochet’s Economists. The Chicago School in Chile* (CUP 1995).

<sup>52</sup> At the request of Lucas Pires, a group of law professors from Coimbra presented a proposal to deeply reform the Constitution and extirpate the socialist and programmatic dimensions of its contents. The proposal has been published subsequently. Barbosa de Melo, Cardoso da Costa and Vieira de Andrade, *Estudo e projeto de revisão da Constituição da República Portuguesa de 1976* (Coimbra Editora 1981).

<sup>53</sup> On these developments, see the detailed explanations provided by Noronha (n 47).

The scholarly debate developed around the theory of the 1976 Constitution reflected the intrinsically polarized nature of the founding document. Three main theories developed as *Habilitationsschrift*.

The first was proposed by Jorge Miranda who had been a member of the Constituent Assembly and the Constitutional Commission.<sup>54</sup> Miranda proposed to overcome the apparent contradictory nature of the constitutional text and claimed that the socialist principle and the democratic principle could be harmonized and coherently interpreted. For him, there was not an intractable tension between revolutionary and democratic legitimacies. The Constitution was a document stemming from a compromise like other European fundamental texts enacted after World War II.<sup>55</sup> It conveyed the tensions and pluralism present at the constituent assembly and could not be reduced to ‘neither a “soviet” founding moment nor a liberalization treaty’.<sup>56</sup>

Some years later, Gomes Canotilho,<sup>57</sup> in ‘Constituição Dirigente’,<sup>58</sup> claimed that the 1976 document was not a mere ‘organizational statute’ or ‘frame of government’. Challenged to bring to life the transformative promises and the emancipatory discourse embodied in the Portuguese democratic Constitution and drawing on the works of Konrad Hesse and Peter Lerche, Canotilho developed the concept of the directive constitution as a blueprint for legislative action. The Constitution is ‘dirigente’, or directive, when the constitutional text entails provisions embodying a prospective programme. The constitutional text not only distributes powers and guarantees the rights of citizens but also entails a normative plan of action binding upon the State which is therefore tasked with implementing the constitutional mandate of social justice.<sup>59</sup>

Another *Habilitationsschrift*<sup>60</sup> from Coimbra proposed a different reading of the 1976 Constitution: the ‘Transição Dualista’. Lucas Pires claimed that the

<sup>54</sup> *A Constituição de 1976. Formação, estrutura, princípios fundamentais* (Livraria Petrony 1978).

<sup>55</sup> The Italian Constituent Assembly also hosted a profoundly divided composition organized in two ideological camps: on one side, those parties that wanted to reintegrate Italy with Western liberal democracies and, on the other, the leftist parties ‘whose final aim was the construction of a socialist republic, following the Soviet example’. Giuliano Amato, ‘The Constitution’ in Erik Jones and Gianfranco Pasquino (eds). *The Oxford Handbook of Italian Politics* (Oxford University Press 2015), 71, 72.

<sup>56</sup> Jorge Miranda. *A Constituição de 1976. Formação, estrutura, princípios fundamentais*. cit.

<sup>57</sup> *Constituição dirigente e vinculação do legislador. Contributo para a compreensão das normas constitucionais programáticas* (Coimbra Editora 1982).

<sup>58</sup> The concept can be translated as directive constitution.

<sup>59</sup> There are striking similarities between Canotilho’s *Constituição dirigente* and transformative constitutionalism.

<sup>60</sup> Lucas Pires, *Teoria da Constituição de 1976. A transição dualista* (Coimbra 1988).

1976 wording of the Constitution and its dualism, oscillating between liberalism and socialism, were manifestly transitory features, understandable only in the context of a temporary revolutionary period. The desirable outcome would be an 'open constitution', typical of a pluralist democracy, where the main economic choices are not predetermined by the constitutional programme, but rather decided by parliament and electoral politics.

