PORTUGAL

The Portuguese Constitution and the Participation of the Republic of Portugal in the European Union

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Introduction

The way the European integration process has unfolded over the last twelve years has focused political and legal discussion on two issues: the legitimacy of the new power structures emerging at the European level and, at the same time, the relationship between European Union law – and, in particular, Community law – and the constitutional law of the states taking part in the said integration process.

In effect the European Union, as well as the Communities it comprises, were born of acts of international conventional law, international treaties, negotiated, approved and ratified by the Member States, in accordance with the constitutional rules governing the external obligations of the state. It is therefore understandable that under constitutional law, and especially in terms of a formal constitution, the legitimacy of the European Communities and Union stems from the states' sovereign will, stated in keeping with their respective constitutional rules. The ratification process involves not only compliance with the rules governing the procedure by which the state is duly bound at the international level but also control over the suitability of the treaty to be ratified as far as the substantive rules of the constitution are concerned.

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From this standpoint, the idea that treaty rules (and, furthermore, acts based on them) shall prevail over the constitution of a state looks hard to accept. None the less, the truth is that by creating the European Communities and the European Union the Member States created a new power centre to which they granted very significant powers both in the social and economic field and the political field (especially so with the coming into effect of the Treaty on European Union in November 1993).

The powers granted to the European Union institutions involve the exercise of very wide-ranging normative powers that may take the form of both the approval for normative acts directly applicable in the legal system of each Member State (regulations: see Articles 108A(2) and 189(2) of the EC Treaty) and the adoption of acts that require Member States to adopt new provisions or amend their domestic laws to match the normative system for which those acts provide (directives: see Article 189(3) of the EC Treaty). So, inevitably, we have to ask which criteria shall apply when the rules conflict. The ECJ has stressed strongly that the Community rule shall prevail over any rules adopted unilaterally by a Member State.[1]

The ECJ has held and continues to hold that it would otherwise be impossible to guarantee the useful effect (*effet utile*) of Community law, as the outcome of its effects on domestic law would entirely depend on the unilateral wishes of each Member State. It would be impossible to provide individuals with suitable remedies and the ultimate integration goals of the treaties would be frustrated.

Affirmation of this view together with recognition of the direct effect of Community rules (i.e. the recognition of an individual's right to invoke those rules before the national authorities, mainly the courts)[2] means that the classic internationalist concept that sees treaty rules (and the rules contained in acts based on them) as commands that bind solely states and have no immediate effect on individuals has been overcome. Thus we see a strengthening of the concept that states that Community law is independent of the law of Member States and which sees supremacy as an existential requirement (*exigence existentielle*) of Community law (in Pierre Pescatore's famous expression).

Recognition of the direct effect of Community rules and the acceptance, by national courts,[3] that Community law shall prevail over the law of the Member States in regard to the relationship between Community law (original and secondary) and the statutory law of the states, and the fact that, for a long time, the European integration process was focused on the economic goal of creating a single market,

[1] See the decisions of the ECJ in Case 6/64, *Costa* v. *ENEL* [1964] ECR 592; and Case 106/77, *Simmenthal* [1978] ECR 629.

[2] See the decisions of the ECJ in Case 26/62, *Van Gend en Loos* [1963] ECR 10; and Case 8/81, *Becker* [1982] ECR 69.

[3] See, as far as Portugal is concerned, the decision of the Constitutional Court 163/90 in *Diário da República*, 2nd Series, No. 240, 18 October 1991, 10,430.

has meant that the politically more sensitive issue of the relationship between Community law and constitutional law has been left on the back burner.

It is clear that the question of the relationship between Community law and constitutional law has, since the 1970s, been raised from the point of view of protecting fundamental rights (that is, whether the actions of Community institutions affect fundamental rights as they are laid down in the Member States' constitutions). But the truth is the case law of the ECJ has come up with an answer that appears to be generally satisfactory. In fact, according to a consistent case law,[4] the ECJ holds that the Community institutions are bound by principles and rules relating to the protection of fundamental rights contained in acts of international conventional law to which the Member States are a party – in particular the European Convention on the Human Rights – as general principles of Community law.

