



40/30 – 40 years of Constitution, 30 years of European integration: between past and present, openness and belonging

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ABSTRACT: This paper reflects about the Portuguese constituent process, within the framework of the so-called constitutionalism of the Social State, typical of European countries, during the second half of the 20th century. It also aims at understanding European integration from a constitutional point of view, having in mind the unusual openness of the Constitution of the Portuguese Republic to foreign legal orders. The analysis confronts the processes of constitutionalization and integration, and it defends that several elements of the first one should be incorporated into the latter.

KEYWORDS: EU – Constitution – constitutional identity – constitutionalism – Social State.

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1. Forty years of CRP: long live the Constitution!

The Portuguese Constitution (CRP) turned forty amid some turmoil, debate and controversy.

The first aspect that I would like to underline is the following: the CRP has been an amazing success, both politically and constitutionally according to any reasonable standard of evaluation. With it, the basic institutional pillars of a solid democratic political regime were established, as well as a broad catalogue of fundamental rights and institutional guarantees that have proved themselves to be essential elements of the new country, which its citizens built from the ground after 1974.

The reference to a country that rose from the ground is not at all a literary figure. Portugal was deeply and decisively changed during the period of consolidation of the democratic regime, as well as during the three decades of European integration.

This is now a country whose citizens have more access to education, embodying the constitutional purpose that education “*conducted at school and via other means of training*” may “*contribute to equal opportunities, to the overcoming of economic, social and cultural inequalities, to the development of the personality and of a spirit of tolerance, mutual understanding, solidarity and responsibility, to social progress and to democratic participation in collective life*” [Article 73(2) of the CRP]. Public investment in education was about 1,4% of the GDP in 1972; it increased sharply from 1975 onwards, and it is now 3,8% of GDP, having been of 4,8% in 2009 and 2010, before the devastating consequences of the economic crisis and the measures adopted in the aftermath.¹ In 2014, on the 40th anniversary of the Revolution, 47.592 students finished their undergraduate degrees, 16.202 got their Master’s degrees and 2.503 finished their PhDs.² These are exceptional numbers, and illustrate a country that is very different from 1974, when university was reserved for a small elite and almost a quarter of the population could not read or write.³

This is now a country that has built a national health service, “*a universal and general national health service which, with particular regard to the economic and social conditions of the citizens who use it, shall tend to be free of charge*” [Article 64(2) of the CRP]. This development has helped to decrease the infant mortality rate from 37.9 per 1000 in 1974 to 2.9 per 1000 in 2015, placing Portugal among the countries with the better world results in this field. Furthermore, a child born today in our country has an average life expectancy of over 80 years, clearly superior to the 68.2 years of 1974.⁴

This is now a country that has built a “*unified and decentralised social security system*” that protects “*citizens in illness and old age and when they are disabled, widowed or orphaned, as well as when they are unemployed or in any other situation that entails a lack of or reduction in means of subsistence or the ability to work*” [Article 63(2) and 3 of the CRP]. In 1974, the country paid social benefits like pensions to only 12.2% of the population over 15 years old. Today,

¹ Data from PORDATA, based in numbers from INE/BP, DGO/MF. Available at <http://www.pordata.pt/Portugal/Despesas+do+Estado+em+educa%3%a7%oc3%a3o+execu%3%a7%oc3%a3o+or%3%a7amental+em+percentagem+do+PIB-867>.

² Data from PORDATA, based in numbers from DGEEC/MEd – MCTES, available at <http://www.pordata.pt/Portugal/Diplomados+no+ensino+superior+total+e+por+n%3%advel+de+for+ma%3%a7%oc3%a3o-219>.

³ The percentage of illiterate citizens, in 1970, was of 25,7%, but only 5,2% in 2011, according to data from PORDATA, based in numbers from INE, available at <http://www.pordata.pt/Portugal/Taxa+de+analfabetismo+segundo+os+Censos+total+e+por+sexo-2517>.