The constitutionalization of social rights and the judicialization of constitutional law was also the object of detailed attention by conservative scholarship. Vieira de Andrade, from the Coimbra Law School, developed the theory that economic and social rights that were not analogous to liberal rights enjoyed a weaker legal status and their protection was conditioned on the available resources. Thus, it was the task of the legislator and not the Constitutional Court to determine, in each historical moment, their actual level of protection.<sup>61</sup>

At the level of constitutional scholarship and case law, the 'open and plural constitution' thesis prevailed to the detriment of justiciable welfare rights. The rich and detailed catalogue of social and economic rights was not matched by doctrinal tools able to bring life to the constituent aspirations of social equality and emancipation. Moreover, the system of constitutional review designed in 1982 is predominantly oriented towards the review of norms and structurally designed for the enforcement of liberal or defensive rights. Social rights are essentially protected through the enforcement of general principles such as equality and subject to the availability of resources, through a case law that is traditionally highly deferential to the legislature's assessment.

Although the Constitution enshrines a remedy specifically tailored for the protection of social and economic rights (review of unconstitutionality by omission, which the conservative political majority tried to abolish in 1982), inspired by the constitution of the former Yugoslavia, it fails to give the Court the power to order injunctions upon the legislature and it has fallen into disuse, also due to doctrinal criticism. Without remedies, sometimes these rights remained mere symbolic norms.<sup>62</sup>

### 3.4.2 European membership

On 18 May 1962, Portugal requested negotiations 'with a view to finding the formula for relations between Portugal and the EEC which would best achieve common interests'. The Birkelbach Report, approved by the European Parliament in 1962, established that admission into the Community was conditional upon respect for democracy, human rights and fundamental lib-

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<sup>61</sup> *Os direitos fundamentais na Constituição portuguesa de 1976* (Almedina 1983).

<sup>62</sup> Aziz Z. Huq, *The Collapse of Constitutional Remedies* (Oxford University Press 2021), 5.

erties. The political conditionality was specifically addressed to the Southern European dictatorships and would exert significant influence in the accession negotiations years later.<sup>63</sup>

Although future accession to EEC was a relevant element of contention during the revolutionary period (1974-1976), it was mainly absent from the work of the constituent assembly. The dividing lines were, however, clearly defined: while the liberal democratic forces aspired to join the European camp of open democracies, the Marxist factions regarded it as the epitome of capitalism and some even claimed its incompatibility with the transformative constitutional project.<sup>64</sup>

Until 1976, the Member States of the Communities member countries hesitated about inviting Portugal, as the risk of the country falling into a socialist dictatorship had not disappeared yet. Adhesion to the EEC was thus an important part of the moderation package. On 27 March 1977, Portugal applied to join the EEC (becoming a full member on 1 January 1986).

The European Community lacked the military means to impose its power and to guarantee inter-European stabilization. It relied instead on soft mechanisms to coerce and persuade neighbouring countries into its framework of operation.<sup>65</sup> European influence and the ‘prospect of membership of the European Community remained an important incentive for the consolidation of the democratic processes in the Iberian Peninsula, although the social and economic climate became extremely adverse’.<sup>66</sup>

The EEC was mostly an *economic* community whose treaty obligations entailed detailed rules that potentially conflicted with the economic constitution of a transformative project such as the 1976 Portuguese Constitution. Accordingly, liberalizing readings of the Constitution emerged in several legislative reforms<sup>67</sup> and opinions of the Constitutional Commission.<sup>68</sup> In particular, an important legislative package implemented a ‘truly capitalist

<sup>63</sup> Sonia Alonso and José María Maravall, ‘Democratizations in the European Periphery’, in Jack Hayward and Anand Menon (eds.). *Governing Europe* (Oxford University Press 2003), 264.

<sup>64</sup> Manuel Malheiros, ‘Adesão ao M.C. e a Revisão Constitucional’ (1979) 6, *Fronteira*, 15.

<sup>65</sup> Laurence Whitehead, ‘International Aspects of Democratization’, in Guillermo O’Donnell, Philippe C. Schmitter and Lawrence Whitehead (eds). *Transitions from Authoritarian Rule* (Johns Hopkins University Press 1986) 3, 12.

