



40/30 (years) of Constitution and Integration: The national and European representation crisis

Wladimir Brito*

ABSTRACT: This article critically approaches some issues of legal and political nature, necessarily controversial, raised by the Portuguese accession to the EU and the own political action of the Union, with the purpose to draw attention to the aspects that seem to be the most relevant in the 40/30 years milestone of the Constitution and the European integration. Amongst these issues I point out the followings: 1) perception and way of receiving the European integration by the Constitution of the Portuguese Republic, 2) degradation of the democratic principle and of the political representation due to the intervention of the EU in the member states politics or the effect of emptying the internal politics caused by the action of the EU, 3) globalisation, neoliberalism and the crisis of the democratic power: producing the effect of moving the locus of the democratic power and the erosion in the relations of the EU with the member states, 4) the EU as a space of action of the market against people. I intend, then, to provoke the debate on these relevant problems of the EU integration.

KEYWORDS: European integration – democracy – globalisation – neoliberalism – market and people.

* Full Professor at the School of Law of University of Minho, Director of the Lusophone Observatory of Human Rights (Observatório Lusófono de Direitos Humanos) and Director of the *Scientia Iuridica* journal.

Introduction

This intervention is based on 10 autonomous and yet interconnected topics that aim at drawing attention to the aspects we consider the most relevant in the 40/30 year milestone of the Constitution and the European integration, which is the theme of these conferences. I intend solely to provoke the discussion of each of the topics separately or in articulation with some or all of them in order to create a critical perception of this 40/30 pair – more than necessary nowadays.

1. When one talks about the 40/30 years of the Constitution and the accession of Portugal to the former EEC, the first question that pops up regards knowing how the Constitution lawfully perceived the international entity it joined. Has it accepted this public international entity as an International Organisation or as an entity of distinct nature from the one the doctrine and the conventions ascribe to the International Organisations? Has it accepted the legal order of the entity as atypical or as a typical legal order of any International Organisation of integration?

I gave an answer to these questions in 2015 in an article published in the *Anuário do Direito Internacional* 2013, but here I simply say that it is enough to see that before the accession and in order to constitutionally adequate the reception of the norms produced in the former EEC, a number 3 to Article 8 of the Constitution was added. This addition reveals that until the revision of 2004, the Constitution attributed to the former ECC – even after the Single Act (1986) and the Treaty of Maastricht (1992) which created the EU – the nature of international organisation of integration.

As of 2004, the Constitution autonomises the mechanism of reception of the norms of the Treaties that govern the EU and the ones that arise from its institutions in the performance of their competences so that it allows them to be applicable in the Portuguese internal order. Curiously, however, it presents a precaution concerning the respect for the fundamental principles of the rule of law. Thus, the Portuguese lawmakers showed they admitted the possibility that such institutions could produce norms that would infringe the rule of law, either against the democratic state or the rule of law itself (or both). In other words, the admitted possibility was that either of violating fundamental juridical principles or of transgressing fundamental democratic principles. If it were not for this provision and apprehension, the need to enshrine that fundamental reserve would not make sense.

Nonetheless, the rule of Article 8(4) of the Constitution does not change its perspective of the European Union, that is it treats the Union as an international entity with which Treaties are celebrated. And based on these Treaties, its institutions can issue rules whose reception in the internal order dismisses any internal procedure, sufficing for publication to occur in the Official Journal of the EU. It should be noted that, in accordance with the constitutional text, such EU rules are external, come from a different legal order than the internal and, therefore, are received, though in a special way.

For that reason, as Nuno Piçarra and Maria Luísa Duarte argue, in the relation between the two legal orders what takes place is the attribution to the EU by the Member States of certain competences. This relation is built upon the principles of conferral of competences and collaboration or functional complementarity of these distinct legal systems. However, in the context of that relation, Jorge Miranda and Rui de Medeiros understand that the Constitution does not confer superiority to the

norms issued by the EU institutions, as both authors see instead a special mechanism of reception.

