SOME DISTINCTIVE TRAITS OF THE PORTUGUESE CONSTITUTIONALISM

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https://doi.org/10.21814/uminho.ed.97.12

1. Foreword

Benedita Mac Crorie was light – pure light. She captivated her students, her colleagues and peers with her disarming intelligence, grace, humbleness, and irreprehensible intellectual honesty. I had the absolute privilege of getting to know her throughout the years, and to witness how she beautifully balanced her life as a wife and a mother to two amazing children with the challenging responsibilities of an academic job. She was an inspiration and an example to me and to many others. I will forever treasure our conversations, her wise guidance, and the memory of her beguiling smile. This essay is dedicated to her and to her beloved family.

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2. Distinctive traits of Portuguese constitutionalism

2.1. A unique hybrid constitutional justice system[1]

The Portuguese constitutional review model is hybrid, as it shares characteristics of the monist/Kelsenian model as also traits of the diffused model of judicial review. The American influence is an indirect one. In fact, Article 63 of the first republican Portuguese Constitution (1911) was inspired in the Brazilian Constitution (1891), which in turn was influenced by the United States Constitution (1787).

In comparison with the Italian, German and Spanish systems of judicial review, the Portuguese system has some unique traits[2]. If the first states opted for concentrated constitutional justice and to give incidental control mechanisms the form of preliminary review, the latter gives *judicial review powers to ordinary courts* as well. Accordingly, if an ordinary judge finds that the norm applicable to a case is unconstitutional, the judge does not suspend the process and questions the Constitutional Court. The Portuguese ordinary courts can *dismiss* the norm application in that concrete judicial process, since they are under the duty not to apply rules, they consider unconstitutional (Article 204)[3]. Despite having these powers, matters in the ordinary courts can be referred to a court outside the ordinary jurisdiction – a Constitutional Court.

Notwithstanding the appraisal of the original traits of the Portuguese constitutional justice model, the truth is that many scholars suggest improvements. One of the deficits of protection is the absence of a constitutional

[1] Catarina Santos Botelho, "Is there a middle ground between constitutional patriotism and constitutional cosmopolitanism? The Portuguese Constitutional Court and the use of foreign (case) law", in Giuseppe Franco Ferrari (ed.), *Judicial Cosmopolitanism – The Use of Foreign Law in Contemporary Constitutional Systems*, Brill, 2019, pp. 424-448, pp. 426-427.

[2] *Vide*, amongst many references, Jorge Miranda, "As instituições políticas portuguesas", in AAVV, *La Constitución Portuguesa de 1976 – Un estudio académico treinta años después*, 2006, pp. 35-ff, p. 41; José de Melo Alexandrino, "Il sistema portoghese dei diritti e delle libertà fondamentali: zone franche nella tutela giurisdizionale", *Diritto Pubblico Comparato ed Europeo*, 2003, pp. 271-ff, p. 272; Maria Lúcia Amaral, "Problemas da Judicial Review em Portugal", *Themis*, VI, 2005, pp. 67-90, p. 82; and Vital Moreira, "A 'fiscalização concreta' no quadro do sistema misto de justiça constitucional", *Boletim Comemorativo do 75º Tomo do BFD*, 2003, pp. 815-ff.

[3] See J. J. Gomes Canotilho and Vital Moreira, *A Constituição da República Portuguesa Anotada*, vol. II, Coimbra, Coimbra Editora, 2010, pp. 517-523.

complaint mechanism, similar to the Spanish "*recurso de amparo constitucional*" or the German "*Verfassungsbeschwerde*"[4].

2.2. The longest unamendable clause in the world[5]

Unamendable clauses (also called entrenchment/eternity clauses) are armors against constitutional law's contingency and portrait a given constitutional identity.[6] They impose substantial limits to constitutional change.

The Portuguese unamendable clause is so remarkable that it raises the pertinent question of its compatibility with a plural and democratic State[7]. For the first time in Portuguese constitutional history, Article 288 (former Article 290) establishes several substantial limitations to the amendment power[8].

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[4] António Vitorino, "A justiça constitucional – Notas sobre o futuro (possível?) da justiça constitucional", *Revista do Ministério Público*, vol. VI, pp. 9-14; Catarina Santos Botelho, *A Tutela Directa dos Direitos Fundamentais – Avanços e Recuos na Dinâmica Garantística das Justiças Constitucional, Administrativa e Internacional*, Coimbra, Almedina, 2010, pp. 167-284; Catarina Santos Botelho, "Haja uma Nova Jurisdição Constitucional – Pela introdução de um mecanismo de acesso directo dos particulares ao Tribunal Constitucional", *Revista da Ordem dos Advogados*, nº 70, 2011, pp. 591-623; Jorge Miranda, *Ideias para uma revisão constitucional em 1996*, Lisboa, Cosmos, 1996, p. 29; Jorge Reis Novais, "Em Defesa do Recurso de Amparo Constitucional (ou uma Avaliação Crítica do Sistema Português de Fiscalização Concreta da Constitucionalidade)", *Themis*, ano VI, 2005, pp. 91-117; J.J. Gomes Canotilho, *Estudos Sobre Direitos Fundamentais*, Coimbra, Coimbra Editora, 2004, p. 79; Manuel Afonso Vaz, *A Responsabilidade Civil do Estado – Considerações breves sobre o seu estatuto constitucional*, Porto, Universidade Católica Editora, 1995, p. 15, nt. 30 and p. 16, nt. 33; Marcelo Rebelo de Sousa and José de Melo Alexandrino, *Constituição da República Portuguesa – Comentada*, Lisboa, Livraria Petrony, 2000, p. 103; Maria Lúcia Amaral, "Queixas Constitucionais e Recursos de Constitucionalidade (Uma Lição de 'Direito Público Comparado')", in AAVV, *Estudos Comemorativos dos 10 Anos da Faculdade de Direito da Universidade Nova de Lisboa*, vol. I, Coimbra, Almedina, 2008, pp. 473-501, pp. 496-499; Nuno Piçarra, *O Tribunal de Justiça das Comunidades Europeias como juiz legal e o processo do artigo 177º do Tratado da CEE – As relações entre a ordem jurídica comunitária e as ordens jurídicas dos Estados-membros da perspectiva dos tribunais constitucionais*, Lisboa, Livraria Petrony, 1991, pp. 95-96; Paulo Otero, *Ensaio sobre o caso julgado inconstitucional,* Lisboa, Lex, 1993, p. 121; and Vital Moreira "Princípio da maioria e princípio da constitucionalidade: legitimidade e limites da justiça constitucional", in AAVV, *Legitimidade e Legitimação da Justiça Constitucional – Colóquio no 10º Aniversário do Tribunal Constitucional*, Coimbra, Coimbra Editora, 1995, pp. 177-198, p. 192.

