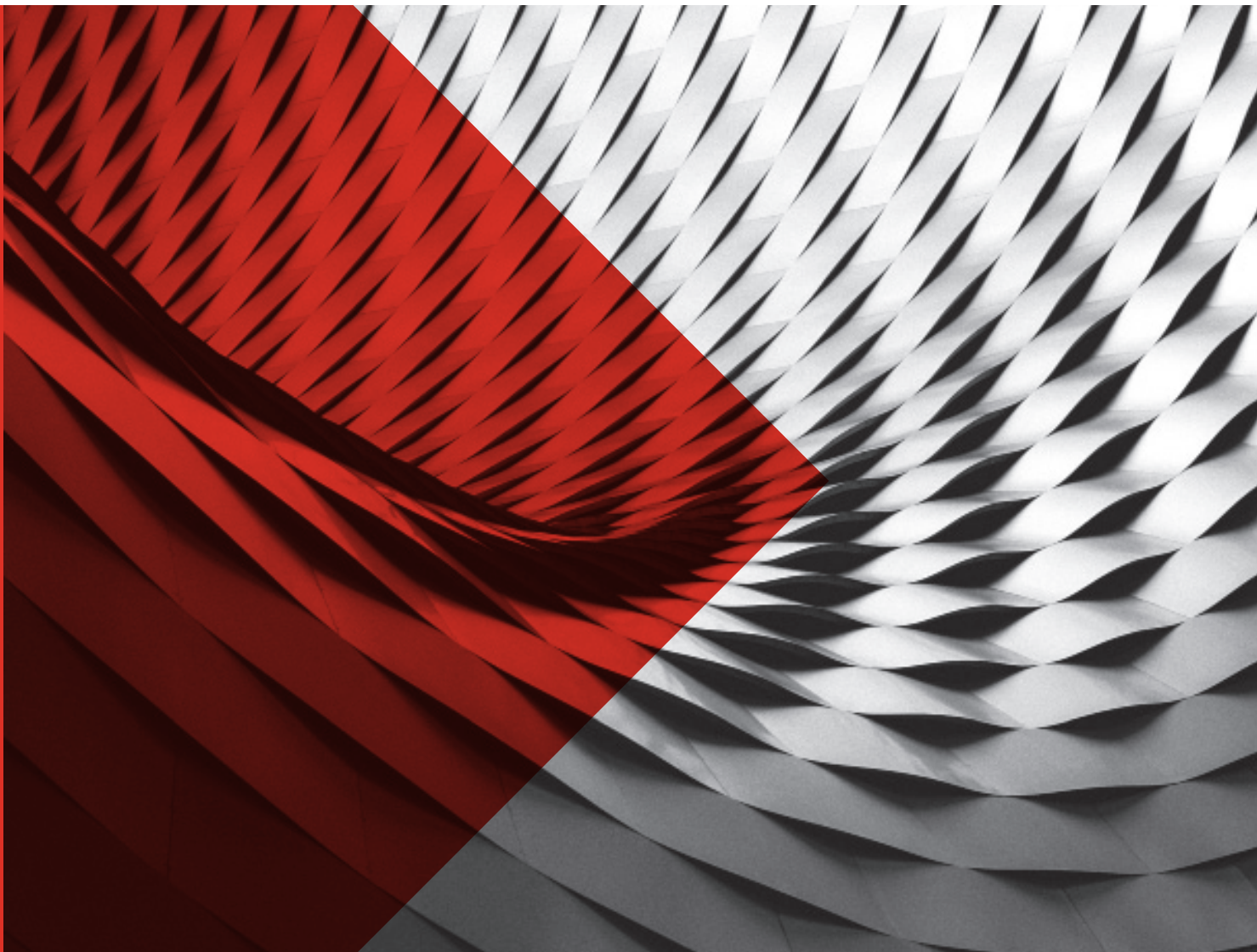


THE INTERNATIONAL POWERS OF THE PORTUGUESE AUTONOMOUS REGIONS OF AZORES AND MADEIRA

RUI TAVARES LANCEIRO



I. Introduction

1. Portugal is a unitary state – in the sense that it is not a federal one. There is a single sovereign power from which a single constitutional power (in the sense of the *kompetenz-kompetenz* power) emerges. However, the autonomy of the Azores and Madeira archipelagos is one of the identifying traits of the current Portuguese constitutional system¹. In these archipelagos the Constitution established autonomous regions with legislative and executive powers – within certain limits.

This regime is limited in order to safeguard the unity of the State. Article 225 (3) of the Constitution of the Portuguese Republic² (henceforward Constitution) establishes that the regional political and administrative autonomy does not affect the «*integrity of the sovereignty of the state and must be exercised within the overall framework of this Constitution*».

2. The Azores and Madeira archipelagos are awarded a system of self-government, with democratically elected bodies and several powers and duties which include legislative and executive powers, as well as international powers (Article 6 of the Constitution).

The autonomous regions' legal framework is to be found in the Constitution itself and also in the Political and Administrative Statutes of the Autonomous Regions, which are basic laws, one for each region, governing the exercise of self-government by the region, as well as its rights, powers and duties.

The autonomous regions, as political legal entities, enjoy a range of powers, responsibilities and rights, both to act (which could, namely, be

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** PhD student and junior assistant in the Faculty of Law of the University of Lisbon.

¹ Regional autonomy is considered as a matter in which constitutional amendments are restricted, by Article 288 o) of the Constitution.

² A translation of the text of the Constitution of the Portuguese Republic can be found in: <http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitiv_e.pdf>, accessed in 15 November 2009.

legislative), in the «regional ambit», or to participate in the state's decision-making procedures.

3. It should be noted that, despite the invaluable historical significance of the decentralization option taken by the Constitution in 1976, the regional self-governance regime did not crystallized – it evolved through the various amendments to the Constitution.

This evolution was not always peaceful, especially in relation to the scope of the legislative powers attributed to the Legislative Assembly. The controversy revolved around the questions of: should there be a list of subjects or a general provision; should there be a national framework in certain aspects; *etc.* Indeed, the years after the adoption of the Constitution marked the beginning of what has been called, appropriately, the “*disputes over the autonomy*”³.

The developments operated in the constitutional framework of the Regions through the successive constitutional amendments were very significant and sought, to some extent, and with a variable degree of success, reduce the scope of the conflict.

II. The Portuguese Constitution and the international power of the autonomous regions

4. The constitutional regime of the autonomous regions was briefly presented in the last paragraphs. Some of its powers were approached – namely the legislative and executive power. But the Constitution also awards specific powers to the autonomous regions in the international sphere.

5. As can be noted, the Constitution in Article 227 (1) s), t), u), v) and x) and in Article 229 (2), true to its spirit of decentralization, assigns an important role to the autonomous regions with regard to the performance of the Portuguese international policy as well as the possibility of an autonomous regional international policy. To this effect, one can note the existence of *i)* powers to participate in the decision-making processes of the international policy of the Portuguese Republic; and *ii)* powers to conduct an international policy of the region.

³ A. VITORINO, “O estatuto jurídico-político das Regiões Autónomas”, in *Direito e Justiça*, nº 10, I (1996) p. 69.

III. The autonomous regions' international powers and their Political and Administrative Statutes

6. The constitutional framework of the autonomous regions' international powers is developed by the Political and Administrative Statute of each of the autonomous regions.

7. The Political and Administrative Statutes of the Regions⁴ regulate which of the organs of self-government of the autonomous region have the powers recognized by the Constitution. The repetition, sometimes literal, of the Constitution is notable.

However, the Political and Administrative Statute of the Autonomous Region of the Azores, after its recent and controversial amendment which came into force in January 2009, has further regulated the autonomous region's international powers. The specifics of its regime will be described throughout the paper.