Nevertheless, this question may still be seen in another perspective, which is the hierarchical position in the internal legal system of the rules of the International Treaties that govern the EU and of which Portugal is a party. That substantiates the relation between two different legal orders – the international and the national - and a set of internal relations between the legal systems of the Member States of the EU and the one of this Organisation, topped by the Treaties.

In the first case, the norms of those Treaties naturally upstage the norms of the domestic law of infra-constitutional degree; whilst the internal norms of this organisation regulate the EU's internal relations, of its organs and institutions, and the relation of these organs and institutions with the Member States. Those internal norms only reveal that the relations are necessarily of International Law, as the secondary law that they are and should not be confused with the ones of external relations (constituting and functionally regulating) of the EU with its Member States.

In the context of the internal relations, the rules issued by the EU institutions will apply in the internal order of each Member State in the terms settled in the constitutive Pact and they can be placed in any hierarchical position the State desires.

In conclusion, we may say that the Constitution saw and still sees the EU as an International Organisation of full integration and it allows the attribution, by sharing, of internal competences in a degree that cannot in any circumstances make the sovereignty of the Member States cease.

2. But if the question of the legal nature is the first that the 40/30 pair arises, there is another one which is knowing up to what extent the EU has undermined the rule of law and the democratic state. In more precise words, up to what extent the EU in the frame of its functioning and of its internal relations with the Member States has been undermining the democratic principle, and with it the political representation.

Before, however, we should note that after the entry into force of the Constitution (1976) until the accession to the EEC (1985) a central block constituted itself in Portuguese politics. It is composed by the Partido Socialista or Socialist Party (PS) and the Partido Social Democrata or Social Democratic Party (PSD), with the participation of the Centro Democrático Social or Social Democratic Centre (CDS) sometimes under the dominance of the PS, sometimes under the dominance of the PSD. This block was responsible, based on a “*consensus of capture*” of the state by the parties, for preparing and legally formalising the accession to the EEC. It also created the political-economic and social conditions for the participation of the country in the “*permissive consensus*” – to use the expression of José Pedro Teixeira¹ – that already existed in the Community and based on which the European Union was being built.

Two consensuses that, in the context of Portugal/EEC-EU relations and in the framework of the 40/30 pair during approximately 20 years (1985-2005), have contributed to the formation of what Habermas, after the Treaty of Lisbon, has called “*executive federalism*”, dominated by an active, cohesive body of techno-bureaucrats. With it, the two consensuses have also contributed to the incompatibility

¹ José Pedro Teixeira Fernandes, *O Futuro da Construção Europeia na Era da Globalização, in 40/30: from the constitutional project to the integration project - hopes, scepticism and reality in a political-constitutional debate*, (Lisboa: Nova Vega, 2015), 157.

of the democracy with the political system of the EU and to the deepening of the democratic deficit. Although in synthesis, let us see how it happened.

3. We know that in the 1970s neoliberalism gained force, especially in the American continent, becoming, from an economic viewpoint, one of the main boosters of globalisation. In the 1980s, after the fall of actually existing socialism in the Eastern European countries, neoliberalism found favourable conditions for expanding globally, generating interconnection and interdependence amid the different societies and strengthening the commercial, economic, political, social and cultural relations amongst states, enterprises and peoples. This expansion benefits the huge technical-scientific advancement of the 80s, namely in the domain of telecommunications and transports.

It turns out that some authors understand that this globalising phenomenon had the effect of promoting the expansion of democracy worldwide, whilst others argue that globalisation, though it promoted such expansion through consecutive series of democratic waves, has in fact taken the form of “*illiberal democracy*” in the countries that adopted this political system, to use the expression of Fareed Zacarias.² This has provoked, in particular as of the our current century, a “*democratic reversal*” in the words of Huntington.³ Examples are Putin’s Russia, the Angola of José Eduardo dos Santos, and several other African countries where elections take place but overall control of the electoral system is held by dominant groups which control political power.

