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The Referendum in the Portuguese Constitutional Experience

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Chapter 6

The Question of the Referendum on the European Union

1. The Question of the Referendum on the Maastricht Treaty

1.1. Antecedents

When, on 1 January 1986, Portugal became a member of the European Community, there was no Constitutional possibility of submitting the decision to a referendum, and there was no proposal to make a referendum possible. The political forces that supported the Constitutional introduction of the referendum in Portugal were also enthusiastic supporters of accession to the European Community, so the idea of submitting the decision to a referendum was never even discussed.

The idea of subjecting certain international agreements to a referendum was first suggested in 1975, during discussions about the new Constitution. Jorge Miranda (1975, pp. 82-83), in Article 166 of his draft, proposed the institution of a referendum on international agreements that involved restrictions on sovereignty within their scope of contents. In Miranda's view, these treaties should have been subject to a popular referendum after being passed in Parliament. The essay by Lucas Pires (1975, p. 106), which served as a contribution to the future draft of the Constitution from the *CDS* included, besides several types of referendum, the need for approval through a national plebiscite, of any decision to be taken or already taken, regarding the international integration process, or any privileged agreement with great powers, especially within the military domain. Integration would change the sovereign contract between the people and their representatives, meaning the Portuguese people would become EEC subjects, and the voice should be heard (Urbano, 1998, p. 118). However, none of these ideas were enshrined in the Constitution.

Several voices raised the idea of a referendum in Portugal on the European integration process. On 17 March 1977, calling upon the *PS* Government on its economic policy, the MP Acácio Barreiros from the *UDP*, supported the need of a referendum on the EEC adhesion (*DAR* 87, 18 March 1977, p. 2966). Three months later, on 3 May, he re-affirmed that position during the debate on a *CDS* proposal to create a parliamentary committee on European affairs (*DAR* 104, 4 May 1977, p. 3515). However, that idea did not have any Constitutional support.

In the 1989 Constitutional revision, even after Portuguese adhesion to the EEC, the *CDS* proposed that the conclusion of treaties which transferred State power to an international organisation should be passed by the Assembly of the Republic by a two-thirds majority of members in full exercise of their office. If a treaty in this case did not obtain the two thirds majority, but received the affirmative vote from the absolute majority of the members in full exercise of their office, the President of the Republic could submit the decision to national referendum [*DAR* (Off-print 1/V) 31 December 1987, p. 11]. This proposal was rejected.

The 1989 Constitutional revision introduced the national referendum, but expressly forbid its use to deliberate on international treaties. Article 118(3) of the Constitution excluded matters referred in Article 164, which included the approval of treaties regarding Portuguese participation in international organisations. The question of the referendum on the Portuguese participation in the European Community forced itself onto the political agenda only after the Maastricht Treaty signature in 1992, and it became especially intense with the holding of the French and Danish referendums.

In Portugal, the opportunity to participate in decision-making on the European integration process through referendums was something new, but there were several precedents in Europe. Besides the example that immediately inspired the proposers of a referendum in Portugal, which was undoubtedly the Danish referendum on the Maastricht Treaty on 2 June 1992, the European integration process had several examples of 'European referendums' in different countries.

Soon after the first enlargement process, in 1972, several adhesion treaties were submitted to referendum: in Ireland, on 10 May 1972, with 83% affirmative answers; in Denmark, on 26 September, with 63.5% affirmative answers; in Norway, on the very same day, where the negative answer prevailed, with 54% of the votes cast making it unfeasible for that country to adhere to the European Community. Curiously, France submitted the adhesion treaties of those three countries, and also the accession of Great Britain, to a referendum. It was held on 23 April 1972, and had 68% of the affirmative answers.

In Great Britain there was no referendum on accession, although the Labour opposition demanded one. In October 1971, there was a vote in the House of Commons on the adhesion to the Community, which

resulted in 356 yeas, 244 nays and 22 abstentions. The vote on the ratification itself, on 13 July 1972, was even more finely balanced (301 yeas and 284 nay votes), (Ribeiro, 1994). After the electoral victory of the Labour Party in 1974, the new Prime Minister, Harold Wilson, who had strongly criticised the Conservatives for signing the treaty, arguing that it would be economically disastrous for Great Britain, proposed a national referendum on the renegotiated accession conditions. This took place on 5 June 1975, with 67% of the affirmative votes against 32% of the negative answers.

The Maastricht Treaty sparked a second wave of referendums. The 'yes' vote won easily in Ireland on 18 June, but 'no' prevailed in Denmark on 2 June 1992. In France, on 20 September 1992, there was a narrow victory for the 'yes' campaign (51.04%). A referendum was held on the European Union in Italy on the same day as the 1989 parliamentary elections, with the affirmative answer winning, but without reference to any specific treaty. In Portugal, the idea that it was possible to hold a referendum on the European Union Treaty appeared when the *PS* and the *PSD* recognised that its ratification demanded an extraordinary Constitutional revision.

1.2. The 1992 Constitutional Revision

1.2.1. The Decision

In early May 1992, the President of the *PSD* and the Secretary General of the *PS* openly expressed a common understanding from both parties that the ratification of the Maastricht Treaty would demand a Constitutional revision. Therefore, Cavaco Silva and António Guterres agreed on a Constitutional revision that would be restricted to the provisions in conflict with the treaty, without supporting the idea of a referendum (Magalhães, 1997).

The collision between the Maastricht Treaty and the Constitutional provisions in several countries such as France, Spain, Germany, The Netherlands and Belgium had already led to Constitutional revisions in order to make it viable. That problem also existed in Portugal. The *PSD* and *PS* leaders had two possibilities: to immediately review the Constitution, or to maintain a future Constitutional battle that would lead to an uncertain result. In the end, they decided to review the Constitution.

Meanwhile, other parties proposed that the Constitutional revision should include changes that would enable a referendum for the European Union Treaty. The *PSN*, which had a member in the Assembly

of the Republic between 1991 and 1995 (Manuel Sérgio), introduced a Draft Resolution No. 25/VI on 12 May 1992 to create an Ad Hoc Committee for the Constitutional Revision [*DAR* (II-A) 39, 23 May 1992, p. 760]. On 15 May, the *CDS* proposed that the Assembly of the Republic take powers of Constitutional revision through Draft Resolution No. 26/VI [*DAR* (II-A) 39, 23 May 1992, pp. 760-761]. It must be noted, however, that none of these parties opposed the European Union Treaty. The *PSN* was in favour, and the *CDS* carried out a process of internal debate.

These draft resolutions were discussed on 22 May and they were rejected, with the only affirmative votes coming from the proposers [*DAR* (I) 67, 23 May 1992, pp. 2186-2196]. The *PS* refused to Constitutionally reconfigure the referendum, but admitted to review the Constitution only insofar as it was strictly necessary to make ratification of the Maastricht Treaty possible.²⁷⁷ The *PSD*, which also voted against the referendum, considered that it could only be justifiable if there was a deep division in the Portuguese society about the general problem of being for or against the European Community.²⁷⁸ The *PCP* and the *UDP*, which had not yet decided to support the referendum, argued that it was necessary to hold a wide national debate before any decision on the ratification of the Maastricht Treaty.²⁷⁹

Before long, the question arose again in the Assembly of the Republic. On 26 May, the Government submitted Draft Resolution No. 11/VI to Parliament in order to approve the European Union Treaty signed in Maastricht on 7 February 1992 [*DAR* (II-A) 40 – Supplement, 27 May 1992]. In the admission dispatch to the draft, the President of the Assembly raised doubts about its Constitutionality and admitted it provisionally, requesting an opinion from the Constitutional Affairs, Rights, Freedoms and Guaranties Committee.

A majority passed the opinion, drawn by Rui Machete (*PSD*), on 1 June 1992.²⁸⁰ It considered that the provisions of the treaty on the single currency, the European System of Central Banks, the European Central Bank, the financial, monetary and exchange policies, the electoral capacity, the restrictions to the admission of foreigners from third countries and the issuing of visas might be incompatible with Portuguese

²⁷⁷ See speech by Alberto Costa [*DAR* (I) 67, 23 May 1992, p. 2190].

²⁷⁸ See speech by Rui Machete [*DAR* (I) 67, 23 May 1992, p. 2192-2193].

²⁷⁹ See speeches by João Amaral (*PCP*) and Mário Tomé (*UDP*), [*DAR* (I) 67, 23 May 1992, pp. 2195 and 2192].

²⁸⁰ The opinion got yea votes from the *PSD*, the *PS* and the *CDS* and nay votes from the *PCP*, [*DAR* (II-A) 42, 5 June 1992, pp. 807-808].

Constitutional rules. This opinion summed up the consensus between the two main parties as to the scope of the revision to be made. Before its approval, the President of the Assembly decided to suspend consideration of the draft resolution approval of the treaty until the Constitutional revision procedure, which had begun a few days earlier, was concluded.

Indeed, between 26 and 27 May, the *CDS*, the *PSD* and the *PS* introduced draft resolutions to open an extraordinary Constitutional revision procedure in order to make the ratification of the Maastricht Treaty Constitutionally viable.²⁸¹ In the debate of these drafts, and under the influence of the referendum held two days before in Denmark, the question for a referendum was presented again with the support of the *CDS*.²⁸²

The *PSD* and the *PS* maintained their positions of against such a referendum.²⁸³ The *PCP*, in spite of its vote against all the draft resolutions, favoured holding a referendum for the first time. In their opinion the referendum should be a pre-condition to any type of Constitutional revision.²⁸⁴

The vote took place on 11 June, with the *CDS* draft having been rejected and all the others passed.²⁸⁵ This resulted in Resolution No. 18/92 of 12 June, through which the Assembly of the Republic assumed powers of Constitutional revision [*DAR* (II-A) 135 – Supplement, 12 June 1992].

1.2.2. The European Referendum in the Draft Amendments to the Constitution

Between 11 June and 15 July the Draft Amendments to the Constitution No. 1/VI (*PSD*), No. 2/VI (Mário Tomé), No. 3/VI (*PS*), No. 4/VI (*PCP*), No. 5/VI (*CDS*) and 6/VI (*PSN*) were introduced.²⁸⁶ Four of them proposed that a referendum should be held.

²⁸¹ See Draft Resolutions No. 29/VI (*CDS*), 30/VI (*PSD*) and 31/VI (*PS*), [*DAR* (II-A) 41, 30 May 1992, pp. 781-782].

²⁸² See speech by Adriano Moreira [*DAR* (I) 73, 5 June 1992, pp. 2393-2395].

²⁸³ See speeches by Rui Machete (*PSD*) and Jaime Gama (*PS*), [*DAR* (I) 73, 5 June 1992, pp. 2398-2399 and 2401-2403].

²⁸⁴ See speech by Octávio Teixeira [*DAR* (I) 75, 12 June 1992, p. 2463].

