



CONSTITUTIONAL IMPLICATIONS OF PORTUGAL'S PARTICIPATION IN THE EUROPEAN INTEGRATION PROCESS: SIGNIFICANT RECENT DEVELOPMENTS

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ABSTRACT

The development of the European integration process involves a certain legal and constitutional profile of the Member States, whose practical consequences depend on the very profile of the Constitutions of those States. With regard to Portugal, its Constitution has been subjected to several constitutional amendments which attended the issue of integration, to a greater or lesser degree, in advance or in development of Portugal's accession to the European Union; we proceed with some detail to the analysis of the fundamental changes carried out by the 6th and 7th constitutional amendments, the latest ones, which currently conform Portugal's Constitution with imperatives of European integration (the first considering the perspective of the eventual approval of the failed European Constitutional Treaty and the second allowing an adjustment of the Portuguese Constitution to certain circumstances arising from the integration process). In September 2010, a group of parliamentarians presented to the Parliament a proposal that would trigger the 8th constitutional amendment process, interrupted in March 2011 following the dissolution of the XI Legislature; the early outcome of this process does not obscure its theoretical importance, given the relevant reflections of the Provisional Committee for Constitutional Amendment, which justify a review intended to complement a current perspective of this subject.

KEYWORDS: European integration; European Union; Portuguese Constitution.

VICISSITUDES JURÍDICO-CONSTITUCIONAIS DA PARTICIPAÇÃO DE PORTUGAL NO PROCESSO DE INTEGRAÇÃO EUROPEIA: DESENVOLVIMENTOS FUNDAMENTAIS RECENTES

RESUMO

O desenvolvimento do processo de integração europeia implica um determinado perfil jurídico-constitucional dos Estados-Membros envolvidos, cujas decorrências concretas dependem do próprio traçado das Constituições desses Estados. No tocante a Portugal, a Constituição foi já sujeita a várias revisões constitucionais onde esteve presente a questão da integração, em maior ou menor grau, por antecipação ou no desenvolvimento do respectivo processo de adesão à União Europeia; por serem as mais recentes, procedemos com algum detalhe à análise das fundamentais alterações, levadas a cabo pelas 6ª e 7ª revisões constitucionais, de conformação

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actual da Lei Fundamental com os imperativos da integração europeia (a primeira das quais na perspectiva da aprovação do malogrado Tratado Constitucional Europeu e a segunda permitindo o ajustamento da Constituição Portuguesa a certas circunstâncias resultantes do processo de integração). Em Setembro de 2010, um grupo de deputados apresentou à Assembleia da República a proposta que viria a desencadear o 8º processo de revisão constitucional, interrompido em Março de 2011 na sequência da dissolução da XI Legislatura; o prematuro desfecho deste processo não obscurece a sua importância teórica, atentas as pertinentes reflexões da Comissão Eventual para a Revisão Constitucional, que justificam também um exame destinado a completar uma perspetivação actual desta temática.

PALAVRAS-CHAVE: Integração europeia; União Europeia; Constituição Portuguesa.

1 Introduction

The process of European integration led to legislative changes at a maximal level both in Portugal and throughout Europe. The six amendments to which the Portuguese Republic Constitution (from now on PRC) was submitted (in 1989, 1992, 1997, 2001, 2004 and 2005) since Portugal's adhesion to the European Economic Community, are a reflex of the changes regarding the internal Legal Order, operated by the mentioned adhesion, as well as the Portuguese Government's determination to suit the principles and goals of the European integration¹. Previously, with the Constitutional Amendment of 1982, and by enrolling on the Fundamental Law the internal automatic value of the rules issued by the competent institutions of International Organizations of which it is part (Article 8, nº 3 of the PRC), Portugal prepared decisively its way towards the adhesion to the European Communities².

¹ For all, RODRIGUES, José Noronha: "Arquitectura Constitucional e o Processo de Integração, o Caso Português", *Cadernos da Escola de Direito e Relações Internacionais*, 2008, Nº 9, pp. 226-257, p. 235, accessed on May 19, 2012, in <<http://apps.unibrazil.com.br/revista/index.php/direito/Article/viewFile/108/98>>. On a broader aspect, the opening of the Portuguese Constitution to the influx of International Law was notorious, revealing a commitment to overcome any vestiges of the previous authoritarian regime, which, like what happened with other States, had little concern with certain legal-international commands (stressing it, for example, VERESHCHETIN, Vladlen S.: "New Constitutions and the Old Problem of the Relationship between International Law and National Law", *European Journal of International Law*, 1996, Vol. 7, Nº 1, pp. 29-41, p. 30).

² For all, GUEDES, Armando Marques, e COUTINHO, Francisco Pereira: "O Processo de Integração Europeia e a Constituição Portuguesa", *Nação e Defesa*, Outono-Inverno 2006, Nº 115, pp. 83-112, pp. 90-91, or RIBEIRO, Marta Chantal da Cunha Machado: "O Direito Internacional, o Direito Comunitário e a nossa Constituição: Que Rumo?", in AAVV, *Estudos em Comemoração dos Cinco Anos (1995-2000) da Faculdade de Direito da Universidade do Porto*, Coimbra, Coimbra Editora, 2001, pp. 939-963, p. 948. Article 8 of the PRC was considered by KOTZUR as "a really innovative version of the occidental European 'open' State" (KOTZUR, Markus: "Universality – a Principle of European and Global Constitutionalism", *Historia Constitucional. Revista electrónica*, septiembre 2005, Nº 6, pp. 201-228, p. 224, accessed on May 19, 2012, in <<http://hc.rediris.es/06/articulos/pdf/09.pdf>>). It is possible to access some very brief notes about the framing of



Taking by reference the marks put in the Portuguese Constitution by the integration phenomenon, and not despising the changes of the Fundamental Law operated by the previous amendments, our study will focus on the text currently in force (resulting from the amendment processes of 2004 and 2005). We shall perform a brief analysis of the implications, concerning the process that lead to the (aborted) Treaty Establishing a Constitution for Europe (also known as European Constitution or European Constitutional Treaty), into the Portuguese Legal System, thereby focusing our attention on the changes undertaken by the 6th Constitutional Amendment (Constitutional Law nº 1/2004, of July 24, 2004) and the 7th Constitutional Amendment (Constitutional Law nº 1/2005, of August 12, 2005). The Portuguese constitutional legislator's options were not peaceful, therefore having engendered controversies, which will be briefly noted in this work.