We will not further develop this point here as it sufficiently explains that in the exact moment when the expansion of democracy happens – allowing the people to elect their leaders – Emmanouil Tsatsanis tells us that “*there is an inexorable process of transference of power away from the nation-state, the locus of the democratic power, to governance places, which is not accompanied by the extension of the institutions and the practise of democratic governance*”.⁴ Such new *loci*, the international governmental organisations, multinational companies of the finance sector that neither take part in electoral process nor can be democratically accountable, acquire enormous power. And in the field of their dominant practises, which is the market, they develop blackmailing actions over states, forcing them to accept the deregulation of either the capital or labour market, as well as the establishment of low taxes for the capitals market and fiscal competition among the states, all as necessary conditions for attracting investment. The protection of the markets and the interest of the large multinational corporations against state intervention in the economic and financial sectors are claimed; the state protects the interest of the entrepreneurial elite and gives it influence in every public policy.

Votes cease to make a difference exactly because globalisation shrinks the national political space, limiting, at distance, the national public policies. It is the system of the Market versus Voters, to use a phrase of Wolfgang Streeck’s coinage,⁵ which was imposed especially during the Clintonian deregulation of the finance

² See Fareed Zacarias, *The Rise of Illiberal Democracy*, in *Foreign Affairs* 76 (6), 22 - 43.

³ Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, (Oklahoma: University of Oklahoma Press, 1991), 3. Huntington says that such third wave began in Portugal in the dawn of 25 April after midnight when the radio broadcasted “*Grândola Vila Morena*”.

⁴ Emmanouil Tsatsanis, *O Futuro da Governação democrática na era da globalização: o triunfo ideológico de uma forma de governo ultrapassada*, in *O Futuro da Representação Política Democrática*, André Freire (org.) (Lisboa: Vega, 2015) 181.

⁵ *Market versus Voters*, in *New Left Review*, n. 71 Set./Oct. (2011), 5.

market in the mid-1990s. All of the above creates the conditions for the advent of public austerity and the transformation of private debt into public debt.

The European integration is the materialisation of this transference and the protection of the market against the people.

4. It is during the 1980s/1990s that such processes of globalisation intensified such that the EU leaders adopted the Alan Greenspan monetary and financial policies, which ignite the 40/30 pair. During this period – 1986 – the Communities began to evolve after the Single Act to what would become the Union later on. This phase creates the European internal market and eliminates the technical and physical borders that hindered the free movement of citizens and goods (mostly for effects of movement of goods and capital). After Maastricht (1992), the Member States policies are Europeanised, marking the beginning of a process of de-politicisation needed for the rise of the non-elected, for the affirmation of their techno-bureaucratic governance and for propagating the belief that this European status is the real expression of democratic normality. The space of political action of the states was reduced to the minimum acceptable. As Tsatsanis states, “*the policies and the legislation that compose the *acquis communautaire* move from the political sphere to the de-politicised sphere of European specialists and bureaucrats*”.⁶

This movement in the 40/30 has found echoes in Portugal where the parties of the “*consensus of capture of the state*” – known as the “big centre” or, later, as “governance arc” – de-politicised the European affairs, treating them always as complex technical-legal, technical-economic and technical-financial issues that would have to be fulfilled internally and in compliance with the directives and guidance of the European politburo, without internal public or political discussion. Ultimately, everything was already conceived and resolved by the techno-bureaucracy based on the principle that one size fits all and, as Peter Mair says, “*the first and more obvious effect of the European Union is to limit the political space available to the parties*” mostly in the decisive political areas, that the EU deliberately harmonises. I shall add the more obvious effect: the interior integration of this depoliticisation of political decisions and public policies formulated by the bureaucratic nomenclature that occupies and dominates the EU’s politburo.

With those two primordial effects and with the transfer of decision-making for public policies, a transfer from the states to the politburo or to the EU’s formal organs (ECB, and multiple regulating agencies, for example) or informal organs (Ecofin) occurred, and the Governments’ political space became necessarily limited and circumscribed to the regulation of internal matters of secondary importance, that is, those which did not collide with the economic, financial and other policies defined by that nomenclature.

However, those institutions lack political accountability, which is a cause of the democratic deficit.

