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The Referendum in the Portuguese Constitutional Experience

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Chapter 3

The National Referendum

1. The Attempts to Introduce the National Referendum: 1975-1989

1.1. The Drafts of the Constitution

1.1.1. The Doctrinaire Drafts

The doctrinaire drafts of the Constitution introduced to the Constituent Assembly contained allusions to the national referendum. The draft of the Constitution drawn by Jorge Miranda (1975) included several possible models for national referendums. These include: **a)** any law or executive law (except on financial matters) within 90 days after its approval or ratification by the Parliament if proposed by twenty percent of voters in the previous election or referendum; **b)** the general principles and purposes of the Plan; **c)** any law (except tax-related issues) proposed by two-thirds of the deputies in full exercise of their office. In case of rejection, the President of the Republic could dissolve Parliament within 15 days after the counting of votes; **d)** international treaties that involved restrictions on sovereignty.

The author did not formally introduce this draft to the Constituent Assembly and his party, the *PPD*, did not adopt it. It was, however, an example of a proposal of wide and ambitious scope for referendary processes. The referendum could happen on many themes, such as international treaties, the general purposes of the Plan, and laws in general; with the matter of taxes being the only exclusion (Urbano, 1998, pp. 115-118). Nonetheless, the popular initiative proposed was hardly practicable, given the high number of signatures required. The first free elections in Portugal, in 1975, had 5,666,696 voters. Consequently, 1,133,340 signatures would be needed to call a referendum.

An essay written by Lucas Pires formed the basis of a future Constitutional draft for the *CDS*, and it included several possibilities for national referendum. Regarding the State's foreign affairs, the author supported the need for an approval of any decision through a national plebiscite. This would include matters related to the international integration process or any privileged agreement with great powers, especially in the military domain. The integration would modify the contract of sovereignty that bounds the representatives, raising a new Constitutional dependence that needed the people's agreement (Pires, 1975, p. 106; Urbano, 1998, p. 118).

Lucas Pires (1975, p. 109) also supported the possibility of referendums on treaties or legislative acts according to the criterion of the President of the Republic. However, the Constitutional extent of this rule could be restricted to a certain number of matters in order to avoid the opportunism of its use as a super-survey, or the attraction of a plebiscitary democracy.

Finally, regarding the national referendum, the author proposed – although in undefined terms – to give the President of the Republic the power to call a referendum to evaluate the trust of the voters towards himself. That power could represent, according to Maria Benedita Pires Urbano (1998, p.119), a way to exercise a scrutiny upon the Head of State, but it contained evident caesarism stains, and had obvious potential for the plebiscitary approach to be abused (Pires, 1975, p. 143).

1.1.2. The Drafts Introduced to the Constituent Assembly

According to the *CDS* draft of the Constitution (*DAC*, 13 – Supplement, 7 July 1975, p. 14), Parliament could decide to submit any previously approved law to a popular referendum of a national scope, except tax-related matters, provided it had a two-thirds majority (Urbano, 1998, pp. 113-114). The draft of the Constitution introduced by the *UDP* proposed to re-examine all the treaties and cultural agreements in the domain of the economy, culture and cooperation made by the fascist regime. It would submit them to a wide debate and popular examination, leaving it to the people to decide on their repeal, revision or confirmation (*DAC*, 13 – Supplement, 7 July 1975, p. 28). The draft did not explain, however, how to proceed with that re-examination.

Despite these suggestions, the Constitution of 1976 did not include any type of referendum.

1.2. The Attempts to Introduce the National Referendum by Law

The debate on the national referendum was revived after the elections of 2 December 1979, when the *AD* (*PSD/CDS* coalition) obtained an absolute majority. The programme of the VI Constitutional Government, led by Sá Carneiro, included the approval of a referendum law. However, that proposal sought, first and foremost, to open the way to the Constitutional revision by referendum. It is true that, in debates about the Government's programme, Luís Beiroco (*CDS*) tried to separate the two issues, stating that the only thing under discussion was the introduction of a privileged instrument of direct consultation of the

popular will, which would enable the government to know the citizens' opinion on fundamental subjects related to the community's life or the organisation of the State (*DAR* [I] 5, 16 January 1980, p. 148). Nevertheless, nobody approached the subject in those terms, because everybody knew that Sá Carneiro's main purpose was a referendum on the Constitution.

It was, however, through the Parliamentary Group of the 'Reformers' that the first bill proposing a national referendum (Bill No. 501/I) appeared. However, the Bill was contested because it did not comply with the Constitution, and it was not discussed as a result. On 20 June 1980, near the end of the I Legislature, the Government introduced Bill No. 365/I (*DAR* [II] 74, 21 June 1980), which requested authorisation to legislate in order to define the regime of the referendum. The left opposition impugned the Constitutionality of that Bill, and it was never discussed. The Bill did not include any mention of the regulation wanted by the Government.

1.3. The National Referendum in the Constitutional Revision of 1982

1.3.1. The Drafts

In the book published in early 1980, *Uma Constituição para os Anos 80* (A Constitution for the 1980s), Sá Carneiro advanced the guidelines for the Constitutional revision in the II Legislature. That draft gave the President of the Republic the responsibility to submit laws of Constitutional revision, laws of the Assembly of the Republic, executive-laws of the Government, and the important issues concerning national interest to popular referendum.

According to that draft, the laws of the Assembly of the Republic could also be submitted to referendum, by a two thirds deliberation of the deputies in full exercise of their office. This may be done before sending for enactment, or by request of the citizens in a number not less than 1/20 of the total number of voters, within 90 days after its publication in the official journal. The Government's executive-laws, except the ones on tax-related matters, may be submitted to referendum through the citizens' request, in the same terms of the laws of the Assembly of the Republic.

On 19 July 1980, Pedro Santana Lopes introduced a draft amendment to Sá Carneiro's draft (Lopes & Barroso, 1980, pp. 173-224) that proposed three relevant modifications. In the political referendum, the

President of the Republic would remain responsible for calling it, but the Government could propose submitting important issues concerning the national interest to referendum. The author thought that, since the Government was responsible for leading the internal and foreign politics of the country, it could be convenient to establish the popular will before taking any measures of exceptional importance (Lopes & Barroso, 1980, p. 188).

For the legislative referendum by parliamentary initiative, it would not be necessary to have a deliberation taken by a two-thirds majority of the members since the absolute majority would be enough. Santana Lopes (1980, p. 198) did not see any reason to prevent the parliamentary majority from asking for popular support of their measures when it would have enough power to approve them in Parliament. Moreover, he reduced the time limit needed for the decision about the legislative referendum from 90 days to 30. He thought that this period would be enough to evaluate the implications of any law, and that it would also save time. There was also the mere convenience that it would be possible to relight the debate on previously discussed subjects (Lopes & Barroso, 1980, pp. 221-222).

The draft amendments to the Constitution personally published by Jorge Miranda (1980) excluded the national referendum and only included the possibility of local referendums. The change of position assumed by the author, in relation to his draft of the Constitution published in 1975 that contained referendum proposals at several levels, is easily explicable by the political evolution of the second half of the 1970s. The national referendum had been used as a weapon by right-wing forces, and particularly by the *PPD/PSD* against the 1976 Constitution, who sought to use it to press for a Constitutional rupture. That subject brought about a deep divergence between Jorge Miranda and the *PPD/PSD*, which led this professor and constituent deputy to leave that party and found the *ASDI*. In the appendix to his draft amendments to the Constitution, Jorge Miranda (1980, p. 210) explained his sympathy towards the referendum as a democratic method. However, he thought that the referendum had to be surrounded by very strong warranties, and that it could only be used safely in countries where democracy was consolidated, which was not the case in Portugal at the time.

The work published in February 1981 by Professors Barbosa de Melo, Cardoso da Costa and Vieira de Andrade (Melo *et al*, 1981), which formed the base of the draft amendments by the *AD*, proposed two other

types of national referendum that needed the decision of the President of the Republic: the political referendum and the legislative referendum.

Regarding the political referendum, the President of the Republic could submit the decision on important issues concerning the national interest and transcendent political importance to popular referendum, when such an action was requested of him by the Government or by the Assembly of the Republic, through deliberation passed by the majority of members in full exercise of their office. According to the authors, the political referendum should be exceptional, and it should only take place in very special circumstances, as long as those circumstances were appraised by the President of the Republic and by the Assembly of the Republic or by the Government, as authors of the proposals. The authors were sought to avoid leaving the decision in the hands of a single sovereignty organ (Melo *et al*, pp. 185-186).

As for the legislative referendum, any law approved by the Assembly of the Republic, except on budgetary or tax-related matters, would be submitted to popular referendum. It could be totally or partially repealed if requested by at least 100,000 citizen voters within six months after publication.

According to the authors, the legislative referendum was a '*pouvoir empêcher*' given to the citizens before the Assembly of the Republic. It was not an instrument of positive popular participation, but a way for citizens to act against parliamentary decisions that they disliked. The referendum would always have a sense of repeal, even if only partially.

However, by not converting the referendum into an instrument of common use, the authors provided several conditions: **a)** a high number of proponents; **b)** the exclusion of budgetary and tax-related matters; **c)** the setting of a deadline to request the referendum (Melo *et al*, 1981, p. 212). The holding of this referendum depended exclusively on the popular decision, and became obligatorily provided the proponents observed the Constitutional and legal conditions (Melo *et al*, 1981, p. 186).

In relation to the legislative referendum, the authors did not follow Sá Carneiro's draft in two specific points. They did not propose that the Assembly of the Republic could raise a legislative referendum before the sending of laws for enactment. If the parliamentary majority wanted to submit one of its own subjects to referendum, it should make the respective proposal to the President of the Republic. For that same

reason, the authors did not propose that the Government could submit its executive-laws to referendum, given that there would always be the possibility of the Assembly of the Republic pronouncing itself on them before any direct intervention of the citizens (Melo *et al*, 1981, pp. 212-213). This draft still maintained that a referendum would be required before administrative regions could be created.

By the end of January 1981, Diogo Freitas da Amaral introduced draft amendments to the Constitution from the *AD* parties (*PSD*, *CDS* and *PPM*), which he had written for the incumbency of the *AD* summit in December 1980. In that draft, the President of the Republic would have the responsibility of submitting decisions about any important issues of national interest to popular referendum, in the terms requested of him by the Government or by the Assembly of the Republic, through deliberation passed by the majority of members in full exercise of their office (Amaral, 1984, pp. 21 and 123).

The Draft Amendments to the Constitution No. 2/II (*DAR*, Off-print 6/II, 26 June 1981, pp. 31-58) finally introduced by the *AD*, followed Freitas do Amaral's proposal, including the national referendum, in addition to the already mentioned Constitutional referendum and the local consultations. It would be a political referendum, which did not happen on routine legislation but on important issues concerning national interest, giving it an exceptional nature. The power of decision belonged exclusively to the President of the Republic, but the power of initiative belonged to the Government and to Parliament, by decision taken by the majority of the members in full exercise of their functions (Urbano, 1998, pp. 130-131). The Draft Amendments to the Constitution from the *AD* also provided that the actual institution of every administrative region would depend on a referendum in each respective area, a matter that will be discussed further ahead.

1.3.2. The Debates

The first discussion on the proposals of the *AD* draft occurred in a subcommittee created within the *CERC*. On 16 October 1981, the proposal for national referendum had the total opposition of the *PS*, the *PCP*, the *ASDI* and the *MDP/CDE* (*DAR*, 6 – Supplement, 28 October 1981, p. 78). The debate on the referendum in the first Constitutional revision was centred on the Constitutional referendum, which made any idea of introducing the national referendum unfeasible from the very beginning. However, the *AD* kept its proposal and tried, during the debates, to separate those two types of referendum.

During the meeting of the *CERC*, on 4 November 1981, Luís Beiroco (*CDS*) pleaded for the *AD*'s proposal, pointing out the safeguards that that proposal assumed. All sovereignty organs would need to agree before a referendum could be called, and ultimately leaving that power to the President of the Republic (*DAR*, 33 – Supplement, 23 December 1981, pp. 25-26). However, in that same committee meeting, several members of the *PS* and the *ASDI* harshly criticised the possibility of a national referendum (*DAR*, 33 – Supplement, 23 December 1981, pp. 26-32).

The socialist José Luís Nunes assumed a radical position against the referendum and considered it a permanent coup d'état (*DAR*, 33 – Supplement, 23 December 1981, p. 27), with the following arguments: **a**) to give the President of the Republic powers to call referendums would mean to give him institutional leadership over the Assembly of the Republic and the Government; **b**) the proposal placed the Assembly of the Republic and the Government at the same level regarding the referendum initiative, which meant that in case of disagreement, any one of those bodies could appeal to the President of the Republic and propose that he call a referendum; **c**) once the President of the Republic was granted the possibility to call a referendum, nothing could prevent him from calling a referendum despite the established rules; **d**) the definition of what could be considered an important issue concerning national interest and could later be submitted to referendum would be decided by the pressures on the street.

Nunes concluded that the consequence of the introduction of the national referendum, as proposed by the *AD*, would be the refusal of the Constitutional rule that says that sovereignty shall lie with the people, who shall exercise it in the forms provided for in the Constitution. The referendum would bring total and complete legislative instability, in short, institutional chaos (*DAR*, 33 – Supplement, 23 December 1981, pp. 26-27).

In the plenary sitting of 8 July 1982, the *AD* only kept a proposal regarding the responsibilities of the President of the Republic (Article 136), which included the responsibility to call referendums. That proposal was rejected, obtaining only 98 yea votes (*PSD*, *CDS* and *PPM*) and 78

may votes (*PS, PCP, ASDI, UEDS, MDP/CDE* and *UDP*). Therefore, it did not obtain the qualified two-thirds majority for its approval.¹²⁶

1.3.3. The Conclusion

The national referendum was not introduced to the Constitution by the Constitutional revision of 1982. The problem was not so much the regime's proposal for a legislative referendum, or for the referendum on important matters concerning national interest, but fundamentally the threat of the *AD*'s proposal for Constitutional referendum. In the context of the *AD*'s absolute majority in Parliament, all the parties on the left were afraid of the abusive use of the national referendum to change the Constitution. Indeed, the Constitutional revision through a referendum was very much associated with the *AD* parties, and it was a source of controversy in Portuguese politics between the end of the 1970s and the beginning of the 1980s, causing major polarisation between left and right wing parties.¹²⁷

The way the debate was framed condemned the national referendum to a postponement that would only end the 1989 Constitutional revision. With the exception of the radical opposition from the socialist MP José Luís Nunes, almost all the speeches against the national referendum in 1982 did not refuse the referendum as an instrument of direct democracy, or as a complement of a representative democracy. However, the idea that the referendum could be used to achieve antidemocratic and unConstitutional end, a double-edged sword, condemned it. Some of the arguments against the referendum in 1982, such as the institutional leadership of the President of the Republic, legislative instability, or the difficulty of defining what was an important issue concerning national interest, had faded in significance by 1989 because the political context had changed. The problem in 1982 was that the national referendum was still inextricably linked with the constitutional referendum. It would be necessary to wait for the second Constitutional revision in 1989 so that everything could change.

2. The National Referendum in the Constitutional Revision of 1989

¹²⁶ See the declarations of vote from Luís Nunes de Almeida (*PS*), António Vitorino (*UEDS*), Luís Beiroco (*CDS*), Jorge Miranda (*ASDI*), Vital Moreira (*PCP*), Luís Coimbra (*PPM*), and Francisco Sousa Tavares (*PSD*) in *DAR* (I) 116, 9 July 1982, pp. 4871-4874.

¹²⁷ Luís Nunes de Almeida referred in the meeting of 4 November 1981 that what public opinion thought about the referendum did not have anything to do with the true concept of the referendum, but with that which the *AD* had been defending for two years (*DAR*, 33 - Supplement, 23 December 1981, p. 32).

2.1. The Antecedents

The debate on the second Constitutional revision began long before 1989. The revision would be possible without the Assembly of the Republic assuming extraordinary powers of Constitutional revision by a four-fifths majority of the members in full exercise of their office. The right wing Portuguese parties, the *PSD* and the *CDS*, never accepted the Constitution of 1976, and as they were dissatisfied with the Constitutional revision of 1982. They demonstrated their hope for an extraordinary Constitutional revision early on. The referendum had a secondary role in this context. The clearly assumed main purpose was a deep change of the part of the Constitution regarding the organisation of the economy, putting an end to the principle of the irreversibility of nationalisations that had been decided during the revolutionary period, and opening up the doors for privatisation of basic sectors of the economy.