This means that said principles are part of the legality block (*bloc de la légalité*) by which the ECJ decides whether Community juridical acts are valid.[5] Thus, in principle, the compliance of such acts with the requirements of national constitutions in terms of protecting fundamental rights is guaranteed. It is the famous concept of *equivalent protection* proclaimed by the German Constitutional Court.[6] Under that concept the relevant bodies of each state – in particular the constitutional court – shall refrain from taking constitutional control over juridical acts of the Communities (and the Union) as long as there is equivalent control, in terms of protecting fundamental rights, by the ECJ.

None the less, we can see that the issue has become more relevant and acute since the expansion of the European Union's powers in the social and economic field and, above all, since the integration process has included areas that traditionally are held to be at the heart of a state's sovereignty: the currency, through the creation of economic and monetary union; internal security, through the strengthening of judicial and police cooperation; and external security, through the setting up of a common foreign and security policy.

Therefore, in recent years the question of the political (and judicial) model for the integration process has been strongly raised – and the discussion is far from over – as has, consequently, the question of the relative positions of the states and the Union within that model. Essentially the discussion has centred around questions of a constitutional nature relating to the legitimacy of the power exercised by the Union institutions, the vertical division of powers between the states and the Union and the interrelationship of the legal systems.

Next we will examine briefly the way in which Portuguese constitutional law has developed in regard to these matters and we will emphasize the solutions laid down in the latest constitutional reviews.

[4] See the decisions of the ECJ in Case 11/70, *International Handelsgesellschaft* [1970] ECR 1133; and Case 4/73, *Nold* [1974] ECR 503.

[5] In accordance with the terms of Articles 173 and 177 of the EC Treaty.

[6] In its famous decision of 12 October 1993 on the ratification of the Maastricht Treaty.

Definition of Portugal as a Sovereign Republic: The Constitution as Grounds for the State's Acts

The Portuguese Constitution currently in force – the 1976 Constitution as amended by Constitutional Laws Nos. 1/82, 1/89, 1/92 and 1/97[7] – states in Article 1 that: 'Portugal is a sovereign Republic based on the dignity of the human being and the will of the people and pledged to building a free, just and united society.'

According to Article 3(1): 'the sovereignty, sole and indivisible, resides in the people who exercise it according to the methods set out in the Constitution.'

These two articles reflect the concepts on which the nation state was created and developed as a basic political structuring of the relationships between the European nations (in Portugal's particular case, the organization of the state corresponds to a nation which is highly homogeneous in cultural terms and has had stable borders for more than 700 years). Under such an approach the state constitutes a politically organized collectivity that proclaims itself sovereign and is recognized as such (that is, it has autonomy in external affairs and has supreme authority over domestic affairs). Sovereignty lies in the people who exercise it within the terms set out in the Constitution.

The Constitution is therefore a parameter, the supreme rule by which the legitimacy of state bodies' actions is gauged. Thus, according to Article 3(2): 'the State submits to the Constitution and relies on democratic legality.' Article 3(3) goes on to say that: 'the validity of the laws and other acts of the State, of the autonomous regions, of the local authorities and of any other public entities depends on their conforming with the Constitution.'

Thus, it is the Constitution which gives legitimacy to the state's actions and the state is given no scope for acting outside or against the Constitution.

Sovereignty and Integration: The Exercise of Sovereign Powers in Common with Other States Within the European Union

Even though it is based on the afore-mentioned concepts and principles, the 1976 Portuguese Constitution contains clauses relating to Portugal's participation in the European Union that suggest some opening up in relation to the Portuguese state's engagement in the economic and political integration process which, although it is not yet fully defined, doubtless involves the exercise of powers that are characteristic of sovereignty, in conjunction with other states and within the European Union institutions.

[7] See J.J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa*, 4th edn, Coimbra Editora, 1997.

These 'opening up clauses', which, basically, were introduced by Constitutional Laws Nos. 1/89 and 1/92, are contained in Article 7(5) and (6) of the Constitution. According to Article 7(5): 'Portugal shall strive to reinforce the European identity and strengthen the European states' actions in favour of democracy, peace, economic progress and justice in relations between nations.'

So, in this case it is a very general clause – introduced by the 1989 constitutional review – that signals the opening up of the Constitution to Portugal's participation in a process leading to the strengthening of the European identity. However, it states nothing as to the nature or scope of that process which is only defined by reference to the principles and values stated in that paragraph (the development of democracy, peace, economic progress and justice in the relations between nations).

