The Portuguese Constitution and European Union Law

Four Notes

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1 A few years ago[1] we examined the topic in the title in writing, tackling it from the two perspectives in which it might be raised (each, of course, being necessarily connected to the other): that of the relationship (which may be termed material-functional) between the two normative complexes, considered in themselves; and that of the relationship (which may be termed organic-functional) likely to become established between the court systems from which, ultimately, the respective types of remedy are to be sought, namely the Portuguese Constitutional Court and the European Court of Justice.

Since then, the context in which the issue arises has changed significantly, especially as regards European Union law: leaving aside the relatively unimportant Treaty of Nice, the process of establishing a "Constitution for Europe" failed but, through the Treaty of Lisbon, the new Treaty on European Union and the Treaty on the Functioning of the European Union were approved and entered into force on 1 December 2009; and, more recently, spurred on by the current financial situation of the euro area and the lessons that experience of the single currency have yielded, and following measures that have been taken meanwhile to remedy the situation and the crisis which resulted in some States participating in the currency (among them, Portugal), the "Treaty on Stability, Coordination and Governance in the Economic and Monetary Union" was approved and ratified by 25 Member States and entered into force on 1 January 2013. But with regard to the Portuguese Constitution, matters are also not exactly on the same footing (at least from a formal point of view), given the addition (which will be discussed later) that takes into account precisely the foreseeable development of the Union's basic law, introduced by the revision that took place in 2004.

Is it the case that, in view of these changes, we shall have to modify the conclusions that were advanced in the articles referred to above? And moreover: will there be other notable aspects of the implications of EU law for the Portuguese constitutional framework, and for its application, which should be considered and analysed?

[1] Costa 1998, p. 1363 et seqq.; later developed and turned into Costa 2000, p. 193 et seqq.

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It is to these questions that we seek to give an initial and very succinct answer in the notes that follow.

2 Although the primacy of EU law over ordinary domestic law has long since been established, in the legal systems of the Member States and in its scope, a similar unquestioned primacy is nonetheless surely far from being accepted, in the same domestic law and its corresponding practice, over constitutional law – over the *Constitution* itself. As we know, this is the Luxembourg Court's understanding, and has been so for a while; but the same approach cannot be presumed on the part of those domestic courts (constitutional courts and the like) to which oversight of their respective constitutions is mainly and more specifically entrusted, as is certainly shown by the case law, and recent case law at that, from one of the most influential among them, namely the German *Bundesverfassungsgericht* (Federal Constitutional Court).

In Portugal, the issue had not yet arisen in practice when we first approached it; and neither has it arisen to date. This means that we can only continue to consider and analyse it at a theoretical and doctrinal level.

From this point of departure (i. e. without being able nor having to take any position in advance from the case law), the view we held was, in short, that if the primacy of national constitutional law was to continue to be recognised domestically, it could not in any event ignore the European commitment also expressly assumed by it (Art. 7.6), a commitment entailing the acceptance by the Portuguese State of the law resulting from the transfer of powers to the then Community by agreement between its Member States. Now, this should mean that, in the event of an (albeit unlikely) conflict between Community rules and domestic constitutional requirements, the application of the former should not always be rejected, but rather that this would only occur in the case of a flagrant and entirely unacceptable clash with the fundamental values and principles of the Constitution. To that end we covered ourselves by invoking the leeway offered by the "tolerance" which the Constitution itself already provided for in the text of the chapter on its relationship with international law (Art. 277.2). And we added that where, all this notwithstanding, the Community law provision had to be overruled, such a result should not be arrived at without first determining its exact meaning and scope (or perhaps by determining its invalidity) by having recourse to "preliminary reference" to the Court of Justice.