²⁸⁵ With yea votes from the *PSD*, the *PS*, the *CDS* and the *PSN* and nay votes from the *PCP*, the *PEV* and two independent MPs elected in the *PCP* lists (204 votes against 15, which guaranteed the necessary majority of four fifths).

²⁸⁶ All draft amendments to the Constitution are published in *DAR*, Off-print 12/VI, 9 October 1992.

The draft from Mário Tomé (*UDP*) proposed to add a single provision to the Constitution over-riding the interdiction of submitting the ratification of international treaties to referendum, laid down in Article 118(3), in this specific instance. The purpose was to temporarily lift the Constitutional obstacle to a referendum on matters relating to the European Union Treaty.

The *PCP* draft also included a single provision stating that the exclusions laid down in Article 118(3) of the Constitution were not valid regarding changes to the European Community Treaties, including the creation of a European Union. The *PCP* proposed that the only purpose of the Constitutional revision procedure was to make the referendum possible, as it was the only way to carry out a Constitutional revision procedure aimed at removing the Constitutional obstacles to the ratification of the treaty.

The *CDS* proposed to introduce in Article 118 of the Constitution, a provision stating that the President of the Republic should submit the approval of treaties to national referendum when they gave an international organisation the right to exercise powers that previously belonged to the Portuguese State. In addition, they proposed that the approval of conventions and international treaties should not be excluded from the scope of the referendum. Finally, the *PSN* proposed that the European Union Treaty, given its exceptional influence on the destiny of the country, should not be excluded in Article 118(3) of the Constitution.

Thus, the *PCP*, Mário Tomé and the *PSN*, supported the idea that the Constitutional revision should first be used to make the referendum viable. Only if the referendum gave an affirmative answer should it pose the question of changing other provisions in order to adjust the Constitution and the treaty. The *CDS* proposed the revision of other aspects of the Constitution. As for the referendum, they proposed that it should always be compulsory when the transfer of powers for the Portuguese State to an international organisation was under discussion. It was not an exceptional and transitory provision, but a general rule which would also be applied towards the European Union Treaty.

1.2.3. The Constitutional Revision Works

The first meeting of the *CERC* was held on 21 September and its work lasted until 12 November. At the very beginning, the *PCP* introduced a proposal of methodology. According to this proposal, the Committee should only consider proposals of transitory provisions aimed at allowing a referendum on the European Union Treaty. The Committee

should address a report to the President of the Assembly with the discussion of these proposals, requesting the call for a plenary sitting to discuss and vote on them. That proposal was rejected, with nay votes from the *PSD*, the *PS* and the *PSN*, abstentions from the *CDS* and yea votes from the proposers and the *PEV* [*DAR* (II-A) 2 – *RC*, 24 September 1992, pp. 18-24].

After that event closed, the leading question of the referendum was discussed exhaustively during the 7 October session.²⁸⁷ It was submitted in the end to an indicative voting in the *CERC*, with all of the proposals for a referendum being rejected. The *PSD* and the *PS* voted against all of them. The *PCP* and the *CDS* voted in favour of all. The *PSN* abstained in the *CDS* proposal, voted against the *PCP* and Mário Tomé's proposals, and voted affirmatively on its own [*DAR* (II) 11 – *RC*, 29 October 1992, pp. 173-174].²⁸⁸

In the final plenary debate, on 17 November, the question was discussed once again. The *PCP* proposed the previous discussion of the referendum issue. That proposal was refused such as in the *CERC*. During the debate, several voices spoke out on the referendum. João Amaral, who supported the *PCP* proposal, considered that the priority was not the Constitutional revision procedure but the holding of a wide national debate that would conclude with the referendum. That was the reason for the *PCP* proposal for a Constitutional revision that covered only the referendum, with the aim of making this a condition of any institutional procedures that would review the Constitution and ratify the Treaty [*DAR* (I) 14, 18 November 1992, p. 420]. Nogueira de Brito supported the *CDS* proposal, stressing the referendum as one of its main purposes. For that, the *CDS* proposed that the restrictions imposed by Article 118 of the Constitution be removed, thus allowing a referendum on the ratification of international treaties [*DAR* (I) 14, 18 November 1992, p. 423].

The parties that were against the referendum gave less importance to the question in their speeches. Nonetheless, they still referred to it. Costa Andrade (*PSD*) first refuted the proposals to allow a referendum on the Maastricht Treaty alone. He believed that that matter should not be the subject of a referendum. As for the *CDS* proposal, he

²⁸⁷ See speeches by MPs Nogueira de Brito (*CDS*), João Amaral and António Filipe (*PCP*) and Mário Tomé (*UDP*) supporting the referendum, and Rui Machete, Costa Andrade and Luís Pais de Sousa (*PSD*), Almeida Santos, Jorge Lacão and José Magalhães (*PS*) against it [*DAR* (II) 5 – *RC*, 8 October 1992].

²⁸⁸ Mário Tomé did not have the right to vote because he was not a member of the Committee, but he took part in the debate as the author of a proposal.

refused it since it exceeded the scope of the Constitutional revision. The *PSD* wanted to restrict the adjustment made to the Constitution during the creation of the European Union [*DAR* (I) 14, 18 November 1992, p. 438]. Jorge Lacão explained the *PS* position. He criticised the *PCP* proposal, considering it a change of the *PCP* position towards the referendum. As for the *CDS* position, he considered it untenable to support a compulsory referendum [*DAR* (I) 14, 18 November 1992, pp. 439-440].

The destiny of the proposals was decided. After the 1992 Constitutional revision, it continued to be forbidden in the Constitution to hold a referendum on the European Union Treaty. The Treaty itself was passed for ratification on 10 December that same year, with 200 yeas votes (*PSD*, *PS* and Freitas do Amaral) and 21 nay votes (*PCP*, *CDS*, *PEV*, Mário Tomé and Corregedor da Fonseca), [*DAR* (I) 19, 11 December 1992, pp. 697-698].

1.3. The Reasons for the Refusal

The ratification of the Maastricht Treaty was the first time that the question of a referendum on the Portuguese participation in the European integration process was intensively discussed. The opponents of the ratification of the Treaty, encouraged by the negative vote in the Danish referendum and the narrow victory of the affirmative answer in France, saw in the referendum the chance to reject it, or at least, to create trouble for its supporters. They knew that the two main parties in Parliament (*PSD* and *PS*) would no problems approving it.

The request for a referendum on the Maastricht Treaty was widely supported by the public, and not just by opponents of the Treaty. The *CDS*, sustaining an ambiguous position on the Treaty, used the proposal for a referendum as an element of differentiation from the *PS* and the *PSD*, considering it essential to have popular legitimacy regardless of the outcome. But even some voices close to the *PS* and the *PSD*, including the President of the Republic, Mário Soares, supported the referendum as a way to strengthen the legitimacy of Portugal's European choice.

A few years later, José Magalhães (1997) admitted in his Dictionary of the IV Constitutional Revision that, in many countries, supporters of the referendary cause tended to favour the 'no' campaigns. He also Stated that there was a fear of submitting a group of obscure changes that were open to varying interpretations to a referendum. In his view, it was risky: there was too much at stake. As the favourable position was revealed by President Soares several times, the bipartisan refusal can only be understood because the *PS* had, at the time, considerable problems

in consolidating its new leadership, and because the *PSD* was afraid that the referendum would be a motion of no confidence against the Government.

2. The Failed Referendum on the Amsterdam Treaty

2.1. The Referendum in the 1994 Draft Amendments to the Constitution

After the intense controversy about the ratification of the Maastricht Treaty, the idea of a referendum on the European integration would come to be discussed in the Assembly of the Republic some years later, although in a completely different context. In the draft amendments introduced at the time of the failed Constitutional revision in 1994, some provisions foresaw the possibility of submitting questions regarding the European treaties to referendums.²⁸⁹

The Draft Amendment to the Constitution No. 1/VI, from the *PS*, admitted the holding of referendums on issues that were the subject of conventions and treaties regarding Portugal's participation in international organisations, agreements of friendship, defence, military affairs, and others submitted by the Government to the Assembly of the Republic. The exclusion of issues that were the object of conventions or agreements concerning peace or rectification of borders should be kept. However, the *PS* did not propose the possibility of referendums directly on the ratification of agreements, but only on issues included in them. The *CDS*, in its Draft Amendment to the Constitution No. 2/VI, insisted on the proposal that agreements transferring powers from the Portuguese State to international organisations should be submitted compulsorily to referendum. The Draft Amendment to the Constitution No. 3/VI, from the *PSN*, only excluded changes to the Constitution and the issues and acts with a budgetary, tax-related or financial implications from the scope of the referendum. The *PSD* draft did not contain any proposal regarding the referendum, but the Draft Amendment to the Constitution No. 8/VI, subscribed by several members of the *JSD*, proposed referendums on international agreements through which Portugal agreed to jointly exercise the powers needed to construct and strengthen the European Union. The Draft Amendment to the Constitution No. 13/VI, from Luís Fazenda (*UDP*), proposed a compulsory referendum to approve agreements on the participation of Portugal in international organisations where powers would be transferred from the Portuguese State. Finally, the Draft

²⁸⁹ All drafts are published in *DAR*, Off-print 24/VI, 7 November 1994.

Amendment to the Constitution No. 14/VI, from the *PSD* member Pedro Roseta, only excluded issues and acts that were of a budgetary, tax-related or financial nature from the scope of the referendum.

2.2. The *PCP* Proposal for an Extraordinary Constitutional Revision

As soon as the VII Legislature began, after the October 1995 elections, the *PCP* introduced Draft Resolution No. 1/VII [*DAR* (II-A) 2, 8 November 1995, p. 25]. With the forthcoming revision of the European Union Treaty, the *PCP* considered it essential to invite the Portuguese people to participate in a great national debate, and to express their views on the revision of the European Union Treaty through a referendum. Therefore, the *PCP* proposed to alter Article 118 of the Constitution through an extraordinary revision procedure.

This situation was unusual because the *PCP* proposed a Constitutional revision procedure for the first time. Previous Constitutional revisions had always been initiated by agreements between the *PS* and the *PSD*, with strong opposition from the *PCP*. In addition, there was also the fact that an extraordinary revision was being proposed when the Assembly of the Republic already had the necessary powers to make an ordinary revision.

The *PCP* wanted a Constitutional revision that allows a referendum on the revision of the European Union Treaty, but did not wish to initiate a process that would go encourage further Constitutional tinkering. Thus, citing the urgency of making the referendum Constitutionally possible, the *PCP* sought to disconnect that issue through an extraordinary revision that, once concluded, would not jeopardise a further procedure of ordinary revision. The proposal did not find any objections as to its Constitutionality, but it was never discussed in the plenary sittings because the ordinary revision procedure began on 26 January 1996.²⁹⁰

2.3. The European Referendum in the 1997 Constitutional Revision

²⁹⁰ See report and opinion by Laborinho Lúcio (*PSD*), [*DAR* (II-A) 14, 6 January 1996, pp. 237-240].

