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## The Referendum in the Portuguese Constitutional Experience

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## **Final Notes and Conclusions**

### **1. The Constitutional Monarchy**

The referendum was an unfamiliar institution to Portuguese monarchic Constitutionalism. In the 88 years from the first Portuguese Constitution, which came into force on 23 September 1822, to the republican revolution on 5 October 1910, Portugal did not adopt any device of semi-direct democracy. There was never any direct consultation of the people when approving any of the three Constitutions or their amendments, called Additional Acts. Moreover, Parliament never approved any legislation foreseeing referendums, either national or local in scope.

In fact, the Portuguese monarchic Constitutional liberalism, established with the triumphant liberal revolution of 1820 or, more precisely, with the liberal victory at the end of the civil war in 1834, always maintained the representative principle as a matter of fundamental principle. It is true that historically the nature of the elections was merely instrumental. They served more to legitimate Governments than to choose them. In 45 general elections, the Government lost only twice (Proença & Manique, 1992, pp. 20-21). The debates on the electoral system were always on the more or less restrictive character of the suffrage, on the direct or indirect nature of the representatives' election, on the existence of one or two parliamentary chambers, and on the elective or hereditary nature of the High Chamber. Only in the last quarter of the 19<sup>th</sup> century, in 1872, did a concrete proposal to introduce the referendum in the Constitution first appear. The idea of introducing the popular ratification of Constitutional reforms did not proceed.

The political process of 19<sup>th</sup> century Portugal allows us to understand this option. From the start, the liberal victory was a difficult and troubled process. In a first phase, the Portuguese liberals were focused on the survival of the regime itself, threatened by successive waves of absolutist reaction. The country had a strong tradition of clerical influence and agrarian dominance. Under these circumstances, any direct consultation of the people would hardly have been favourable to the interests of a bourgeoisie that was essentially urban, composed of merchants, industrialists and liberal professionals, and who followed revolutionary ideals and tried to substitute the power of the old nobility and the clergy, who supported the ancient regime.

After defeating the counter-revolution at the end of the civil war in 1834, the most powerful liberal forces imposed a highly restricted suffrage and the contradictions between the liberal establishment and the popular aims led to an upsurge in huge popular revolts, mainly in the 1840s. When, at the end of the 19<sup>th</sup> century, demands for wider suffrage grew substantially, with demands to move straight to universal suffrage (which would not, in fact, arrive in Portugal until much later), the fear of republican influence amongst urban voters led to a suffrage restriction. The aim was to delay the fall of an increasingly contested Monarchy for as long as possible.

## **2. The First Republic**

The idea of a plebiscite, which was raised during the First Portuguese Republic, is inevitably linked with the aim of monarchic restoration. Paiva Couceiro wanted the plebiscite as a way to avoid the fall of the Monarchy, and revived that idea as a possible way to restore it. In 1911, he addressed an ultimatum to the new republican authorities, demanding their voluntary retirement from power. He assumed an armed struggle in the north of the country on behalf of the plebiscite. The neutral nature of that movement, downgrading the monarchic restoration as an immediate purpose and making it depend on an expression of popular will by plebiscite, divided the royalists more than it disturbed the republicans. When Couceiro was defeated militarily, Dom Manuel II firmly expressed himself against any chance of a plebiscite.

In the following years, during the deepest republican crises, when the monarchic hopes reappeared, the idea for a plebiscite reappeared as well. This happened in 1918, during Sidónio Pais's presidency, when the royalists challenged the President to call a plebiscite on the regime. It happened again, before the uncertainties after Sidónio Pais's murder. That question also divided the supporters of the monarchic cause during that time. Dom Manuel II, who never agreed with the plebiscite, supported by the royalists who were against his recognition as King. The plebiscite was contested by principle reason that it denied the Monarchy's own basis. It was defended for pragmatic reasons, as a way of opposing and challenging the Republic, and trying to probe its eventual weaknesses and divisions. It was a proposal by someone who had nothing to lose, and who obviously had no other chance of obtaining a good reception from the republican power. However, the idea was as far as ever from uniting the monarchists.

The constituent republican representatives of 1911 refused to consider a national referendum. They did not reject the referendum institution in principle, but feared its practice in the current Portuguese conditions. In fact, Switzerland's democracy appears in the speeches of several representatives as an admired example, but was considered possible in Switzerland due to the high civic and political culture of its people. In Portugal, the referendum would lead to the desegregation of the republican regime, given the general lack of culture. It was indeed the same fears that led the Portuguese republicans to restrict the right to vote instead of widening it, which is what they had intended to do. The truth is that, as Vasco Pulido Valente explains (2004, pp. 152-154), the republican' support was an urban phenomenon, with solid roots in Lisbon but weak support elsewhere in the country.

The Republican Constitution of 1911 laid down the referendum only at a local level, allowing two modalities:

- a) the municipal authorities could hold an organic referendum on some deliberations from district authorities, and parish authorities could also have organic referendums on some deliberations from municipal authorities;
- b) the popular referendum was optional on some deliberations from municipal authorities, and mandatory on some deliberations from parish authorities. It was a necessary condition for the approval of statutes regarding the creation, annexation or disunion of administrative circumscriptions.

Due to the political instability of the First Republic, but also to the sluggish legislative procedure that intervened with symmetrical powers, the two Chambers of the Parliament with a clear supremacy over the Executive in terms of legislation, the regulation of the local referendum also dragged slowly for several years, paralysing its application and creating doubts about its compulsory nature.

Nonetheless, the local referendum did exist in the First Republic. During its 16 years, the republican authorities created several municipalities and parishes, and the administrative bodies took several decisions on financial matters, with and without a referendum. This will not be surprising if we think, not just about the long legislative indecisiveness of that period, but also the fact that the country was several times in a State of siege and that dictatorial decrees dissolved the administrative bodies twice. Despite those vicissitudes, after the regulation of its procedure in 1916, the local referendum played a

contradictory role. Instead of being a genuine way of delegating decision-making to the people, the local referendum was restricted to limited spheres. Local government could not take certain decisions without a referendum, most importantly when they wanted to impose duties on the taxpayers. Afterwards, the claim for the regulation of local referendums led to calls for its scope to be restricted, leaving the administrative bodies free to take certain decisions.

