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## The Referendum in the Portuguese Constitutional Experience

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## **Part IV**

# **The Referendum in the Portuguese Democracy**

## **Chapter 1**

### **The Constitutional Referendum**

#### **1. Palma Carlos's Proposal (1974)**

##### **1.1. The Circumstances**

In June 1974, a proposal for a Constitutional referendum introduced by the Prime Minister of the First Provisional Government, Adelino da Palma Carlos, resulted in the first political crisis of the Portuguese democracy, and culminated in his resignation. Adelino da Palma Carlos was a civilian, a legal academic and an opponent of the dictatorship. Considered to be a liberal conservative, he was chosen by the President of the Republic, General Spínola, to lead the First Provisional Government. The military Junta of National Salvation, which was entrusted to assume power on the night of 25 April 1974 by the *MFA* Coordinating Council that led the military coup, approved the Government's Programme by Executive Law.

Besides the compromised nature of the Government, which united people with different conceptions and perspectives as to the revolutionary process, it soon became obvious that the Government was in the epicentre of a confrontation between General Spínola and the *MFA* Coordinating Council. They diverged deeply over decisive questions about the revolutionary process, such as the democratisation of the country and the solution to the colonial problem.

The clash between Spínola and the *MFA* became evident in several public addresses by the President of the Republic, who did not hide his dissatisfaction over the country's direction. These disagreements were reflected inside the Government. After the first three weeks, misunderstandings were rife. (Osório, 1988, p. 93).

On Spínola's insistence, Palma Carlos proposed to change Law No. 3/74, which defined the provisional Constitutional structure based on the *MFA* Programme, in order to modify the balance of powers between the Government and the President. The purpose of the Prime Minister was

to accomplish the Presidential election as quickly as possible and to hold a referendum to approve a Provisional Constitution giving the Chief of State and the Executive the power needed to execute some of the provisions of the *MFA* Programme (Osório, 1988, p. 95).

Armed with Palma Carlos's proposals, Spínola chaired a meeting of the *MFA* Coordinating Council, which was attended by ministers and members of the Junta of National Salvation. With the support of the ministers Sá Carneiro and Vasco Vieira de Almeida, he introduced a catastrophic description of the political and economical situation of the country. In addition to that, he violently attacked the *MFA* Coordinating Council and proposed that the Constitutional referendum and the direct election of the President of the Republic take place simultaneously on 3 October 1974. The election of the Constituent Assembly would take place until 30 November 1976.

On behalf of the Coordinating Council, Colonel Vasco Gonçalves contradicted Spínola's thesis, leading to a violent exchange of words. According to Vasco Gonçalves (Cruzeiro, 2002, pp. 82-84), the meeting ended with a draw: Spínola did not reinforce his powers and the Coordinating Council maintained its positions.

On 4 July, the Council of Ministers discussed the national political situation, having had a general discussion on that theme [Santos, 2006 (I) p. 298]. On 5 July, Palma Carlos introduced two documents to the President. The first was an appraisal of the *MFA* Programme, and the second was a draft amendment to the Constitutional law No. 3/74. On that same day, and upon Spínola's request, he went to the Council of State to introduce those documents and submit them to his appraisal.<sup>87</sup>

On 7 July, the *MFA* Coordinating Council, gathered in Lisbon and expressed its rejection of Palma Carlos's plan. On 8 July, the Council of State unanimously rejected those proposals. On 9 July, Adelino da Palma Carlos announced his resignation to the Council of Ministers (Osório, 1988, pp. 241-249).

## **1.2. The Reasons**

In the document on the *MFA* Programme, Palma Carlos enunciated the main problems that he believed prevailed in the Portuguese situation: the social indiscipline, the short term risk of degradation of

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<sup>87</sup> Both documents are published in Osório (1998, pp. 101-119) and Miranda [1978a (II) pp. 1153-1168].

economic life, and the subsistence of the colonial war (Osório, 1988, pp. 102-104). Palma Carlos considered that the *MFA* Programme was outdated, since it was inadequate, and lacked ideas to alleviate the economic and social disturbances or solve the problem of the colonial war. In his opinion, only the President of the Republic and the Government were able to remove such obstacles (Osório, 1988, p. 106).

There was a question of timing. The *MFA* Programme left the decision on essential matters up to the Constituent Assembly, which had been elected until 31 March 1975 and had a deadline of 180 days to draft the Constitution. There would hardly be a democratic and legitimate Government before the beginning of 1976. For Palma Carlos, it was not possible to wait so long to take essential decisions, so he believed that the election should take place as soon as possible (Osório, 1988, pp. 106-108). There were three main possibilities to choose from. The first was the immediate election of the Constituent Assembly. The second was the immediate election of the President of the Republic. The third was to instantly hold a referendum based on a concrete proposal to overcome the crisis.

Palma Carlos readily excluded the first hypothesis. Firstly, it was not possible to hold elections in short term because the public administration had not been replaced, the balance among all the political parties had not been established, and the country was in the middle of an economic crisis that would be worsened by a dramatic electoral campaign. The second idea was excluded because the Constituent Assembly could not be elected while the overseas problem was not solved, regarding the representation of those territories in the Assembly. And finally, legitimate democratic elections would require an electoral law, a law on political parties, and the law on the electoral registration (Osório, 1988, pp. 109-110).

Palma Carlos considered the proposal for the President's immediate election to be justified, since the current President was the only person capable of obtaining the support of the great majority of the Portuguese people and had enough prestige to promote decolonisation. However, a President needed a Constitution. Otherwise his election would be a mere attribution of the supreme power to a certain chief, which reminded of the 'elections' of Óscar Carmona in 1928 and Sidónio Pais in 1918. For that reason, he proposed simultaneous elections on the referendum on a provisional Constitutional draft that replaced Law No. 3/74 (Osório, 1988, p. 110).

Palma Carlos concluded his explanation by refuting comparisons with the sad memory of the 1933 plebiscite, pointing out the provisional nature of the draft. The provisional Constitution could be submitted to referendum in the overseas territories, and the improvisation of the electoral operations would become less of a concern (Osório, 1988, p. 111). In either case, the passing of the Constitution would necessarily involve the delay of the Constituent Assembly's election for a few months, which would, in turn, delay the making of the definitive Constitution.

### **1.3. The Contents**

Palma Carlos proposed that, up to 31 October 1974, there would be a referendum in order to pass a draft of the Provisional Constitution of the Portuguese Republic. This Constitution would come into force with the definitive Constitution made by the Constituent Assembly foreseen in the *MFA* Programme.

The Provisional Government would submit the draft of the Provisional Constitution to the Council of State by 31 July, in order for it to be passed by 31 August. The Provisional Constitution would be enforced until the Constitution made by the Constituent Assembly was approved by referendum, which had to be before 30 November 1976.

In the Constitutional referendum, the citizens were asked to give a straight yes/no answer to the following question: 'do you approve of the Provisional Constitution of the Portuguese Republic, which allows the President of the Republic and the Government to solve the serious national problems of our time and which will be enforced for a limited period until the approval of the definitive Constitution?' Together with the Constitutional referendum, the Portuguese people would choose the President of the Republic by universal, direct and secret suffrage.

### **1.4. The Reactions**

Palma Carlos's proposal was opposed by the *MFA* Coordinating Council and the left wing of the Junta, led at that time by Costa Gomes. Among the political parties, the Communist Party (*PCP*) was strongly against it and the Socialist Party (*PS*) clearly distanced itself from it. Support came from Spínola loyalists and from the Popular Democratic Party (*PPD*). It is true that the *PPD* did not officially support Palma Carlos's plan, but the ministers from this political area resigned in solidarity with him. The *PPD* leader, Sá Carneiro, actually had a real and direct involvement in Palma Carlos's operation, by openly showing his

participation in the *MFA* Assembly on 13 June, where he exposed a catastrophic picture of the country's situation (Cunhal, 1976, p. 141; Cruzeiro, 2002, p. 82). Costa Gomes (Cruzeiro, 1998, p. 235) and Almeida Santos [2006 (I) p. 295] even expressed the conviction that Sá Carneiro would have been the true initiator of the so-called 'Palma Carlos coup'.

The reception of Palma Carlos's proposal by the Council of State was not good. Diogo Freitas do Amaral (1996, p. 211) States that the Council unanimously approved the proposal that sought the reinforcement of the Prime Minister's powers, giving way to Law No. 5/74, of 12 July, but also unanimously refused the other proposals, including the Constitutional referendum. The day after Palma Carlos resigned. However, he still achieved support from the ministers Sá Carneiro, Magalhães Mota, Vasco Vieira de Almeida and Firmino Miguel, along with the socialist Raul Rego in the beginning. The latter, however, knew the positions of his comrades Mário Soares and Salgado Zenha, and changed his position, which gave rise to bitter recriminations from the Prime Minister and to a sour exchange of words between them (Amaral, 1996, p. 336).

Almeida Santos [2006 (I) p. 300] points out that the communist leader, Álvaro Cunhal, was one of the first ministers to express his position in the Council of 9 July, having refused to follow Palma Carlos, in both the motivation or the resignation. Concerning that, Cunhal (1976, p. 140) wrote that Spínola was the true abetter of the Palma Carlos coup. The scheme was simple. The Council of State would give full powers to General Spínola through the Prime Minister, who had no influence besides the position that he carried out during his incumbency. Within three months there would be an electoral masquerade to confirm the General as President, who was no longer appointed by the *MFA*, but chosen through 'universal suffrage', having therefore 'legitimacy' against the *MFA* to assume full powers. A Provisional Constitution that would postpone the elections for the Constituent Assembly for November 1976 would also be approved.