The draft amendments to the Constitution,²⁹¹ introduced by the *CDS-PP*, *PS*, *PCP*, and *JSD* members,²⁹² revived the 1994 proposals. The *PSN* and the *UDP* failed to gain representation in Parliament. For the first time, the *PSD* draft proposed a referendum on decisive issues regarding agreements on the participation of Portugal in international organisations, or on amendments to such agreements, before their approval by the Assembly of the Republic.²⁹³ The draft from the independent MPs elected by the *PS* implicitly allowed the referendum on European treaties, given that they only excluded alterations to the Constitution, amnesties and generic pardons, acts of budgetary, tax-related or financial contents, and declarations of war, peace, State of siege or emergency from the scope of the referendum.²⁹⁴ The *PEV* draft was essentially similar to the *PCP* one.²⁹⁵

In this Constitutional revision procedure, the innovation of civic initiatives was introduced. These were publicly presented by their authors in Parliament, and were the object of consideration. Regarding the European referendum, a proposal from Professor Jorge Miranda was also favourable. It removed the exclusion of referendums on international agreements, only excluding alterations to the Constitution, amnesties and generic pardons, decisions of budgetary, tax-related or financial contents, and decisions which during the financial year involved an increase in the State's expenditure or a decrease in its revenues. It also excluded the organisation of the courts and the Public Prosecutors Office (Magalhães, 1997).

The work of the IV Constitutional Revision began with a discussion of the referendum proposals. The *CDS-PP* proposal was discussed in the 21 June 1996 session. It suggested that the referendum be compulsory when it entailed agreements that transferred the powers of Portuguese sovereign bodies to international organisations. This was opposed by all the other parties for the reasons explained above [*DAR* (II) 10 – *RC*, 22 June 1996, pp. 176-180].²⁹⁶ In the 25 June session other

²⁹¹ The Draft Amendment to Constitution No. 1/VII (*CDS-PP*) is published in *DAR* (II-A) 21 – Supplement, 1 February 1996, and the other drafts are published in *DAR* (II-A) 27 – Supplement, 7 March 1996.

²⁹² Draft Amendments to the Constitution No. 1/VII, 3/VII, 4/VII and 2/VII, respectively.

²⁹³ Draft Amendments to the Constitution No. 5/VII.

²⁹⁴ Draft Amendments to the Constitution No. 8/VII.

²⁹⁵ Draft Amendments to the Constitution No. 10/VII.

²⁹⁶ See page 286. In spite of the availability declared by all the other parties to accept a referendum on the European Treaty, the proposal was not accepted for two other reasons: the disagreement on whether or not the referendum would be strictly compulsory and the

proposals on the European referendum were discussed. The discussion produced a consensus on the enlargement of the referendary scope to all agreements regarding the participation of Portugal in international organisations, or their alterations, with the possibility of enlarging it even further. The question on whether the subject of referendum should be the specific agreement itself, or the broad concept of the agreement, remained inconclusive [*DAR* (II) 11 – *RC*, 26 June 1996, pp. 200-205].

The *CDS-PP* and *PCP* proposals were rejected in the indicative voting during the *CERC* meetings on 16 and 17 July [*DAR* (II) 14 – *RC*, 17 July 1996, pp. 283 e 287 and 15 – *RC*, 18 July 1996, pp. 300-301]. The proposal that prevailed synthesised the *PS* and *PSD* proposals drawn by Vital Moreira, according to which the referendum would be held on important issues of national interest were the object of international agreements, in the terms of Article 164 (j) of the Constitution, except when they concerned peace or the rectification of borders [*DAR* (II) 15 – *RC*, 18 July 1996, p. 303].

After a political agreement was signed between the *PS* and the *PSD* on the Constitutional revision, on 7 March 1997, it became possible to include matters relating to the ratification of international agreements, making the holding of a referendum on European issues viable. In the 23 July plenary sittings, the parties confirmed the positions taken in the *CERC*. The *CDS-PP* and *PCP* proposals for Article 118 were rejected and the proposals that came from the *CERC* with a two thirds majority were passed [*DAR* (I) 100, 24 July 1997, pp. 3754-3756]. Thus, Article 118(5), which would be renumbered as 115(5), admitted referendums on important issues concerning national interest, which had to be the object of international agreement except when they concerned peace or the rectification of borders.

2.4. The Attempts to Submit the Amsterdam Treaty to Referendum

2.4.1. The Draft Resolutions

Parliamentary initiatives regarding the referendum were introduced soon after the signature of the Amsterdam Treaty, on 2 October 1997. The Government introduced the first on 6 October, (Draft Resolution No. 71/VII). It proposed including Portuguese citizens registered to vote in the national territory and in the other Member States

fact that the proposal from the *CDS-PP* could be applied to an indefinite number of international agreements and not only to the European Union Treaty.

of the European Union. The proposed referendum would ask whether Portugal should continue its participation in the construction of the European Union resulting from the Amsterdam Treaty [DAR (II-A) 3, 17 October 1997, pp. 60-61].

On the very same day, the *PSD* introduced Draft Resolution No. 67/VII, which proposed a referendum in which Portuguese citizens registered to vote in Portugal and abroad would participate. There were three questions: **1)** ‘do you agree with deepening the integration of Portugal in the European Union, according to the Amsterdam Treaty?’ **2)** ‘Do you agree with the reinforcement of the European cooperation of security forces in the struggle against drug trafficking, mafias and others forms of organised crime?’ **3)** Do you agree with the reinforcement of European cooperation in the struggle against unemployment, without prejudicing the main responsibility of the Member States?’ [DAR (II-A) 3, 17 October 1997, pp. 59-60].²⁹⁷

On 16 October the *PCP* introduced Draft Resolution No. 69/VII, which had the following question: ‘do you agree that the evolution of European integration involves a greater transfer of national sovereignty, including the replacement of the *escudo*²⁹⁸ and the imposition of fines on countries that do not fulfil the Maastricht criterions, up to and including the new transfers foreseen in the Amsterdam Treaty?’ [DAR (II-A) 7, 25 October 1997, pp. 121-122]. On 4 March 1998, the *CDS-PP* presented Draft Resolution No. 82/VII so that the Portuguese citizens registered to vote in Portugal and abroad would answer the following question: ‘do you agree that the evolution of European integration, resulting from the Amsterdam Treaty, be made through a progressive transfer of sovereign powers, in agreement with the federal pattern?’ [DAR (II-A) 36, 12 March 1998, pp. 871-873].

On 27 May 1998 the *PSD* introduced Draft Resolution No. 91/VI replacing the previous one [DAR (II-A) 55, 30 May 1998, pp. 1202-1203]. The reason given was related to the change of the calendar anticipated for referendums in 1998. The *PSD* had introduced Draft Resolution No. 67/VII in October, aiming to hold the referendum in the spring of 1998. However, the agreement with the *PS* for a referendum on abortion in June included the postponement of the referendums on regionalisation and European integration, which would be held on the

²⁹⁷ In the admission dispatch of this draft, the President of the Assembly of the Republic, Almeida Santos, was doubtful that the three questions could be considered on the same subject [DAR (II-A) 3, 17 October 1997, p. 60].

²⁹⁸ The Portuguese currency prior to the introduction of the euro.

same day, after summer. The *PSD* understood that holding two referendums simultaneously demanded a simplification of the European question. Therefore, *PSD*'s new draft question was: 'do you agree with deepening the integration of Portugal in the European Union, in agreement with the Amsterdam Treaty?'

Finally, on 23 June, the *CDS-PP* introduced Draft Resolution No. 94/VII, replacing the previous one, and including the following questions: 1) 'do you agree with the participation of Portugal in the European construction within the framework of the Amsterdam Treaty?' 2) 'Do you agree that the evolution of the European construction be based on the reinforcement of the national States, in the cooperation and solidarity among Governments, and in the democratic scrutiny of the communitarian decisions, in rather than following a pattern of political federalism?' [*DAR* (II-A) 62, 25 June 1998, pp. 1386-1388]. The new draft of the *CDS-PP* reflected the change of the party's leadership, with Paulo Portas taking the place of Manuel Monteiro, and replacing the latter's anti-federalist approach with a more pro-European stance. Therefore, the substitution of the question was controversial within the *CDS-PP* Parliamentary Group, and was opposed by members that were faithful to the defeated former leadership.

The drafts that were introduced had significant differences. As for the electoral universe, the *PSD* and *CDS-PP* drafts proposed the participation of all emigrants registered anywhere around the world. The Government draft proposed, on the other hand, the participation of emigrants registered in other Member States of the European Union, while the *PCP* draft was not specific on that point.

The contents of the questions were also significant. Both the *PS* Government and the *PSD* wanted to lead voters to an affirmative vote, asking them about the participation of Portugal in the construction of European Union. The acceptance of that integration would necessarily involve the acceptance of the Amsterdam Treaty. In the initial phase, the *PSD* still added questions that were hardly refusable, like the struggle against crime or unemployment, trying to link such aims to the Amsterdam Treaty. However, the *PSD* retreated from those additional questions, moving towards acceptance of the Government's question. On its side, the *PCP*'s draft questions tried to introduce points that were critical of the European integration process, aiming to lead voters to the negative answer. Thus, the *PCP* draft referred to the transfer of national sovereignty, the end of the national currency, and the fines applied to the countries that did not fulfil the Maastricht criterions. The *CDS-PP* was

undergoing an internal transition process, and this flux was reflected in the draft resolution. The party evolved from an anti-federalist position, expressed in Draft Resolution No. 82/VII, to an acceptance of the Amsterdam Treaty. The latter, more pro-European, stance was seen in the first question of Draft Resolution No. 94/VII, which approached the question supported by the *PS* and the *PSD*, reflecting the change of leadership in the party.²⁹⁹

All of the referendum drafts attempted to avoid an obvious problem, which came from the terms adopted in the 1997 Constitutional revision: the fact that the Constitution did not allow referendum directly on the approval of international agreements, but only on the broad issues that such agreements raised. Although everyone had the Amsterdam Treaty in mind, there was doubt about the effect of a negative answer, since the ratification of the referendum could still proceed.

2.4.2. The Proposal

On 29 June, the plenary of the Assembly of the Republic discussed Draft Resolutions No. 69/VII, 91/VII and 94/VII and Government Draft No. 71/VII [*DAR* (I) 86, 30 June 1998, pp. 2970-2981]. The *PCP* draft was rejected with nay votes from the *PS*, *PSD* and *CDS-PP*, but had yea votes from the *PCP* and *PEV* [*DAR* (I) 86, 30 June 1998, pp. 3005]. The *CDS-PP* draft had nay votes from the *PS*, *PCP* and *PEV* and abstentions from the *PSD*, having also been rejected [*DAR* (I) 86, 30 June 1998, pp. 3005].