It seems clear that referendums under the conditions of the First Republic would suffer some democratic deficit but, in all probability, neither more nor less than the other electoral acts. Similarly, the wisdom of submitting certain decisions from the administrative bodies to a referendum is evidently questionable, especially when the decisions imposed financial duties on the citizens.

The experience of local referendums in the First Republic was not wholly satisfactory. It could hardly have been so. In the Deputies Chamber session of 5 March 1926, less than three months before the beginning of 48 years of dictatorship, Alfredo Guisado appealed for the approval of a new Administrative Code. He deplored that, after 16 years of a Republic, Portugal was still ruled by ragged monarchic codes, and wished that something new and useful could be done with the parish authorities' functions, given that, even the referendum which had been given to them by law, was no more than a gag (*DCD*, 47, 5 March 1926, p. 9).

This frustration is not surprising. In a historical period like the First Portuguese Republic, where few political experiences were satisfactory, we cannot be surprised that the experience of the referendum was problematic.

### **3. The Dictatorship of the New State**

The dictatorship established in Portugal used the plebiscite for Constitutional legitimisation. It was not an expression, or even a consultation, of the popular will, but rather a process that avoided the election of a Constituent Assembly and imposed a Constitution that the dictator put in place.

Portugal lived under a dictatorship from May 1926 until April 1974. Oliveira Salazar ascended to power by undermining democratic principles. With a restricted group of collaborators, he drew up a Constitutional draft that was submitted to a pale discussion involving only those loyal to the regime. A plebiscite followed.

The plebiscite did not even have a democratic appearance. There were neither alternative proposals, nor the freedom to debate the proposed draft due censorship and the prohibition of civil liberties. The vote was obligatory, not secret, and abstentions counted as favourable votes. The plebiscite on the Constitution of 1933 was no more than a farce, as were other electoral acts held by the dictatorship during its existence.

After approving the Constitution through a plebiscite, the regime never again used a similar device. The first version of the Administrative Code approved in 1936, kept the local referendum as it had been during the First Republic, although it placed more limitations on the right to vote (which was not free and restricted to the heads of family loyal to the regime). However, the definitive version of that Code, approved in 1940, removed even that possibility. The Constitutional revision of 1935 gave the President the power to summon a plebiscite if the National Assembly intended to review the Constitution, in the part respecting the legislative power, but he never used that possibility. All the other proposals to hold referendums during the 48 years of dictatorship took place only in the 1960s, mainly to resolve the colonial problem.

#### **4. The Referendum on the Colonial Problem**

Except for the plebiscite of 1933, which was held to give formal legitimacy to the dictatorship, almost every proposal, or mere suggestion, of a referendum during the 48 years of fascism, were focused on Portugal's colonial policy. In the early 1960s, before the the invasion of the 'Portuguese State of India' by the Indian Union was imminent, the Secretary of State of the Army, Francisco da Costa Gomes, proposed the holding of a referendum to Salazar, hoping to allow for an honourable withdrawal, without any illusions as to the result. Salazar peremptorily refused that option. Some disperse references, found in the international press after the fall of Goa, Daman and Diu, referred to a supposed Portuguese referendary proposal. However, these are not credible. The Indian Union would never have accepted such a proposal, but the Portuguese Government never made it.

After the outbreak of the wars in the African colonies, with an international situation that was clearly favourable to the liberation movements, several plans were made by the US Administration to solve the Portuguese colonial problem, which included the proposal of referendums. Convinced that Portuguese colonialism was condemned to failure in the near future, they tried to achieve a solution of self-determination in such a way that would safeguard the American interests

and prevent the Soviet Union from expanding its sphere of influence. The Sakva Plan, drawn in 1962, foresaw the holding of referendums in 1967. In 1963, George Ball, on behalf of the Kennedy Administration, made a similar proposal that was unsuccessful. In 1965, under the Johnson Administration, the Ambassador in Lisbon, George Anderson, introduced a similar plan, without the conviction of a positive answer.

Salazar's answer was always peremptorily negative. In August 1963 he encouraged speculation as to the eventual admission of a plebiscite, alluding to the advantage of a 'solemn and public act' through which the country could pronounce itself on the overseas policy of the Government. However, it quickly became clear that such an initiative was never in the dictator's mind.

Meanwhile, some sectors of the non-communist opposition cherished the idea of a referendum. Humberto Delgado supported the creation of a Federal Republic of the United States of Portugal, by plebiscite, in 1960. That proposal was as unrealistic as the General's expectations of overthrowing the regime by a military coup, which he would lead from exile. Inside Portugal, the Communist Party, in its 5<sup>th</sup> Congress held in 1957, decided to support actively the struggle for the total independence of the colonies. However, some elements of the republican and liberal opposition supported a referendum on the colonial policy. This proposal was ignored by the Government, and had no echo in the rest of the opposition, which reflected all the hesitations of the proponents. The purpose was to keep some distance towards the Government and its colonial policy, but they were also hesitant to recognise the rights of the peoples under colonial rule to self-determination.

At the start of the 1970's, the idea of a referendum on the colonial policy was raised again, this time from the regime's ranks. General António de Spínola proposed this in his book *Portugal e o Futuro*. His aim was to find a solution for autonomy that would be sanctioned by a referendum prepared by the regime and accepted by the international community, being sure that the colonial problem could not have an honourable military solution for the Portuguese Government. However, nobody welcomed the proposal. The regime wanted to resist, militarily, at all costs. The opposition unanimously recognised the right of the people from the colonies to self-determination and independence. For the liberation movements, independence was only a matter of time.



In the first months of the Portuguese democratic revolution, the holders of the new political power were deeply divided as to the solution for the overseas problem. The excessive vagueness of the *MFA* Programme, in the compromise version negotiated on the nights of the 25<sup>th</sup> to the 26<sup>th</sup> of April 1974, reflected precisely those divergences.

The Coordinating Commission of the *MFA*, and the more progressive political forces, extolled the immediate recognition of the right of the people from the colonial territories to self-determination and independence. They also recognised the liberation movements as legitimate representatives of the respective people. General António de Spínola, his military followers, the Prime Minister of the First Provisional Government (Adelino da Palma Carlos) and the more conservative political parties that had been recently constituted (namely *PPD* and *CDS*), defended popular consultations in the territories. These consultations should involve not only the liberation movements, but also new political forces supported by Portugal, and also the communities of Portuguese residents in the territories.