It is true, however, that the purposes announced by some parties as to the second Constitutional revision, independently of its moment, included the enshrinement of the national referendum. In the very beginning of 1984, the National Council of the *PSD* rejected a proposal by two of its members (Santana Lopes and Conceição Monteiro), who argued that the extraordinary revision of the Constitution must be a purpose of the party. In their view, it was essential to change the economic part of the Constitution and the electoral system, and to introduce the referendum (Magalhães, 1989, p. 119).

The *CDS* also proposed that the Assembly of the Republic assume extraordinary revision powers through Draft Resolution No. 23/III, which was rejected on 12 June 1984 with nay votes from the *PS*, the *PCP*, the *MDP*, the *UEDS* and the *ASDI* and yea votes from the *PSD* and the *CDS* [*DAR* (I) 123, 14 June 1984, pp. 5261-5314]. In the next legislative session, the *CDS* introduced Draft Resolution No. 43/III, with the same purpose, and it was rejected on 23 May 1985 with the same result [Magalhães, 1989, p. 129; *DAR* (I) 84, 24 May 1985, pp. 3175-3202]. Still before the second Constitutional revision, the *PSD*, the *PS*, the *CDS* and the *PRD* admitted the inclusion of the referendum among their purposes for the second Constitutional revision in their programmatic documents, although in different ways (Magalhães, 1989, pp. 196, 198, 212, 241 and 252).

2.2. The Draft Amendments to the Constitution

The Draft Amendments to the Constitution No. I/V from the CDS, opened the Constitutional revision procedure on 17 October 1987.¹²⁸ These included two types of national referendum, both decided by the President of the Republic: **a)** on important national matters when that was requested by the Government or by the Assembly of the Republic, through deliberation approved by the absolute majority of members in full exercise of their office; **b)** on the approval of international conventions that assigned the exercise of the Portuguese State's responsibilities to an international organisation, if the respective approval in the Assembly of the Republic did not obtain the two-thirds majority, but still had affirmative votes from the absolute majority of members in full exercise of their office (*DAR*, Off-print No. 1/V, 31 December 1987, pp. 140-141).

In terms of the Draft Amendments to the Constitution No. 3/V presented by the *PS*, **a)** the power to call the referendum was not given to the President of the Republic, but to the Assembly of the Republic by a qualified majority; **b)** the referendum should have binding effect; **c)** the right of initiative belonged exclusively to the Government and to a fifth part of the members of Parliament, with the popular initiative being excluded; **d)** the referendum should not be directly about international agreements or legislative acts, but on matters upon which the Assembly of the Republic or the Government must decide by passing an international agreement or legislation; **e)** the referendum could not happen on a significant group of matters; **f)** temporary limits for calling and holding referendums were imposed; **g)** the Constitutional Court had the responsibility to review the Constitutionality and legality of the referendums. (*DAR*, Off-print No. 1/V, 31 December 1987, pp. 50 and 56).

According to the Draft Amendments to the Constitution No. 4/V, from the *PSD*, the President of the Republic could submit matters of great national interest and superior political importance to binding referendum, upon the Government's request or by deliberation approved in the Assembly of the Republic by the absolute majority of members in full exercise of their office. The budgetary and tax-related matters, and those whose purpose was to increase the State's expenditure or decrease its income, could not be subject to a referendum (*DAR*, Off-print No. 1/V, 31 December 1987, p. 63).

The Draft Amendments to the Constitution No. 9/V (*PRD*) was the most expansive as to the national referendum. It included a political

¹²⁸ Regarding the Portuguese Constitution, once a draft amendment was introduced to the Constitution, any others also had to be introduced within 30 days.

referendum and a legislative referendum. In the first case, the President could submit a political decision of fundamental importance to referendum if this was requested by the Assembly of the Republic with a two-thirds majority. In the second case, the President of the Republic could submit to referendum any decree that he had received from the Assembly of the Republic to enact as law, or from the Government as executive-law emitted in the use of legislative authorisation of the Assembly of the Republic (*DAR*, Off-print No. 1/V, 31 December 1987, pp. 110-111).

2.3. The First Reading in the *CERC*

The first reading of the proposals happened in the *CERC* on 29 July 1988. It was not a conclusive meeting, but it established some approaches as to how matters would proceed. The main divergence between the *PS* and the other parties that proposed the referendum (*PSD*, *PRD* and *CDS*) were the presidential responsibilities. The *PS*, unlike the other parties, did not give the President of the Republic the power to decide on the referendum, but only the right of veto on proposals that he had received.¹²⁹

Another divergence concerned the parliamentary majority needed to propose a referendum. The *PS* and the *PRD* supported the need for a two-thirds majority, while the *PSD* and the *CDS* considered that demand unnecessary. They argued that an absolute majority of the members in full exercise of their office to be enough for that effect.¹³⁰ The demand of a two-thirds majority was based on the idea that the referendum should not be an instrument of power utilised by a parliamentary majority against a minority Government, but a political instrument usable just when there was a wide consensus as to its necessity.¹³¹ There was some consensus as to the exclusion of referendums on some matters, such as the indispensability of the prior review of the referendum's Constitutionality and legality, as well as the convenience of time limits to call and hold referendums.¹³²

¹²⁹ See speech by António de Almeida Santos in the *CERC* (*DAR* [III] 56 – *RC*, 8 November 1988, p. 1800).

¹³⁰ See speeches by Rui Machete (*PSD*) and Nogueira de Brito (*CDS*) in *DAR* (II) 56 – *RC*, 8 November 1988, pp. 1802 and 1813.

¹³¹ See speeches by Miguel Galvão Teles (*PRD*) and Almeida Santos (*PS*), in *DAR* (II) 56 – *RC*, 8 November 1988, p. 1803-1804.

¹³² See speeches by Almeida Santos (*PS*), Miguel Galvão Teles (*PRD*) and Rui Machete (*PSD*) in *DAR* (II) 56 – *RC*, 8 November 1988, p. 1800-1805.

The *PRD* proposal for a legislative referendum, instead of the presidential veto, did not obtain any support. The proponent himself did not support it in a convincing way because Miguel Galvão Teles recognised the sensitivity of the proposal and he did not insist on it.¹³³

2.4. The *PS/PSD* Political Agreement

On 14 October 1988, the *PS* and the *PSD* signed a political agreement for the second Constitutional revision. In this document, they agreed to introduce in the Constitution the deliberative referendum on matters that should be the subject of common legislative acts or international agreements. The President of the Republic would call the referendum under the Government's or Parliament's proposal with deliberation taken by an absolute majority (Magalhães, 1989, p. 167). That agreement gave way to a joint *PS/PSD* proposal regarding the national referendum, which was discussed and passed in the *CERC* on 7 March 1989 [*DAR* (II) 103, 15 May 1989, pp. 2922-2934]. This gave origin to the text passed in the plenary sitting of the 23 May [*DAR* (I) 86, 24 May 1989, pp. 4239-4230].

2.5. The Constitutional Text Passed

The text passed as the new Article 118 of the Constitution,¹³⁴ regarding the national referendum, Stated the following:

- 1) In the cases provided for, and as laid down by the Constitution and law, following a proposal from the Assembly of the Republic or the Government, the President of the Republic may decide to call upon citizens who are registered to vote in the Portuguese territory to directly and bindingly pronounce themselves through referendum.¹³⁵
- 2) The object of a referendum shall be limited to important issues concerning the national interest upon which the Assembly of the Republic or the Government must decide by passing an international agreement or legislation.

¹³³ See speeches by Miguel Galvão Teles, Rui Machete and Almeida Santos as to the legislative referendum in *DAR* (II) 56 – *RC*, 8 November 1988, pp. 1801-1803.

¹³⁴ In the Constitutional revision this text was passed as Article 112-A. In the final wording, it was numbered as Article 118.

¹³⁵ This provision had nay votes from the *PCP*. José Magalhães, in his explanation of the vote, affirmed that the *PCP* did not saw reasons to change the refusal of the introduction of the referendum in 1976 and 1982, but it voted for all of the cautions introduced to avoid plebiscitary perversions [*DAR* (I) 84, 20 May 1989, pp. 4123-4128].

- 3) The referendum could not concern, namely, the alterations to the Constitution, the matters included in Articles 164 and 167 of the Constitution and the issues and acts with a budgetary, tax-related or financial content.¹³⁶
- 4) Each referendum shall address only one matter. Questions shall be objectively, clearly and precisely formulated, in terms of yes or no answers, and shall not exceed a maximum number to be laid down by law. The law shall also lay down the other terms governing the formulation and holding of referendums.
- 5) Referendums shall not be called or held between the dates on which general elections for sovereign organs, the self-government bodies of the autonomous regions, local authority bodies and members of the European Parliament are called and those on which they are held.
- 6) The President of the Republic shall submit all draft referendums submitted to him by the Assembly of the Republic or the Government, to a compulsory and prior review of their Constitutionality and legality.
- 7) The provisions of Article 116(1), (2), (3), (4) and (7) shall apply to referendums, *mutatis mutandis*.¹³⁷
- 8) Draft referendums that are refused by the President of the Republic or by the electorate through negative answer shall not be resubmitted during the same legislative session, except new elections to the Assembly of the Republic, or until the Government resigns or is removed.

In Article 170, on the power of initiative, the following provisions on the referendum were passed: **a)** the power to initiate referendums shall lie on members of Parliament, parliamentary groups and the Government (No. 1); **b)** no member or parliamentary group shall submit a draft referendum which, during the current financial year, involves an increase in the State's expenditure or a decrease in its revenues as set out in the Budget (No. 3); **c)** draft referendums that are definitively rejected may not be resubmitted in the same legislative session, unless a new Assembly of the Republic is elected (No. 4); **d)** draft

¹³⁶ This provision had the abstention from the *PEV*, because this party believed that there were too many matters that could not be the object of referendum. It defended, however, that international agreements, namely those regarding the integration of Portugal in the European Communities should be the object of referendum. See speech by Herculano Pombo in *DAR* (I) 84, 20 May 1989, pp. 4068-4069. Articles 164 and 167 established the matters that were the exclusive responsibility of the Assembly of the Republic.

¹³⁷ Article 116 established the general principles of electoral law.

referendums that are not put to the vote in the legislative session in which they are submitted shall not require resubmission in the following legislative sessions, unless the legislature itself comes to an end (No. 5); e) draft referendums shall lapse upon the resignation or removal of the Government (No. 6); f) parliamentary committees may submit replacement texts without prejudicing the draft referendums to which they refer, unless they are withdrawn (No. 8).

2.6. Remarks on the Constitutional System Passed in 1989

The national referendum was one of the most important innovations of the second Constitutional revision. The system that was implemented had the following key features.

The electoral universe included the citizens registered to vote in the national territory. Therefore, Portuguese citizens registered abroad were excluded. The reason for that exclusion was to avoid important issues of national interest being decided by the large number of citizens who had lived abroad for a long time, and were therefore far removed from the problems of the country. However, the Constitution refers only to Portuguese citizens, keeping the door open for the eventual participation of foreign citizens living in Portugal who are originally from Portuguese-speaking countries. Article 15(3) of the Constitution allows that, through international agreement, and in reciprocal conditions, those citizens could have some rights that are not offered to other foreign citizens (Canotilho & Moreira, 1993, p. 531).

The referendum has binding effect. Advisory referendums were excluded. According to Gomes Canotilho and Vital Moreira (1993, p. 531), this meant that: a) it would not be possible to approve laws or international conventions that contradicted the decision of the referendum; b) the Assembly of the Republic or the Government would be forced to approve, within a reasonable time, the legislative act or the corresponding international convention that had been decided by the poll; c) the President of the Republic would not be able to use the political veto on legislative acts decided by referendum. Neither could he refuse to ratify nor sign international conventions designed to convert the results of the referendum into juridical rules.

The exclusive responsibility for calling the referendum rested with the President of the Republic, following a proposal by the Assembly of the Republic or the Government. Such a proposal had to be made in accordance with the terms laid down in the Constitution and by law. Referendums could not be called by popular initiative.

The President of the Republic had the final decision about calling the referendum. The presidential refusal could not be over-ruled, unlike the veto. If the Constitutional Court declared the draft resolution for referendum unConstitutional or illegal, that decision would be binding. The national referendum, as foreseen in 1989, was always optional. The decision to hold a referendum rested entirely in the hands of the sovereignty organs (Canotilho & Moreira, 1993, p. 530).

The Constitution permitted referendums by the initiative of the Assembly of the Republic and the Government near the President, according to the responsibilities of each one. The Assembly of the Republic could not propose draft referendums on subjects of the exclusive responsibility of the Government.¹³⁸ However, the Government, in cooperation with the President of the Republic, and without Parliament, could propose a referendum that would be binding on the Assembly of the Republic (Magalhães, 1989, pp. 91-92). Thus, a referendum to decide matters of exclusive responsibility to the Assembly of the Republic had to be promoted by the Assembly itself. However, the Government could introduce draft referendums on these matters to the Assembly of the Republic, but the final deliberation always belonged to Parliament.

The parliamentary initiative was also subject to specific rules. It belonged to parliamentary groups or individuals, i.e. members of Parliament. They could not submit draft referendums that involved an increase in State expenditure or a decrease in its revenues, as set out in the Budget during that financial year. That limitation generally applied to parliamentary legislative initiatives, except for the Government's initiatives. Only the Government could introduce proposals to change the State Budgets approved.

Draft referendums that had been definitively refused could not be resubmitted during the same legislative session,¹³⁹ except where new elections to the Assembly of the Republic had been held.¹⁴⁰ Similar to the situation with legislative initiatives, draft referendums that were not voted on in the legislative session in which they are submitted would not require resubmission in the following legislative sessions, unless the legislature

¹³⁸ The exclusive responsibility of the Government to legislate only regards its own organization and working.

¹³⁹ The legislative session has the lasting period of one year and began on 15 October. Nowadays it begins on 15 September.

¹⁴⁰ This formulation would later raise the doubt about when in case of premature elections it would begin a new legislative session or if the previous one would be prolonged. The Constitutional Court was called to decide on that subject concerning a draft referendum.

itself ended. The draft referendums introduced by the Government would lapse upon its resignation or removal. As with legislative initiatives, the parliamentary committees could submit replacement texts of the proposals introduced to them.

Parliamentary deliberation would not need absolute majority. Unless the Constitution specified otherwise, the general rule applied, i.e. that a simple majority sufficed, with the abstentions not being counted for the result.

The referendum would happen where important issues of national interest were at stake, upon which the Assembly of the Republic or the Government were required to assent to an international agreement or associated legislation. The referendum would not necessarily pertain to the Act itself (the passing of the law, the executive law or the international agreement), but would consider the issues included in those Acts. A negative referendum result would not necessarily prevent the approval of the Act, unless the subject submitted to referendum is essential required such approval. However, the content would need to be altered to correspond with the sentiment expressed by the voters. This provision, in addition to considering the referendum as being relatively exceptional (since it could only happen on important issues of national interest), forbids the referendum abrogative, given that it must always occur before the passing of the act to which it refers. This rule equally assured that voters would not be given the role of approving or rejecting general politics, issues of political leadership or projects without concretely defined outlines (Magalhães, 1989, p. 92).

The referendum could not be called to solve hypothetical or abstract questions, but could only concern concrete and existing subjects, normally included in pending legislative initiatives or in international conventions under negotiation or already adjusted and waiting for approval (Canotilho & Moreira, 1993, p. 532). The referendum was forbidden in the following cases: **a)** alterations to the Constitution, with the Constitutional referendum being expressly rejected; **b)** matters provided for in Article 164 of the Constitution,¹⁴¹ which referred to the political and legislative responsibilities of the Assembly of the Republic;¹⁴² **c)** matters provided for in Article 167 of the Constitution,¹⁴³

¹⁴¹ Current Article 161.

¹⁴² This provision made the referendum impossible on **a)** the political and administrative statutes of the autonomous regions; **b)** the statute of the territory of Macau, which was then under Portuguese administration; **c)** the granting of generic amnesties and pardons; **d)** the laws on the Major Options of the National Plans and the State Budget; **e)** the contract

which are the exclusive responsibility of the Assembly of the Republic to legislate;¹⁴⁴ **d**) issues and acts with a budgetary, tax-related or financial content. Even when the Constitution excluded ‘namely’ these matters, it did not prevent the exclusion of other matters by law.