As for the Government draft, the *PS* introduced two draft alterations. The first agreed with the *PSD*, and proposed to ask: ‘do you agree with the following of the participation of Portugal in the European Union within the framework of the Amsterdam Treaty?’ It had yea votes from the *PS* and *PSD*, abstentions from the *CDS-PP* and nay votes from the *PCP*, *PEV* and the *PS* member Helena Roseta [*DAR* (I) 86, 30 June 1998, pp. 3004].³⁰⁰ The second draft alteration was about the electoral universe and proposed the participation of registered citizens in the national territory and in the Member States of the European Union. It had yea votes from the *PS*, nay votes from the *PSD* and Helena Roseta and

²⁹⁹ In the voting of Draft Resolution No. 94/VII, on 29 June, six *CDS-PP* members explained that they had voted yea due to the partisan discipline, in spite of their disagreement with the drafting of the first question [*DAR* (I) 86, 30 June 1998, pp. 3020-3024].

³⁰⁰ The negative vote from Helena Roseta was justified due to the disagreement towards the decision of holding new referendums without a reflection on the scarce participation in the referendum on the abortion held two days before.

abstentions from the *CDS-PP*, *PCP* and *PEV*. The *PSD* submitted the electoral universe to voting on its draft, proposing to include all Portuguese citizens registered abroad. It had the yea votes from the *PSD* and the *CDS-PP* and nay votes from the *PS*, *PCP* and *PEV*, which led to its rejection [*DAR* (I) 86, 30 June 1998, pp. 3005].

Thus, the final text passed included the *PS/PSD* question ('do you agree with the following of the participation of Portugal in the European Union within the framework of the Amsterdam Treaty?') and the electoral universe proposed by the *PS*, giving the right to vote only to the Portuguese citizens registered to vote in the Member States of the EU.

2.4.3. The Refusal

After the draft referendum was passed through Resolution No. 36-A/98, of 30 June, it was submitted to the Constitutional Court. The Court decided, in Ruling No. 531/98, of 29 July, that the draft referendum passed by the Assembly of the Republic did not observe the requirements of objectivity, clarity and precision demanded by Article 115(6) of the Constitution and by Article 7(2) of the Referendum Law. Consequently the draft was considered neither Constitutional nor legal [*DR* 174 (I-A) Supplement, 30 July 1998].

The Court rejected the question because they considered that it was not formulated with clarity or precision, and it could be interpreted in more than one way. According to one interpretation, the focus of the question was the participation of Portugal in the construction of the European Union, with reference to the framework of the Amsterdam Treaty as a circumstantial, complementary or explanatory element. According to another interpretation, the subject of the referendum was the approval of the Amsterdam Treaty, with the first part of the phrase being a circumstantial, complementary or explanatory element.

The Court also considered that the question was not objectively formulated. They held that the term 'following' in the expression 'following of the participation of Portugal in the construction of the European Union within the framework of the Amsterdam Treaty' could lead the voters to misinterpret the consequences of rejecting the Treaty, thus influencing their answer. The Court was concerned that the wording of the question might lead less informed voters to assume that a negative answer implied a withdrawal from the European Union. Therefore, the question was formulated to lead the voters who wanted Portugal to continue its participation in the construction of the European Union to vote affirmatively in the referendum. This downplayed the essence of the

changes that were proposed, which related to the Amsterdam Treaty rather than the European Union itself.³⁰¹

This attempt to hold a referendum failed, with consequences regarding the ratification of the Amsterdam Treaty by Portugal. The question in 1998 was different from the one that had shaken the country in 1992 regarding the Maastricht Treaty. At that time, the question that divided the parties and the country was the referendum itself. The political forces and Portuguese society were divided between favouring and rejecting the very idea of a referendum. In 1998 all the political forces agreed that there should be a referendum, but they were divided about 'which referendum'. The *PCP* wanted to focus on Portuguese participation in the single currency, and tried to achieve a formula to attack it through the Amsterdam Treaty. The two main parties tried, on the other hand, to compromise by offering a referendum but leading voters towards a pro-integration response.

In the end, the question about the eventual referendum on the Amsterdam Treaty was a way to heal the wounds of Maastricht. However, as Maria Luísa Duarte wrote (1998, p. 60), the removal of the Constitutional obstacle was late. Important, and even irreversible, decisions were taken at the time of the Maastricht Treaty: new political structures were built that was not merely economic in nature, but also set boundaries on the powers of the Member States in the areas of traditional sovereignty. Contrarily to what happened in other States, namely in France and in Denmark, it was not possible at that time to ask the Portuguese people if they agreed or not on the creation of a single currency. It is even questionable whether a referendum on the Amsterdam Treaty was really desired by its proposers, since it is hard to see that the potential advantages of holding a referendum justified the potential political and financial costs. Therefore, Duarte suggests that the Portuguese Government hoped that the Constitutional Court would block this politically inopportune referendum. (Duarte, 1998, p. 62).

Therefore, calls to hold a referendum on the Amsterdam Treaty failed. On 10 August 1998, Draft Resolution No. 118/VII was introduced in the Assembly of the Republic. This ratified the Amsterdam Treaty. It was passed on 6 January 1999 with yea votes from the *PS*, *PSD* and *CDS-PP* and nay votes from the *PCP*, *PEV* and nine members from the *CDS-PP* [*DAR* (I) 31, 7 January 1999, p. 1178].

³⁰¹ The decision was taken by eight votes against five.

3. The Referendum Proposals on the Nice Treaty

3.1. The European Referendum in the 2001 Constitutional Revision

In 2001, the Portuguese Constitution was again reviewed through an extraordinary procedure. That year, the Government submitted the Rome Statute of the International Criminal Court to the Assembly of the Republic for approval. The ratification of that agreement by the Portuguese State was inconsistent with some Constitutional provisions at that time. As a result, the amendment was supported by the *PS*, the *PSD* and the *CDS-PP*. Given that the previous ordinary Constitutional revision had been in 1997, less than five years before, the revision would only be possible through an extraordinary procedure.

That procedure began on 2 March 2001 when the *PS* introduced a draft resolution so that the Assembly of the Republic could take up extraordinary powers for Constitutional revision. This was followed by a similar initiative from the *PSD*. Both parties finally agreed on a joint resolution, which was passed on 29 March and gave permission to commence the V Constitutional Revision. Only the *PS*, the *PSD* and the *CDS-PP* introduced draft amendments to the Constitution.

In the event, the Constitutional revision was not limited to its initial purpose. Using the Constitutional cover of the International Criminal Court jurisdiction, the revision also changed Constitutional provisions regarding **a)** the Constitutional status of citizens from the member States of the *CPLP* (Community of Portuguese Language Countries) living in Portugal; **b)** the allowance of the application of rules on judicial cooperation in criminal matters established in the European Union; **c)** the Constitutional rule of home inviolability which was now broken; **d)** amended provisions on the restrictions of the exercise of rights by military personnel and members of the security forces and services; and **e)** qualified Portuguese as the official language of the Republic (Magalhães, 2004).

Before the unexpected widening of the Constitutional revision, the *PCP* went forward in the *CERC* meeting of 27 September 2001 with a proposal that allowed the Constitution to hold referendums on agreements related to the participation of Portugal in the European Union. This was proposed with a view to submitting the ratification of the Treaty of Nice to a referendum. It had been signed on 26 February and introduced for approval in the Assembly of the Republic since 25 May by Draft Resolution No. 59/VIII [*DAR* (II-A) 62 – Supplement, 31 May 2001].

The *PCP* proposal had the same intention as the ones introduced in previous revisions: it kept the Constitutional interdiction of referendums on the ratification of international agreements, except for the agreements through which Portugal agreed to jointly exercise the powers needed to construct and strengthen the European Union. Submitted to an indicative voting in the *CERC*, the proposal was rejected with yea votes from the *PCP*, nay votes from the *PS* and *PSD* and abstentions from the *CDS-PP* and *BE* [*DAR*, 18 – *RC*, 27 September 2001, p. 274]. In the first plenary sittings held on 4 October, which closed the Constitutional revision, the proposal had nay votes from the *PS* and *PSD*, yea votes from the *PCP*, *BE* and *PEV* and abstentions from the *CDS-PP* [*DAR* (I) 9, 6 October 2001, p. 302].

Despite this conclusion, the *BE* introduced Draft Resolution No. 155/VIII on the Nice Treaty [*DAR* (II-A) 7, 16 October 2001, p. 106]. This draft included a proposal for a referendum, in which Portuguese citizens living in Portugal and abroad would take part, with the following question: ‘do you agree with the changes introduced in the European Union, resulting from the Nice Treaty?’ This initiative was never discussed. The Nice Treaty was passed for ratification in the Assembly of the Republic on 25 October 2001, with yea votes from the *PSD*, *PS* and *CDS-PP* and nay votes from the *PCP*, *BE* and *PEV* [*DAR* (I) 17, 25 October 2001, p. 591].

4. The Question of the Referendum on the European Constitutional Treaty

4.1. The Proposal for a Referendum on the Same Day of the European Elections

On 8 October 2003, the *PSD*, after a meeting of its National Council, announced its position in favour of a referendum in Portugal to follow the revision of the European Treaties, which would be passed in the Intergovernmental Conference. They proposed that the referendum should be held on the very same day as the elections for the European Parliament on 13 June 2004. This announcement was made in the Assembly of the Republic by the parliamentary leader, Guilherme Silva. With that in mind, the National Council of the *PSD* assigned the parliamentary group to propose the Constitutional alterations needed for that in the Assembly of the Republic [*DAR* (I) 9, 9 October 2003, pp. 436-438]. The proposal was supported by the *CDS-PP*³⁰² and opposed by all

³⁰² See speech by Telmo Correia [*DAR* (I) 9, 9 October 2003, pp. 438-439].

the other parties,³⁰³ which accused the *PSD* of aiming to distract attention from the troubles of the *PSD/CDS-PP* coalition Government.

Indeed, the proposal was soon condemned to defeat. Given that the Constitution expressly forbids the coincidence of the referendum and the elections for the European Parliament, the success of the proposals would depend on a Constitutional revision that removed that forbiddance, which would only be possible with the *PS* agreement. However, on the very same day the proposal was announced, the *PS* member António Costa peremptorily rejected the idea [*DAR* (I) 9, 9 October 2003, p 442]. There would be no referendum on 13 June 2004.