[5] I will follow very closely my considerations in Catarina Santos Botelho, "Constitutional narcissism on the couch of psychoanalysis**:** Constitutional unamendability in Portugal and Spain", *European Journal of Law Reform*, vol. 21, nº 3, 2019, pp. 346-376, pp. 363-366.

[6] Richard Albert, "Constitutional Handcuffs", *Arizona State Law Journal*, vol. 42, 2010, pp. 663-715, p. 700.

[7] *See* Francisco Lucas Pires, *Teoria da Constituição de 1976 – A Transição Dualista*, Coimbra, 1988, p. 161; and Rui Medeiros, *A Constituição Portuguesa num Contexto Global*, *op. cit*., p. 213. Peter Suber *apud* Fernando Araújo, "Limites à revisão constitucional – um paradoxo?", *Polis – Revista de Estudos Políticos*, nº 7-8, 1999, pp. 95-99, referred to this norm as "a distressing naivety" of the Portuguese constituent power.

[8] In the Portuguese constitutional history, only the republican constitution of 1911 established an entrenchment clause, which was the "republican form of government".

The substantial limits to amendments are the following: "*a*) National independence and unity of the state; *b*) The republican form of government; *c*) Separation between church and state; *d*) Citizens' rights, freedoms and guarantees; e) The rights of workers, works councils, and trade unions; *f*) The coexistence between the public, private, and cooperative, and social sectors of ownership of the means of production; *g*) The existence of economic plans, within the framework of a mixed economy; *h*) The appointment of the elected officeholders of the entities that exercise sovereignty, of the organs of the autonomous regions and of local government organs by universal, direct, secret and periodic suffrage, and the proportional representation system; *i*) Plural expression and political organisation, including political parties, and the right of democratic opposition; *j*) The separation and interdependence of the entities that exercise sovereignty; *l*) The subjection of legal norms to review of their positive constitutionality and of their unconstitutionality by omission; *m*) The independence of the courts; *n*) The autonomy of local authorities; *o*) The political and administrative autonomy of the Azores' and Madeira's archipelagos"[9].

Material limits can be *implicit* as well. Scholars have identified some implicit limitations, such as: the protection of territorial integrity (inferred from the unity of the State)[10], the principle of irresponsibility of judges (derived from the principle of judicial independence and impartiality), and the prohibition of lifelong mandates (resulting from the democratic principle)[11].

The current version of the Portuguese Constitution contains 14 clauses of entrenchment, as some were removed or altered in the constitutional amendment of 1989. Therefore, "it is quite clear that the unchangeable clause was indeed changed. The collapse of communism and the political changes of the 90s asked for a renewed understanding of what a constitution should

[9] This provision was approved by a significant majority, since only five parliament members of the conservative CDS-PP (Popular Party) voted against it.

[10] Oran Doyle, "Constraints on Constitutional Amendment Powers", in R. Albert *et al.* (eds.), *The Foundations and Traditions of Constitutional Amendment*, Portland, Hart Publishing, 2017, pp. 73-95, p. 94. Yaniv Roznai and Susan Suteu, "The Eternal Territory? The Crimean Crisis and Ukraine's Territorial Integrity as an Unamendable Constitutional Principle", *German Law Journal*, vol. 16, 2015, pp. 542-580, p. 573, believe that the alteration of a polity such as territoriality should be done through existing constitutional processes.

[11] Jónatas E. M. Machado, "The Portuguese Constitution of 1976", in X. Contiades (ed.), *Engineering Constitutional Change – A Comparative Perspective on Europe, Canada and USA*, Routledge, 2013, pp. 273-298, p. 283.

be: not a government's programme, not a semantic constitution, but an open constitution. As the constitutional *praxis* did not take these limits into consideration, they became obsolete norms"[12].

The Portuguese Constitution does not seem to allow a simultaneous double revision, which is the synchronized amendment of the entrenchment clause and of the principles and articles related to that limit[13]. However, the 1989 amendment did operate a synchronized amendment, eliminating former paragraph *j*) from the substantial limits list[14]. Simultaneously, Article 81 of the Constitution was modified regarding "nationalizations" and "rural estate property", while other significant changes were introduced in the economic Constitution, concerning the "structure of the means of production".

2.3. The economic constitution

One of the most interesting features of the Portuguese Constitution is the relevance given to economic, social, and cultural rights. Notwithstanding the incompleteness of the sociological split between functional and aspirational conceptions of constitutionalism, the Portuguese constitution fits well in the latter. *Aspirational constitutionalism* embodies the following traits: a prolix and exhaustive constitutional text; a wide catalogue of fundamental rights; and the very generous granting of social constitutional rights, even beyond the budgetary possibilities of the State[15]. Such constitutional arsenal is sometimes difficult to interpret and to implement. Therefore, questions rise regarding the dilution of borders between judicial and legislative power[16].

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[12] Catarina Santos Botelho, "Constitutional narcissism on the couch of psychoanalysis...", *op. cit*., pp. 363-264. See Richard Albert, "Constitutional Amendment by Constitutional Desuetude", *American Journal of Comparative Law*, vol. 62, nº 3, 2014, pp. 641-686. Another interesting perspective is the idea of "constitutional atrophy". See Adrian Vermeule, "The Atrophy of Constitutional Powers", *Oxford Journal of Legal Studies*, vol. 32, nº 3, pp. 421-444.

[13] Catarina Santos Botelho, "Constitutional narcissism on the couch of psychoanalysis...", *op. cit*., p. 363.

[14] Paragraph *j*) stated "the participation of grass-roots popular committees in the local government". The former version of paragraph *f*) entrenched "the principle of collective appropriation of the means of production, of the soil, and of natural resources" and "the prohibition of monopolies and large rural estates" (currently paragraph *f*) has a softer tone: "the coexistence of the public, private and cooperative and social sectors of ownership of the means of production"). Former paragraph *g*) entrenched the "principle of democratic central planning of the economy" (now: "economic plans" "within the framework of a mixed economy").

[15] Catarina Santos Botelho, *Os direitos sociais em tempos de crise...*, *op. cit*., pp. 167-164.

[16] Catarina Santos Botelho, "Aspirational constitutionalism, social rights prolixity and judicial activism: trilogy or trinity?", *Comparative Constitutional Law and Administrative Law Quarterly*, vol. 3, nº 4, 2017, pp. 62-87, pp. 76-84.

The wishful thinking of the Portuguese constitutional framers is well documented. Many foreign authors considered this baroque text an inconsistent compromise between liberalism and socialism, or a "project for building a future"[17]. Portuguese *economic constitution* was inspired in the Constitution of the Republic of Weimar (1919) and the philosophies of "economic democracy" (*Wirtschaftsdemokratie*) and "social market economy" (*soziale Marktwirtschaft*)[18].

