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THE *"COSMOPOLITAN"* LEGISLATIVE REGIONS OF EUROPE: SOME COMPARATIVE LESSONS FROM THE PARTICIPATION OF THE REGLEG IN PORTUGAL

AS "*COSMOPOLITAS*" REGIÕES LEGISLATIVAS DA EUROPA: ALGUMAS LIÇÕES COMPARADAS DA PARTICIPAÇÃO DAS REGLEG EM PORTUGAL

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Abstract: The present paper is the result of the participation in the Conference on *Multilevel Legislative Drafting and Legislative Impact Assessment*, held in Lisbon on the 15th of June 2022. The participation of the legislative regions (REGLEG) in the multilevel legislative drafting of the EU was questioned in Portugal over the transposition of Directives by the Autonomous Region of the Azores, in a procedure that was adjudicated by the Portuguese Constitutional Courts. This was the pretext for this presentation, aimed at discussing the legislative role of the REGLEG in the EU, which necessarily happens within the broader context of an increasingly cosmopolitan global legal order in multilevel networks of government.

Keywords: Regionalism, Legislation, Separation of powers, European Union Law, multilevel networks of government.

Resumo: O presente texto é o resultado da participação na Conferência "*Multilevel Legislative Drafting and Legislative Impact Assessment*", realizada em Lisboa a 15 de junho de 2022. O problema acerca da participação das Regiões com poder legislativo (REGLEG) na produção legislativa multinível da UE foi, em Portugal, colocada a propósito da transposição de Directivas pela Região Autónoma dos Açores, num processo que chegou ao Tribunal Constitucional português. Este foi o pretexto para a presente apresentação, que tem como objetivo discutir o papel legislativo do REGLEG na UE, o que necessariamente acontece no contexto mais amplo de uma ordem jurídica global cada vez mais cosmopolita em redes multiníveis de governo.

Palavras-chave: Regionalismo, Legislação, Separação de Poderes, Direito da União Europeia, redes multinível de governo.

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1. Introduction

The topic of this conference on the *multilevel* government evokes one of the best metaphors to express the overcoming of the exercise of public authority under the traditional constitutional-state limit, guided by the principles of territoriality and citizenship that appear to be threatened by the development of a normative reality that is increasingly integrated on a planetary scale. The possible hierarchical reading of the expression "levels" has attracted criticism as, on the contrary, these new normative *networks* prefer relations of heterarchy or specialty.

The participation of the Legislative Regions (REGLEG) in the workings of the European Union (EU) brings together both these realities, highlighting the functioning of supranational *networks* of regulation in a *multilevel* setting. The REGLEG of the EU add a new layer or *level* to the workings of these networks of government, traditionally functionally oriented by different subject-matters, which is the concurrence with different actors (mostly States) for the regulation over a territory and a population as they aim to exercise legislative power as closely as possible to the people fulfilling the *principle of subsidiarity*, both at the national and the European Union level (Article 5 of the Treaty of the European Union - TEU).

The challenges raised by the participation of the REGLEG of the UE in the *multilevel networks* of government happens in an increasingly integrated global setting that involves different actors, in which *cosmopolitan* engagement is necessary. A case presented from the perspective of the Portuguese Autonomous Region of the Azores aims to shed light on different methodological challenges that arise to judicial, administrative, and legislative actors participating in the global networks of multilevel government.

2. The EU between the *Constitutionalization* and the *Fragmentation* of Global Law

The (legislative) demands made on States are now placed on a global scale as "issues of global concern", so that their response must also be sought beyond their formal administrative borders. The impact of this (relatively) new development in the exercise of sovereign state powers is reciprocally felt at the domestic administrative law of the states and supranational law (multilateral or regional, conventional or customary), in which global regulation is manifested. This new global law is, therefore, based on the relationships necessarily established between different legal orders that is one of the greatest challenges of contemporary cosmopolitan law.

The previously mentioned relationship between legal orders navigates between two very different margins (Cunha, 2016: 197).

On the one hand, the *constitutionalization* of global law is referred to the "post-ontological" affirmation of International Law (Franck, 1999: 8), which is sought in a) the material legitimacy, offered by the concept of *ius cogens*

and the protection of Human Rights as its axiological foundation, b) the procedural legitimacy guaranteed by the growing democratic legitimacy of global deliberation, and c) in organic terms, the universal membership of the UN and its non-derrogability, under the terms of art. 103 UN Charter. The proposal for the democratic proceduralisation of normo-genetic deliberation at supra-state level has been referred to an "emerging democratic entitlement" of the peoples (Franck, 1999: 8). Its application to supra-national decision-making processes, namely within international organizations, has also been discussed (Coicaud, Heiskanen, 2001). These limitations in supra-national processes of deliberation are evident and, for the moment, such constitutional nature of the international community is attributed to the UN Charter, as a result of its quasi-universal membership grounded on recognized principles of international law (Fischer-Lescano, 2003: 717-760).