IV. The autonomous regions' participation in the international policy of the Portuguese State

8. In regard to the power of the autonomous regions to participate in the international policy of the Portuguese state, one can distinguish between *i*) a general power of participation in the decision-making process in the international policy of the Portuguese Republic, and *ii*) several specific powers of participation – in relation to certain subjects, *v. g.* «*territorial waters, the exclusive economic zone and the adjacent seabed*» (cfr. Article 227 (1) *s*) of the Constitution) or the European Union (cfr. Article 227 (1) *v*) and *x*) of the Constitution).

⁴ The Political and Administrative Statute of the Autonomous Region of Azores was approved by the Law no 39/80, of 5 de August, which was amended by the Law no 9/87, of 26 March, the Law no 61/98, of 27 de August, and the Law no 2/2009, of 2 January. The Political and Administrative Statute of the Autonomous Region of Madeira was approved by the Law no 13/91, of 5 June, which was amended by the Law no 130/99, of 21 August and the Law no 12/2000, of 21 de June.

9. The general power of participation is established in a comprehensive way, in article 229 (2) of the Constitution⁵, and, in a more specific way, in Article 227 (1) *t*) of the Constitution, in relation to «*the negotiation of international treaties and agreements that directly concern them*».

The definition of this power of participation is limited in the sense that it only exists in relation to issues which «*concern*» the autonomous regions. It is, thus, necessary to analyze this concept in order to help us understand the meaning and the possible concretizations of such power.

10. The question of the meaning of the constitutional reference to issues which «*concern*» a particular region is as controversial as it is central.

Before the constitutional amendment of 2004, some Authors considered this concept to be close to (or the same as) the concept of regional «*specific interest*» – which was the basis and the limit of the legislative power of the autonomous regions⁶. In 2004 the concept was largely abolished – in relation to the legislative power, as well as several other specific points. Hence, one cannot support such a position, at least in the aftermath of the constitutional amendment of 2004. In fact, even before 2004, the reference to the concept of regional «*specific interest*» ignores that the Constitution, in the provisions under study, referred to «*matters that concerned*» the autonomous regions and not to matters of regional «*specific interest*»⁷. Given that the constitutional text used different terms in the same legal text, one must, at the outset, assume that it was intended to refer to different realities – it is the reflex of the legal Latin adage “*ubi lex distinguit nos distinguere debemus*”. One must, therefore, exclude the use of «*specific interest*» to determine the limits of this power of the autonomous regions. This conclusion comes regardless of any discussion about the current role of this concept in regional autonomy.

⁵ Cfr. also article 227 (1) *v*) of the Constitution, which was referred earlier.

⁶ E. CORREIA BAPTISTA, *Direito internacional público*, Vol. I, (1998), pp. 357-358.

⁷ Cfr., against this opinion, J. MIRANDA, *Funções, Órgãos e Actos do Estado*, (1990), p. 320, footnote, who considers the different terminology as relevant. The same author appears to have changed his position, adopting the position defended by the Constitutional Commission and by the Constitutional (cfr. *Manual de Direito Constitucional*, Vol. III, (2007), p. 319). Cfr. also P. MACHETE, “Elementos para o estudo das relações entre os actos legislativos do Estado e das regiões autónomas no quadro da Constituição vigente”, in *Estudos de direito regional*, (1997) p. 186, who refuses the distinction referring to the “multifunctional” character the concept of «*specific interest*». According to this author, «*a hermeneutic effort proposing to unravel the range of expressions such as “in respect of the autonomous regions”, “regional interest”, “matters that concern the regions” or specific interest does not seem to have founded results*» (p. 185).

One must not, similarly, use the list of subjects over which the Region has legislative powers as a criterion to determine the power in question. The list of subjects define the scope of the regional legislative power, which is rather different than the limits of the possibility of participation of the autonomous regions in the international decision-making processes of Portugal – which have their own national context and which can be broader or more restrictive than the regional legislative power. The autonomous regions may not be able to legislate over certain subjects that «*concern them*», but are reserved to the national legislative power.

Some argue that the issues that «*concern*» to a particular region are those dealing with matters within the scope of the constitutional duty of the bodies that exercise sovereign power to hear the regional bodies of self-government (cfr. Articles 227 (1) *t*) and 229 (2) of the Constitution)⁸. The case-law of the Portuguese Constitutional Court has established that this duty exist in relation to matters relating to the autonomous regions – that is, matters which concern predominantly to regional interests or, at least, those that deserve, at the national level, specific treatment with regard to their impact in the regions, depending on their particularities and their relevance in the regional context⁹. The Constitutional Court also referred that the duty of hearing the regions does not exists «*as soon as an issue [...] also interests them, or as soon as this issue has raised “national” and not merely “mainland” interest*», as not only «*the requirements of autonomy do not ask for more, as this would involve an unwarranted privilege of autonomous regions against the whole country*»¹⁰.

All this means that the expression «*issues that concern*» the autonomous regions refers to acts relating specifically to the autonomous regions or that, at least, affect them in a special way, beyond the general effects of those acts, not in the same way as any other area of the country¹¹.

This is a balanced and reasonable way to determine the subjects that «*concern*» to a particular region and, indirectly, the power of participation of that region in the decision-making processes. However, one must point out that article 227 (1) *t*) of the Constitution establishes the right of participation in the

⁸ J. MIRANDA, *Manual de Direito Constitucional*, Vol. III, (2007), p. 321.

⁹ Cfr., *v.g.*, Judgments of the Constitutional Court n° 14/84, 42/85, 57/85, 130/85, 82/86, 264/86, 125/87, 403/89, 280/90, 629/99 or 670/99. The Judgments of the Portuguese Constitutional Court can be found (in Portuguese) in: <<http://www.tribunalconstitucional.pt/tc/acordaos/>>, accessed in 15 November 2009.

¹⁰ Cfr., Judgment of the Constitutional Court n° 629/99, (7).

¹¹ J. J. GOMES CANOTILHO / V. MOREIRA, *Constituição da República Portuguesa anotada*, Vol. I, 4th ed., (2007), p. 868.

negotiation of international treaties and agreements only in matters that «*directly concern*» the regions – which should mean that there is a difference in degree between the power of the regions to be heard («*subjects that concern them*») and the power to take part in the international negotiations («*subjects that directly concern them*»).

This means that there are two thresholds to be met by the regions in order to exercise the right of participation. The conditions to be met in order for the region to have the power to take part in the international negotiations are stricter than those necessary for the power to be consulted. In this case, the region will not enjoy the power of participation when the subject only indirectly concerns it.

11. In the recently amended Political and Administrative Statute of the Autonomous region of the Azores there is a tentative list of subjects which should be considered to concern the autonomous region.

The list can be found in article 121 (2) of the Political and Administrative Statute and is presented as an example. The list represents an effort to take steps in the right direction. However, it can only be seen as an example of subjects which would always be considered as issues that concern the region. The advantage of the region to have such a provision is that, when such a matter is a subject of an international decision to be made by the Portuguese state, the region will not have to prove the existence of «*concern*» - there is a presumption that it exists.

12. Another distinction can be made. Two distinct but interdependent forms of participation of each autonomous region are recognized in the Constitution: *i*) internal participation and *ii*) external participation¹².

The first form of participation refers to the participation of the autonomous regions in the formation of the Portuguese negotiating position in terms of the national decision-making process. The power of participation, in this sense, is not only a right to be heard but also a power to give their opinions on their own initiative (cfr. article 227 (1) *v*) of the Constitution).

The external participation refers to the participation of the autonomous regions in the negotiation procedures of treaties or agreements. It also related with the participation of representatives of the autonomous regions in the

¹² M. L. DUARTE, “União Europeia e entidades regionais: as Regiões Autónomas e o processo comunitário de decisão”, in *Estudos de Direito da União Europeia e das Comunidades Europeias*, Vol. II, (2006) p. 132.

