Asking for Directions: The Origins of Gomes Canotilho Directive Constitutionalism at the Crossroads of Contemporary Constitutional Thought

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Abstract: As part of a wider critical-reconstructive reflection, this foray into the theory of the directive constitution, advanced by Gomes Canotilho in 1982 and highly influential in Latin-American and Southern-European countries, hopes to capitalize on its inspiring suggestions, while making them available to a wider public. The attempt is to topically reconstitute the basic genealogy of Canotilho's proposal, by searching for some of its sources and tributaries within the context of: (1) the *New International Economic Order* and the *developmental constitutionalist projects* to which it directly or indirectly gave rise (particularly the Lusophone decolonial movement); (2) the wave of South European democratic transitions, especially in its revolutionary moments and attentive to the understandable commitment and socially transformative and emancipatory aspirations constitutionally assumed by then (in parallel with Spain and Greece), (3) the influence exerted by the post-war Italian and German constitutional doctrine, to the point of (a) allowing for Canotilho's inscription in an honourable lineage which dates back to Heller and Smend, and passes through Hesse, bringing him progressively close to Häberle, and (b) rooting the thesis of *dirigism* in the debate between Abendroth and Forsthoff with marginal regards to V. Crisafulli and P. Lerche.
Keywords: Constitutionalism; Directiveness; Portuguese Constitution of 1976; Gomes Canotilho

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A. Introduction

This study points its lights towards the ideas of *directive constitution and constitutionalism* (constituçao dirigente), theorized by the constitutional scholar Gomes Canotilho, on the basis of the Portuguese Third Republic's constitutional project, culture, experience and reality. In times of manifest political and legal bewilderment, such an evocation, at least nominally, of constitutional *direction* and *directiveness*, while highly pertinent and enticing, also bears something ironical and paradoxical, provocative and perilous.

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First of all, “directive” constitutional thought and practice allows for very different readings, prompting truly ambivalent effects: the *adjective* “directive” might well appear either as a self-deceiving overcompensation of constitutionalism’s weak power or ability to guide, direct and provide directions, or as a redundant reinforcement of *law* and *constitutionality’s normativity* and *righteousness*, in their intrinsically *di-rectional* intentionality (from *de-recho, di-ritto, droit, de-reito, dret, di-reito, Recht,* etc.), thus supplementing constitutionalism’s guiding’s strength.[1]

Secondly, in any of the said cases, it also contrastingly highlights the current lack of directions, on the one side, and the entrenched bias against the possibility of even conceiving *of* and struggling *for* them, both individually and collectively, in terms of grounding, constitutive and regulative constitutional ideas and their transformational praxis (just when we needed them most).

Meanwhile, searching for orientations with regards to (but also through) constitutionality (considered as a crucial normative guidance), within a modest quest for its specifically directive or directional contents and forms, gets us deeper into questions of practical (i.e., not necessarily metaphysical) *meaning*, leading to its thematization from a really *radical* point of view: could not and should not constitutionality become, be seen or reencounter itself, as (x) a specific *sense* of political morality, political *ethos* or *Sittlichkeit,* (x) midways between ideological and pragmatical political options and legal judicially enforceable constraints, (x) discerned amidst (or distilled from) the plurality of extant or past constitutionalisms, constitutional imaginaries and experiences, texts and stories and (x) available for systemic internalization or reiterative universalism, that is, prone to new embodiments, in new supranational spaces, transnational networks, societal spheres, states and cities?

Whatever the answer, *directivity, regulation, ruling, governing* tropes all belong to the same semantic constellation, opening to the symbolic realm and the imaginary horizon where specific politics and law are closely held together, in unsolvable nested conflicts (recreated within the different societal spheres), and thence hindering the search for *Verfasstheit* as a specific *Sinn* of constitutive and normative correction and rectification, i.e., *righting transformation* of the world.

Moreover, the feelings of loss and disorientation (with their subproducts of despair, resentment or self-delusion), reign unparalleled across the entire constitutional landscape, affecting not only its general theory and practice, but also directive constitutionality, in

1 According to Romanists like Alvaro D’Ors (or Sebastião Cruz, in Portugal) the word is formed by an intensifier (de) and the substantive *rectum*, which designates the pointer of old scales (in Portuguese called the *faithful*). Both translations are obviously very significant. The device’s objective is to precisely ascertain the equivalence between the weighted objects. When the plates are at exactly the same level, the pointer stands in a completely or rigorously (*de*) straight (*rectum*) position (at least, if the scale is tuned or calibrated).

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particular. In fact, the disenchantment[2] provoked by the defaults and deceits of directive constitutionalism in Brazil[3] and its growingly revisionist impugnation in Portugal, runs parallel to some of the discomfort perceived by the proponents and supporters of *transformative constitutionalism* or *neoconstitutionalist* strands of thought, in general, but more acutely perhaps in Latin or Hispanic América. Both plead for an urgent reassessment and reappraisal, apt to discern and ascertain their irrecusably positive achievements and their contextual explanations, justifications, incarnations and significations; but also to critically rationalize and hopefully escape the sort of trap they somehow lured themselves into, by betting on a risky and eventually counterproductive juristic, judicial and human-rights-based drift, while searching for a - still indispensable – overall developmental and *right-ing* effectiveness of the constitution.

After all, under such guise, it seems fair to ask whether transformative and directive constitutionalism will still represent a progressive move or turn into regressive drives instead. Do they signal positions of retreat and retrenchment or advanced posts, towards significant conquests? As such, the conjunctural analysis hereby required - further entailing other, more structural inquiries - also recalls some nuclear quandaries and dilemmas, paradoxes and promises of what could be dubbed the *positive*, *social*, *welfarist* or *developmental constitution*; and, through this model, of *constitutionality* itself.

With directive and transformative constitutionality, in particular, the idea that democracy works under *legal conditions, limits and processes*, but without any appointed *legal ends, goals or tasks* suffers a *correcting twist*, ultimately based on a different understanding of freedom and its relation to social reality, through the mediation of law and politics: individual and collective freedom cannot be assumed without certain constructed circumstances, and should not be equated, then, with mere political independence and spontaneity but include participatory and positive elements as well. Obviously, though, *scepticism* toward this and similar conceptions, on the one hand, not to mention law and politics' capacity to operate as desired, on the other, is shared by many.

But can some sort of directive constitutionality provide us with an alternative to the reinstatement of empty *formal normativisms*, irrational *material ordinalisms* or crypto-natural law totalisms, after the crisis of *material functionalism*, and under the conditions of globalism and fragmentation, outlined by autopoietic systemics?

2 *Günter Frankenberg*, Comparative Constitutional Studies: Between Magic and Deceit, Cheltenham Massachusetts 2018.

3 *Luciano Scheer / Alfredo Neto*, Constitucionalismo contemporâneo e a constituição brasileira de 1988: uma análise dos impasses à constituição dirigente, Cadernos do Programa de Pós-Graduação em Direito PPGDir./UFRGS 12 (2017), pp. 156-171; *Nelson Moreira*, Constitucionalismo Dirigente no Brasil: em busca das promessas descumpridas, Revista de Direitos e Garantias Fundamentais 3 (2008), pp. 87-128; *Cláudia Carvalho*, Desafios democráticos para a constituição dirigente: entre vinculação e abertura constitucional, Revista Jurídica da Presidência Brasília 14 (2012), pp. 357-381.

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Within the wide spectrum of *constitutionalisms* at offer, against the hegemonic neo- and ordo- liberalism, its constitutional ordering and the tendencies for constitutional revisionism, directive constitutionalism shares concerns with *neo-constitutionalism* (insisting in the normativity of the constitution, judicially enforceable by renewed activist courts) and the *new deliberative or dialogic constitutionalism*, or, after its own cultural and systemic turns, with *European constitutional inter-culturality* and *South-American common (transformative) constitutionalism*, with *transconstitutionalism* and *cosmopolitan constitutionalism.* However, the differences (especially in relation to the first strand), are also quite clear, and probably growing.

