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The primacy of European Union Law over the Portuguese Constitution according to the Constitutional Court – Comment on Constitutional Court judgment no. 422/2020

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1. In Judgment no. 422/2020, reported by Constitutional Court Justice (Justice-Counsellor) José Teles Pereira and approved unanimously in plenary session (pursuant to Article 79-A of the Law of the Constitutional Court), following a long discussion (as noted in the text of the Judgment itself), the Constitutional Court took a position "for the first time", and with general character, on the "terms in which EU Law is accessible to it, within the framework of a concrete review of constitutionality procedure".

The issue that gave rise to this specific review procedure is of little relevance, for the sake of economy of this comment. Basically, the party who brought an appeal to the Constitutional Court under the provisions of Article 280(1)b) of the Constitution of the Portuguese Republic (CPR) asked the Constitutional Court to find a rule of law derived from the Union, with the interpretation established by the CJEU, incompatible with the constitutional principle of equality (prohibition of discrimination) set out in Article 13 of the CPR.

However, prior to judging that claim, the Constitutional Court considered, quite rightly, that it was necessary, as a preliminary matter, to determine whether, in the light of Article 8(4) of the CPR, "the Court is responsible (or rather, under what conditions and presumptions it is responsible) for assessing whether EU Law is in conformity with the Constitution". It is the answer to that preliminary question that makes Judgment no. 422/2020 a landmark in the case law of the Portuguese Constitutional Court.

2. As a backdrop, the Portuguese Constitutional Court highlighted that, where the matter is not one of "systemic violation relating to basic values of the Union", "a (mere) conflict of national rules with EU Law rules (…), which does not express in its essence – as is almost always the case – an intent to disrespect EU Law [but rather, most often, expresses a context of conflict brought about by peculiarities of the national Law (…)], is a phenomenon that is impossible to remove in any interaction between autonomous regulatory systems – and even more so in a relationship with the complexity generated by European integration".

Nevertheless, while conflicts (although apparent) are inevitable, solving these, as mentioned in Judgment no. 422/2020, requires the adoption of "agreements and the creation of room for dialogue and cooperation", within the framework of "*'healthy' confrontation*" that Maria José Rangel de Mesquita speaks of, and always without losing sight of the *principle of sincere cooperation* and the commitment, of the relevant players in this interaction, to the European project.

Accordingly, the judges of Ratton Palace (seat of the Portuguese Constitutional Court) sought to demonstrate that, having observed practice, it is the case that "in situations of deadlock with national constitutional jurisdictions", "decisions constructed in such a way as to provide a kind of accommodating

approach prevail (…). This practice (…) is a central feature of the dynamics of the relationship between the CJEU and the Constitutional Courts of the Member States, and sees the prevalence, on both sides, of practices of *resolution by dialogue* of the conflict intrinsically involved in a complex relationship where points of friction remain".

Therefore, from the perspective of European Union Law – indeed, a large part of the reasoning of Judgment no. 422/2020, one might say too much, is engaged in describing the problem from the perspective of EU Law (which is only "one side of the legal relationship involved in membership of the Union") –, the Constitutional Court undertakes a *domestication* of primacy, stating that the principle of primacy is different "from legal constructions typical of federal systems, based, to varying degrees, on the principle of *supremacy* of the federal legal order", and adding that, "even when the case law interpretation of the principle of primacy (…) points (…) to an absolutely unconditional view of the incidence of the principle (…), the fact is that the practice of the CJEU provides us with a more relativised – and much more complex – picture of the reality of the principle when situated at this level". The judges of Ratton Palace sought, thus, to stress the important steps taken by the "Court of Justice in this *dialogue* of jurisdictions".

Judgment no. 422/2020 draws a similar conclusion from the practice of the constitutional jurisdictions of the Member States: "in general, constitutional jurisdictions, in their decision-making interaction with the CJEU, regarding the relationship between EU Law and the domestic Law of the Member States with constitutional status", relativise the claim of primacy of the national Constitutions.