Article 7(6), which was introduced by the 1992 constitutional review – which preceded Portugal's ratification of the Treaty on European Union – contains a specific reference to the European Union and states the conditions under which the Portuguese state may take part in its building (which, indeed, implies recognition for the changing nature of the Union whose contours cannot be mapped out in a definitive manner at the start). Thus, according to Article 7(6): 'Portugal may, under conditions of reciprocity, while respecting the principles of subsidiarity and taking into account the achievement of economic and social cohesion, agree to the common exercise of the powers needed to build the European Union.'

While this provision expressly legitimizes, at the constitutional level, Portugal's participation in the European Union, it also establishes conditions or limits which the Portuguese authorities may not ignore when ratifying the treaties that contain the rules governing the functioning of the Union.

This first point to be made is that the Constitution – and we feel it would be difficult for it to be any other way given the notion of sovereignty underlying Article 3(1) – sees the European Union as a political entity based on, and legitimized by, the sovereign will of the Member States. This approach gives rise to the authorization granted by the Constitution to the Portuguese state to agree to – that is, to enter into pacts with other sovereign states – 'the common exercise of the powers needed to build the European Union'. The Union's institutional system is therefore seen as a system of entities within which the Member States jointly exercise the powers needed to build the Union. Although the wording of the provision may appear restrictive we do not believe that it should be construed in a way that conflicts with the possibility of setting up institutions or bodies (and granting them significant powers) – such as the Commission, the European Parliament and the European Central Bank – that do not directly represent the states within the Union's institutional system.

The notion of 'the common exercise of the powers needed to build the European Union' should be understood in a broad sense, which basically implies that the Member States are in a non-discriminatory position in relation to the decision-making process and to the effects of decisions taken by the Union's institutions.

This approach gives rise to the requirement of reciprocity provided by Article 7(6). In other words, the authorization the Constitution grants to the Portuguese state to submit the exercise of powers that are characteristic of sovereignty to

conditions that are not expressly laid down in the Constitution, is dependent on the acceptance of such conditions or limits by the other states that take part, along with Portugal, in the building of the European Union. The Constitution makes no allowance for a unilateral yielding of powers which would imply a *capitis diminutio* for Portugal in relation to its partners.

But in addition to these requirements, Article 7(6) of the Constitution also sets two substantive conditions relating to respect for two general principles: the principle of subsidiarity and the principle of economic and social cohesion.

What does the reference to these two principles in Article 7 of the Constitution mean? From our view point, Article 7(6) imposes as a condition of Portugal taking part in the European Union that the latter embodies as guiding principles of its functioning those very principles. The bodies of the Portuguese state that take part in the process of adopting the Union's original law are charged with ensuring this requirement is met.

In fact, the process for reviewing the Treaty on European Union (and the Community treaties), set out in Article N therein, creates the procedural conditions needed for that purpose to the extent that it makes any review contingent on the agreement of all Member States and expressly refers to the conditions laid down in the national constitutions. According to Article N: 'the amendments shall enter into force after being ratified by all Member States in accordance with the respective constitutional requirements'.

The reference the Constitution makes in Article 7(6) to the principles of subsidiarity and economic and social cohesion is surely the result of the importance they assumed during the debate that took place in Portugal over ratification of the Treaty on European Union.

On the one hand the principle of subsidiarity is seen as a means of guaranteeing balanced relations between the centre (the Union's institutions) and the periphery (the states' political bodies) of the Union's political system. On the other hand the principle of economic and social cohesion is understood as a means of ensuring a more equitable distribution of wealth and well-being between the centre (the more developed states and regions in the Union) and the periphery (the less developed states and regions in the Union) of the economic space made up from the single market and economic and monetary union.

Effects of Portugal's Participation in the Building of the European Union on the Government System Laid Down in the Constitution.

In addition to the general clauses examined above that provide for the opening up of the Portuguese Constitution to the complex phenomenon of European integration – which involves accepting conditions and limits on the state's exercise of sovereign powers – the 1976 Portuguese Constitution also contains some new provisions aimed

at preserving, as far as possible, the balance of powers underlying the government system established in the Constitution. These new provisions were mainly laid down by Constitutional Law No. 1/92 which preceded ratification of the Treaty on European Union.