Carlos Brito (1999), then member of the *PCP* leadership, wrote about the event 25 years later and reaffirmed his conviction that the coup consisted in an attempt to change the powers that the *MFA* had delegated to the President, by plebiscite. This would give absolute powers to General Spínola and neutralize the *MFA*. He also says that when the Political Commission of the *PCP* obtained knowledge about the presentation of Palma Carlos's proposal in the Council of State, it

requested meetings with its civil members to advise them on the dangers of that plan.

The socialist ministers also showed their opposition to the proposal. Salgado Zenha said, 'it is known how a dictatorship begins, but never when it ends'. Mário Soares considered the President's premature election as wrong, inconvenient and contrary to the *MFA* Programme, and that the approval of a Provisional Constitution by referendum would set a serious and undesirable political precedent [Santos, 2006 (I) p. 300].

Mário Soares (Avillez, 1996, p. 335) says that Palma Carlos explained his plan to him one month after the Government's formation, but that he disagreed with it. Without a Constitution, it would be necessary to have legislative elections prior to the popular mandate, which allowed for the legitimate drawing of a new Constitution. It should be the new Constitution that determines if the President of the Republic would be directly or indirectly chosen by the people. Soares considered that everything was set out for a plebiscite for President Spínola, and the disastrous example of Sidónio Pais was still in mind. The legitimacy gained from presidential elections would inevitably suffocate the political parties.

The Counsellor of State, Diogo Freitas do Amaral, had a very surprising position, given his political proximity to Spínola and Palma Carlos. His refusal would have contributed to the unanimity of that body against the proposal. As he explains (Amaral, 1996, p. 211), if the proposal had been approved, the *MFA* would be dissolved, Spínola's personal authority would be greatly reinforced, and the regime would be defined in practice as an 'almost-presidentialist' Gaullist type, with the aggravated circumstance of the lack of a parliament to scrutinise it, something that De Gaulle always maintained. Furthermore, the election of the deputies would be postponed for a year and half, also postponing the drafting of the new Constitution for an equal period of time.

Freitas do Amaral (1996, p. 211) based his opposition on three ideas: first, the balance of powers in the Council of State condemned and refused the proposal. Second, neither the *PS* nor the *PPD* were publicly and clearly committed to it. Finally, the proposal would lead to a military presidential system, and Freitas do Amaral favoured a civil parliamentary system.

António de Almeida Santos explains that the *MFA* and the emerging political forces could hardly accept the proposal because of eight reasons: **1)** the appeal to the Constitutional referendum was



susceptible to suspicion in a country still traumatised by the *soit disant* referendum on the 1933 Constitution. **2)** The resistance to a ‘yes’ or ‘no’ referendum – as referendums should be – was understandable given the length and complexity of the question. **3)** The formulation of the question clearly induced a certain answer. **4)** The Government was an interested party, because the reinforcement of its powers was in question, and the Council of State, with military majority, was an interested party too. **5)** The referendum was able to arouse reserves as a normal form of exercising the sovereignty of the Nation, side by side with the elections, in a country without any tradition in that domain. **6)** The President would be the only sovereign organ legitimated by a universal, direct and secret suffrage, thus giving him the legitimacy that would arouse the fear of personal power. **7)** The transitory period would finish in a reasonable forecast, in the second half of 1977, which would be enough time for the imagined crisis, thus justifying emergency measures. **8)** The fundamental basis of the *MFA* complaint was that the scheme would undermine its proclaimed role as the ‘engine of the revolution and warranty of the political unit’, leaving it out of the programmed system. The *MFA* was not ready to leave the political scene so early.

Palma Carlos’s proposal did not obtain doctrinaire supports either. Luís Barbosa Rodrigues (1994, pp. 128-129) points to the disagreement of the proposal with the *MFA* Programme that gave the fullness of the constituent power to the Constituent Assembly. Before the making of the definitive Constitution, the referendum would limit the powers of the Constituent Assembly. The terms proposed for the referendum did not give the voting any guarantees of authenticity. The previous presidential election would give way to a presidential system. Finally, the proposal, when interconnecting the referendum and the presidential election effects, was like a plebiscitary vote of confidence towards the President and the Government (Duarte, 1987, p. 236).

### **1.5. Critical Analysis**

The relationships between General Spínola and *MFA* were always difficult. Spínola was not a man from the *MFA* and his appointment as President of the Junta of National Salvation on the night of 25 April 1974 resulted much more from his own initiative than from the spontaneous will of the Movement. No wonder, then, the divergences between the General and the *MFA* Coordinating Council had been expressed early on in the meeting that lasted the whole night, from the 25<sup>th</sup> to the 26<sup>th</sup> of April. From that moment and until Spínola’s resignation from the position of President on 28 September, the revolutionary process

and decolonisation remained on a collision course. The Palma Carlos coup was the first serious incident of that confrontation.

The main purpose of Palma Carlos was to reinforce the powers and the legitimacy of the President before the *MFA*. For that very reason, the first priority was the direct election of the President at the same time as the referendum on a Provisional Constitution, thus changing the terms of the *MFA* Programme significantly. At stake was more than the chronological order of the elections. The proposal was essentially for a plebiscite on Spínola, with the intention of imposing a conception of the revolution and decolonisation process that was different from the *MFA*'s.

In fact, according to Palma Carlos (Osório, 1988, p. 96), decolonisation was the decisive question for his resignation as Prime Minister. The only proposal by Palma Carlos that was accepted by the Council of State allowed the Prime Minister to choose the governmental cast. However, on the very same day, the Council of State passed a diploma that allowed for decolonisation without consulting the indigenous populations, which Palma Carlos considered unconstitutional. This meant the immediate recognition of the independence of the overseas territories.

It was clear from the start that Palma Carlos's attempts to exorcise the ghosts of referendums past would raise more questions than they answered. The ghost of the 'elections' of Sidónio Pais in 1918 and Óscar Carmona in 1928 could be exorcised by simultaneously holding a Constitutional referendum and a presidential election, so that the election was not seen as a mere attribution of the supreme power, although limited, to certain chief. The referendum argument, however, awakened another ghost: the Constitutional plebiscite of 1933. In an attempt to reassure people that the 'sad memory of that referendum' (in Palma Carlos's words) would not be repeated, Palma Carlos pointed to the provisional nature of the draft to approve. The argument was not strong given that, according to the draft of the Provisional Constitution, the definitive Constitution, which the Constituent Assembly would approve, should also be submitted to referendum. However, despite the arguments, the question around Palma Carlos's proposal was above all the option between Spínola and the *MFA*.

Despite Palma Carlos's attempts to exorcise the ghosts, the truth is that they were unavoidably present in the plebiscitary nature of the operation. The analogy with the presidential elections of 1918 and 1928, and with the Constitutional referendum of 1933, was the fact and it was not bearable in a country just freed of a dictatorship that had been 'legitimated' in that way. Furthermore, since there was no electoral law or

electoral registration made in democracy, the electoral operations would be commanded by the rules of 1946, with an electoral universe that was democratically unsatisfactory.

On the other hand, the delay of the Constituent Assembly election until the end of 1976 would contradict the aim of the political implantation of the emerging parties. These would be delayed to affirm themselves in the political scene in contrast to the legitimating degree afforded the President. The proposal came out to a military presidential system worsened by the lack of a parliament that could scrutinise it.

### **1.6. The Consequences**

The immediate consequences of the refusal of Palma Carlos's proposal were the resignation of the Prime Minister and some ministers, and the appointment of a new Prime Minister with the *MFA*'s confidence, Colonel Vasco Gonçalves, and six military ministers. President António de Spínola's political position came out frankly weakened. The dynamics of the revolutionary process changed, and the decolonisation process would be unblocked with the publication, a few days later, of Law No. 7/74, of 27 July. António de Spínola resigned by the end of September 1974 and the election of the Constituent Assembly took place on 25 April 1975.

## **2. The Proposals for a Referendum on the 1976 Constitution**

During the drafting of the Constitution by the Constituent Assembly elected on 25 April 1975, there was a proposal to submit its text to referendum once approved. On 30 December 1975, the *PPD* introduced a proposal for a Constitutional referendum to the Council of the Revolution<sup>88</sup> having in view the renegotiation of a Platform of Constitutional Agreement established between the *MFA* and the political parties on 11 April, preceding the election of the Constituent Assembly (Miranda, 1981, pp. 300-305). After the events of 25 November 1975, which defeated the military left and changed the course of the revolutionary process, the members of *PS*, *PPD* and *CDS* in the Constituent Assembly started to defend the renegotiation of the Platform of Constitutional Agreement. For that purpose, they paralysed the debate on the organisation of the political power. On its side, the Council of the Revolution proposed the renegotiation of the Platform on 11 December.

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<sup>88</sup> The Council of the Revolution was a military sovereignty organ which replaced the Junta of National Salvation and the Council of State after a failed attempt of coup d'état led by Spínola on 11 March 1975.

The First Platform foresaw in point (C.3) that the President should enact the new Constitution, made and approved by the Constituent Assembly, after first consulting the Council of the Revolution. As an alternative, the *PPD* proposed the submission of the new Constitution to popular referendum within the 15 days of approval by the Constituent Assembly. In case of rejection, the provisional Constitutional laws would remain in force, attributing constituent powers to the next Parliament, which would be chosen by 25 April 1976 (Miranda, 1976, p. 153).

The *PPD* disagreed with the enactment of the Constitution by the President of the Republic after first consulting the Council of the Revolution. According to the reasoning of the proposal, the Constituent Assembly was the only sovereignty organ endowed with democratic legitimacy, and only the people who chose it could judge the results of its work. The enactment of the Constitution by the President, appointed according to criteria of revolutionary legitimacy, was a deviation of the democratic principles and traditions, which made popular consultation on the acceptance or rejection of the Constitution so indispensable (Miranda, 1976, p. 153).