<sup>66</sup> *Ibid.*, 22.

<sup>67</sup> Vital Moreira, *Constituição e revisão constitucional* (Editorial Caminho 1980), 95.

<sup>68</sup> Avelãs Nunes, ‘A constituição económica portuguesa. Da revolução de abril à contra-revolução monetarista’, in *Da revolução de abril à contra-revolução liberal* (Página a Página 2017), 95, 97. These reforms concerned the Agrarian Reform (Law

regime<sup>69</sup> and materially suppressed the constitutional mandate of transition to socialism. For that reason, it was called ‘the first revision of the Constitution’.<sup>70</sup> At the same time, critics of the socialist dimension of the 1976 Constitution invoked the ‘dedogmatization’ of the Constitution to avoid risks of conflict with the Rome Treaty.

Request for accession was immediately followed by a standby arrangement negotiated with the IMF and concluded in May 1978.<sup>71</sup> The policy package was liberally-oriented but Portugal failed to fulfill the conditionality.<sup>72</sup> However, the main relevance of the standby arrangement was that it also worked as a ‘seal of approval’<sup>73</sup> for an international loan provided by a syndicate of countries led by the United States. In the 1970s, private banks started to make their own loans conditional on debtor countries having a standby arrangement with the IMF – a circumstance which increased enormously the power of this organization to ‘meddle’ in States’ internal affairs.<sup>74</sup>

In 1983, in the context of the international debt crisis, a second agreement was reached with the IMF under the so-called *Bloco Central* government (comprising the two main political parties, the Socialists and the Social-Democrats). A painful austerity package was implemented which resulted in a significant decline of incomes and cuts in social transfers and in an increase of unemployment, which reached 10.5 per cent at the end of 1983. Despite the social hardship, for the international community Portugal emerged as a ‘tidy and well-behaved’ economy that had rigorously fulfilled the measures imposed on it.<sup>75</sup>

77/77, 29 September), the Delimitation of Sectors (Law 46/77, 8 July) and the Law on Compensation for Nationalizations (Law 80/77, 26 October).

<sup>69</sup> Marcelo Rebelo de Sousa, *Direito Constitucional, I – Introdução à Teoria da Constituição* (Livraria Cruz 1979) 342.

<sup>70</sup> *Ibid.*

<sup>71</sup> The standby arrangement was the formalization of a long process during which Portugal drew heavily on IMF resources and that started in 1975, after the revolutionary period eased. See Luciano Amaral et al., ‘A Long International Monetary Fund Intervention: Portugal 1975-1979’, *Working Paper #635 2020*, available at <https://run.unl.pt/bitstream/10362/99746/1/WP635.pdf> accessed 25 May 2023.

<sup>72</sup> Silva Lopes, ‘IMF Conditionality in the Stand-By Arrangement with Portugal of 1978’ (1982) 111 (2) *Estudos de Economia*, 141, 147.

<sup>73</sup> Brian Trubbit, ‘International Monetary Fund Conditionality and Options for Aggrieved Fund Members’ (1987) 20 (4), *Vanderbilt Journal of Transnational Law*, 665, 685.

<sup>74</sup> Jamie Martin. *The Meddlers. Sovereignty, Empire, and the Birth of Global Economic Governance* (Harvard University Press 2022), 252.

<sup>75</sup> José Maria Brandão de Brito, ‘The Portuguese Economy: From Salazarism to the European Community’, in Costa Pinto (ed.), *Modern Portugal* (The Society for the Promotion of Science and Scholarship 1998), 102, 111.

