

CITIZENSHIP  
AND POLITICAL  
REPRESENTATION  
IN PORTUGAL

# *Res publica*

1820 1926

*Edited by*

FERNANDO CATROGA  
PEDRO TAVARES DE ALMEIDA



# ***The legal profession and political representation***

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Translated from the Portuguese by Clive Thoms.

*Mais à chaque époque, j'imagine ses juristes.  
À chaque état politique et social nouveau, ses juristes.  
Bien plus : à chaque groupe d'intérêts antagonistes,  
au sein d'une même société, ses juristes.*

LUCIEN FEBVRE

(FEBVRE 1939: 44, from LOUREIRO 1947: 91).

The central role played by the jurist in the construction of modern politics is evident. Protagonist of change and rupture, but also an instrument of order – a very appropriate expression by historian C. Charle (CHARLE 1989: 117) –, the jurist represents, along with the military, one of the leading social sectors at the forefront of the first Portuguese liberalism and the first decades of stabilisation of the constitutional monarchy. Indeed, the triumph of liberalism brought along the adaptation of legal schools (Faculty of Laws and Faculty of Canons) to the legal and political dictates of the modern state, through the recreation of the Faculty of Law of the University of Coimbra, a symptom of the crucial importance of the institution regarding the legitimacy and foundation of the new project. Therefore, law graduates possessed unique specialist knowledge, fundamental to the task of shaping the new State and social order, and consequently for the “public needs” demanded by this historic period. As a result, the legal scholar or, more simply, the graduate in law – who could in fact describe himself merely as a bacharel (graduate), such was their overwhelming predominance at the University of Coimbra, as noted by Eduarda Cruzeiro (CRUZEIRO 1990) – had achieved an unique status. This derived from the potential offered by the ability and know-how regarded as crucial for the implementation of the new legal order (development of constitutional law, codification, legislative production), as well as the recruitment of political representatives and new independent judiciary.

■ The University of Coimbra (1<sup>st</sup> decade of the 20<sup>th</sup> century).

[Magic lantern transparency. Author unknown. Alexandre Ramires Collection]



Symptomatically, the pay scale established by the reforms of Mouzinho da Silveira (Decree no. 24, of 16 May 1832) constitutes one of the signs of the pursued supremacy, significantly by providing the whole of the judiciary with appropriate compensation – especially when regarding the judges at the lower courts (courts of first instance) who enjoyed a substantial increase in remuneration. It is true that the subsequent legislative developments, dictated by external reasons related to the financial constraints on the state, eventually resulted, in the 1840s, in the reinstatement of a wider differential between the rates of pay of the different tiers of the judiciary, re-establishing the symbolic gap which had in fact existed in the past. However, the ultimate objective was achieved, regarding the rates of pay of the judges of the higher courts (Courts of Appeal and Supreme Court of Justice), high in comparison with remuneration in analogous areas of public service (central and local administration, the military and university teaching), a situation which persisted throughout the nineteenth century (FERREIRA 2001: 131; ALMEIDA 1995: 2, 406-408)<sup>1</sup>.

■ José Xavier Mouzinho da Silveira (1780-1849). [BNP]



<sup>1</sup> As from the mid-80's, constant calls were made for improving the remuneration of the judiciary and of university lecturers, in view of the erosion of pay throughout the senior civil service, which continued into the 1<sup>st</sup> Republic.

### ***The power of the jurists under the aegis of the senior judiciary***

Besides, we should not forget that, as the constitutional system introduced by liberalism was based on the division of powers, knowledge in law became, at least as a matter of principle, the legitimate means of access to one of these powers: the judiciary. Therefore, we must recall that the first significant change in this area assigns judges a monopoly in the exercise of justice, ending the privileges of the past which had allowed professors at the University of Coimbra, given their prestige, the possibility of taking the benches of the higher courts (SUBTIL 1996: 332-334). This change resulted in the formation of a new liberal judiciary, recruited (between 1832, in Azores, and the Summer of 1835) without any legal constraint, except for the requirement of a degree in law.