⁴ Dados INE/PORDATA, disponíveis em [http://www.pordata.pt/Portugal/Esperan%3%a7a+de+vida+%3%a0+nascen%3%a7a+total+e+por+sexo+\(base+tri%3%a9nio+a+partir+de+2001\)-418](http://www.pordata.pt/Portugal/Esperan%3%a7a+de+vida+%3%a0+nascen%3%a7a+total+e+por+sexo+(base+tri%3%a9nio+a+partir+de+2001)-418).

it does so to more than 40% of its citizens.⁵

It is important to remember this data so that we bear in mind, after the disturbance and political and constitutional discussion of the period to which we can already call “*the crisis years*”, that, on one hand, what has been accomplished of the social, political and legal project of the 1976 Constitution has made Portugal a fairer, more modern and less unequal country. On the other hand, it is worth mentioning that the constitutional purposes have been shaped by different Governments and Parliamentary majorities, through means that depended not only on the human and financial resources available in each historical moment, but also on the preferences, choices, and world views of the individuals in office who, at several times, have been called to *preserve, protect and defend* the Constitution. Therefore, the CRP has shown itself clearly compatible with a wide margin of discretion of the legislator, in its plural shape, allowing distinct choices, sometimes almost opposite, in terms of public policies.

2. From constitutional conflict to constitutional commitment

I believe that one of the main reasons for the CRP’s success is the fact that it was born of conflict, and not of fake consensus. In fact, both the post-revolutionary and pre-constitutional period and the first decade of democratic constitutionalism were marked by the public expression of very different ideologies and worldviews, as well as social, economic and political projects for the country that were deeply distinct, sometimes radically opposite. Actually, the CRP is often classified, by academics, as a *constitution of compromise*, which shows that it embodies the result of a long process of negotiation and mutual agreements that had to start with an acknowledgement of dissent.

Furthermore, the 1976 CRP is a fortunate (although late) example of the twentieth century constitutionalism, which emerged after the Second World War: the so-called “*constitutionalism of the Social State*”. In fact, the constitutional law of the Social State defines its own limits of validity, and also affirms itself as “*the legal status of the political*”, of a common political project, typical of western European democracies. In the framework of this common project, the Constitution appears as a normative instrument that regulates social life, with its functions being to control and limit the exercise of power and to guarantee a set of rights and liberties. The effective fulfilment of such rights is regarded as a fundamental task of the State, independently of the concrete ideology of each parliamentary majority.⁶

Constitutional law seen this way has a main purpose, which is the framing and regulation of the democratic Social State; at the same time, it aims at solving social conflicts, generating consensus, negotiated agreements that are converted into normative rules. This way, fundamental rights enshrined into constitutional catalogues of rights – of which titles II and III of the CRP are good and long examples – and their institutional guarantees represent, in their concrete wording, a certain political balance

⁵ Data from PORDATA, based in numbers from GFSS/MTSS (until 1998) | ISS/MTSS (from 1999), INE, CGA/MTSS, available at <http://www.pordata.pt/Portugal/Pens%0c3%0b5es+em+percentagem+da+popula%0c3%0a7%0c3%0a3o+residente+com+15+e+mais+anos+total++da+Seguran%0c3%0a7a+Social+e+da+Caixa+Geral+de+Aposenta%0c3%0a7%0c3%0b5es-718>.

⁶ See Francisco Balaguer Callejón, “El final de una época dorada. Una reflexión sobre la crisis económica y el declive del Derecho constitucional nacional”, in *Estudos em Homenagem ao Prof. Doutor José Joaquim Gomes Canotilho*, ed. F. Alves Correia, J. Machado, e J. C. Loureiro (Coimbra: Coimbra Editora, 2012).

between divergent worldviews and conflicting social interests.