Portuguese representation in international organizations – when matters that «*directly concern*» the region are at stake.

In fact, the autonomous regions may have representatives in the delegations of the Portuguese state in international organizations like the UN, UNESCO, the International Labour Organization, the International Seabed Authority or the International Maritime Organization¹³. This possibility makes sense in relation to international organizations in which the positions taken by Portugal can directly affect the regions. The regional delegates to international organizations would be included in the delegation of the Portuguese, in the same way as they participate in the negotiation of an agreement or treaty.

a) Right to be heard in the decision-making process of Portuguese foreign policy

13. As was mentioned *supra*, the Portuguese Constitution establishes the right of the autonomous regions to be heard and their power to participate in the decision-making process of Portuguese foreign policy, both in article 229 (2) of the Constitution, and in article 227 (1) *v*).

This means that, in the decision-making process, there must be a consultation of the autonomous regions over «*matters that concerns them*». In that moment, the autonomous regions must receive all the information deemed necessary in order for them to form an opinion over those matters. The right to be heard requires that the regions have the possibility to issue an informed opinion. The deadline given to the regions must be reasonable in the sense that the period given to the regions to form an opinion allows the formation of that opinion. Otherwise the right to be heard would be emptied of content.

The regions have the power to issue the comments and to make the suggestions that they deem fit.

14. Despite the powers of the autonomous regions to be heard and to comment, within the context of the decision-making process of Portuguese foreign policy, the law governing the hearing of the self-governing bodies of the

¹³ This possibility is expressly provided for in Article 199 of the Statute of the Autonomy of Catalonia (*Estatut d'autonomia de Catalunya*), approved by the Organic Law n^o 6/2006, of 19 June, which is available, in English, in < <http://www.gencat.cat/generalitat/eng/estatut/> >, accessed in 15 November 2009.

autonomous regions¹⁴ does not regulate the procedure of its hearing for these effects in particular¹⁵.

However, the possibility to be heard over acts of political nature¹⁶ covers some acts at the international level, as the preparation of the Portuguese positions at the negotiation of international conventions.

In any case, it should be noted that the powers of the autonomous regions of participation and to be heard established in the Constitution are directly applicable, not depending on implementation by law¹⁷. It is in the Constitution that one must find a legal basis for a model of articulation between the Republic and the autonomous regions which aims to involve them in the European integration. The regulation, or lack thereof, by statute or law, of certain aspects of these powers can never be used to exhaust or limit the powers of the autonomous regions.

15. In any case, since it is a right to be heard on positions of the Portuguese state in the international level, it should not be forgotten that this is a regional contribution to the formation of the national position. The bodies that exercise sovereign power must not be considered bound by the position of the bodies of regional government¹⁸.

b) Participation in the negotiation of international conventions

16. The Constitution establishes that the autonomous regions have the power to «*participate in the negotiation of international treaties and agreements that directly concern them and to share in the benefits derived therefrom*» in Article 227 (1) *t*). It is not, of course, the recognition of some sort of regional treaty-making power, but a form of participation in the exercise of such power by the Portuguese state¹⁹.

The autonomous regions participate within the delegation, the diplomatic mission or the representation of the Portuguese state in the negotiation

¹⁴ Cfr. Law no 40/96, of 31 August.

¹⁵ M. L. DUARTE, “União Europeia e entidades regionais” p. 132.

¹⁶ Cfr. artigo 2.º, n.º 2, da Lei n.º 40/96, de 31 de Agosto.

¹⁷ M. L. DUARTE, “União Europeia e entidades regionais”, p. 133.

¹⁸ A. MARTÍNEZ PUÑAL, “As Regiões Autónomas dos Açores e da Madeira e a actividade externa de Portugal”, in *Estudos de direito regional* (1997) p. 607.

¹⁹ R. M. MOURA RAMOS, *Da Comunidade Internacional e do seu Direito*, (1996) pp. 203 *et seq.*.

procedures or international conference which is drawing up a given international convention. In this sense, the autonomous regions are not negotiating parts as such, but are integrated in the Portuguese delegation.

17. The position of the region does not bind the Portuguese state – it is one of the several public interests that must be taken into account during the negotiation by the representatives of the Portuguese state. One cannot, in fact, forget that, in a unitary state (as is the Portuguese state), the participation in the negotiations is the regional contribution to the formation of the Portuguese negotiating position. It is not legitimate to consider the negotiating position of a certain autonomous region as an independent one or to recognize any kind of regional power of veto in the negotiations.

The participation in the negotiation is the power of the Regional Governments of the autonomous regions.

18. The power of participation in international negotiations was some corollaries. If the region has the power to participate, that it must be informed that the negotiations are taking place²⁰ and must be in possession of all the information available in order to better represent the interests of the regions and their communities. Such a power was established, in relation to the Azores Autonomous Region, in Article 121 (3) *b*) of its Political and Administrative Statute, in the 2009 amendment.

The autonomous regions can also take part in the bodies created by the international conventions with powers to review compliance of the party states or to supervise its enforcement. The international conventions may recognize the power of the region to participate on its own behalf – if it does not, the region may still enjoy such a power, but their representatives must integrate the national delegation.

19. Another corollary of the power of participation in international negotiations is the power to regional self-government bodies to request, suggest or petition the bodies that exercise sovereign power to ratify, accept, approve or accede a treaty or agreement, with a general scope or a specific regional one, bilateral or multilateral, provided that the matter in question does not fall

²⁰ Several Spanish regions have this power established in their autonomic statutes. Cfr., *v.g.*, the Statutes of Aragon (Article 40 (5)); of Asturias (Article 33 (4)); of da Andalusia (Article 23 (1)); of the Community of Valencia (Articles 22 *k*) and 62 (1) *d*); and of the Canary Isles (Article 38 (1)).

beyond the scope of their powers (matters that directly concern the region)²¹. This power was established, in relation to the Azores Autonomous Region, in Article 121 (3) *a*) of its Political and Administrative Statute, in the 2009 amendment.

As long as the final decision to consent Portugal to be bound by a treaty or agreement belongs to the bodies that exercise sovereign power, the constitutionality of such a power can be accepted.

c) Specific rights of participation

20. If, on the one hand, the Constitution provides for a general power of the autonomous regions to be heard in the international decision-making processes of the Portuguese state, on the other hand, it also establishes specific powers of participation.

These specific powers of participation are recognized in relation to certain subjects, *v. g.* «*territorial waters, the exclusive economic zone and the adjacent seabed*» (cfr. Article 227 (1) *s*) of the Constitution) or the European Union (cfr. Article 227 (1) *v*) and *x*) of the Constitution).

In relation to Article 227 (1) *s*) of the Constitution, the regime establishes the power of participation of the autonomous regions without the need to demonstrate that these matters «*concerns*» them. Actually, it would be difficult to prove that these subject-matters comply with the definition given by the Constitutional Court's case-law of matters that concern the autonomous regions. It is, therefore, a specific regime, more favourable to the autonomous regions.

The Constitution, in Article 227 (1) *v*) and *x*) of the Constitution, establishes an autonomous regime for the participation of the autonomous regions within the definition of the Portuguese state's positions in the decision-making procedures of the European Union. This matter is the subject of the next paragraphs.

d) Participation in the framework of the European Union

21. Article 227 (1) *v*) of the Constitution, states that the autonomous regions shall «*give their opinion [...] in matters that concern their specific*

²¹ Several autonomic Spanish regions have this power established in their autonomic statutes. Cfr., *v.g.*, the Statutes of Aragon (Article 40 (3)); of Catalonia (Article 197); of the Community of Valencia (Article 62 (1) *a*)); and of the Canary Isles (Article 38 (3)).

interests, on the definition of the Portuguese state's positions within the ambit of the process of constructing the European Union». The regional power to give opinions and to be heard exists in matters that concern the autonomous regions «specific interests».