We shall also highlight the proposals that, on the theme of the reflections of the European integration, have been discussed in the 8th Amendment Process, fulfilled by the Provisional Committee for the Constitutional Amendment³, whose theoretical relevance the premature epilogue of the referred process could not dispel. In the aftermath of the entry into force of the Treaty on the European Union and the Treaty on the Functioning of the European Union, which consubstantiate the Union's "Fundamental Law", the various projects for amendment already pointed out the need to proceed to the alteration of some constitutional rules which regulate relevant matters, such as the delegation or transfer of sovereignty and the primacy. On this essay, we also intend to analyze the arguments brought into discussion by these proposals.

such dispositions in MONROY CABRA, Marco Gerardo: "El Derecho Internacional como fuente del Derecho Constitucional", *ACDI: Anuario Colombiano de Derecho Internacional*, 2008, Año 1, Nº 1, pp. 107-138, p. 118. About the reasons for Portugal's adhesion to the European Communities, see the synthetic notes of FERNÁNDEZ SÁNCHEZ, Pablo Antonio: "El papel de Portugal en el contexto internacional", *Revista CIDOB d'Afers Internacionals*, 2001, Nº 51-52, pp. 159-170, p. 165.

³ This Committee was constituted as a result of the amendment proposal, presented in September 2010 by a group of congressmen, which would trigger the 8th Constitutional Amendment process. This process was interrupted on March 2011, following the dissolution of the XI Legislature caused by the fall of the XVIII Constitutional Government.



2 The delegations or transfers of sovereignty from Portugal

I. The European Union was built on the idea of a distribution of sovereignty among the involved Member States, which represents an indispensable way of giving existence to a supranational entity. Aiming to establish such distribution and taking into consideration the terms of the current legal and constitutional overview (established by the literal shift operated by the Constitution's Sixth Amendment), "subject to reciprocity and respect for the fundamental principles of a democratic State based on the rule of law and to the principle of subsidiarity, and with a view to the achievement of the economic, social and territorial cohesion of an area of freedom, security and justice and the definition and implementation of a common external, security and defense policy, Portugal may enter into agreements for the exercise jointly, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the European Union" (Article 7, nº 6 of the PRC).

II. In order to fully understand the meaning and extent of the constitutional regime, it is, naturally, essential to acknowledge the history behind the precept, whereby we begin. It was the Third Constitutional Amendment (Constitutional Law nº 1/92, of November 25, 1995) that inserted in the Constitution the initial version of the normative under analysis, whose writing began by prescribing that Portugal could "subject to reciprocity and with respect for the principle of subsidiarity and with a view to the achievement of the economic and social cohesion, enter into agreements for the joint exercise of the powers needed to build" the European Union⁴. For its part, the text immediately preceding the disposition in force (resulting itself from an amendment approved by the Constitutional Law nº 1/2001, of December 12, 2011 – Fifth Constitutional Amendment) provided that Portugal might, "subject to reciprocity, with respect for the principle of subsidiarity and with a view to the achievement of the economic and social cohesion and to an area of freedom, security and justice, enter into agreements for the exercise jointly or in cooperation, of the powers needed to build" the European Union.

III. It is clear that the changes occurred since the initial version to the present date represented an addition to the descriptive character of the precept. So, it is not unreasonable to

⁴ For this rule's perspective in terms of Comparative Law, PERNICE, Ingolf: "Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?", *Common Market Law Review*, 1999, Vol. 36, Nº 4, pp. 703-750.



think that in the roots of these changes lies the concern to delimit, almost casuistically, the terms of Portugal's contribution to the Union's building. However, is this legal solution worth of applause? Cincturing ourselves to the amendment brought into attention by the ultimate transition to the current constitutional text, the truth is that such modification is considered censurable by relevant authors.

Immediately, it becomes possible to censure – from a literal viewpoint or perspective – a deficiency in writing. Moreover, some have considered, in generic terms, the referred constitutional command “careless, poorly written, sometimes repetitive”⁵. Making a deconstruction of this provision, there were those who disapproved several punctual defects and globally classified this command as “extremely long, heavy and explanatory”, besides strictly useless⁶. There was a criticism, more specifically, to the circumstance of the apparent presumption of a direct assumption of competences by the Union, in the constitutional text, when such competences are granted to it by the Member States⁷. Such criticism is likewise correct, because the mere reference to the powers' “exercise” puts into shade the great issue of the ownership of those powers. Despite the fact that the European Union has, nowadays, an extremely broad field of action, it is still grounded on the basic idea of not finding itself dedicated to frame the entire living of its citizens, reason why (on the contrary of what happens to States) the Union's attributions are only those specifically assigned to it. At the same time, at the level of the Union's institutions, their competences are not of a generic type, but only those who, being needed to the performance of the Union's tasks, are also subject to specific indication, all that, naturally, in accordance with the principle of the allocation of competences; mainly, and in addition to the above, it seems desirable to highlight that the ownership of the powers remains with the Member States.

From a substantive point of view, there were many voices considering that the aforesaid change is “sick” because of discordance with the Portuguese Law, since it would lead to an offense to the Article 288, “a”, of the PRC, which says that the Constitutional Amendments shall respect, namely, “the national independence and the unity of the State” (national

⁵ MIRANDA, Jorge: “A Constituição e a Democracia Portuguesa”, 2004, p. 6, accessed on May1, 2012, in <http://www.25abril.org/a25abril/get_document.php?id=249>.

⁶ QUADROS, Fausto de: *Direito da União Europeia*, Coimbra, Almedina, 2004, pp. 417 e 419.