### 3.4.3 The Constitutional Court and the ‘legal counter-revolution’: Strong rights but a weak court

The Constitutional Court is not a creature of the revolution nor of the first version of the constitution. Portuguese constitutionalism had been familiar with diffuse judicial review of legislation since the turn of the twentieth century but its creation was rooted in weak parliamentarism and had remained law in the books. The second pact between the MFA and the political parties dealt with this topic and assigned to the Council of Revolution the powers for judicial review, while maintaining the ordinary courts’ role of diffuse review. Innovatively, it also envisaged the creation of an independent expert commission (the ‘Constitutional Commission’) to advise the Council. The Council was envisaged as a temporary body – and temporary were its revolutionary powers. When it was abolished, in the first constitutional revision, the constitutional review tasks were taken by the newly created Constitutional Court. This body, however, was not designed according to Ackerman’s scheme, as the judicial custodian of the revolutionary *acquis*. Its powers and composition were carefully tailored to avoid any transformative temptations.

The major agreement concerning the institutional design of the Court was conducted outside of Parliament, between the two large political forces – the right-wing ruling coalition, AD (*Aliança Democrática*) and the Socialists – to prevent the radical left parties from having a voice in the process. Even prominent members of the Social Democrats (PSD), like Margarida Salema, were excluded and expressed vocal criticism of the process. The initial proposal expressed a clear skepticism about constitutional review – requesting qualified majority for unconstitutionality rulings and reflection periods.<sup>76</sup> Moreover, the discussion process revealed deep political cleavages, both in parliament and with the President of the Republic. To this day, the creation of the Constitutional Court is referred to as the ‘original sin’.<sup>77</sup>

In the first years of its existence,<sup>78</sup> the Court played a significant role in legitimizing the legislation and doctrines aimed at dismantling the most progressive sections of the constitutional text. Immediately after its implementation, the Court was confronted with the constitutionality of some of the

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<sup>76</sup> According to the Government’s proposal of a bill for the Constitutional Court, ‘unconstitutionality rulings should be rare’. See Barbosa de Melo and Cardoso da Costa, *Projeto de lei sobre a organização, funcionamento e processo do Tribunal Constitucional*. (1984) Separata do Vol. LX do Boletim da Faculdade de Direito da Universidade de Coimbra, 6.

<sup>77</sup> António Araújo, ‘A construção da justiça constitucional portuguesa: o nascimento do Tribunal Constitucional’ (1995) 30 (134), *Análise Social*, 881, 931.

<sup>78</sup> The Constitutional Court was created in the constitutional revision of 1982 and implemented in 1983.



austerity measures. The young Court was quick to endorse the conformity of the regressive policies with the Constitution's progressive social and economic programme.<sup>79</sup> The tone was set. Soon the Court would legitimize a broad economic liberalization package implemented by the Social Democrats with the approval or acquiescence of the Socialists. Only the Communist Party operated as a real countervailing power<sup>80</sup> against policies that expanded private initiative to the banking and insurance sector in 1983, and therefore restricted public ownership in previously, nationalized sectors,<sup>81</sup> in 1985, as well as legislation that allowed for partial privatization of the capital of public enterprises;<sup>82</sup> labour legislation reform;<sup>83</sup> legislation deregulation housing rental market;<sup>84</sup> legislation on agrarian reform;<sup>85</sup> legislation on partial privatizations in basic sectors;<sup>86</sup> legislation imposing moderating fees on access to the National Health Service.<sup>87</sup>

Until today, social rights remain a weak yardstick in the case law of a Court that has failed to live up to the transformative promise embodied in the social Constitution. Its case law 'methodically demolished the economic Constitution

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<sup>79</sup> Teresa Violante and Patrícia André, 'The Constitutional Performance of Austerity in Portugal', in Tom Ginsburg et al. (eds.), *Constitutions in Times of Financial Crisis* (Cambridge University Press 2019), 229, 232-233.

<sup>80</sup> Pedro Magalhães. *The Limits to Judicialization: Legislative Politics and Constitutional Review in the Iberian Democracies*. PhD Dissertation, Ohio State University, 2002, available at [https://www.researchgate.net/publication/252067672\\_The\\_Limits\\_to\\_Judicialization\\_Legislative\\_Politics\\_and\\_Constitutional\\_Review\\_in\\_the\\_Iberian\\_Democracies](https://www.researchgate.net/publication/252067672_The_Limits_to_Judicialization_Legislative_Politics_and_Constitutional_Review_in_the_Iberian_Democracies), accessed 13 February 2023, 247-248.