22. As was referred *supra*, the concept of «*specific interest*» of the autonomous regions was the basis and the limit of its legislative power before the constitutional amendment of 2004 – which abolished the expression for those purposes. However, the participation of the autonomous regions in the European integration is an area where, curiously, the Constitution still retains the term «*specific interest*».

The persistence of this expression raises some difficulties in its interpretation, since one of the purposes of the constitutional amendment of 2004 was, precisely, to introduce significant changes in the system of regional autonomy and self-government. One of these changes was, precisely, the abolition of the concept of «*specific interest*». The fact that this expression was maintained in this provision, therefore, causes some surprise, and one may even speculate if it was merely an oversight by the constitutional legislature.

However, regardless of such considerations, the truth is that the provision still refers to the concept of «*specific interest*», so - since the interpreter must assume that the choice made by the legislature is correct ²² - one should conclude that the legislature intended, in this specific field, to keep the «*specific interest*» of the autonomous region as a criterion for gauging the need for consultation of the regions.

This means that one must make an interpretive effort to uncover the normative content of this expression within current constitutional Portuguese law.

23. Regardless of a literal interpretation, one can perceive that the purpose of the 2004 constitutional amendment was to eliminate the relevance of the concept of «*specific interest*» not solely for the purposes of delimitation of regional legislative power.

In fact, one cannot ignore that the constitutional amendment of 2004 proceeded to systematically replace the reference to «*specific interest*» by changing several constitutional provisions, both within the regulation of the legislative power of the autonomous regions, as in regard to different other matters. For instance, in Article 227 (1) x) of the Constitution, which also

²² It is a general principle of Portuguese law, inscribed in Article 9 (3) of the Civil Code.

regulates the participation of the autonomous regions in the «*process of constructing the European Union*», the expression «*specific interest*» was replaced by «*matters that concern*» the region – which is a broader term, more consistent with the spirit of the amendment.

Moreover, in the preliminary works of the constitutional amendment, there were Members of the Parliament which noted the existence of a clear intention to eliminate all the references to the term «*specific interest*»²³.

Thus, one can only argue that the correct interpretation of the constitutional text must be that the concept of «*specific interest*» used in article 227 (1) *v*) of the Constitution should be read as a reference different of its traditional meaning. The historical concept of «*specific interest*» must, therefore, be abandoned after the constitutional amendment of 2004.

24. But, then, how can one find out the “new” meaning of «*specific interest*»? One could argue that it must have a similar meaning to the concept of «*matters that concern*» the autonomous regions, which is used by article 227 (1) *x*) of the Constitution, also in relation to the *process of constructing the European Union*.

This position has a problem. The text of the Constitution uses two different expressions in article 227 (1) *v*) and *x*) of the Constitution and, as was stated before, where different expressions are used in the same legal text, one should assume that they intend to refer to different realities.

Another approach would be the construction of a new and autonomous meaning – a post 2004 meaning – to the expression «*specific interest*» in the context of article 227 (1) *x*) of the Constitution.

The starting point must be the concept of «*matters that concern*» the region, interpreted in accordance to the Constitutional Court case-law, *i. e.* matters which concern predominantly to regional interests or, at least, those that deserve, at the national level, specific treatment with regard to their impact in the regions, depending on their particularities and their relevance in the regional context. These matters can be within the scope of the regional legislative power or reserved to the legislative power of the bodies that exercise sovereign power. However, not all of the matters within the scope of the

²³ Cfr., *v.g.*, the interventions of Member of the Parliament José Magalhães who states that the «*specific interest*» is a «*nomen juris suppressed by the constitutional amendment*» (in Diário da Assembleia da República, 1^a, IX, 2^a, n^o 79, of 29 of April 2004, p. 4371) and Member of the Parliament José de Matos Correia, who speaks of the importance of the «*repeal of concepts like the “specific interest”*» (in Diário da Assembleia da República, 1^a, IX, 2^a, n^o 78, of 23 of April 2004, p. 4197).

regional legislative power are «*matters that concern*» the region, in the sense of the Constitutional Court case-law. This can have severe consequences.

When the autonomous region has legislative powers on a subject it should have a say in the position adopted by Portugal within the European Union's decision-making procedure about such subject. Otherwise there is the risk of infringement or *expropriation* of the legislative powers of the region by the Portuguese state through the European Union normative powers. The intervention of the European Union, for example, while regulating these subjects can preclude or significantly restrict the scope of discretion of the legislative bodies of regional government. If this happens without even the possibility of the autonomous regions to be heard and to comment on the meaning of this regulation the assignment of legislative powers to the autonomous regions by the Constitution and the Statute is frustrated.

Furthermore, one must consider, albeit ancillary, the historical background of the constitutional text. In fact, one must not forget that the concept of «*specific interest*» prior to 2004 had a substantial connection with the legislative competence of the autonomous regions – as it was determined by reference to that concept. It is, therefore, reasonable to conclude that the intention of the Constitution was to bind the powers of participation, for these purposes, to the legislative competence of the regions. Therefore, it makes sense to interpret this expression, in the current constitutional framework, as referring to matters in which the regions now have legislative powers.

But one must not forget that there are subject not included in the regional legislative power (for instance, those reserved for the bodies that exercise sovereign power) which concern the autonomous regions. In these cases, *i. e.* beyond the regional legislative power, one must refer to the concept of «*matters that concern the region*».

So, when interpreting the concept of «*specific interest*» as the criteria for the existence of the power of the autonomous regions to be heard on the «*definition of the Portuguese state's positions within the ambit of the process of constructing the European Union*», one should note two things:

- i) It covers all the matters subjected to the regional legislative power;
- ii) Beyond the regional legislative power, it covers the matters that concern the region.

In the 2009 amendment of the Political and Administrative Statute of the Azores Autonomous Region, Article 122 (1), uses the concept of «*matters that concern*» the autonomous regions also for these purposes. This provision

should be interpreted in a consistent way with the Constitution and with the interpretation of «*specific interest*» developed in the last paragraphs. Otherwise this provision must be considered unconstitutional.

25. As we are considering the power of the autonomous regions to be heard within the context of the European Union, the points which were made previously, in the matter of the general power to be heard, do apply *mutatis mutandis* to the present subject.

In the 2009 amendment of the Political and Administrative Statute of the Azores Autonomous Region, a provision was added – in accordance with the mechanisms provided by the Treaty of Lisbon to verify compliance with the principle of subsidiarity by the national parliaments – which establishes a right of the region to be heard, through the Legislative Assembly, in these process, when the powers or duties of the region or its condition as an outermost region may be affected.

26. While Article 227 (1) *v*) of the Constitution gives the autonomous regions powers to be heard and to comment the Portuguese positions in the «*construction of the European Union*», sub-clause *x*) of the same Article provides for the power of the autonomous region to participate «*in the process of constructing the European Union by means of their representation in European regional institutions and on delegations involved in European Union decision-making processes*».

In this sense, the regional bodies of self-government should be invited to nominate their representatives in the delegations of the Portuguese state, either in technical negotiations within working groups or with the Commission, or in the political negotiations in the Council of Ministers of the European Union, when «*matters that concern them*», in sense given to the expression by the Constitutional Court's case-law, are at stake. The same applies to negotiations of amendments to the Treaty on European Union and the Treaty on the functioning of the European Union.

The participation within national delegations is an example of cooperation between the Government of the Republic and the regional bodies of self-government, as the representatives of the regions are part of the national delegation, contributing with a regional perspective for the formulation of national position.

Participation is normally carried out by the Regional Government.

