Portugal vs. European Union: a possible constitutional challenge

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Prof. Kukis

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"Language is money, and it represents our identity."

-Portuguese Ambassador Nuno Brito, General Director of Foreign Policy within the MFA (Stoica, 2014)

Introduction

In the far west of mainland Europe, Portugal serves as a gateway to the European world and the Global South due to its past as a seafaring expert that launched the "Age of Exploration," forever connecting the New World to the Old World. Five centuries later, the Lusophone patriarch is on the verge of economic collapse due to a lack of workforce in the tourism and construction sectors (Henriques, 2022), forcing its borders open to its former colonies and initiating a recent surge of migration to the European westernmost country (Ansa, 2022).

In 2022, for example, Portugal created a "Golden Visa" for digital nomads (AIMA, n.d), and as of October of 2023, provides automatic residency with studying and working rights for one year for CPLP (Community of Portuguese Speaking Countries) citizens (European Commission, 2023). It is worth mentioning that as of the beginning of 2023, there were 781,915 foreigners in the country, a significant rise from 590,348 at the beginning of 2020 in a country of merely 10 million people (Lusa, 2023). The Serviço de Estrangeiros e Fronteiras (SEF) has facilitated the application process for CPLP citizens, resulting in over 154,000 lusophone immigrants, primarily Brazilians, applying for residence permits, having already issued 140,000 permits (Lusa, 2023).

In direct response to this new visa, the European Commission has coerced Portugal to submit a response in two months, starting an infringement procedure due to the CPLP visa's transgression the Regulation (EC) No 1030/2002 (free circulation in the Schengen area), and, threatened the country in the absence of a satisfactory response (Ferrão, 2023).

This paper contends that the European Union's dissatisfaction with Portugal's new residence policy not only infringes upon the country's constitutional sovereignty (Article 3 of the Constitution of Portugal) and the right to decide on its economic and diplomatic policies but also sheds light on Europe's increasingly restrictive immigration policies led by right-wing governments from Italy, Hungary, Poland, and Germany. Brussell's discontent is a symptom of political tendencies; Portugal's actions reflect a desperation for workers.

Beneath the surface

As briefly touched upon, Portugal's actions reflect the country's economic, political, and cultural context.

Economic

With only 10 million people and one of the lowest wages in the EU (Lahiri, 2023), Portugal faces a brain drain with young professionals struggling to secure well-paying jobs domestically, especially with the allure of better opportunities in Germany, the UK, and the Netherlands (Khan, 2023). Moreover, Portugal's Golden Visa has been erroneously accused of driving up housing prices, to which the European Commission pleaded with other European governments to stop selling citizenship to investors amid fears of security risks (Irvine, 2023). Portugal needs workers (TPN/Lusa, 2023), which punctuates the country's low birth rate for the past decade, the second lowest in the EU (Pimentel & Sousa Gomes, 2022).

Political

EU countries have agreed on the Crisis Regulation, a crucial element of the EU's migration reform to manage the unexpected mass arrivals of asylum seekers, allowing member states to implement stricter measures as part of the New Pact on Migration and Asylum (Al Jazeera, 2023). It is worth mentioning that Dutch Prime Minister Mark Rutte resigned due to disagreements on immigration policies, further emphasizing the gravity of the issue to EU countries (Al Jazeera, 2023). Following suit, the Portuguese PM António Costa resigned in November of 2023 following a corruption scandal, to which the president called for early elections in 2024 and further investigated the Portuguese Consulate in Rio de Janeiro for granting citizenship to criminals under false documentation (Hérnandez-Morales, 2023; Rico, 2023).

Cultural

Royo (2007) argues that Portugal's integration into the European Community was not merely a geographical inclusion but a reaffirmation of shared traditions, culture, religion, and intellectual values, strengthing Europe's strategic position in the Mediterranean and Latin America. It is crucial to emphasize how Portugal and Spain historically contributed to the Christian occidental humankind and society dominant in Europe; Iberian countries belong to Europe (Royo, 2007). Nevertheless, Fernandes (2018) emphasizes the idea of Lusophony through historical, linguistic, and cultural ties that contribute to the creation of diverse meeting points and innovative hybrid realities in multiple geographic contexts, evident by the Lusophone diaspora and a "sovereignty of service" rooted in soft power and evidenced by symbolized by the election of Portuguese dignitaries to significant positions and its potential mediation role between East and West through Macau[1].

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[1] **#SS166- contextualfactors:** I describe how economic, political, and cultural factors in Portugal, in the EU, and abroad influence current events, particularly the EU's legal action against Portugal in light of the new Migration Act.