<sup>81</sup> Decision 25/85. The Court said the nationalizations only referred to companies and not sectors of activity. Therefore, only the prohibitions enshrined in the law could prevent the full development of private initiative. Later, additional economic sectors were open to private initiative – see Decision 444/93.

<sup>82</sup> Decision 108/88. It should be highlighted that only later, in 1989, was the Constitution formally amended to abolish the irreversibility of nationalizations conducted after 25 April 1974 principle.

<sup>83</sup> Decision 81/95.

<sup>84</sup> Decision 311/93.

<sup>85</sup> Decisions 187/88 and 225/95.

<sup>86</sup> Decision 195/92.

<sup>87</sup> Article 64 of the Constitution expressly established the gratuity of the National Health Service. The Constitutional Court found no unconstitutionality claiming that the constitutional concept of 'gratuity' was normative and therefore encompassed fees aimed at 'rationalizing' demand (Decision 330/88). After the revision of 1989, the constitutional provision reads that the 'National Health Service is tendentially free of charge, taking into account the economic and social conditions of the citizens.' See also Decision 731/95.

even before it had been changed in the constitutional text itself'.<sup>88</sup> In the end, the thesis of the 'open Constitution' prevailed, and it would be aptly summarized by the towering judge<sup>89</sup> Cardoso da Costa: 'The Constitution of the Portuguese Republic is, in a certain sense and large measure, an "open" text (...)'.<sup>90</sup>

### **3.5 From the Revolutionary Constitution to a Conventional European-Style Constitution**

The adaptation of the Constitution to the mainstream European constitutional culture began with the first constitutional revision (1982), which incorporated some deflections from the socialist economic model adopted in 1976 and extinguished the Council of Revolution. But it was only in 1989, with the second revision to the constitutional text, largely negotiated outside of parliament, that the economic Constitution underwent a profound transformation, and the remaining socialist formulae were deleted. The principle of collective appropriation of the means of production was revoked, the agrarian reform was deleted from the text<sup>91</sup> and the reversibility of nationalizations established. Subsequently, a vast privatizing programme was launched.

By then, the socialist dimension of the constitutional text was largely nominal. In fact, even before the second revision, the European Commission had publicly stated that there was no incompatibility between the Constitution – namely the provisions on nationalizations and the public sector dimension – and the accession of Portugal to the Communities, as long as European regulations were respected.<sup>92</sup>

### **3.6 The Revolutionary Promise of Social Rights**

One transformative feature was left untouched in the constitutional text: the precise, extensive, and diverse catalogue of social rights, 'arguably the

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<sup>88</sup> Vital Moreira, 'O Tribunal Constitucional e os trabalhadores', *Expresso*, 17 October 1992, *apud* Magalhães (n 80) 357.

<sup>89</sup> Rehan Abeyratne and Iddo Porat (eds.). *Towering Judges. A Comparative Study of Constitutional Judges* (Cambridge University Press 2021). Cardoso da Costa joined the Court in its early days and presided it between 1989-2003, leaving it only in 2003.

<sup>90</sup> José Manuel M. Cardoso da Costa, *apud* Magalhães (n 80) 359.

<sup>91</sup> In 1977, a new law, more favourable to private ownership, had already made expropriation more difficult – Law 77/77, 22 July 1977.

<sup>92</sup> Avelãs Nunes (n 68) 99.

most exhaustive and detailed of such catalogues in any constitution before or since'.<sup>93</sup>

The original compromise on welfare rights has not only been kept untouched but has even been reinforced subsequently over the years.<sup>94</sup> The Portuguese Constitution entails numerous social rights that are conceived as fundamental subjective individual rights and described in deep detail. At the same time, it demands the creation of institutions necessary for the implementation of welfare rights (a social security system, a National Health Service, a national education system), while setting down the fundamental principles governing these institutions (universality, generality, gratuity). The revolution in the Constitution has survived through the catalogue of social rights.