However, the discussion of how the problem has been perceived by the main constitutional courts of the Member States is rather limited.

It is significant that, regarding the understanding of the *Bundesverfassungsgericht* on the topic, Judgment no. 422/2020 – perhaps because it considers that the *Solange II* case law, together with the *Frontini Judgment* in Italy, was the "source of inspiration for the solution reached in the 2004 revision" for Article 8(4) of the CPR – concentrates mainly on the German constitutional case law in the early stages and is basically concerned with emphasising that the development of the German constitutional case law from *Solange I* to *Solange II* was "an approach aimed at avoiding a situation of potential conflict, by practically draining the element of confrontation involved (the existence of different views on the impact of primacy on national constitutional rules), the scope of which was reduced to extreme situations the occurrence of which, when we observe the way the *Bundesverfassungsgericht* itself characterised community protection of fundamental rights in *Solange II*, would be highly unlikely". Judgment no. 422/2020 therefore undervalues all the German constitutional case law subsequent to the

Solange doctrine. Specifically, and without prejudice to the references to piecemeal dimensions of the Karlsruhe judgment on the Treaty of Lisbon, the Ratton Palace does not give due importance to the *Bundesverfassungsgericht*'s understanding of the relationship between EU Law and the German Constitution after its initial post-Solange decisions, above all after the decisions on the Treaty of Maastricht and the Treaty of Lisbon.

The same may be said as regards the silence of Judgment no. 422/2020 on "the rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts",[1] since it contains not a word on the more recent case law of the constitutional jurisdictions of Poland, Hungary, the Czech Republic and Slovakia, which, in part, is inspired by the German case law on constitutional identity after the Solange doctrine.[2] The Ratton Palace's reasoning strategy is understandable. However, with such a reasoning strategy, there appears to be some imprecision in the statement that "*in general,* constitutional jurisdictions" (my emphasis) demonstrate a relativised image of the claim of primacy of the national Constitutions.

In a nutshell, the understanding of Judgment no. 422/2020 does not give due importance to the most recent developments in how several constitutional jurisdictions assess the principle of primacy. Undoubtedly, "initially, constitutional identities have been taken up as national shields not to stop the European integration process, but to guide it towards a preferred constitutional direction. This was, at least, the effect of the Solange and Frontini decisions".[3] However, subsequently, "constitutional identities have been used as 'hard shields' when national constitutional courts claimed ultimate limits of the European integration process".[4]

3. For the Ratton Palace, "within a framework of relations which, at present, involves twenty-eight legal systems (that of the Union, as a common but autonomous centre of reference, and those of the twenty-seven States), all of which have legal claims based on areas of exclusivity with some overlap with other systems (…), the functionality of the relationship resulting from integration, as a reality opposed to separation (an eventuality that is always possible and, in fact, has already been achieved with Brexit), can only result from a dynamic based on

1 *Cf*. Kriszta kovács (2017) "The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts", in German Law Journal, vol. 18, no. 07, pp. 1703ff.

2 *Cf*. Jöel Rideau (2013) "The case-law of the Polish, Hungarian and Czech constitutional courts on National Identity and the 'German Model'", in Alejandro Saiz Arnaiz & Carina Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration*. Cambridge – Antwerp – Portland: Intersentia, pp. 250ff.

3 *Cf*. Pietro Faraguna (2017) "Constitutional Identity in the EU – A shield or a sword?", in German Law Journal, vol. 18, no. 07, pp. 1628-1629.

4 *Cf*. Pietro Faraguna (2017) "Constitutional Identity in the EU – A shield or a sword?", p. 1629.

factors and practices that induce some kind of coherence of systems, based on something other than hierarchical regulatory integration".