We could now (retrospectively) reformulate the view thus stated by saying that no hierarchical relationship between the Portuguese Constitution and the Treaty was to be posited (merely by virtue of EU membership) such that – we once again resort to the well-known *Kelsen*ian term – the latter has displaced the former in the pyramid of rules; and by adding that this should not prevent the possibility of any kind of trade-off in the application of one or the other in the case where Union law and the national Constitution come into actual or potential conflict – a trade-off that should not be the task of the national or Union courts acting in isolation, but rather a

collaboration between the two.[2] All of this is, after all, consistent with and in ways anticipates and has points of convergence with the concept, which has meanwhile been put forward increasingly by various authors, of a necessary "inter-constitutionality" corresponding to a "multi-level" and "networked" constitutionalism – as the model, according to the authors, best suited to expressing the stage reached in this area by the European Union and its Member States (without however analysing and questioning here the deeper meaning of this concept and without committing to any one of its possible implications).

We believe that the understanding described above still obtains today, at least in its broad outlines.

As pointed out, the great and (given the nature of the text that it was part of) fundamental "innovation" that the Constitutional Treaty would have introduced, as regards the primacy of EU law, was the express enshrining of the principle in its very first and emblematic precepts, on the "Definition and Objectives of the Union": Art. I-6, indeed, states without any qualification that "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States". This proclamation (which – it will also be recalled – raised serious reservations, from more than one quarter) was eventually not included in the TEU as adopted by the Treaty of Lisbon – to which was simply attached a Declaration that "The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law". Nothing therefore changed the status of Union law concerning the "formal" source

[2] This is, we believe, the crucial point. In fact, the most problematic aspect is not so much the side of the question that we have labelled material-functional – since in this regard, the TEU itself is based on the major legal values common to the Member States (Art. 2) and on the safeguarding of the constitutional traditions specific to each of them (Art. 4.2); the more difficult aspect is really knowing whether the guarantee of harmonisation thus postulated between EU law and national constitutions should be reserved exclusively to the ECJ or whether it must be shared with constitutional courts (or the supreme courts) of the Member States. We declare a preference for the latter, in the belief that although it may entail some cost in terms of instability or ambiguity, this will finally match the cost of the similarly unstable balance, a balance left deliberately unresolved, which continues to characterise, institutionally, the European Union as a political formation. For a similar opinion, see Ramos 2005, p. 375 et seq., 394 et seq.
Thus, taking into account what has just been mentioned, we think a similar response should be given today to the issue that parallels the one addressed in the main text, and that we had merely referred to in our previous article: the issue of a rule being made or a decision taken by an organ of the Union, allegedly *ultra vires*, i. e. beyond the functions and powers permitted by the Treaties. Here also our tendency, at least, is to favour the view that the possibility of intervention of the domestic courts (especially constitutional) in the question should not be categorically excluded, although the main word belongs, of course, to the ECJ. As is well known, it is precisely such issues that the German FCC has concluded that it possesses jurisdiction to hear. As for the Portuguese case, and in the absence of any established judicial practice related to the issue, it may however be added that the view advanced here may perhaps now find extra support in Art. 8.4 of the Constitution, as it expressly makes the domestic applicability of EU laws, with the force that it recognises them to have, dependent on them having been "issued by its institutions, in the exercise of their respective powers" (cf. *infra*, in the main text).

(which the case law continued to be) of the principle of primacy – notwithstanding the Declaration's undeniable and substantial effect of enhancing recognition of this principle, together with the removal of any doubt about its validity.

In terms of Portuguese constitutional law, however, something very significant had already occurred in this regard. It was that, in anticipation of a successful conclusion of the ratification process of the Constitutional Treaty and its entry into force, the Portuguese constitutional legislation was amended in advance to reflect the position so emphatically proclaimed in Art. I-6 of the intended Treaty (thus sidestepping in advance the difficulties that were to be raised): this was given effect in 2004 by the inclusion, in Art. 8 of the Portuguese Constitution, of a new provision (Art. 8.4) which reads as follows: "The provisions of the treaties governing the European Union and the rules adopted by its institutions, in the exercise of their respective powers, are applicable to domestic law, in terms as defined by EU law, with respect for the fundamental principles of the democratic rule of law". The Treaty establishing a Constitution for Europe finally foundered; but the rule in the Portuguese Constitution, to which it admittedly gave birth, remains in force – whence the fact that among those constitutions of Member States that we are aware of, this is the one (not to say the only one to do so in this way) that most directly addresses the issue of incorporating EU law into the domestic system and, by the reference to the same law defining its terms, acknowledges its primacy.