In the 2009 amendment of the Political and Administrative Statute of the Azores Autonomous Region, it was established in article 122 (3) that when dealing with matters which relate solely to the Azores Region, the Portuguese State must assure that the region has a leading position in their negotiations.

27. Article 227 (1) x) of the Constitution also establishes the power of the autonomous regions to participate in the institutions of the European Union based in regional representation.

The most important of these institutions is the Committee of the Regions, an advisory body of the Council and of the European Commission²⁴, which consists of representatives of regional and local bodies who either hold a regional or local authority electoral mandate or are politically accountable to an elected assembly²⁵. The members of the Committee of the Regions are not bound by any mandatory instructions and are completely independent in the performance of their duties, in the European Union's general interest²⁶. The Committee of the Regions shall be consulted by the European Parliament, by the Council or by the Commission where the European Union Treaties so provide and in all other cases, in particular those which concern cross-border cooperation, in which one of these institutions considers it appropriate²⁷.

The Portuguese members of the Committee of Regions are divided between two representatives of the autonomous regions (one from Madeira and one from the Azores) and those appointed by the Government from among the elected representatives of local authorities. However, the procedure for appointing Portuguese members of the Committee of the Regions has never been clearly defined in any legislation.

The Assembly of the Republic approved, in 1993, a resolution where some criteria for designation of national representatives were pointed out²⁸. This resolution recognizes the need to take into account the representation of each of the autonomous regions, after consultation of the regional bodies of self-government. The central and regional administrations propose a list of candidates eligible for designation on the basis of geographical and political criteria. After hearing the regions, the Government decides on that list, which members to indicate to the Council of Ministers of the European Union, which

²⁴ Cfr. Article 13 (4) of the Treaty on European Union (TEU).

²⁵ Cfr. Article 300 (3) of the Treaty on the functioning of the European Union (TFEU).

²⁶ Cfr. Article 300 (4) TFEU.

²⁷ Cfr. Article 307 1st paragraph TFEU.

²⁸ Cfr. Resolution of the Assembly of the Republic n° 1/94, of 5 January.

is the competent body to formally appoint the members of the Committee of Regions. It is, in this manner, the Government which has the last word on the appointment of the Portuguese members of the Committee of Regions²⁹.

In the 2009 amendment of the Political and Administrative Statute of the Azores Autonomous Region, it was stated in Article 122 (2) *b*) that the region has the right to participate in the Committee of the Regions: one of the representatives of Portugal proposed by the Portuguese Government to the Council of Ministers of the European Union shall be the President of the Regional Government or whom he stipulates. This right is extensive to the other bodies or institutions of the European Union based in regional representation.

The Political and Administrative Statute of the Madeira Autonomous Region does not have an equivalent provision. However, it is also the President of the Regional Government who is, traditionally, appointed by the Portuguese Government³⁰.

V. The autonomous regions international powers

28. The Constitution establishes the power of the autonomous regions to «*cooperate with foreign regional bodies and to participate in organisations the purpose of which is to foster inter-regional dialogue and cooperation, all in accordance with the guidelines set out by the bodies that exercise sovereign power and are responsible for foreign affairs*» (cfr. Article 227 (1) *u*) of the Constitution).

29. This provision is extremely important. It establishes powers of the autonomous regions to act, in the international arena, as autonomous regions, *i.e.*, independently of the Portuguese state, within certain limitations. It is true that the constitutional provision only expressly mentions «*cooperation*» with «*foreign regional bodies*». Nevertheless, it presupposes the establishment of a relation (of cooperation) with a foreign body – which is an international relation at least in sense of a cross-border relation.

The autonomous regions can, therefore, pursue its own international policy – without the necessity of being represented by the Portuguese State – with its own agenda and objectives. However, it must be guided with a purpose of cooperation with the «*foreign regional bodies*». But how should one interpret the reference to cooperation? It must be interpreted in the sense that

²⁹ J. MIRANDA, *Manual*, III, p. 321.

³⁰ Cfr. Resolution of the Council of Ministers n^o 5/2006, of 19 January.

the autonomous regions can only act in the international arena as long as that action is peaceful and as long as it is helpful for exercise of its' powers and the fulfilment of its' duties.

The Constitution promotes the regions as autonomous actors in the international field, as long as acting «*in accordance with the guidelines set out by the bodies that exercise sovereign power and are responsible for foreign affairs*»³¹. The use of the expression «*guidelines*» indicates that the bodies that exercise sovereign power and are responsible for foreign affairs cannot give orders – specific and concrete – to the regions, conditioning its foreign policy. The state may only establish the framework under which the region acts. The freedom to act – as long as it respects the guidelines – is guaranteed.

A consequence of this is that the Portuguese state cannot be hold accountable for the international acts of the autonomous regions while acting in their own behalf. Otherwise, the Portuguese state could be hold accountable for acts or activities which it did not and could not control. The autonomous regions must be internationally accountable for their own acts.

The Article 123 (2) of the Political and Administrative Statute of the Autonomous Region of the Azores, after the 2009 amendment, establishes a duty of the services of external representation of the Portuguese state to provide to the region «*all necessary assistance for the pursuit of its policy of external cooperation*».

30. This international policy includes, as is expressed in the constitutional text, the power of establishing relations of «*cooperation*» with «*foreign regional bodies*», and the power to participate in «*organisations*» - which can be international organizations – «*the purpose of which is to foster inter-regional dialogue and cooperation*», in its own representation and not in the behalf of the Portuguese state.

a) Cooperation with «*foreign regional bodies*»

31. The first part of Article 227 (1) *u*) of the Constitution provides for the power of the autonomous regions to establish ties of cooperation, not with states, but with «*foreign regional bodies*» - the Constitution says so explicitly.

³¹ Cfr. Article 123 (2) of the Political and Administrative Statute of the Autonomous Region of the Azores which states «*The Region coordinates its actions with the international guidelines set by the bodies that exercise sovereign power and are responsible for foreign affairs*».

One must, therefore determine what are such «*foreign regional bodies*» for the purposes of the Constitution.

The *ratio* of the provision and the principle of regional autonomy points into one direction. This expression is to be interpreted as a reference to legal persons or public bodies which represent a given population and a certain territory that is outside national territory and are not a sovereign state. The concept includes local authorities or municipalities, regions or areas with territorial self-government, the *Länder* or federated states, *etc.*.

32. The power of establishing relations of «*cooperation*» with «*foreign regional bodies*» must include the power to negotiate with those bodies and to effectively cooperate with them. The regions can establish talks with «*foreign regional bodies*» and to promote common actions – which are, in the proper sense of the word, international actions.

In order to establish a relation of cooperation with a «*foreign regional body*», ultimately, the autonomous regions must have the power to negotiate, conclude and approve agreements with those bodies. This possibility was established in the 2009 amendment of the Political and Administrative Statute of the Autonomous Region of the Azores, in Article 124 (2) – the negotiation is a power of the Regional Government, but it must be approved by the Legislative Assembly (cfr. Article 34 (1) *m*)).

Another possibility is the establishment of lobbying offices or representation delegations in «*foreign regional bodies*», so as to represent the region and to facilitate the establishment of relations of cooperation.

33. The Portuguese autonomous regions may establish cooperative international relations with regional bodies from other Member-States of the European Union. As the Constitution promotes the participation of Portugal in the development of the European Union, it is natural that the Portuguese autonomous regions establish such relations with other European regions.

In reality, the European Union is promoting as its own objective the establishment of relations of regional cooperation, developing the powers given by national legal orders to the regional and local entities of its Member-States.