Despite that refusal, Prime Minister Durão Barroso, in the monthly debate in Parliament two days later – on 10 October 2003 – insisted on proposing the referendum and the European elections simultaneously, for three reasons: firstly, because the European elections would set the stage for the great European debate; secondly, because there would be more popular participation; thirdly, because in 2004 there would be at least two elections, one for the European Parliament and another for the Regional Assemblies of The Azores and Madeira [*DAR* (I) 11, 11 October 2003, p. 533]. The proposal was again refused by the *PS* leader Ferro Rodrigues. He expressed his support for referendum if the Treaty involved significant changes in the share of sovereignty between Portugal and the European Union, but he reasserted the *PS* position that the referendum should not be on the same day as the European elections [*DAR* (I) 11, 11 October 2003, p. 536].

In the event, the deadlock over the final treaty draft, which became stuck at the European Council in Brussels on 12 and 13 December 2003, meant that a referendum and European elections on the same day would not be possible. This was recognised by the Prime Minister in the monthly debate of 18 December 2003, whose subject was precisely the deadlock of the Intergovernmental Conference.

4.2. The Draft Referendum on the Main Choices of the Treaty

A few days later, as soon as the works on the Convention calling for a draft on the Constitution for Europe were finished, and the works for the Intergovernmental Convention opened, the *BE* introduced Draft Resolution No. 185/IX proposing a referendum on the main choices of the

³⁰³ See speeches by Isabel de Castro (*PEV*), Bernardino Soares (*PCP*), Francisco Louçã (*BE*) and António Costa (*PS*), [*DAR* (I) 9, 9 October 2003, pp. 438-443].

Treaty Establishing a Constitution for Europe [DAR (II-A) 10, 25 October 2003, p. 394]. This draft, introduced on 22 October, assumed that all Portuguese politicians with responsibilities would support the holding of a referendum on the fundamental choices of the so-called European Constitution, considering it desirable that the Portuguese people should decide if the Government should sign the treaty, or not.

The question proposed included three questions: 1) ‘do you agree with the institution of a Constitution of the European Union, which will prevail over the Constitution of the Portuguese Republic?’ 2) ‘Do you agree with the creation of the post of President of the European Council, replacing the rotational presidencies by all Member States of the European Union?’ 3) ‘Do you agree with the increase of responsibilities and powers of the European Union in the sphere of defence?’

Thus, the *BE* wanted to position itself in relation to the other parties by proposing the referendum. This would anticipate the treaty itself. The proposition to hold a referendum on some questions discussed in the works of the Convention, that would be included in the future treaty, would stimulate opposition to its ratification. For that matter, the *BE* selected the question on the primacy of the European Constitution over the Portuguese Constitution, the end of the rotational presidencies and the European policy of defence.

The draft was discussed on 3 December 2003 at the *BE*’s initiative. The *PS* expressed itself in favour of a referendum, but only after knowing the contents of the treaty and without any Constitutional revision being necessary.³⁰⁴ The *PSD* was also in favour of a referendum on the European construction, stressing that it did not seek to avoid the Portuguese people’s consultation. Having in mind that the new European treaty would be adopted soon, the *PSD* considered that the moment of the consultation was near, and that moment should be the same as the elections for the European Parliament in June 2004, as had been suggested in October 2003. Regarding the *BE* proposal, the *PSD* considered it improper, both in terms of time and form, because the treaty was not yet finalised, and because it placed separate questions, chosen without criterion and logic.³⁰⁵

The *CDS-PP* followed the *PSD* position: the referendum should be on the same day of the European elections in June.³⁰⁶ The *PCP*

³⁰⁴ See speech by António José Seguro [DAR (I) 27, 4 December 2003, p. 1566].

³⁰⁵ See speech by Pedro Duarte [DAR (I) 27, 4 December 2003, pp. 1572-1573].

³⁰⁶ See speech by Diogo Feyo [DAR (I) 27, 4 December 2003, pp. 1576-1577].

strongly opposed the treaty that was being drawn, and criticised the *PS* and *PSD* for having approved a Constitutional provision in 1997 that made a referendum on the European Treaties impracticable. They also supported its revision and rejected the idea of simultaneously holding the referendum and the European elections. However, the *PCP* did not support the *BE* draft. In spite of supporting a referendum, the *PCP* also considered that it should only take place when the ratification procedure was underway, prior to the decisive moment of binding the draft to the Portuguese State. The *PCP* also raised objections as to the Constitutionality of the proposed questions.³⁰⁷ The *PEV* agreed on the need for the referendum, but considered the *BE* proposal premature: a referendum before the conclusion of the Intergovernmental Conference could be ineffective.³⁰⁸

The *BE* draft was submitted to voting and rejected with the only yeas coming from the *BE*. The *PSD*, the *PS* and the *CDS-PP* voted nay and the *PCP* and the *PEV* abstained [DAR (I) 27, 4 December 2003, p. 1594].

4.3. The Resolution on the European Constitution

On 3 December 2003, the European Affairs and Foreign Policy Committee³⁰⁹ introduced Draft Resolution No. 194/IX [DAR (II-A) 19 – Supplement, 6 December 2003, pp. 701-702] on the European Constitution. This took into consideration the works of the Intergovernmental Conference, and the holding of a European Council summit in December. It proposed that the Assembly of the Republic should ‘consider it desirable’ to hold a referendum in Portugal before agreeing to the further evolution of the European Union.

This draft, introduced after a report on the works of the Convention (which approved the draft of Treaty Establishing a Constitution for Europe, drawn by António José Seguro (*PS*) for the European Affairs and Foreign Policy Committee), was discussed on 12 December (Seguro, 2004). In the debate, members of the *PCP*, *BE* and *PEV* criticised the terms referred in the draft resolution regarding the referendum, where it was considered ‘desirable’. For these parties, the

³⁰⁷ See speech by Bernardino Soares [DAR (I) 27, 4 December 2003, pp. 1582-1583].

³⁰⁸ See speech by Heloísa Apolónia [DAR (I) 27, 4 December 2003, p. 1584].

³⁰⁹ In the IX Legislature (2001-2004) the Assembly of the Republic decided to join the Committees of European and Foreign Affairs. That solution would be changed in the next legislature, in 2005.

resolution that came to be passed should be unambiguous the need of the referendum.³¹⁰

4.4. The European Referendum in the 2004 Constitutional Revision

The procedure which led to the VI Constitutional Revision began on 7 October 2003, with the introduction of the Draft Amendment to the Constitution No. 1/IX (*PS*), and finished on 23 April 2004. Three of the draft amendments included provisions regarding the referendum, having in mind especially the referendum on the European Constitutional Treaty, given the compromise assumed by all of the parties.

The *PS* and *BE* drafts did not include any change in the Constitutional provisions on the referendum, on the grounds that holding a referendum would not require any Constitutional change.³¹¹ The Draft Amendment to the Constitution No. 3/IX, which was jointly introduced by the *PSD* and the *CDS-PP* [*DAR* (II-A) 14, 21 November 2003, pp. 564(9-24)] proposed the elimination of the Constitutional provision that forbade the calling and holding of referendums between the date of calling and holding of general elections for the sovereignty organs, or the self-government bodies of the autonomous regions and the local authorities, as well as the members of the European Parliament [Article 115(7)]. The reason for this proposal was obvious: it wished to give Constitutional covering to the proposal announced by the *PSD* in October 2003 to hold the referendum and the elections for the European Parliament on the same day.

The Draft Amendment to the Constitution No. 4/IX (*PCP*), [*DAR* (II-A) 14, 21 November 2003, pp. 564(24-35)] wished to allow, in line with the proposals made on the 1997 and 2001 revisions, the appeal for the referendum on all subjects that were considered fundamental for the participation of Portugal in the European Union. Taking into consideration that the Constitutional text only allowed the referendum on important issues concerning the national interest which were included in an international agreement, the *PCP* wanted to widen its scope to enable an explicit referendum about whether or not Portugal should be bound to a new treaty, or its refusal. They argued that it was important to make the

³¹⁰ See speeches by Honório Novo (*PCP*), Luís Fazenda (*BE*) and Heloísa Apolónia (*PEV*), [*DAR* (I) 31, 12 December 2003, pp. 1789, 1790 and 1797].

³¹¹ See Draft Amendments to the Constitution No. 1/IX [*DAR* (II-A) 8 – Supplement, 18 October 2003, pp. 338(2-7)] and No. 2/IX [*DAR* (II-A) 14 – Supplement, 21 November 2003, pp. 564(2-9)].

question specific so that the results of the referendum could translate into clear action. The Draft Amendment to the Constitution No. 6/IX (*PEV*), although different, aimed at a similar purpose [*DAR* (II-A) 14, 21 November 2003, pp. 564(39-45)].

In the *CERC* meeting of 21 April 2004 the *PSD* and the *CDS-PP* withdrew their proposal to have the referendum and the elections for the European Parliament coincide, given that it was already too late to arrange both elections on the same day. The *PCP* and *PEV* proposals were rejected with yea votes from the *PCP*, *BE* and *PEV* and nay votes from the *PS*, *PSD* and *CDS-PP* [*DAR* (II – RC) 10, 22 April 2004, pp. 318-319]. On 22 April the texts were discussed and voted in plenary sittings. The *PCP* proposal was rejected by 173 nay votes (87 *PSD*, 73 *PS* and 13 *CDS-PP*), and 13 yea votes (four *PCP*, three *BE*, two *PEV*, two *PSD* and two *PS*).

4.5. The Draft Referendums on the European Constitutional Treaty

4.5.1. The Antecedents

The approval of a draft agreement in the Intergovernmental Conference on 18 June 2004 was the starting point of a new phase on the debate about the referendum in Portugal. On 23 June there was an emergency debate in the Assembly of the Republic requested by the *BE* on the European Constitution and the referendum in Portugal [*DAR* (I) 99, 24 June 2004, pp. 5371-5391]. On that occasion, the requesting party urged the Government to define its position by holding referendum before the spring of 2005, and formulating a viable, clear and explanatory question.³¹² In response, the Foreign Minister, Teresa Patrício Gouveia, announced that, by September 2004, the Government would introduce to the Assembly of the Republic a proposal for a referendum during 2005 [*DAR* (I) 99, 24 June 2004, pp. 5374].

Meanwhile, the appointment of Prime Minister José Manuel Durão Barroso as President of the European Commission forced the formation of a new Government under the leadership of Pedro Santana Lopes. Confronted with the European referendum, during the debate on the Government's Programme on 27 July, the new Prime Minister was less peremptory. He affirmed his will to hold a referendum, but this conditional on unspecified agreements and other vague conditions. He

³¹² See speech by Luís Fazenda [*DAR* (I) 99, 24 June 2004, p. 5372].

refused to assume any concrete compromise on behalf of the Government.³¹³

A clearer position on behalf of the Government was taken on 15 September by the Parliamentary Affairs Minister, Rui Gomes da Silva. Taking into consideration the foreseeable approval of the Constitutional Treaty in the European Council of October, the Government announced its intention to propose the referendum for 5 June 2005 [DAR (I) 1, 16 September 2004, p. 42].