⁷ CUNHA, Paulo de Pitta e: “A União Europeia na Sexta Revisão Constitucional”, *Revista da Ordem dos Advogados*, Junho 2005, Ano 65, Vol. I, accessed on May 6, 2012, in <http://www.oa.pt/Conteudos/Artigos/detalhe_artigo.aspx?idc=31559&idsc=45650&ida=45690>.



independence is consecrated by the Article 1 of the PRC, which proclaims that “Portugal is a sovereign Republic”, while the State’s unity is forsaken by the nº 1, Article 3 of the PRC, specifically on the segment establishing that the “the sovereignty, one and indivisible, lies with the People”); the infraction would consist in the circumstance that the new version of the Constitution could be an instrument to allow an alienation of sovereignty regarding fundamental areas (external policy and defense policy) by the sole force of non constitutional rules (the ones from Union Law), paving the way to – against the precept consecrated in the Article 288, “a” – Portugal’s transformation into a non sovereign State (member of a Federation). Being an amendment to the constitutional text, the previously mentioned disrespect towards the Constitution could only embody an eventual case of unconstitutional constitutional rules (the amendment rules). Nevertheless, there are also lots of voices with a less radical analysis regarding the issue. These manifest some doubts concerning the incompatibility between the current meaning of the Article 7, nº 6 of the PRC and the Portuguese constitutional system itself, considering the safeguard, by the first, of the “fundamental principles of the rule of law Democratic State”⁸.

In our opinion, and notwithstanding a less correct literal form, the latest Constitutional Amendment does not violate the national constitutional system. Even considering the theory that the concept of sovereignty adopted by the Portuguese Constitution is of an absolute kind, the truth is that the share of sovereignties, implicated on belonging to the European Union, doesn't embody an alienation of sovereignty. Whether such share corresponds to the legal mechanism of powers' transfer of or to the legal mechanism of powers' delegation (a problem not dealt with, in this short essay), such share belongs to the level of power exercise and not to the level of the respective ownership (which continues being kept by the Member States of the Union, thus maintained as sovereign States). We also do not see affectation of the idea (core of democracy) that the sovereignty lies on the People, since the People continues to be its titleholder. Furthermore, it is also worth referring that, by legal imperatives, the belonging to the Union implies a democratic living.

⁸ MIRANDA, Jorge: *op. cit.*, p. 8. About the reference to democracy, on the broader context of the principles ruling Portugal’s external relations, see the brief note of LARIK, Joris: "Shaping the International Order as a Union Objective and the dynamic Internationalization of Constitutional Law", *CLEER Working Papers*, 2011, Nº 2011/5, p. 12, accessed on April 4, 2012, in <http://www.asser.nl/upload/documents/11222011_91506CLEER%20WP%202011-5-LARIK.pdf>.



IV. In addition to the above, there were authors defending the uselessness of the latest Constitutional Amendment, as inopportune (as well as every amendment, concerning the European issues, previous to the development of the Constitutional Treaty procedure)⁹; anyway, and because the episode of the failed Constitutional Treaty is over, we did not concentrate on the analysis of such ideas. Nevertheless, we wish to add something: we think it would have been useful to make an amendment which would make clear an option maybe not yet properly expressed on the constitutional text; to this extent, we agree with the observations of those who support the insertion, in the Portuguese Constitution, of a general clause of acceptance regarding the conditions of sovereignty involved in Portugal's belonging to the European Union¹⁰.

V. The issue of delegation or transfer of sovereignty from Portugal returned to the fore by the 8th Constitutional Amendment process, when the amendment projects, presented in the Provisional Committee for Constitutional Amendment by the political parties belonging to the Parliament, were discussed. However, with exception of the project present by the Communist Portuguese Party, which proposed to "withdraw from the Constitution a rule that seeks to consecrate the subordination of the Portuguese Constitution to the law of the European Union"¹¹, none of the other parties in the Parliament (Socialist Party, Social Democratic Party, Social Democratic Centre – People's Party, Left Bloc and Ecologist Party "The Greens") did provide any objection to maintaining the content of n° 6 of Article 7 of the PRC. Indeed, the Socialist Party, aiming to support the maintenance of the content of the referred n° 6 of Article 7 of the PRC, argued explicitly that it accepted "some transfer of sovereignty that [our participation in the European Union] implies" and that, despite the non consideration of the precept as "exemplary", from "a theoretical point of view and also from a legal point of

⁹ Thus, CUNHA, Paulo Ferreira da: "Introdução Constitucional à 'Constituição' Europeia", *Videtur*, 2005, N° 23, ponto n° 33, accessed on May 1, 2012, in <<http://www.hottopos.com/videtur23/pfcunha.htm>>.

¹⁰ See QUADROS, Fausto de: *op. cit.*, p. 417. This issue of a general clause of acceptance of sovereignty limitations is not an exclusivity of the Portuguese Constitutional System; for a broader perspective, GUILLOU, Laetitia: "Les révisions constitutionnelles induites par l'intégration européenne: l'introduction du désordre normatif dans la Constitution de 1958", Contribution au VII Congrès de l'AFDC, Atelier n° 1 – Constitution et Europe, s.d. mas 2008, pp. 7-10, accessed on April 4, 2012, in <<http://www.droitconstitutionnel.org/congresParis/comC1/GuilloudTXT.pdf>>.

¹¹ Excerpt from a speech in defense of the Portuguese Communist Party's project of constitutional amendment (PROVISIONAL COMMITTEE FOR CONSTITUTIONAL AMENDMENT: Meeting on January 12, 2011, *Diário da Assembleia da República, II.ª Série-RC*, n° 6, January 13, 2011, p. 4).



view”, did not consider advisable to “introduce amendments that were not crystal clear and that could not give certainty of improving the text”¹².

3 The European Union Law’s Primacy

I. According to the current version of the Portuguese Republic Constitution, “the provisions of Treaties on the European Union and the rules issued by its institutions, in the exercise of their respective powers, are applicable to the domestic systems, in the terms of the Union Law, respecting the fundamental principles of the rule of law Democratic State” (Article 8, nº 4 of the PRC). This nº 4 was added to the Article 8 under the Sixth Amendment, since the Constitution didn't have, previously, any regulation concerning specifically the issue of the Union Law's primacy.

Such primacy means that, in case of collision between Union and national legal rules, those prevail over these. And we believe that the general principle of primacy has an absolute character, since, without primacy, there can't be Union Law: either Union Law has primacy, or it simply doesn't exist as Union Law, that is, as a system common to a group of States. The definition of the Union Law's primacy, with this meaning, had been consecrated a long time ago by the Union’s Court of Justice¹³.

II. The orientation of the previous Portuguese Law seemed to consecrate a limited character of the primacy of Union Law, since the Portuguese Republic Constitution seemed not to admit being contradicted by any other rules.