One must highlight, though, that, during the monarchic constitutions (1822, 1826, and 1838) and the first republican constitutional experience (1911) a kind of "implicit economic constitutionalism" occurred: minimum state and maximum individual freedoms (economic liberalism)[19]. The authoritarian Constitution of 1933 was the first Portuguese constitution ever to implement an economic and social order – corporatism – being, thus, the first formal economic constitution[20].

The current Portuguese Constitution (1976), implemented after the transition to democracy, tried to implement a socialist economic constitution, which gathered legal, philosophical and economic principles envisioned for transitioning to a classless society[21]. Revolutionary socialism and collectivism meant economic change through: (*i*) collective appropriation of the main means of production; (*ii*) democratic economic planning; (*iii*) and the exercise of democratic power by working people[22]. The Constitution recognized three major sectors of ownership: the public sector (which should be the dominant one); the cooperative sector; and the private sector.

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[17] Orlando de Carvalho, "The Constitution of the Republic of Portugal and the ownership of the means of production", *Boletim da Faculdade de Direito da Universidade de Coimbra*, 1981, pp. 223-229, p. 223.

[18] See António Luís Silva Batista, "As constituições económicas portuguesa e espanhola em perspectiva comparada: transição democrática e abertura relativa dos sistemas económicos ibéricos", *O Direito*, vol. IV, 2012, pp. 909-950; and Paulo Alves Pardal, "O acidentado percurso da constituição económica portuguesa", *Revista de Concorrência e Regulação*, nº 22, 2015, pp. 17-53, pp. 20-21.

[19] Manuel Afonso Vaz, *Direito Económico*, 4ª ed., Coimbra, Coimbra Editora, 1998, pp. 51-52.

[20] Paulo Alves Pardal, "O acidental percurso da constituição económica portuguesa", *op. cit.*, p. 25.

[21] The constitutional text had norms such as: "the Portuguese Republic is a Democratic State [with] the goal of assuring the transition to socialism through the creation of conditions for the exercise of power by the working classes" (article 2); "the law can regulate that the expropriation of landowners, owners and entrepreneurs or shareholders does not give rise to any compensation" (Article 82); "all nationalizations [are] irreversible conquests of the working classes" (Article 83).

[22] Orlando de Carvalho, "The Constitution of the Republic of Portugal...", *op. cit*., p. 224.

Constitutional amendments of 1982 and 1989 were of paramount importance, as they revisited the economic constitution, eliminated many of its norms, and neutralized the main socializing traits[23]. Additionally, after the Portuguese adhesion to the (then) European Communities, in 1985, and the Maastricht Treaty, in 1992, the economic constitution shifted very clearly to a market economy and to a regulatory state. The current economic constitution (Articles 80 to 107) is, beyond a doubt, surpassed by the European economic constitution[24].

Hence, some doctrine considers that the Portuguese economic constitution needs further amendments which can truly reflect the European integration[25]. More vehemently, Paulo Otero considers that the economic constitution should be fully interpreted in conformity with EU law, even if that means the "marginalization or ignorance of constitutional provisions contrary or barely compatible with certain imperatives that stem from EU law"[26].

2.4. Perfectionism and prolixity of the fundamental rights catalogue

Fundamental rights are codified in the Portuguese constitution "with a careful, quite perfectionist, systematization which can rarely be found in comparative constitutional law"[27]. The Fundamental rights catalogue consists of sixty-eight articles. With regard to liberty rights, if the Constitution bravely

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[23] Catarina Santos Botelho, "Aspirational constitutionalism, social rights prolixity and judicial activism...", *op. cit.*, p. 66.

[24] Manuel Afonso Vaz and Manuel Fontaine Campos, "Anotação ao artigo 80º", in J. Miranda & R. Medeiros (eds.), *Constituição Portuguesa Anotada*, vol. II, Lisboa, Universidade Católica Editora, 2018, pp. 13-27.

[25] Carlos Blanco de Morais, *Curso de Direito Constitucional – Teoria da Constituição em Tempo de Crise do Estado Social*, vol. II, Coimbra, Coimbra Editora, 2014, p. 260; Francisco Pereira Coutinho and Nuno Piçarra, "Portugal: The Impact of European Integration and the Economic Crisis on the Identity of the Constitution", in A. Albi and S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, 2019, pp. 591-639, 600; and Pedro Coutinho, *A Constituição Económica Portuguesa à Luz da Globalização e da Integração Europeia*, Lisbon, AAFDL, 2021.

[26] Paulo Otero, *Legalidade e Administração Pública: o sentido da vinculação administrativa à juridicidade*, Almedina, Coimbra, 2003, p. 549. In a similar vein, Vital Moreira, "A CRP e a União Europeia", in AAVV, *Estudos em Homenagem ao Conselheiro Presidente Rui Moura Ramos*, Coimbra, Almedina, vol. I, 2016, pp. 869-926, p. 905.

[27] Jorge Reis Novais, *Direitos Fundamentais e Justiça Constitucional em Estado de Direito Democrático*, Coimbra, Coimbra Editora, 2012, p. 240.

declares that they "bind private entities" (Article 18, § 1), it then paradoxically abandons them to the ordinary justice, as a constitutional complaint mechanism is not consecrated in the Constitution[28].

As I mentioned above, the hope for continuous progress translated in the Portuguese constitution having one of the widest social rights catalogues in the world and probably the broadest in Europe.

For example, Article 66 consecrates the *right to environment and quality of life* with such density that it places the Portuguese Constitution as a pioneer in environmental protection through fundamental rights' constitutionalization. Echoing this concern, the Portuguese constitution influenced the Spanish, Brazilian and Mozambican ones[29]. Besides this, the detailed list of rights, freedoms and guarantees regarding the criminal justice system (articles 27 to 32) is quite unusual from a comparative constitutional law perspective[30].

In consonance with the "clear-cut division of the time"[31], the Portuguese Constitution rifts fundamental rights in *two categories*: (*i*) rights, liberties, and freedoms (Title II – Articles 24 to 57); and (*ii*) social, economic, and cultural rights (Title II – Articles 58 to 79).

This division would not be relevant if the constitutional framer did not consecrate a special regime for rights, liberties, and freedoms (herein liberty rights). Indeed, the Portuguese Constitution reserves a special regime to liberty rights[32]. This raises the question of social rights' regime. Is it the

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[28] Jorge Reis Novais, *Direitos Fundamentais e Justiça Constitucional...*, *op. cit.*, p. 289.

[29] Maria da Glória Garcia and Gonçalo Matias, "Anotação ao artigo 66º", in J. Miranda and R. Medeiros (eds.), *Constituição Portuguesa Anotada*, Coimbra, Coimbra Editora, 2010, pp. 1340-1355.

[30] Francisco Pereira Coutinho and Nuno Piçarra, "Portugal: The Impact of European Integration...", *op. cit*., pp. 606-607.