On 9 January 1976, António de Sousa Franco, a member of the *PPD* leadership, justified the proposal when referring to the Party's Programme in an article published in the newspaper *O Jornal*. He defended the principle that the referendum was obligatory to approve laws that revised the Constitution, according to the principle that constituent power should be exercised by the people. In the Constituent Assembly, the parliamentary leader of the *PS*, José Luís Nunes, strongly criticised that article in the session of 14 January 1976. According to him, the *PPD*, unhappy with the democratic and progressive provisions voted for by the Constituent Assembly, intended to demand a plebiscite on the Constitution and, in case of refusal, to trample the will of the Portuguese people and to impose a provisional Constitution drawn behind the people's backs (*DAC*, 104, 15 January 1976, pp. 3359-3360).

Several *PPD* deputies replied to José Luís Nunes's speech. Jorge Miranda<sup>89</sup> denied that the referendum was antidemocratic in nature and refused any comparison between the *PPD* proposal and the plebiscite on the 1933 Constitution. In 1933, there was no Constituent Assembly, nor were there electoral campaigns, parties, public life, pluralism or freedom of expression. The opposition had been persecuted in 1933. In 1976, none of this was true (*DAC*, 104, 15 January 1976, pp. 3361-3362). In response,

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<sup>89</sup> Jorge Miranda, outstanding Professor of Constitutional Law, was *PPD* deputy in the Constituent Assembly.

José Luís Nunes said that the differences between the situations in 1933 and in 1976 gave more reasons to refuse a referendum than to defend it. In 1976, there should be no referendum precisely because there was a Constituent Assembly (DAC, 104, 15 January 1976, p. 3364).

In articles published in the newspaper *Diário de Notícias* on 16 and 24 February 1976, Jorge Miranda (1976, pp. 153-167) referred in detail to the topics raised by the *PPD*'s proposal. Miranda thought that the *PPD* proposal contained two different aspects. He supported it in terms of motives, but disagreed with the contents mainly because of its foreseeable consequences. As to the first aspect, Jorge Miranda thought that the proposal did not deserve the accusations received. He considered the referendum a democratic device, giving several examples in favour of that idea, and he saw the *PPD* proposal as an alternative to the First Platform of Constitutional Agreement. Jorge Miranda explained that, for the *PPD*, the aim was to defend the Constituent Assembly from the interference of any other body because, at that moment in Portugal, no other was representative in nature.

However, Jorge Miranda argued that a referendum would be an unnecessary inconvenience. The proposal was unnecessary because the Council of the Revolution, in the renegotiation of the Platform of Constitutional Agreement stopped referring to the enacting of the Constitution by the President of the Republic after first consulting itself. Therefore, the *PPD* proposal had achieved its purpose (Miranda, 1976, p. 159).

Jorge Miranda also considered the Constitutional referendum to be inconvenient. He immediately thought that the proposed timing – 15 days after the voting by the Constituent Assembly – was excessively short. He considered it to be more desirable to hold any referendum at the same time as the legislative elections. Here, the assembly could choose the constituent powers if the Constitution was rejected.

In case of rejection, the country would suffer serious damage for several reasons. Firstly, the country would continue to be ruled by provisional governments, and two years after the 25 April, the country needed definitive institutions. Secondly, the refusal of the Constitution would question the historical commitment obtained in the Constituent Assembly as well as the sorely reached balance of powers (Miranda, 1976, p. 161). On the other hand, in case of approval, there would be no advantage in submitting it to referendum, and there would be the inconvenience of understanding that the popular approval would represent

the acceptance of all and each of the Constitutional provisions, preventing its further modification (Miranda, 1976, p. 162). Despite his disagreement, Miranda (1974, p. 112; 1976, p. 160) thought that the referendum was legally possible, since the Council of the Revolution, as the heir of the Junta of National Salvation, or even the Constituent Assembly, had changed the provisional Constitutional law for that purpose.

Writing in 1981 on this same subject, Jorge Miranda (1981, p. 300) rectified his opinion, considering it unlawful that a Constitutional law approved by the Council of the Revolution could impose any form of referendum. He did not accept that the decisions of the elected Constituent Assembly should be precarious and dependent on popular approval. The Constituent Assembly should be sovereign.

In 1996, Jorge Miranda (1996a, p. 251) synthesised the reasons for the refusal of the *PPD* proposal. It was too late to organise the referendum; it could reduce the Constituent Assembly's authority; and there was fear of the possible consequences. In fact, the rejection of the Constitution would extend the Provisional Government's inconveniences with serious costs; and an approval would crystallise some Constitutional solutions, making its revision in the future more difficult (Urbano, 1998, p. 112).

### **3. The Proposals for Constitutional Revision by Referendum**

#### **3.1. The Doctrinaire Drafts of the Constitution**

None of the Constitutional drafts introduced by the political parties in the Constituent Assembly included the Constitutional referendum.<sup>90</sup> However, if that was the position of the parties, the same did not happen with the doctrinaire drafts which were openly presented by their authors, who were individually held responsible. Thus, two experts in Constitutional Law, Jorge Miranda and Francisco Lucas Pires, introduced their own drafts of the Constitution.

In April 1975, Jorge Miranda published his own draft of the Constitution (Miranda, 1975), which would eventually form the basis of the *PPD* draft. However, the Political Commission of the Party did not get to pronounce on it, and the Platform between the *MFA* and the Parties rejected much of its content. He never introduced his draft in the

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<sup>90</sup> This did not happen with the parties without parliamentary expression. The Programme of the Popular Monarchic Party (*PPM*) approved in 1974 proposed the referendum on the Constitution and the Constitutional amendments drawn by the Constituent Assembly. This party did not have, however, any representative in the Constituent Assembly.

Constituent Assembly. Article 315 of the draft, under the epigraph of the 'people's deliberation', established that any amendment to the Constitution approved by the Parliament would be submitted to referendum between 60 and 90 days after the final parliamentary vote.

Lucas Pires's (1975) draft was published in essay form, and was requested by the leader of the *CDS*, Diogo Freitas do Amaral, as a contribution to the draft which the Party intended to present. Freitas do Amaral explains in the foreword (Pires, 1975, pp. 5-6) that the ideas proposed by Lucas Pires could not be totally integrated in the *CDS* draft due to the commitments assumed by this party when signing the Platform of Constitutional Agreement with the *MFA*.

In this essay, Lucas Pires recommended caution in the Constitutional revision process. He considered the referendum to be an exceptional device of defence of Constitutional order when threatened. In his words (Pires, 1975, p. 160), Constitutional law cannot be in equal terms with ordinary law and the separation between constituent power and constituted powers is one of the no less important forms of separation of powers. It was a warranty that the revision procedure would only take place in case of the defence and accommodation of the Constitution to new situations.

This decision of promoting the Constitutional revision in defence of the Constitutional order could be made in one of two ways: either by the Parliament, through a two-thirds majority or by referendum, with a proposal by the Chief of State (Pires, 1975, p. 160). That decision of the Chief of State could be made after a popular initiative, that is, if he was addressed with a significant number of requests asking for a plebiscite (Pires, 1975, p. 109). One should note that this proposal referred to the decision of making the Constitutional revision and not the revision process itself.

Maria Benedita Urbano (1998, p. 119) points out that this Constitutional referendum is different from the typical or classic model of consultation. In fact, would not allow the people to sanction a draft of Constitutional amendments, or even to ratify a new Constitution. The people could only decide, in principle, whether or not a Constitutional revision or a new Constitution should be made. In the case of the Constitutional referendum in Switzerland, the people can decide not only whether or not to proceed with a Constitutional change, but also have a say on the Constitutional subject in question. Lucas Pires did not explain

reasoning in this respect. In any case, the Constituent Assembly did not consider any of these proposals.

### **3.2. The Referendum against the Constitution**

#### **3.2.1. The Sá Carneiro Strategy**

As the 1976 Constitution emerged from and reflected the economic, social and political changes of the revolutionary process that began in April 1974, it soon became obvious that the Portuguese right-wing political forces assumed the purpose of replacing the Constitution or deeply changing its ideological sense, as an essential part of its strategy. In the Constituent Assembly, the *CDS* was the only party that voted against the Constitution. However, in spite of having voted in favour of the Constitution on 2 April 1976, the *PPD/PSD* took the leadership of a resolute action seeking to radically change the content of the Fundamental Law. The referendum assumed a very relevant role in that struggle.

On 7 November 1977, one month before the fall of the First Constitutional Government led by the socialist leader Mário Soares, Francisco de Sá Carneiro resigned from the leadership of the *PSD* due to his disagreement with the political line of the majority of the National Political Commission. Sá Carneiro defended a stronger opposition of the *PPD/PSD* towards the *PS* Government and Ramalho Eanes, the President of the Republic who had in the meantime been elected. In his declaration vote before the *PSD* Political Commission, which left him in minority, Sá Carneiro [1989 (V) p. 21] advanced, for the first time, the idea that the Party needed to begin thinking about Constitutional revisions and the election of a new President of the Republic.

At the *PPD/PSD* Congress in Oporto on 28 and 29 January 1978, Sá Carneiro (1978, p. 66) explained the reasons for his resignation and approached the fundamental subjects that the Party must face. They were the structure of the State, the economic and social system, the Constitution, the President of the Republic, the Council of the Revolution, and the political role of the armed forces. He warned that it was necessary to consider Constitutional revisions and the election of a new President (Carneiro, 1978, p. 55). In that Congress, Sá Carneiro was not a candidate to lead the Party, but he was the head of all the lists to the National Council. At the end, he abstained from voting on the approved motion. Sousa Franco continued as President of the National Political Commission.