On the other hand, in addition to rejecting a purely monistic interpretation with primacy of the European rules, the Constitutional Court claimed for itself "the last word on the extent of its powers of control", thus affirming "its *competence* (*competence-competence*) to *definitively* decide all matters relating to its own competence". Of course, the term *Kompetenz-Kompetenz* has several meanings, and we must not forget the distinction between legislative competence-competence (*legislative Kompetenz-Kompetenz*) – as an expression of a power constituting original self-authorisation – and simple "judicial competence-competence (*judicial Kompetenz-Kompetenz*)".[5] The statement in Judgment no. 422/2020 relates, strictly speaking, to the latter area. Even so, it is important to stress that although the Ratton Palace highlighted "the peculiarities of the Portuguese case, where there is evidently a clear option of the constitutional legislator to accept primacy with almost the entire scope and consequences affirmed by the CJEU",[6] the Portuguese Constitutional Court accepted that, "*with regard to respect for the constitutional limits established by the Portuguese CPR to the applicability of European Union law in our domestic order, the last word must be reserved for the Constitutional Court, i.e., the 'court with the specific competence to administer justice in matters of a constitutional-law nature.*"[7]

The Constitutional Court's rejection of the hierarchical or federal temptation and the claiming of its competence-competence deserves full support. In reality, modern pluralism largely constitutes "a contemporary version of dualism".[8] And, when the problem of articulation between legal systems is analysed from the perspective of the States, the Constitution must play a central role – both in considering the most appropriate solution, and as the holder of the last word on how to position itself in the light of the conflict.[9]

5 *Cf.*, with the respective bibliographical references, Rui Medeiros (2015). *A Constituição Portuguesa num Contexto Global*, Universidade Católica Editora, pp. 158-162 (especially, p. 161).

6 Strictly speaking, although the CPR admits the primacy of EU Law, such an option is compatible with the fundamental idea that sovereignty remains with the Portuguese State and, therefore, does not involve adhesion to any monism with primacy of EU Law – *Cf.* with the respective bibliographical references, Rui Medeiros (2015). *A Constituição Portuguesa num Contexto Global*, pp. 268-271.

7 *Cf.* Rui Medeiros (2015). *A Constituição Portuguesa num Contexto Global*, p. 389.

8 *Cf.* Jean L. Cohen (2012). *Globalization and Sovereignty – Rethinking Legality, Legitimacy, and Constitutionalism*, Cambridge University Press, p. 292 – *Cf.*, with the respective bibliographical references, rui medeiros (2015). A Constituição Portuguesa num Contexto Global, pp. 251-290.

9 *Cf.* Armin Von Bogdandy (2008). "Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law", in International Journal of Constitutional Law, 6, nos. 3/4, pp. 402ff. – *Cf.*, in greater detail, Rui Medeiros (2015). *A Constituição Portuguesa num Contexto Global*, pp. 251-290 and 388-389.

None of this is contrary to acknowledging the importance of dialogue between jurisdictions. Judgment no. 422/2020 also deserves great applause with regard to this aspect. In fact, the constitutional commitment to the European Union (…) or, from the point of view of Union law, the principle of sincere cooperation between the Union and the Member States (Article 4(3) TEU) justifies "a *system of cooperation* between the European jurisdictional bodies and the national jurisdictional bodies".[10] More specifically, when the applicability of the community rules is at issue in Portugal, it makes total sense that a decision to disapply a rule of EU Law due to breach of the CPR is only taken by the Constitutional Court when the conflict cannot be overcome by means of a reference for a preliminary ruling.

4. What is decisive, in any case, is how the Constitutional Court interprets Article 8(4) of the CPR.

The Constitutional Court quite rightly begins by highlighting the "constitutional posture of friendship with the European project, in the various revisions of the fundamental law that have occurred since 1982", stressing that "the text of the Constitution accepts (…) the functional sense of the principle of primacy – firstly as an instrumental expression of the '[*convention on the*] *joint exercise, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the* [*EU*]'".