On the other hand, a different movement is evident in the global multilevel networks of interaction of the previously mentioned distinct legal orders – placed between constitutionalization and fragmentation. This *fragmentation* highlights the growing relevance of "self-contained regimes" in international law (Simma, 1985: 111 ss., maxime 117), which traditionally refers to legal regimes that ensure both substantive norms and "self-contained regimes of responsibility", as discussed in the cases Chanel of Kiel[2] and Tehran Hostages[3].

However, the development of International Law in functional subsystems of regulation is based on the unequal promotion of hegemonic prepositions, entailing reciprocal difficulties of communication, especially in the development of collision rules between the respective subsystems for the resolution of possible normative conflicts and antinomies. Besides, the possibilities of "self-contained regimes" must not be overstated, following the perspective that States only abandon the mechanisms of general International Law to enforce state liability in favor of normative sub-systems to the extent to which these operate. This always open up the possibilities of recourse to the general International Law regime of state liability, which is limited to borderline, almost emergency, cases (Cunha, 2016).

These global *networks* of regulation are, therefore, based on legal relationships that prefer *heterarchy* over hierarchy (Teubner, 1992: 1443 ss.), and impose a cosmopolitan legal dialogue. Both these characteristics of the developing global, multilevel networks of regulation are illustrated by subsystems of responsibility, as is the case of the European Union, in spite of the permanent possibilities of *fallback* to the general regime of international responsibility.

2. Article 380 of the Versailles Treaty: "*The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and war of all nations at peace with Germany on terms of entire equality.*" in http://history.sandiego.edu/gen/text/versaillestreaty/all440.html.

3. *Case concerning United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran)*, 24 May 1980, ICJ, www.icj-cij.org/docket/files/64/6291.pdf.

Following this thought, no mere sub-systematic regime of enforcement of responsibility ("self-contained regime") can, therefore, claim to have a constitutional sovereign nature. In particular, the question posed when attempting to decide whether the EU is a "self-contained regime" departs from its constitutional "autonomy". This is based on the "catechism" of direct applicability, primacy over the law of the Member States, and dogmatic autonomy, traditionally pointed out in the case-law of the Court of Justice of the EU (CJEU) as the grounds for the exceptional constitutional nature of the EU Treaties. In the case of the EU, this does not mean reducing EU Law to a special branch of International Law, built as it is on a special historical, socio-cultural, and economic ballast. However, it also does not mean the reduction of the legal system, and in particular the legal-administrative system, of the Member States to a mere federalism of execution, which does not even seem to result from the practice of the EU institutions, especially the case-law of the CJEU, which repeatedly recognizes the Member States as "Masters of the Treaties", as demanded by national higher courts.

A solution to the challenges posed by the antinomies arising from the relationship between apparently sovereign legal orders, as addressed by the international responsibility system of States, appears to offer a viable resolution for both national and supranational participants in this relationship. This applies when considered at the subsystematic level within the European Union or at the global level concerning State responsibility. However, this would never seem to be an adequate solution for resolving antinomies, since it is based on secondary protection, which compensates for the violation of a right – a position (based on an argument of illegality) that is legally unsustainable within a social order that carries an ambition for justice and is aimed at guaranteeing, coercively if necessary, the primary protection of rights. It has been pointed out that, firstly, this is not a satisfactory departing point, either from an adjudicatory or a scientific perspective. Lawyers are builders of meaning and one should look for a legal answer before giving in to secondary norms of enforceability. This solution is dangerously ambiguous due to the unsystematic, customary, and uncodified nature of the international responsibility regime. Its danger lies in the fact that it refers to an atypical sanctions regime, encompassed in a catalogue of counter-measures that is limited only by the principle of proportionality. This approach requires a case-by-case consideration, and is always difficult to control and predict. This solution provides insufficient scaffolding to build an overall system of relationships between competing normative sub-systems that may, eventually, fail to provide adequate answers and lead to a *fallback* on the general international regime of State responsibility, as seen before. As regards the exercise of States' international responsibility, the acceptance of "self-contained regimes" to enforce responsibility for the violation of substantive regimes of international regulation does not exclude recourse (*fallback*) to the general regime of International Law, in case of "subsystematic" failure (Cunha, 2016: 279). This means that enforcement of responsibility is always dependent on state intervention, which is the original subject of International Law. This is especially evident through the possibility of redress at a state level for the incurred responsibility, even more so if constructed as a duty to exhaust domestic jurisdictional mechanisms prior to seeking recourse at international instances.

3. The Legislative Regions of the EU in Context

In the case between Member-states and the EU, this *vertical separation of powers* between States and Supra-national entities is regulated by the *principle of subsidiarity* in Article 5 of the TEU, which also refers to the internal organization of Member-States at the closest possible level to the populations:

"*in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level*."