In point of fact, Portugal's participation in the European Communities and Union has – in common with all Member States – strengthened the Government's position in relation to the other sovereign bodies, especially Parliament.

This is the result of the nature of the Union's institutional system which gives the Council of Ministers (where the Government representatives of the Member States sit) a central role in the decision-making process. In reality, although the Commission has the power of initiative and the European Parliament plays an active part in the decision-making process (indeed to an extent that has become increasingly greater with the successive amendments to the treaties setting up the Communities and the Union), it is really the Council of Ministers that has the decisive say both in terms of approving internal normative acts and preparing the Union budget and also in terms of signing treaties or agreements with other international legal entities.

Under these circumstances, negotiations between Governments (in which each expresses its position and the interest of its own state) and negotiations between them and the Commission are essential aspects of the decision-making process at the European Union level. They enhance the role of national executives and endow them with the role of essential spokespersons for the states' interests in the process of shaping the Union's positions.

Furthermore, the treaties creating the Communities and the Union grant normative powers to the respective institutions (and from the outset to the Council of Ministers) in fields which, within each state, are expressed in the legislative power of parliaments. As a result, the national executives, by taking decisions in the European Council of Ministers in keeping with the respective rules of procedure, acquire normative powers that they would not normally have in their own country without parliamentary control or authorization.

The European Parliament's participation in the decision-making process – notwithstanding its increasing relevance and importance – does not compare with the powers that national constitutional systems grant to the Member States' parliaments nor can it compensate for, in the light of the balance inherent in the national systems of government, the loss of power that results for the Parliament of each Member State from the role the Union's institutional system prescribes for the Council of Ministers.

There may be two solutions for this problem, which are to some extent not mutually exclusive. The first solution consists of seeking to restore the balance between executive power and legislative power by continually enhancing the European Parliament's powers (naturally, it is a solution of a 'federal' nature that does not take into account, nor solve, the specific problems found at the national system of government level, referred to above). The second solution consists of improving and strengthening at the Member State level the constitutional

mechanisms that allow parliaments to control governments in regard to expressing the state's position within European Union institutions.

The Portuguese Constitution, in common with all national constitutions that have taken an interest in the issue, shows concern for the second aspect of the problem by introducing mechanisms that strengthen parliamentary control over the Portuguese Government's actions within the European Union. Thus, in Part III of the Constitution ('Organization of Political Power'), Title II, Chapters II and III, which cover the powers of the Portuguese Parliament and of the Portuguese Government, contain a number of provisions, introduced by the 1992 and 1997 constitutional reviews, which stress parliamentary control over Portugal's participation in the building of the European Union:

(1) Article 161(n) provides that the Portuguese Parliament shall 'state its opinion, within the terms of the law, in regard to pending matters at the European Union level that affect its legislative powers';
(2) Article 163(f) provides that the Portuguese Parliament shall 'monitor and assess, within the terms of the law, Portugal's participation in the building of the European Union';
(3) Article 164(p) provides that the Portuguese Parliament is solely responsible for deciding 'the method of appointing members of European Union bodies, except the Commission'; and
(4) Article 197(1)(i) provides that the Government shall 'present to Parliament, in good time, information relating to the building of the European Union, for the purposes of Article 161(n) and 163(f)'.

The terms under which the powers referred to in aforementioned Articles 161(n) and 163(f) and granted to the Portuguese Parliament are exercised were specified by Parliament in Act No. 20/94 of 15 June 1994 relating to Parliament's monitoring and assessment of Portugal's participation in the building of the European Union. According to that Act the Government shall send to Parliament, as soon as it receives them, all proposals submitted to the Council of Ministers of the European Union by the Commission that cover the following matters (see Article 2(1) of Act No. 29/94):

- planned agreements and conventions to be signed between Member States or between the European Communities and third parties in regard to external affairs;
- planned binding acts of secondary law except acts of day-to-day management;
- planned acts of supplementary law, namely decisions taken by representatives of Member State Governments meeting within the Council;
- planned non-binding acts of secondary law that are held to be important to Portugal; and
- documents (such as the Green Papers and White Papers prepared by the Commission) covering the main economic and social guidelines as well as sectoral guidelines;

On the other hand, Members of Parliament may ask the Government to provide any additional information they feel is relevant to an assessment of the said proposals (see Article 3(3) of Act No. 20/94), including resolutions (or other acts) of the European Parliament.