Accordingly, citing Maria Lúcia Amaral, Judgment no. 422/2020 extracts from Article 7(5) and (6) of the CPR "a true '[…] *structuring principle of the domestic order* […]; […] *a fundamental principle of the CPR which, by shaping the system of sources of Portuguese law, also shapes the form of the Republic*'".

The Ratton Palace concludes by underlining the "predominant element – in some ways the *rule* – contained in the first part of paragraph 4" of Article 8 when it establishes that "*the provisions of the treaties that govern the European Union and the norms issued by its institutions in the exercise of their respective competences are applicable in Portuguese internal law in accordance with Union law*". In other words, the normative message contained in this first part of Article 8(4) of the CPR points to "exclusion of *regular review* of the constitutionality of EU Law applicable in Portuguese territory".

5. It is, however, fundamental to analyse here the "strategic orientation" adopted by the Constitutional Court in its reading of the last part of Article 8(4) of the CPR. In other words, it is decisive to discuss now the way that the Portuguese Constitutional Court exercised its *competence-competence* to clarify the

10 *Cf*. Gomes Canotilho / Vital Moreira (2007). *Constituição da República Portuguesa anotada*, I, Coimbra Editora, p. 270; Rui Medeiros (2015). *A Constituição Portuguesa Num Contexto Global*, p. 390.

meaning of the "*counter-limiting* orientation – '[…] *with respect for the fundamental principles of a democratic state based on the rule of law*'".

6. Judgment no. 422/2020, in order to determine the reach of this "strategic reserve" or this "autonomous space of national control", "more than a definition listing the subject matter contained in these *clauses of constitutional protection*", sought to "establish a general criterion that might guide the interpreter in positioning the various situations presented to the Court in that borderline area that separates inhibition from full access of the constitutional jurisdiction to EU Law".

According to the Ratton Palace, the counter-limit seeks the "defence of the *constitutional identity* of the Republic". What is at issue, in other words, are "characteristic elements of the *constitutional identity* of the Republic", that is, "areas in which, by nature, the CJEU cannot ensure functionally equivalent control and which go beyond the convention of the '[…] *joint exercise, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the* [*EU*]'".

The appeal to constitutional identity comes as no surprise: "'constitutional identity' is à la mode".[11] "The idea of constitutional identity is not new, but in the last few years it has gained momentum and attracted many European constitutional lawyers and students of European law, especially after the German Constitutional Court's 2009 Lisbon Ruling".[12] We may recall, on this subject, that "the Lissabon-Urteil uses the term 'identity' no less than thirty-six times".[13] Basically, while in the 19th century the identity of the nation was being discussed, it is now common to use a concept which is "intimately connected with the constitution of a given state".[14] This "notion of constitutional identity is explicitly or implicitly present in the (…) constitutional case-law regarding the relationship between the law of the European Union and the laws of a certain number of Member States".[15]

11 *Cf*. Monica Claes, (2013). "National Identity: Trump card or up for negotiation?", in Alejandro Saiz Arnaiz & Carina Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration*. Cambridge – Antwerp – Portland: Intersentia, p. 109.

12 *Cf*. José Luis Martí (2013). "Two different ideas of Constitutional Identity: identity of the constitution v. identity of the people", in Alejandro Saiz Arnaiz & Carina Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration*. Cambridge – Antwerp – Portland: Intersentia, pp. 17-18.

13 *Cf*. Jan-Herman Reestman (2009). "The Franco-German Constitutional Divide Reflection on National and Constitutional Identity", in European Constitutional Law Review, vol 5, no. 3, p. 375.

14 *Cf*. Monica Plozin (2017). "Constitutional Identity as a Constructed Reality and a Restless Sou", *in German Law Journal*, Vol. 18, No 07, pp. 1596-1597.

15 *Cf*. Jöel Rideau (2013). "The case-law of the Polish, Hungarian and Czech constitutional courts on National Identity and the 'German Model'", in Alejandro Saiz Arnaiz & Carina Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration*. Cambridge – Antwerp – Portland: Intersentia, p. 243.