During a few decades, these balances, crystallized in constitutional texts, have worked quite well, within the well-defined and homogeneous space of Nation States in Western Europe, and during a period of unprecedented economic growth (the decades that followed World War II). Generalized prosperity ensured a significant degree of ascending social mobility, with fundamental rights acting as essential pillars of this process of development and instruments of personal emancipation. A lot of such rights also presupposed the existence or creation of collective public structures – schools, hospitals, and social services – that have functioned as a platform to guarantee real equality of opportunity. At the same time, the satisfaction of basic needs has made it possible for citizens to freely define their own life paths, independently of their personal characteristics (race, gender, social class), with a wide margin of personal development and a high probability of personal and professional success, in a particularly favourable economic and social context. In Portugal, this ‘golden period’ was shorter, since only 26 years passed between the adoption of the CRP and the introduction of the Euro as national currency. In 2002, which marks a definitive turn in the ways of the exercise of national sovereignty and in the capacity of the country to define and execute its own public policies, its consequences are long lasting and evident, as they materialize, among other aspects, in the success of the constitutional project.⁷

Lastly, I would like to point out a fact that is often forgotten, but whose contribution to social cohesion and integration must be signalled: the construction and use of public services by an overwhelming majority of the population, especially during the first decades of the CRP. In fact, people from different social origins and with highly distinct characteristics met, at different times, in the public sphere, when enjoying fundamental rights such as health or education. This promotes familiarity and mutual knowledge between radically distinct people that is of great importance to the definition of public policies and to make collective decisions.

Through the process and mechanisms that have been described, constitutional law managed to define, during a certain period, the political space of pacific coexistence between opposite social sectors, allowing the finding of legal solutions to the problems raised by their interaction. Political, temporal and spatial complexity, as well as social heterogeneity and the questions it poses looked, therefore, under control. Constitutional democracies framed political pluralism in an effective way, ensuring everyone a large set of fundamental rights, based in the principle of universality in every specific national space, reducing the importance of individual elements or characteristics that, traditionally, had been sources of discrimination, promoting, at the same time, the free statement of socio-economic and political differences.

This constitutional compromise, built from conflict, had political powers under control, which made different political choices, resulting from legitimate but contingent majorities. They had to frame themselves within the borders set by the constitutional pact and this way, social and political conflicts as well as the natural dissent existing in a plural society had to be solved, respecting the limits previously agreed upon and defined as common. In the Portuguese case, it has been possible to establish new consensus on the conditions of the constitutional amendment process, thereby changing the constitutional text in order to allow for political choices that were impossible under the initial version of the CRP. The changes to the constitutional norms on nationalization – which clearly evinces conditions on political and economic fundamental options – are

⁷ See note 1.

a good example of this phenomenon. From the original version of the constitutional text, which foresaw the possibility of nationalization without compensation of big land owners, as well as the principle of irreversibility of the nationalizations that took place after the revolution of the 25th April 1974 (former Article 83 CRP) the text has developed until the current version, which lets ordinary law define the means and ways of intervention and appropriation of means of production, as well as the criteria for setting the applicable compensation (Article 83 CRP). This change naturally allows radically different options in what concerns the definition of economic policies. However, as is typical of the constitutionalism of the Social State, which has been described above, the changes have not been made bypassing or ignoring the constitutional framework, but finding new compromises, new forms of political and democratic balance. Despite the normal political divergences between different institutional actors, the “*will of the constitution*”⁸ has largely prevailed, and the CRP has been an active force in the general ‘legal conscience’.

Therefore, and for a certain amount of time, the constitutional *normativity* was a strong one, insofar as it was not questioned by any representative social sector. Both the legislative and executive powers could chose and plan concrete ways of organising and executing public policies, the legislative design of fundamental rights and their respective institutional guarantees. They were free to define the country’s tax structure, and to establish other sources of financing the Social State. At the political level, specific social benefits and the capacity and necessity of augmenting the amount of such benefits were discussed. Even the concrete wording of constitutional norms could be questioned. However, the guarantee of these norms and the effectiveness of the constitutional project as fundamental tasks of the State and essential constitutional purposes were not called into question.