This disagreement meant that the decolonisation process was delayed for several months. The talks between the Portuguese authorities and the liberation movements remained inconclusive, and the war continued on the ground. The publication of Law No. 7/74, of 27 July, by which the Portuguese State formally accepted the independence of the overseas territories, meant the defeat of Spínola's project.

In July 1974, with the resignation of the Prime Minister Palma Carlos after a failed Constitutional coup, António de Spínola lost his main support. The Coordinating Commission of the *MFA* and the left parties increased their influence over those in power, with immediate effects on the decolonisation process. On the other hand, the combined pressures from the United Nations, the liberation movements that continued the war, and the Portuguese troops in the territories that refused to fight and threatened to recognise the respective independence on their own, created the necessary conditions for a fast progression of the decolonisation processes.

In the territories where the military ending was imminent, Guinea-Bissau and Mozambique, the negotiations excluded any concept of popular consultations. The Portuguese Government recognised the *PAIGC* and the *FRELIMO* as legitimate representatives of their peoples, and those new countries proclaimed independence, on 10 September 1974 and 25 June 1975, respectively.

In two territories where there was no colonial war but where intense claims for independence existed (Cape Verde and Sao Tome and Principe), the independence foresaw, not exactly popular consultations under the form of a referendum, but some form of popular consultation through the direct election of constituent assemblies. The candidates were formally presented by the citizens' groups, which certainly meant that they were, in practice, promoted by the liberation movements (the *PAIGC* in Cape Verde and the *MLSTP* in Sao Tome and Principe).

In the case of Angola, considered the jewel of the crown of Portuguese colonialism due to its immense natural resources, the situation was more difficult. There were three liberation movements competing in the territory, and the process became internationalised, given the direct involvement of the regional and world powers in the support of the several movements. Furthermore, even after Law No. 7/74, António de Spínola insisted on leading the process, and he did not give up on this until his resignation in the end of September 1974.

The *Alvor* Agreement, signed by the Portuguese Government and the three liberation movements, established the date of 11 November 1975 for the independence of Angola. It foresaw the election of a Constituent Assembly by October 1975, prepared jointly by the three movements and contested only among them. Before the signature of the *Alvor* Agreement, the liberation movements refused an informal proposal made by António de Almeida Santos. The idea was to hold a referendum on a Constitutional draft which would be drawn by the three movements, foreseeing a tripartite form of sharing power in order to create peaceful conditions for future elections. In fact, the power system of the *Alvor* Agreement did not work due to the belligerent situation in the territory. However, the strong implantation of the *MPLA* in the area of Luanda allowed this movement to proclaim the independence of Angola in the capital, in the foreseen date.

East Timor was therefore the only Portuguese colony that achieved independence through a popular consultation, after a long and stormy process. The first idea for a referendum, through which the Timorese people would decide between independence, a connection to Indonesia, and a connection to Portugal, was set out in 1975. However, the unilateral proclamation of independence by the *FRETILIN*, after having defeated an attempt of the *UDT* to take power, provoked the invasion and military occupation of the territory by Indonesia.

During the 25 years of occupation, Indonesian forces conducted genocide of Timorese people, with more than 200,000 people killed. However, the resistance to the occupants remained unbroken. The guerrillas' fight in the mountains, the clandestine action among the populations and the action taken by the international community, with the support of Portugal as the administrative power recognised by the United Nations, finally gained results.

Particularly after the international repercussion of a massacre perpetrated in 1991 by the Indonesian Army in *Santa Cruz's* cemetery in Dili, the cause of the East Timorese people became more visible to the world, and the condemnation of the Indonesian invasion became louder and more widespread in the international community. Moreover, the political changes in Indonesia by the end of the 20<sup>th</sup> Century, with the fall of Suharto and his substitution by Habibie, created the necessary conditions for an agreement obtained in the United Nations, between the Portuguese and the Indonesian Governments, as to a popular consultation in East Timor.

In spite of the violence exercised against the pro-independence activists by pro-integration militia, the choice of the Timorese people was overwhelmingly in favour of independence. On 30 August 1999, and through popular consultation, the East Timorese recovered the independence lost in 1975, proclaiming it again on 20 May 2002. East Timor was, thus, the only former Portuguese colony that achieved independence through a referendum. However, this happened 25 years after the Portuguese withdrawal from the territory, and no longer against the Portuguese colonial rule, but actually against Indonesian occupation.

## **5. The Referendum in the Portuguese Democracy**

### **5.1. The Primacy of the Representative Democracy**

At the time of the 1974 revolution, Portuguese democrats had bad memories of referendums. The only plebiscite in Portuguese history was used by the dictator to give himself formal legitimacy in the 1933 Constitution. In the context of a military dictatorship, without public freedoms or any chance to present alternatives, the plebiscite of 1933 only had a vague appearance of a popular consultation. The Constitutional text that was adopted as a result served as formal frame for the repressive dictatorship, from which Portugal was only able to rid itself from 41 years later.

At the beginning of the democratic regime, the institution of the referendum was not rehabilitated. Any suggestion of a referendum was treated with suspicion that the proposer wished to undermine Portugal's fledgling democracy. Firstly, there were Spínola's attempts to overthrow the Armed Forces Movement Programme through a referendum, by replacing the Constituent Assembly election for a provisional Constitution. He also attempted to prevent the unavoidable decolonisation process by holding referendums in the former colonies. Both attempts were rejected by the revolutionary soldiers and the political forces. The soldiers consequently identified themselves more with democratic revolution, and then committed themselves in defending it.

After the approval of the 1976 Constitution, the Constitutional referendum became a goal supported by the opponents of the economic, social and political changes that were Constitutionally enshrined. The parties that were against the 1976 Constitution, including not only the *CDS*, which had voted against its approval, but mainly the *PSD*, which despite having voted for the Constitution never accepted its contents, tried to over-rule the demand of a two-thirds parliamentary majority needed for the Constitutional revision, through a referendum.

The aim of changing the Constitution through a referendum, which contradicted the established rules for the Constitutional revision, was clearly assumed by the candidate for President of the Republic in 1980 supported by the *PSD* and the *CDS*. This fact made that election primarily about the defence of the 1976 Constitution. With the re-election of Ramalho Eanes, representative democracy also defeated the referendary temptation.