The express exclusion of the Constitutional referendum implied, according to José Magalhães (1989, p. 92), other exclusions on related or connection matters, or regarding the indirect protection of the Constitution. An ordinary law, whose content was against the Constitution or Constitutionally bound, could not be submitted to referendum. The Constitution provided clear requirements on that question. Referendum questions could only address one matter, and should not exceed a maximum number of questions laid down by law. The questions should be objectively, clearly and precisely formulated, and should allow a ‘yes’ or ‘no’ answer (Canotilho & Moreira, 1993, p. 534).

and granting of loans and the engagement in other lending operations; **f**) the passing of treaties that address matters which are the exclusive responsibility of the Assembly of the Republic; **g**) the passing of treaties that entail Portugal’s participation in international organisations, friendship, peace, defence, the rectification of borders or military affairs; **h**) the authorisation and confirmation of the declarations of State of siege or State of emergency; **i**) the authorisation to declare war or to make peace. As to the generality of the Constitutional doctrine, it does not make sense to think that the Constitution forbids referendums on all subjects referred in Article 164, given that the same article refers to the responsibility of the Assembly of the Republic to legislate on all matters (Canotilho & Moreira, 1993, p. 534).

¹⁴³ Current Article 164.

¹⁴⁴ This provision included the following matters: **a**) elections for officeholders of sovereignty organs; **b**) the regime of referendum; **c**) the organisation, operation and proceedings of the Constitutional Court; **d**) the organisation of national defence, the definition of the duties derived there from and the basic general elements of the organisation, operation, re-equipping and discipline of the Armed Forces; **e**) rules governing States of siege and States of emergency; **f**) the acquisition, loss and re-acquisition of Portuguese citizenship; **g**) the definition of the limits of territorial waters, the exclusive economic zone and Portugal’s rights to the adjacent seabed; **h**) political associations and parties; **i**) basic elements of the educational system; **j**) election of members from the self-government bodies of the autonomous regions; **l**) election of local government officeholders and other elections conducted by direct, universal suffrage, as well as elections for the remaining Constitutional bodies; **m**) status and role of the officeholders of sovereignty organs and local government officeholders, as well as the officeholders of the remaining Constitutional bodies and all those who are elected by direct, universal suffrage; **n**) inclusion of serious crimes capable of being equalled to essentially military crimes in the jurisdiction of military courts; **o**) rules for the creation, abolition and modification of local authorities; **p**) the regime of local referendum; **q**) restrictions on the exercise of rights by full-time military and militarised personnel in active service.

The Constitution also set time limits for the calling and holding of referendums, which could not happen between the dates on which elections for the President of the Republic, self-government bodies of the autonomous regions, local authority bodies and members of the European Parliament were called and the date on which those elections were held. A prior review of the Constitutionality and legality of any referendum was compulsory. The President of the Republic must send any draft referendum to the Constitutional Court and, in case of unConstitutionality or illegality, must refuse to call the referendum.

The following general principles of electoral law are applicable to the referendum: **a)** suffrage is direct and secret; **b)** electoral registration is official, compulsory, permanent and single for all the elections held by direct and universal suffrage; **c)** campaigns are governed by the principles of freedom of propaganda, equality of opportunities and treatment of all options; **d)** public bodies must be impartial **e)** campaign accounts are submitted to scrutiny; **f)** citizens shall possess the duty to cooperate with the electoral authorities; **g)** the power to rule on the correctness and validity of the referendary process acts shall pertain to the courts.

The legal regime of the referendum is provided by organisational law. That means that the passing of the referendum law requires the absolute majority of the members in full exercise of their office in the final overall vote, and the vote on the details shall occur in a plenary sitting. A prior review of its Constitutionality can be requested, not only by the President of the Republic, but also by the Prime Minister, or even by a fifth of the members of Parliament. The political veto by the President of the Republic can only be surpassed by a majority that is at least equal to two thirds of all members present and greater than an absolute majority of all members in full exercise of their office.

Luís Barbosa Rodrigues (1994, pp. 152-153) synthesises the contribution of each party in the final drawing of the Constitutional rules passed in 1989. The object of the referendum (on legislative acts and international agreements), the time (before the approval of the acts), the limits and restrictions (for material, temporary, formal and organisational reasons), were from the *PS* draft. Giving the power of initiative to the Assembly of the Republic and the Government, the power of decision to the President of the Republic, and the option for a referendum to legitimise the majority through governmental or parliamentary initiative passed by a simple majority, came from the *PSD* and the *CDS* drafts. The prior and compulsory review of the referendum's Constitutionality came from the *PRD* draft.

The unanimous approval of the national referendum in 1989 was a result of its very careful terms. As an instrument of direct democracy, the referendum maintained a secondary position to the principle of representative democracy (Canotilho & Moreira, 1993, p. 530).

3. Organisational Law No. 45/91, of 3 August

3.1. The Bills Introduced

In 1990, the *PS* and the *PSD* introduced the first bills of organisational referendum law (Urbano, 1998, pp. 155-169). In February, the *PS* introduced Bill No. 473/V [*DAR* (II-A) 18, 17 February 1990, pp. 781-802]. In April, the *PSD* introduced Bill No. 515/V [*DAR* (II-A) 33, 18 April 1990, pp. 1112-1140]. Regarding those initiatives, there were some remarks on the Opinions drawn on behalf of the Constitutional Affairs, Rights, Freedoms and Guaranties Committee of the Assembly of the Republic.

The Opinion on the *PS* bill, from Luís Pais de Sousa (*PSD*) mentioned the fact that the text of the bill did not clearly State the consequences of the declaration of unConstitutionality or illegality of the referendum by the Constitutional Court. According to that Opinion, the law should clarify the impossibility of holding the referendum in those cases [*DAR* (II-A) 44, 25 May 1990, pp. 1366-1367].

The opinion on the *PSD* bill, drawn by Alberto Martins (*PS*) hinted at four unConstitutionalities: **a)** that the President of the Republic was not obliged to ask for a prior review of the Constitutionality and legality of a draft referendum if it had been reformulated after being declared unConstitutional or illegal by the Constitutional Court; **b)** that electoral capacity should be given to all Portuguese citizens, and not just to citizens registered to vote in the national territory; **c)** that the President of the Republic could not exercise the political veto on a legislative act or international convention related to the questions submitted to referendum. The referendum should judge on concrete subjects put to the voters, and not on the legal form of how to interpret those answers at the legislative level; **d)** the lack of prior review of the legislative act or international convention reproduced, developed or materialised following an affirmative answer to a referendum. In that case, any law or convention that corresponded to the voters' answer would be protected, even if it included unConstitutional rules [*DAR* (II-A) 44, 25 May 1990, pp. 1367-1369].

The bill from the *PSD* was widely inspired by a draft made by Jorge Miranda (1991) upon the Government's request by the end of 1989, with only some differences (Urbano, 1998, pp. 162-163). Jorge Miranda **a)** clearly Stated which matters had to be excluded from referendum; **b)** extended the time limits to hold referendums, not allowing them within the six months after the election of the Assembly of the Republic; **c)** admitted only the participation of the citizens registered to vote in the national territory; **d)** broke up with the monopoly of the political parties in the campaign for the referendum, thus allowing specific campaign activities to be carried out by groups of citizens as well.

3.2. The Legal System Passed

On 24 May 1990, Parliament discussed and passed the general terms of the bills of organisational referendum law introduced by the *PS* and the *PSD* [*DAR* (I) 78, 25 May 1990, pp. 2595-2612]. The *PSD*, the *PS* and the *PRD* voted for both bills. The *PEV* voted for the *PS* bill and against the *PSD* bill. The *PCP* abstained on the *PS* bill and voted against the *PSD* bill [*DAR* (I) 78, 25 May 1990, pp. 2613]. The Constitutional Affairs, Rights, Freedoms and Guaranties Committee proceeded to fuse both bills in a common text, which was approved in the final overall vote on 23 April 1991 [*DAR* (I) 67, 24 April 1991, p. 2278]. The *PSD*, the *PS*, the *PRD*, the *CDS* and the independent MPs José Magalhães, Jorge Lemos and Herculano Pombo voted yea; the *PCP* and the independent MP Raul de Castro abstained. Law No. 45/91, of 3 August, introduced the national referendum to Portugal for the first time.

The essential lines of the approved legal system were the following:¹⁴⁵

- 1) Object** - As to the object, the law (Article 2) reproduced the Constitutional text [Article 118(2)]: the object of a referendum shall be limited to important issues concerning national interest upon which the Assembly of the Republic or the Government must decide by passing an international agreement or legislation.
- 2) Excluded matters** - The following matters were excluded from the subject of referendums (Article 3): **a)** alterations to the Constitution; **b)** matters provided for in Articles 164 and

¹⁴⁵ For more details on Law No. 45/91, of 3 August, see Urbano (1998, pp. 171-302); Rodrigues (1994, pp. 157-240); Suordem (1997, pp. 15-234).

167 of the Constitution,¹⁴⁶ which referred respectively to the matters included in the political responsibilities and in the Assembly of the Republic's exclusive responsibility to legislate; **c)** issues and acts with budgetary, tax-related or financial content; **d)** matters regarding the organisation and proceedings of the Assembly of the Republic, Government and Courts, and to the statute of the respective officeholders, as well as to the organisation and responsibilities of the Public Prosecutors Office and their public prosecutors.

- 3) Delineation of responsibilities** - Article 5 of the law delimited the responsibilities of the Assembly of the Republic and Government as to the respective drafts of referendum. The Assembly of the Republic can approve draft referendums **a)** on international convention whose matters are included in its partially exclusive responsibility to legislate; **b)** on international conventions not excluded from referendum that are submitted by the Government for approval; **c)** on any legislative matters not excluded from referendum. The Government, without prejudicing the Assembly of the Republic's right of initiative, can propose directly to the President of the Republic referendums on **a)** international conventions whose approval is not the responsibility of the Assembly of the Republic or that had not been submitted to it; **b)** legislative acts on matters not included in the Assembly of the Republic's exclusive legislative responsibility.
- 4) Formulation of the questions** - Each referendum can only consider a single matter (Article 6), and it cannot pose more than three questions [Article 7(1)]. The questions are formulated in terms of 'yes' or 'no' answers. They must be objective, clear and precise without suggesting, directly or indirectly, a particular answer [Article 7(2)]. The questions cannot be preceded by any considerations, preambles or explanatory notes [Article 7(3)].
- 5) Temporary and circumstantial limits** - No act related to the calling or holding of a referendum can be practiced **a)** between the dates on which general elections for the organs of sovereignty, self-government bodies of the autonomous

¹⁴⁶ Current Articles 161 and 164.

regions, local authority bodies and Members of the European Parliament are called and those on which they are held (Article 8); **b**) within three months after a referendum (Article 8); **c**) during the forced States of siege or emergency (Article 9).

- 6) The Assembly of the Republic's initiative** - The deputies, parliamentary groups or Government, can take the referendum initiative in the Assembly of the Republic (Article 10). The deputies and the parliamentary groups cannot submit draft referendums that, during the current financial year, involve an increase in the State's expenditure, or a decrease in its revenues as set out in the State Budget (Article 11). The draft referendums that are not put to the vote in the legislative session in which they are submitted shall not require resubmission in the following legislative sessions, unless the legislature itself ends. The draft referendums definitively refused shall not be resubmitted in the same legislative session (Article 12). The approval is made with a simple majority, without counting the abstentions (Article 13).
- 7) The Government's initiative** - The draft referendums from the Government are approved by the Council of Ministers' Resolution (Article 15) and shall lapse upon the resignation or removal of the Government (Article 16).
- 8) Prior review of Constitutionality and legality** - Within eight days of the publication of the Resolution by the Assembly of the Republic or the Government, the President of the Republic asks the Constitutional Court to conduct a prior review of the Constitutionality and legality of the draft referendum (Article 17). The Constitutional Court shall decide within the time limit of 25 days, which can be shortened by the President of the Republic in the case of urgency. If the Constitutional Court declares the unConstitutionality or illegality of the draft referendum, the President of the Republic shall not call the referendum, and must return the draft to the organ that passed it. The Assembly of the Republic or the Government can reformulate the draft, expunging it of the unConstitutionality or illegality. In those cases, the drafts should be resubmitted,

and reviewed afresh by the Constitutional Court (Article 19).

- 9) **Calling or refusing the referendum** - The President of the Republic decides whether to call the referendum within eight days of the publication of the Constitutional Court's decision, provided it had not declared any unConstitutionality or illegality (Article 25). The decree of the President of the Republic should include the formulated questions and the date of the referendum, which should happen between the sixty and ninety days of the date of publication (Article 26). If the President of the Republic decides not to call the referendum, he should communicate that decision to the Assembly of the Republic in writing, setting out the reasons, or to the Government, in a written document explaining the refusal. The refused draft shall not be resubmitted in the same legislative session (Article 27).
- 10) **Electoral universe** - The right to take part in referendums was given to the citizens registered to vote in the national territory, therefore excluding Portuguese emigrants (Article 28). The right to vote of the citizens of other Portuguese-speaking countries who lived in the national territory was also admitted. These citizens benefit from a special statute of equal political rights, as laid down by a reciprocal international agreement, since they are registered to vote in the national territory (Article 29).
- 11) **Campaigning for the referendum** - The referendum involves an electoral campaign of 10 days (Article 38), the same terms as electoral processes, in order to allow the explanation and debate of the questions submitted to referendum [Article 31(1)]. The campaign is carried out by the legally constituted political parties, or by permanent coalitions, which declare their intent to take a position on the questions submitted to the voters (Articles 31 and 32) to the National Elections Commission (*CNE*) within 30 days of the referendum being called.
- 12) **Effectiveness of the referendum** - The results of the referendum are binding on the Assembly of the Republic and the Government (Article 231), regardless of the number of voters, or the number of valid, blank or null ballot papers

(Article 232). If the affirmative answer wins, the Assembly of the Republic or the Government shall approve the corresponding international convention or legislative act within 60 days (Article 233). The President of the Republic cannot refuse the ratification of the international convention or the enactment of the legislative act, based on the part corresponding to the answers given in the referendum (Article 234). The Assembly of the Republic or the Government shall not approve international conventions or legislative acts, nor resubmit draft referendums, corresponding to the questions that had a negative answer from the voters in the same legislative session, except in cases of a new election of the Assembly of the Republic, or formation of a new Government (Articles 235 and 236).

4. The Initiatives for Referendum from 1991 to 1993

4.1. The Drafts Preceding Law No. 45/91, of 3 August

The imminent approval of the referendum law inspired the appearance of several related initiatives in the beginning of 1991. Before the approval of the law on 23 April 1991, two initiatives for referendum were introduced in the Assembly of the Republic. The independent MPs, José Magalhães and Jorge Lemos, former members of the *PCP*, introduced Draft Resolution No. 77/V, on 5 February 1991, proposing a national referendum on the Portuguese Language Orthographic Agreement of the [*DAR* (II-A) 25, 9 February 1991, pp. 795-797].

The Draft for the Unified Orthography of the Portuguese Language was an international agreement drawn by delegations from Portugal, Brazil, Angola, Cape Verde, Guinea-Bissau, Mozambique and Sao Tome and Principe, in order to unify the orthography of the Portuguese language. Delegations from those States signed the agreement on 16 December 1990. In 1991, the Government announced the introduction of that Agreement to the Assembly of the Republic for approval with the intention that it should come into force on 1 January 1994. Invoking the lack of a national debate on that Agreement, and coinciding with a strong public controversy surrounding some of its terms, José Magalhães and Jorge Lemos moved forward with the draft resolution for a national referendum that would pose the following question to the electors: ‘Shall the Portuguese Language Orthographic Agreement, as it is written, be approved and ratified by the Portuguese organs of sovereignty?’

On 7 March 1991, also before the approval of Law No. 45/91, three independent MPs, Herculano Pombo, Valente Fernandes and Helena Roseta,¹⁴⁷ introduced the second draft referendum, through Draft Resolution No. 80/V [*DAR* (II-A) 32, 16 March 1991, p. 918] which sought to submit the issue of nuclear power to referendum, placing voters with the following question: ‘Shall the installation of nuclear power plants for energy purposes be authorised in the national territory?’