This conclusion was drawn, essentially, from the combined reading of three constitutional provisions: one prescribing to be forbidden to courts to “apply rules which violate the Constitution or the principles therein enshrined” (Article 204); the other featuring the unconstitutionality of the “rules which violate the Constitution or the principles therein

¹² PROVISIONAL COMMITTEE FOR CONSTITUTIONAL AMENDMENT: Meeting on January 5, 2011, *Diário da Assembleia da República, II.ª Série-RC*, nº 5, January 6, 2011, pp. 4-5.

¹³ According to a decision of the Court of Justice from the beginning of the 1970's, it is a legal requirement that the Union Law's rules (referred as Community Law's rules at the time) "are automatically applicable at the same time and with identical effects throughout the Community, without any sort of obstacles imposed on them by the Member States"; and, following, that "the attribution to the Community, by the Member States, of rights and powers correspondent to the Treaty dispositions, implies a definitive limitation of their sovereign rights, preventing the prevalence of the invocation of internal law dispositions of any kind" (*Judgment of the Court of Justice of the European Communities*, 13 July 1972, *Commission / Italy*, 48/71, *Recueil de la Jurisprudence de la Cour*, pp. 529 ss., grounds 8 and 9, p. 534).



enshrined” (Article 277, nº 1); and a third one stating that the “organic or the formal unconstitutionality of duly ratified international treaties does not preclude the application of their rules in the Portuguese legal system, provided that such rules are applied in the other Party’s legal system, unless the referred unconstitutionality results from violation of a fundamental provision” (Article 277, nº 2).

Thus, if a Union Law's rule was contrary to a Portuguese constitutional one, it would obviously be appropriate to say that it violated (contradicted) the Constitution – the Constitution stated that courts could not apply these rules (Article 204), which was another way of saying that, in a conflict of this nature, the Constitution (that is, the national rule) prevailed, setting aside the Union Law's rule. Explaining it in another way: if the Constitution prohibited the courts to apply rules which contradicted it, without more specification about such rules, the Union Law’s rules should be included in these ones, meaning that, in case of collision between an Union rule and a Portuguese constitutional rule, the Portuguese judge would have to apply the Portuguese constitutional rule and not apply the Union rule, in order to obey the Constitution (which entailed him).

On the other hand, and as it may be seen in nº 2 of Article 277, the only situation that was excluded from the constitutionality control was the organic or formal unconstitutionality (excluding the material unconstitutionality, which would always be controlled) of some treaties, and, even so, once it did not result “from violation of a fundamental provision” (otherwise, it would be also subject to control).

In conclusion, and from our standpoint, the Portuguese judges’ situation was a dilemma: they either obeyed the Constitution and, in a conflict situation between a Union rule and an opposite constitutional rule, applied the constitutional rule and set aside the Union rule (thus violating – in our opinion – the principle of the Union Law's primacy, leading the Portuguese State to incur in international liability); or they did the opposite (and, by acting this way, respected the principle of the Union Law's primacy, but were subject to the sanctions for defiance to the Constitution, which tied them).

III. With reference to nº 4, Article 8 of the PRC, and in terms of literal element, there are those who see in the referred provision some sort of obscurity, which however does not



prevent a conclusive reading in the sense of welcoming the principle of absolute primacy of the Union Law¹⁴.

But there are also those who, criticizing its words, understand that this provision suffers likewise from content deficiencies, excluding the acts of the European Union secondary legislation and restricting themselves to the enforcement of Union Law in the Portuguese internal system¹⁵; at the level of the rule's substantiality, relevant authors censure yet its range, but because of its remission (conductive to an opposite direction) to Union Law¹⁶. On the other side of the barricade, in a favorable attitude towards this constitutional amendment, it is argued that such amendment provides a contribution "for a larger clarity and represents a gain in terms of transparency"¹⁷.

What is our understanding? As we have already said, we are persuaded that primacy constitutes a general principle of absolute character; it would be a nonsense the admission of its relativity, which would lead to breaches in the common character of the Union Law, thus subject to be put away by national rules (ceasing to be, in the extent of that removal, a "common" system). In our judgment, the reasons underlying the consecration of primacy impose the conclusion that primacy applies, in terms of material scope, for all the rules of National Law (constitutional or infra-constitutional). In sum, one can see that primacy has to be general, because Member States may not legitimately want to decrease the full scope of Union Law; thus, and regarding the temporal scope of primacy, if Member States edit rules that come to be challenged later by an Union rule, it has to be understood that they have to do

¹⁴ See PITTA E CUNHA, for whom "it does not seem to be any doubt that through it was intended to welcome the unrestricted version of the primacy, since the 'internal order' comprehends the constitutional system" (CUNHA, Paulo de Pitta e: *op. cit.*).

¹⁵ So, FAUSTO DE QUADROS, for whom "remain excluded, from the Secondary Law, the 'acts' (among which stand out the decisions of Article 249 CE), since Article 8, n° 4 only refers to 'rules'; and the disposition continues to concern itself about the 'enforcement' in the internal order, when what was expected from it was a disposition about the primacy's *previous* issue or, even better, that it contained a general clause of acceptance of the sovereignty limitations arising from Portugal's participation in the Union" (QUADROS, Fausto de: *op. cit.*, p. 417). On this disposition's restriction to the application of Union Law in the Portuguese Internal Order, see also CANOTILHO, Mariana Rodrigues: "El sistema constitucional de Portugal", *Revista de Derecho Constitucional Europeo*, julio-diciembre 2010, Año 7, N° 14, pp. 117-135, p. 121.

¹⁶ See PITTA E CUNHA, according to whom, in spite of the position of the Union judges, "the supremacy of Community Law over the national constitutional rules should not be recognized", since such recognition "would implicate the acceptance of the subordination of the national fundamental law's dispositions to the dispositions of Community Law, even the Secondary Law" (CUNHA, Paulo de Pitta e: *op. cit.*).

¹⁷ MARTINS, Ana Maria Guerra: *Curso de Direito Constitucional da União Europeia*, Coimbra, Almedina, 2004, p. 441.



without those rules; they also have to accept the existent Union rules, refraining themselves from approving opposite constitutional rules.