4.5.2. The Drafts

On 29 October 2004, the Treaty Establishing a Constitution for Europe was signed in Rome. Consequently, on 18 November, Draft Resolutions No. 290/IX (*BE*), 291/IX (*PCP*) and 292/IX (*PSD*, *PS* and *CDS-PP*) were introduced in the Assembly of the Republic, in order to submit that Treaty to referendum [DAR (II-A) 17, 20 November 2004, pp. 111-113].

The question in the *BE* draft was the following: ‘do you agree with the alteration of the institutions and responsibilities of the European Union, in the terms of the Treaty Establishing a Constitution for Europe?’ The *PCP* question was: ‘do you agree with binding Portugal to the new treaty that institutes a Constitution for Europe?’ In explaining its draft, the *PCP* called attention to the risk of unConstitutionality in the questions, regretting that the Constitutional revision had not clarified matters. They were critical of the possibility of adopting a question that would lead to an ambiguous situation regarding the effect of the referendum on the ratification of the Treaty. The question of the common draft by the *PSD*, *PS* and *CDS-PP* was the following: ‘do you agree with the Charter of Fundamental Rights, the rules of voting by a qualified majority and the new institutional framework of the European Union, in the terms of the Constitution for Europe?’

The debate about the drafts took place on 18 November 2004, and it is important to compare the positions of the different parties [DAR (I) 18, 19 November 2004, pp. 1028-1041]. The *PSD* declared that it had done everything to hold a referendum on the Constitution for Europe. It had assumed since the beginning of the works of the Convention that if the result was the approval of a text which included important advances in the rights of the European citizens and in the definition of new rules

³¹³ See speech by Francisco Louçã (*BE*) and the Prime Minister’s response [DAR (I) 106, 28 July 2004, pp. 5712-5714].

which significantly modulated the working and the institutions of the European Union, it would demand the holding of a referendum. However, the *PSD*, tried to show some distance as to the question they had subscribed, expressing their preference for the questions proposed by the *PCP* and by the *BE* because it was a simple and linear question. They even declared a willingness to make an express Constitutional authorisation, if needed.³¹⁴

The *PS* supported the proposal that had been subscribed jointly by the *PSD* and the *CDS-PP*, despite stating that it was not ‘its own question’. The criterion, according to the *PS* Statement, was innovation. The idea was to consult the Portuguese people on the new matters included in the Treaty, which would be the extension of the rule of qualified majority and the Charter of Fundamental Rights.³¹⁵ The *CDS-PP* renewed its position in favour of the referendum and supported the question that they had subscribed as the ‘possible question’, despite having participated in the meetings with the *PS* and the *PSD* where the question was drawn up.³¹⁶

The *BE* declared itself perplexed by the question proposed by the *PS*, the *PSD* and the *CDS-PP*, expressing concern that it could, once again, lead to the frustration of the referendum. The question was not precise because it included not one but three questions. It was also not objective because it focused on some of the Treaty’s innovations while neglecting to mention others. Finally, the question was not impartial because it suggested an affirmative answer by selecting on the aspects of the Treaty that were likely to prove more attractive to the people.³¹⁷

The *PCP* accused the *PS*, the *PSD* and the *CDS-PP* of seeking to avoid the referendum. These parties had refused a Constitutional revision six months before that would have allowed the referendum on the Constitutional Treaty without any doubt. Furthermore, the question that they proposed clearly ran the risk of being refused by the Constitutional Court because it was not objective, clear and precise. On the other hand, the *PCP* accused the proposers of not clarifying the practical effect of an eventual negative answer, which also meant that they were not clearly assuming that in that case the Treaty could not be ratified by Portugal. For

³¹⁴ See speech by Luís Marques Guedes [*DAR* (I) 18, 19 November 2004, p. 1028].

³¹⁵ See speech by António José Seguro [*DAR* (I) 18, 19 November 2004, p. 1029].

³¹⁶ See speech by Miguel Anacoreta Correia [*DAR* (I) 18, 19 November 2004, p. 1030].

³¹⁷ See speech by Luís Fazenda [*DAR* (I) 18, 19 November 2004, p. 1030-1031].

the *PCP*, the proposed referendum would be a ‘make-believe’ referendum.³¹⁸

The draft resolutions from the *PCP* and *BE* were rejected, with yea votes from both parties and the *PEV* and nay votes from the *PS*, the *PSD* and the *CDS-PP*. The draft resolution subscribed by these parties had the respective affirmative votes and negative votes from the others [*DAR* (I) 18, 19 November 2004, p. 1041].³¹⁹

The draft referendum was submitted to the prior review of the Constitutional Court on 25 November 2004. As predicted, it was judged unConstitutional and illegal because of its lack of clarity, and because the question was not formulated for a ‘yes’ or ‘no’ answer.³²⁰ The Court considered that the question was not clear, because it contained three different questions. The referendum addressed a global judgement – whether or not there should be a Constitution for Europe – but the question was not clear in that respect. On the other hand, by including three autonomous questions, it was clear that the question was not formulated for a ‘yes or no’ answer. Consequently, the President of the Republic did not call the referendum and announced his decision to the Assembly of the Republic on 6 January 2005 [*DAR* (I) 22, 7 January 2005, p. 1413].

4.5.3. The Outcome of a Failed Referendum

The outcome of the draft referendum on the European Constitutional Treaty in the IX Legislature justified the suspicions of those who had argued that the question (jointly subscribed and passed by the *PSD*, the *PS* and the *CDS-PP*) was condemned, from the start, to being declared unConstitutional. Thus, the *PCP*, the *BE* and the *PEV* accused the proposers of concealing their true lack of will to submit the ratification of the European Constitutional Treaty to the popular verdict, hiding behind a false referendum proposal.

The *PSD* refuted these accusations, accusing the *PS* of formulating the question alone. Guilherme Silva, the parliamentary leader of the *PSD* at that time, later described the arrangements between the *PSD/CDS-PP* parliamentary majority and the *PS* regarding the question to adopt:

³¹⁸ See speech by Bernardino Soares [*DAR* (I) 18, 19 November 2004, pp. 1031.1032].

³¹⁹ The resolution is published in *DAR* (II-A) 20, 3 December 2004, p. 2.

³²⁰ See Ruling No. 704/2004 [*DR* (I-A) 304, 30 December 2004]. The decision was passed by 12 votes against one.

When the works of the Convention were still running we thought that, if the result of these works were significant changes in the framework of the functioning of the European Union, as an actual result of the European Constitutional Treaty, it would be imperative to consult the Portuguese people, by referendum, on that subject. And we said from that very instant that a Constitutional revision was needed. It was not thinkable to formulate a clear question on that subject without a Constitutional revision.

We insisted near the leadership of the Socialist Party, to move forward with a Constitutional revision that would allow an exceptional solution, but we found a barrier of opposition from the PS. The Secretary General of the PS himself said the following to my party's leadership, in my presence: we accept a Constitutional revision only if it demonstrated that we cannot do this referendum in the framework of the Constitution in force. We then began the fate and the torment of the question.

In that sense, we posed the Socialist Party with a very clear question: we feel that it is difficult to find a question that, in the present framework, could be Constitutional. If you found it, we would agree with it. If you gave us the guarantee of its Constitutionality, we shall not touch it or even add a comma. As we wanted to make this consultation by any means, we were even confronted with the following demand from the Socialist Party: 'this is our question, but we don't want to subscribe it. Do it yourself in your draft resolution.' At last, the deal was known, that is, the draft resolution was subscribed by the PSD, the PS and the CDS-PP.³²¹

4.6. The Extraordinary Constitutional Revision of 2005

4.6.1. Preliminaries

In the X Legislature, on 16 May 2005, the PSD introduced Draft Resolution No. 5/X [DAR (II-A) 4, 2 April 2005, pp. 105-106] so that the Assembly of the Republic could assume extraordinary powers for a Constitutional revision. For the proposing party, the idea was to overcome the Constitutional blockade that existed on the possibility of a referendum on the European Constitutional Treaty, which subsisted in the previous legislature because of PS. On 30 March, the socialist parliamentary majority took a similar initiative, through Draft Resolution No. 12/X [DAR (II-A) 4, 2 April 2005, p. 111], recognising the difficulty of holding

³²¹ This Statement was uttered during the debates of the VII Constitutional Revision on 31 May 2005 [DAR (II – RC) I June 2005, pp. 14-15].

the referendum if some changes were not made to the existing Constitutional system. The draft resolutions were discussed on 7 April 2005 and passed unanimously, with the respective text being unified under a proposal by the President of the Assembly [DAR (I) 6, 8 April 2005, pp. 197-209].

The only real disagreement of the debate was on the date of the referendum, given that the *PS* started to support that the European referendum be on the same day as the elections for local authorities in October 2005. This proposal had been announced by the Prime Minister, José Sócrates in the Government's Programme debate on 21 March 2005 [DAR (I) 3, 22 March 2005, p. 53]. Regarding that, the *PCP* expressed its disagreement and stressed that such a proposal meant a change of opinion from the *PS*, which a few months before had contested the *PSD* proposal to make the referendum and the elections for the European Parliament coincide.³²²

4.6.2. The Draft Amendments to the Constitution

Six draft amendments to the Constitution were introduced.³²³ The *PS* draft, introduced on 8 April, included two provisions:³²⁴ one of them removed the prohibition of coincidence between the day that national referendums and elections for local authority bodies were held; the other added a transitory provision allowing a referendum on the approval of the Treaty Establishing a Constitution for Europe, making an exception in the Constitutional provision that only allowed the referendum on issues which should be the object of agreements and not the agreements themselves.

The *PCP* draft, introduced on 13 May, aimed only to change Article 115 of the Constitution. It exempted the construction and strengthening of the European Union in the prohibition of submitting international agreements to referendum.³²⁵ The *PSD* draft, introduced on

³²² See speeches by António Filipe (*PCP*) and Guilherme de Oliveira Martins (*PS*), [DAR (I) 3, 22 March 2005, pp. 205-206 and 211].

³²³ One of the drafts, introduced by monarchist members elected by the *PSD* did not make reference to the subject of the referendum and was only aimed at removing the Constitutional reference to the republican form of government as a matter that any Constitutional revision must respect.

³²⁴ See Draft Amendment to Constitution No. 1/X [DAR (II-A) 15, 19 May 2005, p. 2].

³²⁵ See Draft Amendment to the Constitution No. 2/X [DAR (II-A) 15, 19 May 2005, pp. 3-5].

the same day,³²⁶ included two provisions: a transitory provision, in order to allow the referendum on the Treaty Establishing a Constitution for Europe, signed in 2004, and its future alterations, and another provision in order to allow the coincidence between the holding of only this referendum, and the elections for local authority bodies. The *CDS-PP* draft,³²⁷ also introduced on 13 May, included a provision that was not on the European referendum but insisted on the allowance of a Constitutional referendum, which only excluded matters in which the Constitutional revision would be restricted to in the terms of Article 288.