The leftist parties never accepted the Constitutional referendum, but after 1980 the *PSD* and/or the *CDS* persisted in proposing it even if they had no hope of obtaining approval. Insofar as the *PS* was converging with the *PSD* and the *CDS* in their aim to alter important aspects of the 1976 Constitution, the rightist parties stopped agitating for a referendum and started to pressure the *PS* to sign Constitutional revision agreement, adding up to the necessary two-thirds majority. However, the insistence of the Portuguese right in the use of the referendum as an instrument to change the Constitutional system opened wounds that were hard to heal, and contributed to the fact that only in the 1989 Constitutional revision did the *PS* give up its position against the national referendum and allow it to be introduced, even if in extremely careful terms.

## **5.2. The Weak Experience of Local Referendums**

In almost 40 years of the Portuguese democratic system, there was never great enthusiasm for local referendums. Several reasons can help explain this fact. Jorge Miranda and Rui Medeiros [2007 (III) p. 482] attribute the tiny number of local referendums to citizens' lack of interest in participating, local authority bodies' reluctance to submit their proposals to popular vote, and to a very restrictive interpretation of the legislation by the Constitutional Court.

The weak referendary tradition in Portugal, both at the national and local level, is a reality that can help to explain the weak popular enthusiasm for local referendums. It is also significant that the possibility of local referendums did not appear immediately after the transition to democracy. The Constitution only started to admit local consultations in 1982, and the law did not enable them until 1990, and then with very restrictive terms.

Moreover, experience reveals that the Constitutional Court judged most of the few subjects that raised the interest for calling local referendums as being unconstitutional or illegal. The restrictive nature of the Constitutional and legal enshrinement of the local referendum, with the backup of a restrictive jurisprudence of the Constitutional Court, greatly limited the opportunities for referendums being held. On the other hand, the deliberations taken in order to call local consultations or referendums revealed, for the most part, great ignorance about the legal circumstances in which they could be held. If such ignorance can be understandable in some of the cases of the deliberations taken by assemblies of small parishes, municipal assemblies had less of an excuse.

In the four local referendums actually held, we can verify a seemingly contradictory phenomenon. In the case of the parish of *Serreleis*, there was substantial electoral participation. In the cases of the municipalities of *Tavira*, *Viana do Castelo* and *Cartaxo*, turnout was very low. The difference can be explained by the relative importance attributed by the voters to the matter under consultation. While in a small village like *Serreleis*, the subject of the location of the playing field assumed considerable local relevance, for most of the population of *Tavira* and *Viana do Castelo*, the eventual demolition of an old water reservoir, or the integration of the municipality into an intermunicipal community, were almost irrelevant subjects. In the case of *Cartaxo*, even though the privatisation of car parking sparked great interest, the absolute consensus among the political forces, who also opposed the privatisation, surely demobilised the voters.

### **5.3. The Careful Inception of the National Referendum**

The national referendum was protected by extreme safeguards both in the Constitution and by law. There could only be a legislative referendum. In other words, referendums could only occur on matters upon which the Assembly of the Republic or the Government can decide by passing an international agreement or legislation. Many matters were excluded from the referendum's scope. The referendum could not happen on alterations to the Constitution, or on issues and acts with a budgetary, tax-related or financial content, or on the Parliament's most important issues of political and legislative responsibility.

The referendum is, in general, optional. The only case of an obligatory referendum was established in the 1997 Constitutional revision, and regarded the *de facto* institution of the administrative regions. The referendum could only occur on acts in progress, and never on acts definitively passed within the same legislative session, thus making it impossible to hold referendums to revoke legislation that had already been approved by Parliament. The way that the national referendum was established was designed to emphasise the primacy of the representative bodies.

In addition, the referendum could not be used to stoke conflict between the sovereignty organs. The referendum initiative belonged to the Government, the MPs and 75,000 citizens, but the decision to propose a referendum to the President of the Republic was the exclusive responsibility of Parliament. The decision to call a referendum belonged exclusively to the President of the Republic, and that decision was free and unfettered. Meanwhile, the President could only call a referendum if it was not declared unconstitutional or illegal by the Constitutional Court, a review that was obligatory. The referendum could not be called by the Government or by the Parliament against the President of the Republic, or by the President of the Republic against the Government or Parliament. Nonetheless, despite the admission of the referendum through popular initiative and the admission of the autonomous participation of the citizen groups in the referendum campaign, the decisive role was reserved for political parties, in both the calling the referendum, which required a parliamentary majority, and the campaign itself, where the parties were guaranteed a prominent position.

Other important conditions were also established. The referendum could not coincide with national elections, in order to avoid electoral behaviour being contaminated by acts of a different nature. The

questions had to meet certain criteria: the referendum could be held on a single matter, and have a maximum of three questions, which had to be objective, and clearly and precisely formulated for ‘yes’ or ‘no’ answers.

These conditions help to explain the scarce use of the national referendum since it was introduced in into the Constitution. Nonetheless, before drawing a conclusion, it is important to consider the specific data, summed up in appendix 2, regarding the incidence of the referendum in the Portuguese democracy.

## **5.4. The Referendum Proposals in the Portuguese Parliament**

### **5.4.1. The Issues**

From 1989 up to 2011, the Parliament received 39 referendum proposals that related to nine different matters: 15 proposals were about European Union Treaties, 13 on the decriminalisation of abortion, four on the institution of administrative regions, two on the decriminalisation of drugs, one on the Portuguese Language Orthographic Agreement, one on the building of nuclear power plants, one on the appointment of the directors of public radio and television service, one on medically assisted procreation, and one on gay marriage. Three of these nine matters were never submitted to any parliamentary decision (the Orthographic Agreement, the nuclear power plants and the decriminalisation of drugs). From the six proposals remaining, three were rejected by Parliament: the appointment of directors to the public radio and television services; medically assisted procreation; and the referendum on gay marriage. Parliament approved the holding of referendums on three matters (the European Union Treaties, the decriminalisation of abortion and regionalisation), although only two of them were actually submitted to referendum.

The referendum on the regionalisation was proposed four different times. It was not even discussed the first time (1992). It was rejected the second time (proposed by the *PSD* in 1998). It was passed the third time that it was proposed, by the *PS* in 1998, through an agreement with the *PSD* and the *CDS-PP*, which invalidated a *CDS-PP* proposal.