As a result of this thinking, we believe that the constitutional legislator was right to consecrate the reference to the primacy, so increasing the transparency of the Constitutional System, although the rule required a better elaboration. On the other hand, do seem to us less grounded any fears of a constitutional overtaking¹⁸, since the general principle of allocation of competences must not be forgotten: although the European Union has nowadays a considerable wide field of action, it continues to have, as a basic underlying idea, not to be oriented to frame the entire living of its citizens; for this reason, and in opposition to the States, its attributions are only those specifically assigned; Member States have always decided, and continue to do it, which are those attributions¹⁹.

IV. But would it be necessary to have proceeded to this Constitutional Amendment? In the Project of the Constitutional Treaty (referring more precisely to the Article 10, nº 1 of the Project, which would become the Article I-6 of the foiled Treaty Establishing a Constitution for Europe), there were important authors advocating the uselessness or even the impossibility of such amendment.

The examined rule, which never arrived to the status of law in force, proclaimed that "[the] Constitution and the rules adopted by the Union's institutions in the exercise of its granted competences excel the Member States' Law".

Focusing on this rule, some have considered it subject to two interpretations: taking the first one, according to which the primacy of Union Law would not contend with the national constitutional rights, an amendment of the Portuguese Constitution would be useless, since Union Law would always be applicable in Portugal (as in the other Member States of the Union), given the international obligation took by the Portuguese State as a Part of the European Union; taking a second interpretation, according to which the primacy would represent an unrestricted supremacy of the Union Law over all the National Law (therefore including National Constitutional Law), it would be impossible a compatible amendment of

¹⁸ Or a "constitutional suicide", in the scathing expression of MIRANDA, Jorge: "A 'Constituição Europeia' e a Ordem Jurídica Portuguesa", XX Aniversário do Tribunal Constitucional, November 28, 2003, point nº 16, accessed on May 1, 2012, in <<http://www.tribunalconstitucional.pt/tc/textos030103.html>>.

¹⁹ And in parallel, at the level of the Union's *institutions*, their respective *powers*, which are not of generic type, but only those which, being needed to the performance of the Union's attributions, are also object of specific indication by the Union's rules.



the Portuguese Constitution, because it would implicate “a qualitative change of the State, degraded to a State without constituent sovereignty”²⁰. Underlying the referred opinion, as it may be easily seen, is a conception about primacy distinct from the one we subscribe. Thus, in our view, and as we already said, we agree with the rule’s insertion, in order to obviate the problems of less transparency that previously appeared; we also add that we take for needless a reference to the respect for the fundamental principles of the rule of law Democratic State, since such principles embody the legal structure of the Union²¹.

The Lisbon Treaty doesn't contain any disposition equivalent to Article I-6 of the failed Treaty Establishing a Constitution for Europe, although an attached Statement refers that "in accordance with the European Union Court of Justice's rulings, the Treaties and the rules based upon them adopted by the Union excel Member States Law, on the conditions established by the aforesaid rulings"²². Nevertheless, taking in consideration the content of Article 8, nº 4, of the PRC and according to our primacy's conception, we maintain our opinion, thus taking for desirable, in any case, the non suppression of the constitutional mention to the principle of primacy.

V. The issue of primacy of the European Union Law would not get the consensus of the parties represented on the Provisional Committee for the 8th Constitutional Amendment, as we will demonstrate²³.

The Socialist Party, supporting its project of fully maintaining the content of the constitutional dispositions concerning Union Law²⁴, and without denying that "eventually, here and there, a conflict between rules of the European Union Treaties and of Constitutional

²⁰ MIRANDA, Jorge: *op. cit.*, points nºs 12 e 16. See another side of the same idea in MIRANDA, Jorge: "A integração europeia e a Constituição portuguesa", Jornadas sobre o Tratado de Lisboa, Instituto de Ciências Jurídico-Políticas da Faculdade de Direito da Universidade de Lisboa, 2010, p. 4, accessed on March 23, 2012, in <<http://www.icjp.pt/sites/default/files/papers/821-1350.pdf>>.

²¹ The Maastricht Treaty consecrated the democratic principle: the Article 177 of the Treaty on the European Community (added by the Maastricht modification) became, then, the only disposition of that Treaty where (although referring to external relations) was made a direct allusion to the democratic principle, containing in its nº 2 the respective ingredients: rule of law State, Human Rights and fundamental liberties.

²² Declaration Concerning Primacy (nº 17), attached to the Lisbon Treaty.

²³ We decided to order the references to the projects of constitutional amendment, and their respective defenses on the Provisional Committee for the 8th Constitutional Amendment, according to the representativeness of each party in the Republic's Assembly.

²⁴ Although presented under a different systematic: the Socialist Party proposed the creation of an Article 8-A, under the epigraph “European Union”, which would absorb, in this order, nº 6 of Article 7 and nº 4 of Article 8.



Law may arise"²⁵, stated that such conflict "shall be resolved in favor of the European Union". The admitted concern about the occurrence of such conflicts would not effectively prevent the Socialist Party from maintaining unaltered the text of nº 4, Article 8 of the PRC on its project, considering as preferable to maintain such ambiguity "in this phase of development of the European Union Law and its relation with the internal constitutional orders"²⁶.

The Social Democratic Party proposed the adoption of a solution that would keep almost untouched the text of nº 4, Article 8 of the PRC, with exception of its final segment "fundamental principles of the rule of law Democratic State", which would be replaced by the expression "principles of the Portuguese constitutional order"²⁷. Such amendment proposal, which led to an intense debate, was sustained by the Social Democratic Party on the argument that, beyond the fundamental principles of the rule of law Democratic State, the rules of the Union Law should respect the "fundamental" principles of the Portuguese constitutional system, more precisely "the fundamental core of the sovereignty of the Portuguese State"²⁸; the Left Bloc supported the Social Democratic Party position, considering that the expression proposed by this party had the merit of being less ambiguous and "not only a safeguard of national law, but also a direct reference to the Constitution", oppositely to "an ethereal reference to some absolutely generic principles of the Law State"²⁹.