The territorial separation of powers is one of the traits of *multilevel* global *networks* of regulation for the different cosmopolitan legal actors. In fact, history has shown how this is probably the oldest form of separation of powers, dating back to the Middle Ages. The REGLEG of Europe would be a difficult case study to justify the ambition of sovereignty traditionally assumed by states or "self-contained regimes". The European Union is a much easier sell in this regard. Therefore, one possible answer to the problems raised by *multi-level legislation* could involve turning to the legal regime of state responsibility, particularly addressing possible conflicts between (autonomous or self-contained) normative systems that arise due to the unwillingness or impossibility to fulfil the *legislative* obligations of each of the competing legal systems.

The Treaty of Lisbon signaled a change in the legislative procedures of the EU, as it clarified the exclusive, shared, and supporting competences of the EU and explicitly acknowledged the existence of regional and local self-government within the Member-States. While this explicit recognition of EU regions may be seen as a breakthrough, it also raised questions and concerns about how the spectrum of regional powers, with different state-level processes, could be specifically applied and implemented within the EU's legislative and policymaking architecture.

The Regions of Europe that have legislative competence have been identified as part of the *Conference of European Regional Legislative Assemblies* (CALRE): *Åland Islands*, *the Azores*, *the Balearic Islands*, *the Basque Country*, *Carinthia*, *Catalonia*, *Flanders*, *Lower Austria*, *Madeira*, *Piedmont*, *Salzburg*, *Tyrol*, *Upper Austria*, *the Valencian Community*, *Vorarlberg,* and *Corsica* (as an observer). According to the Conference, approximately 45% of the EU's population live in a REGLEG, even though this percentage seems to refer to all the regions of Europe with legislative powers and not only those referred in CALRE. In this sense, it has been suggested that to increase the visibility and credibility of CALRE, it would be necessary to include *all 71 EU regions of the European Union with legislative powers*. This would represent a substantial percentage (almost half) of the EU citizens living in REGLEG (Hunter et al., 2021: 8).

There are other representative networks of REGLEG, which is proof enough of the ongoing relevance of EU regions. These include, for instance, *The Committee of the Regions (CoR)* established by the Treaty of Maastricht, which is now under Article 305 of the Treaty on the Functioning of the European Union (TFEU) as an advisory body. It comprises 329 members (including regional presidents, mayors, and elected representatives from member states) and aims at representing local and regional EU authorities and advising the organs of the EU "*on new laws that have an impact on regions and cities*". Another representative network of REGLEG is *The Conference of Peripheral Maritime Regions (CPMR)*, which encompasses more than 150 regions from 24 states (including some from outside the EU), representing around 200 million citizens, with the purpose to campaign for a more balanced development of the territory of Europe.[4].

The importance of the regions of Europe has risen, particularly, since the 1980s, and more recently with the advent of the previously mentioned concept of multilevel government in EU regulations, which challenges the traditional centrality of State-centered (international and supranational) action.

The case-study of two policy cases (the *Bathing Water Directive* and the *Flood Risk Management Directive*) in seven regions from four federal or quasi-federal member states (Scotland, Flanders, Wallonia, Carinthia, Vorarlberg, Mecklenburg-West Pomerania, and Bavaria) has illustrated the benefits and limitations of European regionalism, as it inquired into a) how subnational entities are able to reach beyond national governments directly into the European arena, as well as into b) the evaluation of the interaction between subnational and supranational actors when unmediated by central governments and, finally, into c) the evaluation as to how this interaction impacts on the authority of central governments (Högenauer, 2013: 451-475). These problems may be placed between the promotion of *self-interest* vs *multi-level engagement* by the REGLEG of Europe and various factors could potentially influence the choices of legislative regions of Europe (Högenauer, 2013: 451-475).[5].

The analysis of the strategies of seven regions in the negotiation of the two environmental Directives suggests that the extensive use of unmediated

4. Together with the referred *Conference of European Regional Legislative Assemblies (CALRE)*, which is made up of the presidents of European regional legislative assemblies and parliaments, with the purpose of (i) connecting with the "democratic and participative principles within the framework of the EU", (ii) "defending the values and principles of regional democracy", and (iii) "reinforcing links among Regional Legislative Assemblies" (Hunter et at., 2021: 10).

5. According to this Author there are: 1) factors *influencing the motivation for mobilization*, which determine that a region is more likely to mobilize if a) the policy problem is salient for a region, the region has competences in that policy area; *factors influencing the choice of strategy*, whereby a region is more likely to seek unmediated access to the European level if a) there is domestic conflict, b) there is party incongruence between the regional and the central government or ethno-regional parties are in government, c) the influence of a region in domestic European policy-making is low or, in the case of regions from dual systems, are more likely to seek unmediated access to the European level than regions from cooperative systems; 3) *factors enabling or constraining*, which determine that a region's capacity to develop an extensive (and multi-level) strategy depends on a) its economic strength and its size (in population).

access is relatively rare, even for legislative regions. *Domestic conflict* may, therefore, be presented as an important explanatory factor for the absene of unmediated activities at a European level. Moreover*, different processes of national coordination* create diverse incentives to pursue a European strategy. Finally, the pattern of regional activity across the fourteen case studies suggests that *the size of the region* in terms of population is an important indicator for its level of activity in the domestic coordination processes and at a European level (Högenauer, 2013: 451-475).