[31] "This systematic option is the reality of most international legislation approved after the Second World War. In 1966, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were approved. [In] an international regional dimension, there is also a clear division between the European Convention on Human Rights (1950) and the European Social Charter (1961). The latter has a very inferior enforceability level when compared to the ECHR". Catarina Santos Botelho, "Aspirational constitutionalism, social rights prolixity...", *op. cit.*, pp. 68-69. See also Simon Deakin and Jude Browne, "Social Rights and Market Order: Adapting the Capability Approach", in T. K. Hervey & J. Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal* Perspective, Hart Publishing, 2003, pp. 27-43, p. 38.

[32] They have immediate applicability, bind public and private entities and benefit from rigorous limitations to their restriction (Article 18, clearly inspired by Article 1/3 from the German *Grundgesetz*); the right to "resist any order that infringes their rights, freedoms or guarantees and, when it is not possible to resort to the public authorities, to use force to repel any aggression" (Article 21); furthermore, unless it also authorizes the Government to do so, the

same as liberty rights? The Portuguese doctrine is highly divided in this matter[33]. I stand for a renewed understanding of social rights, grounded in material indivisibility and structural interaction between liberty rights and social rights[34].

Article 17 consecrates an open clause on fundamental rights concreteness, which, in turn, allows immediate applicability of rights that have a similar/analogous nature to liberty rights[35]. This permits bridging liberty rights and social rights, upgrading social rights sometimes more evanescent structure. From a comparative constitutional law perspective, Article 17 is an innovative norm[36].

Social rights enforcement was unsettled during Troika's intervention in Portugal (2011-2014). The Memorandum of Understanding signed between the Monetary International Fund, the European Commission and the European Central Bank compelled the Portuguese legislators to a very strict austerity programme. Consequently, several measures which distressed Portuguese societal tissue were implemented: public sector wage cuts, tax increases, flexibilization of dismissal rules, pensions cuts and other welfare benefits, privatization of public utilities, increased working hours (for civil

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Assembly of the Republic (Parliament) has exclusive competence to legislate on liberty rights [*b*) nº 1 Article 165] – Although some social rights also benefit from this partially exclusive legislative competence from the Assembly of the Republic, given *f*), *g*) and *h*) no 1 Article 165 (bases of social security, national health service, nature/ecologic balance/cultural heritage and the e general regime governing rural and urban rentals); finally, amongst several material limits on constitutional amendment, "constitutional revision laws must respect citizens' rights, freedoms and guarantees" [*d*) Article 288].

[33] There are "three main narratives that were built around this inquiry: (*i*) Some authors defend a rigid bifurcation between liberty and social rights and even argue for *an ontological superiority* of liberty rights when compared with social rights. Far from conferring independent constitutional rights, social rights would be principles orientating the state's action. (*ii*) On the other extreme of this discussion, others defend regime *parity* between both rights and refuse any distinction. Then, all *infra* constitutional legislation on social rights is a constitutional *continuum*. (*iii*) The majority of the doctrine supports an intermediate thesis – more or less equidistant – which states that there is no substantial hierarchy between rights (are indivisible, unitary and non-hierarchical), just a *formal* distinction, based either on different regimes, on State's duties or even on the determinability of the right's content". Catarina Santos Botelho, "Aspirational constitutionalism, social rights prolixity...", *op. cit.*, pp. 72-73.

[34] Catarina Santos Botelho, *Os direitos sociais em tempos de crise...*, *op. cit*., pp. 313-321.

[35] Article 17 states the following: "The regime governing rights, freedoms and guarantees applies to those set out in Title II and to fundamental rights of an analogous nature".

[36] Carlos Blanco de Morais, *Curso de Direito Constitucional...*, *op. cit.*, p. 573; Catarina Santos Botelho, *Os direitos sociais em tempos de crise...*, *op. cit*., p. 122, and pp. 305-311; Jorge Miranda and Rui Medeiros, "Anotação ao artigo 17º", *Constituição Portuguesa Anotada*, vol. I, *op. cit.*, pp. 302-309; J.J. Gomes Canotilho and Vital Moreira, *A Constituição da República Portuguesa Anotada*, vol. I, Coimbra, Coimbra Editora, 2017, pp. 370-378; and Manuel Afonso Vaz, *Teoria da Constituição...*, *op. cit*., p. 160.

servants and equivalent), convergence of pension systems (public and private sectors), amongst other measures[37].

In the beginning of the application of the Memorandum of Understanding, the PCC was criticized for its *favor legislatoris* jurisprudence[38]. Yet, deference towards the legislator started to decrease by 2012, as the argument of a "transitional and exceptional circumstance" could not be sustained for a long period of time[39]. In 2013/2014, the PCC considered the argument of the exceptional economic-financial conjuncture as surpassed[40].

PCC's crisis jurisprudence received unprecedented attention and international coverage[41]. If some acclaimed the Court's unwillingness to convey with social state downsizing, others criticized it for obstructing free-market economy, and even suggested the "dissolution of the Constitutional Court as an independent court"[42].

For current purposes, we can discuss if the "constitutional identity" of some EU Member States (such as Greece, Spain, Portugal or Italy) was respected by the European entities during their international bailouts. To Francisco

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[37] Catarina Santos Botelho, "Aspirational constitutionalism, social rights prolixity...", *op. cit.*, p. 79.

[38] During 2010 and 2011, PPC judgments seemed to adhere to the crisis' rhetoric and to refrain from interfering with budgetary impositions and international commitments. See PCC ruling number 399/2010, from October 27th (retroactive personal income tax pensions); and number 396/2011, from September 21th, (public sector wage cuts).

[39] Therefore, its tolerance to the crisis argument would be *inversely proportional* to the duration of the crisis. PCC ruling number 353/2012, from July 5th (suspension of the Christmas-month (13th month) and holiday-month (14th month) payments of annual salaries, both for persons who receive salaries from public entities and for persons who receive retirement pensions from the public social security system). This judgment was highly controversial, as the PCC limited the retroactive effects of the declaration of unconstitutionally on the grounds of "exceptionally important public interest" (Article 282/4). In fact, the PCC suspended its decision's effects in order to permit the full execution of the state budget (which had already been executed for half a year). PCC ruling number 187/2013, from April 5th (review of the constitutionality of norms contained in the State Budget Law for 2013).

[40] PCC ruling number 862/2013, from December 19th (Civil Service Law – Statute governing the Retirement of the Public Sector Staff); number 413/2014, from May 30th (review of the constitutionality of norms contained in the State Budget Law for 2014 – the PCC declared the unconstitutionality of the majority of the measures syndicated); number 575/2014, from August 14th (proposed creation of an additional tax – "Sustainability Contribution" – updating pensions in the public social protection system); number 3/2016, from January 13th (elimination of the lifetime annuity for former political officials, declared unconstitutional on the grounds of the violation of the principle of the protection of trust).