The Portuguese catalogue of social rights is the most precise and detailed among the EU member states. It 'ended up being the most enduring originality of the Portuguese Constitution'<sup>95</sup> and the essence of its symbolism. Its entrenchment resonates the unique consensus between all the political forces and the military. In October 1975, the section on social rights was unanimously approved by the Constituent Assembly. Welfare equates to April's conquests in today's political discourse.

The formative period of the Portuguese Revolution was over by 1989. It left behind an experience of constitution-making based on hope and oriented towards a more progressive and just future, to break free from the inequity of the past.

## 4. REGIME CONSOLIDATION (1989-2008)

### 4.1 The 'Good Student' of European Integration

For some years, the revenues coming from privatizations helped the governments to close budget gaps and Portugal became the 'good student of macroeconomic stability'.<sup>96</sup> The welfare state continued to grow with more

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<sup>93</sup> Pedro Magalhães, 'Explaining the Constitutionalisation of Social Rights: Portuguese Hypotheses and a Cross-National Test', in Denis Galligan and Mila Versteeg (eds). *Social and Political Foundations of Constitutions* (Cambridge University Press 2013).

<sup>94</sup> Although PSD and CDS, the two conservative parties, have in the past presented proposals questioning some of the social constitutional provisions. See Eduardo Paz Ferreira, 'A Constituição económica de 1976: "Que reste-t-il de nos amours?"', in Jorge Miranda (ed.). *Perspectivas constitucionais: nos 20 anos da Constituição de 1976* (Coimbra Editora 1998) 383, 412.

<sup>95</sup> Magalhães (n 93) 433.

<sup>96</sup> Jorge Braga de Macedo, 'Portugal's European Integration: The Good Student with a Bad Fiscal Constitution' (2003) 8 (1-2), *South European Society and Politics*, 169, 171.

programmes being added in the mid-1990s to combat deep poverty. The Portuguese welfare state was established at a late stage and in a period of economic contraction. During the first two decades after accession, economic convergence was accelerated and dissonance between EU and national constitutionalism was not conspicuous. To the contrary, EU integration accelerated economic and political transformation to converge with the standards of other European democracies.

With the introduction of the Euro, Portugal entered a period of economic stagnation and growing public debt. The country went from being the European poster child in the 1990s for its rapid convergence and economic dynamism to entering a prolonged period of economic stagnation in the aftermath of economic and monetary union (EMU). Economic stagnation came in tandem with growing public debt. The roots of these economic problems, however, were more profound, resulting from the combination of a series of idiosyncratic specificities with a wider ‘European problem’ the roots of which can be traced back to the mid-1980s initiatives towards economic integration in the EEC.<sup>97</sup> Public debt increased, but cheap credit was mainly channelled to non-tradable industries protected from international competition. The real estate and construction sectors benefited the most.

## 4.2 The Constitution as An Obstacle to Reforms

After 1989, the Constitution underwent other revisions, several of them related to the EU.

The growth of the deficit and economic stagnation raised concerns regarding the consequences of joining the EMU in ‘one of the countries least prepared for it’.<sup>98</sup> Nevertheless, the public debate did not revolve around EMU as such or around the eventual wisdom of the Portuguese decision to join it. Rather the discussion centred on the ‘lack of structural reforms’, which was in the power of domestic authorities to implement, and on eventual need to amend the Constitution. In fact, there were even those who claimed that Portugal was ‘the good [European] student with a bad fiscal Constitution’.<sup>99</sup>

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<sup>97</sup> For details see Luciano Amaral. *The Modern Portuguese Economy in the Twentieth and Twentieth-First Centuries* (Palgrave Macmillan 2019), 266 ff.

<sup>98</sup> *Ibid*, 290.

<sup>99</sup> Braga de Macedo (n 96).