The referendum on the decriminalisation of abortion was proposed 13 separate times. The first proposal (from the *PSD* in 1996) was withdrawn given the rejection of the bills that were introduced. In 1998, a *PSD* proposal was not submitted to vote, after a joint proposal

from the *PSD* and the *CDS-PP* was rejected and a *PS* proposal was passed. There is no doubt that the divergence between the *PS* and the rightist parties related to the specific question, since the principle of holding the referendum had been agreed between the *PS* and the *PSD*. In 2004, Parliament rejected proposals introduced by the *PS*, the *BE* and through popular initiative.

In April 2005 a *PS* proposal was passed, after a *BE* proposal had been withdrawn and a *CDS-PP* proposal had been invalidated. The proposal that was passed, however, was refused by the President of the Republic. In September 2005, a new *PS* proposal was passed, but it was declared unConstitutional. In 2006, a *PS* proposal was passed, invalidating a proposal by *CDS-PP*, and a referendum was held in early 2007.

The referendum on the European Union was proposed 15 separate times. On the Amsterdam Treaty, in 1997, two *PSD* proposals and one from *CDS-PP* were withdrawn; two proposals from the *CDS-PP* and the *PCP* were rejected and a *PS* proposal was passed, which would come to be declared unConstitutional. On the Nice Treaty a *BE* proposal was introduced but it was never discussed. On the European Constitutional Treaty, a *BE* proposal was rejected in 2003; the *BE* and *PCP* proposals were rejected in 2004, and in that same year a joint proposal from the *PS/PSD/CDS-PP* that had passed would later be declared unConstitutional. On the Lisbon Treaty the proposals from the *PCP*, the *BE*, the *CDS-PP* and the *PEV* were rejected.

#### **5.4.2. The Authorship**

The authorship of the proposals was nearly always from the parliamentary groups. Only one of them, on the Amsterdam Treaty, was introduced in 1997 by the *PS* Government of António Guterres. Three proposals were introduced by independent deputies and neither was discussed. One proposal was introduced by a group of 14 *PSD* members and it was not discussed. The popular initiatives for a referendum on the decriminalisation of abortion in 2004, medically assisted procreation in 2006, and gay marriage in 2010 were all rejected.

33 of the 39 proposals were introduced to Parliament by the parliamentary groups. Seven of them were never discussed. Eight of them were discussed, but they were not voted on. 16 were rejected. Seven were passed (three on the decriminalisation of abortion, one on regionalisation and three on the European treaties). Seven proposals were submitted to the President of the Republic. One of them was refused without being sent to the Constitutional Court. Six were submitted to the Court and three of



them were declared unConstitutional. Three referendums were held. Two of them had a negative answer, and the other an affirmative one. In none of the referendums did more than 50% of the registered voters take part, and consequently none of them could be considered legally binding.

We can conclude, therefore, that despite a significant number of proposals submitted to Parliament, the number of proposals passed was relatively scarce and fell upon only three matters. The criteria for passing were very restrictive and always decided according to partisan convenience.

#### **5.4.3. The Limits of a Popular Initiative**

The popular initiative was not very significant. The demand for 75,000 signatures to propose a referendum to Parliament, in a country where a political party is legally constituted with 7,500 signatures, is clearly out of proportion and acted as a deterrent. Furthermore, that only entitled the proposers to see their draft discussed and voted upon. The fact that all the initiatives were rejected soon discouraged citizens from using this right of initiative.

The right to create citizen groups to take part in the campaign was taken up in the three campaigns held, but the political parties had a decisive role in creating citizen groups that supported their own positions. Nonetheless, the participation of citizens in the three referendums was lower than predicted by those who had argued that the referendum would be an instrument of participation and expression of popular will. There was a clear contradiction between citizens who claimed, when asked by opinion pollsters, that they enthusiastically supported referendums, and claimed to favour of holding referendums on several matters, and the low turnout when the referendums actually took place.

#### **5.5. The President of the Republic and the Proposals for Referendum**

The President of the Republic maintained a relatively low profile in relation to the referendum. Since the initiative belonged to Parliament, only once out of seven times did the President of the Republic (in this case, Jorge Sampaio) assume the political decision to refuse a referendum. In that case, he considered that the proposed date of the referendum, in the middle of summer, would not be conducive to high levels of participation.

As for the other cases, the President of the Republic merely followed the decisions of the Parliament or the Constitutional Court. In the three cases of unConstitutionality, the President had no option but to refuse, and in the others, the President called the referendum.

The Constitutional Court's decisions reflect the restrictive terms under which the referendum was established by the Constitution and the law, and none of the declarations of unConstitutionality were a surprise. Where proposals were made for referendums on the Amsterdam Treaty and the European Constitutional Treaty, the formulated questions were so obviously unConstitutional that it is legitimate to doubt if their proponents actually wanted the referendum. In the case of the referendum on the decriminalisation of abortion, there were some voices that warned about the formal unConstitutionality of the proposal, since it had been introduced in the same legislative session as another referendum on the same subject had been refused.

## **5.6. The Political Parties and the Referendum**

### **5.6.1. PS**

The *PS* introduced nine proposals for referendum on four different matters: **a)** on the appointment of directors to the public radio and television services, which was rejected; **b)** on the regionalisation, which was approved; **c)** on the decriminalisation of abortion on five separate occasions: the first was approved in 1998 and gave origin to the first referendum; the second was rejected in 2004; the third was approved in 2005 and refused by the President of the Republic; the fourth was approved in 2005 and declared unConstitutional; and the fifth was approved in 2006 and gave origin to the second referendum; **d)** twice on European Treaties, both of which were declared unConstitutional.

It is noteworthy that all the proposals for referendum that passed in Parliament were based on *PS* proposals, and they always occurred with a *PS* majority, even when original proposal for a referendum on a subject had come from a different source. The rightist majorities rejected two *PS* proposals, and all the rest were passed. The referendum on regionalisation was agreed with the *PSD*, but the question was agreed with the *CDS-PP*. As for the referendum proposals on abortion, the first was agreed with the *PSD*, but the question was passed with the abstentions from the *PSD* and the *CDS-PP*; the second was rejected by the *PSD* and the *CDS-PP*, despite the affirmative votes from the *PCP*, the *BE* and the *PEV*; the three remaining proposals were approved: the third was passed with the *BE* but it was refused by the President of the Republic; the fourth was also passed

with the *BE* but it was declared unConstitutional; the fifth was approved with the *BE* and the *PSD* and gave rise to the second referendum on the decriminalisation of abortion. The *PS* proposed two referendums on European treaties, both of which were approved: the first on the Amsterdam Treaty was passed with *PSD* support, and the second on the Constitutional Treaty, which was passed with *PSD* and *CDS-PP* support. Both, however, were declared unConstitutional.