The strengthening of the role of the regions of Europe, and, therefore, of the legislative regions of Europe, is very much a topic of the day, politically, economically, and legally. The European Commission has proposed in the *2022 Work Programme* that it is necessary to *assess* the social and economic issues in different regions.[6]. Its furthering has been defended by the CAERE initiative, which has affirmed its commitment to overseeing an improved scrutiny of the "*impact of EU policy and regulations on RLEG, including budgetary and administrative impact*".[7]. It will also look into the most pressing challenges of the near future regarding the mobilization of the EU's financial response to COVID-19 through the Next Generation EU Recovery and Resilience Facility (RRF) (Valenza et al., 2021: 15).

4. The case of the two Portuguese REGLEG

Two Portuguese REGLEG are present in these lists: the Azores and Madeira. The Autonomous Regions are defined as "*collective persons under public law, with a population and territory, which by the Constitution have a private political-administrative status and their own democratically legitimized governing bodies, with legislative and administrative powers, for the pursuit of their specific purposes*" (Diogo Freitas do Amaral, 2006: 675). The Autonomous Regions are protected under the Constitution of the Portuguese Republic (CPR). Article 6, n.º 2 of the CRP provides that "*the archipelagos of the Azores and Madeira constitute Autonomous Regions endowed with political-administrative statutes* (…)", which should itemize the powers of the autonomous region (Article 227, n.º 1 of the Constitution). Within the powers allowed by the Constitution (the same Article 227, n.º 1 of the Constitution) is the specification of subject-matters that may fall under their legislative autonomy (Article 228, n.º 1 of the Constitution). It also defines the status of the members of the autonomous region's organs of self-government (Article 237, n.º 7 of the Constitution). The Constitution also enshrines the principle of cooperation as one of the paradigms governing the relationship between the Republic and the Autonomous Regions in

6. European Commission (2021), Commission Work Program 2022: Making Europe stronger together, COM(2021) 645 final, Strasbourg, available at https://eur-lex.europa.eu/resource.html?uri=cellar:9fb5131e-30e9-11ec-bd8e-01aa75ed71a1.0001.02/DOC1&format=PDF (1last consulted in 1/07/2022).

7. Contribution from Regions with Legislative Powers to The Task Force Subsidiarity And Proportionality, Doing Less More Efficiently (date unknown), page 2 available at https://ec.europa.eu/info/sites/default/files/taskforce-contribution-regions-legislative-powers-rleg.pdf (last consulted in 11/07/2022).

Article 229, n.º 1, determining a generic duty of cooperation between the sovereign organs and the regional government organs.

The legal statute of the autonomous regions establishes its powers concerning political, legislative, administrative, financial, and patrimonial autonomy, as determined from the first article of the Political-Administrative Statute of the Region of Azores, approved by Law n.º 39/80 of 5 August (EPARAA or regional statute), revised by Laws n.º 9/87, of 26 March, 61/98, of 27 August, 2/2009, of 12 January.

The relationship of *specialty* between the legal statute of the autonomous regions and the national laws means that ordinary laws originating from the Government or the Assembly of the Republic are bound to this statute, under penalty of illegality (under Article 280, n.º 2, al. c), and 281, n.º 1, al. d), CRP), and that all rules contained in a regional statute cannot, again, under penalty of illegality, violate the respective statute of the autonomous region (article 280, n.º 2, al. b), and 281, n.º 1, al. c), CRP). This requirement is grounded in light of the parametric nature of the Statute, which holds a "reinforced value" compared to any ordinary legislation approved by the Assembly of the Republic.

The legislative competences of the autonomous region, whose citizens are represented in its Regional Legislative Assembly (article 232, of the CRP), empowers it to legislate on certain matters, based on political-administrative autonomy (article 225, n.º 1 and 2, of the CRP). This competence is, arguably, the most important power conferred by the Constitution to the Autonomous Regions, but its restricted geographical scope of application is limited to the territorial space of the respective archipelago.

The legislative competences of the autonomous regions eliminated the demand for "*a specific regional interest*" in a recent Constitutional amendment; the enumeration of subject-matters falling within the legislative autonomy of the autonomous regions was left to regional statutes. Although Article 228, n.º 1 of the Constitution established a broad *residual* rule stating that regional legislative autonomy "*applies to the matters set out in the respective political-administrative statute which are not reserved for the sovereign bodies*", the exercise of regional legislative power is not limited only to the matters set out in the regional statute. Jorge Bacelar Gouveia establishes five ways in which the legislative competence of the autonomous regions can be exercised: a) *primary legislative exclusive competence*; b) *parameterised regional legislative competence*; c) *authorised secondary legislative competence*; d) *secondary legislative competence of development*; and e) *secondary legislative competence of transposition* (2016: 1228).

Regarding the participation of the Portuguese autonomous regions in the multilevel regulation of the European Union, the most important emphasis, naturally, goes to the legislative competence for the transposition of European directives.