The second change regards the formal institution of the judicial career, aimed at establishing the principle of the independence of the judiciary and the respective corollary – the principle of the unremovability of judges (except for cases referred to in law).

These changes mirror adaptations taken from the European liberal legislative heritage (from France and Spain, in particular), adopted in line with the reformist character that will set the legislative course of the Constitutional Monarchy (FERREIRA 2001: 125-134). In the matter that concerns us, that founding pursuit could be seen, on one hand, in the frequent invocation of the legislative tradition of the past, aimed at restraining to adequacy the impetus of the desired change. On the other hand, it was also reflected in the supremacy aspired to by the judiciary in relation to the traditional legal bodies, cultivated through political and symbolic investment. This investment began to take shape in the liberal fervour of the 1820's (*vintismo*) and was guided by the aim of safeguarding the distinctive status enjoyed by the upper strata of the previous legal system combined with the high standards expected of the judiciary in the liberal political order (FERREIRA 2001: 125-134). This purpose was most clearly visible in the emphasis attached to the image and identity of magistrates – which will be maintained in its essential features for the entire duration of the liberal era.

■ Model for allegorical statue of Justice.  
[Moulded plaster by António Augusto da Costa Mota (nephew), (1920-21).  
AR – Museum]



As stressed by legislators and parliamentarians, most of whom affiliate to the legal profession, the exceptional qualities required of a liberal judge rested upon this principle: the exercise of justice, invested with the doctrinal and symbolic power of the State, required singular qualities, attested to by the disciplinary procedures (internal and external) to which the judiciary was subject, according to legislative tradition, enhanced by the public channels created by liberalism. In the views expressed by distinguished members of the judiciary, particularly in the context of parliamentary debates regarding disciplinary bodies within the judiciary during the 1840's, the position of a judge involved blurring the frontier between the public and private spheres (FERREIRA 2009: 184-186). The importance of the human, ethical and professional qualities required of judges justified this, in contrast with the requirements imposed on other public servants of similar senior rank. This image, anchored in the ideal model of the past, was to take shape in the omnipresent metaphor of the judicial priesthood, profusely invoked once it was rehabilitated – in the wake of the denunciations by the legal profession in the 1820's of the arbitrariness of the judiciary in the final years of the Ancien Régime<sup>2</sup>, mirroring the process whereby the judiciary recovered its identity in France (BERNAUDEAU 2007: 12; BANCAUD 1989).

### ***The supremacy of the 'bacharéis' (university graduates) in Parliament***

As it is not the purpose of this essay to explore this area in further detail, let us look instead at the contribution which legal learning could give to the law-making institution *par excellence*: the legislature, leaving aside an analysis of the profession's presence in other institutions, such as government, the Upper Chamber and in local authorities (civil and municipal).

Whilst their specific expertise made the presence of jurists particularly recommended in the institution producing the law, so did the primary importance attached to *oratory* and *rhetoric* in the cultural matrix of liberalism, these being resources regarded as properly belonging to the training of the graduates in Law, in keeping with the ideal model of erudite knowledge embodied by legal academic teaching, at the time (HALLIDAY; KARPIK 1997: 15-64). These academic skills were recognised as prime weapons in the pluridimensional battle waged by the first generations of liberal politicians, in their eagerness to recreate – or, perhaps more rigorously, to reform – everything in the light of law and the rule of law. From the adoption of representative political institutions, to the design of new administrative structures

<sup>2</sup> Best exemplified in the writings of Mouzinho da Silveira (PEREIRA 1989) and on the image of the ideal judge of the past see HOMEM (2003: 759-767).



■ Group of law and medical students from the University of Coimbra (1910).  
[Photographia Conimbricensis of José Maria dos Santos. Alexandre Ramires Collection]

tailored to the new vision of society (anchored in the ideological values of individualism and meritocracy, the symbols of modernity and progress), nothing escaped their grasp. This helps to explain the ascendancy quickly gained by the legal profession in liberal political society, their qualification asserting itself as the emblem of a new aristocracy (to be created), in opposition to the aristocracy of birth, which had held sway in the social and political structure of the *Ancien Régime*.