In the expressive words of Francisco Balaguer Callejón:⁹ “*Pluralist democracy is configured as a precondition of the constitutional normativity because the legal character of the Constitution only makes sense based on the recognition of pluralism and conflict. Legal rules are essentially mechanisms of social ordering, destined to pacify potential conflicts and to make legal security within the legal order, and peace within the society, possible. At the constitutional level, Law is used to solve fundamental conflicts that would render coexistence impossible or extremely difficult, unless they are channelled through the normative Constitution. In the European post-war societies, these conflicts are articulated through a large social pact (the Social State under the rule of law), which was, simultaneously, a big democratic pact (Constitutional State)*”.

3. From Constitution to integration: openness as a characteristic of the CRP in what regards international relations and fundamental rights

Approved and put into practise under a political and constitutional framework that assured it was a strong normativity, the Portuguese Constitution was never a closed constitution in what concerns external legal and institutional relationships. In fact, regarding international relations, it is important to recall that the CRP has assumed, since its initial version, a very generous approach of openness, manifest in its Articles

⁸ Konrd Hesse, *Die normative Kraft der Verfassung* (Tubingen: J.C.B. Mohr, 1959).

⁹ See, again, Francisco Balaguer Callejón, “El final de una época dorada”...

7¹⁰ and 8¹¹, foreseeing, first, the automatic reception of general and conventional international law by the internal legal order.

In the end, the emancipatory and optimistic narrative of the Constitution was reflected in the project for the insertion of Portugal in Europe and in the world that it established, since the original version of the constitutional text, under several distinct norms, which were maintained or deepened by several constitutional amendments. Actually, these amendments, especially the one approved in 1992, have brought changes that show a clear will of the constituent legislator of allowing and facilitating the integration of Portugal in the EU and the world. There are good examples of this phenomenon: the addition to Article 7 of the Constitution of a norm that allows an agreement with other Member States concerning the common exercise, through cooperation or by the Union's institutions of the powers needed for the construction of the EU [Article 7(6) of the CRP, added by the 1992 constitutional revision and further modified in 2004]; and the norm of Article 8(4), also added by the 2004 constitutional amendment, which implies the openness of the national constitutional order to the EU legal order, under the conditions defined by the latter, with the constituent legislator assuming the need to adapt the CRP to the new reality of “*inter-constitutionality*” or “*multi-level constitutionalism*”.

On the other hand, regarding the protection of fundamental rights, it must be noted that the constituent legislator chose to include in the CRP an “*open catalogue of*

¹⁰ Article 7 (International relations) 1. In its international relations Portugal is governed by the principles of national independence, respect for human rights, the rights of peoples, equality between states, the peaceful settlement of international conflicts, non-interference in the internal affairs of other states and cooperation with all other peoples with a view to the emancipation and progress of mankind. 2. Portugal advocates the abolition of imperialism, colonialism and any other forms of aggression, dominion and exploitation in the relations between peoples, as well as simultaneous and controlled general disarmament, the dissolution of the political-military blocs and the establishment of a collective security system, with a view to the creation of an international order that is capable of ensuring peace and justice in the relations between peoples. 3. Portugal recognises peoples' rights to self-determination and independence and to development, as well as the right of insurrection against all forms of oppression. 4. Portugal maintains privileged ties of friendship and cooperation with Portuguese-speaking countries. 5. Portugal is committed to reinforcing the European identity and to strengthening the European states' actions in favour of democracy, peace, economic progress and justice in the relations between peoples. 6. Subject to reciprocity and with respect for the fundamental principles of a democratic state based on the rule of law and for the principle of subsidiarity, and with a view to the achievement of the economic, social and territorial cohesion of an area of freedom, security and justice and the definition and implementation of a common external, security and defence policy, Portugal may agree to the joint exercise, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the European Union. 7. With a view to achieving an international justice that promote respect for the rights of the human person and of peoples, and subject to the provisions governing complementarity and other terms laid down in the Rome Statute, Portugal may accept the jurisdiction of the International Criminal Court.

