UNIO - *EU Law Jounal*. Vol. 3, No. 1, January 2017, pp 33-37.

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Forty years of Constitution, Thirty years of integration[1]

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ABSTRACT: This article presents an assessment on the history of the Portuguese constitutional option for the European project path. It also reflects about the juridical-political aspects of the construction of the European Portugal and the meanings of sovereignty and self-determination in the context of the European integration, highlighting that in the present the ones responsible for its political conduction are not known, especially when we consider the crisis of the sovereign debts.

KEYWORDS: Constitution – European integration – self-determination – sovereignty.

[1] This text reproduces integrally, and without any modification, my communication in the Colloquium "40/30: forty years of Constitution, thirty years of European integration", that took place in the University of Minho, by initiative of the Centre of Studies in EU law of the School of Law of the University of Minho, on October 25, 2016.

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I. An extravagant introduction

It is only natural that my generation is asked about what happened to the European Portugal.

We were almost thirty years old, or maybe a bit older, on 12th July 1985, when the Treaty of Accession of the "*peninsular peoples*" (as Antero would say) to the EEC was signed in Jerónimos. On 3rd October 1990, when Germany celebrated its reunification with the inclusion of GDR in the Federal Republic, we were reaching the age of reason, the thirties are almost gone and the forties are very close. And now, in the age of reason, we were surprised by the 23rd June referendum vote in the UK to leave the EU. The trajectory of the European Portugal mingles with the path of our adult life. For that, it is very natural that this question is posed to us: what happened to that trajectory? But from my part, the response to the question (or the patient search for the answer: it would be foolish to assume that I have some) cannot be given without a previous "*declaration of interests*" as it is trendy to say nowadays. I loved the European Portugal and the Europe in which it developed. I lived every single of its moments believing in them: I was in Paris when the celebration of the two hundred years of the French Revolution took place; in Germany when the reunification occurred and I was still around when the Maastricht Treaty was signed. I was one of those who thought that 1989 was the end of the twentieth century. For those reasons, I am also among those who today ask themselves, not only where European Portugal is but, what has been made of Europe – that Europe that Tony Judt foresaw as a potential "*grand illusion*" if one day, with the combination of the eastward enlargement and the establishment of the single currency, designed in accordance with the bases of the German ordoliberalism, the winds of divergence convened.[2]

In the day of *Brexit*, I was in Slovenia, in the magnificent Habsburghian landscape of Lake Bled, representing the Portuguese Constitutional Court, of which (in June 2016) I was still a member. On that day, the constitutional courts of Member States – with exception of Hungary's and Poland's – gathered to celebrate the 25 years of the Slovenian Republic, hosted by the Slovenian Court. The President of the Court of Justice of the European Union (CJEU) also attended; and we passed all that day enthusiastically discussing the relations between Luxembourg and Karlsruhe, the relations between Luxembourg and Madrid; the relations between Luxembourg and Rome; the relations between Luxembourg and Brussels. The *plurilevel constitutionalism* was on stage. We debated the Judgment of the CJEU on the request for preliminary ruling sent by Spanish Constitutional Court in the case *Melloni*.[3] We talked about the decision of the Luxembourg Court on a preliminary ruling sent by *Bundesverfassungsgericht* regarding the prohibition of monetary financing to the countries of the Eurozone.[4] We discussed the situation of the Belgian Constitutional Court, champion of the preliminary ruling requests, made by the national constitutional jurisdiction to the Court of the Union. It, was therefore, the big stage of the construction of the European legal space through the dialogue between courts literally done in the *lingua franca* that English is. Discussion ended, and on the following day, we came to know that one of the peoples of a Member

[2] T. Judt, "*A grand illusion? An Essay on Europe*". This essay results from a series of conferences that the Tony Judt attended during the nineties. The author refered the Portuguese edition, T. Judt, "*Uma grande ilusão? Um ensaio sobre a Europa*"(Lisboa: Edições 70, 2013) – translator's note.