In regard to matters covered by the Portuguese Parliament's exclusive legislative powers, it is the Government's duty to present, in good time, for Parliament's assessment the matters and positions being discussed within the European institutions. When, because of urgency, this is not possible the Portuguese Parliament or the Government itself may call for a parliamentary debate on the matters concerned and the positions already taken by the European institutions (see Article 3(1) and (2) of Act No. 20/94).

Parliamentary assessment of plans under discussion by European Union institutions takes place within Parliament's European Affairs Committee which may seek the opinions of other parliamentary committees, depending on the matters under review. The European Affairs Committee prepares reports which it sends to the Speaker and the Government and it may submit resolutions on the matters under review to be debated by a full session of Parliament (see Article 5 of Act No. 20/94).

As well as a case-by-case assessment of the proposals or measures under discussion by the European institutions, the Portuguese Parliament holds a debate, at which the Government is present, every six months – during every presidency of the European Council – on the overall developments in the building of the European Union and Portugal's participation in it (see Article 3(4) of Act No. 20/94).

Furthermore the Government shall provide Parliament, in the first quarter of every year, with a report that allows it to assess Portugal's participation in the building of the European Union. This report must contain information about the decisions taken the previous year by the European institutions that most affect Portugal and any measures the Government has put into practice as a result of those decisions.

On the other hand it should be noted that the Constitution lays down in Article 227(1) (v) that the autonomous regions of the Açores and Madeira shall take part in the defining of the Portuguese state's positions, in terms of the European Union, in regard to matters that are of specific interest to them. Their participation consists of the passing of resolutions by the regional parliaments and consultations between the Portuguese Government and the governments of the autonomous regions. The Constitution also provides in Article 227(1)(x) for the autonomous regions to take part in the building of the European Union through suitable representation in the respective regional institutions, especially the Regions Committee.

So from what we have seen the afore-mentioned constitutional provisions try to accommodate the consequences the European integration process has on the national system of government. Without doubt the most sensitive consequence is the diminishing of the national Parliament's role in setting the more important political and legislative options and the increased weight given to the Government in the conduct of the general politics of the nation.

The mechanisms introduced by the 1992 and 1997 constitutional reviews were

intended to reduce this effect by imposing specific obligations on the Government in regard to its duty to inform Parliament about developments in the integration process and by reinforcing the means by which Parliament exercises political control over the Government in relation to the defining of Portugal's position on European Union matters.

It should be stressed that neither the Constitution nor Act No. 20/94 grants Parliament the right to approve, in relation to matters under discussion by the European Council of Ministers – not even when those matters fall within the scope of Parliament's legislative powers – binding guidelines restricting the Portuguese Government's room for manoeuvre in negotiations with other Member States (within the Council) and with the other Union institutions (the Commission and the European Parliament). Therefore, the Government's freedom to negotiate – which is considered very important to the protection of Portugal's interests in the complex negotiations that are the Community decision-making process – is favoured over parliamentary powers. It is very clearly a symptom of the consequences the integration process has for the structure of the national system of government and for the underlying balance of power.

The fact that since Portugal joined the European Communities in 1986 it has only known a single-party parliamentary majority (the overall majority of the Social Democrats under Cavaco Silva until October 1995 and the near overall majority of the Socialists under António Guterres since then) explains, to a large extent, why the Portuguese Parliament has not gone further than the solutions laid down in Act No. 20/94.

The Relationship Between European Union Law, Community Law and the Portuguese Legal System

There is one final aspect to be considered in order to complete this brief examination of how the Portuguese Constitution views and positions itself in relation to European integration and that is the relationship between European Union law (namely, Community law) and the national legal system.

The problem of relationships between legal systems – from the outset, between international law and Portuguese law – is the subject of Article 8 of the Constitution. Under its current wording that Article lays down the following:

1. The rules and principles of general common international law are an integral part of Portuguese law.
2. The rules contained in international conventions correctly ratified or approved shall take effect in the domestic system once they have been officially published and while they are internationally binding on the Portuguese state.
3. The rules issued by the appropriate bodies of the international organizations to which Portugal belongs shall directly take effect in the domestic system, provided it is so laid down in the respective founding treaties.