Regarding the European referendum, the *CDS-PP* proposed that the Treaty Establishing a Constitution for Europe be considered an issue of important national interest in order to be submitted to referendum. The *CDS-PP* also proposed to make it possible to hold a referendum and local elections simultaneously. On the very same day, the *CDS-PP* introduced Bill No. 79/X, which changed the Referendum Law in terms that reflected its draft amendments to the Constitution [*DAR* (II-A) 17, 21 May 2005, pp. 21-22]. The *PEV* draft, introduced on 16 May, only proposed an exception in the interdiction of submitting international agreements to referendum in order to allow the referendum on the European Constitutional Treaty.³²⁸

4.6.3. The Vicissitudes of the Final Decision

In the works of the *CERC* which took place on 1 June, a common proposal from the *PS*, the *PSD* and the *CDS-PP* was introduced. It replaced the draft amendments from the three parties. Thus, a transitory provision would be introduced in the Constitution in order to expressly allow the Assembly of the Republic to call and hold a referendum on the Treaty Establishing a Constitution for Europe or its alterations. This referendum could be held on the same day as the general elections for the local authority bodies. The proposal had yea votes from the *PS*, the *PSD* and the *CDS-PP* and nay votes from the *PCP*, the *BE* and the *PEV*. The main criticism from these parties, besides the disagreement as to the coincidence with the local elections, was the direct reference to the European Constitutional Treaty, at a moment when, due to the holding of referendums in France (on 29 May) and in The Netherlands (on the very

³²⁶ See Draft Amendment to the Constitution No. 3/X [*DAR* (II-A) 15, 19 May 2005, pp. 5-6].

³²⁷ See Draft Amendments to the Constitution No. 4/X [*DAR* (II-A) 15, 19 May 2005, pp. 6-7].

³²⁸ See Draft Amendment to the Constitution No. 6/X [*DAR* (II-A) 15, 19 May 2005, pp. 8-9].

same day, 1 June) with negative results for the ratification of the Treaty, its viability was obviously prejudiced. The *PCP* and the *PEV* did not give up on their drafts, which had affirmative votes from the proposers and the *BE* and negative votes from the *PS*, *PSD* and *CDS-PP*.³²⁹

The debate on the Constitutional revision in plenary sittings took place on the same day as the debate on the European Council of Brussels (16 and 17 June 2005), which, after the referendums of France and The Netherlands, had decided to halt the ratification process of the European Constitutional Treaty. In that debate, the Parliamentary Affairs Minister, Augusto Santos Silva, proposed the postponement *sine die* of the national referendum foreseen for October, but he reaffirmed the Government's commitment to submit the Treaty to referendum, taking into consideration that any other solution would be unacceptable and would be contrary to the growing interest of the Portuguese people in the European questions [*DAR* (I) 32, 23 June 2005, p. 1288]. This position of the Portuguese Government was accepted by the opposition on the right (*PSD* and *CDS-PP*) but criticised by the opposition on the left (*PCP*, *BE* and *PEV*). The latter opposed the Treaty, and considered that, after the French and Dutch referendums, the implementation of the Constitutional Treaty had been shelved. As a result, insisting it be submitted to a referendum did not make any sense.³³⁰

At the beginning of the debate in the plenary, the proposal that had been passed in the *CERC* was withdrawn by its proponents and replaced with another one. The chance of having a referendum in October was out of the question. Therefore, holding a referendum simultaneously with the local elections did not make sense, and the proposal to make this possible was withdrawn. On the other hand, since there was a strong possibility that the ratification of the European Constitutional Treaty would be scrapped and another treaty drawn on same topic, it was necessary to create structures that would guarantee that any future treaty be submitted to a binding referendum.

For that reason, the final proposal allowed the calling and holding of a referendum on the approval of any treaty that had as its purpose the construction and strengthening of the European Union. According to Vitalino Canas (*PS*), the Portuguese people would be asked if they agreed that the Assembly of the Republic approve a treaty whose

³²⁹ See debate and voting in *DAR* (II – RC) 3, 3 June 2005.

³³⁰ See speeches by Honório Novo (*PCP*), Luís Fazenda (*BE*) and Heloísa Apolónia (*PEV*), [*DAR* (I) 32, 23 June 2005, p. 1293-1296].

purpose was the construction and strengthening of the European Union [DAR (I) 32, 23 June 2005, p. 1311].

In the final vote, the *PCP* and *PEV* drafts had 174 nay votes (101 *PS*, 63 *PSD* and 10 *CDS-PP*) and 20 yea votes (11 *PCP*, seven *BE* and two *PEV*). A *BE* proposal, submitted directly to the plenary, aimed to allow the referendum on any international agreements except when they concerned peace or rectification of borders, had the same 174 nay votes, seven yea votes (from the *BE*) and 13 abstentions (*PCP* and *PEV*), [DAR (I) 32, 23 June 2005, pp. 1320-1322]. The joint *PS*, *PSD* and *CDS-PP* proposal was passed with 180 yea votes (*PS*, *PSD*, *CDS-PP* and *BE*) and 13 abstentions (*PCP* and *PEV*), [DAR (I) 32, 23 June 2005, p. 1327]. With the possibility of holding a referendum on the European Constitutional Treaty being removed, since the ratification process was stopped, the question of the referendum emerged again with the Lisbon Treaty, which replaced it.

5. The Question of the Referendum on the Lisbon Treaty

5.1. From the European Council of June to the Signature of the Treaty

In the second half of 2007 Portugal took the presidency of the European Union, with the main purpose of reforming the treaties. With that in mind, the European Council of Brussels on 21 and 22 June 2007 decided that the next presidency would be in charge of drawing up a new draft treaty, to be submitted to the Intergovernmental Conference, which should be opened in July. This should complete its work before the end of 2007 so that the ratification of the treaty could be concluded before the European election of June 2009.

When the Prime Minister announced the Programme of the Portuguese Presidency of the EU to the Assembly of the Republic on 27 June, there was a conviction, or at least a strong suspicion, that the European Heads of Government would agree to avoid holding referendums on the future treaty. The *PSD* leader, Marques Mendes, wanted to know if any agreement among the Heads of Government had been made to avoid referendums on the future treaty, and reaffirmed the *PSD*'s commitment to a referendum in Portugal on the future treaty. He announced that the *PSD*, at the right moment, would formalise that proposal [DAR (I) 99, 28 June 2007, p. 9]. In response, the Prime Minister denied the existence of any agreement on the referendum, but refused to take any position before knowing the contents of the future treaty [DAR (I) 99, 28 June 2007, p. 13].

The *BE*, the *PCP* and the *PEV* explicitly accused the Portuguese Government of seeking to avoid a referendum. Francisco Louçã (*BE*) spoke about a ‘conspiracy of instantaneous ratification’ fed by the refusal of a referendum by all means. Agostinho Lopes (*PCP*) accused the political heads of the European Union of making-up the Constitutional treaty to avoid the ratification by referendum, and Álvaro Saraiva (*PEV*) concluded that everything was set out as a stratagem from several countries to avoid the referendum [*DAR* (I) 99, 28 June 2007, pp. 27-30].

On 19 October 2007, in a parliamentary debate with the participation of the Parliamentary Affairs Minister, Augusto Santos Silva, several deputies that supported the referendum tried to obtain a commitment from the Government.³³¹ They also confronted the Government with the compromise inserted in its Programme, in which the approval and ratification of the treaty should be preceded by a popular referendum. In addition, they pointed to the similarity of the essential contents between the new treaty and the Constitutional Treaty. The Minister addressed the decision for a moment after the signature of the treaty, which would take place on 13 December [*DAR* (I) 12, 20 October 2007, p. 8].

The change in the *PSD*’s position on the referendum, reflecting the replacement of Marques Mendes by Luís Filipe Menezes in the partisan leadership on 28 September 2007, was also expressed in that debate. On 19 October, the speech by Pedro Santana Lopes as parliamentary leader was very distant from the position in favour of the referendum which had been expressed by the former leadership [*DAR* (I) 12, 20 October 2007, pp. 28-29]. The doubts expressed by the President of the Republic, Cavaco Silva, on the European referendum, and the commitment of the former leader of the party, Durão Barroso, as President of the European Commission, to approve the Lisbon Treaty, influenced that change of position.

5.2. The Draft Referendums and the Debate on the Ratification of the Treaty

On the very same day as the signature of the Lisbon Treaty, 13 December 2007, the question of the referendum returned to the Portuguese Parliament. The *PCP* announced the immediate presentation

³³¹ See speeches by Bernardino Soares (*PCP*), [*DAR* (I) 12, 20 October 2007, p. 7]; Luís Fazenda (*BE*), [*DAR* (I) 12, 20 October 2007, p. 11]; Heloísa Apolónia (*PEV*), [*DAR* (I) 12, 20 October 2007, pp. 13-14]; António Filipe (*PCP*), [*DAR* (I) 12, 20 October 2007, pp. 19-20]; and Honório Novo (*PCP*), [*DAR* (I) 12, 20 October 2007, pp. 29-30].

of Draft Resolution No. 241/X, proposing the holding of a referendum with the participation of all Portuguese citizens registered to vote in the national territory, or in other Member States of the European Union, with the following question: ‘do you approve of the Lisbon Treaty which alters the European Union Treaty and the Treaty that Institutes the European Community?’ [DAR (II-A) 51, 2 February 2008, pp. 22-24].³³²

On 20 December, a week after the signature of the Treaty, a parliamentary debate with the Foreign Minister Luís Amado took place. The Government was again asked about its position on the ratification of the Lisbon Treaty.³³³ Despite the insistence, the Government refused to make a decision before the beginning of 2008 [DAR (I) 29, 21 December 2007, p. 26].

On 21 December, the *BE* also introduced Draft Resolution No. 246/X with the purpose of submitting to referendum the approval of the Lisbon Treaty, and with the same question proposed by the *PCP* [DAR (II-A) 51, 2 February 2008, p. 24]. The *CDS-PP* took a similar initiative through Draft Resolution No. 248/X, whose question was the following: ‘do you agree with the approval of the Lisbon Treaty?’ [DAR (II-A) 51, 2 February 2008, pp. 24-25]. On 8 January, the *PEV* introduced Draft Resolution No. 250/X with the following question: ‘do you agree with the contents of the Lisbon Treaty (which alters the Treaties of the European Union and the European Community)?’ [DAR (II-A) 51, 2 February 2008, p. 25-26].³³⁴

Finally, on 9 January 2008, Prime Minister José Sócrates announced in the Assembly of the Republic the refusal of the referendum on the Lisbon Treaty for three main reasons: **1)** It is not justified to hold a referendum when there is a wide consensus in the Portuguese society as to the European project and the Lisbon Treaty itself. The main Portuguese institutions and political forces agree with the ratification of the Treaty. There is, therefore, no reason of doubt that the wide consensus in

³³² See the political Statement by António Filipe (*PCP*) in support of the referendum [DAR (I) 26, 14 December 2007, pp. 12-14].