[3] Judgment *Melloni*, 26 February 2013, Case C-399/11.

[4] Case C- 62/14, 16 June 2015.

State, whose language we had used the previous day, decided to leave the Union.

Nothing in this introduction follows the style and demands of a scientific colloquium. I believe, however, that the theme that I will approach from now deserves my transgression, or the excuse of a personal note.

II. The Constituent was not European

The Constituent Assembly that approved the first version of the 40 years old Constitution that we celebre today was not an 'European' assembly. It is certain that most of the constitutional projects did have Europe as a mentor. But the Europe that was in mind for those projects had no institutional feature. It corresponded to a pool of ideas: a tradition of thinking and political practices that embodied the concept of an occidental constitution, and according to the connotation that the term occidental had at the time. Therefore, the Constitution of the Republic of Portugal (CRP) was not born as the Italian (1947), the Spanish (1978) or the German (1949). In its original version, dating from 1947, the Italian Constitution already contained a European clause, even if at the time, nothing European existed yet. Its Article 11 said that: "*Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends*". In the same way, pursuant to the Bonn Basic Law stated in Article 23; (and that already suffered many revisions) "*the Federation may transfer sovereignty through the law and with the approval of the Federal Council (Bundesrat)*". Although by the end of the forties, the European integration was no more than a foresight, the Italian and German constitutions prepared for it through an express entitlement, addressed to the respective States, of the transference of 'Sovereign rights' to whatever supranational organization that could emerge in the future. It is not surprising that Italy and Germany were the losers in the War. Italy and Germany were the first interested in any European project. The Spain of 1978 was as well. For that reason, the original version of the its Constitution – that indeed is not coincident with the current version because the text now includes, in Article 135, the so-called budgetary '*golden clause*', regarding the limits of public debt and the deficit required by the Union's rules - already authorised Spain to celebrate treaties that would attribute to organizations (the supranational term is expressly used) "*the exercise of competences deriving from the Constitution*". The CRP in its original version did not entail any of this and could not foresee it. The concerns of the Portuguese Constituent Assembly were different. The "*European project*" was only part of the Constitutional language with the constitutional revisions, in a fragmentary and, sometimes, (in my view) confusing way.

I do not intend to make the exegesis of that language (Article 7, paragraphs 5, 6 and 7; Article 8, paragraphs 3 and 4). If I recalled the historical events that I mentioned above, it is only with one intention: I will identify when the moment was that the Portuguese constitutional system made the "*European decision*". To those who would like to analyse what the "*European Portugal*" was from that national constitutional perspective, that identification is necessary since only form there one can spot the *design* that this decision found. I would say that since that design only took shape after the constitutional tension between 1976-1982 (tension that reflected the main indecision regarding the political system to be followed), it will be closely linked with the key questions to be solved from 1982 onwards. The option for Europe, in Portugal, was made at the same time the choice for the constitutional democracy (Article 3

paragraph 1) or for the rule of law (Article 2), became clear in the "*internal system*", as we started referring to our model of governance. That was the model adopted by the remaining members of the then EEC. As it was that model of governance that we wanted to safeguard the option for Europe was enshrined in the 1982 version of the CRP as an instrument of reinforcement of the internal constitutional order. When strictly seen from this perspective, the project of the European Portugal presented a clearly instrumental side, as did all the other options that serve an external end, beyond the "*good*" that this decision, in itself, entails. It helped to strengthen the democracy. It consolidated the end of the so-called "*constitutional quarrel*". It contributed to make the reversibility of the *internal* model that finally was reached more difficult. Beyond these instrumental purposes, the constitutional process of the European Portugal presented a side of historical inevitability. Redefined for the first time in the history of Portuguese Constitutionalism, the national territory, delimited by the boarders of the continent and the archipelagos, and the closing of (so dramatically late in the concert of nations) the circle of Portuguese expansion, would have to delineate the reinsertion of Portugal in the world. Europe appeared to that necessary reinsertion as an inevitability. If those were, from the strict point of view of the constitutional language, the designs of the European Portugal, there is no doubt that 40/30 years passed that the designs were fulfilled. It remains to analyse the present.