Parliament never discussed these drafts. At the time of their introduction, there was no legal basis for holding referendums of a national scope. By the time the legal framework had been published, on 3 August 1991, the Assembly of the Republic had already finished its term prior to the 6 October 1991 general election.

The review of the Constitutionality of these draft referendums would have been interesting because the referendum was designed for considering important issues of national interest, upon which the Assembly of the Republic or the Government should decide prior to passing an international agreement or legislation. Being sure that the object of the referendum should be issues, and not acts themselves, the Constitutionality of these draft referendums would be certainly have been contested. The question of the first was the approval and ratification of the Orthographic Agreement itself. As for the second, the question would be to know if the nuclear option was a subject that could be decided on by passing legislation. In both cases, the initiatives lapsed before they were scheduled for debate.

4.2. The Drafts Introduced After Law No. 45/91, of 3 August

In the VI Legislature, two draft referendums were introduced after the entry into force of the referendum law. On 8 April 1992, the *PS* introduced Draft Resolution No. 17/VI [*DAR* (II-A) 32, 11 April 1992, pp. 613-614]. The subject was the independence of the broadcasting stations, both public radio and television services.

The dependence of the broadcasting stations, public radio and television services (*RDP* and *RTP*) on political power, and particularly on the Government, gave rise to a strong debate, and even to a message addressed to the Assembly of the Republic by President Mário Soares. In the VI Legislature, the second with a *PSD* absolute majority, the Government decided to introduce Government Bill No. 6/VI [*DAR* (II-A)

¹⁴⁷ Herculano Pombo and Valente Fernandes became independent after their break with the *PEV*. Helena Roseta was an independent MP inside the Parliamentary Group of the *PS*.

9, 21 December 1991, pp. 196-203] on the statute of *RTP*, which turned that station into a limited company of public capital, with its managers appointed by the Government. The State, as the only shareholder, appointed all members of the board of directors. The opposition from the left, which had supported different options in their own bills, contested that option. The *PCP*, through Bill No. 36/VI [*DAR* (II-A) 10, 8 January 1992, pp. 215-225], argued that four of the five members of the board of directors should be elected by a general council with 25 elements representing several entities, with the final board member elected by workers of the station. The *PS*, which introduced Bill No. 37/VI, [*DAR* (II-A) 10, 8 January 1992, pp. 225-232] supported that two of the members be appointed in General Assembly and that the remainder, including the president, be elected by an opinion council representing several entities.

The discussion of these initiatives on the general principles occurred on 7 January 1992 [*DAR* (I) 18, 8 January 1992, pp. 412-434], and the voting took place on 9 January [*DAR* (I) 19, 10 January 1992, pp. 412-434]. The Parliament passed the Government Bill¹⁴⁸ and rejected the bills from the *PS* and the *PCP*.¹⁴⁹ Meanwhile, the *PS* introduced Draft Resolution No. 17/VI proposing a referendum with the following question: ‘Shall the stations of public radio and television service, to ensure their independence from political power, namely from the Government and direct or indirect public administration, have their bodies constituted from opinion assemblies whose composition is plural and representative of several sectors from civil society?’

The debate on this draft took place on 28 April 1992. Leonor Bezeza, on behalf of the *PSD*, strongly criticised the proposal, and totally disapproved of it. The main objections from the *PSD* were the following: **a)** the question was not important enough to be the subject of a referendum. It was long and imperceptible for the majority of electors, rested on an organisational and formal matter, and suggested the answer; **b)** that referendum subverted the primacy given by the Constitution to the representative democracy; and **c)** it was inopportune, because it would

¹⁴⁸ The Government Bill had yea votes from *PSD*, *CDS* and *PSN*, and nay votes from *PS*, *PCP* and the independents João Corregedor da Fonseca (*ID*) and Mário Tomé (*UDP*), [*DAR* (I) 19, 10 January 1992, p. 458].

¹⁴⁹ The *PCP* Bill had yea votes from the *PCP* and independent MPs, nay votes from the *PSD* and the *CDS* and abstentions from both *PS* and *PSN*. The *PS* Bill had nay votes from the *PSD*, yea votes from *PS*, *CDS*, *PSN* and Mário Tomé, and abstentions from the *PCP* and João Corregedor da Fonseca [*DAR* (I) 19, 10 January 1992, pp. 458-459].

take place in the second week of July [*DAR* (I) 55, 29 July 1992, pp. 1731-1736].

On behalf of the *CDS*, Narana Coissoró also disagreed with the proposal, taking into consideration that the *PS* wanted to nullify the voting already done on Government Bill No. 6/VI regarding the *RTP* statute, and to make its bill on the same subject reappear. It was rejected in the meanwhile [*DAR* (I) 55, 29 July 1992, pp. 1742-1743]. The *PCP* abstained, considering that the lack of independence of the broadcasting stations of public radio and television service was an actual and pertinent question, but disagreeing that a referendum was the appropriate response. It thought that the first national referendum demanded a careful reflection on the subject, an accurate formulation of the question and a suitable insertion in the country's electoral schedule. Octávio Teixeira believed that the referendum proposed by the *PS* did not fulfil these requirements [*DAR* (I) 55, 29 July 1992, pp. 1744-1745].

Thus, the draft was rejected, with yea votes from the *PS* and Mário Tomé, nay votes from the *PSD*, the *CDS* and the *PSN*, and abstentions from the *PCP* and Raúl de Castro (*ID*), [*DAR* (I) 55, 29 July 1992, p. 1745]. The Government Bill regarding the statute of *RTP* passed in the final overall vote on 25 June 1992, with yea votes from the *PSD* and the *CDS*, nay votes from the *PS*, the *PCP* and independent MPs, and abstention from the *PSN* [*DAR* (I) 80, 26 June 1992, p. 2694].

On 17 December 1992, the independent MP Mário Tomé (*UDP*) introduced the second draft referendum after the coming into force of Law No. 45/91. The subject was the creation of the administrative regions [Draft Resolution No. 42/VI, *DAR* (II-A) 14, 9 January 1993, p. 265] which will be treated further ahead.

5. The National Referendum in the Constitutional Revision of 1997

5.1. Antecedents

5.1.1. The Extraordinary Constitutional Revision of 1992

The third Constitutional revision was extraordinary in nature. With the conclusion of the second revision in 1989, the subsequent ordinary revision could only take place, as laid down by the Constitution, in 1994. However, the signature of the Maastricht Treaty on 7 February 1992 created a Constitutional problem because some of its fundamental provisions were opposed to Constitutional rules. So, the procedure to pass the Treaty by the Assembly of the Republic, in order for its ratification by

the Portuguese State, was suspended until a Constitutional revision changed the rules of the Constitution. This prevented the European Union Treaty from coming into force in the Portuguese juridical order.

On 11 June 1992, the Assembly of the Republic passed Resolution No. 18/92 with a four-fifths majority of the members in full exercise of their office, as demanded in article 284(2) of the Constitution, to assume extraordinary powers for Constitutional revision [*DAR* (I-A) 135 – Supplement, 12 June 1992]. In that Constitutional revision procedure, the subject of the referendum had special importance because the draft amendments to the Constitution introduced by the *PCP*, the *CDS*, the *PSN*, and the independent Mário Tomé, sought precisely to alter the Constitution in order to allow a referendum on the ratification of the European Union Treaty. This matter will be treated further on.

However, the *CDS* draft included, with regard to the referendum, provisions not bound to that particular subject, which had other implications for the general legal system of the national referendum. The Draft Amendment to the Constitution No. 5/VI (*DAR*, Off-print 12/VI, 9 October 1992, pp. 11-15) proposed a deep alteration to the ratification procedure of international treaties, suggesting a strong referendary component. The Constitution excluded the referendum on international agreements that addressed matters which are the exclusive responsibility of the Assembly of the Republic. These entailed Portugal's participation in international organisations, friendship, peace, defence, the rectification of borders or military affairs, or others deemed fit by the Government to submit to the Assembly.

The *CDS* draft eliminated the exclusion of these matters from the referendary scope, allowing the referendum on the ratification of conventions and international treaties, but with different legal frameworks. It would be obligatory for treaties that transferred responsibilities from the Portuguese State to an international organisation to be decided by referendum. The President of the Republic should submit the approval of such treaties to popular referendum, without any intervention of the Assembly of the Republic or the Government, and without any review of Constitutionality or legality by the Constitutional Court. Other treaties would be decided according to the general legal framework applying to referendums, provided in article 118 of the Constitution and by law. In addition, the *CDS* draft eliminated the adverb 'namely' in the provision regarding the matters excluded from referendum, so that only the matters expressly excluded by the Constitution could be excluded by law.

This proposal was criticised in the debates of the *CERC*, above all for proposing the obligatory referendum on a series of international treaties that barely been proposed. Even treaties of mere cooperation between Portugal and other States could transfer the exercise of responsibilities of the Portuguese State to international organisations. On the other hand, the proposal deprived the organs of sovereignty of their decisive powers in relation to the referendum.¹⁵⁰

The *CDS* proposal was refused in the *CERC* session of 28 October 1992, with nay votes from the *PSD* and the *PS* and yea votes from the *CDS* and the *PCP* and the abstention from the *PSN* [*DAR* (II) 11 – *RC*, 29 October 1992, p. 173].¹⁵¹ In the plenary sittings of 17 November 1992, the proposal by the *CDS* had 192 nay votes (132 *PSD* and 60 *PS*), 20 yea votes (13 *PCP*, four *CDS*, one *PSN* and the independent João Corregedor da Fonseca), and one abstention from the independent Mário Tomé [*DAR* (I) 14, 18 November 1992, p. 455].

5.1.2. The Failure of the Constitutional Revision in 1994

In 1994, the Assembly of the Republic started to assume ordinary powers of Constitutional revision. With this in mind, the parliamentary groups and other individual deputies introduced 13 draft amendments to the Constitution. Seven of them included provisions on the national referendum (Suordem, 1997, pp. 39-49).

The Draft Amendments in this case were the following: No. 1/VI (*PS*), 2/VI (*CDS*), 3/VI (*PSN*), 8/VI (*JSD*), 9/VI (*PEV*), 10/VI (*PCP*), 13/VI (*UDP*), (*DAR*, Off-print 24/VI, 7 November 1994). However, the revisions failed due to a lack of agreement between the *PS* and the *PSD*, and the VI Legislature ended without Constitutional revision. The procedure was carried over to the next legislature, after the elections of 1995, which gave victory to the *PS*, with a relative majority.

5.2. The Preparatory Works for the Constitutional Revision of 1997

5.2.1. The Initiatives

¹⁵⁰ See debates in the *CERC* session of 7 October 1992, namely the speeches by Nogueira de Brito (*CDS*), Jorge Lacão, José Magalhães and Almeida Santos (*PS*) and Costa Andrade (*PSD*), in *DAR* (II) 5 – *RC*, 8 October 1992, pp. 74-83.

¹⁵¹ The *PCP* voted yea, considering that the main subject in discussion was the call for referendum on the Maastricht Treaty.

In 1996, the Assembly of the Republic received several civic initiatives in connection with the Constitutional revision (Magalhães, 1997). Four of them included provisions regarding the Constitutional framework of the referendum.

Professor Jorge Miranda (1996b) sent his contribution to the Ad Hoc Committee of Constitutional Revision (*CERC*) on 5 February. Miranda proposed a significant expansion of the material scope of the national referendum, and a triple system of calling a referendum (by the President of the Republic, Parliament or through the citizens' own initiative). Isaiás de Sousa sent a draft amendment on 23 February 1996 in which he proposed that referendums should be permitted by initiative of 25,000 citizens. José da Silva Pereira proposed that a referendum should be held when requested by 100,000 citizens. The civic association Politics XXI, in the draft sent to the Assembly of the Republic on 4 March 1996, proposed a referendum by popular initiative of 50,000 citizens, who should sign a petition sent directly to the President of the Republic.

The fourth Constitutional revision opened at the beginning of 1996, with the introduction of the Draft Amendment to the Constitution No. 1/VII [*DAR* (II) 21 – Supplement, 1 February 1996], by the *CDS-PP*, which was followed by 10 other drafts. Nine of the 11 drafts introduced contained rules on the national referendum: No. 1/VII (*CDS-PP*), 2/VII (*JSD*), 3/VII (*PS*), 4/VII (*PCP*), 5/VII (*PSD*), 8/VII (independent MPs from the *PS* Group),¹⁵² 9/VII (*TSD*), 10/VII (*PEV*), 11 /VII (*ID*).

5.2.2. The First Reading in the *CERC*

At the start of the fourth Constitutional revision, both main parties (*PS* and *PSD*) agreed that the consideration of the draft amendments to the Constitution began with the proposals concerning regionalisation and the legal framework of the national referendum. The definition of the referendum's legal framework was urgent, because the *PS*, the *PSD* and the *CDS-PP*, had previously agreed that the creation of the administrative regions should be preceded by a referendum, and because the possibility of submitting eventual alterations to the Treaty of the European Union to referendum was still in the open [*DAR* (II) 3 – *RC*, 18 May 1996, p. 34]. For those reasons, with the first reading on the appreciation of the provisions concerning the creation of administrative regions being finished, the discussion of the proposals regarding the general legal system of the national referendum began on 18 June 1996.

¹⁵² Cláudio Monteiro, Jorge Goes and Maria do Rosário Carneiro.

In the session of 18 June 1996, there was a consensus against the Politics XXI and Jorge Miranda's proposals of joining the national and local referendum in the same Constitutional rule, given the special demands of the national referendum legal framework.¹⁵³ As to the initiative for a referendum, there was a wide consensus on the approval of the popular initiative. The fundamental difference was whether initiative should be addressed to the Assembly of the Republic, as supported by the *PSD* and the *PCP*, or directly to the President of the Republic, as proposed by the *PS*, the *PEV* and the *TSD*. This latter solution would change an important aspect of the political system, reinforcing the powers of the President of the Republic, allowing him to call the referendum even against the opposition of the Assembly of the Republic and jeopardising the primacy of representative democracy.¹⁵⁴

The first reading was inconclusive as to the initiative for referendum. The *CDS-PP* was the only party that proposed a decision on initiating referendums that was exclusively presidential. The *PSD* and the *PCP* admitted the popular initiative addressed to the Assembly of the Republic. The *PS* admitted the popular initiative for referendum directly addressed to the President of the Republic, demanding however a higher number of signatures. The *PSD* believed that the Government should not have the power to propose referendums to the President of the Republic, owing such responsibility to be exclusive of the Assembly of the Republic. There was little consensus around the proposals [*DAR* (II) 10 – *RC*, 22 June 1996, p. 171).

The proposals from the *CDS-PP* demanding an absolute majority for the deliberation of the Assembly of the Republic to propose a referendum was not accepted by the other parties. The same happened to the proposal from the *TSD* members, which demanded a two-thirds majority for that purpose.¹⁵⁵ The proposal included in the *PS* and *PCP* drafts was unanimously accepted. It Stated that the resolutions on referendums taken by the Assembly of the Republic or by the Government should only happen on matters included in the respective responsibilities, clarifying in the Constitution something that was already clear in the law [*DAR* (II) 10 – *RC*, 22 June 1996, pp. 175-176).

¹⁵³ See speeches by José Magalhães (*PS*), Luís Marques Guedes (*PSD*) and Luís Sá (*PCP*), in *DAR* (II) 9 – *RC*, 19 June 1996, pp. 156-157.

¹⁵⁴ See the speeches by Luís Sá (*PCP*), Miguel Macedo (*PSD*), and Luís Marques Guedes (*PSD*), in *DAR* (II) 9 – *RC*, 19 June 1996, pp. 159-161.

¹⁵⁵ See speeches by Luís Marques Guedes (*PSD*) and Luís Sá (*PCP*), in *DAR* (II) 10 – *RC*, 22 June 1996, pp. 173-174.

The next discussion was about a proposal from the *CDS-PP* to make a referendum obligatory for the approval of international treaties that sent any responsibilities from the organs of sovereignty of the Portuguese State to international organisations. This proposal had the purpose of compelling the approval of the treaty that changed the European Union Treaty to referendum. However, in spite of the availability declared by all the other parties to accept a referendum on that matter, the proposal was not accepted for two other reasons. The first was the disagreement on whether or not the referendum would be strictly compulsory (in spite of the agreement between the *PS* and the *PSD* on a compulsory referendum about the administrative regions), and the second was the fact that the proposal from the *CDS-PP* could be applied to an indefinite number of international agreements and not only to the Treaty of the European Union [*DAR* (II) 10 – *RC*, 22 June 1996, pp. 176-180].