Now it appears – if we see things as they are – that the terms in which the Portuguese Constitution came to embrace the primacy of EU law only confirm the general drift of the reading we have already advanced of its implications for domestic constitutional law itself, which we recalled at the outset. Indeed, insofar as it ensures the domestic application of EU law "in terms as defined" by it, then, given also the way the ECJ has interpreted and applied it, the effect is of course to ensure its primacy and we do not see how, as a matter of principle, the extension of this also to constitutional laws can be resisted; with the sole proviso, however, that the application of EU law in domestic courts must not lead, in any event, to the disregarding of the "fundamental principles of the democratic rule of law", which means nothing more than that the primacy of EU law cannot be allowed to override what in the final analysis is the essential and irreducible core of the Constitution.[3]

That said, it should just be added that the new constitutional provision obviously does not and could not get us any further forward as to how the Portuguese Constitutional Court would proceed, were it to find itself faced with the critical situation of having to refrain from applying a rule of EU law because it was incompatible with that irreducible core of the democratic rule of law, as conceived by the Constitution that its task is to uphold. Therefore nothing precludes us from continuing to think that, in this case, the Court should not take that step without first referring to the

[3] As for the definition of that core, we believe that it cannot be derived from any generic concept of the "democratic rule of law", but rather from the way the Portuguese Constitution conceives and fashions it (perhaps with its own idiosyncrasies and singularity), and certainly not by restricting itself to the sphere of fundamental rights: indications of principle may be provided by the list of "material limits" for constitutional revision, in accordance with Art. 288.

Court of Justice the "preliminary question" of the interpretation or validity of the rule in question.

3 The relationship of EU law to domestic constitutional law is not limited, however, to the issues we have so far considered. There is another aspect – and that is the question whether the latter does after all extend its own guarantee to the application of the former at domestic level, with precedence over the corresponding ordinary legislation, and if so, whether or not the court (i. e. the Constitutional Court) primarily devoted to protecting the Constitution should also take over the protection of that primacy.

To clarify the point: what is at stake is that, where the reception of EU law, with the primacy that it confers on itself, into domestic law is automatically provided for and assured by the Constitution, it may well be said that non-recognition of such primacy by the legislature or by a national court (either directly, or else by applying an incompatible domestic provision) will at the same time lead to a violation of the relevant constitutional principle (i. e. the principle which is the domestic source of that primacy), that is, to an "unconstitutionality", and as such be liable to scrutiny by the court and according to the procedures specifically provided for.

Now, in the Portuguese legal system – as we have just seen – the principle of "automatic" reception of immediately applicable EU law, and its consequent primacy, is directly expressed at the constitutional level. Moreover, it might be maintained (as we ourselves maintained in the article that we have been taking as a point of reference) that the principle was already there, even before the addition, mentioned above, of Art. 8.4 of the Portuguese Constitution: it was already to be found in Art. 8.3 (expressed in general terms, but essentially addressing the country's integration into the EEC) which states that "the rules adopted by the competent organs of the organisations to which Portugal belongs apply directly in national law, provided this has been established in the appropriate constitutive treaties". The addition of paragraph 4 therefore served only to make things clearer, not so much in terms of the direct applicability of EU law, but rather as to its primacy.