The Constitution recognizes, under the referred Article 227, n.º 1, a), the power of the Autonomous Regions to legislate, under the terms defined in the respective statutes, "at regional level" "*on matters set out in the respective political-administrative statute*", "*which are not reserved to the sovereign bodies*". The same is stated in Article 112, n.º 4 of the Constitution

with respect to the content of regional legislative decrees. Particularly regarding the legislative competence to transpose legislative acts of the European Union, article 112, n.º 4 and n.º 8 and article 227, n.º 1, x) allow the Autonomous Regions to transpose EU's directives into the regional legal order, under the terms defined in the respective statutes. This power to transpose the legal acts of the European Union into the territory of the region is restricted to "*matters of own legislative competence*" with reference to Article 112, paragraph 4, of the CRP and Article 40 of the regional statute. The regional power to transpose directives is thus limited in two ways; on the one hand, *restricted to the regional geographic area* and on the other hand, to the legal configuration of each of the regional legislative powers *under the subject-matters set out in each directive to be transposed*.

One particularly interesting case arose with the transposition to the regional level of the Autonomous Region of Azores (RAA, under the Portuguese acronym) of Directive 2014/24/EU, of the European Parliament, and of the Council, of 26 February 2014, as provided for in Article 1, n.º 1 of the Regional Legislative Decree n.º 27/2015/A, of 29 December, which approved the legal regime of public tenders in the Autonomous Region of Azores (RJCPRAA, under the Portuguese acronym).

Considering the legislative competences of the autonomous regions to transpose directives by means of a regional legislative decree on matters outside the exclusive legislative competence of the sovereign bodies and that fall within the regional scope, it was necessary to assess whether *public procurement* was included in the list of matters provided for in the EPARAA and, to this extent, whether the RAA could define the legal regime regarding public procurement.

At issue here was the legislative competence of the RAA to legislate on *public procurement and the substantive regime of public contracts* and therefore also to transpose EU Directives on the matter (Medeiros, 2020: 5 ss.). The question arose out of the disposition enshrined in article 1.º, n.º 1 and 2 of the RJCPRAA, which in broad terms aims to establish a legal regime for public tenders for the acquisition of goods and services in the RAA. However, there was uncertainty about the competence for the organs of the Autonomous Region to legislate on this matter, under the autonomy recognized by the Constitution and the Regional Autonomy Statute. On the one hand, articles 49.º to 67.º of the regional statute do not expressly include in the legislative powers of the Legislative Assembly of the RAA those matters directly related to public procurement and the substantive regime of public contracts in the nature of administrative contracts, as governed by the RJCPRAA. On the other hand, article 56.º n.º 2, b) of the regional statute grants the Legislative Assembly of the RAA the power to legislate on matters of infrastructures, transport, and communications, more specifically on the regime of public works and contracts. It is this latter rule that may was invoked as the legal basis to empower the Legislative Assembly of the RAA to legislate on matters of public works and public works contracts.

This matter was brought before the Portuguese Constitutional Court, in the Proc. n.º 233/2018, in case n.º 970/2017, by judgment of 2 May 2018, which ruled unconstitutional the norm contained in article 1.º, n.º 1 and 2, of RJCPRAA, regarding contracts for the acquisition of goods and services.

The Constitutional Court based its position on the fact that the regional power to transpose directives is limited to the regional geographic area and to the configuration of each of the regional legislative powers according to the matters covered by each directive that is intended to be transposed. The Court, therefore, found that the provisions of Articles 37.º, n.º 1 and article 40.º of the regional statute do not, in themselves, confer on the Legislative Assembly the power to legislate on the legal regime of public procurement. The list of matters set out in Articles 49.º et seq. of that statute do not include the power to legislate on the legal regime for public procurement in relation to the acquisition of services.

The Court invoked that the method used by the statute to list the matters on which the region can legislate is that of a closed enumeration, and, in that sense, found that that the list contained in the political-administrative statutes must be sufficiently densified so that it can operate as a parametric norm for controlling regional legislative activity. The Constitutional Court made a restrictive reading of the legislative powers of the autonomous regions with regard to matters of legislative competition between the organs of the autonomous regions and the organs of sovereignty. Hence, it follows that except for matters attributed to regional competence by the Constitution, there are no matters of regional scope on which the legislature of the island regions can legislate outside the statutory list. The competence must, as it should, result explicitly and unequivocally from the enabling rules, by virtue of the aforementioned principle of the exhaustive nature of the constitutional and statutory enumeration of the legislative powers of the regions. This solution, in terms of constitutional interpretation, prevents the use of analogy or extensive interpretation of the rules concerning the legislative competences of the organs of the RAA. In this case it prevents them from extending to those matters relating to public works contracts or even the rules which govern the functioning of regional markets and economic activity, and the promotion of competition. This distinction is crucial to empower the regional legislature, as these issues should not to be confused with public procurement. Besides, no provision is made in the regional statute for legislating on the acquisition of goods and services, so it must be understood that, where the legislator did not discriminate it, is not for the interpreter to do so, and therefore that the Regional Legislative Assembly was not legally or constitutionally empowered to legislate on this matter. In conclusion, considering that the regional statute does not include the discipline of public contracts for the acquisition of goods and services as a matter of legislative competence of the Regional Legislative Assembly, this means that it cannot be sustained that the RAA has competence to legislate over the matter, contrary to what occurs in relation to public works which may be found in article 56.º of the regional statute (Medeiros, 2020: 5 ss.).