Nevertheless, the point is that directive constitutionalism (as constitutionality itself) tough seemingly lost among the profuse jungle of appeals, seductions, contradictory injunctions and signs, already conveys a specific and intrinsic pro-(or tra-)jectuality which betokens a highly problematic but excitingly promising idea of directionality, pregnant with normative and juridical significance. New directions are in need and directive constitutionalism may be one of them. But where to, then? Well, the Cat's advice to Alice probably needs an addition: before knowing where to go, we need to know where we are. So, for the sake of this study, where do Canotilho and his theory stand? What do they stand for? Where do we stand in relation to it? What are their standings within constitutional theory in general?

In the following pages, we will mostly consider where this proposal's promising flights take root: first, by bringing out its alleged original sins and the shadows they still cast over the subject, in order to deconstruct, although topically, much of that 'archaeological' criticism; then, in an effort to reconstruct the genealogy of his doctrinal building, through a national and international, cultural and specifically legal contextualization. Previously, though, a basic presentation of the said theory or doctrine (let us not distinguish them here) is of the essence, even if its further reformulations can only be dealt with in another opportunity. In the short space available, the endeavour will not go beyond a quick panoramic view of the original version of directive constitutionalism, outlined by Canotilho in his doctoral thesis, topped off by a mere glimpse of the self-critical reconstructive reflection that it underwent, over time, and which is emblematically represented by the preface to the second edition of that dissertation, published around 20 years later[4].

4 *José Joaquim Gomes Canotilho*, Constituição Dirigente e Vinculação do Legislador: contributo para a compreensão das normas constitucionais programáticas - Tese de doutoramento em Ciências Jurídico-Políticas apresentada à Fac. de Direito da Univ. de Coimbra, Coimbra, 1982. The dissertation was immediately published by Coimbra Editora. The second edition, from 2000, fully maintains the original text but is accompanied by a preface, in which the subject is radically reconsidered. The proloquium in question corresponds to an article initially published in Spain, and later in Brazil, and currently available in *José Joaquim Gomes Canotilho*, Brancosos e Inconstitucionalidade: Itinerários dos Discursos sobre a Historicidade Constitucional, Coimbra, Almedina 2006, as „Rever a ou romper com a Constituição Dirigente? Defesa de um constitucionalismo moralmente reflexive", pp. 101 ff. Since the body of the main text remained unchanged, including with regard to pagination, all the pertaining references apply to any of the editions.

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B. Directive Constitutionalism in a Glimpse

I. The Starting Model

Bearing in mind that constitutional discourse is always conditioned by an *episteme* of material relations and non-discursive practices, Canotilho praises *critical hermeneutics* as a way of keeping under control the directing interests of the cognitive process, directly addressing the *Vorverstandis and the Verstandnis* behind his work. Impossible as it is now, to to do justice to the philosophical, theoretical, doctrinal and social-scientific complexity of Canotilho's work, only some due words.

First of all, *directive constitutions* and an *appropriate theory of directive constitutionalism* only make sense against the background understanding of *reality as a task*, an *Aufgabe*, an ongoing problem incumbent on man, as his own individual and collective, common and shared responsibility, notwithstanding the complexity of means, intermediate institutions and processes involved. Therefore, the idea of *conforming* or *transforming* society in a determinate historical situation, constitutes in itself an open question, an open problem[5].

Secondly, instead of any prior inquiry into the *axiological* grounds of the normative-constitutional order, Canotilho raises the already *legal-politically* oriented concept of *legitimacy* and *legitimation* to the central vertex of his theory, making it depend on the double vectorial convergence of *legal-constitutional and theoretical-legal aspects* (the latter indeed connotated with the material foundation of the normative order) on the one side, and political-constitutional dimensions (essentially captured by the *sociology of domination*) on the other.

However, though refusing any fundamental reference to all sorts of archetypal groundings[6] he does not shy away from substantial normative foundations, still appealing to a notion of *general legal conscience*, and grounding constitutional legitimacy on constitutionality's *dignity or worthiness of recognition*, through the setting of ends and tasks that are incumbent on the state.[7] The legitimation of the constitutional order entails the problem of establishing some *common right* as well as a *right direction* – in no way satisfied either with formalist theories, purely procedural conceptions, or neutral and neutralizing understandings of the transforming social effectiveness of the constitution.

Regarding its *epistemic location*, the problem of the *directive constitution* is cut out as a question of (a) constitutional theory, (b) legal-constitutional doctrine, (c) legislation theory,

5 *Gomes Canotilho*, note 4, pp. 69-71.

6 *Ibid.*, pp. 30 ff. and 38 ff.

7 All of this seems to prove the intimate relationship between foundations and ends, practically-institutionally mediated by the *dialectic of praxis,* which I have allowed myself to partially derive from Canotilho's thought. The dynamic praxeological intentionality at stake could perhaps be approached, then, through the dialectical and recursive mediation of the latest *institutional thinking*, to a practical pragmatic *teleology of ends and tasks*, transformative of *legitimation* itself; or, even better, as *an axiotelic nomos* strongly supported by the *actantial estructures* or forms of *agencing* and *agency* (in so much as they are still viable in polycontextualised societies).

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(d) constitutional methodology and (e) legal theory.[8] Without prejudice to the depth and latitude of his evinced pre-understandings and motives (namely the philosophical-political ones), one is led to assert that the thrust of Canotilho's work stems from the *scientific interest* in the accurate theorization of the Portuguese constitution and its most conspicuous tenets, hardly captured by some of the standard schemes of mainstream (specially anglophone) constitutional theory.[9]

The ensuing intellectual challenge can be resumed very simply: how to *theorize* a constitution like the Portuguese – one that elevates the principle of the Welfare State to constitutional status and dignity, therefore aspiring to a conciliation, combination and possible synthesis of the *rule of law* with (not only *political* but also *social*) *democracy*, namely through a list of economic, social and cultural rights, principles and impositions, which restrain the Legislative's freedom of purposes.

Thence, according to Canotilho himself, the central problem of the *directive constitution* pertains to the realm of *practical philosophy* on the one hand, and the *politics of justice* on the other, essentially contending with the quest for the legal-constitutional institutionalization of *just politics* and *common justice's* fundamental criteria[10]. Buttressing this mindset stands the declared belief that *men* (always) *try to shape the future, in the conditioned circumstances in which they find themselves*. This certainly calls for the right *processes* to attain just solutions, but clearly transcends them – *from* and *to* politically and culturally shaped history – in line with an *actionist or activist philosophy* of praxis, *incompatible with any type of legal, sociological, or scientific positivism*. In fact, we are

8 *Ibid.,* pp. 11 ff.; 164-165; 175, 183, 189, 202.

9 “Four orders of concerns overloaded our research notebook when we analysed the problematic of the directive constitution: 1. Understand the Portuguese democratic constitution of 1976, declaredly committed to serving as an Archimedean lever to a historical process of profound political, social and economic transformations; 2. Explain the structure of constitutional norms and understand the shift in doctrine towards unreservedly recognizing the legality, bindingness and direct applicability of the so-called programmatic constitutional norms; 3. Analyse the reason why a part of the doctrine would express passionate criticism to the well-known phenomenon of 'majority obstructionism' leading to non-compliance or non-compliance with the constitution. (…) 4. Subject to a dogmatic sieve the principle of the normative force of the constitution, putting in check the well-known doctrine of the legislative function's freedom of purposes”, *Gomes Canotilho*, note 4, Brancosos e Inconstitucionalidade, pp. 206-207. These driving concerns challenged the imperatives that Canotilho expressly assumed, in his quadruple facet of *citizen, constitutionalist, jurist and cultivator of legal dogmatics*. Under the first mask, he believed in the potential of constitutional rules to boost the process of political transformation. In his second clothes, he considered himself obliged to deepen, in analytical and typological terms, the rich form of constitutional norms. As a praxeologically committed jurist, he thought he should ask himself about the intrigue of many constitutional norms fiercely criticized almost immediately after their approval by the constituent assemblies and thus victims of persistent (and selective, would be fair to add) political erosion since the first hour. The last theme, in its turn, was suitable for a dogmatic analysis of concepts - frequently used, but seldomly cut with enough rigor - such as legislative discretion or the legislator's freedom of conformation, *Idem*, pp. 207-208.

10 *Gomes Canotilho*, note 4, pp. 22, 24,

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told, *the aspirations for social change through law will only avoid reckless idealism* if they duly take into account the *social context* and the prevailing *epistemic paradigms*.