7. The critical point of the Judgment is not, therefore, the appeal to a criterion of "*constitutional identity* of the Republic". This criterion may have very different meanings.[16] The truly problematic aspect lies, rather, in the fundamental "*normative message*" that results from the apparently limited manner in which the Portuguese Constitutional Court established the meaning of the task of "defending the *constitutional identity* of the Republic" given to it by Article 8(4) of the CPR .

8. According to the Ratton Palace, the European project "already involves, by its own nature, a guarantee of effectiveness of the *values* (*rectius*, *of the fundamental principles*) *of a democratic state based on the rule of law*, when compared with the content of Article 2 of the CPR, in which we can easily find the affirmative basis for the last part of Article 8(4). It is worth, therefore, pointing out that this project already reflects, implements and provides, with a high level of security, parametric values that are equivalent to those recognised in the text of our Constitution, in particular through the jurisdictional control of the CJEU – the nature of which, in the actual sphere of EU Law, is functionally homologous, in terms of its guaranteeing dimension, to the control performed by the Constitutional Court".

It is not a case, Judgment no. 422/2020 adds, "of mere axiological correspondence, but rather of one of the signs (and the results) of the deep historical, cultural and judicial affinity that unites the Member States and gives shape to the legal order they share (…). Connected by common veins, the converging normative directions to which the national legal systems and that of the Union tend to favour, as they must, interaction between these, providing a sound basis of trust in the relationship. And this applies to the institutional perspective, in relation to judicial control of respect for these values by the CJEU, as a specific dimension covered in the first normative segment of Article 8(4) of the CPR".

Hence, taking these premises as a starting point, the Constitutional Court concluded that, in the Portuguese case, there is "a clear option of the constitutional legislator to accept primacy with almost the entire scope and consequences affirmed by the CJEU". In other words, according to the Ratton Palace, the application of the counter-limit in the final part of Article 8(4) of the CPR has a field of application that is "quantitively scant (we are relating the idea of *quantity* to the universe of EU Law), beginning with the level of protection of fundamental rights (the content and guarantee of which are already widely covered by EU Law, and which benefit from a level of protection within that framework that is

16 *Cf.*, for example, on the different understandings of constitutional identity of the *Bundesverfassungsgericht* and the Conseil constitutionnel, Jan-Herman Reestman (2009). *The Franco-German Constitutional Divide Reflection on National and Constitutional Identity*, pp. 374ff.

functionally equivalent to that provided by the national jurisdiction, specifically by the Constitutional Court)" (underlining as in the Judgment itself).

Specifically, according to the Constitutional Court, the counter-limit does not apply when the issue of unconstitutionality "is based on the claim of constitutional parameters which, although they may include, in abstract, *characterising features of the democratic state based on the rule of law*, lack sufficient axiological density to raise such references to a specific level of fundamental and specific national identity".

It is within this context that Judgment no. 422/2020 established the following general criterion: "Pursuant to Article 8(4) of the CPR, the Constitutional Court may only appreciate and refuse to apply a rule of EU Law if the latter is incompatible with a fundamental principle of the democratic state based on the rule of law which, within the scope of EU Law itself – including, therefore, the case law of the CJEU –, does not benefit from a parametric value that is materially equivalent to that recognised for it in the CPR, given that such a principle necessarily imposes on the actual convention of the '[…] joint exercise, in cooperation or by the Union's institutions, of the powers needed to construct and deepen the European Union'. Conversely, whenever the matter at issue is appreciation of a rule of EU Law in the light of a (fundamental) principle of the democratic state based on the rule of law which, within the scope of EU Law, benefits from a parametric value that is materially equivalent to that which is recognised for it in the Portuguese CPR, functionally guaranteed by the CJEU (in line with the judicial means provided for in EU Law), the Constitutional Court refrains from assessing the compatibility of that rule with the CPR" (bold in the judgment).