The Portuguese Constitutional Court, however, has not (yet) declared the unconstitutionality with general mandatory force, under Article 281.º, n.º 2 or 3 of the Constitution, of the rule contained in Article 1, paragraphs 1 and 2, of RJCPRAA, which was considered to be organically unconstitutional in previously discussed case. As a result, the binding nature of the Constitutional Court's decision is restricted to that specific case *sub judice*, under article 80.º, n.º 1 of the Constitutional Court Act, without *erga omnes*

effect on the validity of the rule. This applies to both public administration as to future decisions of ordinary courts.

5. (Some) methodological challenges from a Multilevel Governance

The solution adopted in the case of the REGLEG of the RAA, considering that the regional statute does not cover the regulation within the legislative competence of the Regional Legislative Assembly but retains it, means that not only must the courts apply the law, but other State organs, namely the legislator, are also obliged to fulfill legislative obligations arising, in this case, from European Union Law on public tenders and public administration, when implementing administrative obligations arising from this legislation (national and from the EU). This gives rise to definite methodological challenges on the implementation of EU Law, particularly relevant to the Regions of Europe, not only in the exercise of legislative powers but also in the administrative implementation of the legislation.

5.1. Administrative Control of the applicable law

For some time it has been pointed out how public administration is increasingly bound to a wider legality, which includes not only traditional national law as a paradigm for public administration, but, increasingly, general principles of law, the Constitution, and supra-national Law – even customary law. Moreover, Public Administration is not passively bound to the Law, but the definition of the law applicable to any concrete case is said to be a *creative* action far from the strict obedience to national law, as it appeared to have been traditionally envisioned by the *founding fathers* of administrative law (Otero, 2003: 19). However, the possibility of the Administration refusing to apply a law to which it is bound according to the hierarchical criterion is also only exceptionally acknowledged. Traditionally, it has been ultimately up to the courts to control the constitutionality and international legality of the law that binds the organs of Public Administration, in obedience to the principle of separation of powers. The cases in which the Administration may refuse to apply a national or supranational rule on the grounds of its international illegality or domestic unconstitutionality are, therefore, exceptional or limited (André Salgado Matos, 2004: 306).

When solving legal antinomies constructed in this way, Public Administration is methodologically more suited to use hermeneutic criteria of legal *specialty* and *chronology* rather than those of legal *hierarchy*. When solving a conflict of norms, the conflict found here between the *principle of legal certainty* (that a more strict administrative obedience to the law would entail) and the *principle constitutional justice* (promoted by wider powers of administrative control of the legality to which it is bound) may also be placed at a *cosmopolitan* level where the organs of public administration are called upon to solve conflicts involving regional, national (ordinary, parametric and constitutional), international, and European Union Law (Cunha, 2016: 431). The principled resolution of legal conflicts arising from the administrative determination of applicable legality determines the establishment of a condition of preference in favor or against the (exceptional or limited)

competence of administrative disapplication of legality which, in primary instance, binds it to matters of internationality.[8].

In the case of the European Union, obligations of *conform interpretation* imposed by the *principle of primacy* also extend to the administrative (creative) powers who must define the law applicable to a given case. Such a requirement to the Administration seems to result from jurisprudence of the Court of Justice of the European Union (CJEU) in the Fratelli Costanzo case.[9]. However, this solution may be considered contradictory with the traditional jurisprudential understanding of the principle of separation of powers in the Member States, reaffirmed in the Klaus Konle case.[10], based on the recognition of procedural and institutional administrative autonomy, provided that the effectiveness of EU Law is guaranteed. From this perspective, one need only remember that the binding nature of EU Law for the courts and tribunals is based on an institutional setting that authorizes them to make a reference for a *preliminary ruling* (and, therefore, subject to their decision) unlike the exercise of the other functions of the State, namely those exercised by administrative bodies, which are subject only to the condition of any penalty payment imposed under the terms of Article 267.º TFEU. Unlike the decision on the Fratelli Costanzo case, this will always be sufficient to cast doubts, on the one hand, on the possibility of the CJEU determining the terms of national administrative obligation to comply with EU Law, and, on the other hand, on the possibility of an unlimited administrative control of (EU) legality over the (national) legislation to which it is bound, namely on the use of hierarchical criterion (under the primacy of EU Law) to derogate from national legislation, which is all the more difficult regarding that which is approved expressly for the transposition of a Directive (Cunha, 2020: 3 ss.).