The *PSD*'s proposal to allow emigrants' to vote in national referendums obtained explicit support from the *CDS-PP* and several objections from the *PS*. The question was not the principle, which the *PS* accepted, but its inception in unrestricted terms that gave the right to vote to emigrants in every national referendum [*DAR* (II) 10 – *RC*, 22 June 1996, pp. 180-184].

In the next session, on 25 June 1996, the object of the referendum was discussed. The *PS* proposed that matters included in international treaties, except those concerning peace and the rectification of borders, could be the object of referendum. They also accepted the referendum on issues surrounding the educational system, in spite of their inclusion within the exclusive legislative responsibilities of the Assembly of the Republic. The *PCP* proposed only to make a referendum possible on the revision of the European Union Treaty. The *PSD*, in addition to allowing the Constitutional referendum and the referendum on decisive subjects of the treaties with Portuguese participation in international organisations, proposed that other issues could be the subjects of a national referendum. These matters included all those that were the exclusive legislative responsibility of the Assembly of the Republic, except those regarding national defence and military justice. However, the *PSD* cut the reference to the referendum on matters included in the political responsibilities of the Assembly of the Republic (Article 164), regarding those matters as unsuitable subjects for a referendum.¹⁵⁶ The independent members of the *PS* Parliamentary Group moved forward with the widest proposal of the scope of the referendum, allowing it in almost

¹⁵⁶ See speech by Luís Marques Guedes in *DAR* (II) 11 – *RC*, 26 June 1996, pp. 189-190.

all the matters included in the legislative responsibilities of the Assembly of the Republic.¹⁵⁷

As for the possibility that the acceptance of conventions and international treaties could be put to a referendum, the argument was between those who wanted to make the referendum possible only with regard to the constituent treaties of the European Union, and those who wanted to make that possibility extensive to other treaties. The PCP argued for the former scenario. The *PS* wanted to enlarge the scope of the referendum to the treaties and international conventions, only excluding those concerning peace and the rectification of borders. The *PSD* had a more moderate position in relation to treaties, accepting the referendum only on the decisive subjects of treaties regarding Portuguese participation in international organisations. Luís Marques Guedes considered that the possibility of submitting any international agreements to referendum would jeopardise the negotiation capacity of the Portuguese State at an international level [*DAR* (II) 11 – *RC*, 26 June 1996, pp. 198-199]. The debate gave rise to a consensus around the idea of widening the scope of the referendum to all the treaties regarding Portuguese participation in international organisations or their alterations. The possibility of enlargement remained in the open [*DAR* (II) 11 – *RC*, 26 June 1996, p. 199].

Another subject was to know if the object of the referendum would be the treaties themselves or the issues included in them. The *PSD* proposed that only the decisive issues included in international agreements could be submitted to referendum, but the debate was not conclusive [*DAR* (II) 11 – *RC*, 26 June 1996, pp. 200- 204].

On behalf of the *JSD*, Pedro Passos Coelho introduced a proposal to submit the compulsory or voluntary nature of military service to referendum [*DAR* (II) 11 – *RC*, 26 June 1996, pp. 204-205]. That proposal, however, did not obtain the official support of the *PSD*. That party, in spite of admitting to widen the scope of the referendum to matters that were of the exclusive legislative responsibility of Parliament, did not admit the referendum on the organisation of national defence.¹⁵⁸

As to the prior review of the Constitutionality of the referendum, the members of *JSD* proposed to deal with this issue last. The *PSD* proposed that the decision of the Constitutional Court should merely be

¹⁵⁷ See speech by Cláudio Monteiro in *DAR* (II) 11 – *RC*, 26 June 1996, p. 191.

¹⁵⁸ See speech by Barbosa de Melo, in *DAR* (II) 11 - *RC*, 26 June 1996, p. 207.

advisory. As Barbosa de Melo explained, the *PSD* proposed the end of the prior review of Constitutionality of the acts submitted to the enactment of the President of the Republic. However, they thought that the prior review of the Constitutionality and legality of the referendum was justified. In this way, the result of that prior review should be legally binding, but if the Constitutional Court said that a referendum was against the Constitution, the President of the Republic would no longer have sufficient power to call that referendum [*DAR* (II) 11 – *RC*, 26 June 1996, p. 209]. These proposals were not accepted by the *PS* and the *PCP*.¹⁵⁹

The next subject was the demand for minimum participation so that the referendum would be binding, which appeared in the drafts from the *PS* and the *PSD*. The *PS* linked that proposal with another one which foresaw the possibility of referendum by direct request of popular initiative.¹⁶⁰ The reply to that possibility came from the *PCP*, having in mind the existence of a technical abstention of 10% or over, and the fact that that rule would penalise participating citizens, who would see their vote cancelled out by abstentions.¹⁶¹

5.2.3. The Second Reading

The second reading concerning the proposals on the national referendum began before the first reading of the other matters, given the great weight that the referendum on regionalisation and the eventual referendum on the European Union Treaty assumed in the Constitutional revision process. On 16 and 17 July 1996, the *CERC* proceeded with the indicative vote of the proposals regarding Article 118 of the Constitution.

The *CERC* rejected the proposals from the *CDS-PP*, **a)** so that the President of the Republic could call a referendum through his own initiative;¹⁶² **b)** so that the President was compelled to call the referendum when it was proposed by the Government or by the Assembly of the Republic through deliberation approved by an absolute majority of the members in full exercise of their office;¹⁶³ **c)** so that the President of the Republic was compelled to submit the passing of treaties for the joint exercise of sovereign powers to national referendum, as provided in

¹⁵⁹ See speeches by José Magalhães (*PS*) and Luís Sá (*PCP*) in *DAR* (II) 11 - *RC*, 26 June 1996, p. 209.

¹⁶⁰ See speech by José Magalhães in *DAR* (II) 11 - *RC*, 26 June 1996, p. 211.

¹⁶¹ See speech by Luís Sá in *DAR* (II) 11 - *RC*, 26 June 1996, pp. 213-214.

¹⁶² Nay votes from *PS*, *PSD* and *PCP* and yea votes from *CDS-PP* [*DAR* (II) 14 - *RC*, 17 July 1996, p. 252].

¹⁶³ Same voting.

Article 7 of the Constitution.¹⁶⁴ The *CERC* also rejected the proposals from the *PSD* and the *JSD*, so that only the Assembly of the Republic, and not the Government, had the power to propose referendums.¹⁶⁵

As for the popular initiative of the referendum, the *CERC* rejected the proposal from the *PEV* to make it possible to have a referendum by direct initiative of citizens addressed to the President of the Republic, without specifying the number of subscribers needed for that.¹⁶⁶ The proposal from the *PS* stating that 100,000 citizens could address a draft referendum directly to the President of the Republic was approved, without obtaining the two-thirds majority needed to pass.¹⁶⁷

The *CERC* passed a proposal so that the citizens could propose a referendum to the Assembly of the Republic¹⁶⁸ without any conclusion about the number of signatures required. The proposal from the *PCP* that the Assembly of the Republic had to decide on the popular initiative within the time limit of 60 days was not welcomed, having been reformulated as suggested by Vital Moreira, in order to establish the setting of a time limit for the law. It was approved, however, without obtaining the necessary two-thirds majority.¹⁶⁹ The proposals from the *PS* and the *PCP* were approved unanimously. These included the referendum proposals passed by the Assembly of the Republic and by the Government, which had only matters regarding their respective responsibilities as the subject [*DAR* (II) 14 - *RC*, 17 July 1996, p. 259]. The referendum law already contained such a rule.

As for the electoral universe, the *PS* introduced a new proposal in order that Portuguese citizens who lived in Member States of the European Union could take part in referendums on matters concerning rule by the treaties referred in Article 7(6) of the Constitution, in other

¹⁶⁴ Nay votes from the *PS* and the *PSD* and yea votes from the *CDS-PP* and the *PCP* [*DAR* (II) 14 - *RC*, 17 July 1996, p. 283]. The *CDS-PP* reformulated the proposal, adding reference to Article 7 of the Constitution, through *PCP*'s suggestion, to make the yea votes from this party possible.

¹⁶⁵ Nay votes from the *PS*, the *PCP* and the *CDS-PP* and yea votes from the *PSD* [*DAR* (II) 14 - *RC*, 17 July 1996, p. 283].

¹⁶⁶ Nay votes from the *CDS-PP*, yea votes from the *PEV* and Vital Moreira (*PS*), and abstentions from the *PS*, the *PSD* and the *PCP* [*DAR* (II) 14 - *RC*, 17 July 1996, p. 254].

¹⁶⁷ Yea votes from the *PS*, nay votes from the *CDS-PP* and the *PEV* and abstentions from the *PSD* and the *PCP* [*DAR* (II) 14 - *RC*, 17 July 1996, p. 254].

¹⁶⁸ Yea votes from the *PS*, the *PSD*, the *PCP* and the *PEV* and nay votes from the *CDS-PP* [*DAR* (II) 14 - *RC*, 17 July 1996, p. 255].

¹⁶⁹ Yea votes from the *PS*, the *PCP*, and the *PEV* and abstentions from the *PSD* and the *CDS-PP* [*DAR* (II) 14 - *RC*, 17 July 1996, p. 258].

words, the agreements for the exercise of joint powers needed to construct and deepen the European Union [DAR (II) 14 – RC, 17 July 1996, p. 259]. That proposal opposed the PSD one, which called for a more general right to vote in national referendums for the Portuguese citizens. Both proposals were rejected.¹⁷⁰

As to the widening of the substantial scope of the referendum, proposals were rejected **a**) from the independent members of the PS Parliamentary Group, to add all the matters included in the exclusive legislative responsibility of the Assembly of the Republic (Article 167), without prejudicing the exceptions expressly foreseen in the Constitution¹⁷¹ **b**) from the PSD, to add all matters included in the exclusive responsibility of Parliament (Article 167) except for military ones [paragraphs d), e), m) and p)];¹⁷² from the CDS-PP, to include a legal framework for the creation, abolition and territorial modification of local authorities;¹⁷³ the rules governing the financial relationships between the State and the autonomous regions, the statute of local authorities, including the local finances;¹⁷⁴ **c**) from the JSD, to hold referendums on matters regarding the duties of national defence, with a view to a referendum on the compulsory nature of military service;¹⁷⁵ **d**) from the independent deputies from the PS, to add all the matters included in the political and legislative responsibilities of the Assembly of the Republic (Article 164) apart from the exceptions expressly foreseen in the Constitution.¹⁷⁶

The proposal from the PS to widen the scope of the national referendum in order to include the topic regarding the educational system

¹⁷⁰ Nay votes from the PS and the PCP and yea votes from the PSD and the CDS-PP. The proposal from the PS had nay votes from the PSD, the PCP and the CDS-PP and yea votes from the PS [DAR (II) 14 - RC, 17 July 1996, p. 282].

¹⁷¹ Nay votes from the PSD, the PCP and the CDS-PP, and yea votes from the PS [DAR (II) 14 - RC, 17 July 1996, p. 284].

¹⁷² Nay votes from the PS and the PSD, yea votes from the PSD and Cláudio Monteiro (independent from the PS) and abstentions from the CDS-PP [DAR (II) 14 - RC, 17 July 1996, p. 284].

¹⁷³ Nay votes from the PS and yea votes from the PSD, the CDS-PP and Cláudio Monteiro [DAR (II) 14 - RC, 17 July 1996, p. 284].

¹⁷⁴ Nay votes from the PS and the PSD and yea votes from the CDS-PP and Cláudio Monteiro [DAR (II) 14 - RC, 17 July 1996, p. 285]. The CDS-PP supported the inclusion of these matters in the exclusive legislative responsibilities of the Assembly of the Republic.

¹⁷⁵ Nay votes from the PS, the PSD, the CDS-PP and the PCP and one yea vote from Cláudio Monteiro in the absence of the authors [DAR (II) 14 - RC, 17 July 1996, p. 285].

¹⁷⁶ Nay votes from the PS, the PSD, the CDS-PP and the PCP, and one yea vote from Cláudio Monteiro [DAR (II) 14 - RC, 17 July 1996, p. 285].

(Article 167i)¹⁷⁷ and the proposal from the *PSD* to cut the word ‘namely’ in Article 118(3), so that only matters explicitly referred in the Constitution were excluded from referendum, were both passed.¹⁷⁸ As for the referendum on treaties and international conventions, there were rejections **a)** from the *CDS-PP*, which made it possible to hold referendums on important issues concerning the national interest included in treaties and international conventions whose responsibility of approval belonged to the Assembly of the Republic (Article 164j);¹⁷⁹ **b)** from the *CDS-PP*, so that the approval of treaties themselves should be the subject of referendum, since it gave international organisations some responsibilities of the sovereignty organs of the Portuguese State;¹⁸⁰ **c)** from the *PCP*, for making it possible to hold referendums on treaties concerning the integration process in the European Union, in order to also allow the referendum on treaties in force in Portugal.¹⁸¹

A proposal from Vital Moreira that synthesised the *PS* and the *PSD* proposals was passed. The *PS* proposed that the referendum could have as its subject ‘questions concerning matters’ that should be the object of conventions or treaties, while the *PSD* referred to ‘decisive issues’ of the treaties with Portuguese participation in international organisations. The synthesis would include a reference to ‘important issues concerning the national interest that should be the object of international agreements, pursuant to Article 164j, except when they concern peace or the rectification of borders’.¹⁸² Still regarding Article 118, the *CERC* rejected the proposals **a)** from the *JSD*, to eliminate the prior review of Constitutionality and legality of the referendum, and **b)** from the *PSD*, so that the prior review would give way to a mere opinion from the Constitutional Court.¹⁸³

5.2.4. The *PS/PSD* Political Agreement

¹⁷⁷ Yea votes from the *PS*, the *PSD* and the *CDS-PP* and nay votes from the *PCP* [*DAR* (II) 14 - *RC*, 17 July 1996, p. 285].

¹⁷⁸ Unanimously approved [*DAR* (II) 14 - *RC*, 17 July 1996, p. 302].

¹⁷⁹ Nay votes from the *PS* and the *PSD*, yea votes from the *CDS-PP* and Cláudio Monteiro and abstentions from the *PCP* [*DAR* (II) 14 - *RC*, 17 July 1996, p. 287].

¹⁸⁰ Nay votes from the *PS* and the *PSD* and yea votes from the *CDS-PP* and the *PCP* [*DAR* (II) 15 - *RC*, 18 July 1996, p. 300].

¹⁸¹ Nay votes from the *PS* and the *PSD*, yea votes from the *PCP* and abstentions from the *CDS-PP* [*DAR* (II) 15 - *RC*, 18 July 1996, p. 301].

¹⁸² Yea votes from the *PS* and the *PSD* and nay votes from the *CDS-PP* and the *PCP* [*DAR* (II) 15 - *RC*, 18 July 1996, p. 303].

¹⁸³ Nay votes from the *PS*, the *PCP* and the *PEV* and yea votes from the *PSD* [*DAR* (II) 15 - *RC*, 18 July 1996, p. 303].

On 7 March 1997, the leaders of the *PS* (António Guterres) and the *PSD* (Marcelo Rebelo de Sousa) and the respective parliamentary leaders (Jorge Lacão and Luís Marques Mendes) signed a political agreement for Constitutional revision in a public ceremony. This agreement was controversial and caused great turbulence within the Socialist Party. As a consequence, Vital Moreira left Parliament and the chairmanship of the *CERC*, and Jorge Lacão also felt compelled to resign from the post of parliamentary leader of the *PS*.¹⁸⁴

Regarding the referendum, both parties agreed **a)** to admit referendums by popular initiative addressed to the Assembly of the Republic; **b)** to make it possible to hold referendums on matters included in treaties to celebrate, specifically allowing a referendum on European issues; **c)** to allow the participation of Portuguese citizens registered to vote outside the national territory in referendums that address matters of specific concern to them. To that effect, citizens registered up to 31 December 1996 were immediately considered as voters, as well as those that came to be considered as having ties that effectively link them to the Portuguese community, by a law passed by a two-thirds majority.