5. Furthermore, in the EU the value of the elections in the Member States became gradually less significant by force of the above-mentioned depoliticisation in fundamental affairs of political choice. The political programmes of the parties of the “*consensus of capture/permissive consensus*” tended to converge, decreasing the level of political competition and ideological debate to the minimum standard,

⁶ Emmanouil Tsatsanis, *O Futuro da Governação democrática na era da globalização...*, 186.

conforming to the financial and market policies as harmonised and coordinated by the European politburo. The appearance is such that all those questions seem to be of techno-bureaucratic nature and may only be settled by experts and technicians of the EU. That is the reason for the growing call for partisan consensus – that is, within the parties of the permissive consensus – over those issues. This makes the citizenry's choice between these parties – of the “*big centre*” or governance arc – to be irrelevant, so that these parties become akin to mere football clubs, idealised by voters. The parties became “*catch all*” parties, as Otto Kirchheimer has described,⁷ and have stopped ideologically-politically serving an electorate that ideologically identifies with them. Instead, they started accepting everything they “*catch*” at this level, exactly because they have become political employment agencies run by professional politicians.

6. Political decision-makers of the “*big centre*”, if not the national Parliament itself in place on this 40/30 anniversary, has become a depoliticised centre of consensus-building and not ideological confrontation as far as European politics. As Dani Rodrik well said, quoted by Teixeira Fernandes, with his “*theorem of impossibility*”, according to which democracy, sovereignty and global economic integration are mutually incompatible. Rodrik applies this theorem to the relations between the national politicians and the techno-bureaucrats of Brussels, highlighting discussion about the capability of the politicians to conduct public policies that depart from the will and the principle of the markets,⁸ to which we add the will and the public policies of the EU's nomenclature.

7. In addition there is what Peter Mair calls the “*socialisation effect*” which refers to the intervention of the EU institutions, especially the Commission, in the most diverse aspects of the daily life of the citizen of the Member States. This intervening presence creates the idea of the existence of a normality standard and fatalist acceptability of EU governance by the non-elected, which cannot be changed. Preferably, its lack of democratic legitimacy should not be discussed or put into question.

In the 40/30 years, although there has been an enhancement of the presence and the action of the European Parliament, through the direct election of its members, the point is that this institution has not managed so far to get the credibility that, in principle, should result or be the natural corollary of its direct election by the citizens. They do not believe in its efficiency, see it as an organ without actual power and, thus, show disinterest towards it, substantiated in the extremely low turnout in the EP elections. The political disinterest provoked by the aforementioned de-politicisation legitimates the techno-bureaucratic governance, that is, the power of the non-elected, the EU's nomenclature. All that is possible due to the existing representation crisis, particularly in partisan representation. Parties, Peter Mair tells us in the beginning of his book *Gobernando el vacío*, “*ainda que (..) permanecen, se han desconectado hasta tal punto de la sociedade en general y están empeñados en una classe de competición que es tan carente de*

⁷ Otto Kirchheimer, The Transformation of the Western European Party Systems, in *Political Parties and Political Development*, Joseph La Palombra e Myron Weyner (orgs) (Princeton: Princeton University Press, 1966), 184.

⁸ Dani Rodrik, *apud* Teixeira Fernandes, O Futuro da Construção Europeia, in *O Futuro da Representação Política Democrática*, André Freire (org.) (Lisboa: Vega, 2015), 164.

significado que ya non parecen capaces de ser el soporte de la democracia en su forma presente”.⁹ As these parties have the seats in Parliament and “represent” the citizens of each Member State, the crisis of such parties is also the crisis of the European Parliament, which produces inside the EU what Guy Hermet designates as “winter of democracy”.¹⁰

8. In the 40/30 years, the Portuguese and European citizens are confronted with what George Orwell calls Newspeak, as very properly Guy Hermet alerts in his *L'Hivier de la Democracie ou le Nouveau Régime*, as the form of communication of the main EU organs. The Commission is the leading producer and disseminator of this newspeaking when it uses a lexicon especially created to hide its neoliberal policies and not only. Hence we see the expressions ‘governance’ instead of ‘government’, ‘requalification’ instead of ‘dismissal’, ‘user’ rather than ‘patient’, and ‘social adjustments’ to cover the dismantling of the welfare state. Such lexicon over the last decades of the 40/30 is reproduced in Portugal by the parties and the social forces of the “permissive consensus” particularly in the economy, the work relations or social security and health.