5.2. Participation in legislative procedures

Regional and national legislative authorities may be faced with (concrete) legislative impositions or (continuous) legislative obligations – from domestic national legislation, namely the Constitution, or supra-national origin, international or from the European Union. The adequate fulfillment of any of these legislative obligations may be answerable to regional, national or, in this case, European courts, either by the Region or the Member-State, both in relation to the possible omission of a "duty to legislate" or the ensuing responsibility (Cunha, 2020: 380). The risk here is of promoting a given constitutional "project", national or supranational, which is harder to formulate within the concept of a legislative obligation of supra-national origin, particularly in light of the deliberative limitation of the international arena (Canotilho, 2006: 101 ss.). In the case of EU Law, when fulfilling these same legislative obligations, the legislator, both regional and national, is also

8. V.g., in the case of the reception of International Law, under the fulfilment of the principle of internationality would be easier when be easier under norms with *ius cogens* value *in* Cunha (2016: 431).

9. Decision of 22.06.1989, Proc. C-103/88, Fratelli Costanzo Spa v. Município de Milan.

10. Decision of 01.06.1999, Proc. C-302/97, Klaus Konle v. Austria.

unable to use the preliminary ruling as the mechanism for ensuring uniformity in European Union Law. The changes introduced by the Treaty of Lisbon were a positive step in the involvement of National Parliaments, namely in the enforcement of the principles of proportionality and subsidiarity.

In Portugal, Law n.º 43/2006, of 25 August, was intended precisely to regulate the powers of the parliamentary organ, Assembleia da República (AR), "*in the monitoring, assessment and pronouncement within the scope of European integration processes*". In addition to the right to be informed by the Government, the possibility of adopting "opinions" (articles 1.º, 2.º and 3.º) or "resolutions" (article 3.º, n.º 1 and article 7.º, number 5) has been criticized as a reduction to a "*purely political participation*" which does not bind the Government, which will be especially serious when dealing with matters of reserved legislative competence of the AR. The intervention of the AR will be particularly decisive in the appreciation of all proposals for legislative acts that infringe on the legislative competence reserved to the AR, in accordance with Article 12 TEU and Protocol n.º 1 on the Role of National Parliaments in the European Union. Special care should also be taken when intervening in the simplified revision of the Treaties (Art. 48 TEU), particularly when activating the "passerelle clauses" that may amount to a revision of the Treaties. Strengthening the action of the AR in the application of the principle of subsidiarity (Art. 5(3) § 2 TEU) also implies the possibility of legal action for violating of the principle of subsidiarity, under the terms of Protocol n.º 1 on the Role of National Parliaments in the European Union.

Neither the provisions of the European Treaties, nor the implementation of Portuguese law, provide the REGLEG with adequate participation. It is high time that the Regional Parliaments also be involved – most notably in the fulfillment of the principle of subsidiarity, in which they play a crucial role, and in the defense of their exclusive legislative competence in parallel terms to those expressed for the National Parliaments.

Despite the references to the competences of the Council of Regions, namely in terms of control and granting of judicial legitimacy (Article 8 and 9), the reference in article 4 of the Protocol to the implementation of the principle of subsidiarity – which determines that national parliaments receive the legislative projects of the Commission at the same time as the European Union legislator – could easily be extended to Regional Parliaments, particularly when the interests or the legal position of the Regions they represent may be affected by EU legislation.

In Portugal, Law n.º 43/2006, of 25 August, allows for the hearing of the Legislative Assembly of the autonomous regions in matters of their (one would assume legislative) competence, under Article 3.º, n.º 3, and for regular meetings between the Commission on European Affairs of the AR and the Legislative Assemblies of the autonomous regions, in Article 6.º, n.º 2, f). Both these provisions are clearly insufficient for the REGLEG's adequate participation in the legislative procedures of the EU, and in its need for both stricter participation, and on wider matters. This is the elementary conclusion from the *relationship of cooperation* between the organs of sovereignty of the Republic and the representative organs of the Autonomous Regions, enshrined as a guiding principle in article 229.º, n.º 1)

of the Constitution. This relationship of cooperation is not only administrative (Lanceiro, 2018: 295), as it is legislative and even political under the Constitution of a unitary state.

This is part of External Constitutional Law (*Aussenverfassungsrechts*), still relevant in a contemporary increasingly integrated legal reality. More than sidelining the Constitution and Constitutional Law, it is its cosmopolitan engagement that may reveal better results for the coherence of a multilevel or networked legal integration (Cunha, 2020: 507). Considering the limitations of binding administrative and legislative bodies to Law (as well as to supranational Law in administrative matters) and of its legitimation according to democratic standards, this is a decisive methodological contribution to the *cosmopolitan* implementation of global *multilevel networks* of regulation that include supra-national, national, and regional legislation, institutions, and citizens.