9. The Constitutional Court, without making this a problematic issue, appears to adopt a single perspective and then to generalise, without showing that it has given due to attention to the fact that, strictly speaking, the legislator of the Portuguese Constitution, in Article 8(4), *in fine*, calls on two different types of fundamental principles as limits to primacy: on one hand, the *fundamental principles of a state based on the rule of law*; on the other, the *fundamental principles of a democratic state*.

Now, in the task of enhancing the limit to primacy constituted by the "fundamental principles of a democratic state based on the rule of law", rather than a single approach, it is important to bear in mind that the element of a state based on the rule of law must not be confused with the democratic dimension.[17]

Underlying this suggestion of a dualist approach to the meaning of the constitutional identity of the Republic, which is advocated here, is, from another

17 *Cf*. Rui Medeiros (2015). *A Constituição Portuguesa num Contexto Global*, pp. 391-392.

perspective, the understanding that "the notion of constitutional identity may refer to at least two different ideas: the identity of the constitution and the identity of the people or the political community ruled by such constitution".[18] This second idea – based on *We the People* – is fundamental, as the modern concept of nation cannot be detached from the formation and existence of a political conscience and of a sense of belonging.[19] Both these ideas are included in the counter-limit of "*respect for the fundamental principles of a democratic state based on the rule of law*" and deserve to be treated separately.

10. There is no reason to contest the idea, also underlying Judgment no. 422/2020, that the limit to primacy resulting from the requirement of respect for the *fundamental principles of a state based on the rule of law* only applies in extreme situations. This statement cannot not be separated from the fact that, nowadays, the protection of fundamental rights in the European Union law is (partially) equivalent to that which is guaranteed by the Portuguese Constitution.

10.1. However, and this caveat will easily go unnoticed by those who are carried away by the temptation to uncritically transpose solutions found in other constitutional contexts, the Portuguese Constitutional Court, in the text of Judgment no. 422/2020, gave no importance whatsoever to the *unequivocal specificity* of the 1976 Constitution regarding social rights.

It is well known that the Portuguese Constitution, besides associating a significant set of public policies with social rights, did not simply reject a Constitution without social rights or with a deficit in this category of fundamental rights, but rather opted to extend fundamental rights claims of a social nature far beyond the universe of basic social rights.

In this context, it seems doubtful whether, in the universe of social rights, there is validity in the general and undifferentiated affirmation of Judgment no. 422/2020, cited above, according to which the application of the counter-limit in the final part of Article 8(4) of the CPR has a field of application that is "quantitively scant (…), beginning with the level of protection of fundamental rights (the content and guarantee of which are already widely covered by EU Law, and

18 *Cf*. José Luis Martí (2013). "Two different ideas of Constitutional Identity: identity of the constitution v. identity of the people", p. 19.

19 *Cf*. Ernst-Wolfgang Böckenförde (1999). "Die Nation – Identität in Differenz, in Staat", *Nation, Europa. Studien zur Staatslehre, Verfassungstheorie und Rechtsphilosophie*, Frankfurt am Main: Suhrkamp, p. 38. – *Cf*. also, raising, precisely, the question "*was rechtfertigt die Unterscheidung zwischen Einheimischen und Ausländern, Staatsangehörigen und Fremden, Armen und Reichen, wenn doch alle Menschen sind und alle Menschen «von Geburt gleich an Rechten»?*", Otto Depenheuer (1995) "Integration durch Verfassung? Zum Identitätskonzept des Verfassungspatriotismus", in *The German American Law Journal*, vol. 5, no. 1, p. 104.

which benefit from a level of protection within that framework that is functionally equivalent to that provided by the national jurisdiction, specifically by the Constitutional Court)" (underlining as in the Judgment itself).[20] It is possible that the Ratton Palace judges were thinking of the structuring principles of the Rule of Law – the principle of equality was at issue in the case in question – and of the *rights, freedoms and guarantees*. However, the general and undifferentiated affirmation included in the text of the Judgment provides room for doubt.