Besides having voted affirmatively on its nine proposals, the *PS* supported proposals for a referendum on the the decriminalisation of abortion, introduced in 2004 by the *BE* and by means of a popular initiative. However, the *PS* voted against the proposals referendums on 13 separate occasions. Eight of those occasions were against proposals for referendum on European Treaties: the Amsterdam Treaty introduced by the *CDS-PP* and the *PCP*; the European Constitutional Treaty introduced by the *BE* (twice) and the *PCP*; the Lisbon Treaty introduced by the *PCP*, the *CDS-PP*, the *BE* and the *PEV*. It also voted against a joint *PSD/CDS-PP* proposal for a referendum on the decriminalisation of abortion in 1997, a *PSD* proposal for referendum on the regionalisation in 1998 and the proposals for referendum on the medically assisted procreation and gay marriage introduced by means of a popular initiative.

The *PS* was behind the first proposal for referendum voted in Parliament, in 1992, which was rejected by the *PSD*'s absolute majority. However, the *PS* position would be decisive in all the referendums actually held. The *PS* agreed with the *PSD* about the holding of referendums on the decriminalisation of abortion and regionalisation, and it always kept a convergent position with the *PSD* as for the European Treaties: they agreed not to allow the referendums on the Treaties of Maastricht in 1992, of Nice in 2001 and of Lisbon in 2008; and they cooperated on proposals for referendum on the Amsterdam Treaty and the Constitutional Treaty, which were declared unConstitutional.

As of 2004, the *PS* insisted on the need to hold a new referendum on the decriminalisation of abortion as a condition to approve any legal change. While it was in minority, its proposal for referendum was rejected. When it gained majority, it maintained its position that the law should not be changed without a referendum, and insisted on successive proposals for referendum until one was held.

In the three referendums held, the *PS* defended the affirmative answer in all of them, and was defeated twice. The acceptance of referendums on the decriminalisation of abortion and on regionalisation in

1998 meant that the *PS* has changed its positions, given that a few times before it had refused *PSD* proposals on the same topic. The results of the referendums in 1998 were *PSD* victories and *PS* defeats. The *PSD* insisted on holding the referendums and the results corresponded to its positions. The fact that a governing party agreed to hold two referendums and lost in both cases, resulting in political embarrassment, is somewhat strange. However, the 1998 referendums reflected the contradictions and the divisions within the *PS*, which the *PSD* cleverly exploited. On the decriminalisation of abortion, the leader himself contradicted the official position of the party. On regionalisation, there were also dissenting voices inside the *PS*, as was the case of the historic leader Mário Soares. The divisions inside the *PS* resulted in the acceptance of the referendums, a lack of commitment to the campaigns, and the negative results.

### **5.6.2. PSD**

The *PSD* introduced eight proposals for referendum. The proposals on the decriminalisation of abortion in 1996, the Amsterdam Treaty and the decriminalisation of soft drugs were never discussed. Two proposals for referendums, on the liberalisation of abortion and the Amsterdam Treaty, were discussed but not voted. Two proposals were rejected: the joint proposal with the *CDS-PP* on the liberalisation of abortion and a first version of the proposal for referendum on regionalisation. By initiative of the *PSD*, only the proposal for referendum on the European Constitutional Treaty was approved, and it was declared unConstitutional.

The *PSD* has voted negatively on most of the proposals for referendum submitted to vote. It voted affirmatively on six proposals: **a)** its three proposals, on the decriminalisation of abortion (joint proposal by the *PSD/CDS-PP*), on regionalisation, and on the European Constitutional Treaty (joint proposal by the *PS/PSD/CDS-PP*); **b)** the *PS* Government proposal for a referendum on the Amsterdam Treaty; **c)** the proposal for a referendum on the decriminalisation of abortion in 2006; and **d)** the proposal for a referendum on gay marriage.

However, the *PSD* has voted negatively on 15 proposals for referendum: **a)** the proposal for a referendum on the appointment of the directors to the public radio and television services; **b)** five proposals for a referendum on the decriminalisation of abortion, with three being from the *PS*, one from the *BE* and one by means of a popular initiative; **c)** eight proposals for a referendum on European Treaties: from the *PCP* on the Amsterdam Treaty, from the *BE* (two proposals) and from the *PCP* on the

Constitutional Treaty, and from the *PCP*, *CDS-PP*, *BE* and *PEV* on the Lisbon Treaty; **d**) the proposal, by means of a popular initiative, on medically assisted procreation. On three occasions, the *PSD* abstained: on the proposals for a referendum from the *PS* on the regionalisation and the Amsterdam Treaty and on the *CDS-PP* proposal on the Amsterdam Treaty.

The *PSD* saw the Constitutional introduction of the referendum in 1989 as its victory, since it was its most insistent proposer. It never obtained what it wanted, which was the Constitutional referendum, but obtained the legislative referendum. However, while the *PSD* only initiated specific proposals for referendums, in 1996 and in 1998, it obtained a significant victory in terms of referendums. It imposed referendums on the *PS* about regionalisation and the decriminalisation of abortion, as it wanted to, and it ended up winning both, despite belonging to the opposition. The *PSD*'s purpose was to fight for the referendums in the hope of preventing regionalisation and the decriminalisation of abortion. This weakened the *PS* government's position by inflicting two embarrassing defeats.

On European issues, the *PSD*'s position was similar to the *PS*. Both parties refused to hold referendums on the Treaties of Maastricht, Nice and Lisbon, and they cooperated on the questions about the Amsterdam Treaty and the Constitutional Treaty, which were declared unConstitutional.

The *PSD* never accepted referendums when it was in Government. In 1992 it voted negatively on the referendum proposed by the *PS* about the public radio and television services, and in 2004 it voted negatively on all the proposals for referendums on the decriminalisation of abortion. In 2006, sensing a parliamentary majority with a tendency to decriminalise abortion, it assumed the compromise of accepting a referendum, and it voted affirmatively on the *PS* proposal in that sense.