In text written a few days later, Sá Carneiro (1978, p. 55) criticised the Party for following an excessively moderate line towards the Government. Sá Carneiro (1978, pp. 13-15) defended that the opposition assumed by the *PSD* should be extensive to the President of the Republic, which he accused of being co-responsible for the governmental situation of the country and for playing the lead role of a type of presidential militarism. He believed that the *PSD* Congress fell short of the criticism that the presidential action imposed. Two factions were then visible inside the *PSD*. Sousa Franco and the National Political Commission supported a closer position towards the *PS* Government and a peaceful relationship with the President of the Republic. Sá Carneiro defended a radicalisation of positions against the Government, President Eanes and the Constitution (Manalvo, 2001, p. 76).

In a strategy to return to the Party's leadership, Sá Carneiro began to take public positions that diverged from the Political Commission, and he maintained his attacks against the *PS*, Eanes and the *MFA*. At the same time, he invoked the urgency of a Constitutional revision before the foreseen date (1980), through referendum [Carneiro, 1978, p. 77; 1989 (V) p. 178]. The confrontation peaked in *Vimeiro*, on 2 April 1978, during a lunch with *PSD* militants who invited him to speak. In his speech, Sá Carneiro [1989 (V), pp. 201-207] assumed the purpose of changing the Constitution through referendum. His argument was that, if the Constitution did not foresee the referendum, it did not exclude it. His proposal was for a referendum on the need for a Constitutional revision, and the holding of early elections.

On 3 April, in a radio interview, Sá Carneiro [1989 (V) pp. 181-197] Stated his strategy more precisely. There would be advanced elections to the Assembly of the Republic. The campaign should mainly discuss the Constitutional revision. If the result of the elections led to a conclusion that most of the Portuguese people, or a great percentage of the Portuguese people, wanted a premature revision of the Constitution, a referendum should be held.

The leftist Parties in the Parliament immediately criticised Sá Carneiro's proposal. The communist MP Jorge Leite considered the proposal for referendum to be part of a vast operation to endanger the stability of the democratic system and the Constitution (*DAR*, 56, 5 April 1978, p. 2030). On his side, the parliamentary leader of the *PS*, José Luís Nunes, considered that the innovation of the referendum to be a permanent coup d'état, since the Constitution did not allow it (*DAR*, 58, 7 April 1978, p. 3149).

In an article published in the newspaper *A Capital* on 15 April 1978, Jorge Miranda (1980, pp. 208-210) replied to the argument that even though the Constitution did not foresee the referendum, it did not exclude it either. As he explained, any jurist knows that the rule in public law is competence and not freedom. The State can only practice acts allowed by law, and the only body with power of Constitutional revision was the Parliament. On the other hand, the referendum was not included among the institutions considered by the Constitution.

Given the opposition of the founder of the Party, the Political Commission elected at the *PPD/PSD* Congress was unable to weather the political turbulence that resulted. It resigned at the National Council of 15 April 1978. In that meeting, Sousa Franco clarified the divergences of the Political Commission from the Sá Carneiro line regarding some fundamental points. Sousa Franco refuted the idea that the Party should oppose the President of the Republic, and he did not demand the premature revision of the Constitution, with or without a referendum. In his view, the Constitutional revision should respect the Constitutional rules in terms of both time and procedure. In other words, such a revision should only take place after the beginning of the II Legislature, on 15 October 1980, and with a two-thirds majority, therefore excluding the referendum (Franco *et al.*, 1978, pp. 21-46).

On 3 June 1978, 43 deputies and some other outstanding members of the Party, in solidarity with the National Political Commission, signed a document named Undelayable Options (*Opções Inadiáveis*). They assumed the strategy of proposing a Constitutional revision at the right time, and by the procedure established in the Constitution. A premature revision, with or without a referendum, would be a break with the assumed commitments and a violation of the Constitution (Franco *et al.*, 1978, p. 68). The defeat of these conceptions in the VI *PPD/PSD* Congress, which took place in Lisbon on 1 and 2 July 1978, provoked a division that gave rise to the emergence of a new party: the Independent Social Democrat Action (*ASDI*).

At that Congress, Sá Carneiro definitively assumed the leadership of the *PSD*. In its conclusions, the claim for a premature revision of the Constitution appeared directly, including the implicit idea of submitting the future revision to the electorate. The Constitutional revision would take place in 1980, but the participation of the *PSD* in the Government before new elections would be dependent on the commitment of the *PS*, the *CDS* and the President of the Republic with a programme

that contained fundamental proposals for the future Constitutional revision that would be submitted to the electorate (*PSD*, 1978, p. 18).

On 9 December 1978 the III Congress of the *CDS* took place, in which Lucas Pires (1979, p. 20) assumed his support for the referendum and considered it as a form of democratically granting a new Constitution. However, he supported it carefully, without ignoring that the referendum could be a double-edged sword. The referendum might save Portugal's fledgling democracy, but it might equally send the country back into a dark zone.

### **3.2.2. Sá Carneiro's Draft – *Uma Constituição para os Anos 80***

On 1 January 1979, Francisco Sá Carneiro published his own draft of the Constitution with the title "*Uma Constituição para os Anos 80*" (A Constitution for the 1980s), having in view the Constitutional revision after the legislative elections of 1980. He gave up the idea of a premature revision, but argued that a referendum on Constitutional revisions was necessary. (Carneiro, 1979, p. 15).

According to Sá Carneiro's (1979, p. 178) proposal, the passing of amendments to the Constitution did not require a two-thirds majority, since the absolute majority of the deputies in full exercise of their office would be sufficient. However, laws passed in parliament revising the Constitution should be submitted to a referendum within 60 to 90 days of the final voting.

In an article published in the Portuguese newspaper *Jornal de Notícias*, on 22 January 1979, the Constitutionalist and communist MP, Vital Moreira (1980, pp. 43-44), argued that Sá Carneiro's idea of changing the Constitution before 1980 and/or by plebiscite, was an unconstitutional coup d'état. In *Constituição e Revisão Constitucional*, (Constitution and Constitutional Revision) published in 1980, Vital Moreira noted that Sá Carneiro's draft seemed to abandon the idea of a premature revision by plebiscite. He explained that 'relative contention' with three factors. The first regarded the need to maintain internal order within the *PSD*. The second factor was the need to attract the support of the *PS* for an agreement on the Constitutional revision. Finally, there would be another reason of a tactical order: that draft would be the first phase of a great revision of the Constitution, with the second phase only being possible with an absolute majority (Moreira, 1980, p. 51).

In an interview to the Portuguese Broadcasting on 22 January, Sá Carneiro [1989 (VI) pp. 7-13] retreated from the idea of a premature Constitutional revision, noting the *PS* and *PCP*'s opposition to that proposal. He considered, however, that the Constitution should contain flexible devices that allowed revisions to be made by Parliament with a two-thirds majority, provided the Constitutional revision laws were submitted to a referendum.

The retreat from the demand for a referendum to advance the revision was also justified by the political lull and decrease in tension resulting from the collapse of the *PS* government and the installation of a non-partisan government. Indeed, President Eanes had designated Mota Pinto as Prime Minister. Being close to the *PSD*, he moderated Sá Carneiro's position, and was expected reinforce the *PSD* positions in the field of the Government. In those conditions, the Constitutional revision could wait until the 1980 legislative elections [Carneiro, 1989 (VI) pp. 8-9].

### **3.2.3. The Pressures on the President of the Republic**

Nobody in the *PSD* ignored that fact that the Party was unlikely ever to reach the two-thirds majority needed to review the Constitution. Thus, its political strategy for the Constitutional revision would have to involve the President. Therefore, attention turned to President Eanes and the 1980 presidential election.

In the beginning of March 1979, an esteemed *PSD* member, Carlos Macedo, in an interview to the newspaper *Tempo*, launched a challenge on the President. According to him, the alternative to breaking the deadlock in the country would result in anticipated legislative elections, followed by a referendum for Constitutional revision on the president's initiative. It would only be possible to think about the *PSD* supporting the re-candidature of Ramalho Eanes in 1980 if he agreed to be part of that plan. This is how the *PSD* returned to the idea of the premature revision, which had apparently been laid aside by Sá Carneiro.

On 9 March 1979, Vital Moreira (1980, pp. 77-85) published an article in the newspaper *O Jornal* denouncing the campaigns to make the President of the Republic play a decisive role in the Constitutional revision, ideas that were promoted by rightist political forces. According to Moreira, those political sectors, conscious that they would not have the necessary support in the 1980 elections to force the Constitutional revision according to their perspectives, were trying to harness the democratic legitimacy of the President to those ends (Moreira, 1980, p. 78). There

were two ways to force presidential intervention. One of them would consist in demanding that the President start a premature Constitutional revision by referendum. Another one would consist in linking the presidential elections of 1980 to the Constitutional revision, with the President choosing the bearer of a Constitutional revision project (Moreira, 1980, p. 78).

Two variants would still stand out. For some, the President should propose a new draft of the Constitution, which would then be taken to referendum, as in 1933 or in Palma Carlos's project. For others, the referendum could only change the Constitutional revision procedure, in terms of the time and the form of revision, in order to eliminate the need for a two-thirds majority and abolish limits on revision. For Vital Moreira (1980, p. 79), both outcomes would be flagrantly unConstitutional. In a Constitutional State, the only forms of expression and political decision with legitimacy were those foreseen in the Constitution, and the referendum was not among them. There was already a system for revision in the Constitution, and disrespecting this would be a Constitutional break. Furthermore, the President of the Republic had no Constitutional powers to call a referendum (Moreira, 1980, p. 80).