10.2. On another level, there is a lack of clarity regarding the meaning of the statement that the Constitutional Court refrains from assessing the compatibility of a rule of EU Law in the light of a (fundamental) principle of a state based on the rule of law which, within the scope of EU Law, benefits from a parametric value that is materially equivalent to that which is recognised for it in the Portuguese CPR.

Apparently, this means that, except for violations of fundamental rights which, by reason of their number or seriousness, reflect a systemic failure of the protection offered by Union law, the Portuguese Constitutional Court will not intervene even if, in specific cases, there are particular violations of the fundamental rights enshrined in the CPR.

The fact remains, however, that even if the CJEU *generally* offers equivalent protection of the fundamental principles of the rule of law, this does not prevent there being particular situations in which rules that are part of the CPR's fundamental axiological heritage may be seriously offended.

Now, in particular situations in which rules that are part of the CPR's fundamental axiological heritage are seriously offended, not only does Article 8(4), *in fine*, not contain any opening for advance waiver of review of constitutionality, but in a State based on respect for the dignity of the specific and singular human person, there is no sign of grounds for outrightly denying the possibility of lodging an appeal with the Constitutional Court in such cases.[21]

Article 4(2) of the TEU does not offer equivalent protection. This provision sets out, unequivocally, that "the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security (…)". This national identity clause, "aimed at counterbalancing the

20 *Cf.* Rui Medeiros (2015). *A Constituição Portuguesa num Contexto Global*, pp. 392ff.

21 *Cf.*, with the respective bibliographical references, Rui Medeiros (2015). *A Constituição Portuguesa num Contexto Global*, pp. 396-397.

emphasis put on common principles and supranational constitutionalization",[22] in a sense, "Europeanizes" "the *contro-limiti* case-law of the national constitutional courts (…). In other words, the EU must, *as a matter of EU law*, respect the constitutional identity claimed by Members States, and if necessary, provide for exceptions and derogations".[23] Yet, even so, in the perspective of the constitutional jurisdictions, "the EU's duty to respect national identity under Article 4(2) TEU differs from the duty" of national institutions to protect "'constitutional identity'". In fact, regardless of the specific meaning that we may give to the national identity referred to in Article 4(2) of the TEU, there are two more differences to note, which are included in the case law of the *Bundesverfassungsgericht*. The first "concerns the intensity of the protection due: The duty to respect national identity under Article 4(2) is relative, as it may be balanced against 'rights conferred by Union law'. Secondly, regardless now of "constitutional identity as difference" – *i.e.*, of "constitutional identity as a reference to those characters that make one constitution different from another constitution"[24] –, it cannot be denied that, in the perspective of Article 8(4), *in fine*, "the protection of (…) constitutional identity is a task of the" constitutional "court alone, implying that the ECJ has no say in it".[25]

11. The main criticism that may be levelled at Judgment no. 422/2020 is related, in any case, with the way in which the Constitutional Court assumed its constitutional mandate of defending the fundamental principles of a democratic state.

It is true that, as has already been highlighted, the Constitutional Court was basically faced with a question of a possible violation of the fundamental principles of a state under the rule of law – in this case, the principle of equality – and, therefore, it is not clear what the understanding of the Ratton Palace judges would be when the defence of democracy guaranteed by the Constitution is at issue.

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22 *Cf*. Pietro Faraguna (2017). "Constitutional Identity in the EU – A Shield or a Sword?", pp. 1619-1620.

23 *Cf*. Monica Claes, National Identity: Trump card or up for negotiation?, p. 122 – *Cf*., in this sense, now stating that "recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community Law" and, therefore, "the validity of such measures can only be judged in the light of Community Law" (paragraph 3), but adding, precisely, that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice" (paragraph 4), Court of Justice ruling of 17 December 1970 in the Internationale *Handelsgesellschaft mbH* case.