This being said, Canotilho's study focuses its attention in the *boundness of the legislator* to a set of constitutionally *binding* material *directives*, exemplarily represented by *constitutional impositions*: that is, constitutional norms of a finalistic nature not limited to an expression of sheer *aspirations*[11], mere *commitments*[12] or simple *political programs*. Not that the latter have disappeared, though. The point instead, lies in the acknowledged and discussed existence, along these categories, of new concrete *positive duties*, i.e., impositions of specific normative (but also material) actions, impending upon the legislator. This way, the societal and political conditions of democracy and collective autonomy are assumed, at the constitutional level, as an ongoing enduring responsibility or task, translated into specific obligations, part of them immediate and *perfect*.

From a theoretical point of view, committed to the heuristic of new solutions and the rationalization of pre-understandings, Canotilho scrolls through a set of theoretical conceptions about the constitution, critically assessing their fundamental propositions, so as to demarcate directive constitutionalism.

Dogmatically, as it follows from the above, the heart of the matter resides in the legal categories and institutes of constitutional impositions and legislative omissions, fundamental rights and the principle of equality, even if a wide array of other aspects were also worth mentioning: the complex interaction between *economic, social and cultural constitutionalism* and its (often disregarded) diverse dimensions, or its relationships with rights, freedoms and guarantees, and the new figures (very arguably) included in the third

11 This qualification does not necessarily lead to some normative drainage of the constitution. On the contrary, especially in its eminently North American context, *aspirational constitutionalism* purports to challenge the hegemony of an exclusively conservative conception of the constitution, supported by *judicial precedent-ism* in the defence of entrenched constituted rights, therefore upholding a *prospective* constitutional interpretation instead, see *Robin West*, The Aspirational Constitution, Northwestern University Law Review 88 (1993), pp. 241 ff.; *Michael Dorf*, The Aspirational Constitution, George Washington Law Review 77 (2009), pp. 1631 ff.; "Aspirational constitutionalism refers to a process of constitution building (a process that includes both drafting and interpretation by multiple actors) in which constitutional decision makers understand what they are doing in terms of goals that they want to achieve and aspirations that they want to live up to. (…) Preambles are one good place to do this in the more abstract form (…), but choices of institutional design and arrangements of lists of rights can do this as well", *Kim Lane Scheppele*, Aspirational and aversive constitutionalism: The case for studying cross-constitutional influence through negative models, I.CON 1 (2003), pp. 296-324; see also *Stu Woolman,* Understanding South Africa's Aspirational Constitution As Scaffolding, New York Law School Law Review 66 (2016), pp. 283 ff.; also focusing on the constitution, despite an initial reference to law (in general), *Kermit Roosevelt III*, Law's Aspirations, Journal of Law and Interdisciplinary Studies 2 (2012). According to the author, an aspirational provision has to fulfil three criteria, thus presenting three main characteristics: *defining a purpose*, which appears *initially unfulfilled*, and *that directs later change.*

12 *Cass Sunstein*, The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever, New York 2004; in Portugal, *Luís P. Coutinho*, Direitos Sociais como Compromissos (Social Rights as Commitments), e-Pública 1 (2014), pp. 86-98.

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generation of rights; the material and intrinsic importance assumed by *procedural and procedural provisions*, as well as by *organic arrangements*; and (in association with the former) the centrality of *institutional guarantees* (*Einrichtungsgarantie*), radically reconsidered, as intrinsically valuable constitutive mediations, in terms already touched on above.[13]

As far as rationality and method are concerned, Canotilho detracts from pretenses of value-freeness (*Wertfreiheit*), advocating an assimilation of the legal discourse to the *ratio* of the Democratic-Constitutional State, and the consideration of constitutional problems in terms of pconcretization, although avoiding the usual methodological inversion of reducing the former to mere acts of application and conceiving the questions thereby posed as strictly methodological and interpretative issues: on the contrary, the constitutional method (*Verfassungsmethodik*) herein furthered leans towards a *continuum* of regulation, where the primacy belongs to the legislating entities, but – let me add – whose *agencements* do not necessarily end with them.

II. The Turn

In the second edition of his book on the directive constitution[14] Canotilhos's thought undergoes an expressly admitted change, both detracted and praised as a real and radical inflection. This *turn* and its disparate interpretations have generated an intense debate,

13 In fact, the conception of schools or hospitals as institutions for the realization of economic, political and social democracy and nourishment of republican virtues of citizenship represents one of the great bones of contention between the doctrine, since it is sometimes portrayed as an example of ideological *encystment*, when, quite to the contrary, it can (and should) also be upheld against technological reductions, which turn those organizational human constructs into functional devices for the exclusive achievement of measurable results. Trying not to sacrifice reality, I have been betting on this practical-cultural recovery of constitutionalized institutions as worlds of life committed to an intrinsically valuable actualization of equality and democracy principles which indirectly reinforce, as recognized positive social determinations, those systemic- intended functions, themselves the object of legal claims as fundamental rights (to health, to education, etc.). Thus, the advanced call for new institutions able to enforce this material constitutional ethos, complexly constitutionalizing the failed experience of administrative regulatory entities, engaged in the marketization of all social subsystems, as to preserve their autonomous specificity on the one hand, but also, to force the internalization of constitutionality, something which can also be thought of and attempted, at an institutional level. Mediated by them, and beyond the specificity of *social rights* and their regime, *public social policies* for their realization have been the subject of long and unextinguished debate also in Brazil, especially regarding judicial review. As for Portugal, the most emblematic doctrine would be (along with the control of omissions, referred to below), the *prohibition of non-regression*. According to authors like M. Nogueira de Brito, the latter is able to X-ray both the rise and fall of directive constitutionalism itself, within the jurisprudence of the Constitutional Court [One axial precedent on the subject is the Constitutional Court Decision, regarding the creation of the Portuguese social insertion income (Acórdão TC, nº 509/2002, from 19-12-2002]. Curiously enough, the realist (not to say cynical) dismissal of that doctrine is clearly at odds with the consolidation of the principle of progressive realization of social rights at the international level.

14 *Gomes Canotilho*, note 4.

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especially in Brazil, where the original torch had been received and widely used to shed light into the 1988 Constitution; to the point of justifying a typological analysis of all its expressions and metamorphoses, which, I suggest, might be organized along a spectrum demarcated by *death* certificates and *survival* claims, filed under the titles of *specifications*, *restrictions,* and much denounced *inversions.*

At the same time, the updated version of Canotilho's standings not only on the subject of the directive constitution, but also, and above all, regarding constitutionality and constitutionalism, in themselves, can arguably be grasped , if I see it correctly, with reference to six main acquisitions, which can only be enunciated in the present move: the incorporation of current social systemic conditions, a thickening normative reflection, more sensibility to context variations, openness to internationalization, attention to the renewal of administrative directiveness, and the rethinking of its republican implications.

C. Scavenging Some Roots

I. Archaeological Disputes

One of the most frequent observations regarding Canotilho's thesis concerns its supposed permeability to the strong political-ideological influence of Marxist Communism in the immediate post-revolutionary period – within a process that, according to the dominant narrative, began its decline precisely with the elections for the constituent assembly, and knew its key, pivotal, moment with the end of the *Ongoing Revolutionary Process* (dubbed as PREC, in Portuguese)[15], on the 25th of November 1976. Constitutional revisions would later seal the defeat and erase the main traces of a socialist project still surviving in the (hence so contested) Preamble. As representative democracy prevailed over popular power – so the story goes – the constitution would have appeared to the revolutionary parties as a way of imposing by normative means what had been *lost* in the ballots (from a popular-democratic point of view).

However, no swift transition, fluid continuity or translational equivalence between a general worldview, open to several ideological assimilations, and a party's political program, or between them both and an internally very diverse, and of debatable influence, legal current in Portugal, should be so lightly and unproblematically accepted.

15 Acronym for *Processo Revolucionário Em Curso*, which designates the radically popular-democratic momentum and swift, experienced by the Portuguese post-revolutionary regime, between a failed right-wing coup d'état on 11 March 1975, and the military moderate overcoming of the confused situation created by an allegedly imminent far-left coup d'état, and the perspective of a right-wing reaction to it on 25 November of that same year. It was a period of instability and turmoil, social agitation in the streets, and irruptions of violence at the political extremes, marked by the nationalization of companies, the forcible occupation of land within the scope of a strongly resisted agrarian reform, party and union demonstrations, as well as by the prominence of the COPCON (*Comando Operacional do Continente*, that is, *Operational Command of the Continent*) and the most ideologically tainted factions of the armed forces.