The Socialist Party took a position on that subject in Parliament through a political declaration made by Jaime Gama on 13 March 1979 (*DAR*, 37, 14 March 1979, pp. 1263-1265), which criticised the referendary wave that tried to change electoral calendars and legitimise forms of Constitutional revision by all means. These proposals were entirely illegitimate and contrary to the democratic regime. In the parliamentary sittings that commemorated the 5<sup>th</sup> anniversary of the Constitution, all the left parties criticised the idea of a Constitutional referendum, which they considered a counter-revolutionary coup d'état under the cover of a pseudo Constitutional revision.<sup>91</sup>

On 18 April 1979, some campaigners, mostly from the *PS*, including two former ministers of the First Constitutional Government, António Barreto (Agriculture Minister) and José Medeiros Ferreira (Foreign Minister), signed and published the *Manifesto Reformador* (Reformer Manifesto), (Barreto *et al.*, 1979). They explicitly proposed that the referendum be an extraordinary method of popular consultation, in order that the people had the opportunity to pronounce on the parliamentary capacity to freely review the Constitution.

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<sup>91</sup> In that sense, see the speeches by Salgado Zenha (*PS*) and Manuel Gusmão (*PCP*), (*DAR*, 45, 3 April 1979, pp. 1597 and 1589).

Their exact purposes were: **a)** to hold a referendum that allowed the members of Parliament to freely review the Constitution, before or during the new parliamentary elections; **b)** to dispute those elections to overcome the prejudices and obstacles created by the current political forces, which were neither capable of governing Portugal, nor able to establish the necessary democratic majority; **c)** to increase the powers of the President of the Republic (Barreto *et al.*, p. 15).

In that same month of April 1979, Sá Carneiro began to express concern about the leading presidential role in the political system. The government in power, led by Mota Pinto, had been appointed by the President's initiative, and occupied the same political area of the *PSD*. Moreover, the 43 *PSD* deputies who subscribed the *Opções Inadiáveis* document decided to leave the Party and assumed the status of independent deputies, in disagreement with the party's decision to vote against the Budget of State proposed by the Government.

Sá Carneiro reacted with an interview carried in the newspaper, *Tempo*, on 11 April 1979. He accused the *Inadiáveis*, Mota Pinto and the President of the Republic of intending to found a new, presidentially inspired party. He finished by demanding early elections [Carneiro, 1989 (VI) pp. 125-141]. On 28 April 1979, at a *PSD* rally in *Faro (Algarve)*, he accused Eanes not just of intending to create a new party, but also of planning to call a referendum unilaterally. He wanted a referendum, but only if the Assembly of the Republic approved a referendum law and if the parliamentary majority decided to call a referendum [Carneiro, 1989 (VI) pp. 159-165].

In the Assembly of the Republic on 2 May 1979, Sá Carneiro gave a speech explaining his tactics. The referendum would be openly unConstitutional and undemocratic if the President of the Republic decreed it unilaterally. Therefore, the Assembly of the Republic should approve a referendum law and initiate a referendum in that framework. The responsibility of the President of the Republic would be to enact both acts (*DAR*, 54, 3 May 1979, p. 1893; Carneiro, 2000, pp. 330-345).

On 6 May 1979, at a *PCP* rally in *Almada*, Álvaro Cunhal (1980, pp. 84-85) took a position on the Constitutional referendum, expressing his Party's vehement opposition on three counts. First, the Constitution did not admit the referendum. Second, the reactionary forces wanted the referendum, not as a democratic consultation of the Portuguese people, but for an unConstitutional revision of the Constitution. And third, the referendum would defraud the popular will if handled by forces without any democratic scruples.

### **3.2.4. The Democratic Alliance Project**

The VII *PSD* Congress on 20 June 1979 charged the party leadership with establishing contacts with the *CDS* and the *PPM*, aiming towards a cooperation agreement that expressly supported the idea of a referendum. In Sá Carneiro's closing speech, he affirmed that, in the case of an impasse, the referendum could be a democratic tool, unblocking and clarifying with a view to moving forward in the future. Nobody could deny the people's right to express their own sovereignty, ensuring the future of freedom, justice and progress. However, the referendum could be used as an act against, or for, democratic institutions. The Party would, therefore, study a bill to be introduced in the Assembly of the Republic so that the Parliament could approve a referendum law, allowing an eventual referendum in consonance between the Parliament and the President [Carneiro, 1989 (VI) pp. 225-232].

Meanwhile, after the dissolution of the Assembly of the Republic and the calling of intercalary elections for 2 December 1979, the *PSD*, the *CDS*, and the *PPM* constituted an electoral coalition named Democratic Alliance (*Aliança Democrática*).<sup>92</sup> According to Marcelo Rebelo de Sousa (1983, pp. 583-584), the programme of the Democratic Alliance argued for a deep Constitutional revision in order to change the economic system, to subordinate the armed forces to civilian power, and to reduce the powers of the president within the government's system. The programme argued that the referendum was a Constitutional means of revising the Constitution, and sought to surpass the deadlock between president and parliament, and provide the mandate needed for the Constitutional revision.

In the elections of 2 December 1979, the *AD* obtained an absolute majority, although by a narrow margin, in the Assembly of the Republic. They constituted the VI Constitutional Government with Sá Carneiro as Prime Minister. The Government's programme included the approval of a referendum law.

Sá Carneiro defended that idea, based on the principle that anything that is not forbidden by the Constitution is implicitly allowed [*DAR* (I) 4, 12 January 1980, p. 52]. Several deputies of the opposition disputed the juridical foundations of that idea. José Tengarrinha (*MDP*) considered it clearly unConstitutional [*DAR* (I) 4, 12 January 1980, p. 59].

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<sup>92</sup> See the text of the *AD* Agreement, in Carneiro [1989 (VI) pp. 311-312]. The subscribers of the "reformer manifesto" took part of the coalition in places given by the *PSD*.

Veiga de Oliveira (*PCP*) considered it improper of a jurist to defend such an idea, when the Constitution says in its Article 3 that the sovereignty shall be single and indivisible and shall lie with the people who shall exercise it in the forms provided for in the Constitution [*DAR* (I) 4, 12 January 1980, p. 63]. On behalf of the *PS*, Vítor Constâncio considered that the proposal heralded a rupture in the institutional framework [*DAR* (I) 6, 17 January 1980, p. 189].

In defence of the proposal, Luís Beiroco (*CDS*) tried to separate the referendum law from the Constitutional revision, arguing that the use of the referendum to review the Constitution was not the same as using a referendum to change the Constitution itself. In his opinion, it was important to utilise an instrument to discover directly citizens' opinion on fundamental subjects of community life and the organisation of the State [*DAR* (I) 5, 16 January 1980, p. 148].

The attempt to move the question away from Constitutional revision did not persuade the opposition, which did not forget that Sá Carneiro's purpose was the approval of a referendum law as the first step of a Constitutional revision by referendum. In that sense, José Tengarrinha (*MDP/CDE*) said that the approval of the referendum law was only understandable when related with the purpose of changing the Constitutional order [*DAR* (I) 7, 18 January 1980, p. 253]. José Luís Nunes (*PS*) pointed out that the *AD* majority only intended to introduce a referendum law in order to use the unconstitutional referendum to illegally review the Constitution [*DAR* (I) 7, 18 January 1980, p. 289].

At the end of the debate, the communist leader, Álvaro Cunhal, described the attempt to introduce a referendum as a great subversive operation that would destroy the democratic regime. In addition to what has been mentioned about Article 3 beforehand, Article 111 (which is now 108) established that the political power shall lie with the people and shall be exercised in accordance with the Constitution. The Constitution did not admit the referendum, and the attempt to introduce it by ordinary law was clearly unconstitutional. If the sovereign organs could act according to the principle that the Constitution allows everything that it does expressly not forbid, then this would lead to illegality, free will and despotism [*DAR* (I) 7, 18 January 1980, p. 266]. The socialist leader Mário Soares also refuted the theory that everything that was not expressly prohibited in the Constitution was permitted. Such a doctrine could never be accepted in Public Law and, at the time the Constitution had been drawn up, the *PPD* had expressed no such idea [*DAR* (I) 7, 18 Jan. 1980, p. 272].



In the debate of a confidence motion presented by the Government, on 18 January 1980, Borges de Carvalho (*PPM*) appealed to Natural Law to justify the Constitutionality of the referendum. If the referendum was unConstitutional by the light of the Constitution, it was the Constitution that was unConstitutional and not the referendum. According to Natural Law, there were principles beyond any Constitution [*DAR* (I) 8, 6 June 1980, p. 304].

The idea that the Constitutional referendum would follow from Natural Law was not a new idea. Vital Moreira argued that the proposed referendum denied the idea of a Constitution. The Constitution, and the very idea of a Constitution, was born precisely to limit the absolute State, and to restrict what it could do. In his view, the Constitutional State could act only in the forms prescribed by the Constitution [*DAR* (I) 8, 6 June 1980, p. 317].

### **3.2.5. The Bills of the Referendum Law**

The Reformers Group introduced the first Bill of the referendum law on 6 June 1980. Bill No. 501/I [*DAR* (II) 69, 6 June 1980, pp. 1140-1142] proposed an optional Constitutional referendum, if the Constitutional revision did not obtain the two-thirds majority in Parliament. The President of the Republic could also summon a referendum if requested by the Assembly of the Republic, or if there a minimum of 100,000 electors signed a petition.

The *PS* and the *PCP* appealed the admissibility of the Bill, [*DAR* (II) 71, 14 June 1980, p. 1214-(2)] arguing that it was unConstitutional. They based their case on three points. First, the Constitution established a framework of representative democracy that excluded the referendum. The people exercised political power in the forms provided by the Constitution, and the referendum was not one of those forms. Second, the bill gave powers to sovereignty organs that were not foreseen in the Constitution. Article 113(2) provided that the formation, composition, responsibilities, power, and *modus operandi* of the bodies that exercise sovereign power shall be those laid down by the Constitution. Third, the admission of the referendum as a form of Constitutional revision collided with the Constitutional provisions that regulated that process (Articles 286 and followings). The Assembly of the Republic only acquired revision powers in the II Legislature, and the changes required a two-thirds majority of all the members present, more than an absolute majority of all the members in full exercise of their office.