9. It is important now to address the question of knowing if we are before a crisis of democracy or a crisis of representation. It is an old question in Europe, since Carl Schmitt, in the 1930/1940s in his *Begriff des Politischen* and in *Nomos der Erde in Volkerrecht des Jus Publicum* too, claimed the end of the state-ship and the crisis of democracy resulting from the globalisation of the economic activity.¹¹ This thesis was criticised by Herman Heller in his *Staatslehre* in which he defends that the crisis is not in democracy but in parliamentarianism and representation. In fact, lest we forget, the most significant effects of globalisation and transfer of power to the undemocratically built apparatus were produced in a more intense way in the political parties, at the same time that as they corroded and corrode the state’s status as guardian of political unity – partially through the parties themselves. The parties over the twentieth century were the principal instruments that allowed the state, under the constitutional frame, to exercise the function of guardian. However, as of the second half of that century the belief in parties begins to break down, provoking the progressive emptying of their role, the change of their functions and with it the crisis of the state, generator of the speech of the discourse of fiscal state crisis.¹²

This crisis hit an inflection point in 2007/2008, reinforcing the role of the European apparatus that were neither democratically elected nor subject to democratic control, such as the ECB and the countless European agencies that limit the political action of the parties. That makes political competition progressively depoliticised,¹³ as Teixeira Fernandes states.

Political parties do not have different answers than the ones of those agencies. They have become unable to motivate their citizens to take part in political life, and their action has discredited their political effectiveness, resulting in a transference of

⁹ Peter Mair, *Gobernando el Vacío. La Banalización de la Democracia Occidental* (Madrid:Alianza Editorial, 2016), 21.

¹⁰ Guy Hermet, *L'Hivier de la Democracie ou le Nouveau Régime* (Paris: Armand Collin, 2007).

¹¹ Likewise Gilberto Buscovici, *As Possibilidades de uma Teoria do Estado*, in *Estado*, Revista da História das Ideias, Vol 26 (2005), 18.

¹² See James O'Connor, *The Fiscal Crisis of the State*, (London: Transactions Publisher, 1973).

¹³ Teixeira Fernandes, *O Futuro da Construção Europeia*, in *O Futuro da Representação Política Democrática...*, 166.

trust to the Courts.

In the 40/30, through this transfer process, the Courts have taken on the role of guardian of the Constitution and the political unity it represents. Their prominence has increased, it being up to the judges the task of defining the means and the ways of the so-called deepening of the EU, through their rulings at the EU level. At the national level, the judges' task is to concretise the Constitution and impose their interpretation of the EU Treaties and secondary legislation, participating in the national setting of the public policies under the criteria defined by the EU, usually through the application of the regulations and the techno-bureaucratic directives.

This crisis has fomented indifference in citizens, as far as politics and sometimes even democracy (when it is confused with the action of the parties), leading to indifference towards electoral acts in which they do not take part. In the 40/30 anniversary such indifference has increased significantly both internally and EU-wise, as indicated by abstention in the European Parliament and national elections.

As the European integration empties politics, it empties democracy (to use an expression of Cohn-Bendit). But this MEP's proposal to unravel the issue through classic solutions of representation will not work, as demonstrated by the application of this medicine through the introduction of direct election of the MEPs. The distrust relating to politicians and parties generates indifference that causes growing abstention (a concrete manifestation of this indifference) but also the rise of the non-elected and the techno-bureaucratic management of the markets' interests.

In conclusion, we may say that the European Union is not conventionally democratic and can never be for the simple reason that the techno-bureaucracy does not have an interest in the democratic legitimacy of its power. The bureaucracy believes in the superiority of its technical-scientific knowledge and the solutions it offers to solve the problems of the Member States. It is also indifferent to representation and to the democratic control of its actions.

These 40/30 years of a dangerous emptying of democracy, of a deepening of the representation crisis in the Member States, and of governance by the non-elected has led to all the hazards that follow from such conditions.

It is time to act.