Preferring to follow a different path, the Social Democratic Centre – People's Party focused the issue of the monitoring of the European affairs by the Portuguese entities, "namely, from the legislative point of view", maintaining untouched the nº 4, Article 8 of the

²⁵ According to the same representative, such conflict does not occur with the other rules of the European Union, as to the Portuguese Constitution (PROVISIONAL COMMITTEE FOR CONSTITUTIONAL AMENDMENT: Meeting on January 12, 2011, *Diário da Assembleia da República*, II.^a Série-RC, nº 6, January 13, 2011, p. 6).

²⁶ As to the non inclusion, in the Lisbon Treaty text, of the rule that had been designed for the Article I-6 of the Treaty Establishing a Constitution for Europe ("The Constitution and the laws adopted by the Union's institutions, in the exercise of their competences, excel Member States' laws"), the same representative of the Socialist Party referred that such fact did not mean "obviously, that the European Union had given up on the principle of primacy", having just considered that "it was not necessary to consecrate it" (PROVISIONAL COMMITTEE FOR CONSTITUTIONAL AMENDMENT: Meeting on January 12, 2011, *Diário da Assembleia da República*, II.^a Série-RC, nº 6, January 13, 2011, pp. 5-6).

²⁷ PROJECT OF CONSTITUTIONAL AMENDMENT Nº 1/XI, accessed on April 1, 2012, in <http://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063446f764c3246795a5868774d546f334e7a67774c325276593342734c576c756156684a644756344c334279597a457457456b755a47396a&fich=prc1-XI.doc&Inline=true>.

²⁸ PROVISIONAL COMMITTEE FOR CONSTITUTIONAL AMENDMENT: Meeting on January 12, 2011, *Diário da Assembleia da República*, II.^a Série-RC, nº 6, January 13, 2011, p. 8.

²⁹ PROVISIONAL COMMITTEE FOR CONSTITUTIONAL AMENDMENT: Meeting on January 12, 2011, *Diário da Assembleia da República*, II.^a Série-RC, nº 6, January 13, 2011, p. 11.



PRC, because "this old question regarding the primacy of European law is not fully resolved (or is never resolved!) by means of the mere text's expression of this Article"³⁰. The amendment project of the Social Democratic Centre – People's Party is limited to, on the issue of Union Law, proposing the addition of a new disposition (Article 163-A, under the epigraph "Monitoring on the affairs of European Union")³¹.

The Left Bloc considered sterile any discussion regarding a hypothetical change, "because the destiny of the referred rule has been already perceived, being therefore maybe unnecessary to deepen theoretically amendments that will not exist"³². So, the amendment project of the Left Bloc did not propose any amendment to n° 4, Article 8 of the PRC³³.

The Portuguese Communist Party sustained the thesis that the solution had to consider "to withdraw from the Constitution a rule that aims to consecrate the Portuguese Constitution's subordination to the European Union Law"³⁴. The Communist Party's amendment project proposed, in accordance with this line of thinking, the simple elimination of n° 4, Article 8 of the PRC³⁵.

The Ecologist Party "The Greens" proposed, by its turn, that n° 4, Article 8 of the PRC should maintain the previous writing, plus the expression "and always in obedience to the Portuguese Republic Constitution"³⁶, thus formally suggesting the denial of primacy.

³⁰ PROVISIONAL COMMITTEE FOR CONSTITUTIONAL AMENDMENT: Meeting on January 12, 2011, *Diário da Assembleia da República, II.ª Série-RC*, n° 6, January 13, 2011, p. 12.

³¹ PROJECT OF CONSTITUTIONAL AMENDMENT N° 5/XI, pp. 1-24 accessed on April 1, 2012, in <<http://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063446f764c3246795a5868774d546f334e7a67774c325276593342734c576c756156684a644756344c334279597a557457456b755a47396a&fich=prc5-XI.doc&Inline=true>>.

³² PROVISIONAL COMMITTEE FOR CONSTITUTIONAL AMENDMENT: Meeting on January 12, 2011, *Diário da Assembleia da República, II.ª Série-RC*, n° 6, January 13, 2011, p. 10.

³³ PROJECT OF CONSTITUTIONAL AMENDMENT N° 4/XI, pp.1-22, accessed on April 1, 2012, in <<http://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063446f764c3246795a5868774d546f334e7a67774c325276593342734c576c756156684a644756344c334279597a517457456b755a47396a&fich=prc4-XI.doc&Inline=true>>.

³⁴ PROVISIONAL COMMITTEE FOR CONSTITUTIONAL AMENDMENT: Meeting on January 12, 2011, *Diário da Assembleia da República, II.ª Série-RC*, n° 6, January 13, 2011, p. 4.

³⁵ PROJECT OF CONSTITUTIONAL AMENDMENT N° 2/XI, pp. 1-46. p.6, accessed on April 1, 2012, in <<http://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063446f764c3246795a5868774d546f334e7a67774c325276593342734c576c756156684a644756344c334279597a497457456b755a47396a&fich=prc2-XI.doc&Inline=true>>.

³⁶ PROJECT OF CONSTITUTIONAL AMENDMENT N° 3/XI, pp.1-19, p.7, accessed on April 1, 2012, in <<http://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063446f764c3246795a5868774d546f334e7a67774c325276593342734c576c756156684a644756344c334279597a517457456b755a47396a&fich=prc3-XI.doc&Inline=true>>.



The 8th Constitutional Amendment project was prematurely extinct on June 2011, after being suspended since March of the same year³⁷. However, had its ending been different, would this amendment have resulted in any sort of contribution to the clarification of the existent relation between the European Union Law and the Portuguese Law? In spite of such premature outcome, and understanding as preferable our opinion of the absolute primacy of the Union Law over National Law, we think that, given the content of the referred projects, an amendment project would not lead to a better solution to the issue; in fact, as we reported, no political party presented proposals aiming at the insertion, in the Portuguese Republic Constitution, of a clearly affirmative formula of the aforesaid primacy of the Union Law³⁸. It is visible that the controversy regarding the Union Law's primacy remains vivid, as a demonstration of the concerns and resents of legal articulation between the national environments and the Union environment. Nevertheless, and more than legal-technical disagreements, underpin this issue strong political inflows, crystallized in a tension between national Powers and the Union Power.