¹¹ Article 8 (International law) 1. The norms and principles of general or common international law form an integral part of Portuguese law. 2. The norms contained in duly ratified or approved international conventions come into force in Portuguese internal law once they have been officially published, and remain so for as long as they are internationally binding on the Portuguese state.

3. The norms issued by the competent organs of international organisations to which Portugal belongs come directly into force in Portuguese internal law, on condition that this is laid down in the respective constituent treaties.

4. The provisions of the treaties that govern the European Union and the norms issued by its institutions in the exercise of their respective competences are applicable in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law.

rights". This solution, not very common in compared constitutional law, has revealed itself very useful for an "*inter-constitutional doctrine*" of fundamental rights and an important decisional tool. Beyond this, one should also remember that the Constitution establishes, in its Article 16, a principle of interpretation of all constitutional and legal norms that concern fundamental rights according to the Universal Declaration of Human Rights, as well as a principle of openness to the rights established in international sources of law, as the constitutional catalogue excludes neither them nor their application in the internal legal order. Therefore, with regards to the judicial protection of fundamental rights, one must take into account not only the rights expressly foreseen in the constitutional catalogue, but also the ones established in international law covenants, especially the European Convention for the Protection of Human Rights and Fundamental Freedoms (Hereinafter, ECHR). Having all this in mind, some authors mention a "*material meaning of fundamental rights*", which is translated into considering as such not only the rights whose wording may be found in the Constitution itself, but also all others that are similar from a material and constitutional point of view, and that have been established in catalogues of rights enshrined into treaties or international covenants.

However, it is imperative to recall that the CRP's catalogue of rights is longer and more detailed than both similar constitutional catalogues and most international human rights treaties, including the ECHR. The Portuguese Constitution even includes some of the so-called 3rd generation rights, such as the protection of personal data, administrative transparency, and guarantees in the field of bioethics. For this reason, it has not been deemed imperative to use international law norms as a criteria or autonomous parameter of validity in matters concerning fundamental rights.

As a result, in the recent past, the constitutional openness has corresponded, in the field of fundamental rights, and almost exclusively, to an additive process, a reinforcement of the protection conferred to individual rights, and an enrichment of the internal legal order, both through the application of international Treaty norms and through the influence, at the interpretative level, of the jurisprudence of some courts (such as the ECtHR in Strasbourg). For this reason, in general terms, and for decades, the end result of the influence of EU law in the internal legal order was also understood as a positive evolution, from which positive changes in matters such as equality (especially gender equality) would derive.

This constitutional view of the European Union as a project of social and economic progress is actually well stated in Article 7 (6) of the CRP often forgotten: The achievement of economic, social and territorial cohesion, of an area of freedom, security and justice and the definition and implementation of a common external, security and defence policy, are teleological and fundamental dimensions of the acceptance of the loss of sovereignty inherent "*to the joint exercise, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the European Union*". On this subject, Gomes Canotilho and Vital Moreira explain that "*as a legal and constitutional principle, binding for the entities that, in Portugal's name, share the exercise of powers, [the realization of the principle of social and economic cohesion] has an underlying basic idea: that the EU must be oriented towards the construction of a European Social State under the rule of law. Supranational sociality will imply, among other things, the articulation of the economic and financial convergence of Member States policy with the European Social Charter and the institutionalization of a European social policy (through 'structural funds', 'cohesion funds', 'professional qualification', 'labour protection', 'tax system'). It should be noted that the ample catalogue of economic, social and cultural rights enshrined into the Portuguese Constitution will not cease to impose, in this matter,*

a particular attention to the mutual effect between European social rights and constitutional social rights".¹² In the end, one may conclude, through the interpretation of this constitutional norm, that the sharing of sovereign powers with the EU is only allowed by the CRP to the implementation of a political, economic, and social project that is compatible with the Portuguese constitutional project.