In effect, the academic degree reflected a core element of identity in liberal individualism, serving as proof of the public and self-proclaimed “aristocracy of merit”, legitimating, on objective grounds, the access to positions in the State on the basis of the possession of a diploma attesting knowledge and certifying competence for professional activity (SANTOS 1988; SILVA 1997). In this way, the academic degree becomes the socially distinctive badge worn by the new society, in keeping with the values of a markedly elitist form of liberal doctrine (in the style of B. Constant and F. Guizot) (JAUME 1997: 119-177), subsequent to the Portuguese liberal experience. (HESPANHA 2004: 176-198; BONIFÁCIO 1993: 1043-1091). The political world, increasingly faced with the need to impose rational measures and to win over the public opinion that supported the representative system, was not averse to this new scale of values.

As evidence of this, we may point to the prevalence of university graduates amongst parliamentarians throughout the liberal era in Portugal (1834-1926), symptomatic of the value attached to a university education as a means, in most cases, of bolstering and/or validating the status of already privileged families, in the context

of the selective intake of higher education at this time. This meant that a university education was also a factor of social mobility within the restricted field of the social elites of that time. One of the signs of this process is the significant reduction in the number of ministers with aristocratic titles during the Regeneration (1851-1890), an aspect in which Portugal was ahead of the continent as a whole (ALMEIDA 1995: 1, 96-98). These changes can then justifiably be seen as a sign of the receptiveness of political elites to the social symbols of modernity, characteristic of the way in which the store of liberal ideology was progressively received in Portugal.

Of all university and schools graduates, those with law degrees enjoyed a hegemony in liberal politics, in line with the situation in other European countries (O' BOYLE 1970 : 471-495; ANDERSON 2004; RINGER 1992; MAZZACANE; VANO 1994; CAMMARANO 1995: 281-282). The reasons for this had to do with what we can call, in lack of a better term, the *power of the law*, an expression which seeks to suggest both the complex socio-economic and mental circumstances which serve to explain this pre-eminence (which only changed in the 1920's, on the basis of total student numbers at the University of Coimbra, by faculty)<sup>3</sup>, and the distribution of university graduate students in Portugal by areas of scientific learning<sup>4</sup>. This pre-eminence is understandable given that, in a poorly industrialized country which was only then to accelerate the bureaucratisation of the exercise of State power, the jurist was the graduate who could best combine the technical expertise needed to produce law with the *communicative practises* required by the debates shaping public opinion and, within the representative assemblies, to persuade and refute their adversaries. In short, he possessed the most all-round and versatile skills.



■ Students of the University of Coimbra.  
[João Palhares – Palhares Collection. 2<sup>nd</sup> series. Lisbon: J. Palhares, ca. 1850. Watercolour lithograph. BNP]

A significant contribution to this state of affairs came from the strategic vision displayed by the Faculty of Law at the University of Coimbra, since the early days of the liberal era (and periodically reasserted), in preserving a unified and comprehen-

<sup>3</sup> In the academic year of 1921-22, the Faculty of Law at the University of Coimbra was replaced by the Faculty of Medicine as the country's most attended school of higher education: 349 students against 398 (PRATA 1994: 1, 66).

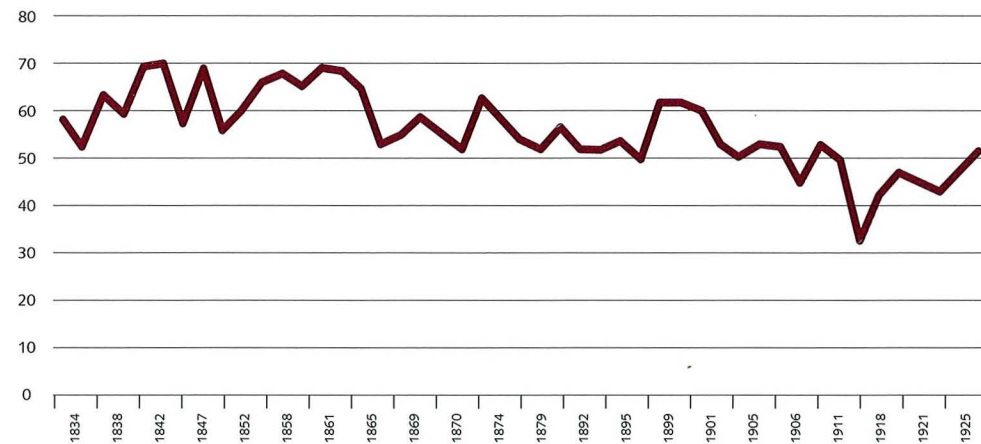
<sup>4</sup> In 1926, students at the law faculties in Lisbon and Coimbra represented 20% of the total university population. "Eficacia do Ensino Superior" (*Faculdade de Direito* 1926: 19).