On this subject, one must point out the regime provided by Regulation (EC) n° 1082/2006 of the European Parliament and of the Council, of 5 July 2006, on a European Grouping of Territorial Cooperation (EGTC). These Groupings have the objective of «*facilitate and promote cross-border, transnational and/or interregional cooperation [...] between its members [...]*

with the exclusive aim of strengthening economic and social cohesion»³². One of the interesting things about this new way of cooperation is the fact that the EGTC have legal personality which is provided by the Regulation, in Article 1 (3). It is a case of “European legal personality”.

An EGTC can be made up of Member States, regional authorities, local authorities and other bodies governed by public law³³, as well as associations consisting of bodies belonging to these categories, located on the territory of at least two Member States. Does this mean that the Portuguese autonomous regions can establish an EGTC with a Member State of the European Union, despite the fact that the Constitution prohibits so³⁴? No, Article 3 (1) of the Regulation expressly links the possibility of a body to be member of an EGTC to «*the limits of their competences under national law*».

The establishment of an EGTC depends on the approval of the Member States concerned, «*taking into account its constitutional structure*» (cfr. Article 4 (3) of the Regulation). The approval can be denied if the Member State considers that such participation is not in conformity with the Regulation or national law, including the prospective member of the EGTC’s powers and duties, or that such participation is not justified for reasons of public interest or of public policy of that Member State.

34. The autonomous regions may also decide to establish relations of cooperation with «*foreign regional bodies*» of non Member States of the European Union. For instance, the regions may chose regional bodies of other States whose official language is Portuguese³⁵, with regions in other European countries that have not joined the European Union³⁶, with other areas considered outermost regions by European Union Law, with areas where there are large communities of Portuguese emigrants from the autonomous regions or where departed migrant communities residing now in the autonomous regions³⁷.

³² Cfr. Article 1 (2) of the Regulation.

³³ Within the meaning of the second subparagraph of Article 1(9) of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts.

³⁴ It only provides for the establishment of cooperation with «*foreign regional bodies*».

³⁵ Cfr. Article 7 (4) of the Constitution.

³⁶ Cfr. Article 7 (5) of the Constitution.

³⁷ Cfr., for instance, Article 124 (1) of the Political and Administrative Statute of the Autonomous Region of the Azores.

35. The Constitutions does not expressly provide for the subjects over which the autonomous regions can establish the relations of cooperation. However, one must bear in mind that the regions can only act within its' powers and duties as established in the Constitution and the Political and Administrative Statute. The regions cannot be bound to do something over which it has no jurisdiction.

b) Participation in international organizations

36. The Constitution provides for the power of the autonomous regions to «*participate in organisations the purpose of which is to foster inter-regional dialogue and cooperation*» in Article 227 (1) u).

The autonomous region is therefore able to participate in international organizations on their own behalf and not in the behalf of the Portuguese State. The participation of the autonomous regions is, however, constitutionally limited to the international organizations that pursue the purpose described – but this is the only limitation provided by the Constitution. One must note that the constitutional text does not mention other characteristics of the organization or its members.

For instance, the Constitution does not establish as a prerequisite that the organization must only have as members other regional entities – *i.e.*, the autonomous regions can be members of international organizations side by side with sovereign states, as long as the organization pursues the purposes established in the Constitution.

The objective of the organization «*to foster inter-regional dialogue and cooperation*» can be pursued as the main purpose of the organization or as one between several purposes. It can also be possible that the organization fosters inter-regional dialogue and cooperation on a specific subject – as the environment, or the law of the sea.

37. The Constitutions does not expressly provide for the limits to the autonomous regions' activities within the international organization. As was mentioned *supra*, the regions can only act within its' powers and duties as established in the Constitution and the Political and Administrative Statute.

c) THE LIMITS OF THE INTERNATIONAL REGIONAL POWERS

38. The international powers of the autonomous regions, as described in the previous paragraphs, are bound by a set of limits which originate from the Constitution and the Portuguese form of state.

39. The international powers of the autonomous regions are bound by Article 7 of the Constitution, which establish the basic guidelines and principles that must be attained by Portugal in international relations. Article 7 of the Constitution merely mentions Portugal as its subject. However, one must consider that its normative content bounds all the public legal persons while acting in the international arena.

40. In addition to Article 7, as was mentioned *supra*, the autonomous regions will have to conduct its policy of foreign inter-regional cooperation and participation in international organizations «*in accordance with the guidelines set out by the bodies that exercise sovereign power and are responsible for foreign affairs*» (Article 227 (1) *u*) of the Constitution). This is a result of the fact that Portugal is a unitary state.

Therefore, if the Government of the Republic has set priorities of its foreign policy by any instrument (for example, a resolution of the Council of Ministers), the autonomous region is bound to these guidelines. However, these cannot be so specific that limit the freedom and autonomy of action of the self-government bodies of the region, as part of their powers. In fact, the usage by the constitutional text of the term «*guidelines*» must be interpreted in the sense that the bodies that exercise sovereign power and are responsible for foreign affairs can establish a framework under which the region can act. To go beyond this line, by giving orders, for instance, is strictly forbidden.

A general duty of coordination and of coherence of international action of the Portuguese state and of the autonomous regions emerges from the constitutional regulation and from the principle of unity of the state, provided by Article 6 (1) of the Constitution. In this sense, even though the Portuguese state and its autonomous regions may pursue different international policies, they cannot be contradictory. In fact, they should promote the same values and have the same general objectives: the ones laid down in the Constitution. Moreover, the establishment of the general position of Portugal in the world stage and the guidelines arising from that position is a responsibility of the bodies that exercise sovereign power and are responsible for foreign affairs, specifically the Government of the Republic. The autonomous regions must observe those guidelines.

Moreover, the autonomous regions must exercise its international powers to the extent that it is more appropriate to their powers and duties and when they do not compromise the Portuguese state's international relations or interfere in the reserved powers of the state in international matters. This is another consequence of the principle of unity of the state.

As an illustration, it is not legitimate for the autonomous region to establish cooperative relations with regional political authorities of a State which is not recognized by the Portuguese state, as it will not be legitimate to try to thwart the conclusion of an international treaty by the Government of the Republic.

41. The autonomous regions, while discharging its powers and duties in the international field, as in any other, are also bound by its Political and Administrative Statute and by the national legal order.

d) The position of the Portuguese Constitutional Court

42. The 2009 amendment of the Political and Administrative Statute of the Autonomous Region of the Azores was extremely important because it was a consequence of the 2004 amendment of the Constitution, which changed the framework of the regional system of self-government. It was also raised controversy over the new regime established.

After its enactment, the Statute was subject to review the constitutionality by the Constitutional Court over some of its points. One of these points was exactly the regulation of the international powers of the autonomous regions.

43. The Constitutional Court started by examining the provisions that established certain international powers of the autonomous region as statutory regional rights.

Article 7 (1) *i*) of the Political Administrative Statute of the Autonomous Region of the Azores, attributes to the Azores, «*the right to its own policy of external cooperation with foreign regional bodies, in particular within the framework of the European Union and of the deepening of cooperation in Macaronesia*».

In this context, which acknowledges to the region its own policy of cooperation with foreign regional bodies, the Political Administrative Statute gives the region immediately afterwards, in sub-paragraph *j*) of the same

Article, «*The right to establish cooperation agreements with foreign regional bodies and to participate in international organizations of dialogue and regional cooperation*».

Article 7 (1) of the Political Administrative Statute of the Autonomous Region of the Azores expressly states that the powers it enunciates go beyond those established in Article 227 of the Constitution.

The Constitutional Court analysed “if” the Statute could do so and “how far” could it go. It began by addressing the participation powers established in Article 227 (1) *t*) of the Constitution, which the Court notes, does not grant the regions treaty-making power. After that, the Constitutional Court examines Article 227 (1) *u*) of the Constitution and the regional power to establish cooperation links with foreign regional bodies and to participate in international organizations. The Constitutional Court observes that these powers are not just powers to participate. That is why, in the Court’s opinion, that «*the Constitution is clear in establishing a limit to safeguard the principle of unity of the State in the exercise of foreign policy*». This limit is congenial to «*the very terms in which Article 225 (3) of the Constitution sets the regional political autonomy, by providing that this does not affect the integrity of the sovereignty of the state and must be exercised within the overall framework of this Constitution*».