On 21 June, the Government introduced the Bill of Authorisation to Legislate No. 365/I [DAR (II) 74, 21 June 1980, p. 1284] to define the legal status of the referendum. The *PS* appealed to its admissibility essentially based on the same arguments [DAR (II) 76, 25 June 1980, pp. 1311-1312]. These initiatives were not considered due to the lack of parliamentary time in the brief I legislature, which ended on 27 June 1980.

### **3.2.6. The Doctrinaire Debate**

The debate about the legitimacy of changing the Constitution by referendum was particularly intense during 1980. The political sectors that defended this option increased their efforts to find a juridical base for it.

In 29 May 1980, the *Instituto Democracia e Liberdade*, (Democracy and Freedom Institute), linked to the *CDS*, organised a workshop on the Constitutional revision, which invited several jurists from the political sphere of *AD*, including Barbosa de Melo, José Miguel Júdece and Marcelo Rebelo de Sousa. They supported the legitimacy of changing the Constitution by referendum, without respecting the Constitutional provisions related to the Constitutional revision. The idea was that the referendum would be a display of the original constituent power. The question would not be to review the Constitution but to make a new one.

In No. 15 of *Democracia e Liberdade* published by the *Instituto Democracia e Liberdade* in June 1980, Afonso Rodrigues Queiró, Professor of Administrative Law at *Coimbra* University, considered it heresy to say that the exercise of sovereignty was regulated and limited by the Constitution (Queiró, 1980, p. 29). According to him, the people were entitled to modify their institutions (Queiró, 1980, p. 25). The Professor thought it illegitimate to limit the exercise of sovereignty by the people to the forms foreseen in the Constitution. The Constitution, in the terms of the classic thought of Rousseau and Siéyès, cannot rule the future action of the constituent power. It is the sovereign constituent power of the people, which could not be fettered by written provisions, approves, sustains and gives the Constitution its validity. It is not the Constitution that sustains, checks competences or fastens limits to the constituent power. The conclusion was that the Constitutional provisions did not constitute a limit to the freedom of the constituent legislator (Queiró, 1980, pp. 24-25).

As to how to exercise constituent power, Afonso Queiró considered the deliberative constituent referendum to be legitimate

because the referendum was pure and simple and did not precede any resolution from the Parliament or from a Constituent Assembly. The referendum was besides and above the Constitution. The popular instance had the supreme power and could express it directly, without the representatives' intervention. The fact that the referendum is not established in the Constitution was not an obstacle because, according to the author, the people are before and above the written positive Constitution (Queiró, 1980, pp. 30-31). Afonso Queiró recognised that the referendum held dangers. To prevent those dangers, the referendary process would need to begin with a legislative process laid down in the Constitution, to regulate the popular initiative process in the constituent domain, and to observe whenever that initiative was taken in the future. That law should regulate the right of initiative, the characteristics of the drafts submitted to the electorate, the time of their presentation, the entity responsible for receiving them, as well as the scrutiny form (Queiró, 1980, p. 32).

Finally, the author considered that it would be totally illegitimate for the President of the Republic or the Council of the Revolution to pronounce on the Constitutionality of an Assembly of the Republic decree regulating the referendary process in order to change the Constitution, since the Constitution did not foresee the referendum. The author believed that any sovereignty organ was entitled to oppose an eventual expression of the will of the people, in defence of the Constitution in force. The President of the Republic could only exercise a political veto, but the Assembly of the Republic could confirm its vote with the absolute majority of its members in full exercise of their office, and he could not refuse that enactment.

There was still one obstacle, which was the need of a two-thirds majority from Parliament to surpass the political veto of the President of the Republic on subjects regarding the electoral acts provided by the Constitution. However, not even this fact deterred the author. According to him, the referendum was not an electoral act provided for in the Constitution, simply because the Constitution did not sustain the referendum (Queiró, 1980, p. 34).

After all, Afonso Queiró's aim was to create a Constitutional doctrine in agreement with the political conveniences of the moment. The goal was to move away from the Constitution in force. In order to do that, it was necessary to find a juridical foundation, which in this case meant refusing the legitimacy of the constituent power and placing the referendum, as an expression of popular will, above it. Through a

referendum, the people could move beyond the written Constitution. However, with the lack of devices already instituted to regulate the referendum procedure, the author appealed to the Constitution after all. The only recognised usefulness of the Constitution was to supply the necessary devices to dig its own grave.

The same is true of the removal of an eventual presidential veto. According to the author, the President of the Republic could not invoke the Constitution to prevent an unConstitutional referendum, but he should be able to use the political veto within the limits of the Constitution. That is to say that the President could not invoke the Constitution in defence of Constitutional order, but he must act in accordance with it when using his own powers. Regarding electoral laws, the political veto could only be over-ruled by a two-thirds parliamentary majority. However, the author argued that, since the referendum was not foreseen in the Constitution, it could not be considered an electoral law in Constitutional terms, and thus could be over-ruled by an absolute majority. Curiously enough, it was in the Constitution that the author founded that thinking. Therefore, the validity of the Constitution was intermittent. It would be completely irrelevant where it contradicted the purposes of the author, but perfectly legitimate where the author sought to liquidate the current Constitutional order.

In the same edition of *Democracia e Liberdade*, Marcelo Rebelo de Sousa and Margarida Salema did not go so far regarding Constitutional subversion by referendum. They considered that the referendum did not respect the established rules of Constitutional revision, but it would not be of a matter of Natural Law either, because the option of semi-direct democracy, in disfavour of direct democracy or representative democracy, does not flow from Natural Law. They even recognised that the common understanding in the doctrine was that the permission of the referendum depended on the Constitution (Sousa & Salema, 1980, p. 50).

### **3.2.7. The AD Strategy**

The purpose of the AD was to achieve a referendum before the Constitutional revision, suppressing the material limits and some of the formal limits on the exercise of the Constitutional revision power. That presupposed a parliamentary majority in the elections of October 1980, the approval of a referendum law defining the juridical outlines of that institution, and the election of a President, by the end of 1980, who accepted such a purpose (Sousa & Salema, 1980, p. 52).

Therefore, Sá Carneiro chose General Soares Carneiro as the presidential candidate for the *AD*. He was not a consensual candidate. He was too right wing, even by *AD* standards, but Sá Carneiro bet his political future on that choice, establishing a link between his continuity in the Government leadership and Soares Carneiro's victory (Manalvo, 2001, p. 89).

In the words that closed his electoral manifesto, General Soares Carneiro clearly assumed the acceptance of Constitutional change by referendum. He thought that the President should have a decisive word in the Constitutional revision. If there was no consensus in Parliament regarding the essential points, he would call a popular referendum. On that, he made his position quite clear (Carneiro, 1980, pp. 13-14).

Soares Carneiro's method of working towards the Constitutional revision was also clear. In the II Legislature, which started in October 1980, the Constitutional revision was inevitable. As the elections were so brief, the anticipation of the revision was not possible. After the election, *AD* political forces should try to reach an agreement with the Socialist Party, since they could not realistically obtain a parliamentary majority of two thirds, necessary for a possible Constitutional revision, themselves. However, the General had demands as to the contents of the revision in some essential points. If these points were not achieved, he would call a referendum.

As Article 286(4) of the Constitution denied the President the power to refuse the enactment of the Constitutional revision law, it is clear that Soares Carneiro's intentions wildly exceeded the constitutional powers of the President of the Republic. The President did not have the right to evaluate concretely the contents of the revision. Neither did he have the right to react to a lack of agreement with the *PS*. The conclusion is obvious. Soares Carneiro's election would have given way to a referendum that would change the Constitution, if the Constitutional revision intended by the *AD* did not obtain the two-thirds majority in the Assembly of the Republic. Therefore, instead of defending and observing the Constitution,<sup>93</sup> Soares Carneiro would have changed it fundamentally.

The necessity to defend the Constitutional order mobilised opinions. In an interview given to the newspaper *Portugal Hoje*, published

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<sup>93</sup> The sworn of the President of the Republic in his installation before the Assembly of the Republic was the following: I swear by my honour to faithfully perform the office with which I am invested and to defend and observe the Constitution of the Portuguese Republic [Article 130(3) of the Constitution].

on 17 July 1980, the French Constitutionalist Maurice Duverger expressed a confusing judgement about the possibility of Constitutional referendum. He considered the referendum proposed by the *AD* as being no more democratic than the referendums used in countries with dictatorial regimes. On 29 July, in an interview with the same newspaper, Jorge Miranda (1983, p. 364) contradicted the legitimacy of the Constitutional referendum saying that the only way to review the Constitution was provided in Articles 286 and the Articles that followed. Anything different from that would be a coup d'état, a Constitutional rupture, or a new Constitution, but not a revision of the 1976 Constitution.

From the side of the *AD*, José Ribeiro e Castro (1980, pp. 45-48), an outstanding member of the *CDS*, exposed his plan in four phases. The first phase would be the *AD* victory in the legislative elections. That would assure the identification of the Portuguese people and their majority with the vision for a Constitutional revision. The second phase would be the drawing of a 'declaration of rights' by the *AD*, which would naturally become the central document of the revision and its fundamental inspiring centre. That document should contain the lines and the fundamental characteristics of the Constitution of 1981. The third phase would be Soares Carneiro's victory in the presidential elections. As President, he would be able to decide on the referendum. The fourth and last phase would be the referendum that would approve the Constitution of 1981.

### **3.2.8. The Presidential Election of 1980 - The Decisive Battle**

In the parliamentary elections of October 1980, the *AD* reinforced its absolute majority. The electoral result allowed it to govern alone but did not allow it to review the Constitution alone. Thus, the *PSD*'s purpose would only be possible with the commitment of the President of the Republic. This explains the declaration by Sá Carneiro the day after the elections, where he stated that the *AD* victory would be the first ballot of the presidential elections.