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Moreover, regardless of all the above, it would always be questionable how come should the adherence to the postulates of legal Marxism necessarily entail, as a matter of principle, any form of theoretical or doctrinal anathema. Be as it may, there is no need to go that far since Canotilho himself - never hiding his pre-understandings - leaves little room for speculations in relation to the putative subscription to the legal Marxism of which he is ‘accused: admittedly built upon a Marxist, decisively non rigid, philosophical worldview, one will certainly struggle to find in what sense or to what extent could his work be seen as owing something significant to Pashukanis, and even less to Struve, Berdyaev or Bulgakov. The furthest he goes in that direction is when he configures the constitution as a statute of social and state order, «*which necessarily reflects, more or less intensely, the constellation of political forces and interests that were at its genesis*» and therefore, the *real constitution* that underlies it. And even so, the monocausal reduction of the constitutional phenomenon to an automatic reproduction of social reality is immediately rebuked, namely when likened to a textual positivistic entrenchment of the interests of the ruling classes in guise of society’s ideological superstructure.

More than that: against any hypothesis of parasitical dependence upon the economical magma of productive relations, in particular, Canotilho categorially asserts constitutionality’s relative autonomy, with the consequence that the theory of the constitution must never be transmuted into a mere critique of political economy or – even less perhaps – into an economic theory of constitutionality. Therefore, neither the economic determinism of less sophisticated (or more orthodox) Marxist strands of thought nor any other juridical-political *economicisms* each with its (declared or not) ideological filiations – gets a great shelter from this theoretical elaboration.

Discarded as this *economic functionalism* may have been, other legitimate suspicions could still arise, namely concerning Canotilho’s eventual concessions to *normative formalism*, which often, and more or less inadvertently, ends up paying lip-service to the former, or to other *material finalisms* and their *technological-social consequentialism*- a threat and a trend , consistently contested both by practical-cultural theories, and by the autopoietic overcoming of critical functionalism and cybernetic systemism.

The construction of Canotilho does not escape all these objections with the same ease. However, the critical reflexive judgments and deontic dimensions of normative regulation he calls upon do not smoothly yield to any sort of instrumentalism. Besides that, directive constitutionalism lends itself to interpretations that are likely to accentuate practical or at least pragmatic components to the detriment of possible temptations of social engineering and to critically shape the remnants of centralized and strictly hierarchical political and legal conformation of society in the name of societal heterarchical polycontexturality.

Instead, what would appear as hardly legitimate, despite the realistically recognized importance of the material constitution, would be the assimilation of such materiality to the real *substantia* of any rational natural law, some regional *Natur der Sache* or the Schmittian *concreteness* of a *pre-legal concrete order*.

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II. Genealogical Re-Construction

To reconstruct the genesis and transformation of *directive constitutionalism* some aspects of the respective historical context of emergence are worth mentioning. We can array them on three levels, discriminating (1) three converging international factors (2) the traits directly related to its Portuguese roots or associated to the national assimilation and translation of exogenous influxes (including the dialogue with its Brazilian counterpart) (3) its legal ancestors, both national and foreign, and (4) some life-long academic partnerships.

1. International confluences

Despite the autochthonous features and the specific circumstances enfolding the Portuguese constitution, her igniting political-revolutionary movement, the constitutional project therein unleashed, and the concurring streams of constitutional thought that shaped its legal text, enveloping culture, and performative interpretation, are a full part of world history's *long-time structures* and conjunctural frames and tendencies.

The same goes for the leading constitutionalism that intended to theorize the socially transformative vocation of the constitution, as it revealed itself, whether macro-, meso- or microscopically, throughout the various parts of the text and in a particularly intense way in a special set of concepts, categories and institutes.

a) New International Economic Order

Tearing down the last remaining colonial empire, in an overall international *environment* yet marked by typical Cold War proxy conflicts, with an authoritarian Spain as neighbour, and collimating the universal institutionalization of a Social State in counter-cycle with the main economic trends fostered by the stagflation crisis and its aftermath[16], the constitution of the third Portuguese republic was not alien to the global geopolitical context, reflecting, among many others, the hopes most part of the newly decolonized or recently democratized countries still placed in the conciliation of social, economic and cultural development with Political Democracy and the Rule of Law, essentially under the badge of the United Nations Human Rights Declaration and Pacts.

This sort of *third (and a quarter) way* (borrowing the later expression from Baudrillard), politically represented to a large extent by the *non-aligned movement*, had one of its fundamental expressions – unfortunately quite forgotten, as Samuel Moyn recently pointed out – in the set of proposals known as the *New International Economic Order* (NIEO).[17] In fact, recently decolonized countries which had just gained political and *de jure*

16 That had already wilted the flowers of the youthful spring of '68.

17 From its beginnings in 1964, the United Nations Conference on Trade and Development (UNCTAD), along with the associated Group of 77 and the Non-Aligned Movement, was the central forum for discussions of the NIEO.

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sovereignty still felt that they were victims of economic *colonization*. At the same time, all the world was confronted with galloping indexes of inequality between developed and underdeveloped countries.

The idea *of a new international economic order* called up for changes in trade, industrialization, agricultural production, finance and transfer of technology in order to end economic colonialism and international dependence through a new paradigm of global interdependence. The movement gained momentum and produced some results within the International Community, ultimately influencing the UN Agenda: in 1974 the United Nations General Assembly adopted the *Declaration for the Establishment of a New International Economic Order* and a few months later the *Charter of Economic Rights and Duties of States*. Later, it would contribute to the formulation of a *new right to development* and more recently influence a non-strictly economical (and less based on the GDP) conception of development, equated with *Freedom* (Amartya Sen) or *Prosperity* (Tim Jackson).

Nevertheless, the United States opposed and boycotted the movement since the beginning. The Washington Consensus[18] at the dawn of the eighties as well as the fall of the Berlin wall and the diagnostic of the end of history (roughly one decade later) hammered the last nails in the coffin. Some *ghostly* meetings continue to take place and in 2018 the UN General Assembly even adopted one resolution – named Towards a New International Economic Order - where she reaffirmed *the need to continue working towards a new international economic order based on the principles of equity, sovereign equality, interdependence, common interest, cooperation and solidarity among all States*. But the vitality had gone and the underlying economic conditions and hegemonic conceptions were no longer present.

It would now be interesting to test the compatibility of *this still industrial and productivist model* with the environmental concerns which also exploded during the 1970's (especially on the back of the nuclear issue), exploring the dialectical fecundity of social and ecological transformative agendas in times of pervading post-material causes. For some countries it may be too late after years of geological extraction, natural exploration, social disintegration and cultural uniformization. Others may be sufficiently *underdeveloped* for that or not so *maldeveloped*. Curiously, the Portuguese constitution honouring the country's Medial (literally Mediterranean)[19] condition of *northern's south* and *southern's north* not only endorsed this *developmental conception* but also trailblazed the recognition of envi-

18 Before the Washington Consensus and the emergence of liberal human rights as *the* new moral (hegemonic) language, the relation between rights and development was still an open path, the economy could still be treated as a political normative question, the dreams of democratization were not confined to a progressively restricted political sphere. Undeveloped societies, building from the ground up, could search for an alternative both to industrialized-led Keynesian consumerism and its financialized, credit-based hypertrophied neoliberal avatar, which promised the substitution of direct political power and responsibilities, agency and conflicts, social redistribution and equality, by peace, social benefits, identitarian recognition, and political delegation in an evident path of growing idiocy.

19 *Geographically Atlantic but culturally Mediterranean*, according to Orlando Ribeiro.