A possible constitutional challenge

The Europeanization of Portugal

Magone (2014) defines *Europeanization* as chiefly a top-down (vertical process) that, together with a horizontal process of transnational cooperation, leads to a convergence of policies, resulting in substantial differences in how countries absorb EC policies into the national political system. Different national cultures and structures will create different outcomes from Europeanization, making it asymmetrical (Magone, 2014).
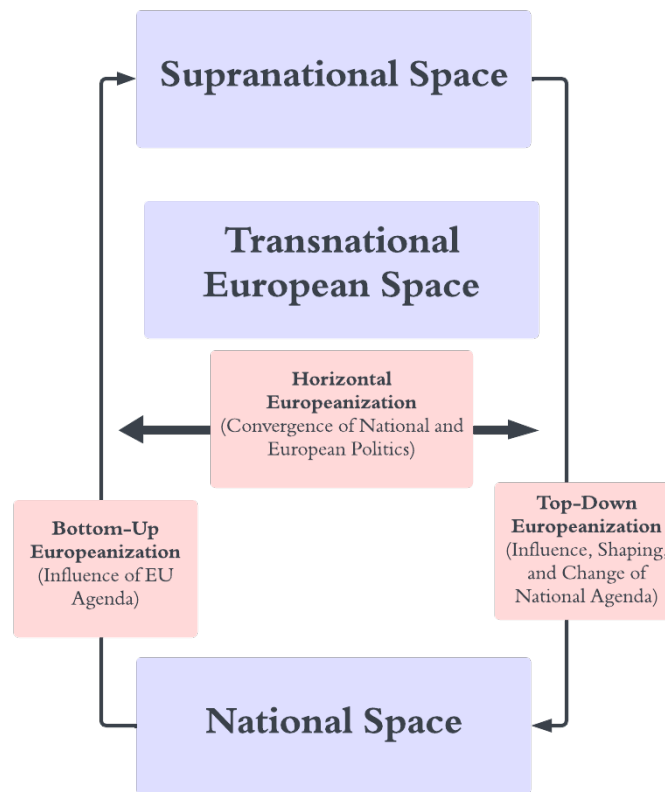

This LO helps us understand the reasons that explain and/or justify how a constitution is created, especially other factors that might (or might not) lead to the implementation of constitutional norms.

Figure 1. *The European Union Multilevel Governance and Different Forms of Europeanization (Magone, 2004).*

The issue of sovereignty in a European federation

Dating back to the Peace of Westphalia in 1648, the political construct of sovereignty is challenged by two opposing views: sovereignty is state-centered, located at one particular level of power, the parliament and the government emanating from it, and the second is the post-sovereignist understanding of a multilevel approach unleashed by globalization and integration (Brack et al., 2019). The creation of the European Communities asks whether power instituted in a supranational union, a hybrid of the federation and international organization, can be democratically exercised collectively (Brack et al., 2019).

The EU can be perceived as both a cooperative federalism and a regulatory federalism; Vicente (2013) describes the four strategies used in defining EU federalism:

Strategy	Description
Constitutional Strategy	Is based on constitutional laws and the European Court of Justice jurisprudence.
Dis-joining Strategy	Argues that the EU cannot be considered a completed federation with only certain features of a federacy.
Distributive Strategy	Focuses on power distribution between the central authority and its units and with the units themselves.
Essentiliast Strategy	Dives into the essence of federalism, linking federalism to statism and expanding from the normative to the analytical sphere

Figure 2. Describes the four main strategies used in defining EU federalism (Vicente, 2013).

Rodrigues (2020) argues that in the second decade of the 21st century, Portugal handing over its policy tools to European institutions threatens democracy, leaving the country in a semi-colonial state. Ironically, Brack et al. (2019) argue that issues such as immigration and borders have expanded the role of EU institutions. Figure 3 is Brack et al.'s (2019) attempt to understand the multiple theories on sovereignty.

Theory	Main locus of power	Main underlying principle	Dynamics for Reconfiguration of Sovereignty	Effects on Member States	Resolution of Sovereignty Conflicts
Federalism	European Federation	Supranationalism	Re-foundation of Europe	Superseded	Constitutionalism
Neo-functionalism	European (con)federation	Supranationalism	Functional spill over/back	Superseded	Conflicts law
Intergovernmentalism	Nation states	Pooled sovereignty	Inter-state Bargaining	Rehabilitated	Veto
Postfunctionalism	Nation states	Pooled sovereignty	Inter-state Bargaining	Rehabilitated	Opt outs, exits

Figure 3. *This table explains the logic underpinning the conception of sovereignty and the relate conflicts in the perspectives outlined above (Brack et al., 2019).*

Sovereignty within the European Union (EU) has become a constitutional issue manifested in democracy and the rule of law and in the challenges to the role of supranational institutions in upholding common values have emerged and economic governance, raising normative, political, and legal questions (Brack et al., 2019). Migration, border control, and Brexit are all intertwined with sovereignty questions, emphasizing these conflicts' diverse and multilevel nature (Brack et al., 2019). Sovereignty is tightly woven into the EU's constitutional fabric, requiring a delicate balance between supranational integration and maintaining democratic norms and the rule of law (Brack et al., 2019)[2].

In conclusion, the EU's legal action against Portugal for its new CPLP residency permit

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[2] **#ss166-constitution:** I applied this LO because the EU's dissatisfaction is clearly affecting a country's sovereignty over its own economic policies in the context of balancing its constitutional provisions while being part of a supranational organiazation that operates like a federation.

challenges its constitutional sovereignty, raising questions about the political motives of conducting a legal intervention considering the ongoing political shifts within Portugal. Thus, the EU's scrutiny of Portugal's immigration policies occurs at a politically sensitive moment for the country; the CPLP permit, created to band-aid the country's prolonged economic crisis, was bad political timing, given that it goes against the EC's interests in reducing the number of non-Europeans in the region.

Word count: 1159

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