The legitimacy of the establishment of cooperative relations between the Portuguese autonomous regions and foreign regional bodies is considered by the Constitutional Court as settled. From this starting point, the Court goes on to say that «*these cooperative ties are not to be weaved by the regions*» exclusively by reference to forms of private law cooperation, despite the fact that «*there is no reference in the Constitution to the forms and nature of the instruments of this cooperation*». The Constitutional Court admits *obiter dicta* the establishment of public law forms of cooperation with foreign regional bodies. It is nevertheless true that the process should conform to the guidelines set by the bodies that exercise sovereign power and are responsible for foreign affairs³⁸. This is also considered true by the Constitutional Court in relation to the power to participate in international organizations the purpose of which is to foster inter-regional dialogue and cooperation.

44. However, from this point onwards the Constitutional Court takes a restrictive view of the international action of the autonomous regions: «*The powers of the autonomous regions in foreign policy, do not transform them in*

³⁸ The Court quotes from R. M. MOURA RAMOS, *Da Comunidade Internacional e do seu Direito*, p. 206.

autonomous and differentiated entities from the Portuguese state, from the standpoint of public international law». The Court notes the unique and meaningful nature of the powers of the autonomous regions with international implications, but claims that these powers do not transform them into subjects of international law. Although it concedes that in inter-regional cooperation there is certainly an external action of the self-governing bodies of the regions, it considers that *«it is cooperation with entities also devoid of international legal personality and always in accordance with the guidelines set by the bodies that exercise sovereign power»*³⁹.

The Constitution Court states that this position is the result of Article 7 of the Constitution (which, as was noted, only mentions Portugal while regulating international relations) and the constitutional allocation of powers and duties in the matter of international policy between the various bodies that exercise sovereign power – the President of the Republic, the Assembly of the Republic and the Government. From this reasoning, the Court concludes that while *«outlining the various actions possible in international relations, the constitutional provisions considers them as powers of the State. Thus, the final word in foreign policy lies with the Republic. Moreover, the unity of purpose in foreign policy required by Article 7 can only be achieved by the sole operative intervention of the bodies that interpret the national interest. The limitation established in Article 227 (1) u) of the Constitution is an axiom of that constitutional option».* It is true that the autonomous regions can establish cooperation relations with foreign regional bodies, but within the guidelines set by the bodies that exercise sovereign power, which is, according to the Court, a consequence of the principle of the sovereign integrity of the State.

45. The Constitutional Court proceeds to apply its reasoning to Article 7 i) and j) of the Political Administrative Statute of the Autonomous Region of the Azores. It notes that these provisions establish a right of the region to have *«its own policy»* without any reference to the *«guidelines set out by the bodies that exercise sovereign power and are responsible for foreign affairs»*, and that its purpose is to expand the powers of the region beyond those established in the Constitution.

The Constitutional Court questions itself: *«The question that arises is therefore whether this is possible. Are the powers of the regions available to be regulated freely by the ordinary legislator or are they reserved to be regulated solely by the Constitution?»*. The response is: *«you cannot expand the regional*

³⁹ The Court quotes from J. MIRANDA, *Direito Internacional Público*, 3rd ed., (2006) p. 205.

powers constitutionally provided for by law or statute, where it interferes with the powers and duties of bodies that exercise sovereign power on the definition of the foreign policy».

The Court concludes: *«Clearly the extension of powers of the Region that Article 7 of Political Administrative Statute explicitly intended, in this case is likely to affect the powers of the bodies that exercise sovereign power established in the Constitution and the conduction of a common foreign policy. In other words, the terms in which the external cooperation of the Regions appears enshrined in Article 7 i) imply a compression of the powers of the bodies that exercise sovereign power that is not constitutionally possible (Article 7 and Article 110 (2) of the Constitution), and a restriction on the unity of the state and the integrity of the sovereignty [Articles 6 and 225 (3) and 227 (1) u) of the Constitution]».*

As a consequence, the Constitutional Court declared Article 7 i) and j) of the Political Administrative Statute of the Autonomous Region of the Azores to be unconstitutional – and therefore, null and void.

46. The Constitutional Court also analyzed the provisions of the Political Administrative Statute of the Autonomous Region of the Azores which gave the power to the Legislative Assembly to *«approve cooperation agreements with foreign regional and local bodies on matters that fall within its powers or on the participation in organizations that seek to promote dialogue and inter-regional cooperation»* (Article 34 m) of the Statute) and the power of the Regional Government to negotiate *cooperation agreements with foreign bodies* (Article 124 (2) of the Statute).

The Court considers these provisions as regulation of Article 227 (1) of the Constitution and not of article 7 of the Statute. In that sense, the powers of international cooperation that it refers to must be exercised *«in accordance with the guidelines set out by the bodies that exercise sovereign power and are responsible for foreign affairs»*. As long as such limitation is in place, *«there is no obstacle to recognize that the regions, while public authorities, can maintain, through the Regional Legislative Assembly, within its jurisdiction and without prejudice to its own powers of state bodies, the power to approve agreements with regional or local foreign authorities»*.

Therefore these provisions are not to be considered unconstitutional.

e) Do the Portuguese autonomous regions have international legal personality?

47. The answer to the question: «Do the Portuguese autonomous regions have international legal personality?» depends on the definition of international legal personality one's adopts.

48. As was mentioned *supra*, the Portuguese Constitutional Court did not consider the autonomous regions as international legal persons. The Court's position seems to stem from a notion of international legal personality which sees it as inexorably linked to sovereignty and statehood.

The arguments used by the Court are questionable. It is true that Article 7 of the Constitution, while establishing a framework to the conduction of international relations, only mentions «*Portugal*». But this does not have as a necessary result that only the Portuguese state has international personality. For once, if interpreted restrictively it means that only the Portuguese state must abide by this provision. But this reasoning is also not correct. This because Article 7 must be interpreted in line with the other provisions of the Constitution – amongst them Article 227 (1) *u*). In this provision the Constitution expressly provides for the international powers of the autonomous regions. It is simply not true that in «*outlining the various actions possible in international relations, the constitutional provisions considers them as powers of the State*» - because it is denied by Article 227. The fact that such provision establishes a condition to the exercise of those powers it refers to «*the guidelines set out by the bodies that exercise sovereign power and are responsible for foreign affairs*» does not waver our conclusion. Such condition is merely the reflex of the delicate equilibrium between central and regional powers established by the Constitution. Hence, the expression «Portugal», used in Article 7, must be interpreted in a broad sense – encompassing all the public legal persons with international powers.

Besides that, the Court does recognize the «*unique and meaningful nature of the powers of the autonomous regions with international implications*» and that there can be cooperation agreements negotiated and approved by the regional bodies of self-government. The Constitutional Court simply considers that these facts are limited by the necessity to act «*in accordance with the guidelines set out by the bodies that exercise sovereign power and are responsible for foreign affairs*» and «*with entities also devoid of international legal personality*». One cannot agree with this position.

No one denies that the autonomous regions must establish their relations of cooperation with foreign regional bodies and participate in international organizations «*in accordance with the guidelines set out by the bodies that*

exercise sovereign power and are responsible for foreign affairs». The limitation of the power does not deny the existence of the power – in fact it reiterates it: if the regions do not have the power to act in the international arena as actors, it would not be necessary to limit its power to preserve the principle of the sovereign integrity of the State.