### **5.6.3. *CDS-PP***

The *CDS-PP* introduced nine proposals for referendum. One of them, on the decriminalisation of drugs, was not discussed. Four proposals were not voted: on abortion (twice), the Amsterdam Treaty and regionalisation. Three proposals were rejected: on abortion, the Amsterdam Treaty and the Lisbon Treaty. A joint proposal with the *PS* and the *PSD* on the European Constitutional Treaty was approved, but it would be declared unConstitutional.

The *CDS-PP* voted affirmatively on 10 proposals for referendum: **a)** the proposal for referendum on the abortion that was subscribed with the *PSD* in 1998; **b)** the *PS* proposal for referendum on regionalisation; **c)** its own proposal for a referendum on the Amsterdam Treaty; **d)** the proposal for a referendum, which was subscribed with the *PS* and the *PSD*, on the European Constitutional Treaty; **e)** the proposal by means of a popular initiative on medically assisted procreation; **f)** all the proposals for a referendum on the Lisbon Treaty; and **g)** the proposal by means of a popular initiative for a referendum on gay marriage.

The *CDS-PP* voted against proposals for referendum on 10 separate occasions. It voted against **a)** the *PS* proposal on the appointment of the directors of public radio and television service; **b)** the *PCP* proposal on the Amsterdam Treaty; **c)** the *BE* and *PCP* proposals for a referendum on the European Constitutional Treaty; **d)** the three proposals for a referendum on the decriminalisation of abortion in 2004; and **e)** the two *PS* proposals in 2005 on the same subject. It abstained four times: **a)** on the *PS* proposal for a referendum on the Amsterdam Treaty; **b)** on the *PSD* proposal for a referendum on regionalisation and on the *PS* proposal on the decriminalisation of abortion in 1998 and, **c)** in the last proposal for a referendum on the decriminalisation of abortion in 2006.

The *CDS-PP* was the first party to support the holding of a referendum on the Maastricht Treaty in 1992, and from that time on it supported the holding of referendums on all treaties regarding the participation of Portugal in the European Union. It proposed the referendum on the Amsterdam Treaty, subscribed the draft referendum on the Constitutional Treaty and maintained that position regarding the Lisbon Treaty. As for regionalisation, it assumed a position against its institution, and supported the referendum as a way to prevent that purpose. Concerning the decriminalisation of abortion, the *CDS-PP* was again opposed, and used the referendum as a platform for that opposition. When there was a parliamentary majority with the tendency to decriminalise abortion, the *CDS-PP* was not against the referendum, hoping to prevent it through those means. When there was a majority in Parliament that could prevent the decriminalisation, the *CDS-PP* did not accept the referendum, in order to avoid the possibility of an affirmative answer.

#### **5.6.4. *PCP***

The *PCP* has always maintained reservations about the referendum, very much influenced by opposition to the *PSD*'s aspirations

for a Constitutional referendum. For that reason, the *PCP* did not follow the *PS*, *PSD* and *CDS* positions in the 1989 Constitutional revision, voting against the admission of the national referendum. The only exception is with regard to the treaties on Portugal's participation in the European Union. The *PCP* argued for the institution of a referendum on the Maastricht Treaty in the 1992 Constitutional Revision, and from that time on it has proposed holding referendums on the Amsterdam Treaty, the Constitutional Treaty and the Lisbon Treaty. It also argued for the 2001 Constitutional Revision to allow a referendum on the Nice Treaty. The *PCP* introduced three referendum proposals, all of which were refused.

The *PCP* voted affirmatively on 10 proposals for referendum. Regarding the European Treaties, it voted affirmatively on **a**) its three proposals, and the Amsterdam, Constitutional and Lisbon Treaties; **b**) the second *BE* proposal for a referendum on the Constitutional Treaty; and **c**) all the proposals for referendum on the Lisbon Treaty. In addition, it voted in favour of the proposals for referendum on the decriminalisation of abortion introduced in 2004 (from the *PS*, the *BE* and by means of popular initiative) after the rejection of the decriminalisation by the majority in Parliament.

The *PCP* voted against 10 proposals for referendum: **a**) on the Amsterdam Treaty presented by the *PS* and the *CDS-PP*, because it disagreed with the formulated question, and the same happened regarding the joint *PS/PSD/CDS-PP* proposal on the Constitutional Treaty; **b**) on the decriminalisation of abortion in 1998 (*PSD/CDS-PP* and *PS* proposals), in 2005 and 2006 (three *PS* proposals); **c**) on the medically assisted procreation; and **d**) on gay marriage.

The *PCP* abstained four times: **a**) on the *PS* proposal for a referendum on public radio and television services; **b**) on the proposals for a referendum on regionalisation in 1998 (although it was against the referendum on regionalisation in the 1997 Constitutional Revision, it recognised in 1998 that the referendum was Constitutionally obligatory and it abstained for that reason); and **c**) on the first *BE* proposal for referendum on the main choices of the European Constitutional Treaty, which were considered to be premature.

Up to 1989, the *PCP* kept a position against the Constitutional acceptance of the national referendum. Once the referendum became a reality, it assumed a pragmatic position about the use of the instrument. The *PCP* supported the holding of referendums on the European treaties, seeing them as a way to contradict the parliamentary hegemony of the

pro-European parties. If the approval of the treaties regarding the participation of Portugal in the European Union were submitted to Parliament, they would be easily have been passed by the large majority of parliamentarians without any hesitation. The use of the referendum, having in mind the examples of Denmark, France and The Netherlands, where the popular will expressed by the referendums did not coincide with the parliamentary expression of the pro-European parties, were seen as a useful and legitimate tool in the struggle against the ratification of the treaties. For that reason, the *PCP* always assumed that the holding of a referendum would be a means to make the refusal of the treaties possible.

As for the decriminalisation of abortion, the position was the opposite. The *PCP* always considered that Parliament should assume the responsibility of decriminalising abortion and strongly criticised the *PS*'s surrender to the *PSD* by accepting to submit that legislative option to referendum. In 2005 and 2006 the *PCP* was once more against the referendum, and supported the legitimacy of Parliament to legislate without a referendum. It also criticised the *PS* and the *BE* for making the decriminalisation of abortion depend on a referendum to over-rule the voters' option in 1998. The *PCP* voted affirmatively on the referendum to decriminalise abortion only in 2004, in the IX Legislature, when there was a rightist majority in Parliament, making decriminalisation by the Assembly of the Republic impossible.