sive plan of studies, rather than adopting a competitive model centred on excessive specialisation and demarcation between “mastery of law” and “mastery of administration” (FERREIRA 2004: 134-150).

For all these reasons, the preference for those with legal knowledge as a selective criteria for the function of legislative representation was all but structural, being of medium duration, and quantitatively demonstrable in both absolute and relative terms.

FIG. 1 PERCENTAGE OF THE GRADUATES IN LAW AMONG DEPUTIES WITH A UNIVERSITY EDUCATION (1834-1925)



SOURCE: Data base of the project *Parliamentary Recruitment in Portugal, 1834-1926*, coordinated by Pedro Tavares de Almeida and funded by the FCT (POCTI/HAR/58007/2004).

This hegemony was particularly noticeable during the early decades of the Constitutional Monarchy and in the 1870's, when law graduates account on average for 3/5 of deputies with a university degree (61%). Episodically, the figures were even more significant: seven out of ten Members of Parliament with a university degree were law graduates, in the legislatures resulting from the 1842, 1845 and 1864 elections. This indicator suggests clear elective affinities in education and in generational groups, despite the varied intensity of the political differences between the deputies in question. The sharing of a common legal culture, cemented by social bonds acquired from their time spent at the university city which had a monopoly on legal education until 1911, was a central factor in the self-reproduction of the power of law within the political elites.

However, we should stress that the category to which we refer (the legal profession) was markedly hybrid in terms of actual professional activities. The common denominator – a degree in law – camouflages the broad range of

occupations actually represented, including civil servants, in the various general and specialist structures and services, judges working in the justice system and related but organisationally autonomous entities (such as judges employed by the Department of Public Prosecutions, and auditors), the judiciary proper, those in legal practise, those merely with a degree (aspiring to public office or otherwise) and also a segment of graduate property owners, without any formal professional affiliation. This again leads us to the power of the law degree.

In any case, the prevalence of the legal profession began to suffer a degree of erosion, due in good part to the growing presence of graduates from other rival traditional areas of learning, and to the increasing credibility attached to the political capabilities deriving from their training. The gradual reduction in the numbers of the legal profession on the parliamentary benches could be observed from the 1870's onwards, although the profession still retained its pre-eminence. In effect, through to the fall of the Monarchy, the legal profession continued to account for more than half the Members of Parliament with a university education, only dropping below this during the Republic when it stabilised at slightly above 40%<sup>5</sup>, with the lowest level recorded at the very outset, in 1911 (31.9%).

In these circumstances, the relative reduction in the number of law graduates in Parliament was connected to the relative increase in the prestige of a number of technical-scientific groups in the new political elites, especially from the Regeneration onwards, reflecting the policy of "material betterment" and its impact on the growth of the central administrative authorities and specialist technical departments.