Therefore, one could raise the question of whether or not the concept of "unconstitutionality", with the resulting effects at the level of the court's competence and procedure,[4] should be applied to the situation where a domestic provision is contrary to EU law. But the answer to that question should be firmly in the negative, and for two reasons: firstly, because, to qualify the situation thus, we would surely be facing a kind of "indirect unconstitutionality", the examination of which would generally (so we would argue) be outside the jurisdiction of the Constitutional Court; secondly, and decisively, because the assumption, by the Constitution, of Portugal's integration into the EEC could only be understood in a global sense, to the fullest extent and with all its implications, including at institutional level, so

[4] While we cannot develop the point in all its detail and with all its implications, it should nevertheless be noted that the problem in question (which has been raised in practice, cf. infra) was, under the Portuguese system of judiciary review of legislation, fundamentally one of finding out if a person affected could lodge an "appeal on constitutionality" to the Constitutional Court, based on the application by a lower court of a domestic provision contrary to EU law.

that there being, under the Treaty, a specific judicial body for ensuring compliance with Community law, it would not make sense and would even be incongruous that a similar domestic body (the Constitutional Court) intervenes to the same effect.

We are also certain that the addition of paragraph 4 to Art. 8 of the Constitution in no way affects this understanding: indeed it only serves to reinforce it.

More important than our doctrinal point of view, however, is the fact that the Portuguese Constitutional Court has arrived at the same conclusion and has tenaciously adhered to it in decided cases – both before and after the explanatory paragraph was added to the Constitution. This goes to show, therefore, that the Court does not consider itself to be specifically suited to the function of ensuring the primacy of EU law (of being the "guardian" of EU law): This primacy should be ensured by the other domestic courts and, as a last resort, the ECJ.

4 These – as set out above – are the two aspects of the issue surrounding the relationship of Portuguese constitutional law with EU law that we should reconsider in the light of the development of the former in this respect arising from the revision made to the Constitution in 2004.

But, in truth, there is – we believe – also a third level of this relationship that cannot be overlooked: a subtler and more complex problem, concerning the extent to which EU law (and decisions taken by EU bodies in applying it) can or should influence a judgment on the compliance of domestic law with the Constitution itself.

At stake here is neither whether the effectiveness of a rule of EU law may be nullified at the domestic level on the grounds of incompatibility with the national constitution, nor whether a domestic legal provision can or should be judged "unconstitutional" because it is contrary to EU law: what is at issue is rather whether constraints imposed on the domestic legislature by EU law (or by measures founded on its application), which narrow its scope for choosing solutions (its margin of legislative freedom), should not be included among the factors to consider (particularly by the Constitutional Court) when reaching a finding of the unconstitutionality or otherwise (with respect to the national Constitution) of laws passed by the domestic legislature.

The question has become acutely topical in Portugal in recent years – due to the programme of measures and targets that the country has undertaken to overcome the financial crisis it finds itself in, measures and targets set out in the Memorandum of Understanding (as successively revised) concluded in 2011 with the European Commission, the European Central Bank and the International Monetary Fund (commonly known as the "troika"). In fact, the programme forced the adoption of particularly stringent measures into law, in various areas, but in particular with respect to wages (especially for public employees) and allowances for pensioners – measures that were repeatedly submitted for consideration by the Constitutional Court which in turn declared them unconstitutional, in broad and crucial respects. Now, in defence of the legitimacy of such measures, the Court was reminded precisely of the fact that these laws were passed in the immediate context of the programme referred to above and also, in particular, in accordance with the

rules of EU law concerning the budget balance and the level of indebtedness of Member States.

It is not our intention, nor would it be feasible, to analyse and discuss the relevant case-law here.[5] Limiting ourselves, therefore, to noting that this case law was not, in general, particularly germane to the problem stated, we will point out only that posing this problem is certainly pertinent and justified – especially when the question of unconstitutionality (as was the case) has been put in the light of the great “formal” (in a certain sense) principles of the Constitution, such as the principle of equality or the principle of proportionality. When these are at stake, we really fail to see how the constraints arising from EU membership and those imposed by EU law can be ignored: without taking them into consideration – either in a judgment founded on the equality principle or by assessing the appropriateness, necessity or proportionality of a legislative measure – not only is the adjudicating body failing to consider a “reality principle” (one that judicial decisions should never ignore) but it also side-lines that other legal order which (with support from the Constitution itself) constrains the domestic legislature, namely EU law. For all these reasons it seems to us that this will be – for those who want to have the question put in these terms – a suitable terrain for “inter-constitutionality” within the framework of a “multi-level” and “networked” constitutionalism.