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ronmental rights, among a robust catalogue of other social warrants, and against the backdrop of a mixed constitution. Turns out that the certificates of caducity and obsolescence issued to the Portuguese developmental constitutionality may have been a bit precipitated, now that even in the USA anti-oligarchic, socializing and egalitarian intentions are consistently assigned to a proper understanding of constitutionalism and deemed as truly essential constitutive dimensions of socially just contemporary polities.[20]

b) Southern European constitutional waves after the dictatorships[21]

As we just saw, like other developing countries, Portugal also felt the need to recover from a huge historical lag (in the social qualification of its citizens and overall collective life) responsible for the perpetuation of very serious existential deprivations and huge inequalities. Waking up from 48 years of authoritarian induced sleep, tired in a corporative corset, it was imperative to recover quickly from the narcolepsy through the promotion of a democratic culture of freedom in the political and public sphere (or its functionally differentiated arenas, across all the sectors of society).

Before transitional studies entered their critical and mature phase, one of the prevailing narratives of this evolution was due to Samuel Huntington. In fact, according to his 1993 book, '*The Third Wave: Democratization in the Late Twentieth Century'*, Portugal, Spain and Greece formed a *New European South*, which pioneered the movement of democratisation taking place in the late seventies and early 1980's. This tide, which allegedly had begun to rise with the end of the Portuguese dictatorship, would have been preceded by two others: the first one developing slowly from 1828-1926 and the second beginning during the Second World War. Both were followed however, by reversing movements. The first started with Mussolini's march over Rome and spanned from 1922 to1942; the second began by the late 1950's when regime transitions took on a heavily authoritarian cast.

20 *Michel Rosenfeld*, A Pluralist Theory of Constitutional Justice: Assessing Liberal Democracy in Times of Rising Populism and Illiberalism, Oxford/New York 2022; *Joseph Fishkin / William E. Forbath*, The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy, Cambridge Massachusetts 2022*; Ganesh Sitaraman*, The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic, New York 2017; *Frank Michelman*, Constitutional Essentials: On the Constitutional Theory of Political Liberalism, New York 2022.

21 *Pamela Radcliff / Kostis Kornetis / Pedro Oliveira*, The Southern European Transitions to Democracy: A Historiographical Introduction, Mélanges de la Casa de Velázquez 53 (2023); *Kim Chrisriaens / James Mark / José Faraldo*, Entangled Transitions: Eastern and Southern European Convergence or Alternative Europes? 1960s–2000s, Contemporary European History 26 (2017), pp. 577–99; *Luís Meneses do Vale*, Os 'trinta dinheiros' da Mesquita e as 'voltas' da Giralda Sobre a amortização eclesiástica dos bens públicos em Espanha, depois da Reforma Aznar (The 'thirty pieces' of the Mosque and the 'turns' of the Giralda; On the ecclesiastical amortization of public assets in Spain, after the Aznar Reform) (unpublished, but summarized and with some additional references here: https://apps.uc.pt/mypage/files/lvale/1757).

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Putting aside several other flaws and shortcomings, this model fails to explain later transformations, particularly in Eastern Europe and Latin America, the first ones clearly debunking the necessary association between capitalism and democracy. In spite of that, it signals some consequential historical conjunctions and in what regards the southern countries in particular, an auspicious impulse, unfortunately too often overlooked, within the EU they all came to join years later. With undisguised condescension, the democratization processes in these countries tend to be seen as experiences with little to offer in terms of political culture.

c) Italian and German post-war doctrine

From a specifically academic and legal point of view the new constitutional order meant an express alignment with the best international examples, joining, with many years of delay, the lot of the most advanced countries, in the adoption of normative democratic constitutions and constitutionalized legal systems.

Indeed, one of the previous regimes' most distinctive characteristics despite its military origin and apparatus[22] on the one hand, and religious inclination on the other, lied in the boasted secular and civil nature of the executive, which concentrated the bulk of the State's Powers under the control of the President of the Council – Salazar (and later Caetano) – and always included the presence of eminent Legal Scholars[23]..

Not having ignored the latest developments in legal and political thought, legal scholarship at the university still ended up making selective use of them, cultivating an academic

22 Very evident in the case of the presidency of the republic, which has always been occupied by a military man.

23 In fact, neither the former monarchist aristocracy, nor the Catholic Church, or the military structure (whose influence was largely surpassed by that of the police bodies, especially political ones, at least until the colonial war) ever threatened political power. On the contrary, however, the Government accused the very strong influence of a *court* of robed nobles, i.e., of academics from Coimbra and Lisbon. These were responsible for an indisputable evolution and reform of the Portuguese civil law, but the major changes, following the latest international doctrines, left untouched all aspects (of organization and political-administrative functioning, for example) likely to threaten the status quo. Neither *God, nor the Fatherland or the Family* were questionable (according to one famous seminal discourse from Salazar in the 30's), political discussions (contrary to the national monolithic public interest), were dismissed as inherently inutile, factious and suspiciously subversive and social (labour) struggles and conflicts neglected in the name of a supposed corporate harmony between employers and employees (instead of classes), organized by professional sectors (but, strictly speaking, with little translation from an effective point of view).

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independence in practice equivalent to the cancellation of subjects - especially political ones (obviously most prone to ideological infiltrations) - adverse to the regime.[24]

The practical-legal irrelevance as well as the political-social atrophy and ineffectiveness of the constitution (merely nominal in its normative part) concealing the persistence of a sort of legal-civil constitutionalisation[25] reflected, in a very interesting way, the contours of that peculiar regime: essentially authoritarian indeed, but also with totalitarian tinctures[26] which manifested themselves under relatively discrete forms of normalization and control. Later on, despite the influence of French examples on the 1975 Constituent Assembly (regarding presidentialist features, for instance), the pristine familiarity with Italian and German literature, casuistry and legislation, especially in Coimbra, stood up as the main source of inspiration when the moment arrived for a democratic constitutionalisation of the legal, political, economic and social order. Shortly said, it is perhaps not wrong to assert that the German constitution served as model, mainly from a theoretical, conceptual and analytical point of view, while the Italian one, sharing a generally closer cultural background, resonated with us especially in terms of content.

In fact, the conciliatory nature of the Italian constitution did not hold back its prospective tension, emphatically codified for posterity by Italian jurist and member of the Italian Constituent Assembly Piero Calamandrei[27]. With roots in the mountains, *where the partisans fell*, the Italian Constitution conveys, in an affectionate and affectionately transparent way, a desire or yearning for justice and social transformation that suffuses and pervades

24 In effect, the sophistication and high dogmatic calibre of the discipline of obligations, property, as well as the respective procedural extensions, coexisted with a very strong control of society, through (strategically orchestrated) conservatism in the areas of Family or Inheritance Law. Although lacking the ornateness and flashy histrionics of his fascist, Nazi, and Francoist emulations, it still relied upon a very seditious propaganda and discipline machine, which elevated the self-denial and discretion of power, respect for authorities and tradition, the cultivation of simplicity and even the glorification of honest poverty to the status of true myths. This is not to devalue the discourses of racial exaltation (especially in an initial phase), nor the existence of paramilitary organizations for youth training, modelled on the Italian and German ones, or the existence of parallel police and judicial orders, conniving with persecution and torture, while aimed at monitoring, dissuading and punishing any sign of political misalignment; rather highlighting, as said, the way through which ultramontane conservatism could be used in a mixture of negative social engineering and reactionary Foucauldian governmentality, igniting the inertial force, meticulously manipulated, of its *regime of truth* and the dissemination of the respective *discursive order*.

Jurists like Orlando de Carvalho were tentatively neutralized in their career aspirations, through forced confinement to areas of civil law considered more harmless, while any challenges, particularly of Marxist influence, were kept under surveillance and quickly annulled.

25 According to the tradition of the French Code civile, but above all, in harmony with the Germanic legacy of Savigny and the *Begriffsjurisprudenz* (although significantly tempered by the *Interessenjurisprudenz*) behind the BGB.

26 Not problematizing the concept, frequently used with excessive lightness, as D. Losurdo taught us.

27 Especially in *Piero Calamandrei*, Discorso sulla Costituzione, Milan 1955 (for my own small presentation and portuguese translation of the text, see https://www.academia.edu/28418136/Piero _Calamandrei_Discorso _sulla_ Costituzione_Milano_1955).

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all the text. Under this assumption, the normativity of the intentions and aspirations she put forward was really taken seriously by some (to the incomprehension of authors of the analytical tradition, on the one hand, and a huge bloc of legal and political dogmatic conservatism, on the other). This *inclined* and *percussive* vector of Italian constitutionality – aimed at counteracting social asymmetries, obliterating the hardest and most resistant reality - created the conditions for an ongoing thematization of its own success, as a question of social transformation, that is, of the endeavour's happy performance considered from an effectual perspective.