## 5. JUDICIAL SUPREMACY AND THE REVIVAL OF THE REVOLUTIONARY LEGACY

### 5.1 Austerity and the Rise of the Constitutional Court

In February 2011, in the aftermath of the financial crisis that followed the Lehman Brothers crash, the caretaker government requested European (and international) financial assistance. A 78 billion Euro loan was delivered between 2011 and 2014 under the supervision of a triad made up of the European Central Bank, the International Monetary Fund, and the European Commission, usually labelled as the ‘troika’. The aid package subjected Portugal to a severe austerity programme. During the first period of its implementation, the document was only available in English – a circumstance proving that the terms of the debt were simply not supposed to be discussed, let alone changed, by the citizenry.<sup>100</sup>

Between 2010 and 2014, the Constitutional Court struck down several of the measures which were imposed as part of the provision of financial assistance (the so-called bailout conditionality).<sup>101</sup> The financial impact of these decisions was enormous and set off a political crisis which was also felt at the EU institutional level, as the Court’s rulings led to several renegotiations of the rescue programme. Intense criticism was voiced against the Court from the government,<sup>102</sup> conservative scholars<sup>103</sup> and opinionmakers. The Constitution was also under harsh attack for being ‘programmatic’, and falsely accused of still prescribing ‘a society without classes’.<sup>104</sup> Nevertheless, national, and international political pressure did not impress the Court which kept on outlawing further austerity measures throughout the years of 2013 and 2014.

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<sup>100</sup> Pierre Guibentif, ‘Societal Conditions of Self-Constitution. The Experience of the European Periphery’, in Jiří Příbáň (ed.), *Self-Constitution of European Society. Beyond EU Politics, Law and Governance* (Routledge 2016), 274, 283.

<sup>101</sup> The Court struck down further temporary pay cuts on public wages and pensions, a broadened framework for the dismissal of public workers and permanent cuts to pensions. For a detailed description of this case law, see Teresa Violante, ‘The Portuguese Constitutional Court and Its Austerity Case Law’, in António Costa Pinto and Conceição Pequito (eds.), *Political Institutions and Democracy in Portugal* (Palgrave MacMillan 2019).

<sup>102</sup> <https://www.tsf.pt/portugal/justica/passos-coelho-diz-que-juizes-do-constitucional-tem-de-ser-mais-bem-escolhidos-3955293.html> accessed 13 February 2023.

<sup>103</sup> Gonçalo Almeida Ribeiro and Luís Pereira Coutinho (eds.), *O Tribunal Constitucional e a crise. Ensaios críticos* (Almedina 2015).

<sup>104</sup> <http://www.asjp.pt/2013/12/16/braga-de-macedo-ataca-tribunal-constitucional/> accessed 13 February 2023.

## 5.2 The Revival of the Revolutionary *Acquis*

The veto power of the Court affirmed itself in a context marked by intense social mobilization. For the first time since the ‘hot years’ of the democratization period, large popular demonstrations took place to protest precariousness and the lack of political alternatives. Such demonstrations, it should be noticed, were not propelled by political parties and trade unions, but were organized by social movements.<sup>105</sup>

As Fishman shows, ‘social pressure in the streets proved to be relevant for the decision-making of governmental elites – even under a right-wing government committed to austerity.’<sup>106</sup> There was an evident link between these social mobilizations and Portugal’s revolutionary road to democracy.<sup>107</sup> The legacy of the revolutionary period was thoroughly revived by those opposing austerity, from social movements to political forces on the left. Such legacy was equated with the constitutional *acquis* of which the Constitutional Court stood as the prime guardian.

## 6. CONCLUSIONS

The Portuguese constitutional experience reveals important variations to Ackerman’s model of revolutionary constitutionalism. First, the creation of the Constitutional Court, in the constitutional revision of 1982, is not fully consistent with the preservationist notion of judicial review put forward by Ackerman. If it is true that the court is the direct heir of part of the powers of the Council of Revolution, the prime guardian of revolutionary achievements, its creation can be situated in the larger context of the legal counter-revolution. The law governing its powers was carefully designed to favour the open rendering of the revolutionary constitution, refusing to include any mechanism specifically designed to protect the long catalogue of social and welfare rights qua individual rights. Moreover, the two main ruling parties were careful to fill the judicial positions with appointments of jurists and professionals who developed a case law that gradually tempered the transformative potential of the constitutional text, and that completed the transition from the transformative to open constitutionalism in accordance with a Western-style conventional constitutional text.