It might be argued that the academic ambitions pursued by the higher education establishments created in the 1830s, competing with the University of Coimbra (and especially with the Faculty of Law) in the technical-scientific field, eventually began to bear fruit. In particular, this new found prominence was to be capitalised in support of the political and symbolic affirmation of the Polytechnic School (*Escola Politécnica*) – an establishment based in the capital, geared to provide the fundamental scientific training needed for access to the prestigious Army College – *Escola do Exército* – (providing the bulk of its student population) and, more broadly, for the teaching of engineering. The strategy of doctrinal and symbolic mobilisation pursued by the academic staff of the Lisbon institution, by invoking the (unconsummated) French model, appears to have contributed effectively to a gradual conversion and/or broadening of the scientific and technical expertise traditionally associated with the military, channelling those skills to the specialist

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<sup>5</sup> Averaging 41.4% and 46.9% respectively, in the second and third decades of the twentieth century.

technical services run by the State. This, combined with the prominent role of the army in establishing the liberal regime and in influencing how it functioned (including though coups d'état) was to prepare the way for a renewed presence of the military in politics, including in the legislature.

More paradoxical, at the European level, was the early visibility achieved by the medical profession on the parliamentary benches – at least from 1890 onwards (ALMEIDA 1995: 1, 157; ALMEIDA 2006; MARQUES 1969: 476). This tendency reflected the prestige gained by medical learning, which was to reach its height during the 1<sup>st</sup> Republic.

We should stress, however, that underlying all this newly won prestige was not only the recognition of the associated technical expertise, but above all the credibility then enjoyed by positivist scientific discourse, across all branches of knowledge, and no less significantly in the field of law. And as politics continued to be the universe of words, which took solid form in law, this accounts for the ability of the legal profession to hold its ground in the field of political representation, despite the decline in its relative importance, in the face of insurgence from other branches of academic learning.

### ***The political twilight of the judiciary: the independence of judicial power and the constitutionality of law***

As the ultimate function of political representation is to produce law, it is no surprise that deputies with legal training predominated on the parliamentary benches

and that the legal profession enjoyed a monopoly in the exercise of judicial power. However, one question must be raised: who judged the constitutionality of the legislation produced by the other institutions and particularly by the legislative institution? As no special structure (Constitutional Court) was envisaged for this purpose, the issue became more pressing in the final decade of the nineteenth century and early twentieth century when the recourse to the bill of indemnity and to administrative dictatorships became more frequent. And as the provisional government of the Republic legislated on the basis of a dictatorship for a number of months (5 October 1910 to 21 August 1911), the question remained current after the fall of the monarchy.

As José Dias Ferreira had warned in 1899, during the preparatory work for the proposed constitutional reform of 1900, there was nothing to fear from the controversial proposal on the right

■ José Dias Ferreira  
(1837-1907).  
[BNP]



of judges to assess the constitutionality of laws. The additional powers granted to the judiciary – confined previously to “application of the law” and extended to the “power of interpretation of the law” (in accordance with Article 13 of the 1900 proposal) – would not result, in his view, in any threat from the power of the judiciary. He supported his position by invoking the nodal values that preside the career structure for the judiciary, implicit in his words: “[the] last revolutionary class has always been the judiciary, and rightly so”<sup>6</sup>. This is manifest in the supreme value attached to tradition, order and legality, in short, in the bolstering of the corporate and conservative character which typifies the cultural and professional make-up of the judiciary. No less relevant in this regard was the system whereby the judiciary was dependent on the government, generating the “historical model of the judge as public servant”, in the continental tradition (PICARDI 1991 cit. from MAGALHÃES 1995: 60-62).

The 1<sup>st</sup> Republic was to preserve the main features of the Monarchical legacy. The debate concerning the judiciary in the Constituent Assembly suggests as much. On the one hand, because of the limits demarcating the proposed Republican reform of the judiciary, which never actually took place. And on the other hand, because of the relative insignificance of the constitutional enshrinement of the diffuse system of the judicial review (CANOTILHO 1993: 974; MIRANDA 2007).

In effect, the limited affirmation of this principle did no more than to denote the political-symbolic dimension of the inclusion of this constitutional provision (Article 63), which predated most similar provisions in other European countries (CRUZ VILLALÓN 1987). In Portugal, the judicial review was only activated on the initiative of parties involved in the process. The judiciary retained a passive stance, remaining largely outside the system of power, not interfering in the powers assigned to the legislature and the executive – unless when requested by the parties. Moreover, the institution of this system in other European countries was prompted by the need to assure legislative uniformity between countries with a federal political structure, despite the implicit political dividends offered by the system of reviewing constitutionality. This is understandable, in view of the parameters that set the constitutional debate of 1911, in particular with the evident mobilisation of the democratic-liberal constitutional heritage, namely the Brazilian Constitution of 1891 and, more broadly, the North American constitutional tradition (CANOTILHO 1996).