The German constitutional paradigm, in its turn, rests on the definition of legal limits (*Grenzen*) and conditions (*Vorgabe*) easily amenable to strictly jurisdictional verification (according to the rationality and prudential method of jurists) much more than on the consecration of tasks (*Aufgabe*) to be progressively fulfilled. Under this standard conception, factual *freedom* and normative *law* are opposed realities; beyond mere legal constraints, susceptible to judicial *sanction*, legal demands entail a series of normative and factual mediations as they need further positive determinations of a technical, economic and political nature. Of course, this overall emerging image (probably more suited, in such a clear-cut, to the American constitution) does not obliterate the extant normatively established functions, aims, objectives and tasks (*Zwecke*, *Statzielbestimmungen*, *Aufträge, etc.*) in the German constitution, nor, even less, the richness of the doctrinal debates (universally influential) they prodded: just recall the philosophical questions raised by the methodological confrontation between logical, theoretical, technical and practical rationality. It is no coincidence, then, that Müller's *structuring method*, adequately adapted to constitutionality's specifically *teleonomology,* became Canotilho's greatest methodological influence.

Anyway, irrespective of the differences, the problem of the constitution's defective enactment and enforcement, realization or implementation was expressly discussed in both cases. But the importance of the issue does not end there. For Canotilho the theme of the *'constituzione inattuata'* or the *nicht erfüllte Grundgesetz* prompted an inquest into the reason why part of the doctrine would express passionate support to the well-known phenomenon of 'majority obstructionism' leading to the non-compliance or non-compliance with the constitution.

2. National inputs, assimilations, and translations

Among the many particularities of the Portuguese constitutional experience three stand out as particularly distinctive, especially in the complex combinatorial conjunction that history has imposed on them.

Firstly, the Portuguese constitution was born in the wake of a very original revolutionary process led by mid-level military personnel (professionally solidarized and politically woken during the war), whose final objective was to hand over the overthrown power to civil society and its political bodies.

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Secondly, the dual (retrospectively negative and prospectively affirmative) dimensions of the constitutional project emerged out of the express refusal of an authoritarian dictatorial regime with peculiar corporative fascist dimensions on the one hand, and the desire for egalitarian social transformation on the other. Underscoring the genetic temporal inscription and the non-neutrality of constitutions in general (always in some way against some things and in favour of others) it also helps us understand the extreme care put in the prevention of eventual underground factual drifts, authorized by formal-procedural political solutions of a nature liberal.

Thirdly (in direct connection with the other two and simultaneously giving them an international dimension that accentuates the universal claim or vocation of the invoked constitutionality), there was a wide and strong commitment to decolonization and emancipation movements, after a more than 10-year long colonial war, into which the poorest population had been drawn (exposing, in an even more acute, necropolitic, way, the country's asymmetries), and, at the same time, responsible for raising the captains political awareness and fostering their professional, military and class cohesion.[28]

One should not forget that the «New State» Regime in Portugal was deliberately built against the Parliamentary Radicalism of the First Republic, its metamorphically unstable multiparty system, volatile succession (and maelstrom) of government executives, and despised urban secular liberalism.

All those 'liberal' and 'democratic' features were dismantled and its remains inhumed under a farcical corporative system aimed at hiding class conflicts behind the appearance of sectorial harmonic consensus, a nominal constitution held hostage by the Government - since the legislator became a *resonance chamber* of the executive under a single party system (appropriately designated *National Unity*) and a façade presidentialism – insomuch as the *power*, as already mentioned, was in fact primarily and ultimately held by the President of the Cabinet or Council Of Ministers (Prime Minister).

After the Carnation revolution, so much of the unleashed energy was spurred and guided by interwoven *principles of redemption and hope*[29]*,* that the achieved compromises made way to the *relative stabilization* of a collective constitutional project engaged with wide and deep social transformation, whose execution however called for normative and factual measures. The legislator was thus the first one entrusted with such a task: he retained an enormous amount of freedom with regard to the means and intermediate ends, but conceived of himself as a constituted power, and thence as an interpreter of this constitutional projective culture: not a simple agent, but clearly an actor.

28 *Cristina Nogueira da Silva*, Constitucionalismo e Império - A Cidadania no Ultramar Português, Almedina, Coimbra 2009; *Miguel Cardina*, O Atrito da Memória – Colonialismo, Guerra e descolonização no Portugal Contemporâneo, Lisboa 2023.

29 I have allowed myself to speak, in this regard, of a *3Bs inspiring formula* (Bloch, Benjamin, Brecht), in the combined interpretation of the 'cultural' theories of constitutionality advocated by Jack Balkin and Peter Häberle, where the aforementioned redemptive and hopeful appeals are taken into serious constitutional consideration.

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As for the nature of such project, the representative domestication of a revolutionary constituent power through the election of a constituent assembly as well as the withdrawal of the military who had partly acted as the vanguard of the liberation movement, already constituted a concession on the part of the most radical forces, even if all civil and non-involved powers from the beginning had announced and in fact worked for the restoration of a democratically representative electoral process. The fact is that, concomitantly,several conservative, reactionary and counter-revolutionary forces were also very active on the ground, often at the highest level, promoting the resistance and stirring the populations or planning terrorist initiatives and even a military counter-coups.

No wonder the desired equilibrium was sought through the textual interweaving of different ideological threads, but - even before that - through the idea of constitutionalizing change itself by means of a normative enshrinement of the constituent power desire, suspending its inertial movement and keeping its productive pledges in a permanent state of potency, always ready for new energetic discharges, in order to resist the thermodynamical fate imposed by the principle of reality.

To put it bluntly, there were grounded fears, that in the ebb of post-revolutionary enthusiasm and on the pretext of a *return to normality* (always highly debatable) some civilizational achievements and hard-earned conquests could be reviled, assaulted, pulled down and then slowly erased by the hugely concentrated economic and social powers, as soon as they managed to impose an easily controllable, strictly liberal and formal democracy.

Thence Canotilho's curiosity and scientific investment in the theorization of the positive, social and prospective (finalistic) dimensions that law had known since Ihering and Duguit, but whose avowed reconcilement with the rule of law and its former theories lived in a relative crisis since the collapse of the Weimar Constitution and the pusillanimity of the Bonn *Grundgesetz* in this respect. At the same time, the republican appreciation for the law, as a statute of freedom as well as a breath of normativism, partially remiss to jurisprudential creativity, reinforced his concentration on the legislative power and the law as the capital sites and instances where constitutional success would be played. The revolutionary process spared much of the judicial and part of the administrative personnel but shook off the numbness of all those decades, completely transforming (and engaging – at least for a moment) the political players and the public sphere – taken by democratic attitudes, practices and culture - and compelling the *rentier* elites to surrender much of their symbolic, social and economic power (or to flee away). So, it is not that the legislator was

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adamantly mistrusted or feared by the aforementioned reasons. He was doomed to be the key player.[30]

Instead, when transposed to the Brazilian context, the inaction of the legislative power (inveterately captive of the local oligarchies and their self-serving deals within the federal Congress) soon led to a natural slip of expectations from the inert legislature and the ineffective government (hampered by those abstruse political alliances it depended on) to the judiciary - at least more immune(given its structural and functional independence and the meritocratic basis of its appointment) to short-sighted political bargaining and still colonially inherited vested powers.

In this sense - that is, to the extent that the core of social change is not played so much in the relationship between the constituent power and the legislator(simultaneously promising and potentially elusive as in the assumption by the Courts of the task of social development through the realization of the constitution) - the Brazilian experience comes close to the model outlined by transformative constitutionalism theoreticians based on the South African and, later, Indian jurisdictional experience.[31]

30 And in fact, the post-revolutionary legislator was indeed plural and democratically responsive, cultivating several channels of communication to the parties' constituencies and the overall society, and also flanked by powerful social organizations like the Unions. Those were times of high and wide politization, marked by an explosion of social, cultural, and political movements, campaigns and actions, and an almost moving romantic militancy. Students launched *Literacy and Health Education Campaigns*, while professors and artists took part in the *Cultural Dynamization Campaigns* MFA (*Armed Forces Movement*). In its turn, *The Local Ambulatory Support Service* (SAAL), set up to provide support for people living in substandard conditions, was designed as a *decentralized service which built new homes and infrastructures in run-down neighbourhoods, using the design and technical support of the brigades that operated in them*. In a more institutional tone, it suffices to mention the mounting of a universal and integral national health system or the democratization of schools.