5.3. The cosmopolitan REGLEG

The limitations of the *principle of primacy* to solve all the normative conflicts raised by implementing European Union Law are evidence of a permanent conflict between *primacy* and *autonomy*, from the perspective of a healthy relationship of legal orders. In the relationship between legal orders and autonomous normo-genetic processes, conditions of validity, and mechanisms of guarantee, the hierarchical criterion leads to argumentatively circular solutions that are unsustainable and unsatisfactory (Cunha, 2020: 361). The hierarchical resolution of competing sovereignties always appears to be a judgement on the value of the sovereignties themselves, which is far from a legal exercise. In the resolution of possible antinomies or conflicts between constitutional law and supra-national law, the insufficiency of any hierarchical solution, based on a "sovereigntist" monism or dualism, again points to the understanding of the issue as a conflict of principles. It is this principialist conflict, which is common to different legal systems, that guides (in an attempt at functional adequacy) the constitutional, national-state, and international rules of conflict resolution (which operate in an all-or-nothing logic) between Constitutional Law and supra-national Law (Cunha, 2020: 361).

Within the framework of solutions of the Constitution, this presents a conflict between the principle of constitutionality, as a consequence of the principle of the rule of law (Article 2.º), and the principle of openness to European Union Integration (Article 7.º). It does not mean that the definition of rules of conflicts is abandoned, but its application should be guided by the fulfillment of principles, even if competing, aimed at ensuring reciprocal effectiveness, based on the recognition of the validity (constitutional) of each of the normative prepositions. It is important here to ensure the reciprocal systematic coherence in a cosmopolitan relationship of legal orders, which is even more relevant in this case than the strict unity of each of legal system, under the possibility of irreparably affecting the relationship with *others*.

The REGLEG of Europe increasingly take part in this cosmopolitan dialogue. The closer proximity to the citizens, fulfilling the *principle of subsidiarity*, both at a national and European level, highlights the importance of the

participation of a new layer or *level*. The lessons of the case discussed here are, in this regard, inescapable. The *cosmopolitan* engagement of the REGLEG is a contemporary tendency imposed by an increasingly integrated global law. However, the participation of the REGLEG in legislative dialogues of EU regulation happens within a institutional constitutional framework, both at the European Union *level* and that of the Member-States, that were not built to encompass such participation. Therefore, this is *reciprocal* effort is still under construction – in fact, a cosmopolitan engagement is always a permanent attitude, a relationship with the other that in this case needs to consider the aims to be fulfilled by the legislative competences of the different levels of government involved in the exercise of the different judicial, legislative, or administrative functions involved.

6. Conclusion

The intervention of the REGLEG in the *multilevel networks* of governance in the European Union allows the identification of some contemporary problems and trends that are increasingly relevant in the development of a progressively integrated global cosmopolitan legal order. This intervention of the REGLEG of Europe must be considered as part of the previously mentioned External Constitutional Law (*Aussenverfassungrechts*), still relevant in today's growingly integrated legal reality. More than sidelining the Constitution and Constitutional Law, it is its cosmopolitan engagement that may reveal better results for the coherence of a multilevel or networked legal integration.

The limitations of the normo-genetic deliberative processes of these multilevel networks of regulation and their implementation meet another actor at a regional level – one even closer to the citizens in fulfilling the aims of subsidiarity at the heart of the legitimation quest, particularly in the EU. It has been pointed out that the participation of the REGLEG of Europe has been placed between the promotion of *self-interest* vs *multi-level engagement*, which may, in fact, prove not to be incompatible with the overall picture of this global multilevel regulation, if taken as another different *input* that potentially influences the choices of legislative regions of Europe. Moreover, consideration of the strategies that have identified the use of unmediated access as rare (given the possibilities of *domestic conflict*, the *different processes of national coordination,* and the importance of the *size* of the region in terms of population), reveals the participation of diverse levels or networks in a cosmopolitan engagement, involving various public and private stakeholders, organs, entities and, in this case, regions.

Furthermore, the limitations of the traditional solution of *hierarchical primacy* between EU Law and that of the member-states raise particular challenges for administrative and legislative enforcement. The Treaty of Lisbon went a long way in solving some of these challenges, namely the involvement of National Parliaments in the enforcement of principles of proportionality and subsidiarity. It is high time for the REGLEG to be also involved – most notably in the fulfillment of the principle of subsidiarity, of which they are a paramount reality – both at the level of the regional parliaments and as a relevant part of the public administration of Member-States.

The judicial decisions invoked in the Portuguese case reveal precisely this trend.

This solution does not build on the hierarchical affirmation of each legal system involved. On the contrary, the affirmation of hierarchy in the relationship between legal orders gives rise to a circular argumentation that provides no satisfactory answer. It is an unsolvable vicious circle. It has been pointed out how these networks of regulation are based on relationships of *heterarchy* as illustrated by the subsystems of responsibility, as is the case of the European Union, despite the permanent possibilities of *fallback* on the general regime of international responsibility. This *multilevel* cosmopolitan dialogue within these *networks* of government is all the more evident, as it involves different organs of the different legal orders – at different levels (in this case territorial) of administrative, legislative, and judicial abidingness to the law. However, one thing is taken for granted: the relationship of networks of regulation involves different legal orders in a *cosmopolitan* dialogue, which also includes the REGLEG of Europe on an equal footing.

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