### **5.6.5. BE**

Since first winning parliamentary representation in 1999, the *BE* has been the most enthusiastic party in its appeals for referendums. It introduced six draft referendums: **a)** on the Nice Treaty in 2001; **b)** on the European Constitutional Treaty (in 2003 and 2004); **c)** on the Lisbon Treaty (in 2008); and **d)** on the decriminalisation of abortion (in 2004 and 2005). The proposal on the Nice Treaty was not discussed. The 2005 proposal for the referendum on abortion was set aside in favour of the *PS* proposal. The rest were rejected.

The *BE* participated in 16 votings on referendum proposals. It has voted affirmatively on 13 and negatively on three. It voted against the popular initiatives for a referendum on medically assisted procreation and gay marriage, and the joint *PS/PSD/CDS-PP* proposal on the European Constitutional Treaty. It voted affirmatively on: **a)** its own four proposals; **b)** the proposals for a referendum on the decriminalisation of abortion introduced by the *PS* in 2004, 2005 and 2006, and the proposal by means of a popular initiative in 2004; **c)** the *PCP* proposal on the European



Constitutional Treaty; and **d**) all the proposals for a referendum on the Lisbon Treaty.

While generally favouring referendums, the *BE* opposed the referendum on medically assisted procreation, since it was otherwise flagrantly unConstitutional. It raised doubts about the question formulated by the *PS*, the *PSD* and the *CDS-PP* on the European Constitutional Treaty, which was also declared unConstitutional. Only one refusal for a referendum was politically motivated, and that referred to the popular initiative for a referendum on gay marriage. As for the rest, the *BE* supported all the referendum initiatives on the European treaties, and all the referendum initiatives on the decriminalisation of abortion, even a majority in Parliament declared itself in favour of decriminalisation. As for this last question, the *BE* position was to accept the *PS* idea that the decriminalisation of abortion should only be decided by Parliament after a referendum to reverse the 1998 result. This was only achieved in February 2007.

### **5.7. Final Note**

More than 33 years have passed on the Constitutional admission of the national referendum in Portugal, and the experience has been relatively disappointing for those who hoped that the referendum would strengthen the direct participation of citizens in political life, surpassing the inherent limitations of the representative democracy and reducing the decisive role of the parties in the political system. Political parties have approached the referendum with extreme caution, preventing the possibility of its use against the representative democracy.

A parliamentary majority is always needed to propose referendums, and they always demand the free decision of the President of the Republic and the previous review of their Constitutionality. The referendum was rarely understood as an end in itself by the Portuguese political forces. Asides from rare exceptions, the proposals for referendums were usually negative, i.e. designed to prevent the approval of something that would probably be approved if the decision were taken exclusively by Parliament. Since the appeal to the direct decision of the people, through referendums, was used as a tool against parliamentary majorities, they may be seen as an opposition tactic. For those who have nothing to lose, the proposal of a referendum gives the parliamentary majority the burden of refusing 'to give the floor' to the people for fear of a negative result. This, in turn, inclines parliamentary majorities to refuse proposals for referendums.

The decision to ask the President of the Republic to hold a referendum always belongs to the parliamentary majority, which can be rejected if it considers that the referendum would weaken its position or contradict its political goals. There are two reasons why a parliamentary majority might accept a referendum: **a)** the majority is so confident in a positive result that it goes forward with the referendum without hesitations, thus withdrawing any advantage that the opposition could have in the case of a refusal; or **b)** the majority is so divided on a certain question that it prefers to delegate decision-making to the people. In the latter case, the holding of a referendum demonstrates that the majority is divided and weak. The Portuguese democratic experience gives examples of both cases.

The referendums on the decriminalisation of abortion and on regionalisation are examples of division and contradictions inside the majority. Both were accepted by the *PS*, under strong pressure, in the first case, by the Catholic sectors of the party, and in the second case, by the anti-regionalist sectors. The *PS* preferred to accept the results of referendums, rather than having its official positions defeated, thus avoiding the consequences of its own division.

The referendums approved on European Treaties were designed to demonstrate wide support for the approval of the treaties. Both in the case of the Amsterdam Treaty and in the case of the European Constitutional Treaty, the convergence of the *PS*, the *PSD* and the *CDS-PP* in favour should have guaranteed an easy victory in the referendum. Conscious of the frustration expressed by many Portuguese about not having had the chance to pronounce themselves on the integration of Portugal in the European Union through a referendum, the supporters of the integration process could have addressed those complaints by allowing a referendum. However, the referendums of Denmark and France in 1992, and France and The Netherlands in 2005, discouraged any excess of confidence, since support for pro-European parties did not necessarily translate into support for the treaties.

As a result, the questions submitted to the Constitutional Court, both in the case of the referendum on the Amsterdam Treaty, and in the case of the referendum on the European Constitutional Treaty, were designed to lead to an affirmative answer. However, they were ruled unconstitutional. The parliamentary majorities, which passed such proposals, did not want the referendum, so they passed responsibility for its refusal to the Constitutional Court.

In the three referendums held, popular participation did not reach expectations. The enthusiasm for the referendums, which seemed to exist up to 1998, was revealed to be an illusion given the low turnout in all the cases. The fact that the first referendum in democracy had a registered participation rate of 30% was a huge frustration to the referendum enthusiasts. The next referendums, despite the fact that participation was greater, were not enabling the democratic and participative merits of the referendum. In spite of the dissatisfaction often expressed by citizens regarding representative democracy, not to mention the small space reserved for citizens in the political system and the non-fulfilment of promises by power holders, the Portuguese did not find in the referendum to be an antidote for the well-known crisis of representative democracy.

Out of 39 proposals for referendums introduced in the Portuguese Parliament, seven were approved and three were held with very low levels of participation, with apparent enthusiasm giving way to evident scepticism. The refusal to hold a referendum on the Lisbon Treaty dashed any hopes of submitting Portugal's participation in the European integration process to a referendum. In 2009, the distant possibility of a new referendum on the institution of the administrative regions was spoken about once again, but in different terms from the last one. There are also proposals for a referendum on gay marriage, which is currently impossible given the declared opposition from the *PS*, the *PCP* and the *BE*. However, it is unlikely that any referendum in the near future will mobilise public opinion, and encourage the civic participation of citizens. The experience of the referendum in Portuguese democracy is very far from being a success.