31 More modestly, I have dedicated myself to the issue of non-legislative or jurisdictional realization of constitutionality, resuming, this time, albeit only in part, a path traced by Afonso Queiró and Rogério Soares at the turn of the last century. Where these indicate the administrative responsibility for legal interpretation, namely in the exercise of discretion conceived as a parallel function to the action strictly bound by the law, both subject to the principle of *juridicity*, I have instead assayed to question the specificity of the constitutional nomos as revealed in the praxis and its institutional support for realization in conditions of egalitarian social transformation; a line of research that is necessarily open to dialogue with North American theories of *administrative* and *departmental*, but also of *social and political movements' constitutionalism*. Obviously, the hypotheses of constitutional, executive, or social short circuit must be properly examined and its grounds, ends, and features, thoroughly distinguished, on the account of the dangers of democratic illegitimacy and normative dilution they convey. Hence the concern with the subjectivation and structuring institutionalization of these and with the inter-subjectivation and communal appropriation/participation *of* and *in* those.

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3. Academic influences

a) Portuguese

In addition to the direct connection to the legal-public tradition of his alma mater(namely to the thought of his advisor Rogério Ehrardt Soares) or to the tutelary presence that - not only scientifically - professor Teixeira Ribeiro exercised over the heterodox political economy scholars at the Faculty of Law, the figure of Orlando de Carvalho stands out as a major academic, cultural and political reference.

As for the first strand, despite the ideological distances between master and pupil - well represented precisely in relation to the Abendroth/Forsthoff controversy - it is worth highlighting, in particular, the way in which it precociously captured and sought to express (theoretically, dogmatically and methodologically) the *juridification* of society and the consequent *oversocialization* of law caused by the growth of the Welfare State as an eminently executive/administrative State. A problem whose constitutional consideration can be found in a work unanimously recognized as a great classic of Portuguese legal and public literature: R. Soares' *Public Law and Technical Society* (1969). In effect, the perplexities, dilemmas and paradoxes raised by the *admirable new world* of technology - which a *beauty*, not long *asleep*, would hardly recognize if she woke up[32] - dominated by instrumental rationality, find there an inspired and elegantly modelled formulation.

The second major influence instead, espoused a sort of holistic conception of critical theory, born from the encounter between the *Interessenjurisprudenz* actionalism and a peculiar reconstruction of dialectic materialism, whose core lies in the mobilizing idea of one global social project, conceived as a reconstitution of actual reality and an interpretative task with an autonomous performative potential.

What he had in mind was a *cluster* of juridical and non-juridical, ethical and non-ethical value references (filled with normative force through a process of rationalizing universalization) and conveying, as its dynamic promotional ideal, the discovery of society precisely as a melting pot of values and counter-values.

Such a project would act upon the law in a dialectic manner, both systemically and counter-systemically, like a conductor, through legal scholarship and jurisprudence, and the breeder of social insubordinations against conservative stabilizations, sedimented by the former in order to pursue human emancipation and the freedom to flourish as *the realization of each person in the community and the community in each person*.

32 The cited book opens precisely with this allegory.

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b) International

aa. Hesseian lineage

Himself a disciple, like Peter Häberle, of German constitutionalist Konrad Hesse, Gomes Canotilho is part of a lineage that goes back to the Weimarian methodological dispute (*Methodenstreit*) - in many ways, the cradle or seedbed of European 20th century Constitutionalism. Hesse's intermediary role in this chain of transmission bestows a place of honour to R. Smend and H. Heller's thoughts, blended into an idea of *social constitutional integration* simultaneously axiological and sociological, legally worked out through a normative ordering nourished by Kelsenian analytical rigor and a crucial reliance on the problematic category of the *Wille zur Verfassung*.

Over time, Canotilho's thought would evolve in a direction progressively confluent with that of Häberle, namely through a clear cultural shift, on the one hand, and an accentuation of *European and international friendship or friendliness,* on the other. This would be enough to once again corroborate the modest role played by legal Marxism (the same could not be said about Marxian thought in general, as already seen) in Canotilho's theses; an impression that also gains strength if we consider the way the exposure and increasingly shared perception of neoliberalism's radicalism, has led to huge changes in our political topography. Especially after the succession and worsening of the system's internal crises and contradictions and the tremendous catastrophes it continues to fuel. This results in a moderate repositioning of authors formerly dismissed as radical which simultaneously recalls the distance between social state reformist policies and any support for radical structural transformation of society.

When we think about a confrontation like the one that pitted German constitutionalist Ernst Forsthoff against his contemporary Wolfgang Abendroth regarding the social rule of law, what strikes us as stranger, today, is, firstly, the terms in which the problem was posed and discussed, i.e., the fact that the issue at stake could even be so controversial, given the way in which it quickly became somehow consensual, and, secondly, that it was not the harmless political science underdog (who had studied with Heller and would later be Habermas's supervisor) but the legal giant to hold the upper hand, despite the fact that few years earlier he was dedicating pages of emphatic support to the total State in the context of the Nazi rise.[33]

33 *Andreas Fischer-Lescano / Joachim Perel / Thilo Scholle*, Der Staat der Klassengesellschaft. Rechts- und Sozialstaatlichkeit bei Wolfgang Abendroth, Baden-Baden 2012.

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bb. The Abendroth/Forsthoff debate

Regarding the content of the debate[34] it became highly influential, particularly for the countries of southern Europe which were late in building their social and democratic states under the law; better still, who laid the cornerstones of their welfare systems in a context that was not yet democratic - something which probably lies at the origins of themany enduring misunderstandings regarding the meaning of constitutional sociality, in its articulation with democracy and law.

Forsthoff tried to demonstrate that the Welfare State was not a legal term, which meant that it failed to uphold any legal principle in the constitutional context of the basic law. More deeply, it should be regarded not quite as an instrument of justice, but as an

34 *Ernst Forsthoff*, Begriff und Wesen des sozialen Rechtsstaates, Berlin 1954; *Wolfgang Abendroth*, Zum Begriff des demokratischen und sozialen Rechtsstaat im GG der BRD, Berlin 1954. The controversy had also a huge impact in Spain, where the main texts were translated and published in 1986. *Ernst Forsthoff / Wolfgang Abendroth, Karl Doehring*, El Estado social, Centro de Estudios Constitucionales, Madrid 1986; meanwhile, transferring the debate to the European level, *Christian Joerges*, Rechtsstaat and Social Europe: How a Classical Tension Resurfaces in the European Integration Process, Comparative Sociology 9 (2010), pp. 65–85; *Kolja Möller*, The Constitution As Social Compromise: Hybrid Constitutionalisation and the Legacy of Wolfgang Abendroth, in: Marco Goldoni / Michael A. Wilkinson (eds.), The Cambridge Handbook on the Material Constitution, Cambridge 2023, p. 135.

35 In fact, for the sake of rigour, it should be noticed that Abendroth proposes a constitutional-compromise model, according to which the German constitution did not enshrine either a capitalist liberal order or a socialist order, deferring these issues to field and dynamics of democratic decision. First of all, he conceived some central norms of the constitutional text as *compromise precepts*, which made the economic and social order available for the formation and deliberation of the democratic will, through parties and unions. Yet, both in terms of assumptions and established conditions, the departure from the traditional liberal formal-procedural model was evident, since it allowed, after all, for the minimally adapted reproduction of capitalist material structures. Indeed, the norms in question already include a set of advances in the promotion of effective conditions of social self-determination, by guaranteeing material and normative presuppositions for this purpose. Secondly, action under these norms takes place in a social context in which the social forces in conflict are balanced, legitimized and reinforced and in which, therefore, a dual constituent power emerges or a coupling of constitutional processes takes place: the constitutionalisation of the normative commitment in the written constitution, on the one hand, and the self-constitutionalisation of subordinate powers, and therefore, in terms of the social substrate, on the other. An idea that once again works as a sort of settlement of commitment (although in a non-corporatist sense, insofar as it assigned to labour parties and unions a universalist role in establishing and defending the constitution, given the coincidence between their interests and the general interest of the democratic order). Finally, following on from the previous point, it should be said that constituent power was legitimized not only according to the representative political model, but also through the substantial transforming actions that were believed to be able to be adopted by popular forces. This means that the constitutional commitment was ultimately aimed at social transformation, since it did not intend to preserve the status quo, but to encourage the systematic extension of the democratic principle of equality and self-determination to the various sectors of the economy and society, converting the State repressive in a common self-management of the social process. The analysis follows, very closely, *Möller*, note 35.