The subject of these provisions is the question of incorporating the principles and rules of international law into the Portuguese legal system by providing technical solutions that allow the national legal system to open itself up to international law.[8] Article 8(3) (though modified in 1989) was introduced into the Constitution in 1982 with Portugal's entry into the European Communities specifically in mind. Thus Article 8(1) of the Constitution contains an automatic reception clause for general or common international law, which means that such law shall apply in Portugal without there being any intervention on the part of the national authorities. Article 8(2), relating to international conventional law, provides for complete reception of the respective rules, and the effect of such rules in Portugal is only dependent on their publication, as in the case of internal normative acts. Finally, Article 8(3) (which covers law deriving from treaties, i.e. secondary law) also lays down an automatic reception clause for rules that are adopted by the appropriate bodies of the international organizations to which Portugal is a member, to the extent that the immediate application of those rules at the national level is laid down in the respective founding treaty. In the light of these principles we will look at the application of European Union law, and in particular Community law, in the Portuguese legal system.

In the case of original law, that is the rules contained in the treaties setting up the European Communities and Union, they take effect in Portugal, under the terms of Article 8(2) of the Constitution once they have been approved and ratified by the appropriate constitutional bodies through publication in the official Portuguese journal, the *Diário da República*. This approach applies to all conventional acts. There is no reason to distinguish between the treaties setting up the European Communities and the Union from any other. And in this context no distinction is made between European Union law taken as a whole (including the rules relating to pillars II and III of the Union) and Community law proper (which relates solely to pillar I of the Union).

In regard to secondary law, as we have seen, Article 8(3) of the Constitution provides for the respective direct applicability. In other words it shall immediately apply in the Portuguese legal system, without the need for any act of reception or incorporation on the part of the national authorities (including publication in the national official journal), to the extent that direct application is laid down in the founding treaty. This means that binding legal acts adopted by European Union institutions, whose immediate applicability is provided for in the treaties, shall take effect in Portugal without being dependent on the adoption of any act or compliance with any other formality on the part of the national authorities.

Now we have to ask whether that principle after all only applies to Community regulations – whose direct applicability is expressly provided for in Articles 108A

[8] See Carlos Botelho Moniz and Paulo Moura Pinheiro, 'As relações da ordem jurídica portuguesa com a ordem jurídica comunitária – algumas reflexões' (1992) 4/5 *INA, Cadernode Ciência da Legislação*, 121.

and 189 of the EC Treaty – or whether it cannot be invoked in regard to directives and decisions.[9]

We do not think so and we believe Portuguese case law upholds our view as it accepts that the rules in non-transposed directives may be invoked before the national authorities, namely the courts.[10] Clearly, it would not be possible to accept the invocation of a rule before the Portuguese authorities, namely the courts, if that rule was not in force in Portugal. And rules of secondary law that have not been adopted by the Portuguese authorities nor published in the Portuguese official journal (as in the case of rules contained in Community directives) can only be in force in Portugal if they are covered by an automatic reception clause such as that in Article 8(3) of the Constitution.

We, therefore, hold that Article 8(3) of the Portuguese Constitution covers not only acts of secondary law that according to the treaties are directly applicable but also those that the ECJ, when interpreting the treaties, has held could contain rules which may have a direct effect (that is, rules which being clear, precise and unconditional can be invoked by individuals before the national courts in defence of their rights). Despite a certain lack of precision in the terminology, the aim of the aforementioned Article 8(3) is understandable and it arises from the need to include in the Portuguese legal system all acts of secondary law which may have a direct effect, otherwise the national authorities would be unable to apply them.

We would stress that in our analysis of Article 8(3) of the Constitution the issue is how acts of secondary law are incorporated into the Portuguese legal system. And we have seen that the system used by the Constitution is that of automatic reception, which ensures in a perfectly suitable manner that secondary law is effective within the Portuguese legal system. Another issue with which the Constitution does not concern itself – and strictly speaking need not concern itself – is the possible direct effect of rules contained in the European Union laws, and in particular the Community laws, that are in force in the Portuguese legal system.