[41] Joaquim Cardoso da Costa, "Tribunal Constitucional e debate público", in AAVV, *40 Anos de Políticas de Justiça em Portugal*, Coimbra, Almedina, 2016, pp. 113-141.

[42] See generally, Andreas Dimopoulos, "PIGS and Pearls: State of Economic Emergency, Right to Resistance and Constitutional Review in the Context of the Eurozone Crisis", *Vienna Journal on International Constitutional Law*, vol. 7, nº 4, 2013, pp. 501-520; Catarina Santos Botelho, "Aspirational constitutionalism, social rights prolixity...", *op. cit.*, pp. 78-81; Luis Gordillo Pérez, "Derechos Sociales y Austeridad", *Lex Social*, 2014, pp. 34-56; and Susana Corado, Nuno Garoupa & Pedro Magalhães, "Judicial Behaviour Under Austerity – An Empirical Analysis of Behavioral Changes in the Portuguese Constitutional Court, 2002-2016", *JLC*, vol. 26, 2017, at 10.

Balaguer Callejón, the "economic interpretation of the Constitution that was imposed all over Europe, and to which a constitutional interpretation of the crisis shall have been opposed to", did not respect the pluralist democracy principle[43]. It is also important to mention that the PCC was not some sort of "'Don Quixote' fighting the windmills of austerity", as it "made every effort to internalize the European and international obligations of the Portuguese state"[44].

2.5. The insular autonomic regime

Portugal was always a unitary state. With the transition to democracy, after several decades of dictatorship, the democratic principle called for some decentralization of the majority deliberation: the insular autonomic regime[45]. Nevertheless and contrary to other constitutional experiences (such as Spain), autonomy is not a right *per se* but a "constitutional status". It is the Constitution that defines which regions there are – in the Portuguese case, the Azores and Madeira archipelagos – and the extension of their competences[46].

According to article 6 of the Portuguese Constitution, Portugal is a partial and homogeneous regional unitary state[47]. In fact, there is a single *Kompetenz-Kompetenz* power, but with two autonomous regions with limited legislative, executive and international powers[48]. Along with Continental Portugal, they form the whole of the Portuguese Republic. One can wonder: Why these regions and not others?

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[43] Francisco Balaguer Callejón, "El final de una época dorada. Una reflexión sobre la crisis económica y el declive del Derecho Constitucional nacional", in AAVV, *Estudos em Homenagem ao Prof. Doutor José Joaquim Gomes Canotilho*, vol. II, Coimbra, Coimbra Editora, 2012, pp. 99-121, p. 101. Similarly, Catarina Santos Botelho, *Os direitos sociais em tempos de crise...*, *op. cit*., pp. 487-488.

[44] Francisco Pereira Coutinho and Nuno Piçarra, "Portugal: The Impact of European Integration...", *op. cit*., pp. 618-619.

[45] Maria Lúcia Amaral, *A Forma da República – Uma introdução ao estudo do direito constitucional*, Coimbra, Coimbra Editora, 2005, pp. 367-378.

[46] Maria Lúcia Amaral, *A Forma da República...*, *op. cit.*, p. 371.

[47] See Jorge Miranda, "Anotação ao artigo 6º", *Constituição Portuguesa Anotada*, vol. I, *op. cit.*, pp. 138-147; and J. J. Gomes Canotilho & Vital Moreira, *Constituição da República Portuguesa Anotada*, *op. cit.*, pp. 642-651.

[48] See Filipa Urbano Calvão, Manuel Fontaine Campos and Catarina Santos Botelho, *Introdução ao Direito Público*, Coimbra, Almedina, 2021, p. 158; and Rui Lanceiro, "The international powers of the Portuguese autonomous regions of Azores and Madeira", *Revista da Faculdade de Direito da Universidade de Lisboa*, nº 51, 2010, pp. 293-320.

The answer is straightforward. They were established due to their insularity and historical autonomic aspirations. Article 225, § 1, very clearly establishes that "the grounds for the specific political and administrative regime of the Azores and Madeira archipelagos are their geographic, economic, social and cultural characteristics and the island populations' historic aspirations to autonomy"[49]. In a similar tone, Article 229, § 1 asserts that "in cooperation with the self-government organs, the entities that exercise sovereignty shall ensure the economic and social development of the autonomous regions, with a particular view to the correction of the inequalities derived from insularity"[50].

Therefore, Article 81, e), states that "in the economic and social field the state is under a priority duty to promote the correction of the inequalities derived from the autonomous regions' insular nature and encourage those regions' progressive integration into broader economic areas within a national or international framework"[51].

Partial regional autonomy (self-government) is therefore one of the identifying traits of the Portuguese constitutional system. This is so vital, that regional autonomy is an "eternity clause", refrained from the amendment process [Article 288, o) of the Constitution].

Article 225, § 3 of the Constitution of the Portuguese Republic establishes that the regional political and administrative autonomy does not affect the "integrity of the sovereignty of the state and must be exercised within the overall framework of this Constitution". Besides the Constitution, the Political and Administrative Statutes of each of the Autonomous Region, regulate the exercise of self-government. Addressing "disputes over the autonomy", the regional self-governance regime enhanced through the various amendments to the Portuguese Constitution.

A singular trait of the Portuguese Constitution is that, as far as political associations and parties are concerned, "no party may be formed with

[49] J. J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, vol. II, *op. cit.*, pp. 641-644.

[50] J. J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, vol. II, *op. cit.*, pp. 688-692.

[51] J. J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, vol. I, *op. cit.*, pp. 964-974.

a name or manifesto objectives that show it has a regional nature or scope" (Article 51, § 4). The *prohibition of regional parties* has been criticized by some, as it restricts freedom of association, contributes to low turnout rates in the autonomous regions, and does not respect the autonomy of the regions.

It is relevant to mention that this prohibition, consecrated in 1976, was thought to be short-term. In fact, in the course of the Portuguese transition to democracy, there was some concern about separatist tendencies in the autonomous regions of Azores and Madeira. Although these fears were unfounded, the prohibition of regional parties was even reinforced, as it moved from the organizational part to the fundamental rights catalogue[52].

2.6. Flexibility of the legal definition of the right to strike

The right to strike is, under the Portuguese Constitution, a fundamental right (placed in the rights, liberties and guarantees catalogue) and immediately applicable to public and private entities (Article 18). According to Article 57, § 2, "workers have the competence to define the scope of the interests that are to be defended by a strike and the law may not limit that scope"[53].

The lack of a legal conceptualization of the right to strike does not allow a distinction between conducts that can be considered strikes and other behaviours that should be excluded from constitutional protection[54]. If some scholars blame the constitutional prohibition of legal limitation of "the scope of the interests that are to be defended by a strike" for the absence of a legal concept of strike[55], others argue that this legal flexibility should be restricted by a legal definition which takes into consideration the sociological

[52] Jorge Miranda, "Anotação ao artigo 51º", *Constituição Portuguesa Anotada*, vol. I, *op. cit.*, pp. 1008-1021, p. 1016; and J. J. Gomes Canotilho & Vital Moreira, *Constituição da República Portuguesa Anotada*, *op. cit*., p. 658.