It is clear, however, that by posing the problem just addressed in the way we did, we are of course detracting from the possibility of removing it on the basis of the consideration that such rules of EU law (or decisions taken in applying it) are themselves, ultimately, inconsistent with the national Constitution. This, of course, is also a theoretically possible course to take, but if we do so we will have reverted to the question we started with. In any event, we do not believe that the problem can or always has to be posed in the form of a dilemma in this way: rather we think that situations may well arise where the national legislature’s freedom of action is constrained by EU legal rules, without the question (theoretical or otherwise) of the compatibility of these with the national constitution having to be posed in earnest.

5 It only remains to focus on one last point – one that now concerns an obligation that the EU Member States that are parties to this Convention have taken on through the “Treaty on Stability, Coordination and Governance in the Economic and Monetary Union” – commonly known as the Budget Treaty.

The obligation created by this instrument that is taken into account here is that which binds the Contracting Parties to introduce into the domestic legal system of

[5] This has provoked an extended and intense doctrinal debate (in addition, predictably, to an intense political debate, heavily reported in the media): for the former see the different views expressed in the collection of articles in Ribeiro and Coutinho 2014 and Novais 2014. Note however that the constitutional issues raised by the financial crisis has given rise to widespread interest amongst scholars, in particular in the *IXth IACL World Congress of Constitutional Law*, which took place in Oslo in June 2014, where two of the workshops were indeed devoted to the topics of “Social Rights and the Economic Crisis” and “Constitutions and Financial Crisis”: the papers presented there (including Portuguese ones and others dealing with the case of Portugal) are still available on the website www.uio.no/wccl

each, one year at the latest after the entry into force of the Treaty, "provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes", through which compliance is guaranteed, again by each one of them, with the budgetary balance rule, as defined by the Treaty, and its corollaries (Art. 3.2, with reference to paragraph 1, and Art. 8 dealing with the non-fulfilment of the obligation).

The Portuguese State has now complied with this obligation by passing Law No. 3/2013 of 2013, which embodied the seventh amendment to the Budget Framework Law (Law No. 91/2001 of 20 August), in particular by giving a new wording to Art. 12-C of this Framework Law.

Although some voices were heard advocating the incorporation of the Treaty's budgetary balance rule into the constitutional text itself,[6] this was not, as it turns out, the route taken. Rather, it was understood that the incorporation of the rule in the Budget Framework Law already satisfied the alternative requirement of the Treaty that this rule must be included at least in a provision by which compliance could be fully assured during the process of presentation, discussion and approval of the annual budget.

To conclude, what should be noted here is that such an understanding is entirely acceptable, given the fact that the Budget Framework Law comes within the category of laws to which the Portuguese Constitution attributes an "enhanced value" in the sense of being laws that are "legal prerequisites of other laws" (cf. Art. 112.3 of the Constitution) and cannot therefore be modified by them. That is the unanimous (we suppose) opinion of the scholars; and, although it has not received the explicit imprimatur of the Constitutional Court, neither has it been rejected, and one can even say that it has been implicitly accepted by that Court (see, in particular, Judgment no. 374/2004[7]). Indeed, in accordance with the provisions of Art. 106.1 of the Constitution, the annual budget law must be "prepared, organised, enacted and implemented [. . .] in accordance with the appropriate framework law" – which no doubt means that its mandatory provisions cannot be called into question case by case during each annual budget process: this is precisely the minimum that the Budget Treaty requires, in the alternative which provides for the incorporation of the budgetary balance rule into domestic law.

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[6] As we know, this is the position in Germany with the parallel rule in Art. 115 BL (German BL, *Grundgesetz*) – which, as we also know, was the source of inspiration for Art. 3 of the Treaty.

[7] Constitutional Court of Portugal, Acórdão n.º 374/2004 (26 May 2004), http://www.tribunalconstitucional.pt/tc/acordaos/20040374.html

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