³³³ See speeches by Honório Novo (*PCP*), [DAR (I) 29, 21 December 2007, p. 27]; Heloísa Apolónia (*PEV*), [DAR (I) 29, 21 December 2007, pp. 27-28]; Diogo Foyo (*CDS-PP*), [DAR (I) 29, 21 December 2007, p. 30]; and João Semedo (*BE*), [DAR (I) 29, 21 December 2007, pp. 32-33].

³³⁴ The admission of the draft resolutions by the President of the Assembly of the Republic occurred only on 31 January 2008, after the presentation of Draft Resolution No. 68/X, through which the Government proposed the approval of the Lisbon Treaty for ratification to the Assembly of the Republic (DAR (II-A) 51 – Supplement, 2 February 2008, pp. 27-(2-272)).

Parliament expresses the major will of the Portuguese people. 2) Ratification by Parliament is as legitimate and democratic as the ratification by referendum. The holding of a referendum in Portugal would keep in check, without any reason, the full legitimacy of the ratification by the national parliaments, as carried out in all other European countries. 3) The Treaty of Lisbon is different from the former draft of the Constitutional Treaty, and the electoral compromise of the *PS* on the referendum expressly respected the Constitutional Treaty and not any other [DAR (I) 32, 10 January 2008, pp. 7-9].

The announcement of the Government's refusal to accept a referendum on the Lisbon Treaty resulted in the presentation of a motion of no confidence by the *BE*, in order to confront the Government with the non fulfilment of its compromise to submit the Treaty to referendum. The motion was discussed on 16 January and rejected by nay votes from the *PS*, having obtained yea votes from the *BE*, the *PCP* and the *PEV* and abstentions from the *PSD* and the *CDS-PP* [DAR (I) 35, 17 January 2008, pp. 6-52].

The discussion of the draft referendums took place on 7 February 2008 at the *PCP*'s initiative [DAR (I) 45, 8 February 2008, pp. 6-43]. In that debate, the proposers of the referendum refuted the Prime Minister's arguments that the referendum was not necessary, considering that refusal a serious non-fulfilment of a compromise inserted in the Electoral Programme of the *PS* and in the Programme of the Government. They argued that this reflected the broad consensus in Parliament, and in the country, on the European integration process. The right of the Parliament to ratify the Treaty without a referendum had been surrendered when the *PS* promised, in the Programme of the Government, that a referendum would be held, and when they promoted the 2005 Constitutional revision with the express purpose of enabling such a referendum. The idea that the Lisbon Treaty was substantially different from the European Constitutional Treaty was also refuted. Statements from several European leaders affirming that the treaties were similar in substance were quoted.³³⁵

The *CDS-PP* position, supporting its draft resolution, diverged from the *PS* and *PSD* views as to the referendum, and also diverged from the *PCP*, *BE* and *PEV* as to the answer to give if the referendum took

³³⁵ See speech by Agostinho Lopes (*PCP*) who, quoting Statements from José Luís Zapatero, Angela Merkel and Romano Prodi, considered that the new treaty was nothing but a Constitutional Treaty with a new name that had been exclusively changed to try to avoid new popular rejections [DAR (I) 45, 8 February 2008, pp. 6-7].

place. While the left parties proposed the referendum and assumed the refusal of the Treaty, the *CDS-PP* supported the referendum because it wanted to remain faithful to the compromise it had made with the Portuguese people. They hoped that the Portuguese people would favour the ratification of the Treaty, rejecting the argument by the *PS* and *PSD* that the supporters of the referendum only wanted to attack the European integration process.³³⁶

The draft resolutions were rejected. The *PCP*, the *CDS-PP*, the *BE* and the *PEV* voted affirmatively on all the drafts, as well as the *PS* MP António José Seguro, two members of the Party of the Land Movement (*MPT*) and two *PPM* members elected by the *PSD*. The *PS* MP Manuel Alegre abstained. The *PS* and *PSD* members voted negatively, although four *PS* members and nine *PSD* members sent explanations of vote expressing their disagreement towards the positions taken by their parties.³³⁷

Nonetheless, the approval of the Lisbon Treaty for ratification would be made in the Assembly of the Republic on 23 April 2008, with yea votes from the *PS*, *PSD* and *CDS-PP* and nay votes from the *PCP*, *BE*, *PEV* and one member of the *MPT* elected by the *PSD* (Pedro Quartin Graça). Manuel Alegre (*PS*) and nine *PSD* members tempered their yea votes with Statements of regret that the approval of the Treaty had not been preceded by a referendum [*DAR* (I) 75, 24 April 2008, pp. 43-48].

5.3. Some Remarks on the Refusal of the Referendum on the Lisbon Treaty

The referendum on the Lisbon Treaty was refused following a change of *PS* and *PSD* positions, which was denied by the *PS*, but admitted by the *PSD* in respect to itself. It is undeniable that the allegation concerning the compromise of the *PS* and its Government with the referendum only respected the European Constitutional Treaty is not believable. It is obvious that when those programmes were drawn the only treaty that was foreseeable and could be submitted to referendum was the Constitutional Treaty, but it is not less true that when the 2005 Constitutional revision was concluded, with the only purpose of making possible the referendum supported by all Portuguese parties, the ratification of the Constitutional Treaty was already out of question. The last minute change of the Constitutional provision that had been passed

³³⁶ See speech by Diogo Feyo (*CDS-PP*), [*DAR* (I) 45, 8 February 2008, pp. 13-14].

³³⁷ See voting and the explanations for the vote in *DAR* (I) 45, 8 February 2008, pp. 34-43].

had the only intention of making it possible to hold a referendum on another treaty, which would replace the Constitutional Treaty, and that treaty is none other than the Lisbon Treaty.

It is also not true that the Lisbon Treaty is substantially different from the Constitutional Treaty. Firstly, because such an idea is sufficiently denied by a lot of Statements from European leaders confirming the substantial identity of both treaties; secondly, because if in Portugal José Sócrates refused the referendum because the treaties were different, in Spain, Zapatero refused a new referendum because the treaties were similar; thirdly, because the three questions chosen by the *PS* to include the draft referendum on the Constitutional Treaty and that justified a referendum for being innovative, went through the Lisbon Treaty. The truth is that the victory of the negative answer in the referendum held in France and in The Netherlands on the Constitutional Treaty threw some panic among the supporters of the European construction process drawn on that Treaty. Therefore, it was obvious that the mandate given to the Portuguese Presidency in the European Council of Brussels of June 2007, presupposed an agreement that was not publicised among the European leaders with the purpose of avoiding by all means the holding of referendums in the ratification process of the next treaty. It is exactly what happened. Only in Ireland was there a referendum by Constitutional imperative and the result allowed us to understand the fear of European leaders in holding other referendums.

In Portugal, the parties that supported a referendum on the European integration process since the Maastricht Treaty, the *PCP*, the *CDS-PP*, the *PEV*, and the *BE* since its creation, all tried within their powers to submit the Lisbon Treaty to referendum. The left parties, assumed the proposal of a referendum and the struggle against the Treaty. The *CDS-PP* assumed the proposal of a referendum and the support of the Treaty. The *PS* and the *PSD* preferred to avoid the risk of a referendum with an uncertain result and changed their positions. For both parties, the ratification of the Lisbon Treaty was too important to run the risk of its refusal by referendum.

6. The Ghost of the European Referendum in the Portuguese Political Life

Since 1992, the referendum on the participation of Portugal in the European integration process has hovered, like a spectre, over Portuguese political life. The referendum was proposed and gave rise to a particularly intense debate regarding the Maastricht Treaty; it was again

proposed on the Amsterdam Treaty; it was present, although less intensively, on the Nice Treaty; it came burst back on to the agenda over the Constitutional Treaty and the Lisbon Treaty. However, this referendum never happened.

The proposal for a referendum on the Maastricht Treaty was born on the political right wing. The *CDS-PP* was the first parliamentary party to propose the idea, during a 'euro-sceptic' phase of this party, under the leadership of Manuel Monteiro. The idea would soon be supported by the left, who saw in the referendum a possibility to contradict, through a popular vote, an approval in Parliament by an expressive majority. This idea was encouraged by the victory of the 'no' campaign in Denmark and by the narrow affirmative result in France. That was the position of the *PCP* and the *PEV*, which from this time forward, always supported the referendum when dealing with the ratification of a new European treaty. Much like the *PCP* and the *PEV*, the *BE* consistently supported the referendum since its creation, and followed the positions of the political forces which took part in it. This included the referendum on the European treaties, even if they were not as critical of the European integration process as the *PCP*, defining themselves as the 'Europeanists of the left'.

On the right, the *CDS-PP* was consistently in favour of the European referendum. Despite their abandonment of euro-sceptic positions at the beginning of 1990's, it assumed a favourable position towards the European integration process once again. The *CDS-PP* remained faithful to the idea that the international agreements, including the European treaties, should be the object of referendum.

The positions of the centrist parties were always more contradictory. Assuming an essential political convergence as to the European integration, the *PS* and the *PSD* kept an adjusted position on the possibility of a referendum. In 1992, they jointly refused the referendum on the Maastricht Treaty, rejecting the proposal introduced in the Constitutional revision. In 1997, they adopted a Constitutional formula that supposedly allowed a referendum aimed indirectly at European treaties, but which achieved opposite result. In spite of their Statements supporting a referendum on the European integration process, the *PSD* and the *PS* prevented it in practice, with the Constitutional text they adopted and with the unConstitutional and illegal questions which they agreed to put forward, first with the referendum on the Amsterdam Treaty, and later on the Treaty Establishing a Constitution for Europe. Meanwhile, both refused a Constitutional proposal that would allow a

referendum on the Nice Treaty in 2001. With the referendum on the European Constitutional Treaty, which all parties promised to submit to referendum, the *PSD* laid the blame on the *PS* for the failure of their common draft for the referendum, for having refused to change the Constitution and for having 'imposed' a question that was clearly unconstitutional. But, the truth is that the *PSD* subscribed to the question, and when the decisive moment for the Lisbon Treaty arrived, it was again in agreement with the *PS* in refusing the referendum.

The single conclusion to take is that in Portugal there was never a referendum on the European integration process because neither the *PS* nor the *PSD* wanted to hold one. Despite having admitted to its convenience in 1998 and having assumed the compromise of holding it in 2004, the truth is that they obstructed it. While they declared themselves supportive of the democratic value of the referendum, they placed greater importance on the European integration process, which always had an enthusiastic support from both parties.