4 The referendum on the Treaties on the European Union

I. The issue of the referendum on the European Union Treaties is the object of Article 295 of the PRC, added by the Seventh Constitutional Amendment (restricted to this Article), under the epigraph "Referendum on European Treaty" and providing that "nº 3 of Article 115

[74c325276593342734c576c756156684a644756344c334279597a4d7457456b755a47396a&fich=prc3-XI.doc&Inline=true>](#).

³⁷ PROVISIONAL COMMITTEE FOR CONSTITUTIONAL AMENDMENT: Meeting on March 30, 2011, *Diário da Assembleia da República, II.ª Série-RC*, nº 14, March 31, 2011. January 13, 2011.

³⁸ The Parties with greater representation in the Republic's Assembly have expressed the desirability of fully maintaining the current text of nº 4 of Article 8 of the PRC. The Socialist Party saw in it the "virtuosity to mitigate and curb any tendency to an absolute primacy, without being mixed with principles which we believe are of sovereignty, fundamental principles of our constitutional order" (PROVISIONAL COMMITTEE FOR CONSTITUTIONAL AMENDMENT: Meeting January 12, 2011, *Diário da Assembleia da República, II.ª Série-RC*, nº 6, of January 13, 2011, p. 17). The Social Democratic Party considered that the disposition contributed to the maintenance of the equilibrium "between, on one hand, accepting that primacy, since without it the European Union can't exist, and, on the other hand, such primacy being not absolute at the point of trampling fundamental values and principles of each Member State of the European Union" (PROVISIONAL COMMITTEE FOR CONSTITUTIONAL AMENDMENT: Meeting on January 12, 2011, *Diário da Assembleia da República, II.ª Série-RC*, nº 6 of January 13, 2011, p. 11).



does not harm the possibility of a referendum on the approval of treaty aiming at the construction and deepening" of the Union.

Previously to this Constitutional Amendment, only Article 115, nº 3 of the PRC was in force. It provided that the referendum could only have as its scope "issues of relevant national interest that should be decided by the Republic's Assembly or by the Government by means of approval of international convention or legislative act".

Considering the dimension of the present essay, and the relative linearity of this point, we believe as not justifiable long considerations about the content of the underlying amendment, which we will briefly address as to the problem of its necessity; it actually makes sense to approach the "problem" of this amendment's need, since it was widely opposed. Thus, according to an opinion that seems more on this sense (although not entirely clear expressed), it was pondered that the Constitution does not allow referendums having as scope the direct approval or rejection of treaties, being however added that there could be European referendums (which, if we correctly interpret this understanding, would have as its scope individualized issues contained in the European Treaties)³⁹. Another position contested the amendment, but by understanding, at least in this case, as secondary the literal content of the Fundamental Law; criticized the "positivist legalism" consistent in a sacred reverence to the constitutional text (which would have already been overtaken and subverted by the process of European integration); and added that, even in case of prohibition of the referendum by that text, "the referendum will always be constitutional and, in such case, the prohibiting or omissive rule clearly unconstitutional in substance"⁴⁰.

We consider as basically relevant the amendment leading to the present legal regime, but we also understand that the benefit it brought is rather limited; indeed, it was already

³⁹ MIRANDA, Jorge: *op. cit.*, note nº 18.

⁴⁰ CUNHA, Paulo Ferreira da: *op. cit.*, point nº 17. Without specific reference to the Portuguese case, but in general terms, considering legal-politically natural (and not a subversion) that the legal evolution of the European Union may cause changes on the national Constitutions, GUSMÃO, Hugo César Araújo de: "Poder de Reforma da Constituição Estatal num Contexto Supranacional: O Caso Europeu", *NEJ (Novos Estudos Jurídicos)*, jan.-abr. 2010, Vol. 15, Nº 1, pp. 129-142, p. 136, accessed on March 25, 2012 in <<http://siajweb06.univali.br/seer/index.php/nej/Article/view/2306/1621>>. The assessment of the exact nature of this dialectic is related to the existence, or not, of a Union's Constitutionalism; about this last point, see a synthetic but recent testimony in MARTINS, Ana Maria Guerra: "Constitucionalismo Europeu e Direitos Fundamentais após o Tratado de Lisboa", *Jornadas sobre o Tratado de Lisboa*, Instituto de Ciências Jurídico-Políticas da Faculdade de Direito da Universidade de Lisboa, 2010, pp. 1-2, accessed on April 3, 2012, in <<http://www.icjp.pt/sites/default/files/papers/822-1351.pdf>>.



possible, under the previous constitutional version, to perform referendums about the European integration; the difference is that, with the current constitutional ruling, the issue object of referendum may be an actual treaty, in total; and the advantage, we believe, consists in a greater convenience regarding the formulation of the actual scope of the referendum⁴¹. A different issue, but also worth our testimony, is to debate whether it is politically desirable, or not, that the Portuguese People should be able to pronounce itself, by means of a referendum, about its belonging, and in which terms, to the European Union; and our answer is definitely affirmative⁴².

II. The general discipline of the referendum in Article 115 of the PRC was never discussed on the Provisional Committee for the 8th Constitutional Amendment, due to the suspension of the respective activities, occurred on March 30, 2011 by deliberation of the Provisional Committee for Constitutional Amendment, when Article 34 was still being discussed. For identical reason, Article 295 of the PRC (that, as we have just seen, admits referendums on Union Treaties and represents an exception to the prohibition of n° 3 of Article 115) was also not analyzed by the aforesaid Committee. Nevertheless, none of the amendment projects proposed any modification to the mentioned dispositions regulating the issue of the referendum.

5 The monitoring on the affairs of the European Union

I. The Fundamental Law gives to the Republic's Assembly the legal-political competence to monitor and analyze Portugal's participation in the European integration process (Article 163, "f", of the PRC), and also to pronounce itself about issues, related to its

⁴¹ See also GUEDES, Armando Marques, and COUTINHO, Francisco Pereira: *op. cit.*, p. 86.