Actually, it is this limitation which allows for the existence of regional autonomy in international relations, because it is the consequence of the «*unity of purpose*» in the conduction of the Portuguese foreign policy that the Constitutional Court refers. As long as the regions observe the guidelines set out by the bodies that exercise sovereign power and are responsible for foreign affairs and that they act in coherence with the general positions taken by the Portuguese state, there is no violation of the principle of the unity of state.

49. The second statement (the regions do not possess international legal personality because they solely relate «*with entities also devoid of international legal personality*») shows the rationale behind these statements.

The foreign regional bodies with which the regions can establish cooperation relations are considered by the Constitutional Court, automatically, as «*entities also devoid of international legal personality*». This is not provided by the Constitution. The Constitutional Court simply is saying: as they are not states, but only regional bodies, ergo they can not possess international legal personality.

50. As was stated earlier, this demonstrates that the rationale of the Constitutional Court must be one akin to a classical conception of international legal personality, according to which, with some exceptions, it is reserved to the sovereign states and the international organizations.

However, a more contemporary approach assumes that, while the sovereign state is the archetypal “person” of international law, other entities may also be considered as the subjects of international law in so far as they can enter into legal relations in the international sphere. Still, in order to achieve the status of international legal personality, *de facto* participation in the international field is generally not considered enough⁴⁰. It is necessary that the entities in question are considered subjects to rights or duties with derive directly from the international law. The idea that the state is the only entity with

⁴⁰ Cfr., *v.g.*, G. DAHM/J. DELBRÜCK/ R. WOLFRUM, *Völkerrecht*, Vol. I/1, 2nd ed. (1989) pp. 21 *et seq.*; M. N. SHAW, *International Law*, 5th ed. (2003) pp. 176 *et seq.* and p. 194; A. VERDROSS/B. SIMMA, *Universelles Völkerrecht*, 3rd ed., (1984) § 446; A. L. PAULUS, *Die internationale Gemeinschaft im Völkerrecht*, (2001) p. 227.

international legal personality – with the exclusion of all other entities (public or private) is not in accordance with the international law⁴¹. In fact, it is widely accepted that there is no *numerus clausus* of subjects of international law⁴². In this sense, non-state territories can be recognized as having international legal personality⁴³ - even in the sense of sub-state autonomous territories and not only federated states or territories not under the state's control⁴⁴.

51. In fact, there is no logical reason why the states may not grant to regional or even local entities international legal capacity through their national legal orders. The relevant factor is the regulation of its powers and duties by national law and state practice: do they establish and recognize the power of the region to be subjects to rights or duties with derive directly from the international law or not⁴⁵? The capacity of the entity in question to possess international rights and duties is left to the state's internal legal order to establish.

In the case of the Portuguese autonomous regions one must find the answer to these questions in the international powers granted by the Constitution studied earlier.

The Constitution provides for the power of the autonomous regions to negotiate and approve cooperation agreements, as a way to establish relations of cooperation. It, therefore, provides for the possibility of the regions to bind themselves to these agreements – to be subject to rights and duties establish therein. But can these cooperation agreements be considered a form of international agreements? Or are they merely private law instruments – like contracts? As was stated by the Constitutional Court, the Constitution does not limit the regions' power to private law instruments – the regions can use public law instruments. If they do so, they can be subjects to rights or duties with derive directly from the international law – from these agreements – hence, they do have international legal personality.

⁴¹ E. CORREIA BAPTISTA, *Direito Internacional Público*, Vol. I, p. 388.

⁴² Cfr., *v.g.*, MOSLER, “Die Erweiterung des Kreises der Völkerrechtssubjekte”, 4 *BDGVR* (1961) pp. 39 *et seq.*, at p. 71; P. C. JESSUP, *A Modern Law of Nations*, (1949) p. 21 *et seq.*; TIETJE, “Die Beilegung internationaler Investitionsstreitigkeiten”, in *Streitbeilegung in den internationalen Wirtschaftsbeziehungen – Völkerrechtliche Einhegung ökonomischer Globalisierungsprozesse* (2005) pp. 47 *et seq.*, at p. 61.

⁴³ M. N. SHAW, *International Law*, pp. 193 *et seq.*

⁴⁴ E. CORREIA BAPTISTA, *Direito Internacional Público*, Vol. II, (2004), pp. 324 *et seq.*; N. QUOC DINH, P. DAILLIER, A. PELLET, *Droit international public*, 6th ed., (2000) pp. 412-413.

⁴⁵ E. CORREIA BAPTISTA, *Direito Internacional Público*, Vol. II, (2004), pp. 324 *et seq.*

In fact, the Constitution also establishes the power of the regions to participate in international organizations – which can be created by international agreements. If the Constitution allows the region to participate in the organization, then it may, necessarily, participate in the agreement that creates the organization. These agreements are international agreements in the proper sense of the word – they have international legal consequences: they establish international organizations. Even more so: if the regions participate in international organizations, then their actions within the organization are regulated by the treaty which constitutes the international organizations, in terms of their participation, voting rights, *etc.*. This means that the region is directly subject to international law provisions. So, at least in part, the Constitution presupposes the international capacity of the autonomous regions⁴⁶.

The autonomous regions do have international legal personality⁴⁷ as a result of the Portuguese national legal order.

52. However, it is true that the still predominant view amongst international legal scholars is that, in order to achieve the status of international legal personality, not only do the entities in question must possess the capacity to be subject to international rights and duties, but it is also necessary some sort of acceptance of other subjects through the actual granting of rights or obligations under international law to the entity in question⁴⁸ or even its recognition as such⁴⁹.

Actually, this kind of international legal personality cannot be considered as an *erga omnes* characteristic – as the legal personality of the states is. It is a case of limited or qualified personality. It depends upon the recognition of the other international legal entities⁵⁰. This recognition can be express (by a declaration of recognition) or tacit (by the acceptance of such personality in an indirect way, as for instance, the negotiation or completion of a cooperation

⁴⁶ E. CORREIA BAPTISTA, *Direito Internacional Público*, Vol. I, pp. 387 *et seq.*.

⁴⁷ E. CORREIA BAPTISTA, *Direito Internacional Público*, Vol. I, p. 388.

⁴⁸ Cfr. Sir R. JENNINGS/Sir A. WATTS, *Oppenheim's International Law*, Vol. I, Introduction and Part 1, 9th ed. (1992) p. 16; I. BROWNLIE, *Principles of Public International Law*, 6th ed. (2003) p. 57; P. FISCHER/H. F. KÖCK, *Völkerrecht*, 6th ed. (2004) p. 109; MENON, "The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine", 1 *Journal of Transnational Law and Policy* (1992) pp. 151 *et seq.*, at 152 *et seq.*; N. QUOC DINH, P. DAILLIER, A. PELLET, *Droit international public*, 6th ed., (2000) pp. 412-413.

⁴⁹ E. CORREIA BAPTISTA, *Direito Internacional Público*, Vol. II, p. 325.

⁵⁰ E. CORREIA BAPTISTA, *Direito Internacional Público*, Vol. II, p. 325.

agreement). These entities – as the autonomous regions – possess a limited range of powers and duties of international law which depend on a number of things: the type of entity concerned, its claims and expectations, its functions and even the attitude adopted by the international community⁵¹.

In a general way, one can say that these entities are bound to international law in the measure of their capacity and the effective exercise of that capacity – for example, when they bound themselves to international obligations through the approval of an agreement⁵².

In this sense, although there can be no doubts of the legal international personality of the autonomous regions, one must say that the actual scope of that personality (in the sense of its actual international powers and duties) – that which can be considered their international legal capacity – will depend on the attitude adopted by the international community.

⁵¹ M. N. SHAW, *International Law*, pp. 193 *et seq*

⁵² E. CORREIA BAPTISTA, *Direito Internacional Público*, Vol. II, p. 325.