■ Afonso Costa (1871-1937).  
[Postcard. Private collection]



<sup>6</sup> Dias Ferreira, speech in the debate on the draft law preparing constitutional reforms, *Actas da Câmara dos Senhores Deputados*, Appendix to session no. 115, of 17 July 1889, p. 24-25.

In these circumstances, once a firm consensus has been built up around the liberal constitutional framework of the judicial power<sup>7</sup>, the sharply worded declarations by the Minister of Justice and Religion, Afonso Costa, left no room for doubts concerning the regulatory model for the judiciary he advocated for the future<sup>8</sup> – after calls for adopting a model of self-governance for the judiciary (from Barbosa de Magalhães, in particular) had been stilled. The fact is that ministerial statements pointed towards the retention of the traditional system, meaning that the judicial authorities were to play a merely advisory role.

The frequently invoked argument pointing to the danger of the judiciary becoming a “State within the State” is without doubt persuasive, albeit unoriginal. Above all, because it responds both to fears concerning the self-serving, corporatist tendencies of the judicial class, and to its associated conservative and reactionary image, supported by interpretations regarding some of the more controversial rulings handed down by the Supreme Court of Justice on the constitutionality of decrees which took effect both under the dictatorship and during the early period of the new regime.

In effect, the early years of the Republic produced a number of controversial judicial episodes<sup>9</sup>. Cases surrounded by controversy tend to be read as a clear signs of the judiciary’s notorious opposition to the guiding principles and core interests of the Republicans, in connection with the judicialisation of issues relating to religion and insurrection.

In short, we can say that the methods for subordinating the judiciary to the requirements of the regime resulted in the use of informal and formal measures to assure the traditional dependency of the justice system – albeit predictably exacerbated by the spectre of the extreme politicisation which dominated the socio-political turmoil of the Republican regime (CHORÃO 2009).

The divergent positions expressed, both in Parliament and in the press, on the question of “justice vs. politics” express the tensions implicit in the issue of “legality vs. legitimacy” (ISRAEL 2005: 34-41). So whilst some (including both the Republic’s detractors and its ardent supporters) called for the independence of the judiciary, in order to safeguard the constitutional and legal order, others invoked the superior-

<sup>7</sup> Constitution of 1911, Articles 6 and 56 to 63.

<sup>8</sup> *Diário da Assembleia Nacional Constituinte*, Session no. 17, 10 July 1911, p. 12-13.

<sup>9</sup> We may draw attention to some of the most striking examples, such as the compulsory transfer of five 2<sup>nd</sup> instance judges and the suspension of a sixth judge, in rulings from the Lisbon Appeals Court in the proceedings against João Franco and the ministers involved in the “matter of royal loans” (decrees of 21 and 22 December 1910 and 14 January 1911); the parliamentary reactions to the acquittals of the alleged conspirators, in the course of the monarchical incursions of 1911, by the 2<sup>nd</sup> instance Courts (*Diário da Câmara dos Deputados*, Session of 26 February 1912, p. 4); and finally the role of the press in connection with the judicial decisions on the proceedings concerning the “religious question”, especially in highlighting those resulting in acquittal of the defendants (MOURA, 2004: 484-486).



■ José Maria Villhena Barbosa de Magalhães (1879-1959). [BNP]

ity of political legitimacy – to the detriment of judicial legitimacy –, advocating the creation of a Republican judiciary, for the sake of defending the regime<sup>10</sup>.

Either way, the system of powers contained the germ of the inexorable movement towards the functional division and specialisation of the judiciary. Which is to say, the seed of its exclusion from the active political domain.

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<sup>10</sup> The example of the French 3<sup>rd</sup> Republic was invoked by Members of Parliament to legitimate and support the purging of the judiciary.

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