4. The European consensus

To understand the jump from the Constitution to integration, and the problems that have emerged from it in the last decade during an economic and financial, but also social and political crisis, whose consequences Portugal and the EU itself, are still facing today, it is necessary to bear in mind the specific design of the European constitutional project. However, this is a particularly complex project, full of intrinsic contradictions. It aimed, in the first place, at creating a legal and institutional structure that was favourable to and enabling of a common market of services and capital, with social concerns being much less profound than that primordial purpose. By trying to integrate the so-called "*common European constitutional heritage*", for the last two decades, the EU has slowly developed principles and mechanisms of protection of fundamental rights, as well as a deeper meaning of some basic constitutional principles (such as equality or proportionality), without, however, managing to suppress the serious difficulties that prevent a full assimilation by the system of the elements with a social character, first of all, at the level of negotiation and approval of constitutional-type norms.

Actually, and unlike national constituent processes, in which several distinct social and political sectors were represented, and from which resulted negotiated texts that tried to balance conflicting interests, establishing a specific and coherent equilibrium between majority and minorities, in the different areas of collective life, the European constituent process was simply based on a compromise between different States' interests. However, these do not adequately represent the distinct worldviews and the specific problems of each national social sector, which causes the process to be distorted favouring the contingent political majorities, without adequate representation of each country's minorities. This way, internal conflicts that were framed by national constitutional law can no longer be solved in an appropriate manner, as the national sphere lacks sovereignty to do so – having ceded it in favour of the realization of a project that, as has been said, should promote economic, social and territorial cohesion – and the European sphere lacks representative pluralism. Internal social conflicts (of which the definition of the contents of labour law, social benefits and of the tax structure are clear examples) are, therefore, artificially transformed into conflicts between different levels of sovereignty and constitutionality, into a dispute between the EU and Member States, where the Union and its institutions often serve as justification for the adoption of measures whose compatibility with national constitutions is at least arguable. It was this transformation of social and political conflict into a sovereignty conflict that Portugal saw, during the period between 2011 and 2015, regarding the adoption of the so-called "*austerity measures*", when the discussion about possible public policies to address the crisis was changed into an opposition between the compliance with "*European agreements*" and the respect for fundamental rights enshrined in the CRP, with the Constitutional Court acting as main actor of a legal and constitutional, but

¹² See J. J. Gomes Canotilho e Vital Moreira, *Constituição da República Portuguesa Anotada*, volume I (Coimbra: Coimbra Editora, 2007).

mostly political, debate.

However, the loss of capacity of constitutional law to frame and solve social conflicts does not cause them to disappear. On the contrary, this kind of conflict is always present, in the social and political arena, and the erosion of the mechanisms of conciliation that were typical of the constitutionalism of the second half of the 20th century promoted their polarization and deepening, and not their resolution. Not even the courts, seen as the fundamental institutional guarantee of constitutional rights, were apt to give a sufficient answer to these questions. On one hand, because the loss of sovereignty affects all State's powers, and therefore the courts' judicial power is also diminished. On the other hand, because supranational judicial instances have demonstrated a weak capacity to understand the deep social conflicts lying under certain European legal solutions and to solve them under a European legal and constitutional framework, that reflects pluralism and is oriented towards a balance between social sectors. This problem is not new, and it is particularly striking when cases discussed in Court show a significant collective dimension, as the *Viking*¹³ and *Laval*¹⁴ sentences point out, or when such cases refer to complex and encompassing social policy questions, such as *Dano*¹⁵ and *Alimanovic*¹⁶ or the preliminary references regarding austerity measures that were rejected by the Court of Justice of the European Union (CJEU)¹⁷ may demonstrate.

Furthermore, it must be noticed that the centralization of the European political and constitutional space reduces pluralism and, as a consequence, limits the capacity to promote and debate, at least still intra-systemically, new solutions to social, political and economic problems affecting the citizens. The “*European consensus*” thus generated is not the result of a truly plural dialogue, but of the lack of alternatives. This way, it puts on the margin of political debate and of the construction – permanent and always renovated – of the overlapping inter-constitutional projects (the one of the EU, and the Member States) a significant – and growing – share of European citizens, who do not agree with the fundamental pillars of European policies. By driving the critics away and defining as contrary to the EU (and, as a natural consequence, rejecting) every political, economic and constitutional proposals that is perceived as anti-institutional or anti-systemic, and placing out of the debate its representatives, the European project loses the capacity of understanding conflict, as well as a basic capacity of synthesis between distinct solutions. Furthermore, it loses a significant degree of *constitutional imagination*, much needed to create and define new solutions to its intrinsic contradictions and its fundamental problems.

5. Of new conflicts and new consensus

Recent history is perhaps too close for us to be able to draw definitive conclusions about it. In the field of provisional balances, however, it is already possible to make a few statements.

First of all, it is my belief that the CRP has resisted quite well to the terrible

¹³ ECJ, *Viking*, proc. C-438/05, 11th December 2007.

¹⁴ ECJ, *Laval*, proc. C-431/05, 18th December 2007.

¹⁵ ECJ, *Dano*, proc. C-333/13, 11th November 2014.

¹⁶ ECJ, *Alimanovic*, proc. C-67/14, 15th September 2015.

¹⁷ ECJ has declared itself manifestly incompetent to review the compatibility of several austerity measures, in different occasions. See cases C-128/12, *Sindicato dos Bancários do Norte*, C-134/12, *Corpul Național al Polițiștilor*, and C-665/13, *Sindicato Nacional dos Profissionais de Seguros e Afins*.

challenges brought by the economic crisis of the last decade, with particular importance of the catalogue of fundamental rights and some of its institutional guarantees, namely, the courts. With imperfections and insufficiencies, as any human work that is created from conflict and political dialogue, but, above all, with a capacity to “*limit the exercise of power*” that is fundamental to call any legal order “*constitutional*”.

Secondly, the deficiencies of the European constitutional project in what regards the protection of the fundamental rights of its citizens were revealed. The possible mechanisms of defence against institutional decisions (eventually) contrary to the Union’s law, especially to the rights enshrined in the European Charter of Fundamental Rights, were shown to be inexistent or ineffective, incapable of being used by the common citizen or by civil society organizations, or even by their democratically elected representatives.

Thirdly, under the national constitutional legal order, much less complex than the European one, it was possible to find alternative solutions, and to redesign an important set of public policies, in a way that seems to be more according to the jurisprudential reading of the constitutional text, in a way that may still be framed by the EU constitutional project. This balance corresponds, largely, to the aspirations of Portuguese citizens, at least if we evaluate them by the growing tendency to trust the Government and the Parliament, as shown by the latest Eurobarometer: the percentage of Portuguese that trust these institutions are twice as high as in the previous inquiry and slightly higher than European average; the majority of which is favourable to the country’s integration in the EU is conserved.¹⁸

The EU remains, however, a hostage of difficult and precarious political balances, which render it impossible to create mechanisms of a constitutional nature that enable a more effective response to the fundamental problems, accentuated by globalization and the financial crisis, whose resolution must be found on the supranational (European) field, such as the management of migrations and refugees, the establishment of economic governance mechanisms and the coordination of public policies that effectively ensure economic and social cohesion among all Member States. Actually, the EU has not even been able to avoid, in an effective way, the threat to the fundamental principles of the democratic State and the rule of law that are posed by some Governments in its own midst, as the problematic relations with Hungary and Poland very well show.

In this time of decisions and crossroads, it is perhaps worth going back to the basic ideas of the constitutionalism of the Social State, which, with all the difficulties inherent to the new framework of inter-constitutional pluralism, have proved themselves to be fundamental tools to the solution of several problems. Truly representative institutions are mechanisms built to control the exercise of power, and ensure guarantees of defence of the citizens and democratic alternatives. To lawyers, and in particular to constitutionalists, belongs the important role of proposing ways of institutionalizing and executing these concepts in the very complex European context. It is urgent that we start.

¹⁸ See National Report of the Eurobarometer Standard 86, Fall 2016, available at <https://ec.europa.eu/portugal/sites/portugal/files/eurobarometro-standard-86-portugal-ppt.pdf>.