5.2.5. *CERC*'s Work after the *PS/PSD* Agreement

After the agreement for Constitutional revision between the *PS* and the *PSD*, the *CERC* resumed its work on 11 April 1997, passing the proposals **a)** from the *PSD* and the *CDS-PP* to include in Article 10, the referendum as one of the ways to exercise political power by the people, side by side with the universal, equal, direct, secret and periodic suffrage [*DAR* (II) 75 – *RC*, 16 April 1997, p. 2156]; **b)** from the *PSD*, with drafting improved in the *CERC*, to include within the powers of the members of Parliament (Article 159) the introduction of draft resolutions, namely for referendums, given that the deliberations of the Assembly of the Republic regarding the calling of referendums should assume the form of a Resolution [*DAR* (II) 104 – *RC*, 18 June 1997, p. 3082]; **c)** from the *PS* and the *PSD*, to introduce in Article 170 a reference to the popular initiative on referendums, given that, in that same rule, the possibility of legislative initiatives introduced by citizens was foreseen.¹⁸⁵

¹⁸⁴ Jorge Lacão substituted Vital Moreira as chairman of the *CERC*. For details on the negotiations of the agreement see Sousa (1997, pp. 49-62).

¹⁸⁵ Yea votes from the *PS* and the *PSD*, and abstentions from the *PCP* [*DAR* (II) 107 - *RC*, 21 June 1997, p. 3142]. Luís Sá justified the *PCP*'s abstention for disagreeing with the indefinite terms foreseen in the citizens' legislative initiative.

In the *CERC* session of 12 June 1997, the *PS* and the *PSD* introduced two new proposals for Article 118 as a consequence of the political agreement for Constitutional revision: **a)** to improve the drafting of No. 1, according to which the national referendum be called by decision of the President of the Republic, in cases provided for and as laid down by the Constitution and the law, following a proposal from the Assembly of the Republic or the Government in relation to matters that fall under their respective responsibilities; **b)** to add a new item, according to which, the referendum may also be held by the citizens' initiative when submitting a request to the Assembly of the Republic. Such requests shall be submitted and considered under the terms and within the time limits laid down by law.¹⁸⁶

In that session, José Magalhães (*PS*) introduced a single *PS/PSD* proposal in order to allow citizens living abroad to participate in national referendums, provided the citizens who resided abroad were properly registered to vote under the provisions of Article 124(2), and are called upon to take part in referendums that addressed matters specifically concerning them.¹⁸⁷ Article 124(2) would concern the election for the President of the Republic, and it would establish that the right to vote of citizens living abroad would be ruled by law, in consideration of the existence of ties effectively linking them to the Portuguese community [*DAR* (II) 102 – *RC*, 12 June 1997, p. 3009].

Still regarding the possibility of residents abroad participating in national referendums, the *PS* and the *PSD* proposed that this should be included in the responsibilities of the Constitutional Court (Article 225). This would involve the prior review of Constitutionality and legality of the national, regional and local referendums, including the judgement of the requirements regarding the electoral universe. It was unanimously approved [*DAR* (II) 111 – *RC*, 28 June 1997, p. 3268].

5.3. The Constitutional Rules Passed

The debate in the plenary sittings confirmed the positions taken by the several parties in the *CERC*. Thus, the proposals of the *CDS-PP* and the *PCP* regarding Article 118 were rejected, with the proposals in the *CERC* being passed by an indicative two-thirds majority. In addition to

¹⁸⁶ The first proposal was approved unanimously. The second received the yea votes from *PS*, *PSD* and *PCP*, the nay votes from *CDS-PP* and the abstentions from *PEV* [*DAR* (II) 102 - *RC*, 12 June 1997, p. 2992].

¹⁸⁷ The proposal had the yea votes from *PS*, *PSD* and *CDS-PP* and the nay votes from *PCP* [*DAR* (II) 102 - *RC*, 12 June 1997, p. 3012].

the introduction of an obligatory referendum on the institution of the administrative regions, which will be treated further ahead, the Constitutional revision of 1997 significantly altered the extent of the Constitutional rules of the national referendum.¹⁸⁸

The most important innovations introduced were as follows:¹⁸⁹

- 1) The inception of the referendum by the citizens' initiative addressed to the Assembly of the Republic. That request shall be submitted and considered under the terms and within the time limits laid down by law [Articles 118(2) and 170(1)(3)].
- 2) The acceptance of referendums on matters regarding integration in the European Union, through the admission of referendums on important issues concerning national interest that should be the object of international agreement, except when they concern peace or the rectification of borders [Articles 118(5) and 164j)].
- 3) The passing of the rule according to which the referendum shall only be binding in the event that the number of voters exceeds half of the number of registered electors [Article 118(11)].
- 4) The recognition of the citizens who reside abroad to have the right to vote in referendums that address matters of specific concern to them. The electoral universe includes the citizens registered abroad up to 31 December 1996 and those that are considered as having ties that effectively link them to the Portuguese community [Articles 118(12), 124 and 297].
- 5) The attribution to the Constitutional Court of the responsibility to previously review requirements concerning the electoral universe of the referendum [Article 225(2)f)].

Although less significant, the plenary passed other provisions:

- 6) Article 10 was amended to contain a reference to the referendum as one way of exercising political power by the people, providing that the people shall exercise political

¹⁸⁸ On the Constitutional system passed in 1997, see Canas (1998, pp. 7-46) and Miranda & Medeiros [2007 (II) pp. 295-313].

¹⁸⁹ The Constitutional revision of 1997 altered the numbering of some articles of the Constitution. Article 118 changed to 115, 124 to 121, 159 to 156, 164 to 161, 167 to 164, 170 to 167, and 225 to 222. The above mentioned numbers were the previous ones.

power by means of universal, equal, direct, secret and periodic suffrage, referendum and the other forms provided for in the Constitution.

- 7) Article 118(1) made it clear that the Assembly of the Republic and the Government could only propose draft referendums to the President of the Republic on matters included in the respective responsibilities.
- 8) The cast of matters excluded from the referendum started to be categorical, due to the suppression of the adverb 'namely' in Article 118(3);
- 9) The referendum on the bases of the educational system was allowed [Articles 118(4) and 167i)].
- 10) No. 6 of Article 118 (previously No. 4) was improved. It had the following drafting: each referendum shall only address one matter. Questions shall be objectively, clearly and precisely formulated, by soliciting yes or no answers, and shall not exceed the maximum number to be laid down by law. The law shall also lay down the other terms governing the formulation and holding of referendums.
- 11) The introduction of draft resolutions, namely of referendums within the powers of MPs was included (Article 159b).

The Constitutional revision of 1997, bringing more matters under the exclusive legislative responsibility of the Assembly of the Republic, consequently extended the matters excluded from the scope of the referendum. Since then, the Constitution excluded referendums on rules governing: **a)** the appointment of members of European Union bodies, with the exception of the Commission; **b)** the Republic's intelligence system and State secrets; **c)** the drawing up and organisation of the budgets of the State, the autonomous regions and local authorities; **d)** the national symbols; **e)** the finances of the autonomous regions; **f)** the police forces and security services; **g)** the organisational, administrative and financial autonomy of the President of the Republic's support services (Article 164p).¹⁹⁰

6. From the Constitutional Revision of 1997 to the Referendums of 1998

6.1. Antecedents

¹⁹⁰ See the debates and voting in the plenary sittings in *DAR* (I) 94, 16 July 1997, pp. 3379-3380; 95, 17 July 1997, p. 3461; 100, 24 July 1997, pp. 3754-3756; 104, 31 July 1997, pp. 3997-3998 and 4005.

The Constitutional revision of 1997 revived already existing proposals for referendums, decisively influencing their work and determining, to great extent, their approved texts. The revision process was induced, since the very beginning, by the claim by the right wing parties that a referendum was necessary to institute the administrative regions. This gave rise to a special regime for referendums on regionalisation. In addition, since 1992, several political forces, from the left to the right, demanded a referendum on Portuguese participation in the European integration process.

In 1997, all the parties agreed to hold a referendum on European issues, with differences remaining on what issues should be submitted to referendum. On 20 December 1996, the *PSD* introduced Draft Resolution No. 38/VII in the Assembly of the Republic, asking for a referendum on the alteration of the law on abortion. Soon after the Constitutional revision, on 3 September 1997, by which time it looked certain that one or more referendums would be held in a short term, it was deemed urgent to pass legislation to adapt the never applied Law No. 45/91, of 3 August, to the new Constitutional rules of the national referendum.

6.2. The New Organisational Referendum Law

6.2.1. The Introduced Initiatives

On 6 October 1997, the *PSD* introduced the first initiatives to change the Organisational Referendum Law: Bill No. 416/VII, which was intended to adapt the current law to the new Constitutional rules [*DAR* (II-A) 3, 17 October 1997, pp. 17-19], and Draft Resolution No. 66/VII, which established the requirements of the referendum from a popular initiative in Parliament's Rules of Procedure [*DAR* (II-A) 3, 17 October 1997, p. 59]. On the same day, 6 October 1997, the *PSD* introduced Draft Resolution No. 67/VII, asking for a referendum on the revision of the European Union Treaty.

A few days later, on 9 October 1997, the socialist Government introduced Bill No. 145/VII to amend the Organisational Referendum Law [*DAR* (II-A) 3, 17 October 1997, pp. 30-58, corrected in *DAR* (II-A) 18, 19 December 1997, pp. 243-244], based on a draft drawn by Luís Barbosa Rodrigues (1998) upon the Government's request. On 11 November 1997, the *CDS-PP* introduced Bill No. 429/VII [*DAR* (II-A) 11, 15 November 1997, pp. 212-214].

6.2.2. The Parliamentary Debate

On 19 November 1997, Barbosa de Melo drew an Opinion on all of the legislative initiatives introduced, [*DAR* (II-A) 13, 24 November 1997, pp. 243-248] synthesising the main subjects in the debate: **a)** the rules for the popular initiative of the referendum, namely the minimum number of signatures required, the organisation of the proposing group and the rules of procedure; **b)** the prior review of Constitutionality and legality of the draft referendum, regarding the procedure and time limits for the Constitutional Court decision, the scrutiny of the electoral universe and the effects of that decision; **c)** the terms of recognition of the right of the citizens who reside abroad to vote in national referendums; **d)** the participation of the citizens' groups in the campaign for the referendum; **e)** the effects of the referendum in the cases of affirmative or negative answers; and **f)** the special rules for the referendum on the institution of administrative regions.

The debate on the legislative initiatives took place during the plenary sittings of 20 November 1997 [*DAR* (I) 16, 21 November 1997, pp. 614-638] and the voting was on the 27th. The *PS*, the *PSD* and the *CDS-PP* made the respective bills viable with mutual abstentions, while the *PCP* and the *PEV* voted against all the initiatives introduced by the other parties [*DAR* (I) 19, 28 November 1997, pp. 711-712). This position was essentially due to the rules regarding the referendum on the administrative regions, which was also under debate. That debate was based on options taken in the Constitutional revision, in spite of the *PCP*'s opposition.

The detailed debate was held on 4 March 1998 [*DAR* (I) 44, 5 March 1998, pp. 1470-1495].¹⁹¹ On that occasion, the understanding between the *PS* and the *PSD* as to the referendums to hold and their respective timings was already clear. Both parties agreed to propose to the President of the Republic the holding of a referendum on the decriminalisation of abortion at the end of the first semester of 1998, and to hold referendums on regionalisation and European integration in the last quarter of that year. The perspective of those referendums, which were convenient to both parties, was very influential in the final solutions passed by law.

The detailed debate followed the preparatory work of the Committee, and focussed on the proposals that the parties wanted to keep for the voting. The main divergences among the parties became very clear

¹⁹¹ As laid down in Article 168(4) of the Constitution, the detailed debate of the referendum law happens obligatorily during a plenary sitting.

at this point. The *PS* and the *PSD* agreed to remove the prohibition of any act to call or hold a referendum within three months of holding a referendum, as laid down in Article 8 of the law in force. The *PCP* was opposed to this idea.¹⁹² The aim was to achieve a schedule in which the referendums could coincide in a short time, and to allow more than one national referendum to be held in the same day.

The text passed the demand of 75,000 signatures for the popular initiative of the referendum. The *PCP*, which proposed 25,000, was against this proposal, which obtained favourable votes from the *PS*, the *PSD* and the *CDS-PP*.¹⁹³ The initiative must explicitly enclose the question or questions to submit to the voters and the identification of the acts of procedure in the Assembly of the Republic. When there is no procedure for any act on which a referendum can happen, the popular initiative must enclose a draft on the matter submitted to the referendum.¹⁹⁴ The proposals for shortening the time limits introduced by the *CDS-PP* were rejected, having just obtained the support of the *PSD* and its proponents [*DAR* (I) 44, 5 March 1998, pp. 1475-1476].

The *PCP* and the *CDS-PP* strongly contested a last minute proposal from the *PS* and the *PSD* as to party participation in referendum campaigns. Law No. 45/91, of 3 August, in its Article 31(2), lays down that the political parties taking a position on the subjects submitted to the electors would carry out the campaign. According to the proposed alteration, the campaign would be carried out by the parties or coalitions that declared their intention to participate in the explanation of the subjects submitted to the electors. Thus, the parties would always have access to means of campaigning, namely on the radio and in television, even if they did not support any of the positions in question. The *PCP* and the *CDS-PP* contested such a possibility because, in their opinion, it could prejudice the conditions of equality that should be insured between the positions of yes and no.¹⁹⁵ However, the reason for that proposal was precisely the internal division of the *PS* and the *PSD* as to the referendum on the decriminalisation of abortion. For that reason, the *CDS-PP* and the *PCP* proposals to maintain the rule then in force had the yea votes from

¹⁹² See speech by António Filipe (*PCP*) in *DAR* (I) 44, 5 March 1998, p. 1471.

¹⁹³ The proposal from the *PCP* was rejected with nay votes from the *PS*, the *PSD* and the *CDS-PP* and yea votes from the *PCP* and the *PEV* [*DAR* (I) 44, 5 March 1998, p. 1474].

¹⁹⁴ The *PCP* and the *PEV* voted against these demands [*DAR* (I) 44, 5 March 1998, p. 1474].

¹⁹⁵ See speeches by António Filipe (*PCP*) and Jorge Ferreira (*CDS-PP*) in *DAR* (I) 44, 5 March 1998, pp. 1476-1479.

the *PCP*, the *CDS-PP* and the *PEV* and nay votes from the *PS* and the *PSD* [*DAR* (I) 44, 5 March 1998, p. 1480].

The same question arose concerning the participation of citizen groups in the referendum campaign because the proposed formulation was identical. In other words, 5,000 citizens could constitute a group to intervene in the campaign, bearing in mind that they would take part in the explanation of the subjects submitted to referendum, even without a concrete position on these subjects. The proposals from the *PCP* and the *CDS-PP* were rejected, having had yea votes from these parties and the *PEV* and nay votes from the *PS* and the *PSD*. The proposal passed with diametrically opposed votes [*DAR* (I) 44, 5 March 1998, p. 1481].

The proposal for Article 243 concerning the duty of the Assembly of the Republic in the case of a negative answer also had the *PCP*'s disagreement. The Government bill initially Stated that the Assembly of the Republic or the Government could not approve an international convention or legislative act corresponding to the questions that had garnered a negative answer with binding effectiveness in the same legislative session, except with the election of a new Assembly of the Republic or new a Government. However, in the final drafting, the *PS* recalled the reference to the same legislative session. Therefore, in the case of a negative answer in the referendum with binding effectiveness, it would be possible to legislate on the same subject only after a new election of the Assembly of the Republic or new referendum with an affirmative answer. This allowed for a fresh referendum. The *PCP* assumed the Government's original proposal, which was rejected. This proposal had yea votes from the *PCP* and the *PEV* and nay votes from the *PS*, the *PSD* and the *CDS-PP*. The proposal that passed had an opposite voting [*DAR* (I) 44, 5 March 1998, p. 1485].