[53] See J. J. Gomes Canotilho & Vital Moreira, *Constituição da República Portuguesa Anotada*, *op. cit*., pp. 750-760; and Rui Medeiros, "Anotação ao artigo 57º", *Constituição Portuguesa Anotada*, vol. I, *op. cit.*, pp. 1124-1135.

[54] J. J. Gomes Canotilho e Jorge Leite, "Ser ou não ser uma greve (a propósito da chamada 'greve self-service')", *Questões Laborais*, vol. 13, 1999, pp. 3-44, p. 15.

[55] José João Abrantes, "A greve no novo Código do Trabalho", in AAVV, *A Reforma do Código do Trabalho*, Coimbra, Coimbra Editora, 2014, pp. 651-661, p. 74; and Pedro Romano Martinez, *Direito do Trabalho*, 7ª ed., Coimbra, Almedina, 2015, p. 1194.

perspective of the strike. Nevertheless, Article 57, § 2 displays "a rare case of express prohibition of fundamental rights' restrictions"[56].

Additionally, Article 57, § 4, explicitly prohibits employers' lockouts. A lockout is a crime, punishable with imprisonment up to two years and may result in a fine applied to the employer (Articles 544 and 545 of the Portuguese Labour Code).

The Portuguese prohibition of lockout is so wide that the Portuguese state had to make reservations to the European Social Charter: Portugal formally declared that the obligations entered under Article 6, § 4 shall in no way invalidate the prohibition of lockouts as enshrined in the Portuguese Constitution.

Another interesting aspect is that the constitutional prohibition of lockout was subject to the PCC appreciation, with the argument that it could be a case of unconstitutional constitutional norm. In Ruling 480/89, without formally answering the *vexata quaestio* of whether unconstitutional constitutional norms were a valid constitutional theory, the PCC decided that the prohibition of lockout did not violate the equality principle[57]. In fact, it considered that equality should not be refrained in a formal dimension, but share a material dimension as well. The material dimension of the equality principle allows to treat differently what is different and equally what is equal. In this sense, the Court considered that the employer and the employee were not in an equal position, and therefore the law could treat them in a different way. If the PCC had decided otherwise, probably it would have to deem that constitutional norm unconstitutional.

2.7. Prohibition of military/ paramilitary, racist or fascists organizations – Limits to pluralism?

Regarding the freedom of organization, the triad *violent, racist and fascist* is constitutionally forbidden. Article 46º, § 4 states that "armed associations, military, militarized or paramilitary-type associations and

[56] J. J. Gomes Canotilho & Vital Moreira, *Constituição da República Portuguesa Anotada*, *op. cit.*, p. 756.

[57] From 13.07.1989.

organisations that are racist or display a fascist ideology are not permitted"[58]. On the one hand, the Portuguese Constitution prohibits parties which resort to or encourage *violence* (armed associations, military, militarized or paramilitary-type), even if it they are not subversive or racist *per se*. Such exclusion flows from the rule of law, democratic principle and the unicity of the armed forces (Article 275, § 2)[59].

On the other hand, *racist* organizations are prohibited, as they violate the human dignity principle (equal social dignity). There are a few historical examples, such as the apartheid, some colonialist organizations, holocaust, genocide, skinheads' movements, etc.)[60]. The reference to "racist" organizations was not in the original version of the Portuguese Constitution, being added later through the constitutional amendment of 1997.

Additionally, the prohibition of *fascism* is a legacy from the Portuguese authoritarian regime of 1933-1974. The Preamble of the Portuguese Constitution very clearly attests that "on the 25th of April 1974 the Armed Forces Movement crowned the long resistance and reflected the deepest feelings of the Portuguese people by overthrowing the fascist regime". Some doctrine considers such prohibition an unconstitutional constitutional norm or a "material constitutional self-rupture", since it violates the principles of equality and pluralism[61]. Is it justified to prohibit only extreme-radical-right and not also extreme-radical-left organizations, such as some communist organizations which historically were also accountable for massive deaths and human rights violations?

The Constitutional Court is responsible for declaring, according to the terms and for the purposes of Law no. 64/78, dated 6 October, that an

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[58] See Jorge Miranda, "Anotação ao artigo 46º", *Constituição Portuguesa Anotada*, vol. I, *op. cit.*, pp. 952-960; and J. J. Gomes Canotilho & Vital Moreira, *Constituição da República Portuguesa Anotada*, *op. cit*., pp. 642-651.

[59] According to Article 275, no. 2, "the Armed Forces shall be composed exclusively of Portuguese citizens and shall have a single organizational structure for the whole of Portuguese territory". See J. J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, vol. II, *op. cit*., pp. 868-872.

[60] J. J. Gomes Canotilho & Vital Moreira, *Constituição da República Portuguesa Anotada*, *op. cit*., p. 648.

[61] Jorge Miranda, "Anotação ao artigo 46º", *op. cit*., pp. 959-960. Therefore, the Author recommends that this article be interpreted restrictively (according to Article 18, no. 2): the prohibition only affects the political organization and not freedom of speech; by "fascist ideology" one should interpret an ideology similar to the Portuguese pre-revolution period or to the Italian fascist experience, which influenced the Portuguese one. In agreement with this last assertion, see J. J. Gomes Canotilho & Vital Moreira, *Constituição da República Portuguesa Anotada*, *op. cit*., p. 648.

organization has adopted a fascist ideology and for decreeing its respective abolition" (Article 10 of the Law of the Portuguese Constitutional Court).[62] Regarding the Parliament, "members of the Assembly of the Republic shall lose their seat in the event that [they] are convicted of participating in organizations that are racist or display a fascist ideology" [Article 160, § 1, d)].

2.8. A *sui generis* system of government and the government's power to legislate in all the subjects that are not reserved to the parliament

After several decades of parliamentary instability (during the First Republic, 1910-1926) and dictatorship (1926-1933 and 1933-1974), the Portuguese Constitution of 1976 sought to establish a system of government that would emphasize checks and balances between the main political organs: President, government and parliament[63].

The Portuguese political system is mostly characterized as *semi-presidential*, since the President of the Republic is directly elected and the government (and Prime-Minister) are politically responsible to the legislature[64]. Others, though, prefer the designation of "premier-presidential system"[65], or even "parliamentary system"[66].

The Portuguese system was influenced by the French semi-presidentialism, and the rationalized parliamentarism of the Weimar Republic[67]. The *parliamentary* traits are the following: the government as a political autonomous organ (Article 182); the government is responsible to the

[62] Law no. 28/82, of 15 November, modified by Law no. 143/85, of 26 November, Law no. 85/89, of 7 September, Law no. 88/95, of 1 September, Law no. 13-A/98, of 26 February, and Organic Law no. 1/2001.