At the *PSD* National Council on 18 October 1980, Sá Carneiro [1989 (VII) pp. 365-372] defined the Party's strategy. The *PSD* should try to achieve a consensus with the *PS* for the Constitutional revision. However, since consensus would be difficult to reach, the best way would be to pass a law on the referendum. With this law passed in the Assembly of the Republic and the Council of the Revolution, and therefore enacted by the President of the Republic, the *PS* would be capable of accepting a Constitutional revision agreement.

However, on 13 November 1980, the President of the Republic sent a message to the Parliament on the opening of the II Legislature, in which he made his opposition towards any Constitutional revision quite clear. As far as he was concerned, the proposal did not follow the rules Constitutionally provided, and he peremptorily refused the Constitutional referendum [*DAR* (I) 1, 14 November 1980, p. 14]. This Statement, refusing the use of the referendum to impose a Constitutional change made by the President of the Republic who was already a candidate for re-election, make it very clear what was at stake in the presidential election of December. The choice between Ramalho Eanes and Soares Carneiro was also, above all, a choice between the defence and the rupture of the Constitutional order.

As expected, the debate raged with great intensity in the Assembly of the Republic during the first sessions of the II Legislature before the presidential election. In the debate of a motion of confidence presented by the Government, on 20 November, Almeida Santos (*PS*) affirmed his opposition to the referendum, not because it was good or bad, democratic or antidemocratic, but because the Constitution did not allow it [*DAR* (I) 4, 21 November 1980, p. 61].

On 21 November, Lucas Pires (*CDS*) defended the Constitutional referendum because the people are the first and last bastion of the human will in politics. The Constitutional revision was a responsibility of the Assembly, but the referendum could make sense against hegemonic attempts on the Constitution by some Parties [*DAR* (I) 5, 22 November 1980, p. 31].

On 25 November, Jaime Gama (*PS*) said that the revision of the Constitution should be based on Constitutional arguments rather than political blackmail. For the establishment of wider consensus – the two-thirds majority – it would be necessary to discuss, negotiate and make reciprocal arrangements. The Constitutional arrogance of those who exhibited the systematic blackmail of the referendum should be substituted by a clear will of cooperation and dialogue with the opposition [*DAR* (I) 6, 26 November 1980, p. 153].

On 4 December 1980, Sá Carneiro died in a plane crash, and on 7 December 1980 General Ramalho Eanes was re-elected President of the Republic, defeating General Soares Carneiro. That first week of December 1980 closed this chapter of Portuguese political life. The possibility to review the Constitution by referendum ended then.

### **3.2.9. Critical Analysis**

Jorge Miranda (2003, p. 379) synthesised the arguments raised about the Constitutional referendum between 1977 and the end of 1980. For this author, the referendum sought: **a)** to solve the problem of the material limits of Constitutional revision by appealing to the people as holders of sovereignty to surpass them; **b)** to overcome an ideological deadlock that the Constitution would bring; **c)** to remove the rule of the two thirds majority for the approval of Constitutional changes; **d)** to make the revision possible even if they did not have the qualified majority required in the Assembly of the Republic.

The legal arguments used to found that pretension were, in synthesis, the following: **a)** the people, in agreement with the democratic principle, would be above the Constitution and could change it without respecting the established rules; **b)** the referendum, as an expression of popular will, would belong to the Natural Law which, since it predated the Constitution, would provide a legitimate source of change; **c)** the fact that the Constitution did not foresee the referendum did not mean that it would forever be prohibited; **d)** the referendum would arise from the Constitutional principle of the direct and active participation of the citizens in public life; **e)** there were Constitutional referendums in other countries that lacked Constitutional provisions. These were even allowed in violation of Constitutional rules.

According to Jorge Miranda (2003, p. 379), the weakness of those arguments was notorious before the general rules of interpretation and the basic rules of the western Constitutionalism. All public power has to be contained in juridical rules and, in that, representative and pluralist devices prevail over those of direct democracy. Actually, all those arguments were refutable and the defenders of the Constitutional order instituted in 1976 refuted them, based on the following arguments:

- a)** It is correct to subordinate the exercise of power by the people to the forms and terms provided in the Constitution. In a democratic State based on the rule of law, the people can only exercise its sovereign power for those forms and terms, because the law also limits its power (Miranda & Medeiros, 2007, p. 299).
- b)** The referendum did not come from Natural Law but from positive law. The contemporary democracy is not seated in the direct democracy, but fundamentally, in the representative democracy. The referendum, as experience shows, can be a complement of representative democracy,



but it can be also an instrument in the hands of undemocratic regimes.

- c) The idea that everything that is not prohibited is permitted is only valid in the domain of private law, and not in public law, otherwise there would be the risk of falling into the domain of arbitrariness. In fact, there could be no referendum without the juridical definition of who had the power to summon it and which rules would be applied for its accomplishment.
- d) The active and direct participation of the citizens in public life does not necessarily presuppose the referendum. Once that principle was proclaimed, it fell upon the Constitution and the law to define the ways to operationalise it, which may or may not include the referendum.
- e) The defenders of the admissibility of the Constitutional referendum gave several examples of cases of referendums verified in other countries that contradicted Constitutional provisions, or were held without Constitutional provisions. The most commonly cited example was the referendum summoned by General De Gaulle on 28 October 1962 to achieve the Presidential election by universal suffrage. However, the French example of 1962 was not comparable with the Portuguese situation of 1976-1980 because, as Vital Moreira (1980, p. 81) pointed out, the Constitution in France allowed the legislative referendum, and the President was responsible for summoning it. In the Portuguese case, the Constitution did not admit any type of referendum. Furthermore, unconstitutional acts do not become Constitutional when they are practiced. Saying that the Constitution in Portugal could be ignored, and that a referendum could be held because such a procedure, although unconstitutional, had been done in other countries, is not indeed a legal argument. For the same reason, it is not valid to argue that, in previous historical moments in Portugal, Constitutional revisions were passed without respect for the Constitutional formalities. That is true, but those facts do not make them less unconstitutional.

The conclusion is that the most important question was not a legal discussion, but a political attitude. The Constitutional revision was very clearly regulated in Articles 286 and the following of the Constitution. The revision could only happen in the II Legislature of the

Assembly of the Republic, which began in 1980. The changes of the Constitution would require a two-thirds majority of all the members in full exercise of their office. The President of the Republic could not refuse the enactment of the revision law. The revision laws would have to respect a group of principles granted in Article 290 of the Constitution, designated as material limits of the Constitutional revision.

It was obvious that, regarding the Constitutional order, the Constitutional revision should observe such rules. However, as Jorge Miranda (2003, p. 379) reminds us, the problem was not a procedure to modify the Constitution, which presupposed the acceptance of their rules, but a process for its substitution. What was being questioned was the opposition to the Constitution and the rupture of the 1976 Constitutional order or, as Vital Moreira put it, the denial of the idea of a Constitution.

### **3.3. The Constitutional Referendum after the 1980 Presidential Election**

#### **3.3.1. The 1982 Constitutional Revision**

##### **3.3.1.1. The Draft by B. Melo, C. Costa & V. Andrade**

The presidential election of 7 December 1980 made it clear that the Constitutional revision was in agreement with the established rules. The debate from now on would concern the draft amendments to the Constitution.

In February 1981, three Professors from *Coimbra* University, António Barbosa de Melo, José Manuel Cardoso da Costa and José Carlos Vieira de Andrade, made a study for the base of the Democratic Alliance draft amendments to the Constitution (Melo *et al*, 1981). It was published under the title of *Estudo e Projecto de Revisão da Constituição da República Portuguesa de 1976* (Study and Draft Amendments to the Constitution of the Portuguese Republic of 1976).

The section referring to the political power organisation, which was under Cardoso da Costa's direct responsibility, proposed a wide Constitutional inception of the referendum with an extensive explanation on the deeply democratic nature of that institute. In this study, the referendum was conceived as a process or device that should intervene in special or even exceptional circumstances. These were characterised as follows: **a)** for a political impasse; **b)** for subjects whose magnitude and relevance justified that the responsibility of their decision was directly assumed by the people as a whole, or **c)** when it was to be suspected, with a

minimum of likelihood and legitimacy, that the decisions taken by the representatives did not correspond to the feeling and common will of the citizens (Melo *et al*, 1981, p. 163).

In this manner, they proposed the possibility of Constitutional referendum when, having a clear parliamentary majority in favour of changing the Constitution, that did not reach the two thirds majority needed to approve it. The authors invoked two facts in favour of their proposal. Firstly, the fact of it being a matter that respected the organisation or the rule of the community's fundamental life, and therefore sufficiently important to justify the referendum. Secondly, the fact that the proposal for a referendum had the support of those who held major democratic offices: the majority of the Parliament and the President of the Republic, who would have the responsibility to call, after all, the referendum.

Consequently, they proposed that the alterations should require passage by a two-thirds majority of all the deputies in full exercise of their office, just as the Constitution Stated. However, the President of the Republic could decide to call a referendum on these alterations if they had not obtained the required majority, and also if they had been approved by the absolute majority of all deputies in full exercise of their office (Melo *et al*, 1981, pp. 303-304).

According to the authors' explanation, this provision opened a democratic escape valve for extreme situations which, even though exceptional, deserved Constitutional regulation. It would mean giving the same weight to the two-thirds majority on the one hand, and on the other, the sum of the will of the President of the Republic, the majority of Parliament and the majority of electors.