Another divisive subject was the allocation of the broadcasting time. According to the proposal passed, the broadcasting time would be divided into two blocks. One block was divided equally among the parties or coalitions with current parliamentary representation. Another block was divided between the parties without parliamentary representation, and the citizen groups constituted for that effect. In the case of referendums from popular initiatives, the author of the citizen group's initiative shares the first block of broadcasting time in the same position of the parties with parliamentary representation. The *PCP* contested this proposal, arguing that the broadcasting time should be distributed equally between the two opposing positions (yes and no), with the broadcasting time for each position distributed equally among the parties, coalitions and citizen

groups that supported it. The proposal had yea votes from the *PS*, the *PSD* and the *CDS-PP* and nay votes from the *PCP* and the *PEV*. The proposal from the *PCP* obtained the opposite voting [DAR (I) 44, 5 March 1998, p. 1492]. In the final overall vote, the legal framework for the new Organisational Referendum Law had yea votes from the *PS*, the *PSD* and the *CDS-PP* and nay votes from the *PCP* and the *PEV* [DAR (I) 44, 5 March 1998, p. 1492].

6.2.3. Organisational Law No. 15-A/98, of 3 April

The main innovations in the new referendum law (Organisational Law No. 15-A/98, of 3 April) were the following:¹⁹⁶

- 1) The passing of a special legal system on the institution of the referendum on administrative regions, which will be treated ahead [Articles 1(2) and 245 to 251].
- 2) The widening of the material scope of the referendum with the admission of referendums on matters until then excluded, like **a)** the bases of the educational system; **b)** important issues concerning the national interest such as the object of international agreement except when they concern peace or the rectification of borders; **c)** the organisation of the courts and the organisation and responsibilities of the Public Prosecutors Office and their Public Prosecutors; **d)** the organisation and procedures of the Assembly of the Republic and the Government (Article 3).¹⁹⁷
- 3) The prohibition of passing initiatives for the referendum between the dates on which general elections for the sovereignty organs, the self-government bodies of the autonomous regions, local authority bodies and Members of the European Parliament are called and those on which they are held (Article 8).
- 4) The elimination of the prohibition to call or hold a referendum within the first three months after a referendum (Article 8).

¹⁹⁶ For the referendum's legal system after Organisational Law No. 15-A/98, of 3 April, see Canas (1998, pp. 7-46) and Mendes (2006).

¹⁹⁷ The matters referred in c) and d) were expressly excluded by paragraph d) of Article 3, Law No. 45/91, of 3 August. As the Constitutional cast of the excluded matters became categorical with the elimination of the adverb 'namely' in Article 115(4) of the Constitution, that paragraph was removed, which can raise problems (Canas, 1998, pp. 12-13).

- 5) The admission of the referendum by popular initiative in the following terms: **a)** the initiative shall be written; **b)** addressed to the Assembly of the Republic; **c)** subscribed by at least 75,000 citizens registered to vote; **d)** containing the full name and identity card number of all of them;¹⁹⁸ **e)** as well as the question or questions to submit to referendum, with the indication of the acts under consideration in the Assembly of the Republic; **f)** when no act for referendum is being considered, the popular initiative shall include a draft regarding the subject of the referendum; **g)** within the time limit of two days the President of the Assembly of the Republic asks the responsible committee for an opinion on the initiative, setting a time limit for that; **h)** once the opinion is received, he admits the initiative or orders the representative of the citizen group to be notified in order to improve the text within 20 days; **i)** once admitted, the initiative is sent to the responsible committee; **j)** the committee hears the representatives of the proposing citizens for the explanations necessary to understand and formulate the questions; **k)** within the time limit of 20 days, the committee draws the draft resolution and addresses it to the President of the Assembly for scheduling; **l)** the draft resolution shall be scheduled for one of the 10 following plenary sittings; **m)** the initiatives that are not voted do not lapse with the end of the legislature, with the procedure restarting in the next one (Articles 10 and 16 to 22).
- 6) The compulsory nature of the Resolutions of the Assembly of the Republic and the Government proposing referendums to contain the questions to ask and the definition of the respective electoral universe, with this being the object of prior review by the Constitutional Court [Articles 12(2), 24 and 26].
- 7) Extending the time limit given to the President of the Republic to decide on whether to call the referendum from eight to 20 days after the decision of the Constitutional Court verifying the Constitutionality and legality of the draft (Article 34).

¹⁹⁸ The Assembly of the Republic may request the administrative check from public administration by simply authenticating signatures and identifying the subscribers.

- 8) The possibility of changing the day of the referendum in case of dissolution of the Assembly of the Republic or dismissal of the Government [article 35(3)].
- 9) The possibility of participation by citizens residing abroad, including citizens registered up to 31 December 1996 and those that come to be considered by law as having ties that effectively link them to the national community [reference to Articles 121(2) and 297 of the Constitution].¹⁹⁹
- 10) The campaign for the referendum is carried out by **a)** the political parties or coalitions (directly) or through citizen groups or entities designated by them; **b)** groups of at least 5,000 citizens that declare the purpose of taking part in the explanation of the subjects submitted to referendum (Articles 39 to 41).
- 11) The proposal for broadcasting times to be distributed in an equalitarian way between the supporters of the 'yes' and the 'no' camps was defeated. One block of broadcasting times would be distributed among the parties represented in the Assembly of the Republic, which is jointly attributed to the parties that take part in a coalition. Another block would be distributed among the other parties and the citizen groups. In the case of a referendum of popular initiative, the author of the citizen group's initiative shares the first block in the same conditions of the parties or coalitions with parliamentary representation (Article 61).
- 12) The referendum would only be binding in the event that the number of voters exceeded half of the number of registered electors (Article 240).
- 13) The enlargement from 60 to 90 days for the time limit given to the Assembly of the Republic to pass the law or the corresponding international agreement with an affirmative answer from the electorate with binding effect (Article 241).
- 14) The prohibition of the approval by the Assembly of the Republic or the Government of law or international agreement regarding the questions that received a negative answer with binding effect, except new election of the Assembly of the Republic or new referendum with an affirmative answer (Article 243).

¹⁹⁹ In Ruling No. 288/98, of 17 April, the Constitutional Court judged that there would be a specific interest in the emigrants' participation if the legal treatment of the matters would have a particular incidence regarding the interests of Portuguese emigration.

7. Subsequent Evolution

7.1. Abortion, Regionalisation and the European Union - Remission

The entry into force of Law No. 15-A/98, of 3 April, almost one year after the Constitutional revision of 1997, concluded the legal framework needed for the first referendum of the Portuguese democratic period. After the law passed, on 4 March, and following multiple vicissitudes, the Assembly of the Republic passed a resolution approved on 19 March that proposed a referendum on the alteration of the law on abortion, which took place on 28 June of that year. On 8 November, the referendum on regionalisation was held. Its draft had been approved in the Assembly of the Republic on 29 June. An eventual referendum on the European Union Treaties had been imminent in Portuguese political life since the Maastricht Treaty of 1992. It reappeared in 1998 as a true possibility with the Amsterdam Treaty, and again in 2001 with the Nice Treaty. In 2005, there was the European Constitutional Treaty, and finally in 2008 the Lisbon Treaty. However, the referendum was never held.

The referendums on the decriminalisation of abortion, the creation of the administrative regions and participation in the European integration process, defined the future debates and referendum initiatives that were proposed and passed in Portugal as a national referendum. It is therefore justified to analyse in detail each one of these three main themes of the referendum in Portugal in the following chapters. Other unsuccessful referendum proposals were proposed during the last few years. These were always about less peaceful questions such as drug consumption, medically assisted procreation and gay marriage.

7.2. The referendum proposals on the decriminalisation of drug consumption

In 2000, the *CDS-PP* and some *PSD* members belonging to the *JSD*, proposed a referendum on the decriminalisation of drug consumption. On 25 February 2000, the Left Block (*BE*) introduced Bill No. 113/VIII on the separation of narcotic markets and the struggle for drug addiction, aiming to separate the markets between the so-called soft and hard drugs. Soft drugs would become legal, and the public healthcare system could supply substances like heroin and cocaine to the citizens who needed them, under medical supervision. The State would control the trade, importation and distribution of such substances [*DAR* (II-A) 23, 3 March 2000, pp. 479-488]. A few days later, on 2 March, the *PCP*

introduced two bills on the legal system of drugs. Bill No. 120/VIII on the decriminalisation of drug consumption, and Bill No. 119/VIII established the system of administrative sanctions applicable for that consumption. According to the bills, the mere consumption of drugs would not be a crime, with dissuasion used instead of criminal sanctions [DAR (II-A) 24, 15 March 2000, pp. 521-524].

On 11 May, some *PSD* members belonging to the *JSD* introduced Bill No. 210/VIII on 'drugs and the struggle against addictions', supporting the decriminalisation of soft drug consumption, and the medical prescription of other drugs needed by the addicted as a result of their addiction [DAR (II-A) 41, 18 May 2000, pp. 1506-1508]. Finally, on 1 June, the *PS* Government introduced Government Bill No. 31/VIII defining the legal system of drug consumption and the health and social care of people who consume such substances without medical supervision. Drug consumption would be decriminalised, giving way to merely administrative sanctions [DAR (II-A) 47, 8 June 2000, pp. 1594-1599]. The plenary debate was scheduled by the *BE*, which allowed the discussion of all bills already introduced. It took place on 21 June 2000.

During the previous week, on 15 June, the *CDS-PP* introduced Draft Resolution No. 59/VIII proposing a referendum on the decriminalisation of drug consumption. The two proposed questions were the following [DAR (II-A) 50, 17 June 2000, pp. 1658-1659]: '1) Do you agree that the consumption of the so-called soft drugs should stop being punished by the State? 2) Do you agree that the consumption of the so-called soft drugs should stop being considered a crime, giving way to merely administrative sanctions?'

The *CDS-PP* wanted to hold the debate on its referendum proposal on the same day of the debate on the bills, but the *BE* did not accept that proposal. On the eve of the debate, the *JSD* members introduced their referendum proposal, through Draft Resolution No. 63/VIII, including the following questions [DAR (II-A) 51, 24 June 2000, p. 1668]: '1) should the consumption of 'soft' drugs (cannabis and by-products) in establishments expressly authorised for that effect be decriminalised and regulated? 2) Should the medical prescription of 'hard' drugs (methadone, heroin and/or similar substances) to citizens who need them be allowed, with the State controlling the trade, importation and distribution of such substances?'

The proposals had different purposes. The *CDS-PP* wanted to avoid the decriminalisation of drug consumption, which was foreseeable in the bills introduced by the Government, the *PCP*, the *BE* and even the

JSD members. The decriminalisation had wide support in Parliament. The only solution for the *CDS-PP* was to appeal to voters, and this was why it insisted on holding the referendum proposal and the wider debate on the same day. The *JSD* proposal had another purpose, which was to give way to the *PSD* Bill No. 210/VIII. This *JSD* bill did not have universal approval within the *PSD*. On the contrary, the majority of the party and the parliamentary group were clearly against it. Given the divided opinions on the bill, the appeal to hold a referendum was the common denominator able to unite the party.

The *CDS-PP*'s draft referendum was not formally accepted for consideration.²⁰⁰ However, it was present in the debate. The *BE* criticised it with a political declaration²⁰¹ and the *CDS-PP* supported it in the same way.²⁰² In the debate, the idea of referendum was always present having been supported by the *PSD* and *CDS-PP* members and rejected by the others [*DAR* (I) 81, 23 June 2000, pp. 3161-3177 and 3180-3198]. The proposals were not submitted to vote. The bills were sent to the Committee for a fresh discussion, and a replacement text emerged with majority support. On 6 July, the bills from the *BE* and the *PSD* were rejected and those by the Government and the *PCP* were passed.²⁰³ The replacement text passed by the Committee had yea votes from the *PS*, the *PCP*, the *BE* and the *PEV* and nay votes from the *PSD* and the *CDS-PP*.

However, given the lack of prior consultation with the self-government bodies of the autonomous regions regarding a law whose regulation in the regions would be under the responsibility of the legislative assemblies, the President of the Republic vetoed the law on 24 July 2000,²⁰⁴ sending it back to Parliament for further consideration, which happened on 18 October [*DAR* (I) 89, 27 July 2000, pp. 3549-3550]. During this time, the *CDS-PP* and the *PSD* made several appeals for the acceptance of their proposal for referendum. In the plenary sittings of 26 July 2000, when the presidential veto was announced, the *PSD* leader appealed for the referendum with a political declaration [*DAR* (I)

²⁰⁰ The proposal from the *PSD*, introduced only on the eve of the debate had no legal conditions for appreciation.

²⁰¹ See speech by Luís Fazenda in *DAR* (I) 81, 23 June 2000, pp. 3150-3151.

²⁰² See speech by Basílio Horta in *DAR* (I) 81, 23 June 2000, pp. 3155-3156.

²⁰³ The *BE* bill had yea votes from the *BE*, the *PEV* and 14 *PS* members, nay votes from the *PSD*, *CDS-PP* and three *PS* members, and abstentions from the *PS*, the *PCP* and six *PSD* members. The *JSD* bill had only 14 yea votes from *PSD* members, the abstentions from the *BE* and 16 *PS* members, and nay votes from the others. The Government and *PCP* bills had yea votes from the *PS*, the *PCP* and the *PEV*, nay votes from the *PSD* and the *CDS-PP* and abstentions from the *BE*.

²⁰⁴ See the reasons for the veto in *DAR* (II-A), 61, 28 July 2000, p. 1976.

89, 27 July 2000, pp. 3549-3550], thus starting the *PSD* political campaign with the purpose of addressing public opinion.

On that same day, a movement called 'Drug, All for the Referendum' sent a letter to the Assembly of the Republic requesting the suspension of the new appreciation of the law, and the *PSD* and the *CDS-PP* demanded a referendum before the final decision.²⁰⁵ Nobody requested to set the proposals of referendum in the order of business. However, on the day after the debate, 19 July, during the final overall vote, the *PSD* and the *CDS-PP* introduced a proposal to add a provision in order to make the introduction of the law conditional on the holding of a referendum. The *PS* refuted that proposal, arguing that it was unconstitutional because the decision on the holding of a referendum required a specific initiative and a specific procedure of approval. For that reason, no law could include a provision where its entry into force was conditional on an eventual referendum, whose initiative could not even be considered by Parliament. The appeal by the *PS* was supported by the *PCP*, the *BE* and the *PEV*. Consequently, the Parliament did not admit the proposal for discussion.²⁰⁶ In the event, Parliament passed Law 30/2000, of 29 November, which decriminalised the consumption of drugs. The proposals for referendum introduced by the *PSD* and the *CDS-PP* were never discussed as laid down by the Constitution.

7.3. The Initiative for a Referendum on Medically Assisted Procreation

Another proposal for referendum, this time by popular initiative, referred to the techniques of medically assisted procreation. On 19 July 2005, the *BE* introduced Bill No. 141/X in order to regulate the medical applications of assisted procreation [*DAR* (II-A) 34, 20 July 2005, pp. 62-69]. After that, there three other initiatives were introduced: on 28 July 2005, Bill No. 151/X (*PS*) regulated the techniques of medically assisted procreation [*DAR* (II-A) 47, 7 September 2005, pp. 20-29]; on 6 October, Bill No. 172/X (*PCP*) covered the techniques of medically assisted reproduction [*DAR* (II-A) 55, 13 October 2005, pp. 66-75]; and on 14 October, Bill No. 176/X (*PSD*) was on the legal system of medically assisted procreation [*DAR* (II-A) 59, 22 October 2005, pp. 36-46].

²⁰⁵ See speeches by Telmo Correia (*CDS-PP*) and Durão Barroso (*PSD*) in *DAR* (I) 12, 19 October 2000, pp. 437-439 and 440-441.

²⁰⁶ See speeches from Luís Marques Guedes (*PSD*) and Telmo Correia (*CDS-PP*) supporting the proposal and from Jorge Lação (*PS*), António Filipe (*PCP*) and Luís Fazenda (*BE*) refuting it for being unconstitutional [*DAR* (I) 13, 20 October 2000, pp. 489-491].

All these drafts were discussed in plenary sittings, passing the general principles on 10 November 2005,²⁰⁷ and then sent to the Health Committee for a detailed discussion, which finished on 23 May 2006.²⁰⁸ On the very same day of the final overall vote, 25 May, a so-called 'Pro Referendum Movement on Medically Assisted Procreation' addressed the Assembly of the Republic with a petition signed by 78,333 citizens, asking for the suspension of the final overall vote and the calling of a referendum on that subject. Also on the same day, the *CDS-PP* introduced a request to delay the final overall vote for a week, which was rejected by the *PS*, the *PCP*, the *BE* and the *PEV*, and was supported by the *PSD*, the *CDS-PP* and two *PS* members. In the final overall vote, Law No. 32/2006 of 26 July, on medically assisted procreation, had yea votes from the *PS*, the *PCP*, the *BE*, the *PEV* and eight *PSD* members; the nay votes came from the *PSD*, the *CDS-PP* and three *PS* members; and the abstention from 21 *PSD* members [*DAR* (I) 127, 26 May 2006, p. 5859].