[63] Vitalino Canas, "The Semi-Presidential System", *ZaöRV*, vol. 64, 2004, pp. 95-124, p. 95.

[64] Gianluca Passarelli, "The government in two semi-presidential systems: France and Portugal in a comparative perspective", *French Politics*, vol. 8, nº 4, 2010, pp. 402-428, Octavio Amorin Neto and Marina Costa Lobo, "Portugal's semi-presidentialism (re)considered: An assessment of the President's role in the policy process, 1976-2006", in AAVV, *Portugal in the Twenty-First Century: Politics, Society and Economics*, 2012, p. 49; and Vitalino Canas, "The Semi-Presidential System", *op. cit.*, p. 116.

[65] Robert Elgie, *Semi-presidentialism – Sub-Types and Democratic Performance*, Oxford, Oxford University Press, 2011, pp. 29, 122, 132–43.

[66] J. J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, vol. II, *op. cit*., p. 19.

[67] Manuel Afono Vaz *et al*., *Direito Constitucional – O sistema constitucional português*, Porto, Universidade Católica Editora, 2015, pp. 30-37.

parliament, either through the consideration of the government's programme (Article 192), the request for confidence motion (Article 193) or the motion of no confidence (Article 194); and the ministerial counter-signature (Article 140). The characteristics of the *presidential* regime are three: direct election of the President (Article 120), presidential veto (Article 136), and presidential powers of political *indirizzo* [such as Article 133, *d)*]. Last but not least, the *rationalized parliamentary* traits relate to the government's double responsibility to the parliament and to the President (Articles 190 and 191), and the dissolution of the parliament by the President (Article 172).

Notwithstanding external influences, the Portuguese Constitution reveals some unique traits. The government is not necessarily formed by the party that wins the parliamentary elections. Article 187, § 1 of the Constitution affirms that the "the President of the Republic appoints the Prime Minister after consulting the parties with seats in the Assembly of the Republic and in the light of the electoral results", but he needs parliamentary support in order to get his programme expressly or implicitly approved (Article 192)[68].

Even if the nomination of the current Portuguese government – a contraption (*geringonça*) formed by the Socialist Party (PS), the Communist Party (PCE) and the far-left party Left Bloc (BE) – was consistent with the Constitution, it generated some criticism amongst PSD and CDS-PP, the elections winning parties[69]. However, while the assertion that the party/colligation with the highest percentage of votes wins the elections is correct, it does not mean that it is entitled to form government. One thing is to *win the legislative elections*, another one is *to form government*.

Another interesting trait of the Portuguese political system is that the President cannot dismiss the government at his discretion, but only "when it becomes necessary to do so in order to ensure the normal operation of the democratic institutions and after first consulting the Council of State" (Article 195, § 2). The Council of State is "the political organ that advises the President of the Republic" (Article 141).

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[68] Catarina Santos Botelho, "Portugal: The State of Liberal Democracy", *op. cit.*, pp. 230-234.

[69] In my opinion, behind this political distress was the fact that there was a kind of "gentlemen's agreement" according to which the political alliances in the Parliament would be made known to the electorate *a priori* and not *a posteriori*.

In continuity with the previous Constitution of 1933, the current Constitution grants the government a wide range of legislative powers: (*i*) *exclusive powers* "to legislate on matters that concern his own organization and modus operandi" (Article 198, § 2); (*ii*) *independent powers* to legislate "on matters that do not fall within the exclusive competence of the Assembly of the Republic" [Article 198, § 1, *a)*], and therefore law (parliament's legislation) and decree-law (government's legislation) share the exact same legal status, being mutually revocable (*lex posteriori derrogat lex anteriori*); (*iii*) and *dependent powers* to legislate on matters of the competence of the Parliament (Article 165), "subject to authorization" [Article 198, § 1, *b)*] or to "make executive laws that develop the principles or the general bases of the legal regimes contained in laws that limit themselves to those principles or general bases" [Article 198, § 1, *c)*][70].

In Europe, parliaments are decreasing their political and legislative strength in favour of governments, which possess indirect democratic legitimacy[71]. The length of the Portuguese government's independent/concurring powers are unique in a comparative constitutional law perspective[72]. Although the parliament is the most important legislative organ – since *qualitatively* the utmost relevant subjects belong to its area of legislative competence (Articles 161, 164 and 165)[73] and it has primacy even above governmental legislation (Article 169)[74] – the truth is that *quantitatively*, the government legislates much more[75]. In fact, the government produces 80% of the legislation[76].

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[70] J. J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, vol. II, *op. cit.*, pp. 477-483.

[71] Carlos Blanco de Morais, *O Sistema Político no Contexto da Erosão da Democracia Representativa*, Coimbra, Almedina, 2017, p. 722; and Paulo Otero, *Direito Constitucional Português*, vol. I, Coimbra, Almedina, 2010, p. 209.

[72] Carlos Blanco de Morais, *O Sistema Político...*, *op. cit.*, pp. 719-723; and Jorge Miranda and Jorge Pereira da Silva, "Anotação ao artigo 161º", *Constituição Portuguesa Anotada*, vol. II, *op. cit.*, pp. 502-516, p. 506.

[73] See Jorge Miranda and Catarina Santos Botelho, "Anotações aos artigos 164º e 165º", *Constituição Portuguesa Anotada*, vol. II, *op. cit.*, pp. 527-555.

[74] According to Article 169, no 1: "1. Save for those passed in the exercise of the Government's exclusive legislative competence, executive laws may, upon a motion made by ten Members of the Assembly of the Republic within the thirty days following their publication [be] subjected to consideration by the Assembly of the Republic with a view to causing them to cease to be in force or amending them".

[75] Manuel Afonso Vaz *et al*., *Direito Constitucional – O sistema constitucional português, op. cit.*, pp. 52-58.

[76] Carlos Blanco de Morais, *As Leis Reforçadas – As leis reforçadas pelo procedimento no âmbito dos critérios estruturantes das relações entre actos legislativos*, Coimbra, 1998, p. 193; Jaime Valle, *A participação do Governo no exercício da função legislativa*, Coimbra, 2004, p. 294; and Jorge Miranda and Jorge Pereira da Silva, "Anotação ao artigo 161º", *op. cit.*, pp. 502-516, pp. 505-506.

Some argue that the extent of governmental competences is too generous and should be shortened through constitutional amendment[77]. To counterbalance the government's (possibly) excessive legislative powers, the President plays a relevant role. Unlike the veto of parliament legislation, which can be surpassed[78], the veto of government legislation is definitive (Article 136, § 4)[79].