III. Sovereignty and self-determination

The evaluation of the present situation is such a challenging endeavour to which I cannot simply abide. I might have '*personal*' impressions that I mentioned in the introduction to this text, but I do not own the necessary instruments to evaluate with rigour the historical mutations that we see today.

I will say, therefore, that only when seen from the prism of national constitutional law, the European Portugal path is the trajectory of any other Member State of the Union that has authorised transferences of sovereignty in favour of a common entity that integrates all. For the dogmatic sphere of constitutional law, this is the identifying trace of the European *Sonderweg*; a set of national fundamental systems, in which each of them warrants the entities of the political community, created by that system to entitle or transfer to the entities of that *polity*, or other political community, "*competences deriving from the Constitution*", as the Spanish say. To affirm this is the same as saying that the dogmatic sphere of constitutional law will look into the current state of *Sonderweg* through certain and determined prisms; and that in those prisms will be, before anything else, written the word *sovereignty* and the legal meaning that *shall* be attributed to such a term after thirty years of integration. To consider that this point of view is worthless because it opens a discussion merely semantic or nominal, I do not think it would be right. It seems appropriate to undertake the discussion: for all the motives, including the one that at a first sight might seem more futile – refuting common, imprecise, unscrutinised language regarding this subject that, at least in our public sphere, takes place.

For a long time now, we know that the concept of sovereignty can no longer be understood as it was in the beginning of the Westphalian era, as if it was a legal concept. The idea that a 'supreme power' could only be conceptualized as a pure fact, placed beyond the law, was bluntly denied by the science of public law of the beginning of the twentieth century, withdrawing it from the universe of 'concepts of pure facts'. Jellinek, Kelsen, Malberg and Hart solved the aporia of its incompatibility

[incompatibility of the sovereign entities] with any legal attachments. There is not any incompatibility between sovereignty and submission to the law. We have known that for an almost a century now. This way, there is no incompatibility between the condition that is proper of a sovereign State and its accession to historical processes that imply the increasing interlacing, or the increasing interdependence of the different national state systems.

The problem that the European *Sonderweg* points out today does not lie in the process of increasing interlacing. The *new* problem that we face today, and that arises clearly due to sovereign debt crises, *is that we do not know who guides that process*. I believe that the vicissitudes lived in the process of European integration after the so-called '*crises of the sovereign debts*' illustrates well this affirmation, in the exact measure that the "*crises*" reveal what changed in relation to the past. Furthermore, I do not believe that it is excessive to identify such past, in relation to which the 'crisis' reveals a certain discontinuity, considering the capacity that *all* the subjects of the integration had – and no longer do – to guide the process of the increasing interlacing.

In a time when one could safeguard such a guiding force was still in the sphere of the interlacing subjects – the states. There was still space for a theoretical representation of state "*sovereignty*" that would conciliate with its belonging to the universe of public law itself. That space could be occupied by the idea of '*self-determination*', that would work as synonym of the idea of '*sovereignty*', recovered from the universe of fact-concepts. But the problem that we face today is not knowing if the world-of-facts, that in the meantime took over, saves any room for this understanding of *sovereignty as self-determination*. It remains to be seen – and for this question I have no answer – if this is a *new problem* that the integration process, in its most recent manifestations and avatars, raised itself or if this is a *new problem* brought by the national constitutional law not only because of the course that the European project took but, moreover, because of the general course that the world took with so-called *globalization*. It is also the globalization that forces us to rethink all the problems brought by the disjunction between de-facto-powers and de jure powers - a disjunction that is renewed by the transformations brought by technology and by the challenges launched by economic governance. But this is other issue, that will be tackled in other colloquium and not in the one celebrating the forty years of the Constitution and the thirty of the integration.