In this matter, in our opinion, each authority charged with applying such rules, mainly the courts, shall judge whether the rule is suitable to being invoked directly by individuals. Clearly such a judgment must be based on criteria provided by the Community legal system itself (if necessary by resorting to the preliminary rulings' mechanism laid down in Article 177 of the EC Treaty).

Having examined how the Portuguese Constitution deals with the matter of incorporating European Union law, namely Community law, into the national legal system we must now turn to the question of supremacy. On this matter, in reality, the

[9] See, for a restrictive position as far as directives are concerned, Marcelo Rebelo de Sousa, 'A transposição das directivas comunitárias para a ordem jurídica nacional' (1992) 4/5 *INA, Cadernos de Ciência da Legislação*, 69.

[10] See, as far as Portugal is concerned, the decision of the Supreme Administrative Court, of 14 March 1995, 'Liga para a Protecção da Natureza', in *Acórdãos Doutrinais do Supremo Tribunal Administrativo*, 1996.

Constitution is not explicit but it contains some elements that allow us to examine the problem and draw some inferences.

The first conclusion we can draw in regard to this matter from an overall examination of the Constitution is that the Portuguese Constitution does not recognize the supra-constitutional force of Community law or European Union law in general. In fact, the Constitution expressly provides, in Article 278(1), for an *a priori* control system of the constitutionality of any rule contained in any international treaty awaiting ratification, and therefore it excludes in the first instance the possibility of recognizing the supraconstitutional force of European Union law, which, as we know, is based on the treaties setting up the Communities and the Union. On top of this, the system of *a posteriori* control of constitutionality laid down in Article 281 of the Constitution also covers treaty rules which only reinforces the conclusion we reached above.

Thus in this area there is a clear clash between the principles that the Portuguese Constitution lays down and the guidelines to be found in the case law of the ECJ, which, as we know, take the doctrine of supremacy to its extreme. The Portuguese Constitutional Court has not yet been called upon to make any pronouncement on this question, nor has any serious conflict between the rules or acts of Community law and the principles or rules of the Portuguese Constitution arisen. That is why the problem is lying dormant, as it is in most other Member States.

The progressive approximation of the political and legal cultures of the European Union Member States, shown in constitutional values based on a very similar framework – and naturally reflected in the provisions of the treaties themselves – tends to reduce the possibility of conflict, although it does not provide a definitive solution to a problem that may arise at this level.

If this is the situation in regard to the problem of the relationship between constitutional law and European Union law then in the relationship between the latter and national legislation the pre-eminence of Union law, and in particular Community law, seems to be guaranteed under the Portuguese legal system.

In fact, although the wording of Article 8 of the Constitution is not entirely clear in this respect, it seems to us that the automatic reception systems (Article 8(1) and (3)) and the full reception system (Article 8(2)) are only compatible with one solution, namely that international law and also European Union law shall prevail over Portuguese ordinary law. This is indeed the view of national case law.

Concluding Remarks

The Portuguese Constitution perceives the European integration process as a political and legal process based on the sovereign will of the Member States, submitted to conditions and principles laid down in the Constitution.

The Constitution allows in Article 7(6) for Portugal to participate in this process and the solutions adopted in Article 8 of the Constitution, as to the incorporation of

European Union law (both original and secondary) in the national legal system, are compatible with the doctrines of direct effect and supremacy developed by the ECJ (save, as far as supremacy is concerned, to the question of the relations between constitutional law and European Union law).

The way in which the European integration process has evolved (and the participation of Portugal in it) shows, however, that the formal pre-eminence of the Constitution over European Union law is accompanied, substantively, by a significant influence of European Union law over the Constitution. This is particularly so in Article 7(6) of the Constitution with reference to the principles of subsidiarity and economic and social cohesion. It is also the case for the new provisions of Article 15(5) (participation of the nationals of other Member States in the election, in Portugal, of members of the European Parliament) and Article 102 (the role of the national central bank).

Article 15(5) and Article 102 were amended in 1992, before the ratification of the Treaty on European Union. With these amendments – prior to the ratification of the Treaty – the formal pre-eminence of the Constitution was safeguarded. It should be noted, however, that this pre-eminence was guaranteed by means of a modification of the Constitution in order to reconcile its rules with those of the treaty pending ratification.