The questions for the referendum proposed by the petition were the following: **1)** Do you agree that the law should allow the creation of more human embryos than those immediately transferred to the mother? **2)** Do you agree that the law should allow the conception of a child without a biological father and mother united through a stable relationship? **3)** Do you agree that the law should allow surrogate motherhood, allowing a woman to become pregnant with a child that was not biologically her own?

The day after, the President of Parliament sent the petition to the Health Parliamentary Committee to give an opinion on its admission. On 6 July, the Committee passed an opinion made by Manuel Pizarro (*PS*), expressing doubts on the admission of the petition and requesting the President to send the petition to the Constitutional Affairs Committee for opinion. On 21 June, the opinion of this last Committee, drawn by Vitalino Canas (*PS*) considered the petition as illegal and unable for admission.

The Referendum Law lay down in article 4(1) that only issues included in international agreements or legislative acts in procedure can be the subject of referendum, since they were not definitively passed.

²⁰⁷ The votings were the following: *BE* bill: yea – *PS*, *PCP*, *BE*, *PEV*, two *PSD*; nay – *PSD*, *CDS-PP*, three *PS*; abstentions – 15 *PSD*. *PS* bill: yea - *PS*, *PCP*, *BE*, *PEV*; nay – *CDS-PP*; abstentions – *PSD*, three *PS*. *PCP* bill: yea - *PS*, *PCP*, *BE*, *PEV*; nay – *PSD*, *CDS-PP*, three *PS*; abstentions – 17 *PSD*. *PSD* bill: yea – *PSD*; nay – *PCP*, *CDS-PP*, *PEV*; abstentions – *PS*, *BE* [*DAR* (I) 127, 26 May 2005, pp. 2823-2824].

²⁰⁸ See Opinion by the Health Committee in *DAR* (II-A) 114, 25 May 2006, pp. 2-17.

Therefore, once the final overall vote of the bills concerning medically assisted procreation was held, the act was definitively passed. It could not be submitted to referendum.

On 22 June, the President of the Assembly of the Republic sent the opinion of the Constitutional Affairs Committee to the Health Committee so that it could finish its own opinion. On 27 June, the Health Committee considered the petition illegal and unable to be admitted.

However, the President did not follow the opinion of the committees and, on 28 June, he decided to notify the representatives of the group of citizens who had taken the initiative giving them the opportunity to perfect the initiative. The reason was that, as laid down by article 17(4) of the Referendum Law, the initiative of citizens should be followed by a bill, which should put forward the subject that they want to submit to referendum.

The *PCP* appealed against that decision, following the opinions passed by the parliamentary committees and considering that the introduction of a bill was useless given that this could not be submitted to referendum since a law on that same subject had been passed. The Constitutional Affairs Committee was requested to give its opinion on this incident. This time, Paulo Rangel (*PSD*) drew an Opinion draft where he refused the appeal, considering that the opinion of the Parliamentary Committees on the admission of initiatives was not binding and that the decision of the President was not final and definitive.

The subscribers of the popular initiative took advantage of the opportunity and addressed Parliament with a draft on medically assisted procreation. President Jaime Gama admitted the initiative of a referendum on 16 July 2006 and sent it to the Health Committee in order for the draft resolution to be drawn as laid down by law.

On 13 October 2006, the Health Committee presented Draft Resolution No. 159/X, which gave a legal form to the popular initiative. It was submitted to the plenary sittings of the Assembly of the Republic and proposed a national referendum on the subject of medically assisted procreation [*DAR* (II-A) 11, 21 October 2006, pp. 26-27]. The debate took place on 15 November 2006 and the initiative was rejected, with nay votes from the *PS*, the *PSD*, the *PCP*, the *BE* and the *PEV*, and yea votes from

the *CDS-PP*, two from the *PS*, one from the *PSD*, and one abstention from the *PS*.²⁰⁹

This initiative was taken by the most conservative sectors of Portuguese society and its purpose was to prevent the passing of legislation for medically assisted procreation. They did not keep, however, within the deadline. After the legislative procedure opened in July 2005 and finished in May 2006, which was when the final overall vote was scheduled, the petition for referendum was presented and requested the suspension of the voting. Once the voting was held, the admission of that initiative was unfeasible. This was the opinion of the Parliamentary Committees, but the President of the Assembly did not follow it and admitted the petition.

In spite of the clear illegality of the proposal, the President preferred to admit it, worried that public opinion would react badly to a refusal based entirely on procedural reasons. He preferred therefore to allow the appreciation of the matter. The proposal was refused, having had only yea votes from the *CDS-PP* and three isolated votes from the *PS* (two) and the *PSD* (one). The same majority, which passed the law on medically assisted procreation, also rejected a referendum that only wanted to refuse that law.

7.4. The Popular Initiative for a Referendum on Gay Marriage

The last attempt to hold a referendum in the first decade of the 21th century regarded the legal admission of gay marriage. It was a popular initiative that wanted to be a last appeal to prevent the passing of legislation on that matter. However, without great expectations as to the result, it was clear from the start that the majority who passed the law would reject the idea of a referendum.

This question arose in 2006 when the *BE* introduced Bill No. 206/X [*DAR* (II-A) 85, 11 February. 2006, pp. 8-10] on 7 February which proposed the alteration of the Civil Code in order to allow gay marriage. It was soon followed on 3 March by the *PEV* which introduced Bill No. 208/X [*DAR* (II-A) 93, 11 March 2006, pp. 9-12] under the title of universal and equal access to marriage. The difference between both initiatives was the right to adopt. While the *BE*, saying nothing, admitted the adoption of children by married people of the same sex, the *PEV*

²⁰⁹ See the debate in *DAR* (I) 20, 16 November 2006, pp. 54-61 and the voting in *DAR* (I) 21, 17 November. 2006, p. 86.

allowed the possibility of adoption only to married people of a different sex.

The discussion on the general principles of both bills took place on 10 October 2008, and both were rejected [*DAR* (I) 12, 11 October 2008, pp. 19-29]. The bill of the *BE* had nay votes from the *PS*, the *PSD* and the *CDS-PP*, abstentions from the *PCP*, the *PEV* and one *PSD* member, and yea votes from the *BE* and the independent MP Luísa Mesquita (ex-*PCP*). The bill from the *PEV* also had nay votes from the *PS*, the *PSD* and the *CDS-PP*, the abstentions of eight *PSD* members and Luísa Mesquita, and the yea votes from the *PCP*, the *PEV*, two *PS* and one *PSD* members [*DAR* (I) 12, 11 October 2008, p. 42]. The reason for the different voting was the different option of each bill regarding the adoption.

The rejection of the initiatives by the *PS*, which held the absolute majority, was justified by reasons of timing. The *PS* affirmed itself in favour of gay marriage, but considered that the civil law should only be changed in that sense after new elections, when that proposal had appeared expressly in the candidates' programmes.²¹⁰ Consequently, the bills introduced in the X Legislature were rejected and nobody proposed any referendum.

In the XI Legislature, which began in 2009, the question was different, given that the *PS*, which remained as a major party although without an absolute majority, decided to move forward with the legal acceptance of the gay marriage, excluding, however, the possibility of adoption by gay couples. The right wing parties (*PSD* and *CDS-PP*) maintained their opposition. The *PEV* evolved to the position of the *BE*, supporting the possibility of adoption. The *PCP* adhered to the solution proposed by the *PS* Government, admitting marriage but not adoption.

The legislative procedure was resumed on 16 October 2009, with the introduction of Bill No. 14/XI by the *BE* [*DAR* (II-A) 4, 12 November 2009, pp. 40-43]. The *PEV* introduced Bill No. 24/XI on 30 October, [*DAR* (II-A) 4, 12 November 2009, pp. 71-74] and the *PS* Government introduced Government Bill No. 7/XI on 21 December [*DAR* (II-A) 18, 22 December 2009, pp. 37-40]. The *PSD* introduced Bill No. 119/XI on 4 January 2010 [*DAR* (II-A) 21, 7 January 2010, pp. 62-65] proposing the existence of a civil union registered between two persons of

²¹⁰ See speech by Jorge Strecht in *DAR* (I) 12, 11 October 2008, pp. 25-26.

the same sex as an alternative to marriage.²¹¹ The discussion on the general principles was scheduled for 8 January 2010.

Meanwhile, on 5 January 2010, the President of the Assembly of the Republic received a popular initiative of referendum, signed by 90,785 citizens (according to the account of the proponents). They proposed the holding of a national referendum through which the Portuguese citizens could say whether they agreed or not that marriage could be celebrated between persons of the same sex. The President admitted the initiative immediately and sent it urgently to the Constitutional Affairs Committee to issue an opinion, within 24 hours. The entire procedure, necessary to make the joint discussion of the referendum and the bills proposed on 8 January, was now ready to begin.

The Committee did just that. The President dispensed the legal time limit of two days to send the initiative to the Constitutional Affairs Committee, sending it on the very same day. The Committee did not use the time limit of 20 days to issue its opinion on the admission of the initiative, doing it in 24 hours. The Assembly did not use the legal procedure to verify the veracity of the signatures, giving credit to the proponents. The procedure that followed was exceptional. Having in mind the popular nature of the initiative and the social and political sensibility of the subject, Parliament wanted to avoid any accusation of having refused the debate on the initiative because of formal reasons. Everything was put in place to allow the debate on 8 January.

The Constitutional Affairs Committee considered there were no Constitutional or legal obstacles to the admission of the initiative²¹² and, according to its responsibility, after first consulting the representatives of the proponents, it drew Draft Resolution No. 50/XI [*DAR* (II-A) 22, 18 January 2010, pp.10-11] to submit to the plenary. The draft included the following question: ‘Do you agree that marriage could be celebrated between persons of the same sex?’

The referendum was not at the centre of the parliamentary debate of 8 January, which was opened by the Prime Minister, José Sócrates, who introduced the Government bill. The only express support

²¹¹ On the contents and Constitutional framework of the initiatives introduced, see the opinion drawn for the Constitutional Affairs Committee by António Filipe (*PCP*) in *DAR* (II-A) 23, 9 January 2010, pp. 2-22.

²¹² See the opinion drawn by António Filipe (*PCP*) for the Constitutional Affairs Committee in *DAR* (II-A) 23, 9 January 2010, pp. 44-48.

for the referendum came from the *CDS-PP*.²¹³ The other parties, did not even refer to it, or did so briefly just to register their positions. Being sure that the proposal would be defeated, given the known positions of the *PS*, the *BE*, the *PCP* and the *PEV*, the debate would centre on the introduction of gay marriage, and the different conceptions of the parties regarding that question, and not the referendum. The popular initiative had been taken by the most conservative sectors of Portuguese society, some of them tied to the Catholic Church, having the clear support of the *CDS-PP* and the more discreet support of the *PSD*. The aim of the initiative was to put pressure on Parliament to block the passage of legislation enabling gay marriage, but it had no prospect from the beginning of being politically viable.

The Government proposal was passed with yea votes from the *PS*, the *PCP*, the *BE* and the *PEV*, nay votes from the *PSD*, the *CDS-PP* and two *PS* members, and seven abstentions from *PSD* members. The other initiatives were rejected.²¹⁴ The draft resolution for the referendum was also rejected, with yea votes from the *PSD*, the *CDS-PP* and two *PS* members, nay votes from the *PS*, the *BE*, the *PCP*, the *PEV*, and the abstentions from three *PSD* members [*DAR* (I) 20, 9 January 2010, p. 59].

7.5. The Alterations to the Referendum Law

The only alteration to Law No. 15-A/98, of 3 April, happened in 2005. This happened because of controversies surrounding the call of a second referendum on the decriminalisation of abortion. On 20 April 2005, the Assembly of the Republic passed the proposal for a new referendum on that subject. However, on 5 May, the President of the Republic, by message addressed to the Parliament, announced the refusal of that proposal. In response, the *PS* introduced Bill No. 122/X on 28 June. The party aimed at holding that referendum in 2005 and this bill facilitated the procedures to hold referendums.

The Assembly of the Republic passed that bill in general terms on 8 July [*DAR* (I) 40, 9 July 2005, pp. 1782-1783] and in a final overall vote on 28 July 2005 [*DAR* (I) 42, 29 July 2005, pp. 1917-1918] with yea votes from the *PS* and the *BE* and nay votes from the other parties. Therefore, Organisational Law No. 4/2005, of 8 September, changed

²¹³ See speech by José Ribeiro e Castro in *DAR* (I) 20, 9 January 2010, pp. 35-37.

²¹⁴ The *BE* and *PEV* bills had the same voting: yea – *BE*, *PEV*, eight *PS* and one *PSD* members; nay – *PS*, *PSD*, *CDS-PP*; abstentions – *PCP* and one *PSD* member. The *PSD* bill had yea votes from *PSD* and *CDS-PP*, nay votes from *PS*, *BE*, *PCP*, *PEV*, two *CDS-PP* and one *PSD* members, and abstentions from *PSD* and eight *CDS-PP* members [*DAR* (I) 20, 9 January 2010, p. 59].

several time limits established in the Referendum Law, in the Law of the Electoral Registration and in the Electoral Law for the President of the Republic. The referendum started to be allowed between the 40th and the 180th day after publication of the decree that called it (until then it should happen between the 60th and the 90th day). The new law also changed some intermediate time limits of the Referendum Law and of the Law of Electoral Registration, in order to contain the whole referendary procedure inside the minimum time limit allowed, which was 40 days.²¹⁵ That attempt, however, was fruitless due to the unConstitutionality of the draft referendum. The alterations introduced in the law did not have the intended practical effects.

8. Defining the Portuguese National Referendum

Considering the national referendum, as it is enshrined in Portugal by the Constitution and by the law, in the context of the typologies adopted by several authors as described in Part I, we can define the Portuguese national referendum as follows:

According to Jorge Miranda (1996a, pp. 237-238) it is **a**) internal; **b**) national; **c**) legislative, except in the case of the referendum on European Union, which would be political; **d**) optional, except in the case of the referendum on the administrative regions, which is mandatory; **e**) of parliamentary initiative; **f**) binding; **g**) positive; and **h**) resolute.

According to Maria Luísa Duarte (1987, pp. 207-208) it is **a**) legislative, except in the case of the referendum on the European Union, which would be on an international issue; **b**) national; **c**) optional, except in the case of the referendum on the administrative regions, which is mandatory; and **d**) binding.

According to Butler and Ranney (1978, pp. 23-24), it is a government-controlled referendum because the majority of the Parliament, which supported the Government, has the power to decide whether a referendum will be held. However, the Portuguese Government cannot decide on whether the effect of the referendum is binding or merely advisory, because the binding effect is directly established by the

²¹⁵ Bearing in mind that in the beginning of 2006 there would be the election of the President of the Republic, the *PS* approved in the same Organizational Law No. 4/2005, of 8 September, an alteration to the Electoral Law for the President of the Republic, shortening the minimum antecedence for setting that election from 80 to 60 days, in order to make the referendum possible in 2005.

Constitution. In the case of the creation of the administrative regions, the referendum is Constitutionally required.

Regarding the classifications of Gordon Smith (1976, p. 6), the Portuguese referendum is controlled, having in mind the degree of government control exercised on its holding. However, as to the consequences, as we will see in the next chapters, the first referendum on the decriminalisation of abortion and the referendum on the administrative regions were anti-hegemonic referendums. The second referendum on the abortion was pro-hegemonic.

According to Uleri (1996, pp. 6-7), the Portuguese referendum is **a)** prescribed; **b)** optional, except in the case of the referendum on the creation of the administrative regions; **c)** binding; and **d)** decision-controlling vote, given the coincidence between the promoter of the consultation and the author of the decision put to vote.

Finally, according to LeDuc (2003, p. 39), the Portuguese referendum is **a)** mandatory Constitutional, having in mind the binding effect, and **b)** a resource of the parties, considering the political function of the referendum. Regarding the typology proposed by LeDuc (p. 39) the Portuguese referendum is on public policy questions, except the referendum on the European Union, which would be on an international treaty.