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illegitimate means of distributing wealth. Abendroth, instead, derived such a legal principle from Articles 20 I, 28 I 1 GG, considering it essential for the preservation of the rule of law and democracy. [35]

As said, time proved the second right, although - from our perspective - at the cost of a deflating the potential contained in his model's promises of socialization, especially from an equalizing and constructive point of view. In fact, it seems fair to think that the active and participatory dimension of social democratic constitutionalism has mainly given way to a corporate selective *solidarism*, centred on conditional social benefits, conceived as (functionally embedded) mitigations or compensations within an essentially consumerist model of ordo-liberal economic integration.

cc. Proximate inspirations

The immediate dogmatic references to Canotilho's reflection come from the works of Peter Lerche and Vezio Crisafulli. Even if they may be read within the framework and in function of the previous debate, they do not immediately concern the *spirit of the constitution* or the *meaning of constitutionality* (including *behind* or *beyond* any specific fundamental text) rather the deontical-constitutional status of a certain norm.

As a matter of fact, the expression *dirigierende Verfassung* (nominally the most faithful transliteration of *constituição dirigente*) was already used by Peter Lerche in 1961 to designate a new constitutional dominium that should be added to the previous ones.[36] Lerche argued that modern constitutions tend to include a series of constitutional policies which represent a new sort of imposition or injunction toward the legislator. These lines of constitutional direction should take a place beside the extant sectors dedicated to the rules of principle, rights, the division of powers and state competencies, and the disposal of means, forming a new segment or chapter he decided to christen as directive constitution. What he had in mind, one must notice, were not task- or end-norms but precepts mainly connected with the principle (or enshrining rights) of equality, whose implementation begot legal constitutional duties onto the legislator.

In the book where he theorized the prohibition of the constitution's *deficient* enactment and fulfilment, Lerche also claims that directive constitutionalism allows for the legislator to benefit from a wide discretion in its action: whenever one norm is referred or subsumed to this constitutional dimension the possibility to judicially review its enacting legislation

36 *Peter Lerche*, Übermass und Verfassungsrecht: Zur Bindung des Gesetzgebers an die Grundsätze der Verhältnismässigkeit und der Erforderlichkeit, Berlin 1999.

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if not impossible, in the indicated extreme cases, becomes more difficult.[37] Besides that, [t]*his "leading core" of the German constitution was, as is known, quite restricted, as the* Grundgesetz *was and is characterized by an ostensible parsimony in the use of programmatic norms.*[38]

Canotilho's concept and thesis are both wider and deeper, as Bercovici stresses: *directiveness*, although dogmatically (structurally and functionally) specific to some norms, shows its imprint all across the constitution; its objective is *the reconstruction of Constitutional Theory by means of a Constitutional Material Theory, conceived also as a social theory*. The same is to say that [t]*he directive constitution searches to rationalize politics, incorporating a materially legitimate dimension when establishing a constitutional fundament for politics. The core of the idea of directive constitution is the proposal of material legitimation of the constitution by the means and functions anticipated by the constitutional text.* That is why, according to Canotilho, *the directive constitution's main problem is a legitimating problem.*[39] Meanwhile, in Italy, many years before that, Vezio Crisafully had already fathered the concept of *programmatic norms* in order to inculcate the notion that many constitutional social demands were also juridical rules and therefore could be applied by the courts in concrete cases.[40]

At stake was the country's debate on the obstructions to the constitution's execution, and while its intention was to highlight those *programs'* constitutional *normativity*, the long-term effects end up being the opposite, with part of the doctrine using the category to devaluate and degrade any *norm* that consisted of, or contained a, mere *program* of

37 "Peter Lerche's dogmatic effort did not have as a backdrop any constitution of a programmatic profile, much less of a socializing nature. It was only intended to capture the normativity of some norms of the Constitution of Bonn imposing duties of legislative action. (...) Consequently, when some authors equate the theory of the constitution with the social-communist ideology crystallized in a programmatic constitution, they are operating an unacceptable transposition of plans. From legal-constitutional methodology they jump to constitutional ideology. From the dogmatic effort around the differentiated normativity of the various types of norms and principles, they derive a deliberate purpose of the socialist revolution through the Fundamental Law" *Canotilho*, note 4, pp. 112-113.

38 *Ibid*., p. 214

39 *Gilberto Bercovici*, A Problemática da Constituição Dirigente: Algumas Considerações sobre o Caso Brasileiro, Revista de Informação Legislativa 142 (1999), pp. 35-51; *Idem*, A Constituição Dirigente e a Crise da Teoria da Constituição, in: Cláudio Pereira de Souza Neto / Gilberto Bercovici / José Filomeno de Moraes Filho / Martonio Mont'Alverne Barreto Lima (eds.), Teoria da Constituição: Estudos sobre o Lugar da Política no Direito Constitucional, Rio de Janeiro 2003, pp. 114-120; *Idem*, La constitution dirigeante et la crise de la théorie de la constitution, in: M. Carducci (a cura di), Una Costituzione da reinventare. Temi brasiliani di critica costituzionale, Lecce 2004; *Idem*, Revolution trough Constitution: the Brazilian's directive Constitution debate, Revista de Investigações Constitucionais 1 (2014), pp. 7-18.

40 *Vezio Crisafulli*, La Costituzione e le sue disposizioni di principio, Milan 1952, "Le Norme 'Programmatiche' della Costituzione", pp. 51-83 and "L'art. 21 della Costituzione e l'Equivoco delle Norme 'Programmatiche'", pp. 99-111.

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action for the political actors or the society in general.[41] By discrediting all the inconvenient provisions as merely programmatic and thus deprived of any value whatsoever, it was then possible to impair the constitutional effectiveness, especially in relation to economic, social and cultural matters like the ones covered by social rights.

D. Conclusion

The programmatic-directing constitution provides a *material premise, not a replacement, for politics*. This means that politics is no longer understood as a legally free and constitutionally unbound domain, in obedience to the acquisitions of liberal normative constitutionalism: the legal-constitutional binding of political (prescriptive, ruling) acts goes beyond their obliging delimitation and procedural instrumentation, in demand of a material constitutional grounding. This viewpoint brings the *function of political indirizzo*, rightly envisaged as the *progressive implementation of the purposes and general tasks of the constitution*, rightwards into the inner sphere of constitutional relevance. The *selection and specification of constitutional purposes* as well as *the indication of adequate means or instruments for their achievement* expected from it, bears witness to the creativeness of the demanded activity. The programmatic constitution eschews the *temptation* to normatively *consume* governmental options, but strives, notwithstanding, for a successful overcoming of the opposite propension to submerge the function of government in the pervasive immanence of the economy, however disguised as some sort of *catalytic nomos*, or as the spontaneous self-regulation of supposedly plural differentiated subsystems.

A true child of its time -as Gomes Canotilho himself was the first to admit - the theory of directive constitutionality has nevertheless continued to evolve and to find renewed relevance - whether thanks to or despite its reinvention. As part of a long effort to oppose some of the hegemonic tendencies of constitutional thought, it is increasingly being rediscovered, in its full potential, as new generations wake up from the long sleep that fell upon its propelling dreams, since the late seventies, and has meanwhile engendered some of our worst living nightmares.

After all, daring to (ab)use the simple words he once wrote me in adedication (something I almost never asked anyone for) our work should just be a *bridge to another shore*.

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41 The same would happen in many other countries. In Brazil, with the aggravating factor that the doctrinal borrowing of this concept left out the authors own sharp critic, from few years after, to its usage – Gilberto Bercovici.

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