### **3.3.1.2. The AD draft**

The draft amendments to the Constitution introduced on 25 April 1981 by the Democratic Alliance parties (*PSD*, *CDS* and *PPM*) followed the guidelines proposed in the draft, but with two main differences. The President of the Republic could summon the referendum after first consulting the Council of State (advisory body of the President of the Republic who created the draft proposed and the 1982 Constitutional revision). The referendum could not have amendments to the Constitution that modified the balance of attributions and competences between the sovereignty organs or the provisions on the statute and election of their officeholders as subjects [*AR*, 1994 (I) p. 67].

This proposal was strongly criticised in Parliament by José Luís Nunes on behalf of the *PS*, saying that the Constitutional referendum would simply break the stabiliser scheme of the Constitution of the Republic, which a majority could not change arbitrarily [*DAR* (II) 33 – Supplement, 23 December 1981, p. 26]. This possibility would mean the subordination of the parliamentary system and the delivery of powers to the President, who could then subvert the semi-presidential system, transforming it into a presidential system *tout court*.

Also on behalf of the *PS*, Luís Nunes de Almeida stressed that Constitutions were not necessary if simple majorities could change them. The ordinary law could rule everything. When the qualified majority was not obtained, the proposal for referendum would empty the sense of the word Constitution [*DAR* (II) 33 – Supplement, 23 December 1981, p. 33].

### **3.3.1.3. The Return to the Debate of 1980**

During the debate in the Ad-Hoc Committee of Constitutional Revision, the controversy before the 1980 presidential election threatened to resurface. Everything began with Jorge Miranda's speech on 4 November 1981, where he considered the proposal for a referendum by the *AD* as a confession that the proposal introduced before the presidential election was against the Constitution and would mean an institutional rupture [*DAR* (II) 33 – Supplement, 23 December 1981, p. 28]. Before this Statement, Fernando Condesso (*PSD*) revisited the theory that the Constitution admitted the referendum even if it was not included in its provisions [*DAR* (II) 33 – Supplement, 23 December 1981, p. 30] and Luís Beiroco (*CDS*), said that the explicit inclusion of the referendum in the Constitution, in quite strict terms that prevent any doubts or doctrinal divergences as to the cases in which it can be held, did not mean that the Constitution in force prohibited the referendum [*DAR* (II) 33 – Supplement, 23 December 1981, p. 32]. These Statements caused a small storm.

Luís Nunes de Almeida considered that, before such Statements, he saw the *AD* proposal for a national referendum in a different light. If the *AD* understood the referendum as legitimate even if it was not provided by the Constitution, the referendum proposed was only one form of referendum, thus admitting the legitimacy of other forms [*DAR* (II) 33 – Supplement, 23 December 1981, p. 33]. In the next meeting, on 5 November, Nunes de Almeida (*PS*) and Vital Moreira (*PCP*) insisted on clarifying that point [*DAR* (II) 35 – Supplement, 6 January 1982, pp. 3-4]. Given that the Constitutional revision obviously needed the agreement of

the *PS* to obtain the necessary two-thirds majority, the *AD* retreated from that position. Luís Beiroco (*CDS*) declared that the *AD* accepted the results of the presidential election, and took part in the works of the Constitutional revision. Francisco Sousa Tavares (*PSD*) said that the presidential election revealed that the will of the people did not align with the *AD*'s interpretation of the Constitution, and therefore the *AD* should abandon it definitively. Manuel Costa Andrade (*PSD*) was still clearer in affirming that, if the *AD* proposal were defeated, there would be no doubt that the Constitution did not allow the referendum [*DAR* (II) 35 –Supplement, 6 January 1982, pp. 3-5).

#### **3.3.1.4. The Ending in Plenary**

In the plenary sittings, the *AD* maintained its proposal of national referendum even if only symbolically. In the first article where that subject was raised (136), which related to the responsibilities of the President of the Republic, the *AD* proposed the inclusion of a new paragraph giving the President the power to call a popular referendum. That proposal obtained 98 yea votes (*PSD*, *CDS* and *PPM*) and 78 nay votes (*PS*, *PCP*, *ASDI*, *UEDS*, *MDP/CDE* and *UDP*). It did not have the two-thirds majority needed to pass [*DAR* (I) 116, 9 July 1982, p. 4874)]. This voting prejudiced the other proposals regarding the national referendum.

Actually, the *AD* proposal of 1982 was justified by the symbolic loyalty to its history, making it obvious that there would never be a majority of two-thirds to approve it. The defeat of Soares Carneiro during the presidential election of 7 December 1980 had decided the question. The main questions for the *PSD* in the 1982 Constitutional revision, which needed the agreement of the *PS*, were the extinction of the Council of Revolution and the end of the transitional Constitutional period. In order to achieve these important goals, they were prepared to drop their demand for the Constitutional referendum.

#### **3.3.2. The Constitutional Referendum in the Subsequent Constitutional Revisions**

In the Constitutional revision of 1989, which approved the national referendum, there was no proposal for a Constitutional referendum. The same happened in the extraordinary revision of 1992. In 1994, a process of Constitutional revision began, but did not finish due to the absence of a global agreement between the *PS* and the *PSD*. Fifteen draft amendments were presented, but only one, personally presented by

Pedro Roseta (*PSD*), proposed the Constitutional referendum (*DAR*, Off-print 24/VI, 7 November 1994, pp. 135-137).

In the 1997 Constitutional revision, the *PSD* again raised the proposal of Constitutional referendum, assuming it as a tradition of the Party (Magalhães, 1997). The proposal, introduced by Luís Marques Guedes in the Ad-Hoc Committee of Constitutional Revision, wanted the revision laws passed in the Assembly of the Republic to be subject to a binding consultation of the population before enactment as a way of democratically strengthening that change of the Constitution. He gave the example of the neighbouring Spain, where such a procedure exists (*DAR*, 11, 26 June 1996, p. 189). The proposal also excluded the need to respect the material limits of the Constitutional revision.

José Magalhães (*PS*) considered that proposal a less violent way of achieving the result wanted by Soares Carneiro in 1980. The Portuguese Constitution did not need any strengthening of legitimacy. Luís Sá (*PCP*) also expressed his opposition towards the proposal. The specification of material limits to the Constitutional revision and the request of a qualified majority for the revision were two basic lines of defence of fundamental democratic principles. The *PSD* proposal wanted to sweep away the first line. It was not a way to strengthen the direct democracy, but an instrument of Constitutional rupture (*DAR*, 11, 26 June 1996, p. 193).

The *PSD*'s insistence was weak. Barbosa de Melo soon recognised the unfeasibility of the proposal and did not want to waste any more time defending 'a lost cause' (*DAR*, 11, 26 June 1996, p. 194). Nevertheless, Vital Moreira (*PS*) gave three reasons for his opposition to the proposal. First, the Portuguese Constitutions, except for the 'sad memory' of the one in 1933, were drawn by constituent assemblies and reviewed by parliamentary assemblies. Second, it did not make any democratic sense to submit a law with 100 or 200 provisions to popular vote, mixing both essential and trifling questions. Each of the four or five million citizens would answer one question, not respecting the law as a whole but, probably, the provision that respected the conjuncture of his daily life most. Third, the referendum was against the Constitution, surpassing the material limits of the Constitutional revision. The Constitutional revision system requires that only a two-thirds majority can review the Constitution, once approved by a Constituent Assembly. It would be absurd that a relative majority of citizens, called to decide occasionally on the Constitutional revision, could defeat these changes after a required two-thirds of parliamentarians approved the amendments

to the Constitution, (*DAR*, 11 – *RC*, 26 June 1996, p. 195). The Committee refused the proposal in indicative voting, with the *PS* and *PCP* nay voting, the *PSD* yea voting, and the *CDS-PP* abstaining (*DAR*, 14 – *RC*, 17 July 1996, p. 284).

In the VI Constitutional revision, in 2004, the *PSD* and the *CDS-PP* introduced unique draft amendments retaking the proposal for Constitutional referendum. In the terms of the proposal, a two-thirds majority would approve the amendments, which had to respect the material limits of the Constitutional revision,<sup>94</sup> but the respective law could be submitted to referendum by deliberation of the Assembly of the Republic (Magalhães, 2004).

The debate had no surprises or novelties, with the proposal being supported by Luís Marques Guedes and Gonçalo Capitão (*PSD*) and Diogo Foyo (*CDS-PP*) and being criticised by Alberto Martins (*PS*) and António Filipe (*PCP*). It was submitted to indicative voting in the Committee, and the proposals had the yea votes from the *PSD* and the *CDS-PP* and the nay votes from the *PS*, *PCP*, *BE* and *PEV*.

In the plenary sittings, the proposal to remove the exclusion of the Constitutional changes from the extent of the referendum had 86 nay votes (77 *PS*, 4 *PCP*, 3 *BE*, 2 *PEV*), 107 yea votes (92 *PSD*, 13 *CDS-PP* and 2 *PS*) and one abstention from *CDS-PP* [*DAR* (I) 78, 23 April 2004, p. 4282]. It did not obtain the qualified majority required. The proposal to allow the referendum on the Constitutional revision had 89 nay votes (76 *PS*, 8 *PCP*, 3 *BE* and 2 *PEV*) and 108 yea votes (94 *PSD* and 14 *CDS-PP*). It did not obtain the qualified majority [*DAR* (I) 79, 24 April 2004, p. 4340).

In synthesis, Portuguese democracy never accepted the Constitutional referendum. The principle according to which the Constitutional revision shall observe the limits established in the Constitution, either the limits of time (requiring the elapse of five years between each ordinary revision), or the formal limits (requiring the approval of every amendment by a two-thirds majority), or even the material limits, were never removed. Despite the attempts of the right wing parties, mainly the *PSD*, to use the referendum as a way to carry out or ratify a Constitutional revision, the left wing parties, namely the *PS* and

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<sup>94</sup> The draft, however, proposed the removal of some of the most relevant material limits for Constitutional revision.

the *PCP*, always opposed those proposals, preventing the fulfilment of the majorities needed to review the Constitution in that sense.