24 *Cf*. Pietro Faraguna (2017). "Constitutional Identity in the EU – A Shield or a Sword?", p. 1622.

25 *Cf*. Monica Claes / Jan-Herman Reestman (2015). "The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case", in *German Law Journal*, vol. 16, no. 04, p. 931.

However, the text of Judgment no. 422/2020 shows that the Constitutional Court wished to provide "a general orientation for interpreting the presumptions for triggering the last part of paragraph 4 (that provides clear criteria for dealing with future situations)" and sought a "general criterion (…) to be called on in most situations". And, even so, the Ratton Palace showed no echo of the "*intense and normatively thick*" reflection,[26] largely the result of the post-Solange German constitutional case law, on the relationship between, on the one hand, European integration and, on the other, popular sovereignty and the democratic principle.

Now, to be precise, when we see the issue from this perspective, it seems problematic to uncritically transpose the presumption of compatibility as regards the protection of fundamental rights to review concerning the democratic principle. The centrality of the democratic principle and the acknowledgement of the important role that representative democracy plays in this in constitutional states such as Portugal means that, in terms of legitimacy, one cannot simply replace the requirements of democratic legitimisation by any substitute. This does not mean undervaluing the process of democratic transformation of the Union and the effort to create, within the framework of European integration, new mechanisms to strengthen the democratic legitimacy of the Union. However, since popular sovereignty fulfils the decisive function of protecting the democratic self-determination of a political community, popular sovereignty today also means protection of democracy. Since the idea of democracy cannot be fully detached from constitutional states such as ours, and since there are still limits to the democratic dimension at European level, representative democracy – with its *one person-one vote* rule – requires certain decisions affecting the political community to be reserved for democratically formed republican deliberation.[27]

In other words, in the light of the importance of the *citizen's right to democracy*, "the principle of representative popular democracy protected by the right to vote may be violated if the body whose members are appointed by means of free elections sees its powers significantly curtailed and, consequently, suffers a substantial loss of its capacity of authorisation".[27] Therefore, the search for a constitutional response "to *contemporary federal processes* must include a search for balance. Balance between participation of the Republic in one of the dimensions of those processes – in particular that which involves integration of

26 *Cf*. Julio Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, pp. 4 and 13.

27 *Cf.*, with the respective bibliographical references, Rui Medeiros (2015). *A Constituição Portuguesa num Contexto Global*, pp. 173-190 and 399-412.

27 *Cf*. Pedro Machete (2012). "Constitucionalismo liberal e globalização – a legitimação democrática do poder público na 'constelação pós-nacional'" in *Estudos em Homenagem ao Professor Doutor Jorge Miranda*, III, Coimbra Editora, p. 335.

the State in a broader *political community* – and the necessary preservation of the power of *sovereignty*, or of *self-determination*, of the Portuguese people".[28]

In conclusion, contrary to that which appears to result from the text of Judgment no. 422/2020, it is not enough to recognise, when protection of fundamental principles of the democratic state is at stake, that the value of democracy is part of the constitutional law of the European Union. The fact is "democracy cannot be detached from an idea of *self-authorisation of a specific people*".[29] Basically, since popular sovereignty fulfils the decisive function of protecting the democratic self-determination of a political community, defence of the Republic's popular sovereignty requires the Constitutional Court to protect the representative democracy enshrined in the Constitution.[30]

28 Cf. Maria Lúcia Amaral (2005). *A Forma da República, Coimbra Editora*, p. 327.

29 Cf. Rui Medeiros (2015). *A Constituição Portuguesa num Contexto Global*, p. 392.

30 Cf. Dieter Grimm (2009). *Souveränität – Herkunft und Zukunft eines Schlüsselbegriffs*, Berlin University, p. 123.

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