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<sup>105</sup> Britta Baumgarten, ‘Time to Get Re-Organized! The Structure of the Portuguese Anti-Austerity Protests’, in Landon E. Hancock (ed.) *Narratives of Identity in Social Movements, Conflicts and Change* (Emerald Group Publishing Limited 2016) 155.

<sup>106</sup> Robert M. Fishman. *Democratic Practice. Origins of the Iberian Divide in Political Inclusion* (Oxford University Press 2019), 134.

<sup>107</sup> *Id.*, 143.

Second, Portuguese contemporary constitutional history is deeply intertwined with European integration. However, European integration did not work as an insurance policy against fascism or as the ultimate guarantee of the constitutional protection of democracy.<sup>108</sup> The Portuguese ‘never again’ claim was originally carved out in the anti-oligarchic constitution, embodied in the project of transformative constitutionalism. The original pact framed the protection against the ghosts of the past through redistributive mechanisms and a democratic third way between market economy and socialism. This constitutional project was fundamentally at odds with the demands of European integration which, particularly at that time, required a full-fledged market economy. Contrary to the ‘post-fascism constitutionalism’ thesis, the taming of transformative constitutionalism implied the return of old fascist economic elites in the liberalization of the economy, and the revival of authoritarian economic theories such as economic conditioning, under the guise of limitations to foreign capital in nationalization processes. To conform to European standards, open constitutionalism extirpated some of the transformative constitutionalism shields against the return of an oligarchic order. European integration thus posed as a powerful institutional vehicle that challenged the original constitutional identity and restricted the possibilities to insulate the system against the return of oligarchies. Paradoxically, European integration undermined the original constitutional protections against the return of authoritarian ghosts.

The Portuguese experience thus stands as a ‘truncated’ case of revolutionary constitutionalism. It starts in phase one and two as revolutionary but then, as the pressure to adapt the constitutional system to the European integration demands intensifies, particularly after the adoption of the first constitutional revision and the creation of the Constitutional Court (1982), it deviates conspicuously from the model. The Court was part of the legal counter-revolution, aimed at taming the revolutionary elements of democratic constitutionalism, embodied in the transformative and anti-oligarchic Constitution, and smoothing it into a conventional Western-style constitutionalism, translated in the ‘open’ Constitution, making room for a full-fledged market-economy.

However, the pressure of fiscal stability conveyed by the demands of supranational integration would later induce the Constitutional Court to stand as the guarantor of the revolutionary legacy of Portuguese constitutionalism enshrined in the social rights catalogue and the constitutional compromise with welfare. During the Euro crisis, the Court claimed the supremacy of social

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<sup>108</sup> As S. Rehling Larsen claims, ‘Varieties of Constitutionalism in the European Union’ (2021) 84 *Modern Law Review*, 477.

rights to the detriment of fiscal stability, bringing to light the inherent tension between national and European constitutionalism.

A peaceful coup, initiated by middle-rank military members, gave rise to a revolutionary process that transformed Portugal into a democracy. The fractured legacy of the unique transition process, during which the military was competent to supervise democratization and safeguard the achievements of the revolution, is felt still today. These cleavages are invoked to criticize the revolutionary period, of which the Constitution often becomes the ultimate symbol, and, consequently, a target of attack.

On the one hand, the Constitution symbolized the revolutionary *acquis* of social transformation, equality, and democratic governance; on the other hand the macroeconomic stabilization of the Portuguese economy, the 'good student' narrative, stands as a symbol of the desire of economic convergence, even at the cost of widespread social hardship. The two realities have been in tension since the 1980s, but it was with EMU, and the introduction of the Euro, that the friction between domestic and European constitutionalism evolved into a clash. Transformative constitutionalism and European integration are becoming increasingly incompatible. One of them will eventually give way.