Therefore, the Portuguese President is more than a mere "*pouvoir neutre*" (Benjamin Constant) which preserves national stability, guarantees checks and balances between the organs of the state and guards the Constitution of 1976. Willingly, the President can play a more interventive political role.

2.9. Restrictiveness of referenda

National referenda were introduced, in a very restrictive way, by the second constitutional amendment of 1989. 1997's constitutional amendment implemented a specific referendum for the creation of administrative regions (Article 256) and a regional referendum (Article 232, § 2). In practice, Portugal only had three national referenda (1998 – abortion; 1998 – regionalization; and 2007 – abortion) since the transition to democracy.

There are several concrete principles guiding referenda, such as: the existence of a relevant national, regional or local interest at stake (Articles 115, § 3 and 232, § 2); unicity of the referendum subject (Article 115, § 6); yes or no questions (Article 115, no 6); and the existence of a binding effect only

[77] José de Melo Alexandrino, "A preponderância do Governo no exercício da função legislativa", *Legislação (Cadernos do INA)*, 2009, pp. 99-108.

[78] According to Article 136, § 2: "If the Assembly of the Republic confirms its vote by an absolute majority of all the Members of the Assembly of the Republic in full exercise of their office, the President of the Republic must enact the legislative act within a time limit of eight days counting from its receipt".

[79] Although a government with a parliamentary majority can always surpass the presidential veto, through Article 197, § 1, d): "In the exercise of its political functions the Government has the competences to present and submit government bills and draft resolutions to the Assembly of the Republic". Then, the government can "copy-paste" its law-decree into a draft resolution to the parliament. If the parliament approves the draft and the subsequent law, the President can veto that law, but the parliament is able to surpass the veto by an absolute majority (Article 136, § 2).

"when the number of voters exceeds half the number of registered electors" (Article 115, § 11)[80].

A unique trait of the Portuguese system is that referenda *are not for the immediate popular approval or disapproval*, but to decide whether that legal diploma (law, convention, local decree, etc.) should be approved or rejected by the pertinent legislative organs. The idea was to avoid populist manipulations in favour of representative democracy, although this argument is weak given the restrictiveness and requirements of referenda design in the Portuguese system[81].

A quorum of participation was introduced by 1997's constitutional amendment. Accordingly, it is required that the number of voters exceeds "half the number of registered electors" (Article 115, § 11) for the referendum to have binding effect. The *ratio legis* was to avoid binding referendum results over relevant national questions approved by an electoral minority[82].

However, this rule has been heavily criticized by some Portuguese doctrine, since it has the pernicious effect of encouraging abstention[83]. If turnout is not over 50%, then the referendum is nonbinding and merely consultative. This rule could make sense if our Constitution allowed referenda over constitutional issues[84]. Yet, such referenda are expressly forbidden in Portugal [Article 115, § 4, a)], as well in other states such as Greece and Luxembourg.

2.10. Universal Declaration of Human Rights as a constitutional *continuum*

Article 16, § 2, regarding the scope and interpretation of fundamental rights, states that "the constitutional norms concerning fundamental

[80] Jorge Miranda, "O referendo e o plebiscito: a experiência portuguesa", *Cuestiones Constitucionales*, vol. 19, 2008, pp. 149-171, p. 158.

[81] Jorge Miranda, "O referendo e o plebiscito: a experiência portuguesa", *op. cit.*, p. 159.

[82] J. J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, vol. II, Coimbra Editora, Coimbra, 2010, p. 101.

[83] J. J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, vol. II, *op. cit*., p. 101; Jorge Miranda, "O referendo e o plebiscito: a experiência portuguesa", *op. cit*., pp. 149-171, p. 160; and Pedro Magalhães, "A necessária eliminação do nº 11 do artigo 115º", J.A. Tavares *et al.* (eds.), *A Constituição Revista*, Lisboa, FFMS, 2011, pp. 103-105.

[84] Jorge Miranda, "O referendo e o plebiscito: a experiência portuguesa", *op. cit.*, p. 160.

rights must be interpreted and completed in harmony with the Universal Declaration of Human Rights". The question, therefore, is the following: Is the Universal Declaration of Human Rights (UDHR) a constitutional *continuum* or a mere interpretative instrument?

To some doctrine, Article 16, § 2 is an interpretative norm, as it refers to an exterior parameter of interpretation: The UDHR[85]. In this sense, the Portuguese Constitution should be interpreted in consonance with the Declaration. An example could be Article 2 of the UDHR, which, when interpreted toe to toe with the Portuguese prohibition of discrimination (Article 13, § 2 of the Constitution[86]) clarifies that this prohibition is not exhaustive, but merely suggestive. Therefore, we can argue that the Constitution also prohibits discriminating people with disabilities[87].

Other scholars, though, enlarge the above interpretation and argue that Article 16, § 2 proceeds to the formal reception of the UDHR as a material extension of the written constitution. The UDHR thus has a supra-constitutional value[88]. Concretely, it expands the fundamental rights catalogue (Articles 24 to 79) and other fundamental rights consecrated elsewhere – in ordinary laws or in international norms – derived from the "open clause" in matters of fundamental rights (Article 16, § 1)[89]. Accordingly, and as the Portuguese Constitution lacks a general permission of fundamental rights' restriction, Article 29, § 2 of the UDHR could be immediately applicable as a constitutional norm for restriction[90].

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[85] J. J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, vol. I, *op. cit*., p. 367.

[86] Article 13, § 2: "No one may be privileged, favoured, prejudiced, deprived of any right or exempted from any duty for reasons of ancestry, sex, race, language, territory of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation".

[87] Catarina Santos Botelho, "A indiferença à diferença", *Observador*, 17.04.2018, available at https://observador.pt/opiniao/a-indiferenca-a-diferenca/

[88] Jorge Miranda, "Anotação ao artigo 16º", *Constituição Portuguesa Anotada*, vol. I, *op. cit.*, pp. 289-301, p. 290.

[89] Article 16, no. 1, states that: "The fundamental rights enshrined in the Constitution shall not exclude any others set out in applicable international laws and legal rules". About the Portuguese "open clause", see Ana Maria Guerra Martins and Miguel Prata Roque, "Universality and Binding Effect of Human Rights from a Portuguese Perspective", in R. Arnold (ed.), *The Universalism of Human Rights*, Heidelberg, Springer, 2013, pp. 297-324, p. 309.

[90] Article 29, § 2 foresees the following: "In the exercise of their rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".

This doctrinal approach is criticized by authors that highlight its inconsistency with Article 18, § 2 of the Portuguese Constitution, which limits fundamental rights' restrictions "in cases expressly provided for in the Constitution"[91]. Furthermore, human rights law instruments should never be interpreted in a way that diminishes human rights protection (Article 53 of the Charter of Fundamental Rights of the European Union)[92].

[91] J. J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, vol. I, *op. cit*., pp. 367-369.

[92] Which states that: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions".