



# Portugal

## THE STATE OF LIBERAL DEMOCRACY

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### I. INTRODUCTION

On 25 April 2017, Portugal celebrated 43 years of democracy and the 41st anniversary of the Constitution (1976). Still, even though the regime's democratic consistency has evolved over the last decades, by 2012 Portugal had one of the highest public debts in the European Union (EU) and struggled to comply with the EU's fiscal rules. In 2016, Portugal was able to meet the EU Stability and Growth Pact deficit rules (3%) and, in June 2017, left the excessive deficit procedure.

Notwithstanding that Portugal, as other states, escaped severe forms of populism, there is an undeniable disenchantment with representative democracy as a form of legitimization of power.<sup>1</sup> Liberal democracies are struggling with the political apathy of the electorate, which is visible in the high rates of abstention in electoral acts.

Subsequent to the presentation of the current constitutional and economic framework, we address some of the most relevant constitutional developments of 2017, such as the municipal elections, the economic sustainability of the traditional press and mass media in general, the law regarding the financing of political parties, the failings of civil protection services in the deadly fires of last June and October, intelligence services' access to metadata, and relevant labour law changes.

### II. LIBERAL DEMOCRACY ON THE RISE OR DECLINE?

On 25 April 1974, and after almost five decades of the right-wing authoritarian dictatorship of Salazar and Marcello Caetano, a bloodless military coup marked the beginning of the Portuguese revolutionary transition towards democracy. Empirical studies confirm "unquestionable societal improvements" on the matters of health, education, housing and standards of living in the last decades.<sup>2</sup> Yet, because GDP growth was around zero from 2000 to 2008 and then negative in 2012 and 2013, Portugal struggled to comply with EU's fiscal rules.

Portugal's three-year EUR 78-billion international bailout consisted in a *Memorandum of Understanding* agreed to between the International Monetary Fund, the European Commission and the European Central Bank (known as "Troika"). The agreement with Troika was signed by both Government parties (centre-right and conservatives) and the socialist opposition (centre-left). Between 2011 and 2014, Portuguese legislators adhered to a very strict austerity programme, which predictably led to unpopular public policies and stressed Portugal's social fabric.<sup>3</sup>

After the Troika's intervention and the centre-right Government's (2011-15) action, the public budget balance deficit declined from 11.2% in 2010 to 4.4% in 2015 (3.2%

<sup>1</sup> Catarina Santos Botelho, 'Populismos e a (in)completude democrática' (Observador 2017) < <http://observador.pt/opiniao/populismos-e-a-incompletude-democratica/> > accessed February 2018.

<sup>2</sup> Marina Costa Lobo, António Costa Pinto and Pedro C. Magalhães, 'Portuguese Democratisation 40 Years on: Its Meaning and Enduring Legacies' (2016) 21 SESP 163, 175.

<sup>3</sup> Catarina Santos Botelho, Os direitos sociais em tempos de crise (Almedina 2015) 435.

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excluding one-off operations, which do not account for EU excessive deficit procedures). In 2016, with a socialist minority government (with parliamentary support of the other left-wing parties), the country had a deficit of 2% and was able to meet the EU Stability and Growth Pact deficit rules (3%). In June 2017, Portugal left the excessive deficit procedure.<sup>4</sup>

Although Portugal has moved away from the prospect of a second bailout on the grounds of a stronger economy and lower unemployment rates, a primary deficit surplus and low national debt interest rates, the continuous cut in public investment and the absence of structural reforms still worry several experts. For the upcoming years, several challenges arise such as growth potential, which remains low (1.5% of GDP according to Fitch), public debt decrease sustainability in terms of GDP ratio and the risk of bailouts to the banking system, all of which may affect economic growth.

Notwithstanding the financial and economic crisis, which clearly impacted the balance of power amongst the mainstream parties (centre-left, centre-right and conservatives), *populist movements* did not flourish in the Portuguese societal and political arena. The crisis had negative effects on the economic sustainability of the traditional press and mass media in general. This situation can jeopardise both pluralism of opinion and information quality. An eventual absence of stable and independent mass media might have pernicious effects on liberal democracy pillars.

Empirical studies demonstrate that we must be wary of quickly concluding that such crises and scarcity are the only variables responsible for the decline in institutional trust. There are some indicators that the per-

ception of corruption is definitely a determinant factor.<sup>5</sup>

From a global perspective, the available indicators do not confirm the worsening of the Portuguese justice system. As several other civil law systems, it may lack efficiency due to the complexity of law procedures and the consequent high congestion rate. Nonetheless, the Portuguese Public Prosecution Service has allowed corruption scandals involving high-level politicians and business elites abusing public funds to be fully investigated, even though many are still pending.

Disenchantment with politics is a reality of today's liberal democracies.<sup>6</sup> In this sense, many citizens feel alienated from the political sphere and do not believe that traditional partisan structures are the answer to exercise their voting rights. As far as Portugal is concerned, the country's turnout metrics are quite disturbing: 2014 EU Parliament elections, 33.67%; 2015 parliamentary elections, 55.84%; 2016 presidential elections, 48.70%; and 2017 local elections, 55%.<sup>7</sup> There is a controversy over these numbers since it is estimated that about 1 million people are not residents in the electoral districts. If so, we should add about 15% to these percentages to get the actual turnout, and thus they are more aligned with European standards.

In sum, the lack of participation in day-to-day deliberations raises scepticism towards a representative democracy that does not incorporate strong participatory and deliberative mechanisms.

On 1 October 2017, Portugal held local elections, which were perceived as a clarification of the political arena. The downfall of the former right-wing Government was interpreted by some supporters as a breach in

the constitutional praxis of the last decades. Portugal has a semi-presidential government system in which a directly elected President exists alongside a Government, the latter being politically responsible vis-à-vis the President and the Parliament.<sup>8</sup>

Article 187/1 of the Constitution states that the President appoints the Prime Minister "in the light of the electoral results". In the 2015 legislative elections, the colligation PàF (Portugal à Frente), which gathered the centre-right party PSD (Social Democratic Party) and the conservative CDS-PP (Popular Party), won by 39%.

However, after being nominated by President Cavaco Silva as Government, the colligation PàF was not able to pass its programme within the Parliament. A motion of rejection of the Government's programme was approved by 123 votes, determining its fall (articles 194/4 and 195/1/d) of the Constitution). For that reason, this Government was the shortest one in the history of the Portuguese constitutional democracy, governing only for 28 days.

According to the Constitution, the President was doubly limited. In fact, due to him being in the last semester of his term of office, and to the Parliament being in the first semester since its election (article 172/1), he was not able to dissolve the Parliament and call an early general election.

This constitutional impasse led to a political crisis and the President only had three viable options: (a) maintain a caretaker Government, which was not the best solution, since the Government would have to "limit itself to undertaking the acts that are strictly necessary in order to ensure the management of public affairs" (article 185/6 of the Con-

<sup>4</sup> Decision of the Council of the European Union 2017/1225, of June 2017 < [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2017.174.01.0019.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2017.174.01.0019.01.ENG) > accessed February 2018.

<sup>5</sup> Mariano Torcal, 'The Decline of Political Trust in Spain and Portugal: Economic Performance or Political Responsiveness?' (2014) 58 ABS 1542, 1561.

<sup>6</sup> Catarina Santos Botelho, 'O voto é um direito ou um dever?' (Observador 2017), < <http://observador.pt/opiniao/o-voto-e-um-direito-ou-um-dever/> > accessed February 2018.

<sup>7</sup> <https://www.idea.int/data-tools/country-view/247/40> Aina Gallego, *Unequal Political Participation Worldwide* (CUP 2014), João Cancela and Benny Geys, 'Explaining voter turnout: A meta-analysis of national and subnational elections' (2016) 42 ES, 264.

<sup>8</sup> Gianluca Passarelli, 'The government in two semi-presidential systems: France and Portugal in a comparative perspective' (2010) 8 FP 40, and O. Amorim 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 *Portugal in the Twenty-First Century: Politics, Society and Economics* (2012) 49.

stitution) and therefore, with a low political legitimacy, could not underplay innovative legislative acts; (b) nominate a government of presidential initiative, in a broader-based firm, with members of the three political parties that had signed the Memorandum of Understanding with Troika. Nevertheless, due to the distressing political crisis, such composition would almost certainly fail again when submitting its programme to the Parliament; and (c) nominate a Government of the Socialist Party (which was the second most voted party), after two other left-wing parties – the Communists (PCP) and the Left Bloc (BE) – clarified that they would bestow their parliamentary support. The President opted for this last alternative, believing it could guarantee stability. For the first time since the establishment of democracy, PCP and BE supported the party in government.

Even if the nomination of the current Government was consistent with the Portuguese Constitution, it generated some criticism amongst the PSD and CDS-PP, the elections' winning parties.<sup>9</sup> 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*. 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 a government. It is one thing to win the legislative elections, another to form a government.

As one could easily wonder, these uncomfortable political tensions raised a lot of expectation as to the results of the municipal elections. The Socialist Party (PS) raised its

number of mayors from 149 to 159, whereas the PSD obtained its worst result ever at local elections. In Lisbon, the Portuguese capital, the PSD candidate only earned 11.2% of the votes. CDS-PP had a positive result in Lisbon, but was defeated in the rest of the country with about 3% of the national vote. As for BE, the result was positive. On the contrary, the Communist Party vote share diminished from 11.1% to 9.5%.

On 21 December 2017, the Parliament approved, by a large majority, changes to the organic law regarding the financing of political parties.<sup>10</sup> Only CDS-PP and PAN (People-Animals-Nature Party) voted against it. In the previous year, Justice Manuel Costa Andrade, President of the Portuguese Constitutional Court (PCC), had requested the Parliament to alter the oversight model for party financing and suggested the creation of an independent entity to control political accounts and financing. The PCC’s competence to control the financing of political parties already received criticism amongst constitutionalists.<sup>11</sup>

Some argued that the President of the PCC should not make legislative suggestions, since constitutional courts are not policy-makers.<sup>12</sup> In my point of view, though, the separation of powers does not mean total imperviousness, especially when considering the Constitution. Additionally, and more importantly, these recommendations were given in a non-binding, informal and cooperative way.

If it is true that the reign of politics should not dethrone the reign of law, it is also true that, as the fundamental law of a political community, the Constitution is a *political*

norm: a norm about the production of other norms. Since the post-War period, constitutional texts have become more politicised, breeding “constitutional expectations” that might breach constitutional constancy.<sup>13</sup> Although we firmly agree that constitutional courts are not co-legislators, we also read elsewhere that “nothing positive comes from exorcising the Constitution and constitutionalism itself from politics, as if both were impenetrable domains. There is no Constitution without politics. And maybe that assertion should suffice”.<sup>14</sup>

However, the extent of the changes to the law in question went far beyond the PCC recommendations. The breach of the tradition of public funding and the opening of the door to private donations prompted an outcry in Portuguese social media.

The main alterations are the following: a) creation of an Entity for Political Accounts and Financing (ECFP), which would investigate irregularities and illegalities of politicians and electoral campaigns’ accounts and apply the respective fines. The ECFP’s decisions could be appealed to the Portuguese Constitutional Court; b) abolition of the fund-raising ceiling; c) extension of VAT exemption to political parties (it previously encompassed goods and services obtained to spread the political message or their own identities, and would now be also applied to all purchases of goods and services respecting parties’ activities); and d) a transitory norm casts doubts on whether these changes would be applicable retroactively. In that scenario, this law could be applicable to pending cases, allowing political parties to recover VAT from previous years.

Given the political relevance of organic laws,

<sup>9</sup> See Francisca Almeida, ‘Da (in)admissibilidade constitucional de um Governo de esquerda’ (Expresso 2015) < [http://expresso.sapo.pt/blogues/blogue\\_olado\\_a\\_lado\\_b/2015-10-18-Da--in-admissibilidade-constitucional-de-um-Governo-de-esquerda](http://expresso.sapo.pt/blogues/blogue_olado_a_lado_b/2015-10-18-Da--in-admissibilidade-constitucional-de-um-Governo-de-esquerda) > accessed February 2018.

<sup>10</sup> Law no. 19/2003, 20 June 2003.

<sup>11</sup> More broadly and concerning the competences of the PCC, see Maria Lúcia Amaral and Ravi Afonso Pereira, ‘Um tribunal como os outros. Justiça constitucional e interpretação da constituição’ in *Estudos em Homenagem ao Conselheiro Presidente Rui Moura Ramos* (Almedina 2016) 435.

<sup>12</sup> Nuno Garoupa, ‘Da forma à substância na lei dos partidos’ (Diário de Notícias 2018) < <https://www.dn.pt/opiniao/opiniao-dn/nuno-garoupa/interior/da-forma-a-substancia-da-lei-dos-partidos-9050460.html> > accessed February 2018.

<sup>13</sup> Catarina Santos Botelho, ‘Aspirational constitutionalism, social rights prolixity and judicial activism: trilogy or trinity?’ (2017) 3 (4) CALQ 62, Michel Rosenfeld, ‘Constitutional adjudication in Europe and the United States: Paradoxes and contrasts’ in *European and US Constitutionalism* (CUP 2005) 197, 205 and Rupert Scholz, ‘Konstitutionalisierte Politik oder politisierte Konstitution?’ in *Realitätsprägung durch Verfassungsrecht* (Duncker & Humblot 2008) 9, 12.

<sup>14</sup> Catarina Santos Botelho, ‘O lugar do Tribunal Constitucional no século XXI: os limites funcionais da justiça constitucional na relação com os demais tribunais e com o legislador’ (2018) 34 Julgar.

the Prime Minister and one-fifth of all the Members of the Assembly of the Republic could ask the Constitutional Court to undertake the prior consideration of constitutionality on these diplomas (article 278/4 of the Constitution), but they decided not to. On 3 January 2018, President Marcelo Rebelo de Sousa, vetoed this law given “the absence of grounds concerning the changes in the way political parties are financed which can undergo public scrutiny”. The bill was returned to the Parliament, which could “validate it by a majority that is at least equal to two-thirds of all Members present and is greater than an absolute majority of all the Members in full exercise of their office” (article 136/3 of the Constitution). However, most parties acknowledged that the law might need further reflection and a deeper public scrutiny.

### III. MAJOR CONSTITUTIONAL DEVELOPMENTS

2017 was a tragic year due to the lethal nature of the fires registered in June and October. Around 100 people died and over 500,000 hectares of forests were burned in what was considered *Portugal’s deadliest year on record for wildfires*. The Portuguese Government was heavily criticised for the failings of the civil protection services and its lack of efficiency in forestry management policies. CDS-PP put to the vote a motion of no confidence against the Government, which was rejected (by 122 to 105) thanks to the parliamentary support given by the left-wing parties.

Marcelo Rebelo de Sousa, in a speech addressing this situation, hinted he could use his presidential powers to dissolve the Government or even the Parliament unless “forestry reform and fire prevention were made top priorities”. The assertiveness of the President and the social turmoil that followed such tragedies had several consequences: (a) the Portuguese Internal Affairs Minister

Constança Urbano de Sousa resigned; (b) right after the first wave of fires in June, a commission of independent technical experts was nominated and its report pointed out malfunctions on fire prevention and monitoring, civil protection response and emergency communications. This commission was given the task of analysing the second wave of fires in October as well; (c) several policy measures were announced by the Government in order to maintain forests and prevent fires; and (d) given the fact that the State’s responsibility was at stake for failing to protect its citizens, the Government agreed to an extrajudicial agreement, mediated by the Ombudsman, stipulating monetary compensation to the families and heirs of people killed in the fires and also to those seriously injured therein.

It is relevant to mention that, on 20 October 2017, Maria Lúcia Amaral, former Justice (2007-2016) and Vice-President of the Constitutional Court was elected by the Parliament as Ombudsman and took office on 2 November of that same year. Since 1999, the Portuguese Ombudsman has been credited an “A” status by the United Nations, in full compliance with the Paris Principles.

The Portuguese Data Protection Authority (CNPd), presided since 2012 by Filipa Calvão, is an independent body which supervises and monitors compliance with the laws and regulations in the area of personal data protection. Its previous consultation on legal provisions relating to the processing of personal data is mandatory. In October 2015, the CNPD pronounced itself against parliamentary legislation (Decree no. 426/XII) that allowed intelligence officers from the Security Information Service (SIS) and the Strategic and Defence Information Service (SIED) to access traffic, localisation and other electronic communications-related data for purposes of prevention of phenomena such as terrorism, espionage, sabotage and highly organised crime as long as certain

conditions (necessity, appropriateness and proportionality) were respected.<sup>15</sup>

The legislative goal was not to access content of communications (written or voice) but to obtain authorisation to demand the *metadata* (data about data) from the entities that treat data, concurring the conditions under which communications took place (location and traffic).

Two months later, and following the request of prior control from the President of the Republic Aníbal Cavaco Silva, the Portuguese Constitutional Court (PCC) took the view that the legislation was in breach of article 34/4 of the Portuguese Constitution, which prohibits public authorities from engaging in any form of intrusion into communications other than in the cases provided for in criminal procedural law.<sup>16</sup> The intent of this provision is to protect the privacy of individuals and the right to communicational self-determination.<sup>17</sup>

In August 2017, Organic Law 4/2017 was published, regulating the access of SIS and SIED to telecommunications and Internet data outside criminal proceedings. The novelty in this legislative reformulation is judicial supervision and prior authorisation for the access to telecommunication and Internet data, carried out by a group of judges from the Supreme Court of Justice.

The CNPD, which had already decided against the previous legislation proposal, reaffirmed that, since the access to data is carried out within the scope of criminal prevention, and therefore outside the constitutional scope of criminal proceedings by the SIS and SIED, both non-criminal investigation bodies, this act is still in violation of the aforementioned constitutional rules and principles.<sup>18</sup> Even acknowledging that it is a “high-level judicial control”, the CNPD problematises its operability because the absence of “a clear and standardised procedure

<sup>15</sup> Opinion 51/2015 < [https://www.cnpd.pt/bin/decisooes/Par/40\\_51\\_2015.pdf](https://www.cnpd.pt/bin/decisooes/Par/40_51_2015.pdf) > accessed February 2018.

<sup>16</sup> Ruling no. 403/15, 27th of December, 2015 < <http://w3b.tribunalconstitucional.pt/tc/en/acordaos/20150403s.html> > accessed February 2018.

<sup>17</sup> Catarina Santos Botelho, ‘Novo ou velho direito? – O direito ao esquecimento e o princípio da proporcionalidade no constitucionalismo global’(2018) 7 AB INSTANTIA 49.

<sup>18</sup> Opinion no. 38/2017, 30th of May, 2017 < [https://www.cnpd.pt/bin/decisooes/Par/40\\_38\\_2017.pdf](https://www.cnpd.pt/bin/decisooes/Par/40_38_2017.pdf) > accessed February 2018.

(...) constitutes a very considerable obstacle to the legality and constitutionality of the remedy”. More specifically, the legislation “infringes the prohibition of intrusion in the electronic communications provided for in the Constitution of the Portuguese Republic, as well as the rules of the Constitution, the Charter of the Fundamental Rights of the European Union and the European Convention on Human Rights”.

On 14 August, the President of the Republic Marcelo Rebelo de Sousa promulgated the diploma, invoking the “broad consensus [was] reached in order to overcome the doubts that had given rise to the previous request for preventive constitutional review” as well as “the relevance of the regime in question for the defence of the Democratic Rule of Law, in particular for the protection of fundamental rights”. PCP and BE requested successive control of constitutionality to the Portuguese Constitutional Court (articles 281 and 282).

In Portuguese Labour Law, a collective agreement is not immediately binding to all employees in an undertaking, since it only covers employees affiliated with the trade union that entered into it with their employer (or the employers’ association the latter belongs to). However, this extension can be achieved through courts or the Government. In the first case, several judicial decisions have demanded the extension of salary clauses based on the constitutional principle equal payment for equal work (article 59/1/a) of the Constitution). The Government can also intervene by extending collective agreements through administrative regulation.<sup>19</sup>

#### IV. LOOKING AHEAD TO 2018

In 2018 the Portuguese Constitutional Court will most likely decide on recent legislation (or legislative projects) regarding the following issues: (a) legislation on medically assisted reproduction; (b) access to metadata by information services of the Portuguese Republic; (c) legalisation of euthanasia and

assisted suicide; (d) legalisation of cannabis; (e) legalisation of prostitution.

On 4 October 2018, the Estoril Institute for Global Dialogue will present its first Portugal Talks with the theme “voter turnout”. The Scientific Committee is presided by Nuno Garoupa, who is joined by Marina Costa Lobo, Pedro Magalhães and Catarina Santos Botelho. A working group will be established with the task of producing a final report with proposals aimed at reducing electoral abstention and improving the quality of democracy.

#### V. FURTHER READING

Carlos Blanco de Morais, *O Sistema Político no Contexto da Erosão da Democracia Representativa* (Almedina 2017)

Jorge Miranda, *Direitos Fundamentais* (Almedina 2017)

Jorge Pereira da Silva and Gonçalo Almeida Ribeiro (eds), *Justiça Entre Gerações: Perspetivas Interdisciplinares* (Universidade Católica Editora 2017)

Manuel Afonso Vaz, Catarina Santos Botelho, Luís Terrinha and Pedro Coutinho (eds), *Jornadas nos Quarenta Anos da Constituição da República Portuguesa – Impacto e Evolução* (Universidade Católica Editora 2017)

Susana Coroado, Nuno Garoupa and Pedro Magalhães, ‘Judicial Behavior under Austerity: An Empirical Analysis of Behavioral Changes in the Portuguese Constitutional Court, 2002–2016’ (2017) JLC 289

<sup>19</sup> Ana Teresa Ribeiro, ‘The Extension of Collective Agreements by State Intervention: The Portuguese Regime and the Protection It May Offer to SMEs’ in *Employment Relations and Transformations of the Enterprise in the Global Economy* (G. Giappichelli Editore 2016) 247.