WELCOME: THE EUROPEAN CONSTITUTION

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The discussion on the content and the existence itself of a European Constitution is long and old. This is certainly not be the good circumstance to synthesize that history. One of the problems that we now urgently need to approach is to determine the juridical nature of the Treaty that institutes a Constitution for Europe and consequently which should be the hierarchical value of its dispositions in relation to the internal law, especially to the Constitutional Law. On this subject, I have to recognize that I see unequivocally, in this Treaty, a Constitution that changes the nature and the juridical force of the founding treaties of the EEC and the European Union. In fact, it represents an enormous step towards the future establishment of a Federal State. Obviously enough, that option will raise, in several Member States, serious problems of constitutionality of the Treaty, which should be addressed and solved before ratification. On the other hand, according to the draft Treaty, the goal to achieve is to create an entity that is not framed upon the categories that we presently know. It is not yet a federal State, but also no longer is it a pure supranational international organization. In fact, the draft treaty not only consecrates the primacy of Community law over national legislation of Member States, but assures, in article I-5, the respect for the national identity of these same Member States, as reflected in the fundamental political and constitutional structures of each of them, respecting the essential functions of the State.

Thus, I believe that it will be essential to develop a larger doctrinal and jurisprudential elaboration on the real meaning of the dual nature of the Union. For now being, I think that one cannot see in the Draft Treaty what it didn't want to adopt (namely, the immediate constitution of a federal State, with all of its juridical and constitutional implications). On the other hand, it should also not be ignored what has been written in concrete terms (namely the transfer of important sovereignty powers and the hierarchical subordination of national law to community law, there including constitutional law). In fact, It seems quite obvious that, what is intended with article I-10º, nº 1, is to unequivocally consecrate the findings of the jurisprudence of the European Court of Justice on the primacy of Community law, which ensures that Community law may not be revoked or amended by national law, and that it takes precedence over national law – even constitutional law – if the two conflict. That trend was put in motion by the precedent-setting judgement Costa/Enel, in 1964.

This procedure will remove the objections that some national jurisdictions have voiced against the absolute primacy of Community law, namely, when that option would offend certain essential principles of the constitutional juridical order, most especially, those principles that safeguard fundamental rights and others that grant the Constitution its specific identity. Those objections should be considered legitimate, whereas the transfer of powers by Member States to the Community institutions was made according to an implicit condition: that in the exercise of those competences, community institutions would not be, in any case, authorized to challenge the sovereignty of Member States and the fundamental principles of their respective juridical-constitutional order. In what comes to Portuguese positive law, considering particularly article 277º, paragraph 1, of the Constitution of the Portuguese Republic, we have to recognize that, presently, the Constitution doesn't allow doubts on the primacy of the princi-

ples and constitutional norms over the norms of conventional international law. Nor is allowed the application, in the legal internal order of norms of community law incompatible with constitutional dispositions, or, at least, with the fundamental structural principles of the Constitution. Thus being, there seems to be no foreseeable way the new Treaty can be ratified without and before a due constitutional reform procedure takes place. And if, as it seems, the ratification is going to be preceded of a referendum, then that constitutional reform should also necessarily precede the mentioned referendum.

Another important subject that should be addressed is to determine how in the future will occur the articulation of competences between national courts (especially upper courts and constitutional courts), the European Court of Justice and the European Court of Human Rights. Presently, we only have competence articulation between the national courts and the European Court of Human Rights, on the one hand, and between those same courts and the European Court of Justice, on the other hand. The Union didn't join the European Convention on Human Rights, partly due to an opinion of the European Court of Justice that denied the Union competence for such purpose. If that problem is fixed by the future article I -7 of the Treaty, a tripolar judicial system will be created, whose operation needs further elaboration. Seemingly, significant difficulties should not exist to establish the relationship between the national or community courts and the European Court of Human Rights, except for those that will elapse of the future existence of a multipolar control system, namely in what concerns the respect for fundamental rights. In fact, the incorporation of the Charter of Fundamental Rights proclaimed at the Nice European Council in the European Constitution and the substantial enlargement of the competences of the EU – including, for instance, the criminal procedural legislation – did not lead to a substantial revision of the system of appeals or of the mechanisms of preliminary rulings by the European Court of Justice. Only one exception should be mentioned: the obligation to decide "as rapidly as possible" preliminary rulings in cases in which there are citizens in prison.

Accordingly, on the one hand, a substantial part of legislative work – because it is incorporated in European laws or drafted according to European framework laws – will not be subject to control of constitutionality by Constitutional Courts. On the other hand, it is not entirely clear how should be solved cases of eventual simultaneous disconformity of a norm of national ordinary law to national constitutional law and community law. For these cases – that can be multiplied due to the incorporation of the Charter of Fundamental Rights in the European Constitution – we shall have to establish an appropriate articulation between Constitutional Courts and the ECJ, or else we would be limiting Constitutional Courts to a role of mere *reshipment instance* of judgements to the EJC. Simultaneously, in that scenario, the ECJ would to be quickly submerged with thousands of judgements. Total juridical uncertainty would occur, not only as for the determination of the court with competence to judge, but also as for the solutions adopted, with conflicting judgements and, consequently, unequal treatment of identical situations. A solution for this problem should be preferably found already in the text of the *European Constitution*. I made some warnings on difficulties that it we should be able to overcome. But my closing remarks will include a word of hope: May the *European Constitution* be a contribution to a process in which the Europeans show their capacity to draw all consequences of what unites us. That can only be achieved if we are fully conscious of all that can separate us.