⁴² Following the same order of ideas, for all, DIAS, João Pedro Simões: "A influência da adesão às Comunidades Europeias na conformação constitucional do Estado", Instituto de Estudos Estratégicos e Internacionais, XXIII Conferência Internacional de Lisboa, Sessão temática – Prioridades para a Acção Externa de Portugal – Europa, accessed on May 1, 2012, in <<http://www.ieei.pt/post.php?post=121>>; or, on a previous time, MIRANDA, Jorge: "O Tratado de Maastricht e a Constituição Portuguesa", *Revista do Tribunal Regional Federal 1ª Região*, jul.-set. 1996, Vol. 8, N° 3, pp. 17-30, p. 25. On the importance of these referendums (as to Member States in general) for the process of European integration, KAUFMANN, Bruno: "The European Referendum Challenge: Questions & Answers on the ratification process for the European Union's new constitutional treaty", International IDEA, May 13, 2005, p. 3 (electronic page), accessed on April 14, 2012, in <http://www.idea.int/elections/upload/european_referendums_bk_050513.pdf>.



exclusive legislative competence, still undecided by the Union's institutions (Article 161, "n", of the PRC); for the purposes of the referred rules, the Government is responsible for presenting to the Republic's Assembly the "information regarding the building process" of the Union (Article 197, "i" of the PRC). The structure adopted by the Constitution concerning the monitoring and analyzing of the Union's acts, by the national institutions, has evoked opposition; regarding Portugal's participation in the European integration process, there are those who consider unacceptable that the mentioned competences (according to which "the Assembly's power of analyzing – clearly put out of place – is attached to the Government's power-duty of information") were unscripted on two "crossed" dispositions, necessary jointly read; and such circumstance, preventing a true "parliamentary intervention *a priori* or *a posteriori*"⁴³, is still in force, on a context "in which the changes, even by force of the recent Lisbon Treaty, are insufficient"⁴⁴ for the solution of this issue.

II. The problem of the monitoring of European politics by the national institutions was not completely aloof from the 8th Constitutional Amendment process, although the issue has not been discussed on the respective Provisional Committee, due to the suspension of its activities, when Article 34 was still being discussed. It is important to testify that the amendment project of the Socialist Party was part of the proposal of modification of Article 165, "n", of the PRC, in order that the Republic's Assembly could "pronounce itself on the issues pending from decision in institutions of the European Union, according to the respective treaties and law"⁴⁵, differently from its current competence to pronounce itself about the aforesaid issues of its reserved legislative competence. We note, identically, that the Social Democratic Centre – People's Party proposed the addition, to the Constitution, of an Article (Article 163-A), providing that the Republic's Assembly "contributes to ensure Portugal's participation in the activities and decision-making processes of the European institutions, behooving to the Assembly the exercise of the political control of the Government's action in the European Union" (n. 1); that "behooves especially to the

⁴³ MIRANDA, Jorge: *op. cit.*, pp. 27-28.

⁴⁴ GOUVEIA, Jorge Bacelar: "Sistema político-constitucional português: Balanço e desafios", Oração de Sapiência, Universidade Autónoma de Lisboa, December 13, 2010, p. 28, accessed on May 20, 2012, in <<http://www.jorgebacelargouveia.com/images/site/intervencoes/sapiencial.pdf>>.

⁴⁵ PROJECT OF CONSTITUTIONAL AMENDMENT N° 9/XI, pp.8-9, accessed on April 1, 2012, in <<http://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063446f764c3246795a5868774d546f334e7a67774c325276593342734c576c756156684a644756344c334279597a6b7457456b755a47396a&fich=prc9-XI.doc&Inline=true>>.



Republic's Assembly to proceed to the supervision, according to the Treaties, of the respect for the principles of subsidiarity and proportionality on the exercise of the European Union's legislative attributions" (n. 2); that, "except impediment by urgent reason, the Prime-Minister's participation on the meetings of the European Council shall always be preceded by a debate in the Republic's Assembly" (n. 3); and that "when engaging on meetings of the European Union Council, in which are discussed issues included in the Republic's Assembly legislative reserved competence, the Government members are tied to the orientations outlined by this sovereignty institution, according to the law" (n. 4)⁴⁶. The other political parties have not presented any proposals.

On the topic of monitoring of the Union's affairs, we consider as arguable, that the proposal presented by the Socialist Party would represent any kind of benefit, and as less adequate the proposal of the Social Democratic Centre – People's Party; but, given the scope of the present study, we shall not deepen this topic.

6 Conclusions

1 – Regarding the delegations or transfers of sovereignty from Portugal, attributable to its belonging to the European Union, and notwithstanding a deficient literal conformation, the current constitutional text does not collide with the main principles of the Portuguese constitutional system; indeed, the distribution of sovereignties implicated in the quality of member of the European Union does not represent an alienation of sovereignty, since it deals with the exercise of the sovereign powers and not with the respective ownership (which still belongs to the Member States); nor does it exist impingement on the democratic basic idea that the sovereignty belongs to the People, since the People continues to be its titleholder and the belonging to the Union implicates a democratic living.

⁴⁶ PROJECT OF CONSTITUTIONAL AMENDMENT N° 5/XI, p. 5, accessed on April 1, 2012, in <http://app.parlamento.pt/webutils/docs/doc.pdf?path=6148523063446f764c3246795a5868774d546f334e7a67774c325276593342734c576c756156684a644756344c334279597a557457456b755a47396a&fich=prc5-XI.doc&Inline=true>>.



2 – As to the principle of primacy of Union Law, the constituent legislator was correct when consecrating a reference to it, increasing the transparency of the Portuguese Legal-Constitutional System; we thus applaud the remission made on this context to the Union Law, although it seems to us that the exception regarding the respect for the fundamental principles of the rule of law Democratic State is dispensable, since these ones shape the legal structure of the Union itself.

3 – The constitutional normative spectrum allusive to the referendum on Union Treaties seems pertinent to us, although the innovation brought by the amendment which consecrated it, represents a limited gain: it was already possible, under the previous constitutional version, to implement referendums about issues of European integration; the difference lies on the circumstance that, nowadays, the issue of a referendum can be a treaty in total, with the inherent advantage of a wider convenience regarding the formulation of the referendum's object.

4 – On the issue of the monitoring of the Union's affairs by the national institutions, it is in force, in the Portuguese Legal System, the principle of a generic monitoring and analyzing power by the Republic's Assembly. The Parliament may pronounce itself on the issues, pending from decision, tied to the spectrum of its reserved legislative competence, a regime that does not evoke our opposition.

5 – The very recent and interrupted 8th process of Constitutional Amendment would not represent, for the topics studied here, any substantial benefit.

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